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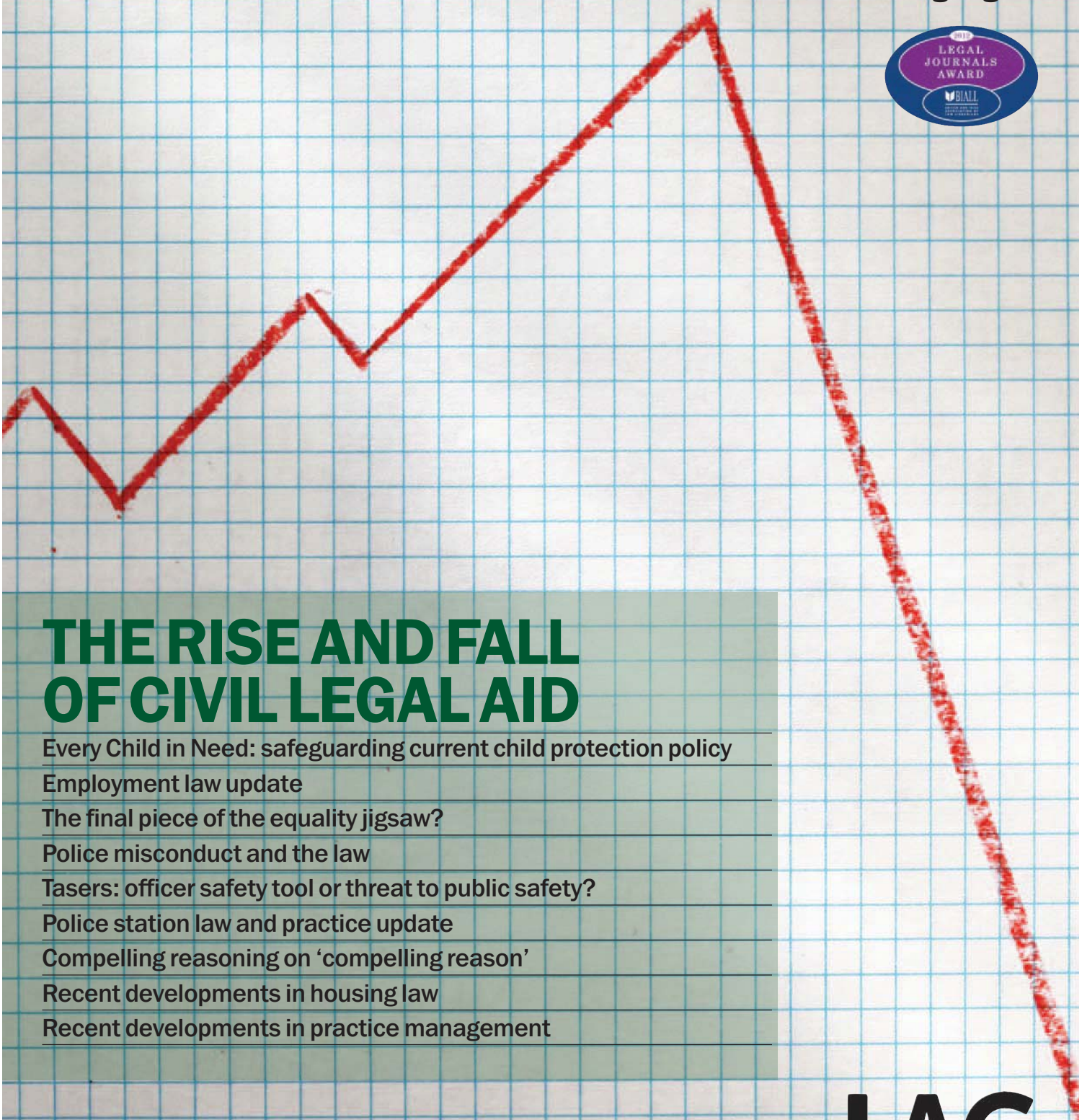

THE RISE AND FALL OF CIVIL LEGAL AID

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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Universal credit, universal fear

With the ink hardly dry on the Welfare Reform Act 2012, which received royal assent on 8 March 2012, the Chancellor of the Exchequer George Osborne is talking about squeezing a further £10 billion in cuts from the social security budget. This would be in addition to the £18 billion which the coalition government has already announced that it is stripping from welfare spending in the two years since it came to power. LAG believes that the poorest and most vulnerable in society, who rely on the benefits system, are already bearing a disproportionate share of the government's deficit reduction programme.

The 'universal credit' is the government's flagship policy in welfare reform, and is due to be rolled out next year. It will be piloted in the North East, to be followed by a general roll-out across the country from October 2013. Only new claims will be covered at first, and in the following year existing claims will be transferred to universal credit. The government is calling it 'the most significant change to the welfare system since the Beveridge reforms in 1947'. It will combine benefits such as jobseeker's allowance, income support and family credit into one single benefit. The government's aims by doing this are to simplify the benefits system and to increase incentives for people to take paid employment. There are, however, fears over the likely impact.

Last year saw the implementation of the local housing allowance reforms which have capped state support for rent payments. This has forced many low-income families into having to find the money to make up the difference to cover their rents or face losing their homes. The anecdotal evidence is that this has led to a rise in overcrowded homes and forced many people into substandard accommodation, such as the 'sheds with beds' phenomenon reported in some London boroughs. According to a BBC report, there were 2,500 of these modern slum dwellings in one area of west London alone. Difficulties over finding the money for rent in low-income families will be compounded in April 2013 when the cap on the total benefits that single people, couples and families can claim is introduced.

The government is also replacing the qualifying conditions for benefits. For example, the rule on claiming benefits in work will change from requiring 16 hours of work per week to 24 hours per week. Many employed claimants are likely to lose out if they cannot persuade employers to increase their hours. Of greatest concern is the £500 per week maximum which working-age couples and single parents can claim for living and housing costs. From 2013, the government will introduce a cap on the total amount of benefit which working-age people can receive so that households on working-age benefits can no longer receive more in benefit than the average wage for working families. Especially if George Osborne goes through with his plan not to uprate benefits in line with inflation, the squeeze on claimants will become more acute as the value of their capped benefits is eroded in real terms. The chancellor might well move to do this in his autumn statement on the budget, as it appears that he wants to assert control from the Treasury over Iain Duncan Smith's Department for Work and Pensions (DWP).

Another important point to make on the shift to the universal credit is that the government is also moving to localise the administration and payment levels of related benefits. From October 2013, local councils will be responsible for establishing local replacements for the social fund. Currently the social fund provides community care grants for big-ticket items such as furniture and white goods for claimants. It also provides crisis loans for claimants to tide them over in an emergency. Local councils will be expected to come up with schemes to replace these. In addition, from next year council tax benefit (CTB) will be abolished and local councils will be expected to provide an alternative benefit, but with a ten per cent reduction on the cash they get to support CTB currently. The signs are that local government is unprepared in its plans to introduce these benefits and there are likely to be large variations on what can be claimed in different council areas: so much, then, for universal benefits.

Such big reforms in the administration of benefits will inevitably have teething difficulties. Claimants are likely to be confused and concerned about the changes. As LAG readers will be aware, this new welfare system is all planned to take effect at the same time that legal aid is being withdrawn from benefits cases. Many clients who will still continue to qualify for legal aid in other matters will be hit by the changes and they are likely to ask for benefit advice from their solicitors. The government's expectation seems to be that the not for profit sector, which of course will also be hit by legal aid and other cuts, will pick up the pieces. However, without money to support benefit advice services they will not be able to meet the need for advice. LAG would suggest that the DWP needs to move quickly to find the cash to do so. We note that it has been reported that the government has set aside between £80 million and £145 million for the financial services industry to create new bank accounts for universal credit claimants. This raises the question: if the government can find cash for banks, why is it unable to fund advice to ensure that vulnerable benefits claimants will not lose out on their legal rights?

Children and the law conference

On 13 October 2012, 1 Pump Court Chambers, in association with LAG, will host a conference on children in conflict with the law entitled 'The child's voice in the law: speak, hear and listen' in London. The conference aims to provide a practical examination of current legal issues facing children within the UK. It will bring together speakers from both the private and public sector; Anthony Hayden QC, deputy High Court judge Family Division, will chair the event. Other speakers will include: Sue Berlowitz, deputy children's commissioner on 'Children at risk in 2012'; HHJ McCreath on 'Children in the criminal justice system'; Frances Crook, chief executive of the Howard League for Penal Reform on 'Legal aid reforms and the impact on children'; and HHJ Singleton QC on 'The impact of family proceedings on immigration claims'.

The organisers believe that the conference will be of interest to practitioners undertaking publicly funded work, all those working directly with children or in children's services and individuals with an interest in this field. The day's programme will include discussion about housing and community care, immigration and asylum, crime, prison law and family law. There will be a number of plenary sessions and simultaneous breakout sessions to ensure that every area of law is represented from a multi-disciplinary perspective. The aim of the conference is to provide practical guidance in what is often a challenging field.

The conference also aims to raise funds for the Lorraine Poswa Mzimkhulu Pre-school, which 1 Pump Court built and continues to maintain. The school is situated in the district of Libode in the Eastern Cape of South Africa, which is an area subject to extreme levels of poverty and deprivation. The school plays a vital role in the community, providing both essential early years education to those who have no other access to such education as well as, what is for many of the children, their only daily meal.

■ For further information and to book contact Clare Sabido, telephone: 020 7842 7070, e-mail: conference@1pumpcourt.co.uk or visit: www.1pumpcourt.co.uk/conference/.

Legal aid position on welfare benefits

Details of the scheme to provide legal aid in complex welfare benefits cases were disclosed by the government in a written ministerial statement last month (*Hansard* HC Written Ministerial Statement col 42WS, 18 September 2012). Jeremy Wright, parliamentary under-secretary of state for justice, explained that it had not been possible for the government to establish the system of independent verification by which, during the passage of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Bill, it had agreed that an independent person would identify points of law in welfare benefits cases before the First-tier Tribunal to qualify for legal aid. The government has decided to permit legal aid only in cases where the tribunal itself identifies an error of law in its own decision.

The government agreed to establish a system of legal aid in complex welfare benefits cases in response to criticisms from the Opposition and a significant number of Liberal Democrat MPs during the debate on the LASPO Bill. The issue led to the largest revolt against the bill in the House of Commons, with MPs supporting an amendment that called for legal aid to be extended to complex welfare benefits cases. This was followed in the House of Lords by a vote in favour of an amendment proposed by Liberal Democrat peer Lady Doocey, which called for legal aid to be reinstated for welfare benefits cases.

Meanwhile, the Legal Services Commission (LSC) has announced details of a tender procedure for face to face welfare benefits contracts that will start in October 2013. From April to October 2013, the LSC will adopt interim measures to 'ensure that there is continued service provision of welfare benefits advice'.

'We believe the proposed scheme will cover very few cases and no way near satisfies what was agreed with MPs. Next year will see massive upheaval in the benefits system due to the introduction of universal credit. Claimants will need expert help, particularly with the complex cases these changes are likely to bring in their wake,' said Paul Treloar, head of policy and communications at Lasa.

■ See: www.legalservices.gov.uk/civil/cls_news_14085.asp.

LAW SOCIETY

Lucy Scott-Moncrieff

LAG 40th Anniversary Annual Lecture Event

Lucy Scott-Moncrieff, President of the Law Society, will deliver LAG's 40th anniversary annual lecture: 'Where do we go from here?' The event will take place on Tuesday 4 December 2012 from 6.30 pm to 8 pm in London. It will be followed by a reception hosted by Freshfields Bruckhaus Deringer. To book, e-mail: lag@lag.org.uk.

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

IN BRIEF

JUSTICE Tom Sargant memorial annual lecture 2012

'After the Act: what future for legal aid?' will be delivered by Roger Smith OBE, director of JUSTICE, on 16 October 2012 in London. The event is free of charge, but donations are welcome. Reservation of places is essential.

■ To book: e-mail: events@justice.org.uk and include names and e-mail addresses (where known) of any additional guests.

■ For further details, visit: www.justice.org.uk/events.php/45/justice-tom-sargant-memorial-annual-lecture-2012.

Co-operative launches family law services

Last month, The Co-operative launched its family law operation. The national telephone-based service, covering divorce, child protection, mediation and financial issues, will also offer face to face advice, initially in London, with plans to expand this to encompass five regional hubs across England and Wales.

Martyn Wates, deputy group chief executive of The Co-operative Group, said: 'At a time of major changes in legal aid, we believe it's vital to make it as easy as possible for people to gain access to justice.'

news feature

New faces at the Ministry of Justice

David Cameron has brought in a new ministerial team at the Ministry of Justice (MoJ) following the Cabinet reshuffle last month.

MoJ ministerial team's duties

Chris Grayling, the new Lord Chancellor and Secretary of State for Justice (see September 2012 *Legal Action* 4), has responsibility for the following:

- the resourcing of the MoJ;
- overall strategy on criminal justice, penal policy and rehabilitation;
- judicial policy, appointments and conduct;
- other functions of the Lord Chancellor; and
- EU and international.

Lord McNally, minister of state and deputy leader of the House of Lords, has responsibility for the following:

- MoJ business in the House of Lords;
- support to the Justice Secretary on constitutional matters;
- legal aid;
- family justice;
- freedom of information;
- human rights and civil liberties (jointly with Damian Green, minister of state, minister for policing and criminal justice (see right));
- defamation;
- EU business; and
- Crown dependencies.

Jeremy Wright, parliamentary under-secretary of state, minister for prisons and rehabilitation, has responsibility for the following:

- rehabilitation revolution;
- prisons and probation;
- youth justice; and
- sentencing policy.

Helen Grant, parliamentary under-secretary of state, minister for victims and the courts, has responsibility for the following:

- victims and criminal injuries compensation;
- courts, tribunals and administrative justice;
- women in the justice system, including women's prisons;
- judicial policy (including diversity);
- civil law and justice;
- international business (non-EU);
- law reform and sponsorship of the Law Commission;
- legal services and claims management regulation;
- coroner and burial policy;
- data protection and data sharing;
- the National Archives;
- devolution;
- sponsorship of the Office of the Public Guardian, Office of Court Funds, Office of the Official Solicitor and Public Trustee, and the Parole Board;
- better regulation and growth;
- sustainability;
- equalities; and
- support to Maria Miller, Secretary of State for Women and Equalities, on her cross-government work.

Damian Green, minister of state, minister for policing and criminal justice (jointly with the Home Office), has responsibility for the following:

- strategic oversight of the criminal justice system, reporting jointly to the Justice Secretary and the Home Secretary;
- joint working with Home Office, Attorney-General's Office and criminal justice system agencies;
- criminal law, procedure and the criminal offences gateway;
- sponsorship of the Criminal Cases Review Commission;
- the Transforming Justice programme;
- human rights and civil liberties (jointly with Lord McNally); and
- the minister also has a range of Home Office responsibilities for policing.

Background and experience of the team

Legal Action understands that Chris Grayling was a last-minute choice for the role of Justice Secretary after Iain Duncan Smith clung to his job at the Department for Work and Pensions. Chris Grayling is perceived as being less liberal on penal policy and human rights than his predecessor Kenneth Clarke, and it is in these areas of policy that he will face some big challenges. While cuts have been made to the prison building programme, the prison population is not reducing. The Justice Secretary also has to respond to the European Court of Human Rights' judgment on the issue of prisoners' voting rights by November 2012.

Liberal Democrat peer Lord McNally, who has responsibility for legal aid, led the coalition government's defence of the controversial Legal Aid, Sentencing and Punishment of Offenders Bill when it was debated in the House of Lords. An amendment hostile to the government's plans for legal aid in domestic violence cases was defeated only after a drawn vote meant that under parliamentary procedure it had to fall. One of the first tasks the minister will undertake in respect of his new brief will be to introduce the secondary legislation that sets out the criteria to claim public funding in such cases.

MINISTRY OF JUSTICE

Lord McNally

Interestingly, the new team includes seasoned members of the legal profession. Jeremy Wright was called to the Bar in 1996; he specialised in criminal law and has represented defendants and worked as a prosecutor. Helen Grant qualified as a solicitor in 1988, and in 1996 set up Grants Solicitors as a specialist firm focused on dealing with the problems of family breakdown, including, in particular, domestic violence.

Steve Hynes, LAG's director, commented: 'Much significance has been made of the fact that Chris Grayling is not a lawyer, but the last two incumbents in the post, Ken Clarke and Jack Straw, were only briefly practising lawyers before pursuing political careers. The role has become increasingly a political one, particularly after the expansion of the department under the last government to cover the Prison Service and the Probation Service.

However, LAG welcomes the appointment of two experienced legal aid lawyers to government. It is rather curious though that responsibility for legal aid has been given to the minister with the least knowledge of the subject.'

■ **Correction**: The photograph of Chris Grayling that appeared in September 2012 *Legal Action* 4 should have been credited to Simon Jacobs.

Adam Griffith, policy officer at the Advice Services Alliance, considers the latest statistics from the Legal Services Commission (LSC) and their impact on the implementation of the cuts to the scope of legal aid.

The rise and fall of civil legal aid

Introduction

Much of the discussion on the changes to civil legal aid, now enacted in the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012, has focused on the number of cases that cannot be taken, and clients which cannot be helped, as a result of the reduction in the scope of legal aid. Less attention has been paid to the fact that the civil legal aid system was already shrinking before the reductions in scope come into effect.

Analysis of LSC statistics shows that the supply of civil legal aid services reached a peak in 2009/10, before declining significantly in 2010/11 and 2011/12. This decline is worrying in itself. However, it also affects the number of cases that are being made available in the current tenders for face-to-face contracts starting in April 2013.

Certificated work

Civil legal aid consists of certificated work and controlled work. Certificated work covers a relatively small number of cases but takes around three-quarters of the civil legal aid budget.[1]

The number of certificated cases started in the last seven years is as follows:

- 155,065 in 2005/06;
- 151,247 in 2006/07;
- 137,963 in 2007/08;
- 145,286 in 2008/09;
- 159,715 in 2009/10;
- 144,875 in 2010/11; and
- 140,996 in 2011/12.[2]

Over this period, the number of certificates issued peaked in 2009/10, fell significantly in 2010/11 and fell slightly again in 2011/12, but remained above the lowest level reached in 2007/08.

In each of these years, of the certificates issued:

- 83–85% were in family;
- 7–9% were in housing;
- 2–3% were in clinical negligence; and
- in the last three years, 2% were in immigration.[3]

Controlled work

Controlled work includes Legal Help (and Help at Court) and Controlled Legal Representation in mental health and immigration. Legal Help is provided both face to face (by solicitors' firms, not for profit (NFP) agencies and Community Legal Advice Centres (CLACs)) and by telephone (through Community Legal Advice (CLA)).

The number of cases started in the last seven years is summarised in Table 1.[4] The number of face-to-face cases started in family, housing and immigration in the last seven years is summarised in Table 2.[5]

The figures highlight a number of trends as follows:

- Solicitors averaged around 500,000 new matter starts (NMS) from 2005/06 to 2009/10. In 2010/11, they fell by 18%. In 2011/12, they fell by a further 10% to just over 386,000.
- NFPs' NMS rose steadily until 2009/10. In 2010/11, they fell by 19%. In 2011/12, they fell by a further 16% (in 2011/12, the decline in NFPs' NMS was due largely to a drop in immigration NMS following the collapse of two large immigration providers).

Table 1: controlled work cases started

	2005/06	2006/07	2007/08	2008/09	2009/10	2010/11	2011/12
Solicitors	516,688	508,399	471,132	507,935	521,502	427,585	386,375
NFPs	191,635	231,305	251,752	278,076	285,998	231,157	195,477
CLACs				6,950	9,538	18,515	25,588
Total face to face	708,323	739,704	722,884	792,961	817,038	677,257	607,440
CLA	73,625	111,319	84,575	100,851	126,866	124,819	97,872
Total	781,948	851,023	807,459	893,812	943,904	802,076	705,312

Table 2: face-to-face controlled work cases started in family, housing and immigration

	2005/06	2006/07	2007/08	2008/09	2009/10	2010/11	2011/12
Family	283,274	280,466	260,765	281,179	293,183	246,534	214,035
Housing	97,918	104,157	103,723	113,321	112,247	92,466	87,401
Immigration	91,131	91,037	84,899	94,983	98,643	83,453	61,105

- Overall, the total number of face-to-face cases rose steadily (with a slight hiccup in 2007/08) until 2009/10. The number then fell by 17% in 2010/11 and a further 10% in 2011/12.
- Within these figures, the NMS in family, housing and immigration were fairly consistent until 2009/10. Over the next two years, however, family NMS fell by 27%, housing NMS fell by 22%, and immigration NMS fell, most dramatically, by 38%.
- The figures for CLA telephone specialists rose initially, fell substantially in 2007/08 (this was almost certainly due to the introduction of the operator service within CLA), made up most of their lost ground in 2008/09, and increased substantially in 2009/10. They then fell slightly in 2010/11 but very significantly, by 22%, in 2011/12.

Telephone advice

The figures for CLA telephone specialists closely reflect the fall, since 2009/10, of the number of cases opened by the CLA operator service, the number of cases referred by the service to face-to-face providers and the number of cases closed by the service. The figures for the last five years are set out in Table 3.[6]

Impact on procurement for 2013

The LSC has published procurement plans setting out the number of face-to-face cases that it wishes to procure through the tender process which opened on 14 September 2012.

On the author's calculations, the total numbers of cases in these procurement plans are as follows:

- Family: 95,761;
- Housing: 51,889; and
- Immigration and asylum: 40,831.

The author understands that the LSC reached its figures by applying the percentage reductions set out in the Ministry of Justice's final impact assessment to the number of cases started over a 12-month period which straddled the last two financial years.[7] Since the figures were calculated as percentages, they reflect the drop in the number of cases started over the past two years, but are not as low as they would have been if they had been based solely on the number of cases started in 2011/12.

Conclusion

The figures set out above indicate that there has been a significant contraction of civil legal aid and controlled work, in particular, since 2009/10. This contraction manifested itself as a significant reduction in the number of cases started by solicitors' firms, NFP agencies and CLA telephone specialists. That this contraction occurred during a period of economic stagnation is particularly alarming. Further investigation is needed to understand the reasons behind this. What is clear is that the contraction has affected the number of cases being tendered for the first post-LASPO Act contracts starting in April 2013.

It is not easy to predict what the level of demand for in-scope cases will be from April 2013. The figures set out above indicate that the number of cases started by legal aid providers can fluctuate significantly from year to year. It is to be hoped that the Legal Aid Agency, which succeeds the LSC in April 2013, will have the resources to increase the number of NMS available if demand exceeds the level allowed for currently.

Table 3: outcomes of cases opened by the CLA operator service

	2007/08	2008/09	2009/10	2010/11	2011/12
Closed by operator service	166,297 (55%)	235,947 (58%)	290,574 (61%)	264,339 (62%)	200,737 (61%)
Referred to face to face providers	61,732 (20%)	65,140 (16%)	60,941 (13%)	49,392 (11%)	39,621 (12%)
Referred to CLA specialists	76,621 (25%)	108,868 (27%)	125,143 (26%)	116,025 (27%)	90,994 (27%)
Total	304,650	409,955	476,658	429,756	331,352

1 The proportion was 69% in 2008/09, 71% in 2009/10, 72% in 2010/11 and 77% in 2011/12: percentages calculated from LSC, *Annual report and accounts 2008/09*, p9; 2009/10, p5; 2010–11, p5; and 2011–12, p6.
2 LSC, *Statistical information 2005/06, Statistical information 2006/07* and *Statistical information 2007/08*, Table CLS4. LSC, *Statistical information 2008/09*, *Statistical information pack for financial year 2009–2010*, *Statistical information pack for financial year 2010–2011* and *Statistical information pack for financial year 2011–2012*, Table CLS5.
3 Ibid.
4 See note 2, Table CLS2.
5 Ibid.
6 Information provided to the author by the LSC.
7 Available at: www.justice.gov.uk/legislation/bills-and-acts/acts/legal-aid-and-sentencing-act/laspo-background-information.

Caoilfhionn Gallagher, a barrister at Doughty Street Chambers and a co-ordinator of the Every Child in Need campaign, discusses proposed changes to the guidance supporting 'children in need' and illustrates why urgent action to oppose these proposals is necessary to protect vulnerable children.

Every Child in Need: safeguarding current child protection policy

In September 2012 *Legal Action* 5 we introduced our campaign group, Every Child in Need. We oppose changes proposed by the Department for Education (DfE) to the legal framework which supports 'children in need' under section 17 of the Children Act (CA) 1989.

We are a wide group, comprising charities, campaigners, lawyers and affected children and families themselves. We work with and reach thousands of children across the country. We are supported by many social work professionals who share our concerns, and professional bodies including the Royal College of Nursing and the Law Society.

The DfE ran a consultation over the summer months, which closed on 4 September 2012. The Every Child in Need campaign's full response can be found on our website.[1] Details are also available there of what you can do to help if you share our concerns.

The proposals

The DfE is proposing to remove long-standing statutory guidance which:

- has been in place for over 12 years, since April 2000 – the *Framework for the assessment of children in need and their families*, or '*Framework guidance*';[2]
- was issued jointly by three government departments – the Department of Health, the Department for Education and Employment and the Home Office – following an extensive and multi-disciplinary process focused on the developmental needs of children; and
- has since that time formed the basis for many landmark court decisions regarding the rights of vulnerable children.

The DfE proposes replacing the *Framework guidance*, which sets national minimum standards applicable across England, with short, vague guidance entitled *Managing individual cases*, which allows individual local authorities to set their own standards and targets. The changes affect all 'children in need' across England, a very wide group with vastly differing needs, which includes, for example, all disabled children, homeless teenagers, children in long-term hospital care, victims of child trafficking, child carers and children in and leaving custody.

What we do

Every Child In Need is a focused campaign. Our aim is to persuade the government not to proceed with damaging changes to the statutory framework which currently protects children in need. Our campaign brings together lawyers, advocates and organisations working with and for children in need, as well as helping children and young people make their views known to government.

Please visit: www.everychildinneed.org.uk/get-involved/ for the ways in which you can support the campaign.

Our concerns

We have four key concerns about the draft *Managing individual cases* guidance.

1. Focus of the draft guidance

The draft guidance is focused heavily on the narrow group of children who are a) at risk of serious harm and b) recognised as such. This is essentially the threshold for section 47 of the CA 1989, not section 17. However, its reach extends to the much wider group of children in need, who are not being abused but require social care support. Children with significant levels of need for social care input but who are not presently at risk of 'harm' or 'unsafe' in the narrow sense that those terms are used in the draft guidance, will not be provided with timely assessment and assistance by their local authorities.

2. Abolition of minimum timescales for assessments

At present a core assessment must be concluded within seven weeks (35 working days), unless there is good reason to depart from this. The DfE's impact assessment for these proposals recognises that 'there is a risk of negative impact on children if central government is less prescriptive'. There is no evidence base to justify taking this risk in relation to children in need. We fail to understand how it can be in children's best interests for the time taken to assess their needs to vary (potentially by a matter of weeks or even months) according to where they

happen to live. The draft new guidance recognises that 'drift and delay prevent children getting the help they need' (para 1.9). We agree, and this is precisely why we are concerned at the proposed abolition of the current mandatory timeframes.

3. Removal of distinction between initial and core assessments

Under the new guidance there will no longer be any initial assessments. These perform an important function for many children in need, ensuring that while a longer-term, more detailed, multi-agency assessment is undertaken, any immediate and pressing needs are nevertheless met in the meantime, such as providing suitable interim accommodation. It is also particularly important for children who may in fact be both 'children in need' and 'children at risk' but where the safeguarding issues are not immediately apparent, such as trafficked children, or those at risk of gang violence.

4. No requirement for a 'realistic plan of action'

The current draft guidance removes the requirement under the *Framework guidance* for a 'realistic plan of action' to be put in place at the conclusion of an assessment (para 4.1). Without this requirement, which has been embedded in the case-law, assessments will not lead to robust plans to show how the needs of vulnerable children will be met. Examples of relevant case-law include:

- *R (S) v Plymouth City Council* [2009] EWHC 1499 (Admin), 3 June 2009 – no 'realistic plan of action' to meet a disabled child's needs for accommodation and 'respite care', now referred to as 'short breaks'; and
- *R (S) v Sutton LBC* [2007] EWHC 1196 (Admin), 18 May 2007 – no 'realistic plan of action' for a homeless teenager to be supported to live in the community.

Voices of children

The very limited evidence available to the DfE is one-sided. It has been gathered through local authorities themselves, or in one instance from a small number of children (11 in total) who were hand-picked by local authorities.[3] The DfE has produced a short evaluation document, prepared by academics who spoke to 47 professionals but not a single child or family. The consultation ran over the summer months, when schools were closed and families were on holiday, and when parliament was in recess. Finally, the DfE did not produce any accessible or child-friendly versions of the consultation documents.

Case study

The following case study provides a real-life example of how a child has been affected by the government's proposals. She is based in a 'trial authority' which has already been made exempt from the *Framework guidance* requirements on maximum timeframes for assessments and the need for initial assessments, in advance of the proposed changes nationwide. This is a real child who individuals involved with the campaign have worked with, but her details have been anonymised to protect her identity.

Child A

Child A fled her violent mother to live with her father, whom she had never met. Her father lives in one of the trial local authorities. In spite of a great deal of effort, the relationship between A and her new family became strained and broke down. A ended up attempting suicide.

Social services became involved at this point and moved A into alternative accommodation, away from her father. However, in moving her, no assessment was undertaken. Under the current guidelines, it should have carried out an initial assessment within seven working days. However, because the authority was exempt from the timeframes as a trial authority, it did not have a set time in which it had to carry out an assessment. In spite of the clear problems A faced, an assessment was not prioritised.

A was moved into a hostel, where she was living with men in their 40s and 50s. She suffered inappropriate advances from a number of these men, including one very serious incident. After a number of weeks, she again contacted social services, who had still failed to assess her and were not providing her with any support. She was told that if she did not stay at the hostel, she would be made homeless.

She instructed solicitors who contacted the local authority to inform it that it had to carry out an assessment of her needs. Solicitors were able to ensure that an assessment was undertaken, which identified the young person's vulnerabilities. She was moved to suitable accommodation and provided with appropriate support to meet her needs.

Campaign supporters

Charities and organisations:

Ambitious about Autism
Asylum Aid
Carers Trust
Children's Heart Federation
Down's Syndrome Association
ECPAT UK
Hackney Law Centre®
Howard League for Penal Reform
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JustRights
Law Centres Federation
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Bhatia Best
Bindmans
Disability Law Service
Doughty Street Chambers
Garden Court Chambers
Goodmans Law
Irwin Mitchell
Maxwell Gillott
Scott-Moncrieff and Associates

The DfE has failed in its obligations to ensure that those most affected by the proposed changes – vulnerable children – are properly consulted and their experiences and views taken into account. The Office of the Children's Commissioner shares this fundamental concern of the Every Child in Need campaign, and has queried whether the DfE has breached article 12 of the UN Convention on the Rights of the Child as a result.

1 See www.everychildinneed.org.uk.
2 Available at: www.dh.gov.uk/en/Publicationsand statistics/Publications/PublicationsPolicyAndGuidance/DH_4008144.
3 *Children's experiences of child protection procedures*, Office of the Children's Rights Director, May 2012, available at https://rights4me.org/~/media/Library%20Documents/Reports/Reports%202012/REPORT%20Childrens%20Experiences%20of%20Child%20protection%20Procedures.pdf.

Employment law update

Tamara Lewis looks at proposed law reforms and case-law relating to discrimination, unfair dismissal, redundancy, TUPE, human rights and annual leave.

POLICY AND LEGISLATION

Ending the employment relationship: consultation

The government has published a consultation making a series of proposals with a view to encouraging settlement of employment disputes and avoiding employment tribunal (ET) proceedings.[1] It proposes renaming compromise agreements as 'settlement agreements' and making these easier to achieve. The government develops its idea of 'protected conversations', contained currently in the Enterprise and Regulatory Reform Bill, ie, employers (and employees) can make offers and enter settlement discussions even where there is no existing dispute between them, which will not be admissible in evidence in any subsequent unfair dismissal case unless there has been improper conduct in such negotiations. Acas will produce a Code that sets out guidelines for 'improper' behaviour and contains templates for offer letters. The government also consults over whether or not it should include a tariff of suitable settlement figures in the Code, which is surely an idea to be strongly discouraged. In addition, the government proposes to reduce the upper limit on the unfair dismissal compensatory award, so that it cannot exceed a claimant's pay for 12 months. It is also proposed that the overall cap (currently £72,300) be reduced. The consultation closes on 23 November 2012.

Employment Tribunal rules: Review by Mr Justice Underhill: consultation

In July 2012, a working party led by Mr Justice Underhill published a proposed review of the ET rules of procedure. The idea was to simplify the rules, make them more efficient and flexible and give tribunals more power to deter weak cases at an early stage. Last month, the government launched a consultation on the proposed rule changes that closes on 23 November 2012.[2]

Government responses to calls for evidence

Last month, the coalition government published its responses to *Dealing with dismissal and 'compensated no fault dismissal' for micro business: call for evidence* (March 2012) and *Call for evidence: Effectiveness of Transfer of Undertakings (Protection of Employment) Regulations 2006* (November 2011).[3] Regarding micro-businesses, the government has announced that it will not introduce compensated no fault dismissal. Nor will there be a separate Advisory, Conciliation and Arbitration Service (Acas) Code of Practice on disciplinary and grievance procedures for small businesses. However, the government will consult with Acas on the development of an interactive checklist tool to help small businesses follow grievance and disciplinary procedures and make it clearer that they may not be required to follow formal procedures to the same extent as larger businesses. Acas will also be asked to make clearer distinction in its Code between the handling of poor performance and the handling of misconduct issues.

The government's response to its call for evidence on the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) 2006 SI No 246 points out that many of the changes desired by respondents cannot take place because of the EC Acquired Rights Directive on which TUPE is founded. The government will consult in the future on any proposed amendments.

Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 SI No 162

The general public sector equality duty in Equality Act (EqA) 2010 s149 is accompanied by specific duties set by regulations in each of England, Wales and Scotland. The last of these, the specific duties for Scotland, have now been approved by the Scottish Parliament and came into force on 27 May 2012.
A Schedule to the regulations lists which public authorities are covered.

Equal pay audits

The government has announced that it will go ahead with plans to make employers that lose equal pay cases in ETs carry out and publish equal pay audits. There will be a civil financial penalty if the employer ignores an order. An audit will not be ordered if the employer:

- has carried one out in the previous three years;
- has transparent pay practices; or
- can show a good reason why an audit would not be useful.

Small employers with fewer than ten employees initially will be exempt, but this will be reviewed once it is seen how the audits work in practice. The government issued its response to the equal pay consultation in June 2012.[4]

ET fees

Following its fees consultation, the government has announced that it will introduce fees at two levels from summer 2013:

- Level 1 will include claims for notice pay, redundancy pay and wages. The proposed issue fee for level 1 claims is £160 with an additional £230 for the hearing.
- Level 2 will include claims for unfair dismissal, discrimination, equal pay and whistleblowing. The issue fee proposed for level 2 is £250, with an extra £950 for the hearing.

In addition, judicial mediation will cost £600 and appeals to the Employment Appeals Tribunal (EAT) will cost £400 to issue and £1,200 for the hearing.

As with the civil courts generally, there will be full or partial remission of fees for those unable to pay. The government plans to review the remissions system for all of the civil courts, including ETs, this autumn with the aim of simplifying the system and ensuring that those who can pay, do so. The consultation response was issued in July 2012.[5]

DISCRIMINATION

Agency workers

Following *Muschett v HM Prison Service* [2010] EWCA Civ 25, 2 February 2010; [2010] IRLR 451, CA, there has been a general but wrong impression that agency workers cannot claim the protection of discrimination law against the end-user: this is not necessarily true. Depending on the facts, the worker may be able to claim against the end-user as the 'principal' in a contract worker triangle. Under former Disability Discrimination Act (DDA) 1995 s4B, a 'principal' must not discriminate against a disabled 'contract worker'.[6]
A 'principal' is someone who makes work available for doing by individuals 'employed by' another person, who supplies them under a

contract to the principal. This means 'employed' as defined in the discrimination legislation, ie, not just employees in the unfair dismissal sense, but including those employed on a contract personally to do any work.[7]

■ Camden LBC v (1) Pegg (2) Randstad Care Ltd (3) Hays Specialist Recruitment Ltd t/a Camden Agency for Temporary Supply

UKEAT/0590/11,
13 April 2012

Camden council needed to recruit a temporary School Travel Planning Officer. It approached the Camden Agency for Temporary Staff (CATS), which had no one suitable. CATS in turn approached Beresford Blake Thomas Ltd (BBT), the trading name of Randstad Care Ltd. BBT put Ms Pegg forward and, after an interview, the council offered her the role of Senior School Travel Planning Officer. After about nine months, Ms Pegg's psychiatric health deteriorated and subsequently her assignment was terminated. She claimed disability discrimination under the DDA 1995.

While she worked for the council, Ms Pegg was paid by, and under contract to, BBT. The written contract stated that there was a 'contract for services' between BBT and Ms Pegg for the period of assignments, but there was no contract between assignments. Ms Pegg was not obliged to accept any assignment offered to her, but if she did, for the period of the assignment, she would accept the supervision and control of the client.

The ET found that the claimant was fully integrated into the council's team during her assignment. She frequently represented the council at meetings and conducted courses on its behalf. To the outside world, she was held out as fully integrated with the council. She could not choose her hours and she had to ask for leave like permanent staff. There was no question of her being able to send a substitute. The tribunal said that, once Ms Pegg had accepted an assignment, she was obliged to work personally for BBT and she was therefore employed by BBT within the meaning of DDA 1995 s68. She was supplied to work for the council under a contract made with BBT: it did not matter that CATS was an intermediary. Ms Pegg was therefore able to claim disability discrimination against the council, which was a 'principal' under DDA 1995 s4B.

The EAT rejected the council's appeal. Once Ms Pegg had accepted the assignment, she owed a contractual duty to BBT to do the work personally. This was enough to bring her within DDA 1995 s68. The EAT added that such arrangements are common and no doubt parliament intended the contract worker protection to apply to comparable cases.

Illegality

An employee cannot enforce a contract of employment, eg, by bringing a claim for pay deductions or unfair dismissal, where the contract is illegal. There are three situations where an employer can rely on a defence of illegality to such claims, ie:

- where the contract is entered into with the intention of committing an illegal act;
- where the contract is prohibited by statute; and
- where the contract, although lawful when made, is illegally performed and the claimant knowingly participated in the illegal performance (*Hall v Woolston Hall Leisure Ltd* [2000] IRLR 578, CA).

By contrast, an employee may still be able to bring a discrimination claim provided the claim is not bound up inextricably with the illegality. Various issues arose in the following case, but the report below focuses on the central issue of illegality.

■ Hounga v (1) Allen (nee Aboyade-Cole) (2) Allen

[2012] EWCA Civ 609,
15 May 2012

Ms Hounga was a Nigerian national aged somewhere between 14 and 18 years old. She had a good command of English, but she was illiterate. She worked as an au pair for the Allens in the UK from January 2007 until her dismissal in July 2008. Mrs Allen had dual British and Nigerian nationality. In order to obtain a visitor's visa to come to the UK, Ms Hounga swore an affidavit in Nigeria stating that she was older than she was and giving her name as Adeyinka Mary Aboyade-Cole. The Aboyade-Cole family then paid for her airline ticket and provided a phoney letter of invitation to visit her 'grandmother', Mrs Aboyade-Cole, in England for a holiday. Ms Hounga repeated this lie to British immigration officers on her arrival. Ms Hounga was then collected by Mrs Allen and taken to her home. At some point while she was in Nigeria, Mrs Allen told Ms Hounga on the telephone that she would be paid £50 per month. After she was dismissed, Ms Hounga brought various tribunal claims, including unfair dismissal, pay deductions and race discrimination.

The ET found that Ms Hounga wanted to come to the UK and obtain schooling here, having worked for Mrs Allen's mother, Mrs Aboyade-Cole, in Nigeria. The dishonest plan for coming over was masterminded by the Aboyade-Cole family, but Ms Hounga went along willingly with what was suggested. She arrived on a six-month visitor's visa and it was illegal for her to work. During her stay, Mrs Allen had seriously physically abused her. The fact that Ms Hounga was illegally in the country gave the Allens the power to treat her badly. They would not have dismissed a British-based person working for them who had rights. The dismissal was therefore race discrimination. The tribunal rejected the claim for unfair dismissal because it was founded on an illegal contract, since Ms Hounga knew and understood that she did not have a right to work in the UK.

The Allens appealed. The EAT said that the ET had not explained why it had allowed the race discrimination claim despite the illegal contract. The parties agreed that the EAT should decide the issue itself. The EAT decided that the race discrimination claim in respect of Ms Hounga's dismissal should be upheld. The Allens appealed again.

The Court of Appeal considered the key case of *Hall v Woolston Hall Leisure Ltd* [2000] EWCA Civ 170, 23 May 2000; [2000] IRLR 578, CA. It was established in *Hall* that in a discrimination case, the test was whether the claim arose out of, or was so clearly connected with or inextricably bound up or linked with, the claimant's illegal conduct that a tribunal could not permit the claimant to recover compensation without appearing to condone this conduct. In practice, it would require 'quite extreme circumstances' before this test would exclude a claim founded on tort, as is a discrimination claim. Applying the test to the facts, Ms Hall was allowed to bring her claim. She was dismissed due to her pregnancy. She was aware that her employer was not paying tax on her wages, but her acquiescence was in no way linked to her discrimination claim. By contrast, in *Vakante v Governing Body of Addey and Stanhope School (No 2)* [2004] EWCA Civ 1065, 30 July 2004; [2005] ICR 231, CA, a Croatian national falsely told his employer that he did not need a work permit. His employer was completely unaware of the illegality. Mr Vakante was not permitted to bring a race discrimination claim when he was dismissed eight months later because the whole employment relationship had been achieved by his dishonest and criminal conduct.

In the present case, the EAT had thought that Ms Hounga's situation was different from Mr Vakante's. It felt that the dismissal by the Allens was not inextricably linked with Ms Hounga's conduct in entering the country and working illegally. Furthermore, Ms Hounga's involvement in the illegality was far less than that of the Allens. The Court of Appeal disagreed. It said that this case was almost indistinguishable from the *Vakante* case. Both contracts were illegal from the outset. It did not matter that the employer had also participated in the illegality, unlike in *Vakante*, where the employer was entirely unaware of it. Ms Hounga knew of and participated in the illegality. Her case was founded on the argument that, as an illegal worker, she could be mistreated. This argument was inextricably

bound up with her own illegal conduct in knowingly lying in order to gain entry to the UK. To accede to the claim would be to condone the illegality. The ET's finding that the dismissal was race discrimination was therefore set aside. The Court of Appeal concluded:

[W]hilst one inevitably has sympathy for Ms Hounga as a young person of whom unfair advantage was probably taken, there is no escaping the tribunal's findings that she knew what she was doing and knew it to be wrong and illegal. Whichever party bore the greater responsibility for making of the illegal contract, she was a willing participant in it (para 62).

UNFAIR DISMISSAL

Tribunal composition

Since 6 April 2012, the default position is that employment judges sit alone on unfair dismissal cases, except where they decide that it would be desirable to have a full panel, having regard to any disputes of fact, legal issue or the views of the parties (Employment Tribunals Act 1996 s4(3) (as amended by the Employment Tribunals Act 1996 (Tribunal Composition) Order 2012 SI No 988) and s4(5)). An early EAT comment on the new regime comes from Lady Smith in the Scottish EAT.

■ **McCafferty v Royal Mail Group Ltd**
UKEATS/0002/12,
12 June 2012

In this case, the tribunal found by a majority that the claimant's dismissal was not unfair, the employment judge dissenting. Having rejected the appeal, the EAT noted that had the case been heard by a judge sitting alone, evidently it would have led to a different result. It added:

Some may consider that to be a sobering thought. It certainly seems supportive of the arguments advanced in response to and against the proposal last year that Employment Judges be able to sit alone in unfair dismissal cases (see: the 2011 Government consultation paper on reform of Employment Tribunals 'Resolving Workplace Disputes'). It perhaps also underlines the need to give careful consideration to any views expressed by parties as to whether or not proceedings should in fact be heard by an Employment Judge and members ... (para 37).

Reason for dismissal

Under Employment Rights Act (ERA) 1996 s98, an employer must prove the reason why it dismissed the employee. If the employer cannot prove a 'substantial' reason for dismissal, the dismissal will be unfair. Reasons for dismissal fall into categories, ie:

- capability;
- conduct;
- redundancy;
- statutory restriction; or
- 'some other substantial reason' of a kind which can justify dismissal.

■ **Leach v Office of Communications (OFCOM)**
[2012] EWCA Civ 959,
13 July 2012

Mr Leach was employed by OFCOM as an International Policy Adviser (Professional Senior Associate). OFCOM is a high-profile independent regulator for communications industries in the UK. It is actively involved in a range of social responsibility initiatives in order to meet its statutory duty to have regard to the vulnerability of children. His role involved regular overseas travel. In November 2007, the Metropolitan Police Child Abuse Investigation Command (CAIC) told OFCOM that Mr Leach posed a continuing potential threat or risk to children and that the media was interested in exposing him. In December 2007, CAIC representatives agreed to make formal 'limited disclosure' under the multi-agency public protection arrangements created under the Criminal Justice and Court Services Act 2000. OFCOM did not take this disclosure at face value; it probed for more information, but it was not privy to all the evidence. Mr Leach attended a disciplinary meeting in January 2008, where he was dismissed, as nothing he said enabled OFCOM to discount the information which CAIC had given it.

Mr Leach claimed unfair dismissal. OFCOM said that its reason for dismissal was 'some other substantial reason', ie, that the police disclosure that Mr Leach was a continuing threat to children, which meant that the fundamental relationship of trust and confidence between the parties had broken down. OFCOM did not seek to justify the dismissal on the basis of 'conduct', ie, that Mr Leach was in fact guilty of the disclosed matters.

The ET rejected the unfair dismissal claim. The EAT rejected the appeal, but made some important comments. It said that 'it sticks in the throat' that an employee may lose his/her job, and perhaps the chance of future employment, based on allegations which s/he has had no chance to challenge. Yet, on the other hand, there are cases where employers must be warned of facts indicating a risk to children, even in the absence of a conviction. The risk of injustice is inherent in a system where 'disclosures' of the kind made here, unsupported by any court finding, are permitted. However, the question was not whether Mr Leach had suffered an injustice, but whether OFCOM's conduct was fair. If Mr Leach was treated unfairly by CAIC, his remedy was against it. An employer in a case like this cannot be expected to carry out its own investigation as it would not have the expertise or resources. However, it should not take an uncritical view of the information supplied; an employer should insist on a sufficient degree of formality and specificity about disclosure before contemplating any action against the employee. The tribunal had found that OFCOM had adopted an appropriately critical approach.

The EAT went on to comment on the growing trend for employers to give 'breakdown of trust and confidence' as the reason for dismissal where the facts fall short of misconduct. The EAT said that this approach was not 'an automatic solvent of obligations'. The reason must still be 'substantial' and tribunals must not dilute this requirement. '"Breakdown of trust" is not a mantra that can be mouthed whenever an employer is faced with difficulties in establishing a more conventional conduct reason for dismissal' (para 3). In the present case, for example, it would be important to identify why CAIC's disclosure made it impossible for OFCOM to continue to employ Mr Leach. The reason appeared to be the risk of reputational damage. This was a substantial reason in the particular circumstances, even though it was uncomfortable in the absence of any established misconduct.

The Court of Appeal rejected the appeal. It felt as uncomfortable as the EAT, but stated that it agreed totally with the EAT's analysis. Regarding the use of 'breach of trust and confidence' as a reason for dismissal, the Court of Appeal added its own voice:

The mutual duty of trust and confidence, as developed in the case law of recent years, is an obligation at the heart of the employment relationship. I would not wish to say anything to diminish its significance. It should, however, be said that it is not a convenient label to stick on any situation, in which the employer feels let down by an employee or which the employer can use as a valid reason for dismissal whenever a conduct reason is not available or appropriate (para 53).

Comment: The important part of this case is the strong statements by the EAT and the Court of Appeal against bland statements by employers that dismissal is due to the employee's breach of trust and confidence. Employers must be specific about why they cannot continue to employ the employee, and the reason must be 'substantial'.

REDUNDANCY

Definition

If a worker is dismissed for redundancy, s/he is

entitled to a redundancy payment provided that the worker has not turned down an offer of suitable alternative employment. It is often obvious when the dismissal is for redundancy, eg, the employer is cutting down its overall number of staff. However, there are many ambiguous situations where it can be surprisingly difficult to apply the legal definition in ERA s139. Section 139(1)(b)(i) says that an employee is dismissed for redundancy 'if the dismissal is wholly or mainly attributable to … the fact that the requirements of that business … for employees to carry out work of a particular kind … have ceased or diminished or are expected to cease or diminish'.

■ Packman t/a Packman Lucas Associates v Fauchon

UKEAT/0017/12,
16 May 2012

Ms Fauchon was employed to provide bookkeeping services. There was a downturn in business, and additionally the employer introduced a software package which reduced the number of hours a bookkeeper needed to spend on the work. Ms Fauchon did not agree to reduce her contractual hours, so she was dismissed.

The ET decided that Ms Fauchon was dismissed for redundancy and awarded her a redundancy payment of £11,210. The employer appealed. It said that it was not a redundancy situation because the employer did not require fewer employees, it just required Ms Fauchon to work fewer hours. It relied on a case called *Aylward and others v Glamorgan Holiday Home Ltd* UKEAT/0167/02, 5 February 2003, which that said there must be a reduction in headcount for there to be a redundancy situation.

The EAT rejected the appeal, saying that *Aylward* was wrong. The redundancy definition must be looked at as a whole. It is a redundancy dismissal if an employee is dismissed because the employer requires fewer employees to do less work or even the same amount of work. Equally, it is a redundancy situation if an employee is dismissed because the amount of work for the same number of employees is reduced (para 33). The EAT commented that this is also logical in industrial relations terms if 'full-time equivalent' posts are considered. If, for example, there are two people working full-time and there is only enough work for one person to work full-time, it is a redundancy situation whether the employer dismisses one person, or instead requires each person to work part-time and has to dismiss and replace them if they disagree. What is not a redundancy situation is if the number of employees and the total number of hours worked remains the same.

TUPE

Service provision change

There are two definitions of a transfer covered by TUPE. The traditional definition derived from EU law is contained in regulation 3(1)(a), and the newer service provision change in regulation 3(1)(b). The latter was intended to cover contracting-out without any difficulty. One condition of there being a service provision change is that immediately before the service provision change, there must be 'an organised grouping of employees … which has as its principal purpose the carrying out of the activities concerned on behalf of the client' (TUPE reg 3(3)(a)(i)). The following two cases illustrate the difficulty caused by this phrase.

■ Eddie Stobart Ltd v Moreman and others

UKEAT/0023/11,
17 February 2012,
[2012] IRLR 356, EAT

Eddie Stobart was a logistics company. At the material time, it provided warehousing and delivery of meat to two clients, Vion and Forza. The clients both required different delivery times so that the company's nightshift employees worked principally on tasks required for the Forza contract, whereas its daytime employees worked principally on tasks required for the Vion contract. When Vion arranged for the work to be taken over by another logistics business (FJG), Eddie Stobart wrote to the employees who worked wholly or mainly on the day shift and told them they would be transferring to FJG. The company also wrote to those who had spent more than 50 per cent of their tasks in the previous 90 days on the Vion contract. FJG refused to accept that there had been a transfer. The claimants brought various claims, including for unfair dismissal against Eddie Stobart and/or FJG. The ET found that there had been no transfer because there was no 'organised grouping of employees' as required by the service provision change definition: Eddie Stobart was therefore responsible for the dismissals. The company appealed.

The EAT (under the former President, Mr Justice Underhill) rejected the appeal. It agreed that there was no service provision change under TUPE reg 3(1)(b) because there was no 'organised grouping' of employees. The definition does not simply say that the employees needed in fact to have carried out the relevant activities: it suggests that the employees must be organised in some way by reference to the requirements of the client in question. The definition does not naturally apply to a situation where, due to shift patterns or similar organisational reasons, a group of employees happens to work mostly on tasks benefiting a particular client, but without any deliberate planning or intent. In this case, there were no teams dedicated to the Vion contract, but employees happened to work on that contract simply because of the shift system and time of day that Vion required deliveries.

■ Seawell Ltd v (1) Ceva Freight (UK) Ltd (2) Moffat

UKEATS/0034/11,
19 April 2012

Ceva was in the business of freight forwarding and management logistics. Seawell was one of its clients. Seawell supplied personnel, goods and materials to oil platforms. It purchased supplies from Ceva, which were stored at Ceva's warehouse at Dyce and delivered by Ceva to platforms when required. Ceva's workforce at Dyce was divided into inbound goods and outbound goods. Mr Moffat worked in the latter group, which comprised eight people. Mr Moffat, who was a logistics co-ordinator, spent 100 per cent of his time on the Ceva work. Two of his colleagues worked for a different customer altogether and four other people (his line manager, the general manager and two warehousemen) spent 10–30 per cent of their time on Ceva work. Seawell had always intended to carry out these activities in-house, and by 1 January 2010 it was doing so completely. Ceva informed Mr Moffat that he should report to Seawell for work on 5 January 2010. However, Seawell disputed that TUPE applied.

The ET decided that TUPE did apply because the service provided for Seawell by Ceva was logistics co-ordination and freight forwarding of supplies to oil platforms, and Mr Moffat's principal purpose was carrying out this activity. Indeed, he was in charge of the activity and he made it happen. The tribunal said that other people, eg, the warehousemen, could carry out some of the activities without being part of the organised grouping. Alternatively, the organised grouping comprised the general manager, the manager, the two warehousemen and Mr Moffat because together they ensured that the service was effective. However, under TUPE reg 4, only the claimant transferred because only he was assigned to the grouping – the others spending less than 50 per cent of their time there.

The Scottish EAT allowed the appeal and said that TUPE did not apply. Mr Moffat would have to claim unfair dismissal against Ceva. The EAT confirmed its view in *Argyll Coastal Services Ltd v Stirling and others* UKEATS/0012/11, 15 February 2012 that an 'organised grouping of employees' means employees who are deliberately organised for the purpose of carrying out activities for the client as a team. It need not be the sole purpose of the group, but it must be the principal purpose. This was also consistent with the case of *Eddie Stobart Ltd v Moreman and others* (discussed above). In the present case,

first, the only deliberately organised groupings were the outbound group (including Mr Moffat) and the inbound group. However, the outbound group was not organised for the purpose of the Seawell contract. Nor did Ceva specifically form a grouping consisting of Mr Moffat to do the Seawell contract. It was not enough simply that he happened to spend 100 per cent of his time on the contract or that he made it happen.

Second, Mr Moffat did not work on the whole of the activities concerned. The 'activities' which Ceva took back in-house comprised receipt, storage and supply. Mr Moffat had worked on only some of those activities. The general manager, the manager and the warehousemen had done other parts of those activities, but they were not part of an organised grouping dedicated to the Seawell contract.

Third, the tribunal had failed to make a specific finding that Mr Moffat was 'assigned to' the organised grouping. It was not enough just to say that he happened to be spending 100 per cent of his time on such work.

For all these reasons, Mr Moffat's employment did not transfer under TUPE. There was also an issue regarding consultation, which is not the subject of this report.

Comment: These cases seem to drive a coach and horses through the service provision change definition. Their effect appears to be that employees who happen to have spent all their time on a particular area of work, but without any formal decision to put them on such work, will not be considered part of a deliberately organised grouping. So, if and when this area of work is transferred to a new provider, such that there is no work left for the relevant employees with the original employer, they have no protection under TUPE reg 3(1)(b). It remains to be explored whether the slightly less focused wording of the old transfer definition in reg 3(1)(a), backed as it is by EU law, can avoid this difficulty.

Pensions

Under TUPE reg 4, where an employee is covered by a transfer, all the transferor's rights, powers, duties and liabilities under or in connection with the employee's contract are transferred to the transferee. However, TUPE reg 10 states that this does not apply to an occupational pension scheme, except for provisions 'which do not relate to benefits for old age, invalidity or survivors'.

■ Procter & Gamble Company v Svenska Cellulosa Aktiebolaget SCA and SCA Hygiene Products Manchester Ltd (formerly known as SCA Hygiene Investments Ltd)

[2012] EWHC 1257 (Ch),
14 May 2012

The pension scheme in question was a non-contributory final salary scheme. The normal retirement age (NRA) under the scheme was 65. The scheme had a state pension offset so that the combined amount of the scheme's benefits and state pension reached the target calculation. Members could opt to retire at any time after the age of 55 with their employer's consent. When Proctor & Gamble transferred its business to SCA, the issue arose about which pension benefits would transfer.

SCA relied on two Court of Justice cases, *Beckmann v Dynamco Whicheloe Macfarlane Ltd* C-164/00, [2002] IRLR 578, ECJ, 4 June 2002 and *Martin and others v South Bank University* [2004] IRLR 74, ECJ, 6 November 2003 to argue that a pension that provides a unitary benefit, payment of which commences before NRA, cannot be or become an old age-benefit. Proctor & Gamble argued that the cases were irrelevant because they both concerned payments made exclusively before NRA and were triggered by redundancy, which was not the situation here. The High Court agreed with Proctor & Gamble. *Beckmann* and *Martin* concerned early payment of lump sums and early retirement pension payable from the date of redundancy to the NRA. They were payable in the context of redundancy or premature retirement on organisational change or in the interests of the service. Neither were concerned at all with benefits payable after NRA. In the present case, the High Court decided that the benefits payable after NRA were properly characterised as 'old age benefits', even if they were paid under a unitary pension under which benefits were first paid before NRA because the member in question had reached the age of 55. Such benefits therefore would not be transferred under TUPE.

Comment: Advisers concerned with issues of pensions and TUPE are advised to read this case for themselves for the full details. The case is being appealed.

HUMAN RIGHTS

Article 6 of the European Convention on Human Rights ('the convention') states that everyone is entitled to a fair and public hearing. It may be useful for challenging certain tribunal and court processes. It has been suggested that it applies additionally to hearings held by professional bodies determining a person's right to practice his/her profession. Employees have also used it to claim the right to legal representation at internal disciplinaries.

■ Mattu v University Hospitals of Coventry and Warwickshire NHS Trust

[2012] EWCA Civ 641,
18 May 2012,
[2012] IRLR 661

In this case, the Court of Appeal stated firmly that article 6 does not apply to the conduct of internal disciplinary hearings. This is because such hearings do not determine the employee's civil rights. Even if being dismissed makes it difficult for the employee to get a job in the future in his/her chosen career, this is due to the decisions freely made by potential future employers. It is not the same as a professional body imposing a ban on someone's right to practice. Any suggestion to the contrary in *Kulkarni v Milton Keynes Hospital NHS Foundation Trust and the Secretary of State for Health* [2009] EWCA Civ 789, 23 July 2009 was obiter and incorrect. Mr Mattu could bring claims for unfair dismissal and wrongful dismissal in the ET or courts, and these would be bound by article 6 in the usual way.

ANNUAL LEAVE

The Working Time Directive 2003/88/EC gives all workers an entitlement to at least four weeks' holiday per year. Under article 7, leave cannot be replaced by pay in lieu except where the employment has come to an end. The Directive is implemented in the UK by the Working Time Regulations (WT Regs) 1998 SI No 1833. Regulation 13 gives the right to four weeks' leave which, under regulation 13(9), can only be taken in the year in which it is due and may not be paid in lieu except on termination. It is well-established that workers are entitled to carry over leave to the next leave year where they have been unable to take it because of sickness. However, what happens if, due to sickness, they never return to work before leaving the job? Can they claim pay in lieu for leave years before the year of termination, and does it matter that they never asked for leave at the time?

■ NHS Leeds v Larner

[2012] EWCA Civ 1034,
25 July 2012

Ms Larner was absent on sick leave for the whole of the leave year 2009/10. She did not request leave or ask to carry it over. She was dismissed very early in the leave year 2010/11

SUGGESTED READING

IDS Employment Law Brief

- Ministers of Religion 953
- Costs in employment tribunals 955

on the ground of ill-health. She had never returned to work. NHS Leeds refused to pay her holiday pay in respect of the 2009/10 year. It argued that she was not entitled to be paid because she had never requested leave in that year or asked to carry it over. The ET and EAT upheld Ms Larner's claim. (See UKEAT/0088/11, 29 June 2011; [2011] IRLR 894; April 2012 *Legal Action* 16.) NHS Leeds appealed again.

The Court of Appeal rejected the appeal. Having analysed a number of recent cases of the Court of Justice on the Working Time Directive, the Court of Appeal said that as Ms Larner was sick during 2009/10, she was entitled to carry forward her leave entitlement for this year without having made any prior request so to do. As she was then dismissed before she could take the carried forward leave, Ms Larner was entitled to be paid in lieu. Regarding any apparently contradictory wording in the WT Regs, it would be possible to interpret the regulations so as to be compatible with the Directive. However, this was not necessary in this case. The Court of Justice has said recently that article 7 of the Directive has direct effect, and as NHS Leeds is an emanation of the state, Ms Larner could rely on it directly.

The Court of Appeal did not want to give any further general guidance regarding sickness and holiday pay, since this was a developing area with a steady succession of references to the Court of Justice for rulings. It also declined to decide the issue whether the additional 1.6 weeks under WT Regs reg 13A should be treated in the same way as the four weeks required by the Directive.

1 Available at: www.bis.gov.uk/assets/biscore/employment-matters/docs/e/12-1037-ending-the-employment-relationship-consultation.pdf.
2 Available at: www.bis.gov.uk/assets/biscore/employment-matters/docs/e/12-1039-employment-tribunal-rules-underhill-review.pdf.
3 The government's responses are available at: www.bis.gov.uk/assets/biscore/employment-matters/docs/d/12-1143-dismissal-for-micro-businesses-response.pdf and at: www.bis.gov.uk/assets/biscore/employment-matters/docs/e/12-1141-effectiveness-transfer-of-undertakings-response.pdf respectively.
4 Available at: www.incomesdata.co.uk/areas-of-expertise/employment-law/downloads/Modern-Workplaces-Equal-Pay.pdf.
5 Available at: https://consult.justice.gov.uk/digital-communications/et-fee-charging-regime-cp22-2011.
6 There is similar wording in EqA s41.
7 Under DDA 1995 s68; EqA s83(2) is almost identical.

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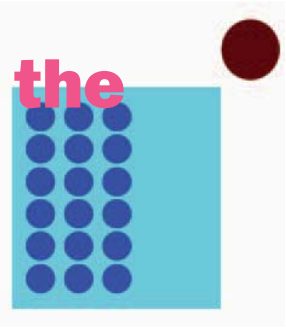
The final piece of the equality jigsaw?



The Equality Act (EqA) 2010 was intended to outlaw age discrimination in services, public functions and associations. After a period of uncertainty, the government announced in June 2012 that the ban would commence on 1 October 2012. Nony Ardill discusses what shape the ban will take.

The ban on age discrimination in services, public functions and associations is arguably the most significant extension of discrimination law under the EqA. For other characteristics, ie, disability, sex, race, religion or belief, gender reassignment, pregnancy and maternity and sexual orientation, protection in these sectors predated the Act by some years. Discrimination is now outlawed in services, public functions and associations for all protected characteristics except marriage and civil partnership.

The Employment Equality (Age) Regulations 2006 SI No 1031 (introduced further to Council Directive 2000/78/EC and now consolidated into the EqA) banned age discrimination in employment and training. Older people's organisations led the call to extend the ban to services, arguing that age was still the 'Cinderella' equality strand. An opportunity arose with the Labour government's commitment to harmonising and extending discrimination law through a single statute.

Most of the EqA's provisions came into effect on 1 October 2010. However, protection against age discrimination was not commenced in relation to Part 3 (Services and public functions) and Part 7 (Associations).

Scope of the changes

Age discrimination, harassment and victimisation are now outlawed in the provision of services (including goods and facilities: EqA s31(2)), whether provided by the private, public or voluntary sector. It is irrelevant whether they are provided for payment or free of charge. Service providers must not discriminate in providing a service, or by refusing a service, or providing one of an inferior quality. The ban under EqA Part 3 includes public functions, ie, functions carried out by or on behalf of the state, such as law enforcement and tax collection (EqA s29(6)). However, Part 3 protection for age does not extend to people under the age of 18.

EqA Part 7, which deals with associations, applies to the way that an association deals with its members, associates, guests and would-be guests. The ban under Part 7 extends to all age groups, including people under 18. Note, however, that there is still no protection from age discrimination in relation to premises (EqA Part 4).

Objective justification

Unlike other protected characteristics, direct discrimination because of age can be objectively justified if it is 'a proportionate means of achieving a legitimate aim' (EqA s13(2)). This recognises that some age-differentiated treatment is seen as socially acceptable.

The test is best applied in two stages:

- First, does the aim of the rule or practice represent a real need, which is not discriminatory?
- Second, if the aim is legitimate, are the means of achieving it proportionate, that is, appropriate and necessary in all the circumstances?

Case-law to date relating to section 13(2) has only looked at the application of this test to employment and occupation, where the domestic courts' interpretation of the objective justification test must reflect EU law. The leading case is *Seldon v Clarkson Wright and Jakes* [2012] UKSC 16, 25 April 2012. In this context, the Supreme Court has held that the approach to justifying direct age discrimination cannot be identical to the approach to the objective justification test for indirect discrimination (per Lady Hale at para 51). However, in the absence of an EU Directive relating to age discrimination in services, how the courts will interpret the objective justification test remains to be seen.

Exceptions to the ban

EqA s197 provides a vehicle for introducing exceptions by Ministerial Order, amending the primary legislation.* Most of the exceptions take effect as new paragraphs under EqA Sch 3 as follows:

- use of age criteria in immigration control: para 15A;
- financial services: para 20A;
- general age-based concessions: para 30A;
- age-related holidays (such as Saga and Club 18–30): para 30B;
- age 'challenges' by shops selling age-related goods (such are fireworks and cigarettes) seeking proof of age: para 30C;
- minimum age limits for occupants of residential park homes: para 30D.

In addition, new paragraph 1A in Schedule 16 allows age-based concessions in private clubs or associations. An exception permitting age bands and age limits in sport is introduced by new section 195(7) of the EqA. Note the absence of any express exception for health and social care: here, any age-based treatment must be objectively justified.

Exception for financial services

This exception removes the whole financial services sector from the scope of the age discrimination ban. The only limitation is that an assessment of risk relating to age (where one is carried out) must be done by reference to 'relevant' information 'from a source on which it is reasonable to rely'. Note that comparable exceptions for both disability and gender are more tightly drafted; for example, the latter requires any assessment of risk to be based on actuarial or statistical data and the different treatment to be proportionate (EqA Sch 3 para 22(3)).

As the exception is cast so widely, when a financial transaction involves no assessment of risk it will be difficult to challenge discriminatory treatment of customers, even if based on negative ageist stereotypes, for example, a bank refusing to serve older customers unless they are accompanied by a younger relative.

Exception for concessionary services

This exception permits any service-related concession for persons of a particular age group. Thus, it is drafted more widely than the version that was consulted in 2011, which contained both a reasonableness test and a requirement that the concession should not deter other age groups.

There is a risk that this exception could be used as a way of sidestepping the new law by creating artificial pricing structures designed to exclude older – or younger – people; for example, a cafe wanting to deter younger people could deny them a 50 per cent discount it offers to pensioners.

Conclusion

As with any new legislation, it will be important for the courts to clarify the application of the new age discrimination ban. The Equality and Human Rights Commission has powers to support strategic litigation relating to the EqA and would be interested in hearing of any upcoming cases. The commission can be contacted at 0161 829 8407.

* Available at: www.legislation.gov.uk/ukdsi/2012/9780111525692/pdfs/ukdsi_9780111525692_en.pdf.

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Police misconduct and the law

Stephen Cragg, **Tony Murphy** and **Heather Williams QC** continue their six-monthly review of important developments in the law relating to police misconduct.

CASE-LAW

Disability discrimination

■ ZH v Commissioner of Police of the Metropolis

[2012] EWHC 604 (QB), 14 March 2012

The claimant, a severely autistic teenage boy with learning difficulties and epilepsy, became 'stuck' by the side of a swimming pool, fixated by the water, during a school visit (para 3). When police officers approached and touched him, he jumped into the pool. After he was removed from the water, he was physically restrained by officers using their body weight, handcuffs and leg restraints. He was then placed in the back of a police van, before being released to his carers.

The High Court, sitting as Central London County Court (due to a shortage of judges at Central London County Court), found that the officers had breached the duty to make reasonable adjustments to their normal control and restraint policies, which admittedly arose under the Disability Discrimination Act (DDA) 1995 in light of the claimant's disabilities. The court identified reasonable adjustments that were not made by officers in respect of liaison at the scene with the claimant's school carers to obtain information on his condition and explore alternative options, both before approaching him, thus causing him to jump in the water, and before restraining him on his removal from the pool. The defence that such steps were impracticable or unrealistic was rejected.

Additionally, the court held that ZH was assaulted and falsely imprisoned, as officers had not acted in the claimant's 'best interests' under Mental Capacity Act (MCA) 2005 ss5–6, given that they had decided what was in his best interests without first taking reasonable steps to consult with his carers.

The restraint was also held to amount to inhuman and/or degrading treatment infringing article 3 of the European Convention on Human Rights ('the convention'), given its duration, the force involved and the claimant's age, health and vulnerabilities. Article 8 was infringed as the restraint was not 'in accordance with the law' and article 5 was violated as the claimant suffered a deprivation of liberty.

The claimant was awarded non-pecuniary damages of £28,250, comprising: £5,000 for injury to his feelings in respect of his DDA claim; £22,500 for psychiatric injury and temporary exacerbation of his epilepsy; and £750 for trespass to the person.

In addition, the defendant was ordered to pay indemnity costs and enhanced interest because he had rejected a Part 36 liability offer of 95 per cent liability in respect of the DDA or assault claim. The commissioner has been granted permission to appeal to the Court of Appeal against the liability decisions.

Comment: This case is believed to be the first time that police have been found liable for disability discrimination in respect of their treatment of a disabled member of the public. While the decision turned on the particular facts, it illustrates the way that breaches of a duty to make reasonable adjustments may arise in the policing context. The Equality Act (EqA) 2010 contains comparable provisions to those applicable at the time of these events under the DDA.

Interestingly, in rejecting the commissioner's defence under the MCA, the court also ruled that the common law defence of necessity was no longer available in circumstances that could not meet the more prescriptive terms of the MCA. This aspect of the judgment has not been appealed.

Negligence: duty of care

In general the police do not owe a duty of care in negligence when investigating and suppressing crime: *Hill v Chief Constable of West Yorkshire Police* [1989] AC 53, 28 April 1988, followed in *Brooks v Commissioner of Police of the Metropolis* [2005] UKHL 24, 21 April 2005; [2005] 1 WLR 1495 and in *Smith v Chief Constable of Sussex Police* [2008] UKHL 50, 30 July 2008; [2009] 1 AC 225 ('the *Hill* core principle').

■ An Informer v A Chief Constable

[2012] EWCA Civ 197, 29 February 2012

The claimant acted as a police informant in respect of a business associate. During the police investigation, suspicion arose that the claimant himself was engaged in money laundering. He was arrested and subsequently a restraint order was granted over his assets, causing him significant financial loss.

The Court of Appeal, agreeing with the trial judge, held that the officers involved owed no duty of care to the claimant to avoid causing him economic loss in respect of their conduct of the investigation, as the alleged negligence fell within the *Hill* core principle. By virtue of his informant status, the police had assumed a responsibility to preserve his confidentiality as an informer and to keep him reasonably safe from harm arising from that status, but it would not be in the public interest for the duty of care to extend to an investigation of potential crimes committed by the claimant.

Comment: It appears from their respective judgments that a majority of the court (Arden and Pill LJJ) accepted that the police could owe a duty of care to an informant in respect of his/her financial well-being (as well as his/her physical safety) if the circumstances were outside the *Hill* core principle.

The judgment of Arden LJ contains a helpful review of the recent case-law concerning when police owe a duty of care, including an identification of exceptions to the *Hill* core principle and a summary of the position in comparative jurisdictions. She also suggested that a different conclusion might have been appropriate in this case if the negligence in question had related to simple error, such as the police losing a file. Neither Arden nor Pill LJJ, in contrast to Toulson LJ, appeared to express much enthusiasm for the *Hill* core principle by which they were bound; the former referring to 'a need for caution in applying the *Hill* principle beyond those situations in which the public policy considerations that underlie it are present' (para 109).

■ Michael (Administratrix of the estate of Miss Joanna Louise Michael (deceased)) and others v (1) Chief Constable of South Wales Police (2) Chief Constable of Gwent

[2012] EWCA Civ 981, 20 July 2012

The claim was brought on behalf of the estate and dependants of Ms Michael who was murdered by her ex-partner. Shortly before the fatal attack on her, Ms Michael made a 999 call, which was received by a Gwent Police operator. During the call she indicated that she had been assaulted by her former partner and

that he had said he was going to return shortly to kill her. The call was passed to South Wales Police, as Ms Michael lived near Cardiff. The Gwent Police operator did not supply the information about the threat to kill to her South Wales Police counterpart, who wrongly downgraded the call to one not requiring an immediate response. By the time officers attended her address, Ms Michael had been stabbed to death. The alleged negligence also related to systemic police failings, including in respect of a past history of domestic violence during the relationship.

The Court of Appeal unanimously concluded that the negligence claim should be struck out as there was no reasonable prospect of establishing that a duty of care arose, since the circumstances fell within the *Hill* core principle. The court rejected the claimant's submissions that the *Hill* core principle did not apply to routine administrative tasks; to complaints of systemic negligence; and/or to instances where police had failed to follow their own policies.

By a majority (Longmore and Richards LJJ), the court decided that the claim relating to failure to protect the life of Ms Michael, in breach of her rights guaranteed by article 2 of the convention, should proceed to trial; no equivalent non-actionability principle precluded liability here and it was arguable on the pleaded facts that the information available to police indicated a real and immediate risk to her life.

Comment: As regards the negligence claim, the court considered that the claimant was attempting to re-run arguments that were rejected by a majority of the House of Lords in *Smith* (see above) (which also concerned police failure to prevent the claimant from violent attack by an ex-partner). While it was accepted that the *Hill* core principle did not apply to a situation where no criminal investigation had begun, or to a situation where the police had assumed a particular responsibility towards a member of the public, the court concluded that neither applied on the pleaded facts.

Given the potential similarities to the pleaded facts in *Smith*, the outcome is not perhaps surprising. However, the degree of support expressed for the application of the *Hill* core principle appears to contrast with the reservations expressed in *An Informer* (see above).

■ A and B v Chief Constable of Hampshire Constabulary

[2012] EWHC 1517 (QB),
31 May 2012

The High Court upheld the Master's decision to strike out pleaded claims in negligence relating to the wrongful revealing of A's status as a police informer.

The central disclosures occurred during the course of the criminal trial of X, a serious criminal in respect of whom A had provided information to the police.

The court held that no duty of care arose in relation to the conduct relied on because of the immunity rule in respect of the actions of parties and witnesses for anything said or done in the course of proceedings in a court of justice. Although in *Jones v Kaney* [2011] UKSC 13, 30 March 2011; [2011] 2 AC 398, the Supreme Court abolished the immunity previously applying to expert witnesses in respect of negligence claims brought by an instructing party, the court could not be taken to have intended to abolish the core immunity in respect of judicial proceedings, which has applied to witnesses, parties and advocates for centuries and has been reaffirmed in cases such as *Darker v Chief Constable of West Midlands Police* [2001] 1 AC 435, 27 July 2000.

Comment: As the allegation was that the disclosures had compromised the claimants' safety, it appears to have been accepted that a duty of care would have arisen if they had not occurred within the context of judicial proceedings immunity. This approach would be consistent with *An Informer*, discussed above.

Human rights

Article 3

■ R (MM and AO, a child by her mother and litigation friend) v Secretary of State for the Home Department

[2012] EWCA Civ 668,
18 May 2012,
2012 WL 1684825

The appellants in this case (an adult and a child) were detainees at Yarl's Wood Immigration Removal Detention Centre. They challenged the refusal of the respondent to establish an independent inquiry regarding their treatment during a protest at the centre in June 2009. In response to the protest, the authorities had staged an intervention which forcibly separated children, including AO, from their parents; and resulted in some adults, including MM, suffering physical injuries. AO was diagnosed as suffering from post traumatic stress disorder as a result of the incident. The challenge centred on an alleged failure by the respondent to properly plan the intervention, particularly given that it had been unprecedented and unusually distressing for the children.

Following a complaint on behalf of the appellants to the UK Border Agency (UKBA), the UKBA's Professional Standards Unit (PSU) conducted an internal investigation into the incident. It was common ground that the PSU was not hierarchically independent of the UKBA. The respondent eventually accepted that article 3 was engaged by the nature of the index events but argued that a combination of the internal inquiry, private law proceedings (which the appellants had already commenced), and the possibility of an investigation by the Prisons and Probation Ombudsman (if the private law proceedings were to be discontinued or otherwise concluded without resolution of the material issues), was sufficient to meet the investigative obligations under article 3. The Court of Appeal agreed.

Comment: As when rejecting a request for a public inquiry arising out of the 2006 disturbances in Harmondsworth Immigration Detention Centre (*R (AM and others) v Secretary of State for the Home Department and others* [2009] EWCA Civ 219, 17 March 2009, although a breach of article 3 was found in *R (AM)*: see October 2009 *Legal Action* 17), the Court of Appeal in this case again placed central reliance on *Banks and others v UK* App No 21387/05, 6 February 2007. There, an application for a public inquiry arising from the Wormwood Scrubs litigation was found to be manifestly ill-founded by Strasbourg, principally because of the availability of civil and criminal proceedings.

It is also of note, in the context of non-independent investigations into police complaints, that Pill LJ (with whom Patten and McFarlane LJJ agreed) expressly observed in *MM and AO* that:

> *… there was, in my judgment, value in the promptly conducted [internal] investigation. It was not independent of government but it was thorough and systematic and involved the marshalling and retention of a considerable amount of evidence. To debate at this stage whether or not its conclusions were sound is not the point; what has to be considered is its relevance to the article 3 procedural duty and, in my judgment, its content gives it significant relevance* (para 54).

This approach conflicts with the judgment of a differently constituted Court of Appeal on 22 November 2011 in *R (Mousa) v Secretary of State for Defence and another* [2011] EWCA Civ 1334 (see April 2012 *Legal Action* 33), which was not cited or referred to by the Court of Appeal in *MM and AO*.

Article 8: data retention

■ R (RMC and FJ) v Commissioner of Police of the Metropolis

[2012] EWHC 1681 (Admin),
22 June 2012

The claimants challenged the retention by the police of custody photographs taken on arrest. RMC had been arrested in relation to a minor assault but never charged. FJ was a minor who had been arrested in relation to a sexual

offence but never charged. The police have power to take photographs on arrest under section 64A of the Police and Criminal Evidence Act 1984, and then to retain the photographs for various police purposes, but the statute says nothing about the length of retention or when photographs must be destroyed.

At the time of challenge the policy applied by the police in retaining the photographs was uncertain, but before the hearing the commissioner argued that they were retained under the Management of Police Information (MOPI) code of practice and guidance, which covers the general retention of information (other than Police National Computer (PNC) records) by the police. The MOPI guidance provides for retention of information depending on the seriousness of an offence, with usual retention for six years, rising to ten years for assault cases such as RMC, but up to 100 years for a sexual offence case such as *FJ*.

The claimants argued that the case-law relating to the indefinite retention of DNA samples (*R (GC) v Commissioner of Police of the Metropolis* [2011] UKSC 21, 18 May 2011; [2011] 1 WLR 1230 and *S and Marper v UK* App Nos 30562/04 and 30566/04, 4 December 2008; (2009) 48 EHRR 50) could be applied to the retention of photographs under the MOPI guidance, which constituted an unjustified breach of article 8 of the convention.

The Divisional Court, applying the reasoning in previous case-law, held that article 8(1) was engaged by the retention of photographs (the commissioner had argued that it was not) and that the MOPI policy which applied to retention could not be justified for the purposes of article 8(2). The policy made no distinction between retention in cases where a person was convicted and cases where they were not. Retention was for a long period of time with little if any prospect of a review. No account was taken of the fact that FJ was a minor – the 100-year rule applied regardless in his case.

FJ also challenged the retention of PNC records which related to his offence, but the court held that any interference with his article 8(1) rights could be justified, especially as the interference was slight.

Comment: Although there are new provisions for retention of DNA samples and fingerprints in the Protection of Freedoms Act 2012 (not yet in force), that Act does not cover the retention of photographs and each police force will have its own policy of retention (probably based on the MOPI guidance). The Divisional Court declared that the Metropolitan Police policy based on the MOPI guidance was unlawful but did not quash the retention, giving the police a few months to develop a new policy. It is understood that both the Home Office and the police are working on this task. The decision of the court has not been appealed.

The court was aware of the judgments in both *T and R* and *Catt* (discussed below) when it gave judgment; therefore a serious question remains about whether retention of other categories of data in line with the MOPI guidance, taken from those arrested but not charged, would also be held to be unlawful at least in some circumstances.

■ Catt v Commissioner of Police of the Metropolis

[2012] EWHC 1471 (Admin), 30 May 2012, [2012] HRLR 23

The claimant challenged retention of data by the defendant relating to his attendance at various political protests as a breach of his article 8 rights and the Data Protection Act (DPA) 1998. He was 87 years of age when he made the claim and of good character. He had not personally been involved in any criminal activity but had attended many protests, some of which were against a US arms company where other protestors had committed criminal offences. The claimant gained access to records which showed that his presence at a number of demonstrations, including the arms company demonstrations, was recorded in police reports of those events and retained on the National Domestic Extremism Database.

Dismissing his claim, the Divisional Court took the view that as the claimant was involved in public protest, he had no 'reasonable expectation of privacy'. Accordingly, article 8(1) was not engaged by the retention of this data as it could be expected that the police would take such action. Even if article 8(1) did apply, the court found that the recording and retention of this information was easily justified for the purposes of article 8(2) because of the very public nature of the claimant's activities, in relation to a wider campaign 'marred by serious, persistent criminality' (para 64).

Comment: It is noteworthy that the court departed from the approach taken in *RMC* (discussed above) and a number of Strasbourg authorities, which found that article 8(1) is engaged by the retention of records by the police; and that when considering whether there has been an unlawful interference under article 8(2) it is the nature of the database on which information is recorded (as opposed to the circumstances of its collection) that should take primacy. In *Catt*, the court instead concentrated on whether the claimant should have expected information about him to be retained given the nature of his activities. It may be that these contrasting approaches will need to be reconciled by the Court of Appeal. The claimant is in the process of renewing a refusal of permission by the Court of Appeal on the papers to an oral hearing.

■ R (T and R) v Commissioner of Police of the Metropolis

[2012] EWHC 1115 (Admin), 27 April 2012

The claimants judicially reviewed the issuing of 'harassment warnings' by the police and their subsequent retention in police files for a period of seven years. In *T*, the claimant had been issued with a warning about her behaviour when it was reported that she had made homophobic comments to a neighbour's visitor. She had not been interviewed before the warning was issued (although the police had made some attempts to contact her). In *R*, the claimant was arrested and interviewed by the police after an ex-girlfriend had complained about continued contact by the claimant. The police decided no crime had been committed but nevertheless the warning was issued.

In both cases, although the warning letter confirmed that it did not constitute a criminal record, it was also made clear that it could be disclosed in any subsequent criminal proceedings. The claimants' case was that the issue and retention of the warning was an unjustified breach of their article 8 rights; a breach of the DPA; and not in accordance with guidance issued in relation to harassment warnings.

Eady J decided the case as follows:

- First, although the police may have been heavy handed in issuing the warnings, they were not unlawful in either case. There was no universal rule that a person should be interviewed before issue, and no universal practice followed by the police.
- Second, although it was surprising that retention was necessary for seven years, and although '[t]he preponderance of modern case-law' meant that retention of the notice and associated records can involve a 'prima facie intrusion upon the subject's article 8 rights', if the records were kept strictly confidential then article 8 might not apply at all (para 97).
- Third, even if there was such an intrusion, then it was likely that retention could be justified for the purposes of article 8(2) (and for the DPA) for police purposes.

On these bases, the judge decided that retention was not unlawful and emphasised that the police need to retain data in the fight against crime.

Comment: As with *Catt* (discussed above), the court in this case was prepared to be more accommodating to police arguments about the need for retention than was the Divisional Court in *RMC and FJ*. This may have been because the commissioner in *T and R* made clear that disclosure of the harassment warnings was very unlikely (for example, for the purposes of inclusion in an enhanced criminal record certificate); however, this will not always

be the case. The court was of the view that greater clarity was needed in relation to the issue of warnings and that it would be disproportionate for the police to move directly from receiving a report to issuing a warning, without at least some investigation. The Court of Appeal has granted permission to appeal in this case and a hearing is listed for January 2013.

Articles 10 and 11: protestors

■ R (Hicks and others) v Commissioner of Police of the Metropolis and others

[2012] EWHC 1947 (Admin), 18 July 2012

A number of claimants challenged police decisions and actions before and during the royal wedding. These included arrests on the day and searches the day before of various squats. The Divisional Court dismissed all the claims. The claimants' primary argument was that the police operated an impermissibly low threshold of tolerance for public protest in central London on the day of the royal wedding and that officers were acting pursuant to an unlawful policy of pre-emptively arresting those who were viewed as likely to express anti-monarchist views, without proper regard for the lawful pre-conditions for such arrests. What follows is a summary of the court's decisions on the main points:

■ The court found that the evidence relied on by the claimants in support of the existence of the policy (including police media statements, briefing notes and notebook entries of arresting officers) was not sufficient to rebut the evidence in the defendant's formal policy documentation that the police understood the difference between lawful protest and unlawful disruption; and had applied that distinction to their policing decisions.

■ The individual arrests were lawful as they were based on reasonable grounds to suspect protestors of criminal offences; or were based on reasonable grounds to anticipate that they were necessary to prevent an imminent breach of the peace. That was the case even when the arrests took place some way from the proposed place of protest; and where the anticipated breach of the peace did not come from the claimants but from those celebrating the royal wedding whom it was believed may react violently to any expressed opposition to the wedding.

■ Despite evidence that some arresting officers had acted on instructions when carrying out the arrests, those officers had formed the requisite belief themselves and so had not fettered their discretion.

■ For the purposes of article 5(1)(c), detention 'reasonably considered necessary to prevent his committing an offence' is not qualified by the words 'for the purpose of bringing them before the competent legal authority' (para 184). The claimants' arrests to prevent a breach of the peace were therefore not a breach of article 5 even if the intention had always been to release them when the royal wedding celebrations had concluded, such that there was never an intention to bring them 'before the competent legal authority'.

■ The various search warrants were obtained and executed for proper purposes and not simply for rounding up potential protestors, even where no items referred to in the warrants were seized. See also page 27 of this issue.

Comment: The judgment contains a wide-ranging analysis of numerous areas of protest and police law, including a review of the right to protest and breach of the peace. Applications are being pursued for permission to appeal a number of aspects to the Court of Appeal.

Articles 10 and 11: stop and search

■ R (Roberts) v Commissioner of Police of the Metropolis and Secretary of State for the Home Department (interested party)

[2012] EWHC 1977 (Admin), 17 July 2012

The claimant, who was subjected to a stop and search by police under section 60 of the Criminal Justice and Public Order Act 1994, was unsuccessful in seeking a declaration that section 60 is incompatible with articles 5 and/or 8 of the convention; or a declaration that the decision to search her was unlawful.

In relation to article 5, the court held on the facts that there was no deprivation of liberty as the claimant would only have been stopped for three minutes or so had she not resisted the search under section 60. In relation to article 8, the claimant was treated as a victim for the purpose of section 7(1) of the Human Rights Act 1998, given the random nature of searches permitted by section 60 had been applied to her detriment and notwithstanding that a good reason for the search was found on the facts. Article 8(1) was also found to be engaged by the search given that it involved a search of the claimant's handbag and an element of humiliation/embarrassment. However, section 60 was held to be 'in accordance with the law' and therefore not in breach of article 8(2).

In upholding section 60, the court distinguished *Gillan and Quinton v UK* App No 4158/05, 12 January 2010; (2010) 50 EHRR 45 (see May 2010 *Legal Action* 39) essentially on the basis that section 60 was more circumscribed and limited in its application than section 44 of the Terrorism Act 2000 (at issue in *Gillan*). The court also placed reliance on *Colon v The Netherlands* App No 49458/06, 15 May 2012, on the suggested grounds that Strasbourg had found a not dissimilar power to section 60 to be compliant with article 8(2) in that case. This was despite the High Court accepting in *Roberts* that a number of important procedural safeguards relied on by the European Court of Human Rights in *Colon* are absent in the operation of section 60. In so doing, the court was heavily influenced by the fact that the purpose of section 60 is to protect the public; and its view that such protection can only be effective if section 60 permits random searches: 'To … citizens in … Haringey at risk from serious gang violence, the possibility of being subjected to a random search must seem a justifiable price to pay for … protection from indiscriminate use of weapons' (para 45). See also page 26 of this issue.

Comment: The High Court declined to deal with the argument that the random nature of the searches under section 60 was racially discriminatory, suggesting that this issue was better investigated by the Equality and Human Rights Commission. The claimant has applied for permission to appeal.

Stop and search: equality duty

■ R (Diedrick) v (1) Chief Constable of Hampshire Constabulary (2) Chief Constable of Thames Valley Police (3) Chief Constable of Hertfordshire Constabulary (4) Secretary of State for the Home Department and Stopwatch and Association of Chief Police Officers (interested parties)

[2012] EWHC 2144 (Admin), 26 July 2012, 2012 WL 2922971

The claimant renewed to an oral hearing a paper refusal of permission to judicially review the secretary of state's decision to replace, from March 2011, the mandatory requirement on all chief constables to monitor the ethnicity of those subject to a stop and account with a discretion for chief constables to do so, for example, where local concerns exist. The claimant also challenged the Chief Constable of Hertfordshire's decision not to exercise his discretion to monitor the ethnicity of those subjected to stop and account by his officers with effect from 2 March 2011.

Permission was refused by Mr Justice Kenneth Parker (with the agreement of LJ Stanley Burnton). In relation to the secretary of state, the court agreed that monitoring of ethnicity should be decided on a local basis, given that asking a person for his/her ethnicity takes time and has the potential to escalate tension and worsen race relations in some cases and/or areas. The secretary of state was held to have correctly weighed up the relevant factors and had agreed to keep the matter

under review. She was also found to have complied with the general public sector equality duty (ie, Race Relations Act 1976 s71, since replaced by EqA s149), notwithstanding that she had not prepared an equality impact assessment and the consultation period had lasted only a month. The court was influenced in that regard by the fact that the decision had been the subject of debate in both Houses of Parliament. The Chief Constable of Hertfordshire was also found on the facts to have paid due regard to the equality duty and to have acted rationally when exercising his new found discretion not to monitor ethnicity during stops and account.

Comment: As in *Roberts*, and unlike in *Gillan* (both discussed above), the court in *Diedrick* was sceptical about the utility of statistics in illustrating the disproportionate use of stop and account, including on black and minority ethnic communities. It was also influenced by the fact that the recording of ethnicity is to remain a mandatory requirement for stops and searches. On 20 August 2012, another High Court judgment concerning the equality duty was delivered in *R (D) v Secretary of State for the Home Department* [2012] EWHC 2501 (Admin) in the context of immigration detention. In *D*, the defendant was found to have breached this duty as there was no evidence that EqA s149 had ever been considered in the context of an immigration detainee with serious mental illness. In *D*, the court stressed that the duty under section 149 was not to achieve results but to have due regard to the need to achieve those results.

Demonstrations: police powers

■ R (Gallastegui) v Westminster City Council and Commissioner for the Metropolis and another (interested parties)

[2012] EWHC 1123 (Admin), 27 April 2012

This was a challenge to the decision of Westminster Council to issue directions preventing the erection of tents by protestors in Parliament Square Gardens under Part 3 of the Police Reform and Social Responsibility Act 2011. The Metropolitan Police Commissioner was an interested party to the proceedings. The commissioner had granted permission to the claimant to protest in Parliament Square Gardens on a number of occasions since 2006 under section 134 of the Serious Organised Crime and Police Act (SOCPA) 2005.

The court rejected arguments that the directions were unlawful and breached the claimant's convention rights. There was no inconsistency between the directions (which dealt with the erection of tents) and the SOCPA authorisations (which controlled demonstrations). The claimant's right to assembly had not been interfered with as the directions simply prevented her sleeping at the site. The provisions were not themselves incompatible with convention rights as they could be exercised compatibly by police officers and local authority officers. Any interference with the claimant's convention rights was proportionate given the rights of others to use Parliament Square Gardens.

Comment: Although this was not a case about the exercise of police powers, it does demonstrate the range of powers that the police and others have to regulate protest outside parliament. The court was anxious to emphasise that the judgment did not restrict the right to demonstrate, only the ability to sleep in a tent outside parliament.

Disclosure: disciplinary records

The test for admissibility of similar fact evidence in civil proceedings is one of relevance, ie, whether or not the material to be adduced is potentially probative of an issue in the action. If this test is met the court should exercise its discretion on whether to admit the evidence with regard to the overriding objective of having a fair trial process: *O'Brien v Chief Constable of South Wales Police* [2005] UKHL 26, 28 April 2005; [2005] 2 WLR 1038 (see October 2005 *Legal Action* 27).

■ Alleyne v Commissioner of Police of the Metropolis

*23 July 2012, QBD, LTL No AC970952**

The claimant took a claim, including for assault, battery and/or negligence, arising out of personal injuries he sustained during a police raid on his home. The defendant initially stated that no relevant disciplinary records existed for the officers in the case; however, he later disclosed documents relating to three unsubstantiated complaints against the officers concerning similar facts to the index event. The defendant argued that the complaints should not be admitted in evidence at trial on the basis that they were not relevant as they were not probative of any matters. The court disagreed and admitted two of the complaints.

In deciding that it was proportionate and just to admit the complaints, the trial judge was influenced by the fact that one of them had resulted in a civil action that settled at an early stage; and that matters of distinction between that unsubstantiated complaint and the case at hand were matters that the trial judge could properly take into account at the conclusion of the evidence. He declined to admit the third unsubstantiated complaint on the basis that it would encumber the claim by leading to questions of peripheral matters.

Comment: Despite the House of Lords' decision in *O'Brien*, defendants and some judges can still be resistant to disclosing, and certainly admitting in evidence, unsubstantiated complaints concerning similar facts. This judgment is therefore welcome, although the court did place considerable emphasis on the fact that this was a trial by judge alone, such that the judge would be well placed to guard against any undue attention being paid to matters that had not reached any set of findings against an officer. That challenge will obviously be greater in a trial by judge and jury (see the discussion of *Mahboob v Chief Constable of West Midlands Constabulary* [2010] EWCA Civ 1509, 22 November 2010; May 2011 *Legal Action* 23).

Limitation

■ Roberts v Commissioner of Police of the Metropolis

[2012] EWCA Civ 799, 3 April 2012

The claimant's claim that he was assaulted by police officers was commenced four months after the expiry of the three-year limitation period applicable by virtue of Limitation Act (LA) 1980 s11. The Court of Appeal allowed the claimant's appeal from the judge's refusal to extend time for bringing the claim under LA s33.

The Court of Appeal held that the judge had misdirected himself in holding that where a serious allegation such as assault was made, a good reason for missing the limitation period should be shown for a section 33 application to succeed.

The court emphasised that the key question in relation to the exercise of the section 33 discretion was the extent to which the defendant could show that the delay after the expiry of the limitation period had adversely affected the defendant's ability to have his/her defence fairly tried.

Furthermore, where no such prejudice existed, the fact that the claimant may have an alternative claim against his/her former solicitors is unlikely to be determinative. In the present case it was appropriate to grant the section 33 application as there was no evidence of prejudice to the defendant, a detailed defence had been pleaded and claims of false imprisonment and malicious prosecution relating to the same incident would in any event proceed.

Comment: The Court of Appeal's approach is helpful for claimants, particularly given the express acknowledgement that, where the claim form is issued outside the three-year limitation period, time will usually be extended by exercise of the section 33 discretion unless the defendant is able to show prejudice resulting from delay after the expiry of the limitation period. This is often difficult for a defendant to show, not least because three years since the incident will already have

elapsed and officers may well have produced accounts within that time.

Damages

■ Simmons v Castle

[2012] EWCA Civ 1039, 26 July 2012

The Court of Appeal announced that from 1 April 2013, damages for pain and suffering and loss of amenity (PSLA) in cases of personal injury, nuisance, defamation and 'all other torts which cause suffering, inconvenience or distress to individuals' will be ten per cent higher than previously (para 20).

Comment: The court's description appears to cover claims for PSLA in all tort causes of action likely to arise in respect of claims by members of the public stemming from police misconduct. Practitioners will wish to bear this development in mind when considering quantum in new or ongoing cases and in relation to settlement negotiations.

* A judgment is not yet available.



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Tasers: officer safety tool or threat to public safety?

Sophie Khan discusses the public safety implications of plans to introduce Taser stun guns for police throughout London in the absence of a public consultation.

Introduction

Now that the London 2012 Olympic and Paralympic Games have come to a close, the future of policing the capital has once again taken centre stage. The Metropolitan Police Commissioner Bernard Hogan-Howe's 'total policing' programme, with his 'total war on crime', includes plans to roll out the use of Taser stun guns in each borough of London. The Commissioner announced in December 2011 that he would launch a number of actionable commitments designed to improve officer safety, and that one of those commitments was his pledge that: 'Each borough to get Taser in two area cars.' The Metropolitan Police currently has 1,140 Tasers, of which 446 are deployable by officers from CO19 Firearms Command and the Territorial Support Group. Since 2 July 2012, response teams in Bromley, Harrow, Barking and Dagenham, Enfield and Kingston have been authorised, as part of a pilot scheme, to have at any one time a maximum of four Tasers on patrol in two vehicles. There is no fixed date by which the remaining boroughs of London will be given the same capability, but what is known is that the Commissioner has no plans to hold a public consultation before the roll out of Tasers to consider whether such a move has any safety implications for members of the public.

Risks posed by Tasers

Tasers have been linked to over 500 deaths in the United States, 26 in Canada and 15 in Australia. The latest reported death in Australia was of a Brazilian student, Roberto Laudisio Curti, 21, who died after three Sydney police officers fired their stun guns at his back, reportedly as he was running away from them. The New South Wales Ombudsman is independently overseeing a police investigation into the death, and an inquest is due to commence this month. The similarities of this case with the tragic death of Jean Charles de Menezes – who was shot dead in London by Metropolitan Police officers at Stockwell tube station in 2005 – are striking, and reinforce the argument that Tasers are as dangerous and fatal as a loaded gun.

Use of Tasers in the UK

The increased use of Tasers by the British police is of serious concern, as many of the situations in which Tasers are being used are not sanctioned under the Association of Chief Police Officers (ACPO) *Operational use of Taser by authorised firearms officers – policy and operational guidance* (ACPO, 2008).[1] However, no steps are being taken by the Home Office to address the unnecessary and disproportionate uses on members of the public, even though it has now become a trend routinely to Taser those who are suffering from mental health issues and disability before arrest. For example:

■ In January 2012, a disabled man, dependent on a wheelchair, was Tasered by West Midlands police officers when he was unable to get out of his car.

■ In March 2012 officers Tasered a 59-year-old man who was suffering from a rapid onset of Alzheimer's disease at the time of the incident in Epworth, North Lincolnshire.

■ In August 2012, West Mercia Police referred an incident to the Independent Police Complaints Commission (IPCC), in which a man from Worcester suffering from mental health issues was Tasered by officers before falling from a porch roof.

The sharp increase in the use of Tasers on vulnerable individuals could be due to the impression given to police officers that the Taser is an 'officer safety tool' rather than a 'weapon'.[2] The reluctance of the Commissioner to conduct a public consultation adds to this perception, and needs to be challenged, as the ACPO Taser policy specifically states that Tasers can only be used when 'officers [are] facing violence or threats of violence of such severity that they will need to use force to protect the public, themselves and/or the subject(s)' (para 3.2). Outside this remit the use of the Taser becomes unlawful and exposes officers both to criminal charges under Criminal Justice Act 1988 s134(1) and to a potential breach of article 3 of the European

Convention on Human Rights ('the convention'), the prohibition that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.

News that the Home Office is trialling the prototype X2, a new Taser variant with a two-shot capacity, adds to the concerns that the ACPO Taser policy and guidance are not being followed. The device has been specifically developed with a double cartridge and carries a 'power magazine' capable of up to 500 firings. It is unclear when the Home Office approved the import of these weapons for the Centre for Approved Science and Technology (CAST) to carry out its own trials in the UK, as there has been no public announcement. The lack of transparency over such a decision leads to fresh criticisms that the safety of the public is being marginalised and that the findings of the trials could be questioned, especially as there has been no independent investigation into the use of Tasers since 2008. The only reported investigation was carried out by the IPCC and published on 10 November 2008: *IPCC report on cases involving the use of Taser® between 1 April 2004 and 30 September 2008*. The Police Action Centre, launched in August 2012, aims to undertake the first independent investigation into the use of Tasers by British police since 2008 in the coming months, and will report on the injuries sustained by those who have been Tasered and whether the current ACPO policy and guidance is compatible with article 3 of the convention.

Use of Tasers abroad

In the United States, the argument about whether or not the law enforcement agencies are provided with the correct policy and guidance has already been made. It was reported that in March this year on appeal, the US District Court Western District of North Carolina Charlotte Division ruled in favour of the Estate of Darryl Turner, a 17-year-old shop assistant who was Tasered for an extended 37-second shock discharge, on all objections filed by Taser International against an earlier judgment, apart from a reduction in the award of damages from $10 million to $5 million (*Fontenot, as Administratrix of the Estate of Darryl Wayne Turner, deceased v Taser International Inc*, 27 March 2012). On the motion of 'Failure to Warn', Taser International argued that Darryl Turner's Estate had failed to show that Taser International should have known of the inadequacy of its warnings at the time of sale or at least by the time of Darryl Turner's death. The appeal court held that 'a reasonable jury could conclude that a different warning would have resulted in a different outcome', and that 'Plaintiff presented substantial evidence that Taser's warning was inadequate and that its failure to provide a reasonable warning was an actual and proximate cause of Turner's death'.

This is a significant judgment as it sends a clear message to police forces that there are real risks associated with Tasers which can no longer be ignored. The outcome of this judgment also reinforces the author's view that Tasers should only be used by firearms officers, as they are a prohibited weapon under Firearms Act 1968 s5(1).

Taser-related deaths

'Excited delirium syndrome'

The US appeal judgment also dispels the argument put forward by Taser International that 'excited delirium syndrome' is the cause of death of those who have been Tasered. Excited delirium syndrome is said to be a pathological condition and usually occurs when someone is restrained in a prone position for a prolonged period of time by a number of officers. The symptoms include 'superhuman strength' which is similar to the adrenaline rush one gets when one is under attack, the 'fight or flight' concept, and is a reaction seen in those being restrained.

The syndrome is widely considered to be used to 'cover up' police-related deaths, as it has not been acknowledged as a recognised cause of death by the UK's Department of Health or the World Health Organisation. Additionally:

- In Canada, the Braidwood Inquiry – conducted by the retired British Columbia Appeal Court Justice Thomas R Braidwood QC in 2009 into the death of Robert Dziekanski, a Polish immigrant, on 14 October 2007 following an incident in which he was Tasered by Royal Canadian Mounted Police officers at Vancouver International Airport – found that the term was rejected by international medical professionals and was being used to cover up actual causes of death using Tasers and extreme restraint.
- The American College of Emergency Physicians recognises the term, but notes that the exact pathophysiology remains unidentified and that no clear definitions or causes exist.[3]

Cardiac arrest

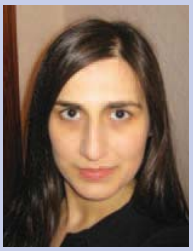
The death of Brian Loan, a 47-year-old man from Sacriston, County Durham, is believed to be the first Taser-related death in the UK. Mr Loan was Tasered at his home and was then taken to Durham City police station on 11 October 2006. He was released on bail, and on the morning of 14 October 2006 he was found dead by his father. During the inquest at Gateshead County Court, the Home Office pathologists found that Mr Loan was suffering from severe heart disease and died of 'natural causes'. However, his family refused to accept the verdict as they stated that he had never previously complained of chest pains. Although the coroner, Terence Carney, accepted the opinions of the pathologists, he did state that: 'It may be in five or ten years' time somebody may find a link, but no one has found one in this case.'

The body of evidence that now exists suggests that Taser-related deaths are a direct consequence of the 50,000 volts of electrical shock. An important recent study was carried out by Dr Douglas P Zipes, a cardiologist and professor emeritus at Indiana University. The study analysed detailed records from the cases of eight people who went into cardiac arrest. Seven of the people in the study died, while one survived. The study makes the case that electrical shocks from Tasers can in some cases set off irregular heart rhythms, leading to cardiac arrest.[4]

Conclusion

In the light of this study, there needs to be a review of the ACPO Taser policy and guidance to ensure that the safety of the public is being taken seriously by the state. The Commissioner's ill-advised decision to roll out Tasers in the absence of a public consultation is wrong, as the safety of the public must be paramount. As the Taser may have the potential to undermine the safety of the public, the time has come to declare war on the Taser.

1 Available at: www.acpo.police.uk/documents/uniformed/2008/200812UNTAS01.pdf.
2 See: www.channel4.com/news/taser-firings-the-inside-story.
3 Lisa Hoffman, 'ACEP recognizes excited delirium as unique syndrome', *Emergency Medicine News*, November 2009, Vol 31, Issue 11, p4.
4 'Sudden cardiac arrest and death associated with application of shocks from a Taser electronic control device', *Circulation – Journal of the American Heart Association*, 30 April 2012.



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Police station law and practice update

Ed Cape continues his six-monthly series on police station law and practice. This article covers recent developments in policy and legislation as well as recent, significant case-law on stop and search, arrest, legal advice and assistance, identification and bail.

POLICY AND LEGISLATION

PACE Codes of Practice

A revised Police and Criminal Evidence Act (PACE) 1984 Code of Practice C was brought into force on 10 July 2012 by the Police and Criminal Evidence Act 1984 (Codes of Practice) (Revision of Codes C, G and H) Order ('the PACE Codes Revision Order') 2012 SI No 1798. In addition to the changes anticipated in 'Police station law and practice update – Part 1', April 2012 *Legal Action* 24, there are a number of other important changes in the revised Code.

The previous version of Code C para 2.4 provided that a legal representative 'must be permitted to *consult* a detainee's custody record' (emphasis added) as soon as practicable after his/her arrival at the police station and at any other time while the person is detained. Paragraph 2.5 provides that after the detainee has left the station, s/he or his/her lawyer has a right, on giving reasonable notice, to *inspect* the original custody record. The difference in terminology was used by some custody officers to prevent lawyers from actually looking at their client's custody record while at the police station. The revised Code C has replaced the word 'consult' with 'inspect' in paragraph 2.4, so that this doubtful practice can no longer be sustained. This change is also reflected in the revised Code H (see below), although in terrorism cases the right to inspect the custody record is subject to arrangements for doing so being agreed with the custody officer.

Lawyers have reported an apparently growing practice of police officers interviewing suspects at home in order to avoid the right to legal assistance. There is no prohibition in Code C on the police interviewing a suspect away from a police station provided that no decision has been made to arrest him/her (Code C para 11.1). While the normal requirements regarding cautioning a suspect before interview apply in this situation (Code C para 10.1), there was no obligation on the police to inform the suspect of his/her right to consult a solicitor since the obligation to do so under Code C para 3.21 applied only to a person attending voluntarily at a police station. The revised version of Code C para 3.21 now applies to a person voluntarily attending a police station 'or other location', and thus includes a person interviewed at home. In such cases, where the person is cautioned s/he must be told that s/he is not under arrest, is not obliged to remain at the police station or other location, and that s/he may obtain free and independent legal advice. Code C para 3.22 makes it clear that in respect of a person interviewed at home, the reference to not being obliged to remain at the location means that the person may require the officer to leave. The officer should not be able to avoid these obligations by delaying administering a caution by taking an unreasonable view of whether or not there are reasonable grounds for suspicion, which is the relevant trigger under Code C para 10.1.[1] It was held in *R v Williams* [2012] EWCA Crim 264, 24 February 2012 that the test for whether or not there are grounds for suspicion is an objective one, and does not simply rely on the subjective view of the officer.

Revised Code C s6 includes a number of changes regarding the right of access to legal advice. *Note for guidance* 6B, replacing the former *Notes for guidance* 6B1 and 6B2, sets out the procedure to be followed where a detained suspect asks to consult a solicitor, reflecting the current arrangements regarding the Defence Solicitor Call Centre and CDS Direct. *Note for guidance* 6ZA is a new provision stating that police officers must not, except in answer to a direct question, indicate to a suspect that the period of detention or, if not detained, the time taken to complete an interview, might be reduced if s/he does not ask for legal advice or, having asked for it, changes his/her mind. While welcome, the difficulty with this provision is that any such indications are likely to be 'beneath the radar'.

Finally, revised Code C para 6.6(d) tightens up the procedure to be followed where a detained person, having asked to consult a solicitor, changes his/her mind. Under the former version of the Code, in such circumstances an interview could proceed in the absence of legal advice provided that the suspect confirmed in writing or on the interview record his/her agreement to proceed, and where an inspector or above had enquired about the suspect's reasons for changing his/her mind and had given authority for the interview to proceed. In the revised version, the inspector must speak to the suspect to find out why s/he has changed his/her mind, and must make reasonable efforts to contact the solicitor to find out his/her expected time of arrival and to inform him/her of the suspect's change of mind. The suspect must be informed of this, and confirm in writing whether s/he wishes to proceed and endorse the custody record to this effect. Furthermore, on commencing the interview, the suspect must be informed that if the solicitor arrives at the police station before the interview is completed s/he will be informed of his/her arrival, and that the interview will be interrupted to enable him/her to speak to the lawyer if s/he so wishes.

A revised Code G, governing statutory powers of arrest by police officers, will come into effect on 12 November 2012: PACE Codes Revision Order article 2(1). The anticipated changes were outlined in the April 2012 update but, as suspected, not all of the changes originally proposed have survived in the final version. Nevertheless, the revised Code does go beyond the judgment in *Hayes v Chief Constable of Merseyside Police* [2011] EWCA Civ 911, 29 July 2011 (see 'Police station law and practice update', October 2011 *Legal Action* 12) in some respects, and the automatic response of many police officers in arresting suspects who voluntarily attend at the police station will have to change.

With regard to the reasonable suspicion requirement for arrest,[2] the version of Code G para 2.3A put out for consultation stated that before making a decision to arrest, a police officer should 'make all efforts that it is reasonably practicable to make in the circumstances to identify facts and information which point to the person's innocence as well as their guilt'. That does not appear in the final version, and paragraph 2.3A simply states that there must be 'some reasonable, objective grounds for the suspicion, based on known facts and information …'. However, *Note for guidance* 2 states that before making an arrest decision an officer 'should take account of any facts and information that are available, including claims of innocence made by the person, that might dispel the suspicion'. *Note for guidance* 2A then gives examples of facts

and information that might dispel suspicion in relation to the use of reasonable force to prevent a crime or in respect of self-defence, and in relation to allegations of the use of force by school staff. (And note that, when in force, Legal Aid, Sentencing and Punishment of Offenders Act 2012 s148 will amend Criminal Justice and Immigration Act 2008 s76 to 'clarify' the law of self defence.) Furthermore, *Note for guidance* 2B provides a reminder that an officer who is an 'investigator' for the purposes of the Code of Practice issued under Criminal Procedure and Investigations Act 1996 s23(1) should 'pursue all reasonable lines of inquiry, whether these point towards or away from the suspect'. Since an investigator is defined by paragraph 2.1 of that Code as 'any police officer involved in the conduct of a criminal investigation', an arresting officer will normally come within the definition of an investigator.

With regard to the necessity for arrest, governed by PACE s24(4) and (5),[3] paragraph 2.9 of revised Code G develops the explanation of the necessity conditions contained in paragraph 2.9 of the former version. This is too extensive to be fully dealt with here, but two aspects are worth brief consideration. First, in considering whether or not arrest is necessary to allow the prompt and effective investigation of an offence, paragraph 2.9(e) states that an officer can take into account whether, without arresting a suspect, investigative actions such as search of property, or the taking of fingerprints, footwear impressions, photographs, or samples, might be frustrated, unreasonably delayed or otherwise hindered or rendered impracticable. Where relevant, a defence lawyer might argue that with the exception of intimate samples, all of these actions can be carried out with the consent of the person concerned without arresting him/her.

The second aspect concerns the process by which an officer should consider whether voluntary attendance, rather than arrest, would be sufficient. *Note for guidance* 2F states that the officer is 'not required to interrogate the suspect to determine whether they will attend a police station voluntarily to be interviewed', but 'they must consider whether the suspect's voluntary attendance is a practicable alternative for carrying out the interview'. Where a suspect attends a police station voluntarily by prior arrangement, *Note for guidance* 2G states that his/her arrest is only justified if new information coming to light after the arrangements were made indicates that voluntary attendance is no longer a practicable alternative. Furthermore, the 'possibility that the person might decide to leave during the interview is … not a valid reason for arresting them before the interview has commenced'. It would seem that many police officers are quite confused about voluntary attendance, and what powers they have in respect of volunteers, and custody officers often take the view that where a suspect has not been arrested they do not have responsibility for him/her. In this context, arrest may appear to an officer to be the easier option. Defence lawyers will, therefore, need to be familiar with the provisions of Code G in this respect, and be ready and willing to make suitable representations, and to challenge officers about the necessity for arrest both at the police station and in subsequent court proceedings.

Note that a new edition of *Guidance on the safer detention and handling of persons in police custody* was published in March 2012 by the National Policing Improvement Agency.[4]

Terrorism powers

A revised Code H was also brought into force on 10 July 2012 by the PACE Codes Revision Order. Most of the revisions to Code C are reflected in the revised Code H, but in addition there are two other major changes. First, section 14 is revised to take account of the permanent reduction in the maximum period of detention without charge of persons detained under Terrorism Act (TA) 2000 Sch 8, which was given effect by Protection of Freedoms Act (PoFA) 2012 s57 (amending TA 2000 Sch 8 para 36(3)(b)(ii)).[5]

Second, a revised section 15 deals with the power of the police, in terrorism cases, to question a person after charge where this is authorised by a Crown Court judge (Counter-Terrorism Act 2008 s22, brought into force from 10 July 2012 by the Counter-Terrorism Act 2008 (Commencement No 6) Order 2012 SI No 1724). There is also a new Code of Practice governing the video-recording with sound of such interviews, and of interviews of persons detained under TA 2000 s41 or Sch 7 (given effect by the Terrorism Act 2000 (Video Recording With Sound of Interviews and Associated Code of Practice) Order 2012 SI No 1792 and the Counter-Terrorism Act 2008 (Code of Practice for the Video Recording with Sound of Post-Charge Questioning) Order 2012 SI No 1793).[6]

Code A does not apply to stop and search under the TA 2000 (see 'Police station law and practice update', October 2011 *Legal Action* 10). A new Code of Practice governing the exercise of stop and search powers under TA 2000 ss43 and 43A was introduced, as from 10 July 2012, by the Terrorism Act 2000 (Codes of Practice for the Exercise of Stop and Search Powers) Order 2012 SI No 1794.[7] The new Code reflects the amendments to the TA 2000 by PoFA ss60 and 61 which, in turn, are a response to the adverse European Court of Human Rights (ECtHR) judgment in *Gillan and Quinton v UK* App No 4158/05, 12 January 2010; (2010) 50 EHRR 45. The power to stop and search without reasonable suspicion, formerly governed by TA 2000 ss44–47, is now governed by a new section 47A and Schedule 6B. Broadly, the conditions for issuing an authorisation for stop and search without reasonable suspicion are tightened up, and the officer granting authorisation must now reasonably consider that the authorisation is necessary (rather than merely expedient) to prevent an act of terrorism. There are also greater limits on the duration of such authorisations. Where an authorisation is in place, police officers can still stop and search vehicles or pedestrians without reasonable suspicion, but the Code states that an officer 'should have a basis for selecting individuals or vehicles', normally to be derived from a tactical briefing given by the authorising officer (paras 4.9.1 and 4.10.1). Furthermore, '[o]fficers should be given clear instructions about where, when and how they should use their powers' (para 4.10.11).

There has been a massive drop in the use of TA stop and search powers since changes were first made in early 2011, from a peak of over 210,000 in 2008/9 to just under 11,000 in 2010/11; and between January and March 2011 only 11 such stop and searches were recorded.[8] However, since the suspicion threshold for stop and search under PACE Part 1 is so low (for example, in *Howarth v Commissioner of Police of the Metropolis* [2011] EWHC 2818 (QB), 3 November 2011, McCombe J said that '[i]t is well recognised that the threshold for the existence of reasonable grounds for suspicion is low' (para 31)), it remains to be seen whether TA stop and searches are simply replaced by stop and search under PACE.

Biometric data

Significant changes to the regime governing the destruction, retention and use of biometric data – fingerprints, footwear impressions, DNA samples and the profiles derived from such samples, but not photographs – are to be introduced by PofA Part 1 Chapter 1 (the relevant provisions are not yet in force, but will come into effect on a day to be appointed by the secretary of state: PoFA s120(1)). The existing regime is regulated by PACE s64, but changes were made necessary by the adverse decision of the ECtHR in *S and Marper v UK* App Nos 30562/04 and 30566/04, 4 December 2008, which found that the blanket retention of biometric data of persons arrested and not charged, or charged but not convicted, breached the right to private life under the European Convention on Human Rights ('the convention') article 8. The response of the New Labour government, in legislating for a retention period of six years for adults and

(normally) three years for juveniles, was wholly inadequate (PACE s64 was to have been substituted by a new s64 and ss64ZA–64ZN, inserted by the Crime and Security Act 2010 s14, but these provisions will not now take effect).

The new regime, which is to be contained in new sections 63D–63U of PACE (to be inserted by PoFA ss1–17), is complex but, broadly, DNA samples (as distinguished from the data derived from them) will normally have to be destroyed once the relevant data has been extracted from them, and other biometric data taken from a suspect who is not convicted will have to be destroyed once a speculative search has been carried out. However, there are significant exceptions to this and, in particular, material taken in respect of a serious offence such as murder, manslaughter, false imprisonment and kidnapping may be kept indefinitely if it is taken from a person who has a previous conviction for a recordable offence, or for three years if s/he does not. The new legislation also provides for the appointment of a Commissioner for the Retention and Use of Biometric Material, and for greater regulation and oversight by a National DNA Database Strategy Board. The new provisions do not affect police powers to take fingerprints and biometric samples, nor do they affect the evidential use of such data, in respect of which there has been considerable concern (see 'Police station law and practice update – Part 1', April 2012 *Legal Action* 25).[9]

CASE-LAW

Stop and search

■ James v Director of Public Prosecutions

[2012] EWHC 1317 (Admin), 27 April 2012

On 30 December 2009, two uniformed police officers stopped J in order to search him under Misuse of Drugs Act 1971 s23, and gave him their reasons for doing so. He submitted to a 'pat down' search, but when asked to open his mouth and lift his tongue he did his best to conceal the drugs under his tongue. There was a difference in evidence from the two officers about what happened next, but the judge preferred the evidence of one of the officers who said that he then put his hand on J's neck, but did not apply force until J tried to swallow the drugs. The significance of this is that PACE Code A para 3.2 requires that the co-operation of the person to be searched must always be sought, even if s/he initially objects to the search, and that a forcible search may only be made if it has been established that the person is unwilling to co-operate. Force may then be applied 'as a last resort', but it must be reasonable force. In finding J guilty of obstruction of a police officer in the execution of his/her duty, the judge found that the officers had complied with the requirements of paragraph 3.2.

On appeal by case stated J's counsel argued that in putting his hand on J's neck the officer had conducted a forcible search without first establishing that J was unwilling to co-operate. Counsel for the Director of Public Prosecutions (DPP) argued that the placing of the hand on J's neck without applying pressure did not amount to the application of force, or at least did not amount to a forcible search. Mr Justice Mitting accepted the latter argument: neither a 'pat down' search nor the placing of a hand on the body, except possibly sensitive parts of the body, amounts to the application of force or a forcible search. The forcible search began only when J attempted to swallow the drugs.

■ Sobczak v Director of Public Prosecutions

[2012] EWHC 1319 (Admin), 1 May 2012

On 12 October 2010, two police officers were called to the scene of a serious incidence of violence at premises in Brighton. On entering the premises they found many people, some of whom were covered in blood and some who were verbally aggressive. One police officer followed a man acting aggressively, and when the man produced a screwdriver the officer backed into a room where he found S lying injured on the floor. S got up and emerged from the room in an angry state, with his fists clenched and his head down. He was told by the police officer to calm down, which he did, and he was then pulled out of the entrance to the room and subjected to a 'pat down' search. Subsequently, while the officer was trying to release a woman's leg from the jaws of a police dog, S approached the officer with his fists clenched causing the officer to fear that S would strike him, as a result of which the officer struck S twice with his baton and discharged a Captor spray. S was subsequently charged with assault on a police officer in the execution of his duty.

At trial, S argued that the officer had no power to search him, had thereafter become a trespasser, and thus was not acting in the execution of his duty when S approached him aggressively. It was agreed that the officer was not acting under PACE s1 stop and search powers, since they do not apply in a dwelling, but the court accepted the prosecutor's argument that in carrying out the 'pat down' search the officer was acting under Criminal Law Act 1967 s3(1), which empowers any person to use reasonable force in the prevention of crime. Such a search would, nevertheless, be governed by PACE s2(2) and (3) requiring the officer before commencing the search to take reasonable steps to inform S of his name and station, and the object of and reasons for the search.

The Divisional Court accepted all of this, but found that since the officer did not comply with section 2 the 'unattractive' conclusion was that the search of S was unlawful (para 13). However, the assault did not take place during the search, but shortly afterwards, when the officer was trying to help the woman bitten by the police dog which, said the court, came within the officer's duty towards another person and to prevent her from contributing to the violence. The Divisional Court endorsed the justices' finding that there was a 'sufficient gap in time to make the events separate and distinct' (para 25). As a result, the officer was acting in the execution of his duty at the time that S assaulted him.

Comment: There have been a number of cases in the past few years where the courts have subjected the procedural requirements relating to stop and search to close scrutiny, and have reinforced the mandatory nature of the obligations under PACE s2 (see 'Police station law and practice update – Part 2', May 2010 *Legal Action* 35). These two cases emphasise the importance of the precise facts, and sequence of events, in determining whether a stop and search is lawfully conducted. They also serve as a useful reminder that the information requirements of PACE s2 and Code A apply not only to stop and search under PACE s1, but also to other powers to search a person or vehicle without arrest (other than search of an unattended vehicle).

■ R (Roberts) v Commissioner of the Metropolitan Police and Secretary of State for the Home Department (interested party)

[2012] EWHC 1977 (Admin), 17 July 2012

R was removed from a bus when a ticket inspector found that she had insufficient funds on her Oyster card to cover her fare. The police were called, and when the officer arrived she repeated the (false) assertion she had made to the ticket inspector that she did not have any identification on her. The place where she was asked to leave the bus was covered by an authority granted two hours earlier under Criminal Justice and Public Order Act 1994 s60, authorising stop and search for the purpose of discovering offensive weapons or dangerous instruments without the need for reasonable suspicion. The officer decided to search R under this power. R refused to co-operate, resisted the search and walked away, and she was then handcuffed and taken to the ground. The search of her bag did not disclose any weapons or dangerous

instruments. R, a 38-year-old woman of good character, challenged the stop and search under Human Rights Act (HRA) 1998 s4, on the ground that section 60 is incompatible with articles 5 and/or 8 of the convention, and sought a declaration that her stop and search was unlawful.

The Administrative Court rejected her application. R argued that section 60 is incompatible with article 5 because it involves a deprivation of liberty which is not 'in accordance with a procedure prescribed by law' (article 5(1)). Citing a number of authorities, including *Gillan and Quinton* (see above) and *Austin and others v UK* App Nos 39692/09, 40713/09 and 41008/09, 15 March 2012, the court concluded that the stop and search did not amount to a deprivation of liberty.

The argument regarding article 8 was essentially that an interference with private life is only permitted if it is in accordance with the law and is necessary in a democratic society, inter alia, for the prevention of disorder or crime, and that given that a section 60 stop and search can be carried out without the need for any suspicion in respect of the individual searched, it is arbitrary and thus not in accordance with law. The court felt bound to accept that a section 60 stop and search does engage article 8, and identified the real issue as being whether it is in accordance with law. The court distinguished section 60 powers from those under TA 2000 s44, which had been found by the ECtHR in *Gillan and Quinton* to contravene article 8 rights. The legal test for an authorisation under section 60, said the court, is not the same as for section 44 since the authorising officer must reasonably believe that incidents involving serious violence may take place; the authorisation is narrow and limited in its scope; and a section 60 search is limited to searching for offensive weapons or dangerous instruments. As a result, the court was satisfied that stop and search under section 60, both generally and on the particular facts, was in accordance with article 8 rights. See also page 20 of this issue.

Comment: This is unlikely to be the last word on the compatibility of section 60 stop and search with article 8 of the convention. As noted earlier, stop and search powers under TA 2000 s44 have been repealed following *Gillan and Quinton*, and the test for authorisation is now that the authorising officer reasonably considers that an authorisation is necessary to prevent an act of terrorism. While it is true that under section 60 the authorising officer must reasonably believe that violent incidents may take place, having so concluded s/he may grant an authorisation if it is expedient to do so. The court, in effect, anticipated the criticism that expediency is insufficient to satisfy the test of 'in accordance with law' by stating that the authorising officer must, nevertheless, consider the proportionality of and necessity for a section 60 authorisation because this requirement is imposed by HRA s6(1), which provides that it is unlawful for a public authority to act in a way that is incompatible with a convention right (para 36). Whether this is sufficient is debatable. In justifying its decision, the court strongly defended the need for random search: 'It is the very random quality of the power that provides an effective deterrent and increases the chance of discovering the weapons' (para 40). It should be noted that Code A para 2.14A, introduced after the events in the instant case, but before the judgment, states that the selection of persons and vehicles to be searched 'should reflect an objective assessment of the nature of the incident or weapon in question and the individuals and vehicles thought likely to be associated with that incident or those weapons'.

With regard to the disproportionate use of section 60 stop and search by reference to ethnicity, an issue raised by R, the court felt that the use by the Equality and Human Rights Commission (EHRC) of 'unlawful act' notices under Equality Act 2006 s21 would be more appropriate than challenge under the HRA. In a report published by the EHRC shortly before the judgment, the commission found that 'the black population were stopped and searched [under section 60] at a rate of 20 per 1,000 and the white population at a rate of [two] per 1,000' between 2008 and 2011 (para 3.6).[10] The assertion by the court that '[t]here is nothing in the legislation which itself is racially discriminatory' is hardly an adequate response to this level of disproportionality (para 47).

Arrest

■ R (Hicks and others) v Commissioner of Police of the Metropolis and others

[2012] EWHC 1947 (Admin), 18 July 2012

This judgment, concerning four separate claims and multiple applicants, concerns a number of police operations involving stop and search, arrest and detention, the use of handcuffs, the taking and retention of fingerprints, DNA samples and photographs, and search of property, at the time of the royal wedding in April 2011. Broadly, the applicants claimed that the various police actions had been in pursuance of an unlawful policy to prevent lawful protest, that the unlawful motives had vitiated the legality of those actions, and that they had been in breach of the applicants' rights under articles 5, 8, 10, 11 and 14 of the convention. Apart from the claim in respect of the retention of photographs, all other claims were rejected.

There was nothing to suggest, said the court, that the policing of the royal wedding had involved an unlawful policy or practice involving an impermissibly low threshold of tolerance for public protest; the various documents showed a proper understanding of the distinction between lawful protest and unlawful disruption; and even though exercise of the various police powers may have had the effect of preventing disruption of the royal wedding the dominant purposes had been lawful. See also page 20 of this issue.

Comment: There is not space here to examine in detail this 85-page judgment. The claim of an unlawful policy to prevent protest was supported by evidence of a range of media interviews with senior police officers, briefing documents, and police officers' notes. For example, on being asked in an interview on BBC Radio 4's 'World at One' programme whether people have a democratic right to protest, the police media spokesperson Commander Christine Jones replied: 'Absolutely they do and we will always ensure that we do everything we can to permit peaceful protest but to be perfectly honest there are 364 other days of the year when people can come to London and demonstrate and frankly it's not appropriate on the day of the royal wedding for people to come with that intent' (para 147 of the judgment). The court rejected the applicants' argument that this gave 'a steer that protest was not likely to be accommodated', and in any case was unwilling to place any significant weight on media statements of this kind (para 147). In legal terms there is nothing much new in this judgment, but it does reinforce the low threshold needed for the exercise of many police powers, even where they require reasonable suspicion or a belief that they are necessary, and the flexibility that the courts are willing to allow the police in exercising their discretion.

■ R (Rawlinson and Hunter Trustees and others) v Central Criminal Court and another

[2012] EWHC 2254 (Admin), 31 July 2012

This case concerned an investigation by the Serious Fraud Office (SFO) into lending between a collapsed Icelandic bank and two well-known businessmen, RT and VT, and companies that they owned or controlled. In March 2011, the SFO, working with the City of London police, placed an Information before the Central Criminal Court in order to secure search and arrest warrants. The judge issued the warrants, but gave no reasons. Two days later the warrants were executed, and RT and VT were both arrested, interviewed and cautioned, and then released on bail. The

claimants sought judicial review of the issue and execution of the warrants. The SFO conceded that some of the material placed before the judge had not been accurate and that the warrants against VT and another could not be maintained. The primary issues considered by the court were the validity of the warrants issued by the judge, and the lawfulness of the arrest and bail of RT.

The court held, in setting aside the warrants, that had the information put before the judge been presented properly and accurately, the judge would not have issued the warrants. However, it rejected the claim regarding the arrest. It was established law, said the court, that if apparently reliable information is given to a police officer who then relies on it to make an arrest, then the arrest is lawful notwithstanding that the apparently reliable information was incorrect. In the instant case, in making an arrest the arresting officer was entitled to rely on information provided by the SFO. Furthermore, the necessity test had been properly considered.

Comment: The police and other investigative authorities (and indeed the courts) often appear to make mistakes in complying with the requirements regarding the issue and execution of search warrants, and this judgment is required reading for defence lawyers who act in cases involving search warrants. The fact that evidence has been secured in the course of an unlawful search does not necessarily mean, however, that the evidence will be excluded or even that the authorities would have to return it (para 179) (see, for example, *R (Dulai and others) v Chelmsford Magistrates' Court and others* [2012] EWHC 1055 (Admin), 26 April 2012; *Glenn & Co (Essex) Ltd and others v HM Commissioners for Revenue and Customs and East Berkshire Magistrates' Court* [2011] EWHC 2998 (Admin), 16 November 2011; and *R (El-Kurd) v Winchester Crown Court* [2011] EWHC 1853 (Admin), 15 July 2011).With regard to the arrest of *RT*, it was argued that what was termed the *O'Hara* principle (see *O'Hara v Chief Constable of Royal Ulster Constabulary* [1997] AC 286), that an arrest carried out by a police officer relying on apparently reliable information which is in fact incorrect is nevertheless lawful, should be subject to an exception where the information is supplied by another member of the investigative team who knew, or ought to have known, that the information was false. This argument was rejected by the court:

It cannot be the duty of the police in cases such as the present one to duplicate this work as the police are entitled to rely on the result of investigations by the SFO. They do not need to exercise an independent mind so as to scrutinise that information (para 222).

In any event, the police and the SFO were not part of the same investigating team (para 224). The court also adopted the same approach in rejecting the claimant's argument that his arrest was not necessary for the purposes of PACE s24(4) – the officer was entitled to act on the information supplied by the SFO. The claimant also argued that if an exception to the rule in *O'Hara* was not made, he would have no private law remedy in respect of an arrest based on false information. Citing the judgment in *Davidson v Chief Constable of North Wales Police and another* [1994] 2 All ER 597, the court said that in such circumstances the tort of false imprisonment against the third party was potentially available (para 231).

Legal advice and assistance

■ Saunders v The Crown

[2012] EWCA Crim 1380,
26 June 2012

On 16 November 2011, S was convicted of nine counts of fraud by false representation involving the use of her neighbour's name to apply for credit card accounts. She had been interviewed by police on 16 February 2011, having declined legal advice, during the course of which she either made no comment or denied the allegations put to her. At trial, the prosecution sought to rely on the interview because her evidence that her cousin must have been responsible for the false applications in her neighbour's name and for use of the cards had not been put forward during the interview. S argued at trial that evidence of the interview should be excluded under PACE s78 because she had not made an informed and voluntary waiver of her right to legal advice. Her decision was made in ignorance of the practice of the interviewing officer not to provide unrepresented suspects with pre-interview disclosure, and had she known of this practice she would have sought legal assistance. This argument was rejected by the trial judge who held that disclosure was:

... for the purpose of a solicitor and not for the purpose of a defendant. Where a defendant opts to forego legal representation, 'the necessity for disclosure does not arise' (para 8).

In rejecting S's appeal, the Court of Appeal relied on the guiding principle established in *McGowan (Procurator Fiscal, Edinburgh) v B (Scotland)* [2011] UKSC 54, 23 November 2011, that to be valid a waiver must be 'voluntary, informed and unequivocal' (Lord Hope, para 17). While S did not appreciate that without legal assistance she would not be given pre-interview disclosure, the prosecution is not required to establish that the accused understood all of the implications of her decision. Her work record and her previous convictions demonstrated that, apart from the question of disclosure, 'she could be expected to be well-aware of the benefit she would gain from legal advice' (para 13).

Comment: In *McGowan* Lord Kerr, dissenting, argued that for a waiver to be effective it must be shown that the suspect had a clear understanding and insight of the significance of his/her decision however obvious that might be. The majority of the Supreme Court, however, held that while it is for the prosecution to show that waiver is voluntary, informed and unequivocal, an express waiver will normally be sufficient unless the suspect is of low intelligence or vulnerable (see 'Police station law and practice update – Part 2', May 2012 *Legal Action* 22). The decision in the instant case demonstrates the limitations of this approach – S can be assumed to have understood, in general terms, what the benefit of legal assistance would be, but she did not know how it would have benefited her in the particular circumstances of the case since she had no way of knowing that without legal assistance she would not be given pre-interview disclosure. It is difficult to see, therefore, how it can be said that her decision was informed. On the facts of the case, as the court determined, legal assistance may have made no difference but while that may be relevant to the question of admissibility, it is not relevant to the issue of whether or not waiver was validly given.

The court also said, obiter, that it wanted to 'scotch the suggestion ... that the detainee should not have been warned that asking for a legal representative might cause a delay while she was kept in the cells' (para 21). As noted above, the revised Code C, which came into force only two weeks after this judgment, explicitly states that other than in answer to a direct question the police must not give such a warning.

Identification

■ R v Deakin

[2012] All ER (D) 27 (Aug),
3 August 2012

A police officer investigating a violent disturbance at a pub asked another police officer, C, if he knew the defendant. C said that he did, and the first officer then asked C to watch some CCTV footage as she believed the defendant featured in it. C watched it and confirmed that he recognised the defendant and that he was 100 per cent sure that it was him. It was accepted at trial that C's identification was in breach of Code D, but the judge decided that the evidence was admissible.

Quashing the conviction, the Court of Appeal held that the breach had resulted in a

very real prejudice to the defendant which outweighed its probative value.

Comment: It is not clear, from the short report available, precisely why it was agreed that the identification was in breach of Code D. However, it is likely that it fell foul of the revised Code D, which came into force on 7 March 2011 (see 'Police station law and practice update – Part 1', April 2011 *Legal Action* 15). Section 3 of Code D distinguishes between identification of a suspect by an eye-witness and the showing of films, photographs or other images to establish whether a witness recognises a person who is known to him/her. In the case of the latter, the Code provides that as far as possible the principles for video identification of a known suspect should be followed (para 3.35), and sets out the matters that must be recorded (para 3.36). Breach of Code D does not necessarily result in exclusion of the identification or recognition evidence.[11] However, in the instant case the Court of Appeal clearly decided that the prejudice resulting from the procedure adopted could not be sufficiently dealt with by a judicial direction.

Bail

■ R (Carson) v Ealing Magistrates' Court

[2012] EWHC 1456 (Admin), 4 May 2012

C was arrested on 12 March 2012 on suspicion of racially aggravated harassment of her neighbours. She was released on police bail, not having been charged with an offence, subject to a number of conditions including that she did not reside at her home. The reason given was that this was necessary to prevent further offending and because of the risk of interference with witnesses. A few days later C unsuccessfully applied to a custody officer to vary the condition, and two subsequent applications to a magistrates' court were also unsuccessful. There being no right of appeal to the Crown Court, C applied for judicial review of the magistrates' decision. The Administrative Court held that the condition was disproportionate and removed it.

Comment: The police have the power to release a person without charge, but on bail, under a number of provisions in PACE. There is no time limit on the duration of such bail. Where bail is granted under PACE s37, conditions can be imposed for a variety of purposes including where they are necessary to ensure that the person does not commit an offence on bail, and to prevent him/her from interfering with witnesses or otherwise obstructing the course of justice (PACE s47(1A) and Bail Act (BA) 1976 ss3(6) and 3A(5)). There is no provision in Code C giving a suspect or his/her lawyer a right to make representations regarding bail conditions (see 'Police station law and practice update – Part 1', April 2012 *Legal Action* 24). The suspect can make an application to vary or remove conditions to a custody officer (BA 1976 s3A(4)) and/or to a magistrates' court (Magistrates' Courts Act 1980 s43B(1)). However, as noted in the judgment, there is no right of appeal to the Crown Court.

There have been very few reported decisions on police bail without charge, and the courts are generally reluctant to interfere with police discretion in this respect. In this context it is interesting to see that the Administrative Court was not only willing to entertain a judicial review application but also, in effect, to overturn the decisions of both the police and the magistrates' courts. In coming to the conclusion that the condition was disproportionate, the court gave four reasons. First, although not a reason in itself for not imposing conditions, the claimant had not been charged and had not even seen the evidence against her. Second, while not wanting to minimise the seriousness of offences involving racial abuse, the allegation was one of abuse rather than violence or criminal damage. Third, because the claimant had not been charged, the bail conditions were likely to remain in place for at least several months. Fourth, exclusion of a person from his/her own home was a very serious matter and, on the facts of the particular case, had rendered the claimant practically homeless (paras 9–12). It is unlikely that judicial review will be a realistic option in most cases, but the court's reasoning may be useful in more routine applications for variation or removal of conditions. Note that the procedure for applications to a magistrates' court for variation of police bail conditions is now governed by Criminal Procedure Rules 2012 SI No 1726 r19.6, in force from 1 October 2012.

1 Code C para 10.1 refers only to grounds for suspicion, but this has been interpreted to mean reasonable grounds for suspicion. See Ed Cape, *Defending Suspects at Police Stations*, 6th edition, LAG, October 2011, para 4.37.
2 See generally Ed Cape, note 1, paras 2.15–2.17.
3 See generally Ed Cape, note 1, paras 2.18–2.20.
4 Available at: www.homeoffice.gov.uk/publications/police/operational-policing/safer-detention-guidance-2012.
5 Note that PoFA s58, inserting a new Part 4 para 38 into TA 2000 Sch 8, enables the secretary of state to temporarily extend the pre-charge detention limit to 28 days during periods that parliament is not sitting, and the government also published two draft Detention of Terrorist Suspects (Temporary Extension) Bills, which were subjected to pre-legislative scrutiny, which may be speedily enacted in a perceived emergency, available at: www.homeoffice.gov.uk/ publications/counter-terrorism/draft-detention-terrorist-bills.
6 *Code of Practice for the video recording with sound of interviews of persons detained under section 41 of, or Schedule 7 to, the Terrorism Act 2000 and post-charge questioning of persons authorised under sections 22 or 23 of the Counter-Terrorism Act 2008*, available at: www.homeoffice.gov.uk/publications/counter-terrorism/video-recording-code-of-practice?view=Binary.
7 *Code of Practice (England, Wales and Scotland) for the exercise of stop and search powers under sections 43 and 43A of the Terrorism Act 2000, and the authorisation and exercise of stop and search powers relating to section 47A of, and Schedule 6B to, the Terrorism Act 2000*, available at: www.homeoffice.gov.uk/publications/counter-terrorism/stop-search-code-of-practice?view=Binary.
8 See Home Office, *Police powers and procedures England and Wales 2010/11 – second edition*, 19 April 2012, and Home Office Statistical Bulletin, *Operation of police powers under the Terrorism Act 2000 and subsequent legislation: arrests, outcomes and stops and searches. Quarterly update to December 2011*, 14 June 2012, available at: www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/police-research/police-powers-procedures-201011/ and www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/counter-terrorism-statistics/hosb0712/hosb0712?view=Binary, respectively.
9 See, in respect of DNA evidence, the Nuffield Council on Bioethics report, *The forensic use of bioinformation: ethical issues*, September 2007, available at: www.nuffieldbioethics.org/bioinformation, and *R v Doherty and Adams* (1997) 1 Cr App R 369 (concerning the correct approach to presentation of DNA evidence).
10 *Race disproportionality in stops and searches under section 60 of the Criminal Justice and Public Order Act 1994*, Briefing paper 5, Summer 2012, available at: www.equalityhumanrights.com/uploaded_files/ehrc_-_briefing_paper_no.5_-_s60_stop_and_search.pdf.
11 See Ed Cape, note 1, paras 8.82–8.83.

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Compelling reasoning on 'compelling reason'

Edward Jacobs explores the concept of 'compelling reason' in the light of recent case-law at different levels, and analyses how this may affect future decisions of the courts.

Introduction

In *R (Cart) v Upper Tribunal and R (MR (Pakistan)) v Upper Tribunal (Immigration and Asylum Chamber) and Secretary of State for the Home Department* [2011] UKSC 28, 22 June 2011; [2011] 3 WLR 107 and *Eba v Advocate General for Scotland* [2011] UKSC 29, 22 June 2011; [2011] 3 WLR 149, the Supreme Court decided that a judicial review of decisions of the Upper Tribunal was only permissible on two grounds, ie:

- where the case raises an important point of principle or practice; or
- where there is another compelling reason for the case to be subject to review.

The former ground does not present any significant problems, either of analysis or of case-handling. The latter ground, however, presents considerable problems, both of analysis (what amounts to a compelling reason?) and of case-handling (how can the courts dispose of the cases as efficiently as possible?). The court recognised this and suggested ways in which the courts could manage the cases that it might generate efficiently.

How judges have approached 'compelling reason'

In order to gauge the effect of the Supreme Court's decisions, it is instructive to compare two cases which show how judges at different levels and in different contexts have decided that the 'compelling reason' test has been satisfied. One was decided before the Supreme Court gave its decisions, the other applied those decisions. Neither can be cited formally as an authority, but they provide insight into the day-to-day application of the test, before and after the Supreme Court's decisions.

The first case, *OA (Nigeria) v Secretary of State for the Home Department* [2011] EWCA Civ 688, 12 May 2011, is a decision of Moore-Bick LJ giving permission to appeal to the Court of Appeal from a decision of the Upper Tribunal (Immigration and Asylum Chamber). The judge gave permission before judgment was given in *Cart and MR* and *Eba*. The case concerned a woman from Nigeria who claimed to have been continuously resident in the UK for 14 years. The First-tier Tribunal found in her favour, accepting evidence that she had cared for an injured man between 1991 and 1996. The Upper Tribunal had allowed the secretary of state's appeal and found that she had not been continuously resident before 1999. Moore-Bick LJ said that he found it difficult to identify an important point of principle or practice (para 10).

However, he found a compelling reason to give permission in the fact that he was 'uneasy about the way in which the Upper Tribunal handled the factual issues', although he said that this should not give the appellant 'undue encouragement as to the likely outcome' (para 12). It is not clear whether he was uneasy at the way the tribunal dealt with the evidence relating to caring for the injured man or at the tribunal's assessment of the extent to which the appellant had established a private life in this country.

The second case, *R (Kuteh) v Upper Tribunal* (Administrative Appeals Chamber) [2011] EWHC 2061 (Admin), 8 July 2011, is a decision of Wilkie J giving permission to apply for a judicial review of a decision of the Upper Tribunal (Administrative Appeals Chamber) refusing Mr Kuteh permission to appeal. The judge gave permission in the light of the judgments in *Cart and MR* and *Eba*. Mr Kuteh was barred from working as a registered mental nurse following an incident in which he had hit a girl under his care. The circumstances were hotly disputed. Two witnesses said that essentially he was protecting himself from her.

However, the tribunal's reasons did not mention one of the two witnesses and Wilkie J surmised that his statement had disappeared from the tribunal's bundle of witness statements. The Upper Tribunal had refused permission, saying in effect that even if the tribunal overlooked the evidence, it was not material given the evidence as a whole. Wilkie J followed the analysis of Dyson LJ (now Lord Dyson) in *Uphill v BRB (Residuary) Ltd* [2005] EWCA Civ 60, 3 February 2005; [2005] 1 WLR 2070. He said that the prospects of success might not be high, but it was a case in which there had been such unfairness that Mr Kuteh may have been deprived of any right of appeal altogether (para 25).

It is difficult to discern any difference of approach between these cases. If the Supreme Court intended that compelling reason should provide a narrow and exceptional category, it is not evident in Wilkie J's approach in *Kuteh*. He used the court's language, but decided that the circumstances were sufficient to require the attention of a supervising court 'even where the prospects of success may not be very high', echoing Moore-Bick LJ's comment in *OA* to the same effect (para 25). Although the Upper Tribunal's decision in *Kuteh* was quashed eventually ([2012] EWHC 2196 (Admin), 23 May 2012), it is difficult to see what in the circumstances of a routine case justified that attention.

The Court of Appeal's response

Since Wilkie J gave permission to apply for a judicial review, the Court of Appeal has reacted to the challenge of defining the scope of 'compelling reason'. In *PR (Sri Lanka)*, *SS (Bangladesh) and TC (Zimbabwe) v Secretary of State for the Home Department* [2011] EWCA Civ 988, 11 August 2011, the court analysed the concept of 'compelling reason' in the context of permission to appeal. It decided that the scope of this concept was a matter of judicial policy in the deployment of scarce judicial resources at the higher levels. It was for the Court of Appeal to set the limits of the concept as the final arbiter of whether cases should progress as far as that court. The views of the Supreme Court were persuasive, but no more. The court cited *Uphill v BRB (Residuary) Ltd* (above) for three propositions:

- It was necessary to show a very high prospect that the decision was perverse or otherwise plainly wrong.
- This will not be sufficient to justify giving permission if it is overridden by the circumstances, such as the fact that the issue had not been raised on the first appeal.
- A lesser prospect of success was acceptable when there had been such a failure of procedure that there had been no effective first appeal at all.

The provenance of the case might be relevant to the application of these principles. They applied regardless of the subject matter, with no special approach for cases involving international obligations, such as asylum and human rights. 'Compelling' meant legally compelling, not emotionally or politically.

Turning to Upper Tribunal cases before it, the court picked up the theme of the

provenance of the case being relevant to the scope of the criteria. The point of principle or practice had to be one that called for the attention of the Court of Appeal and could not be left to the specialist tribunal. The Upper Tribunal was a specialist body, and judges of the High Court and the Court of Appeal contributed to its standards by sitting as members as well as through judicial oversight in the senior courts. Cases involving international obligations did not form a special category as there was no international right to a second appeal. By the time a case was considered by the Court of Appeal, it would already have been decided twice, ie, by the First-tier Tribunal and the Upper Tribunal. The issue was whether there was something that made a third consideration compelling.

The court then applied its analysis to the three cases before it. Two themes emerge from the detailed analysis of the arguments in those cases:

- First, the court emphasised the proper role assigned to the judges of the tribunal system, especially the Upper Tribunal. The second-appeal criteria were designed to prevent the senior courts from trespassing inappropriately into their area of responsibility.
- Second, the court emphasised that issues, even if arguable, had to justify the exceptional course of an appeal to the Court of Appeal in order to be compelling.

The Administrative Court's response

The Administrative Court has now reacted to the Court of Appeal's decision. In the cases of *R ((1) Khan (2) Jassi (3) Olawoyin (4) R) v Secretary of State for the Home Department and Upper Tribunal (Immigration and Asylum Chamber)* [2011] EWHC 2763 (Admin), 6 October 2011, Ouseley J laid down the principles that that court would follow in applying *Cart and MR* and *PR*. He authorised his judgment to be cited as an authority.

The judge began by emphasising that *PR* was binding in the Administrative Court and applied to all applications for permission to apply for judicial review of non-appealable decisions of the Upper Tribunal, not just refusals of permission to appeal. In future, there would be no excuse for applications to be framed in terms of the previous law. They should be made promptly, be short and focused, and be supported by only the minimum documentation necessary. Until there was a rule change to allow an entirely written procedure, any oral hearing would be short. The judge concluded by reminding parties of the court's cost powers.

Analysis

How would the applications in *OA* and *Kuteh* fare under the analysis in *PR* and the guidance in *Khan*? Moore-Bick LJ's concern in *OA* is not entirely clear from his reasons. Whatever it may precisely have been, it concerned either findings of fact or the analysis of the evidence. Those were matters that had been considered by two specialist tribunals. Those tribunals had come to different conclusions, but that is the nature of a two-tier system. The case was within the specialty of the judges who heard the cases. Moore-Bick LJ's concern was that the Upper Tribunal judge may not have undertaken the analysis and fact-finding correctly. The reasoning in *PR* and the court's application of that reasoning to the individual cases before it emphasise the importance of leaving specialist tribunals to their own proper functions other than in exceptional cases. This was not a case in which *OA* had been deprived of any fair hearing at all. If concern over the nature of the fact-finding process amounts to a compelling reason, the Court of Appeal's analysis and strictures on its application will be set at naught.

Kuteh is similar to *OA* in that it also involved the assessment of evidence, albeit at a different level. The Upper Tribunal judge had undertaken precisely the role that the tribunal system conferred on him: ie, to assess, as an appellate judge in a specialist jurisdiction, whether or not there was an arguable case that the First-tier Tribunal had made an error of law. Wilkie J's approach effectively deprived the Upper Tribunal judge of the power to make a judgment on the materiality of the error without holding a rehearing. Materiality was relevant before the Upper Tribunal for two reasons. First, it is an essential requirement for an error of law: *R (Iran) and others v Secretary of State for the Home Department* [2005] EWCA Civ 982, 27 July 2005 (at paras 9 and 10). Second, if permission were given, the absence of a material error would be relevant to disposal, as section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 allows the Upper Tribunal to refuse to set aside the decision even if an error was made. Moreover, judging materiality is something that the Court of Appeal itself did in *PR* (at para 52).

Does this mean that judges will now take a more restricted view of the scope of 'compelling reason'? Probably not. There is always a tension between the criteria that have to be applied and a judge's unease at the outcome of a case or at the way the case has been handled. *PR* may change the way judges express their concern in future, but it will not change judges' desire to use the criteria to ensure what they see as a just result. *SC (Zimbabwe) v Secretary of State for the Home Department* [2011] EWCA Civ 1490, 9 November 2011 provides what is, hopefully, an extreme example. Ward LJ gave permission to appeal against a decision of the Upper Tribunal admitting that 'its merit seems to me to be impossibly thin' and that most would not think the point compelling (para 5). He concluded by saying that he would bear the slating that he would receive from the full court with fortitude and that counsel had been 'a lucky girl' to obtain permission to appeal (para 6).

Edward Jacobs is one of the founding judges of the Upper Tribunal, assigned to the Administrative Appeals Chamber. He is author of *Tribunal Practice and Procedure*, second edition, LAG, June 2011.

Recent developments in housing law

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

POLITICS AND LEGISLATION

Housing allocation and homelessness

The Welsh Government has published new statutory guidance for local housing authorities in Wales covering both social housing allocation and homelessness: *Code of guidance for local authorities: allocation of accommodation and homelessness 2012* (Welsh Government, August 2012).[1] It was issued in exercise of powers under Housing Act (HA) 1996 ss169 and 182 and came into effect on 13 August 2012. It will be updated online twice a year.

Although the guidance is only directly applicable to local councils, the Welsh Government has invited all housing associations operating in Wales to take account of it in performing their own housing functions: *Housing association circular RSL 003/12: code of guidance on allocation of accommodation and homelessness* (Welsh Government, August 2012).[2]

Homelessness

The latest statistics for England show that, in 2011/2012, 174,800 cases of homelessness prevention were estimated to have taken place outside the statutory homelessness framework of HA 1996 Part 7 (Homelessness), an increase of seven per cent on the previous year: *Homelessness prevention and relief: England 2011/12 official statistics* (Department for Communities and Local Government (DCLG), August 2012).[3] The most common action taken was the use by local housing authorities of landlord incentive schemes to secure private rented sector accommodation for those who would have become, or were, homeless (27,600 cases). The UK government has also published a report documenting the cost of homelessness for the national economy: *Evidence review of the costs of homelessness* (DCLG, August 2012).[4]

Tenancy strategies

Local housing authorities in England must publish their tenancy strategies for the letting of social housing in their districts (of their own stock and the stock held by local social landlords) by 15 January 2013: Localism Act 2011 s150. Shelter has published a new report designed to assist local politicians, strategy officers and policy officers in preparing their tenancy strategies in the light of the flexibility available to them as a result of the 2011 Act: *Local decisions on tenure reform: local tenancy strategies and the new role of local housing authorities in leading tenure policy* (Shelter, July 2012).[5] It has also published a briefing for local councillors: *Creating a tenancy strategy suitable for your area* (Shelter, July 2012).[6] The documents were published alongside a background research paper commissioned by Shelter, comparing social housing tenure arrangements in a range of countries: *Security of tenure in social housing: an international review* (Heriot Watt University, May 2011).[7]

Under-occupation of social housing

On 1 April 2013, new welfare benefit provisions will reduce housing benefit for those social sector tenants of working age who are under-occupying their homes. The UK government has issued guidance to help local authority housing benefit departments apply the new rules: *Adjudication and operations circular HB/CTB A4/2012* (Department for Work and Pensions (DWP), July 2012).[8] The DWP has also issued a series of template documents and leaflets designed to assist local authorities with their support for housing benefit claimants who will be affected by the April 2013 changes: *Support for housing benefit claimants to meet any rent shortfall* (DWP, July 2012).[9]

Possession claims

The latest official statistics from the county courts indicate that over the three months April to June 2012:

- 15,050 mortgage possession claims were issued; and
- 36,190 landlord possession claims were issued (nearly 23,000 by social landlords).

The figures are accompanied by a useful analysis: *Statistics on mortgage and landlord possession actions in the county courts in England and Wales April to June 2012. Statistics bulletin* (Ministry of Justice, August 2012).[10]

Mortgage default

The Council of Mortgage Lenders (CML) has published its latest figures for properties repossessed by its members. They show that 8,500 properties were repossessed in April to June 2012: CML press release, 9 August 2012.[11] Two leading academic commentators have suggested that repossessions are likely to remain at relatively low levels as a result of low interest rates: *New forecast scenarios for UK mortgage arrears and possessions* (DCLG, August 2012).[12]

Rough sleeping

The UK government has published a second report from the Ministerial Working Group on Homelessness intended to give councils, charities, health services and the police a blueprint to work together to ensure that families and vulnerable people at risk of homelessness are offered help early, no matter which agency they turn to first: *Making every contact count* (DCLG, August 2012).[13]

Social housing tenancies in Scotland

On 1 August 2012, new provisions took effect in Scotland to prevent secure tenants from being subject to possession proceedings for rent arrears without pre-action procedures having been carefully followed. The Scottish Secure Tenancies (Proceedings for Possession) (Pre-Action Requirements) Order 2012 SI No 127 specifies the action a social landlord must take before beginning the process of recovering possession. The Scottish Secure Tenancies (Proceedings for Possession) (Confirmation of Compliance with Pre-Action Requirements) Regulations 2012 SI No 93 require certification from the landlord that such action has been taken before proceedings are issued.

Mobile home parks

The UK government has responded to the House of Commons Select Committee's recent report on park homes: *Park homes: government response to the House of Commons Communities and Local Government Committee's first report of session 2012–13* (Cm 8424, DCLG, August 2012).[14] The government acknowledged that while there are good site operators, who provide a decent

service to their resident home owners and operate within the law, malpractice is widespread. It agreed with the committee that the current legislation does not adequately protect residents and their assets, and fails to enable them to exercise fully their rights as home owners.

New home construction

The UK government has announced an initiative to stimulate development of housing on over 1,000 sites by allowing the developers to re-open 'old' (pre-April 2010) Town and Country Planning Act 1990 s106 planning agreements made with local councils: DCLG press notice, 13 August 2012.[15] It has issued a consultation paper, detailing its proposals: *Renegotiation of section 106 planning obligations: consultation* (DCLG, August 2012).[16] Responses should be made by 8 October 2012. There is an accompanying impact assessment of the proposals: *Renegotiation of section 106 planning obligations: impact assessment* (DCLG, August 2012).[17]

PRIVATE SECTOR

Rent Act 1977

■ Triplerose Ltd v Bonner and Rent Assessment Committee

[2012] EWHC 2306 (Admin), 29 May 2012

Mr and Mrs Bonner were Rent Act (RA) tenants paying a rent of £81 a week. Their landlords applied for registration of a fair rent, seeking £220 a week. The rent officer registered a fair rent of £155 per week. The landlords appealed to the Rent Assessment Committee (RAC). The RAC determined that the market rent would be £270 a week. In deciding that, it

> *... was particularly influenced by the advertised rent for a studio flat in the same road as the premises which had shared use of the kitchen. The rent for that property was advertised at £135. The committee therefore doubled that to give a market rent ...* (para 11).

From that figure, it 'made adjustments to reflect the market disadvantages' of the premises (for example, poor, unmodernised kitchen and bathroom, disrepair etc) and then made a deduction for scarcity (RA 1977 s70(2)), arriving at a fair rent of £97.20 per week (para 12). The landlords appealed, complaining that the RAC was wrong simply to double the rent for the advertised studio flat because Mr and Mrs Bonner rented three rooms. Furthermore, the comparable was not mentioned before or at the hearing and the landlords had no opportunity to consider it or to make any further inquiries because the address did not appear in the decision.

HHJ Mackie QC, sitting as a judge of the High Court, found that there was an error of law. Although the RAC 'was fully entitled to take account of its local knowledge and experience and to apply that to the assessment of rent' (para 19), in this case

> *... it took a 'comparable' about which it knew very little and simply doubled it. There is no sign that it did anything else* (para 20).

On the face of it, the reasons were a

> *... product not of skill, judgment and experience of local conditions but extrapolation from what may or may not have been a relevant and pertinent comparable. Even allowing for the usual allowances that need to be made, having regard to the informality of the committee process and the reasons identified in the cases, it [was] an error of law which cannot stand* (para 22).

It appears that the judge remitted the case to be heard by another committee.

■ Tolui v Rent Assessment Committee of the London Rent Assessment Panel

[2012] EWCA Civ 1065, 17 July 2012

Mr Tolui, a landlord, applied for the registration of a fair rent under RA 1977. He sought £360 per week. The RAC did not accept that that was an appropriate sum to register. After making adjustments for the condition of the property and for other matters such as scarcity, it reduced the uncapped fair rent to £195 per week. It then applied the cap provided by the Rent Acts (Maximum Fair Rent) Order 1999 SI No 6 to that uncapped sum so as to reduce the recoverable registered fair rent with effect from 21 January 2010 to £63.50. Mr Tolui appealed.

Wyn Williams J dismissed the appeal (*Tolui v London Rent Assessment Panel* [2011] EWHC 3636 (Admin); March 2012 *Legal Action* 23) on the basis, first, that the appeal was considerably out of time and, second, that the points raised on the appeal did not disclose an error of law in the RAC's reasoning.

Patten LJ refused a renewed application by Mr Tolui for permission to bring a second appeal. When he took into account the total period of time since the decision was made (ie, from 29 January 2010 to 28 April 2010 when Mr Tolui wrongly began a claim for judicial review) he was 'simply not persuaded that the judge's exercise of discretion was one which was flawed as a matter of law' (para 10). The decision 'was undoubtedly on the tough side' but there was no prospect of the court being persuaded that in taking the line he did, the judge could be said to have committed an error of law which would found a further appeal (para 10).

Procedure in possession proceedings

■ Spicer v Tuli

[2012] EWCA Civ 845, 29 May 2012

Law of Property Act 1925 receivers under a charge instructed solicitors to sell a flat. They discovered that Ms Tuli and her two daughters were in occupation. They brought a claim for possession against trespassers, as defined by Civil Procedure Rules (CPR) 55.1. Ms Tuli filed a defence alleging that she had been a tenant since 2003, under two successive tenancy agreements. A trial was fixed for 25 September 2008. There were delays in Ms Tuli giving disclosure. It was not until 24 September 2008 that the receivers' solicitors inspected the original documents on which Ms Tuli relied. In a subsequent telephone conversation, the receivers' solicitor told Ms Tuli's solicitor that 'he took the view that the tenancy agreements were not genuine and that he would seek every avenue to establish the truth' (para 3). He also said that more time was needed, bearing in mind the lateness of disclosure. The solicitors agreed that there would be 'a consent order withdrawing the proceedings' (para 3). Lewison LJ considered '[i]n that context, that could only have been understood as a withdrawal which did not preclude the further pursuit of the receivers' claim; in other words, a discontinuance' (para 3). On 25 September 2008, a signed consent order was placed before the court. It provided that the proceedings 'be dismissed' (para 5). Lewison LJ said that '[t]he underlying agreement ... was that the proceedings would be withdrawn so as to give the receivers time to investigate the position' (para 5). In November 2009, the receivers began fresh proceedings claiming possession. Ms Tuli applied to strike out the new claim. She contended that the fact that the first action was dismissed rather than discontinued meant that any further claim for possession was an abuse of process and barred as a result of cause of action estoppel. District Judge Avent dismissed that application. HHJ Faber dismissed an appeal.

The Court of Appeal dismissed a second appeal. After referring to *Johnson v Gore Wood & Co* [2002] 2 AC 1, HL, Lewison LJ said that it was quite clear that the receivers had indicated they would pursue their claim against Ms Tuli. That was the basis of the suggestion that the action be withdrawn. The accident that the draft consent order substituted 'dismissed' for 'withdrawn', instead of 'discontinued', did not 'alter the broad

merits-based approach' (para 14). 'It would … be unconscionable to allow Ms Tuli to take advantage of what was plainly a technical error' (para 14). There was no abuse of process. The Court of Appeal also found that cause of action estoppel did not apply.

■ **Poplar Housing and Regeneration Community Association Ltd v Byrne**

UKSC 2012/0095,
26 July 2012

The Supreme Court has refused permission to appeal because the application did not raise a point of law. (The defendant's defence to a possession claim was struck out as a result of a failure to comply with directions. See May 2012 *Legal Action* 33.)

Long leases

Service charges

■ **South Tyneside Council v Ciarlo**

[2012] UKUT 247 (LC),
25 July 2012

The council was the landlord of 702 separate dwellings which it sold on long leases under the right to buy provisions. It sought to recover, by way of service charges, a proportion of the management fee it paid to its arm's length management organisation (ALMO) for the management of those properties by apportioning part of the fee it paid to the ALMO for managing all its housing stock. A Leasehold Valuation Tribunal (LVT) held that the council could not recover a flat rate across-the-board charge, but would have to show how much actual management fee was attributable to each property type within the 702 leaseholds.

The Upper Tribunal allowed the council's appeal. The formula adopted by the council had produced a 'careful and reasonable apportionment' of the global management costs across the entire stock and the service charges were recoverable (para 43).

■ **Liverpool Quays Management Ltd v Moscardini**

[2012] UKUT 244 (LC),
25 July 2012

A property management company sought to recover, through service charges, legal costs it had incurred in respect of legal advice about action that could be taken against the developer of its blocks of flats in relation to structural defects. The LVT held that no provision in the leases entitled the company to recover those charges.

The Upper Tribunal dismissed the company's appeal in respect of that item. The legal advice did not relate to matters of 'maintenance' or the 'running' of the property (which the lease did cover) but was about prospective action the leaseholders themselves might take against the developers.

■ **Green v 180 Archway Road Management Co Ltd**

[2012] UKUT 245 (LC),
23 July 2012

The lease of a flat obliged the tenant to pay 25 per cent of the sum for which the building was insured. The lease required that the insurance be taken out in the joint names of the landlord and tenant. The tenant disputed liability to pay insurance premiums for five years. The LVT held that she was liable.

The Upper Tribunal allowed an appeal. The evidence showed that in the four most recent years the landlord had taken the insurance only in its own name and in those circumstances could not recover under the lease.

■ **R (Khan) v Upper Tribunal (Lands Chamber)**

[2012] EWHC 2301 (Admin),
26 June 2012

The claimant held a long lease in a block of flats. A resident-owned management company incurred legal costs of £75,000 in earlier litigation against him. The claimant referred those costs to a costs judge for assessment and they were reduced to £25,000. The company then sought to recover the full £75,000 from all the residents by way of service charges. An LVT held that the lease entitled the company to recover its full costs. The Upper Tribunal refused permission to appeal from that decision. The claimant sought judicial review of the refusal of permission.

The High Court refused permission to bring a claim for judicial review. The £25,000 assessment simply capped what the company could recover from the paying party in the litigation. It did not prevent the company recovering its full costs through the service charges.

Selective licensing

Confiscation; proceeds of crime

■ **Sumal & Sons (Properties) Ltd v Newham LBC**

[2012] EWCA Crim 1840,
8 August 2012

Sumal was the owner of a property in Newham. In March 2010, Newham council introduced a selective licensing scheme under HA 2004 Part 3. There was a delay on Sumal's part before it obtained a licence. Newham prosecuted Sumal for being the owner of rented property without a licence contrary to HA 2004 s95(1) in respect of the unlicensed period. Sumal was found guilty. Magistrates committed the case to the Crown Court for sentence, where the company was fined £2,000. The court also made a confiscation order in the sum of £6,450.83, under Proceeds of Crime Act 2002 s70. The company was also ordered to pay prosecution costs of £3,821.96. Sumal appealed.

The Court of Appeal rejected an argument that the case should not have been referred to the Crown Court. It upheld the fine in full (providing useful remarks in support of significant fines for such offences). However, it allowed the appeal against the confiscation order. Confiscation orders are not available for offences under HA 2004 s95. The rent was not obtained as a result of or in connection with criminal conduct, but was payable under the terms of the tenancy agreement.

Safety offences and prohibition notices

■ **Portsmouth City Council v JL Homes Ltd**

Portsmouth Crown Court,
10 August 2012

Following receipt of complaints from students renting a house from the defendant company, a council inspection found: 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 substandard; 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.

The company 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.

■ **Health and Safety Executive v Ahmid and Basharat**

Sheffield Magistrates' Court,
6 August 2012

The defendants were husband and wife. They were private landlords. They let a property in 2009. Some years later, following an inspection by a council officer, a gas safety investigator was called in and found serious faults with appliances and fittings throughout the property. He also found evidence of carbon monoxide fumes and decommissioned the boiler, cooker and gas fires classifying them as 'immediately dangerous'. The appliances and flues had not been checked annually by a registered gas engineer, they had not been maintained in a safe condition as required by law, and the tenant had never been given a copy of the gas safety record.

Following guilty pleas in a prosecution brought by the Health and Safety Executive

(HSE), both received suspended sentence orders with three months' imprisonment suspended for 12 months. Mr Ahmid was required to undertake 150 hours of unpaid work and ordered to pay £2,500 towards prosecution costs. Mrs Basharat was required to undertake 200 hours of unpaid work and ordered to pay £5,000 in costs.

■ 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 a gas fitting was in a safe condition and failure to carry out an annual inspection.

He received a suspended sentence order with six months' imprisonment, suspended for two years, and a requirement that he carry out 200 hours of unpaid work. He was ordered to pay £8,211 in costs.

■ 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 were inadequate means of escape from any fire and there was an increased risk of fire as the tenant had to use portable electric heaters. The landlord's appeal against the prohibition order was dismissed by a residential property tribunal. He appealed on the grounds that: he had undertaken further works; the premises met building regulations requirements; and the Local Authorities Co-ordinators of Regulatory Services (LACORS) guidance on fire safety (which had not been before the tribunal) 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 tribunal by the council.

■ Oxfordshire CC v Lei

Oxford Magistrates' Court, 20 July 2012

The fire authority served a prohibition notice on the defendant landlord preventing him from allowing people to sleep on the top floor of his house. He ignored the notice and continued to house people on the top floor. He pleaded guilty to 12 charges made up of three different offences, committed on four separate occasions. These included failure to comply with the prohibition notice, as well as on-going failures to provide an adequate fire detection system, an alarm system or a safe means of escape, such that people were at risk of death or serious injury if there were a fire.

He was fined £2,250 and ordered to pay costs of £1,300.

■ 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. He 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 unpaid work.

■ Liverpool City Council v Kassim

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

The council served a prohibition notice to forbid the use of residential accommodation on the grounds that the heating system provided could not prevent a Housing Health and Safety Rating System (HHSRS) hazard arising from 'cold'. The landlord successfully appealed to a residential property tribunal which held that the affordability of the heating system to a tenant was not a relevant consideration.

The Upper Tribunal set aside that decision and remitted the case for rehearing. The council applied for its costs. 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. On inspection, there were found to be two HHSRS category 1 hazards and two category 2 hazards under HA 2004 Part 1.

On a prosecution brought by the council, he was fined £1,500 and ordered to pay £2,000 costs.

■ Southend BC v Sandhu

Southend Magistrates' Court, 11 July 2012

The defendant was the landlord of a three-storey property with one ground floor self-contained flat and nine bedsits sharing one bathroom. He was convicted of running an unlicensed house in multiple occupation (HMO).

He was fined £1,500 plus £270 costs.

■ 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 incorrectly positioned and did not direct occupiers to an 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.

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

Planning enforcement

■ Searle v Secretary of State for Communities and Local Government

[2012] EWHC 2269 (Admin), 16 August 2012

The claimants were Romany Gypsies who had bought agricultural land with stabling for their horses. They moved their mobile homes onto the land and lived in them without planning permission. The council issued enforcement notices requiring removal of the mobile homes. The claimants' appeals to a planning inspector were dismissed.

Edwards-Stuart J dismissed a further appeal because the inspector had made no error of law. However, the judge said that: 'It is clear that the council must pursue the problem of finding alternative and suitable sites for the claimants and other Travellers with much more vigour than it has done to date' (para 62).

■ Hillingdon LBC v Brar

Uxbridge Magistrates' Court, 20 July 2012

The council served an enforcement notice, which was upheld on appeal in September 2010, requiring the defendant landlord to restore an outbuilding (which 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. He was fined £10,000 and ordered to pay £4,300 costs.

■ **Hillingdon LBC v Uddin**
Uxbridge Magistrates' Court, 3 July 2012
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 an HMO licence on another of his properties.

He was fined £6,600 for failing to comply with a planning enforcement notice ordering him to stop using the outbuilding as accommodation and £5,400 for breaching an HMO licence. He was ordered to pay costs of £3,377.

■ **Hillingdon LBC v Sodha**
Uxbridge Magistrates' Court, 3 July 2012
The defendant was a private landlord. He was prosecuted by the council for breach of planning controls by converting a house into seven self-contained flats and by renting a shed as living accommodation.

He was fined £3,500 and ordered to pay costs of £2,079.

HOUSING ALLOCATION

■ **Basildon BC v Limbani**
Basildon Magistrates' Court, 10 August 2012
The defendant applied to the council for an allocation of social housing accommodation (HA 1996 Part 6). The council accepted the application and nominated her to a housing association which granted her a tenancy. The council later discovered that in her application she had not declared that she owned a property that was registered in her name. She paid the mortgage on that property and rented it out to tenants.

The council brought a prosecution on two charges under the Fraud Act 2006 and a further charge under the Forgery and Counterfeiting Act 1981. After a trial, the defendant was convicted and sentenced to eight months' imprisonment.

HOMELESSNESS

Local Government Ombudsman
Complaints
■ **Kent CC and Dover DC**
09 017 510 and 09 017 512, 31 July 2012
A homeless 16-year-old boy, who had previously been in care and had drug-related issues, applied to Dover DC for homelessness assistance (HA 1996 Part 7) in January 2009 and again in June 2009. The council should have accepted the applications and applied a joint protocol agreed with Kent CC for dealing with homeless children in need.

The Local Government Ombudsman was critical of Dover's failure to comply with its statutory obligations and found that:

■ In January 2009 the Dover housing officer should have accepted that the complainant was homeless and should have provided suitable temporary accommodation. The failure to do so was contrary to law and hence was maladministration. The housing officer did not follow the joint protocol and did not contact Kent's children's services. This was also maladministration.

■ In June 2009 a different and specialist housing officer for Dover DC did not accept that the complainant was homeless. This was again contrary to law and hence was maladministration. She took a month before contacting social services. This was contrary to the joint protocol and was maladministration.

■ Dover DC did not give the complainant written decisions about his homelessness and he could not, therefore, ask for a review or appeal. This was contrary to law and hence was maladministration.

■ Dover DC twice offered the complainant to bed and breakfast accommodation. This was contrary to statutory guidance, contrary to what the council stated in its own policy, and was maladministration.

■ Dover DC did not help the complainant join its housing register for social housing until June 2009. It offered him a flat two months later. The failure to help him register in January 2009 compounded the maladministration of refusing to treat him as homeless.

■ After offering a flat, Dover DC was obdurate in refusing – for four weeks – to accept Kent as a guarantor. There was no evidence that it considered other options or the impact of its position on a young man who was still a child, living alone in a tent and suffering physical and mental ill health as a result. It only changed its position when Shelter intervened and threatened legal action.

The Ombudsman recommended that the councils between them pay £10,100 compensation.

1 Available at: http://wales.gov.uk/docs/desh/publications/120813allocateaccommodationen.pdf.
2 Available at: http://wales.gov.uk/docs/desh/publications/120813housingrsl00312en.doc.
3 Available at: www.communities.gov.uk/documents/statistics/pdf/2199659.pdf.
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Jan Luba QC is a barrister at Garden Court Chambers, London. He is also a recorder. Nic Madge is a circuit judge.

Recent developments in practice management

In this series of articles, Vicky Ling looks at what you need to add to your compliance programme if you decide to switch to Lexcel version 5 from the Specialist Quality Mark (SQM). This month, the author looks at client care requirements – section 7 of Lexcel.

The Law Society provides a helpful overlaps table that gives an indication of the areas where additional plans, policies and procedures are needed.[1]

Client care

Some of the requirements to provide clients with information in Lexcel section 7 are covered by SQM section F 'Meeting clients' needs', and the complaints and feedback requirements are found in section G 'Commitment to quality'. The main differences between the two standards arise from the fact that the SQM only covers publicly funded work, whereas Lexcel covers all legal work undertaken by a practice. So, for example, Lexcel requires the adviser to consider whether the intended action would be merited on a cost/benefit analysis. This is not covered in the SQM because the relevant provisions are found in the Funding Code.

Similarly, Lexcel requires practices to maintain a record of any standing terms of business with a client. This would usually apply in commercial work, where there is an overall contract which applies to all work done by the solicitors, rather than agreeing separate terms of business for each transaction. Lexcel also requires solicitors to advise clients of the circumstances in which they may be entitled to exercise a lien over papers when bills are not paid – again, this would not arise in publicly funded work.

Complaints-handling procedure

It is worthwhile using the changeover from the SQM to Lexcel as an opportunity to review your complaints procedures. It is worth remembering that the Solicitors Regulation Authority (SRA) Code of Conduct 2011 now defines a complaint as being any expression of dissatisfaction that the complainant has suffered (or may do so) financial loss, distress, inconvenience or other detriment (see the Glossary). The Law Society has published a useful practice note on complaints management (September 2011), which takes the outcomes-focussed regulation approach into account.[2]

The Legal Ombudsman has provided some information about the types of complaint that are referred to his office. There is helpful guidance available on the Ombudsman's website.[3] The following are issues which generate complaints, so it is important to ensure that your systems and procedures are designed to prevent them from happening:

- clients were not advised about alternative funding options which were available;
- clients were not told about disbursements;
- costs were more than the estimate but the client was not notified in advance;
- delay;
- discrimination;
- errors in the bill;
- failure to advise;
- failure to follow instructions;
- failure to keep the client informed of progress on his/her case/matter;
- failure to progress the client's case or matter;
- failure to provide information about costs;
- failure to respond to telephone calls, e-mails or letters;
- information was disclosed to a third party without the client's consent;
- loss of, or damage to, documents, the client's property or the file;
- refusing or failing to release files or papers;
- something was charged more than once; and
- VAT was charged when it should not have been.

Practices need to achieve certain outcomes under the Code of Conduct in respect of complaints handling:

- you must inform clients in writing at the outset of their matter of their right to complain – Outcome 1.9;
- you must give clients details of their right to complain to the Legal Ombudsman at the outset of the matter and, if they do complain, at the end of your complaints handling procedure – Outcome 1.10;
- you must handle complaints 'promptly, fairly, openly and effectively' – Outcome 1.11.

There are likely to be various stages to the complaints resolution process. It makes sense for the fee-earner handling the matter to try to resolve any problem relatively informally, only referring a complaint for more formal investigation if it cannot be resolved initially. Complaints received in writing should generally be considered as formal complaints. The formal stage should be followed by a review process, to demonstrate the fairness of the system. The Legal Ombudsman expects practices to conclude their investigations within eight weeks and will generally only become involved after that. The involvement of the Ombudsman may result in a costs award against the firm and is clearly to be avoided if at all possible.

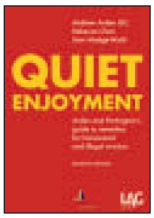
Practices need to be able to report numbers of complaints resolved internally as well as through the Ombudsman to the SRA, so the complaints procedure should allow data to be collected from the outset, even when problems are quickly resolved – which will hopefully be in most cases. If you can demonstrate that a high percentage of expressions of dissatisfaction are resolved without having to involve the Ombudsman, it will demonstrate that your practice has effective complaints handling procedures and is meeting the SRA's specified outcomes.

1 *Lexcel v5 – overlaps with the SQM*, October 2011, is available at: www.lawsociety.org.uk/accreditation/lexcel/lexcelv5.
2 Available at: www.lawsociety.org.uk/productsandservices/practicenotes/complaintsmgnt/4986.article.
3 Available at: www.legalombudsman.org.uk/lawyers/index_lawyers.html.

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.

Legal Action Group Books

▶ Just published



Quiet Enjoyment: Arden and Partington's guide to remedies for harassment and illegal eviction

Seventh edition

Andrew Arden QC, Rebecca Chan and Sam Madge-Wyld

■ Pb 978 1 908407 14 6 ■ 294pp
■ September 2012 ■ £40

This book aims to provide lawyers and other advisers with a practical guide to the law, so that the relevant legal issues may be more easily understood. In addition, particularly with assistance from non-lawyers in mind, it offers an outline of relevant court procedures and seeks to demonstrate how the legal system can be made to operate for the benefit of the occupier.

LAG eBook *

▶ Recently published

Professional discipline and healthcare regulators: a legal handbook

Christopher Sallon QC, Jon Whitfield QC, Gemma Hobcraft, Amanda Hart, Nicole Ridgwell, Sue Sleeman, Eloise Power, Louise Price and Steve Broach

■ Pb 978 1 908407 06 1 ■ 622pp
■ August 2012 ■ £60

This is a practical and accessible guide to the law, practice and procedure of professional disciplinary hearings before healthcare regulators, with information and advice for every stage of proceedings.

This book is essential reading for lawyers, advisers, trade union officials and healthcare professionals. It is a practical handbook for the busy legal practitioner and an affordable and accessible guide for registrants and their union representatives.

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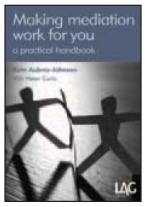

Making mediation work for you

Kate Aubrey-Johnson with Helen Curtis

■ Pb 978 1 903307 93 9
■ 516pp ■ June 2012
■ £40

This book is a guide to how mediation works in practice. Covering civil, family, workplace and community mediation, it will outline the process and focus on strategies, techniques and negotiation skills to ensure the best possible outcome. It also includes tactical guidance from experienced mediators. The book is aimed at individuals and their representatives and also at trained mediators looking for an accessible guide on how to get the best from mediation.

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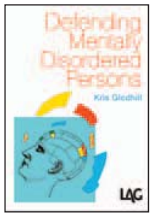

Defending Mentally Disordered Persons

Kris Gledhill

■ Pb 978 1 903307 28 1
■ 848pp ■ April 2012
■ £48

Criminal practitioners will encounter clients with mental health problems regularly. This book provides guidance on recognising the signs of such problems and understanding the correct procedures to provide the client with the best representation.

Defending Mentally Disordered Persons covers all aspects of the legal process from initial contact with the client at a police station through to the sentencing hearing, and representing mentally disordered prisoners on their release.

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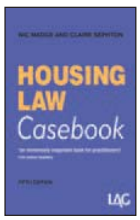

Housing Law Casebook

Fifth edition

Nic Madge and Claire Sephton

■ Pb 978 1 903307 88 5
■ 1212pp ■ February 2012
■ £60

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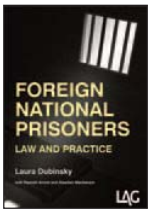

Foreign National Prisoners: law and practice

Laura Dubinsky with Hamish Arnott and Alasdair Mackenzie

■ Pb 978 1 903307 66 3
■ 986pp ■ January 2012 ■ £55

Foreign National Prisoners: law and practice is the first interdisciplinary guide to the immigration law, prison law and false imprisonment aspects of legal challenges brought by foreign national prisoners and former prisoners. The book provides a detailed analysis and critique of the case-law from the domestic, Strasbourg and Luxembourg courts; a comprehensive overview of the relevant legislation and prison and Home Office policies; and practical guidance.

LAG eBook *

▶ Forthcoming

Homelessness and Allocations

Ninth edition

Andrew Arden QC, Emily Orme and Toby Vanhegan

■ Pb 978 1 908407 08 5
■ *c*1000pp
■ October 2012 ■ £55

Homelessness and Allocations, now in its ninth edition, has established itself as the definitive guide to the rights of the homeless. Written by leading experts, the text clearly and succinctly sets the law in its context, and appendices reproduce the relevant consolidated legislation and guidance.

'This is *the* book on the law relating to homelessness.' *Law Society Gazette*

' ... an indispensable commentary on and guide to a complex and fast-moving area of the law: a must-have for academics, specialist practitioners and busy local government officers alike'.
Solicitors Journal

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Professor Phil Fennell, Cardiff Law School
Douglas Joy, The Disability Law Service
Alex Ruck Keene, 39 Essex Street
Norman Lamb MP, Minister of State for Care Services (invited)
Stephen Lowe, Age UK
Sophy Miles, Miles & Partners LLP
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