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LEGAL ACTION GROUP: 40 YEARS AS THE ACCESS TO JUSTICE CHARITY

LAG
the access to justice charity

LAG

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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Workplace justice?

Dr Vince Cable, the Business Secretary, outlined the government's plans to reform 'employment relations' in his speech to EEF, the manufacturers' organisation (formerly the Engineering Employers' Federation) in November. Among the proposals was the suggestion that all complaints should be submitted to the Advisory, Conciliation and Arbitration Service (Acas); most complaints go to the service already, but if the government intends that this should happen before an employment tribunal (ET) claim is issued, it is likely that there will be a need to develop a complex set of rules to ensure that employees' rights to proceed to the ET are protected while they go through Acas. LAG believes that this would increase the 'red tape' that the coalition government has stated that it wishes to avoid. Vince Cable floated plans to allow 'protected conversations' to take place between employees and employers, which would be inadmissible in evidence before an ET. According to the Business Secretary, this would 'allow employers to raise issues such as poor performance or retirement plans in an open way'. It seems to LAG that this proposal misunderstands the fundamental purpose of much of employment law, which is to ensure that employers adopt a fair and reasonable procedure when dealing with employees. Dismissal in performance cases should be a last resort after a process of warning and counselling the employee concerned about what is expected from him/her has taken place. Similarly, before retirement, a reasonable employer should consult the employee about his/her retirement plans; this discussion should not require a dubious off-the-record conversation. LAG fears that the introduction of the 'protected conversations' provisions would increase suspicion in the workplace and stifle what is the essential ingredient of excellent industrial relations: good communication.

The coalition government's proposal to introduce charges to both lodge a claim and bring it to a hearing will lead to great injustice. Practitioners tell LAG already that many employees are often discouraged from bringing claims as they feel that a tribunal case will count against their career prospects. Also, unrepresented employees are often intimidated by employers and their representatives to drop their claims because of the fear of costs being awarded, or they are overwhelmed by what is a legalistic system, and then decide not to pursue their case.

Citizens Advice has estimated that the coalition government's proposal to double the minimum qualifying period to claim unfair dismissal would leave 3m employees 'even more insecure than they are already'. This plan, combined with the measures described above, would mean that the majority of the working population of almost 30m would have less legal protection from dismissal or other unfair treatment in the workplace. LAG believes that lack of confidence in employment protection would feed greater economic instability. Many employees without adequate workplace rights would not be confident enough to take on mortgages and the other expenses of the consumer society.

LAG would like to remind the coalition government that the law on unfair dismissal was introduced by a Conservative administration 40 years ago under the Industrial Relations Act 1971. Mainly, it was intended to prevent wildcat strikes caused by the dismissal of employees. However, by taking disputes over sackings out of the workplace and into the courts, the law on unfair dismissal contributed to a marked reduction in industrial disputes. In the same period, trade union membership has also declined, with the overwhelming majority of employees in the private sector no longer union members. For better or for worse, employees now look to a local Citizens Advice Bureau, an advice centre or a solicitor to help them get redress when things go wrong at work.

In most workplaces, power has shifted decisively in favour of employers. The decline in trade union membership and influence means that no one speaks with authority on behalf of the millions of workers who stand to lose out if the coalition government's plans are implemented. LAG believes that the policy discourse on employment rights is dominated by the employers' lobby and, in turn, this has led to employer bias in the set of proposals that the Business Secretary outlined in November.

We know that people worry about problems at work. In LAG's opinion poll research survey on legal advice published in November 2010, the public placed employment law advice third in order of importance, behind protecting children and keeping a roof over their head. If employment laws were watered down, it would only be a matter of time before the public expressed its dissatisfaction over the lack of legal protection through the ballot box. The coalition government needs to learn that while sections of the employers' lobby are strident and like nothing more than to complain about employees' rights and red tape, they do not command many votes. LAG believes that if the proposals are implemented, the coalition government is in danger of capitulating completely to the employers' lobby and ignoring the interests of justice and millions of workers.

Legal aid reform: timetables revised

Implementation of the legal aid cuts has been put back from October 2012 to April 2013, and this six-month delay will also apply to the abolition of the Legal Services Commission (LSC), the introduction of the mandatory telephone gateway and the revised eligibility criteria for civil legal aid, according to a written ministerial statement from Kenneth Clarke, Justice Secretary and the Lord Chancellor, to the House of Commons last month.

The written statement also revealed that the coalition government plans to put back the introduction of competitive tendering for criminal legal aid. In November 2010, ministers said that they intended to produce a consultation paper on competitive tendering for criminal work. This has now been delayed until autumn 2013. The first contracts are scheduled to begin in summer 2015. This is the second time that a government has put back plans for the introduction of competitive tendering in criminal legal aid; in July 2009, the previous Labour administration abandoned a best value tendering (BVT) scheme for criminal legal aid work (see August 2009 *Legal Action* 4).

'The delay to [best value tendering (BVT)] represents a ceasefire, but one that comes with risk. Large firms desperately need volume in order to return a decent profit; all firms desperately need other parts of the criminal justice system to reform and not pass on inefficiencies. The Bar now has breathing space to consider once again its ProcureCo* design, and with increased downward pressure on advocacy fees, increased costs of regulation and solicitors eating into a shrinking advocacy market, they are really left with no other option than to fight for the scraps that remain. BVT is unlikely in my view ever to come to pass; the enemy is probably no longer the government, but each other. It will be a bloody ending for publicly funded criminal work,' said Andrew Keogh, a solicitor and director of training at the training company CrimeLine.

Steve Hynes, LAG's director, said: 'LAG believes that the deadline to implement the government's planned changes to legal aid was always going to be hard to meet on a practical level: notice to providers of legal aid services would have had to have been given immediately after the Legal Aid, Sentencing and Punishment of Offenders Bill received royal assent. Most experts, including LAG, had said that the timetable was too tight to implement the changes by October 2012. Rumours had been circulating in recent months that the LSC was telling this to the Ministry of Justice. It would seem that the government eventually decided to listen.'

* ProcureCo is a model designed to allow barristers to work together and with other professionals by means of a procurement company.

■ See: *Hansard* HC Written Ministerial Statement cols 74WS–75WS, 1 December 2011.

news feature

Justice for All campaign update

Gail Emerson and Will Horwitz, Justice for All's campaign managers, write:

Members of the House of Lords used their first debate on the legal aid cuts to deliver scathing cross-party criticism of the proposals in the Legal Aid, Sentencing and Punishment of Offenders Bill, known as the Legal Aid Bill, in a session that lasted for eight hours and saw unanimous opposition to the coalition government's plans.[1] Forty-two peers from all the major parties spoke out against the changes, leaving Lord McNally, the Justice Minister, who introduced the bill, as its sole defender. Justice for All was pleased to see serious debate on all the issues campaigners have raised.

The second reading debate

Seventeen peers spoke specifically about protection for victims of domestic violence. The Opposition's Baroness Scotland led a rigorous dismantling of the coalition government's case, while cross-bench peer Lord Elystan-Morgan suggested that the narrow definition and criteria victims must fulfil to access legal aid have been 'deliberately created as a massive obstacle course for likely applicants'.

Several peers showed strong opposition to the removal of legal aid for clinical negligence, highlighting the importance of this support for people who suffer industrial injuries or problems during child birth. Liberal Democrat peer Lord Clement-Jones described the removal of clinical negligence as 'the most unfair and emotionally disturbing aspect of the bill'.

The importance of legal aid advice on welfare benefits issues, particularly at a time when the welfare system is undergoing fundamental reform, was raised by 12 peers. They were particularly concerned about the loss of support for individuals appealing or challenging government decisions, given a history of poor decision-making within the Department for Work and Pensions. Several peers were exceedingly well-informed in this area, partly because currently the Welfare Reform Bill is also being debated in the Lords. Cross-bench peer Baroness Grey-Thompson said that 'the proposals in this bill could act as a double whammy' for disabled people who may find themselves cut off from benefits and unable to challenge that decision.

Justice for All was particularly pleased to hear one peer, Lord Howarth, mention us by name, and another, Baroness Howe, quoted a letter from a member of Young Legal Aid Lawyers, who had written to the peer through our pair-up-with-a-peer scheme. The scheme has seen over 200 members of the House of Lords matched with campaigners who share their interests.

Current stage of the Legal Aid Bill

After this encouraging start, we are now in the midst of the House of Lords' public bill committee stage, during which peers will debate the details of the bill and consider specific amendments. The next chance for the whole House of Lords to consider the Legal Aid Bill will be at report stage in a month or two's time; Justice for All is planning another round of campaigning to coincide with this crucial phase.

Readers should keep an eye on our website for all the latest news and information about the campaign.[2] Also, if you can spare some time over the next few weeks to lobby a member of the House of Lords on the Legal Aid Bill using our pair-up-with-a-peer scheme, please e-mail the campaign.[3]

1 *Hansard* HL Debates cols 820–936, 21 November 2011.
2 Visit: www.justice-for-all.org.uk for news and information.
3 E-mail: pairupwithapeer@justice-for-all.org.uk.

news feature

Wakefield prison forced to issue LAG prison law book

Nicki Rensten, a caseworker at the Prisoners' Advice Service (PAS), writes:

In February 2011 David Wardenier, who was a prisoner in HMP Wakefield, ordered the current leading prison law textbook *Prisoners: law and practice* by Simon Creighton and Hamish Arnott, which is published by LAG. Although the book was dispatched to him immediately, it took over eight months, numerous complaints and a Prisons and Probation Ombudsman's investigation before he was issued with it.

Prisoners' rights under article 10

Prisoners and their legal representatives have waged a long-standing war of attrition against attempts to prevent them from receiving books and publications, with cases almost never coming to court and nearly always being settled favourably as, ultimately, the provisions of article 10 (freedom of expression) of the European Convention on Human Rights clearly protect prisoners' rights to receive literature unless a restriction is necessary to protect national security or similar concerns.

In recent years, while the majority of the prison estate in England and Wales has accepted this position, increasingly, HMP Wakefield has become insistent on preventing prisoners from receiving magazines and books, usually using procedural reasons to do so. Examples of publications refused include:

- a large-print dictionary supplied by Haven Distribution, where the prisoner was told that he could go to the library if he needed to look up a word;
- a standard English dictionary supplied by Haven Distribution to a prisoner who works as a Toe-By-Toe mentor, helping other prisoners to read;
- an issue of left-wing newspaper *Fight Racism! Fight Imperialism!* on the ground that an article about the Wakefield Close Supervision Centre undermined staff morale, where the same article had also appeared in *Inside Time*, a national newspaper for prisoners, and had been distributed widely without problem; and
- *Prison Law Index*, published by Prisons Org UK, which like *Prisoners: law and practice* was available in the prison library. The publishers are on the National Offender Management Service's list of Prison Service 'approved suppliers'.

Prisoners: law and practice was published in September 2009. The book was advertised in publications read by prisoners, including *Inside Time* and another prisoners' newspaper *Converse*, where they were encouraged to order the book directly from LAG at a 'special inmate price' of £35 including postage and packing.

Wakefield Prison's stance

On 28 February 2011, Mr Wardenier sent a cheque to LAG ordering a copy of *Prisoners: law and practice*. Twelve days later, he was handed a memo informing him that as LAG was not on Wakefield's approved suppliers' list, he could not have the book. Repeated attempts by Mr Wardenier, LAG and PAS failed to persuade the prison that, whatever its general policy, it would be sensible simply to issue the book to Mr Wardenier, as the book had been paid for and was in the prison, and clearly Wakefield had no objection to the title per se as it was available in the prison's library.

The prison's stance was entirely intransigent, with governor Susan Howard continuing to insist that Mr Wardenier must obtain a refund from LAG, and then repurchase the title from the 'approved supplier', DHL. However, even Mr Wardenier's offer to co-operate with this cumbersome and farcical process did not result in the prison doing anything actually to facilitate it. PAS then referred the matter to the Prisons and Probation Ombudsman, making it clear that other avenues of legal challenge remained under consideration.

Ombudsman's investigation and recommendation

In August, the case was referred to the Ombudsman's office. Initially, it appeared that the investigation would be cursory, with no guarantee that there would be an inquiry into anything other than the prison's side of the story. However, because of increasing pressure, both on Wakefield and the Ombudsman, mainly as a result of the parallel case regarding the withholding of *Prison Law Index* as described above, Mr Wardenier's complaint was referred up to Deputy Ombudsman Elizabeth Moody, who eventually ruled in our favour. The deputy ombudsman's draft report dated 25 November 2011 stated that although it was reasonable that prison governors should exercise controls over what items prisoners can hold in their possession, as *Prisoners: law and practice* itself was not considered to be a problem and as Mr Wardenier had ordered and paid for a copy already, it would be 'unnecessarily bureaucratic' to expect him to send back the book to LAG and reorder it from elsewhere (para 10).

- The Ombudsman's final report will shortly be available on the PAS website: www.prisonersadvice.org.uk.

Caravan Sites Bill receives HL first reading

In an attempt to bring back the statutory obligation on local councils to provide caravan sites for Gypsies and Travellers, Lord Avebury introduced the Caravan Sites Bill in the House of Lords last month. He said: 'Gypsies and Travellers are still the most deprived of all communities in the UK, and this is partly because one in five of those who live in caravans are homeless. The formula that worked after 1968, reinforced by an obligation to grant enough planning permissions to eliminate the deficit, could make a big contribution towards their security and stability.'

Chris Johnson, a solicitor and partner of the Community Law Partnership in Birmingham, told *Legal Action*: 'The Caravan Sites Act 1968, which contained a duty on local authorities to provide sites, led to the creation of the 350 local authority Gypsy/Traveller sites that now exist in England, but since the repeal of the duty to provide sites this figure has remained static.' Chris Johnson believes that the reintroduction of the statutory obligation to build sites is 'the obvious answer to the "problem" of unauthorised encampments and sites owned by Gypsies and Travellers where they do not have the necessary planning permission'.

Steve Hynes, LAG's director, gives a flavour of the main themes and discussions at the group's community care conference, held in London in November last year.

What price dignity? LAG conference report

Dignity and autonomy

At LAG's latest community care conference, the audience of lawyers, policymakers and others with an interest in community care law heard contributions from the leading practitioners in the field. In the plenary sessions especially, the speakers moved beyond consideration of the current state of the law, delving into the meaning of dignity within the context of community care law and the political question of how much the state should be responsible for guaranteeing a person's dignity.

In his opening remarks, the chairperson of the first session, Stephen Knafler QC, a barrister at Garden Court Chambers and general editor of LAG's *Community Care Law Reports* (*CCLR*), discussed the reduction in government funding for adult social care services. He said that it had been reduced by 11.8 per cent in the year ending April 2011 and that a further 26 per cent was due to be cut by 2014. He predicted difficulties for councils in meeting these cuts as 'the scope for efficiency savings is less than it was ten years ago'.

Lord Justice Munby gave the keynote speech for the second year running.[1] His excellent speech discussed the theme of dignity and the current state of the law. He explored the adequacy of autonomy and best interests as legal concepts, gave an analysis of European jurisprudence and argued for dignity to be at the centre of judicial and state decisions on personal welfare: 'Dignity surely has a crucial role to play in the context of community care and adult social care, contexts in which, too often it might be thought, proper regard for the dignity of the vulnerable and disabled is sacrificed to economics. And most scandalously of all, as continuing exposés of conditions in too many hospitals, care homes and other institutional settings disgracefully reveal, dignity at even the most elementary level is too often lacking.'

In response to questions from the audience, Munby LJ discussed American law and the treatment of individuals by the state: 'In this country if a prisoner wants to starve himself to death he is able to do so, because of autonomy the state cannot intervene', but in America, he argued, a prisoner 'is not allowed to cheat the state'. Expanding on a point in his speech in which he argued that in Europe, in contrast to the US, the Kantian philosophical view prevails of 'treating people as subjects not objects, as ends not means,' he said that autonomy in the interests of dignity can be overridden 'but only if you are doing so in the interests of the individual ... not if you are pursuing a separate interest of the state'.

Setting minimum standards

Much of the discussion at the conference centred on the case of *R (McDonald) v Kensington and Chelsea RLBC* [2011] UKSC 33, 6 July 2011; (2011) 14 CCLR 341. Munby LJ sidestepped any direct comment on the case, but other speakers gave their candid views on what they saw as the failings in the Supreme Court's judgment. This case received much media attention last year and concerned a woman who needed assistance to use the toilet at night because of a bladder condition and the effects of a stroke. Her local council was no longer willing to pay for the cost of a carer and gave her the options of either moving to sheltered accommodation, in which she would receive the care she required, or being

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Alison Pickup and Paul Bowen of Doughty Street Chambers, speaking to Lord Justice Munby

provided with incontinence pads for use at night.

Paul Bowen, a barrister at Doughty Street Chambers, discussed the *McDonald* case and was critical of the Supreme Court's decision, which ruled that Ms McDonald's care needs package was adequate. Much of the case hinged on whether or not it was reasonable for the council to expect Ms McDonald to use incontinence pads at night, as it was not prepared to cover the cost of a carer to assist her with using the toilet at night. He argued that it ' … should have quashed the council's decision on the basis that it had failed to give any, or sufficient, weight to Ms McDonald's critical interests of autonomy and dignity when carrying out its own assessment as it was required to do under article 8 [of the European Convention on Human Rights]'. Paul Bowen also contended that Lord Brown's reasoning (Lord Brown gave the majority verdict in the case) was flawed as he relied in part on the concept of the 'margin of appreciation' to justify his decision. Paul Bowen argued that this cannot be relied on in a domestic court as it is only applicable in the Strasbourg court in order to balance the different powers and resources available in member states.

The conference delegates also heard from Catherine Casserley, a barrister at Cloisters, who provided a useful guide to using the reasonable adjustments duty under the Disability Discrimination Act 1995 and related case-law. Her presentation ended the first morning plenary session.

Public sector equality duty: challenging the cuts

The second morning plenary session was entitled 'Public sector equality duty: challenging the cuts' and was chaired by Jean Gould, a specialist legal trainer at Carers UK. The session's two speakers were Karen Ashton, a partner at Public Law Solicitors, who co-authors *Legal Action*'s 'Community care law update' articles (see page 27 of this issue), and Helen Mountfield QC, a barrister at Matrix Chambers.

In her presentation, Helen Mountfield QC discussed the public sector equality duty. She said that it should be explained to judges that '[the duty] is a fundamentally new approach to equality law, a move away from the restitutional model' to a model in which 'any rational decision-maker has to take the duties into account and give due regard to them' in the performance of its functions. Helen Mountfield QC believes that the duty 'is one of the most powerful tools we have for challenging the very serious cuts our clients face'.

LEGAL ACTION GROUP

Luke Clements and Pauline Thompson pictured at the reception to mark the launch of the fifth edition of their book *Community Care and the Law*. The event, which took place after the conference, was also held to mark Pauline's retirement as co-author. Everyone at LAG would like to thank Pauline for her marvellous contribution to LAG's work.

What is the future for adult social care?

The first speaker in the afternoon plenary session was Dame Jo Williams, chairperson of the Care Quality Commission. She said that a recent BUPA report had found that in the next ten years there would be a shortfall of 100,000 places in care homes for elderly people and the need for community-based rather than hospital services for people at the end of their lives. In her view the 'quality of individual leaders on the ground is essential for the quality of caring services'. Baroness Sally Greengross OBE, chief executive of the International Longevity Centre – UK and a commissioner at the Equality and Human Rights Commission (EHRC), spoke about the EHRC's inquiry into older people's rights in home care.[2] The report found that half of the people surveyed were happy with the care they received while the other half were not. She also stressed the importance of good quality care as an elderly person may see only a care worker each day and said that one unhappy elderly person had told the inquiry: 'I'm not really treated as a person, but as a commodity.'

Dignity as a core value

The conference closed with a speech from Richard Gordon QC, a barrister at Brick Court Chambers and *CCLR*'s editor-in-chief. In keeping with the conference theme, he explored the everyday meaning of the term 'dignity'; he argued that in human rights and community care law, 'dignity is the ultimate core value'. He noted that the EHRC's home care review contained 'no less than 58 references to the word dignity'.

In the context of *McDonald*, Richard Gordon QC said that the court had concentrated on defining need, 'leading to the barren conclusion that Ms McDonald only needed incontinence pads because the local authority said they were the only option'. In his view, 'the courts have not got round to focusing on dignity'. He reflected the majority of opinion at the conference when he said: 'We cannot, I suggest, without protest watch dignity being stripped from others whose humanity is no different from ours without the duty to do something if we wish to preserve our own dignity, our own democracy.'

For many elderly and other vulnerable people, there is a significant gap between their expectations of what the state should provide in services to maintain their dignity and the reality of the cash-strapped public sector. The conclusion from LAG's conference would seem to be that politicians and society need to find the money to meet the price of maintaining dignity, as the law cannot be relied on to do so.

1 A full copy of Munby LJ's speech will be published in *CCLR* later in the year.
2 *Close to home: an inquiry into older people and human rights in home care*, available at: www.equalityhumanrights.com/uploaded_files/homecareF1/home_care_report.pdf.

LAG would like to thank Simmons & Simmons for hosting the event and the conference sponsors: 1 Pump Court, Doughty Street Chambers, Matrix Chambers and Tooks.


ROBERT ABERMAN

2012 is the 40th anniversary of the founding of LAG. Throughout this year, we will be producing publications and holding events to celebrate this milestone, and to promote our thinking on access to justice and legal services. Here, Poonam Bhari, LAG's chairperson, writes about LAG's 40 years as a champion of access to justice and its plans for the future.

Legal Action Group: 40 years as the access to justice charity

In 1972, we published the first LAG Bulletin, which eventually became the *Legal Action* journal. Subsequently, LAG moved into training courses and book publishing. Our publications and training courses continue to inform lawyers and advisers about developments in the law. They have been successful over the years in assisting practitioners to become more expert in areas of work which are important to the poor and other vulnerable groups. We have had more mixed success in our policy work. For example, in our 20th anniversary year we published *A Strategy for Justice*, which attempted to set out the problems and solutions to providing accessible publicly funded legal services.

One of the central ideas in *A Strategy for Justice* was to suggest that a coherent method was needed to plan the provision of legal services. One proposal was for a legal services commission to take over from the then Legal Aid Board, which was run by the Law Society. Local planning of legal advice services was also suggested. Both of these ideas were adopted, but with what can only be judged as partial success. An illustration of this was the last government's development of Community Legal Service Partnerships (CLSPs) to better plan and co-ordinate services, much along the lines of LAG's proposals, but subsequently CLSPs were abandoned to save costs.

The Legal Aid, Sentencing and Punishment of Offenders Bill currently before the House of Lords threatens a radical recasting of legal aid and access to justice policy to the detriment of many millions of people. LAG has played a leading role in the Justice for All campaign, a coalition of many organisations fighting against the government's proposals (see page 4 of this issue). So far the signs are good that the House of Lords will amend the bill favourably, but it is not until its return to the House of Commons in the spring that we will learn whether the government is going to accept the amendments or get into a tussle over them with the House of Lords.

Last year, we worked with the government to persuade it to make resources available to the not for profit sector to offset the impact of cuts in both legal aid and other sources of funding for legal advice services. Due in part to our efforts, the government made £20m available through the Advice Services Fund (£16.8m for England with the rest to be split between Scotland, Wales and Northern Ireland). We are concerned that this should be more than just a 'one-off' contribution and will continue to try to influence the government on this.

One of the major problems with legal services policy is that it is perceived by the government and much of the media to be mainly of concern to legal services providers and the justice system. LAG believes that it is important to engage with the end users of legal advice services. Our opinion poll research on social welfare law, released to coincide with the publication of the government's plans for legal aid in November 2010, showed that a remarkable 84 per cent of a cross section of the public supported the view that advice services in civil law should be either free to everyone or to those on the national average income or below.

The year ahead

LAG wants to make the argument directly to the public to support policies which lead to greater access to justice for everyone, whether it is through the greater availability of representation in courts or the wider reach of public legal education. To reflect this aim, we will describe ourselves in future as: 'LAG: the access to justice charity'.

Over the coming months, we hope to initiate further research projects on legal services and a major policy book is planned for publication in November this year. *Legal Action* journal will publish a series of articles on the future of legal services and access to justice policy. Along with other events, we will also be holding a special reception for the many authors, trainers, former staff and others who have contributed to LAG's work over the years.

An important part of the 40th anniversary celebration is the appeal which we are launching this month to raise £40,000 to support LAG's policy and other work. The cut backs in government spending are affecting every firm and organisation in the legal sector. This fundraising campaign is vital to secure the future of LAG as an independent voice campaigning for access to justice through publicly funded legal services.

Employment law update

This article by **Philip Tsamados** looks at proposed law reforms and case-law relating to discrimination, unfair dismissal, respondents' rights when no response is entered, contractual and employment rights, and whistle-blowing.

POLICY AND LEGISLATION

Proposed employment law reforms

During a speech to EEF, the manufacturers' organisation for UK manufacturing companies, in November last year, Dr Vince Cable, the Business Secretary, announced the results of a consultation on resolving workplace disputes and the Red Tape Challenge review of employment law.[1] Proposals include:

- A call for evidence on the consultation required for collective redundancies and as to whether the current 90-day minimum period for more than 100 redundancies can be reduced.
- Consultation on the introduction of fees for taking a claim to an employment tribunal (ET) – an initial fee and a further fee to take the claim to hearing, as well as a additional option to introduce larger fees for claimants seeking awards of £30,000 or more.[2]
- A call for evidence on proposals to simplify the Transfer of Undertakings (Protection of Employment) Regulations 2006 SI No 246 (TUPE), which many businesses say are too complex and bureaucratic.
- An amendment to the public interest disclosure (whistle-blowing) legislation preventing workers from bringing whistle-blowing claims arising from their own personal work contract (in effect ending the precedent arising from the case of *Parkins v Sodexho Ltd* [2002] IRLR 109; [2001] UKEAT/1239/00/2206, 22 June 2001).
- Merging the 17 sets of National Minimum Wage Regulations into one, with the intention of simplifying the law, making it easier for employers to navigate and complementing the work of the Low Pay Commission in considering how best to streamline the system.

In addition, in November 2011 the government in its response to the *Resolving workplace disputes* consultation (Department for Business, Innovation and Skills and Her Majesty's Courts and Tribunals Service, January 2011) has made the following proposals:[3]

- From April 2012, increasing the qualification period for unfair dismissal from one to two years.
- Requiring all employment disputes to go to the Advisory, Conciliation and Arbitration Service (Acas) for pre-claim conciliation before they can proceed to an ET.
- To publish a consultation in early 2012 on 'protected conversations' which allow employers to discuss issues such as retirement or poor performance in an 'open manner' with staff without this being relied on in any subsequent tribunal claims.
- To appoint Mr Justice Underhill to lead an independent review of the existing ET rules of procedure, to address concerns that they have become increasingly complex and inefficient over time and are no longer fit for purpose.
- To carry out further consultation on measures to simplify compromise agreements, which will be renamed 'settlement agreements'.
- Plans, subject to subsequent consultation, as to how and whether to develop a 'rapid resolution' scheme which will offer a quicker and cheaper alternative to taking a claim to an ET.
- Modifying the formulae for up-rating ET awards and statutory redundancy payments to round to the nearest pound.
- From April 2012, to take witness statements in ETs as read (rather than read aloud), to withdraw expenses for witnesses and for judges to sit alone for unfair dismissal claims, so as to lower costs and speed up tribunal claims.
- From April 2012, that the maximum level of costs which can be awarded against a party in the ET rise from £10,000 to £20,000 and the deposit order maximum from £500 to £1,000.

Full details of the proposed changes will be provided in future updates as and when these become available and when any proposed legislation is published. See also page 3 of this issue.

DISCRIMINATION

Vicarious liability

In discrimination cases it is possible to bring a claim against an individual respondent who has acted as an agent of a discriminating respondent employer (Equality Act (EqA) 2010 ss109–110). If compensation is awarded against more than one respondent, liability to pay can be made on a joint and several basis (meaning that each respondent separately as well as jointly is responsible to make payment). Compensation can also include an additional award of aggravated damages in a situation where a claimant's sense of injury is 'justifiably heightened by the manner in which or motive for which' the employer did the wrongful act: *Alexander v The Home Office* [1988] IRLR 190, CA; [1998] ICR 685. This can include a respondent's behaviour after the discrimination complained of in defending the subsequent ET proceedings: *Zaiwalla & Co v Walia* [2002] IRLR 697, EAT; [2002] UKEAT 451/00/2407, 24 July 2002.

The following case involved consideration of these three issues: vicarious liability, joint and several liability and an award of aggravated damages for the respondents' behaviour both after the complained-of discriminatory act and outside of its defence of the subsequent ET proceedings.

■ Bungay and Paul v Saini, Chandel and All Saints Haque Centre (in compulsory liquidation)

UKEAT/0331/10, 27 September 2011

Mr Chandel and Mr Saini worked at the All Saints Haque Centre, an advice centre, as company secretary/project manager and senior advice worker respectively until Mr Chandel's dismissal and Mr Saini's resignation, both of which took place in July 2006. They brought tribunal claims against the centre and against two of its directors, Mr Bungay, chairperson of the centre's board and Mr Paul, a board member. The claims were for unfair dismissal and direct discrimination and harassment contrary to the former Employment Equality (Religion or Belief) Regulations 2003 (EE(RB) Regs) SI No 1660 (the provisions of which are now part of the EqA 2010). The claims arose out of an alleged anti-Hindu campaign conducted by the centre and its directors and was said to be aggravated by the behaviour of Mr Bungay and Mr Paul in making false accusations of obtaining property by deception to the police about Mr Chandel and Mr Saini which resulted in them being arrested following their respective dismissal and resignation. These allegations were not made until some considerable time after the respondents had been dismissed and after they had brought

proceedings against the appellants in the ET.

The tribunal held that both employees had been unfairly dismissed and that Mr Chandel had been discriminated against on account of his Hindu faith (although following a separate appeal to the Employment Appeal Tribunal (EAT) in October 2008 it was found that Mr Saini had suffered harassment on the ground of religion). At the subsequent ET remedies hearing in April 2010, the tribunal awarded both employees compensation for injury to feelings and aggravated damages, to be paid by the centre, Mr Bungay and Mr Paul on a joint and several basis.

Mr Bungay and Mr Paul appealed to the EAT (the centre was by this time in compulsory liquidation and took no part in the appeal) on several grounds. First, they submitted that the tribunal had no jurisdiction to award damages against them. They submitted that they were directors not employees of the centre and could not be personally liable to Mr Saini and Mr Bungay and they had not acted as agents for the centre within the meaning of regulations 22(2) and 23(2) of the EE(RB) Regs (which are now essentially within the EqA 2010 ss109–112).

The EAT considered the law relating to agency and its application to discrimination law. It determined that the test to be applied is whether, when carrying out the discriminatory act, the discriminator was exercising authority conferred by the principal (here the centre) and not whether the principal had in fact authorised the discriminator to discriminate (applied most recently in *Mahood v Irish Centre Housing Ltd* UKEAT/0228/10, 22 March 2011). In the present case the EAT held that both Mr Bungay and Mr Paul had, in their capacity as its directors, clearly exercised authority conferred by the centre within the meaning of regulation 22(2). They were both board members and it was clear from the centre's articles that board members were authorised to manage the centre's business. Additionally, following the Court of Appeal's judgment in *Jones v Tower Boot Co Ltd* [1997] ICR 254; [1997] IRLR 168, the EAT said that it was necessary to give a purposive construction to discrimination legislation and interpret the word 'agent' within regulations 22 and 23 so as to include Mr Bungay's and Mr Paul's conduct. In reaching that conclusion, the EAT further held that the tribunal had correctly pointed out that regulation 23(2) created its own liability as though it was under regulation 23(1) – ie, the appellants were deemed by regulation 23(2) to have aided the centre to discriminate and as a result of regulation 23(1) to have acted unlawfully themselves if liable as agents.

Second, Mr Bungay and Mr Paul submitted that there was no basis on which to make them jointly and severally liable for the compensation awarded because other directors, not named as respondents, were equally to blame for the offensive conduct against Mr Saini and Mr Chandel.

The EAT considered the case of *Miles v Gilbank* [2006] EWCA Civ 543, 11 May 2006; [2006] IRLR 538, in which a salon manager was held to be jointly and severally liable for acts of pregnancy discrimination suffered by the claimant notwithstanding that others were involved. In the case before it, the ET had found Mr Bungay and Mr Paul jointly and severally liable because they were 'the prime movers' in the campaign of discriminatory behaviour against Mr Saini and Mr Chandel and that this was very similar to the situation in *Gilbank*.

The EAT also considered case-law relating to joint and several liability. It started with *Way and another v Crouch* [2005] IRLR 603, in which the EAT pointed to the Civil Liability (Contribution) Act 1978, which states that where a joint and several award is made, it is not appropriate in almost any case for a tribunal to make an award which is 100 per cent against each respondent. The EAT in the present case stated that the correct approach is to follow the ordinary principles of the law of tort, and so where there was an award of joint and several liability, each respondent would be liable to the full extent of the damages to the claimant. As between themselves, respondents may have a right to seek a contribution, but that did not affect the claimant's position, which was that s/he could recover the award in full from whichever respondent s/he chose. This was the approach adopted by the Court of Appeal in Gilbank and by the EAT in *Munchkins Restaurant Ltd and another v Karmazyn and others* UKEAT/0359/09, 28 January 2010; December 2010 *Legal Action* 18 and most recently in *Hackney LBC v Sivanandan and others* UKEAT/0075/10, 27 May 2011; October 2011 *Legal Action* 17. The EAT in the present case went on to say that the time may well have come when *Way* and *Crouch* should no longer be relied on or cited as representing the law accurately. As a result, the EAT was satisfied that the tribunal had correctly imposed joint and several liability without apportionment.

Third, Mr Bungay and Mr Paul submitted that the tribunal was wrong in law to have regard to their post-dismissal conduct in assessing aggravated damages. The tribunal had awarded aggravated damages because of the high-handed manner in which both men conducted the disciplinary hearings that led to Mr Chandel's and Mr Saini's dismissals. In addition, the tribunal had found a clear connection between Mr Bungay's and Mr Paul's discriminatory behaviour pre-dismissal and their subsequent malicious and unfounded complaints to the police made both after the dismissals and after Mr Chandel and Mr Saini had brought ET proceedings, as a result of which they were arrested and detained before being released without charge.

The EAT believed that this ground of appeal was defeated by *Zaiwalla* (above), which held that post-dismissal behaviour can lead to an award of aggravated damages. Furthermore, it found that there was no rule of law which restricts the circumstances in which such damages can be awarded. Indeed, in cases such as this, where a campaign of discrimination continued after employment had ceased, it was better for the matter be dealt with within the discrimination proceedings in front of an ET, rather than being pursued in further separate litigation. Accordingly, this part of the appeal was also dismissed.

Disability

Duty to make reasonable adjustments

Under EqA s20(2) and (3) (formerly Disability Discrimination Act (DDA) 1995 s4A), where a provision, criterion or practice applied by or on behalf of an employer, or any physical feature, places a particular disabled person at a substantial disadvantage in comparison with non-disabled persons, it is the duty of that employer to take such steps as it is reasonable, in all the circumstances of the case, to have to take to avoid the disadvantage. In the following case, the EAT made observations as to the assessment of reasonableness when considering this duty.

■ Cordell v Foreign and Commonwealth Office

UKEAT/0016/11, 5 October 2011

Ms Cordell, who was profoundly deaf, was employed by the Foreign and Commonwealth Office (FCO) from October 2001 onwards. When she was posted to London and Warsaw, the FCO provided her with the support of professional 'lipspeakers'. In October 2009 she was offered a posting in Kazakhstan, but subject to formal proceedings, including whether and at what cost arrangements could be made to accommodate her disability. After investigation, the FCO decided that the appointment could not proceed because of the problems with, and, in particular, the cost of, providing a team of English-speaking lipspeakers.

Ms Cordell brought a tribunal claim of disability discrimination for the failure to appoint her to the post. She complained of direct discrimination (under the former DDA 1995 s3A(5), now the EqA s13) and failure to make reasonable adjustments (under the

former DDA 1995 s3A(2), now the EqA s21). Ms Cordell relied, in particular, on the fact that the FCO had a policy to pay the school fees of the children of staff posted abroad (known as a continuity of education allowance, or CEA).

The ET rejected the complaint of direct discrimination on the basis that there was a material difference between Ms Cordell's circumstances and the circumstances in which the CEA was paid and that to ignore it would be artificial. With regard to the complaint of failure to provide reasonable adjustments, the tribunal found that the proposed adjustment was not reasonable. There were issues as to whether it would be possible to engage the necessary team of lipspeakers and the costs were in the region of £249,500 a year. This was five times the amount of Ms Cordell's salary, almost as much as the costs of running the embassy and represented most of the FCO's disability budget. While the tribunal accepted that the decision would have an impact on the type of postings available to Ms Cordell, the cost of the adjustment was simply unreasonable.

Ms Cordell appealed to the EAT which also found against her. With regard to the direct discrimination, the EAT found that the reason why Ms Cordell was not appointed was because of the cost of providing the necessary support combined with the uncertainty over whether the support would be available. This was a reason related to disability but it was not the disability itself. In any event, Ms Cordell could not rely on those receiving payment of school fees as comparators because their circumstances were different, as could be illustrated by the fact that Ms Cordell would also qualify for such a payment if she had school-age children.

With regard to failure to provide reasonable adjustments, the EAT noted that tribunals are required to make a judgment on how much it is reasonable to expect employers to spend, based on what the tribunal considers right and just in its capacity as an industrial jury. This can be informed by a variety of considerations so as to place the required expenditure in context and in proportion. This can include provisions within the European Convention on Human Rights ('the convention') Code of Practice, the degree to which the employee would benefit from the adjustment, the size of any budget dedicated to reasonable adjustments (although this cannot be conclusive), what the employer has chosen to spend in what might be thought to be comparable situations, what other employers are prepared to spend, and any collective agreement or other indication of what level of expenditure is regarded as appropriate by representative organisations.[4]

However, such considerations can only assist up to a point and even when identified are no more than of suggestive or supportive value. This is a point that should be borne in mind when deciding how much time and effort to put into investigating them. Ultimately, there remains no objective measure for calibrating the value of one kind of expenditure against another.

Burden of proof

The burden of proof which applies to discrimination claims is now contained within EqA s136. This states at subsection (2) that if there are facts from which a tribunal could decide, in the absence of any other explanation, that a respondent has contravened the Act, a tribunal must hold that the contravention occurred and, at subsection (3), that subsection (2) does not apply if a respondent shows that s/he did not contravene the Act. This wording, while different to the former legislation, essentially has the same meaning.

The Court of Appeal in *Igen Ltd and others v Wong*; *Chamberlin Solicitors and another v Emokpae*; *Brunel University v Webster and others* [2005] EWCA Civ 142, 18 February 2005; [2005] IRLR 258, CA; May 2005 *Legal Action* 25 has provided guidance on the stages which a tribunal should follow (under the burden of proof as it was then contained within former Sex Discrimination Act 1975 s36A and as such to all other forms of discrimination). In *Igen*, the Court of Appeal said that a tribunal must go through a two-stage process:

- The claimant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent had discriminated against the claimant. In deciding whether or not the claimant has proved these facts, the tribunal can take account of the respondent's evidence.
- The respondent must prove that s/he did not commit that discrimination.

Although there are two stages, tribunals generally wish to hear all the evidence in one go, including the respondent's explanation, before deciding whether the requirements of each stage are satisfied. The following case acts as a salutary reminder to tribunals in its application of the stages of the burden of proof.

■ Transport for London and McGill v Aderemi

UKEAT/0006/11, 4 November 2011

Mr Aderemi, who was black African, reached a stage after a number of years of employment with Transport for London (TfL) where he did not progress further as a manager or within the pay structure despite being well qualified, receiving exemplary appraisals, being promised fast-tracked promotion, requesting promotion and requesting regrading. He brought a claim of race discrimination against TfL and a manager, Mr McGill. This claim contained complaints of direct discrimination and victimisation (the latter resulting from a grievance which raised circumstances denoting race discrimination). The case boiled down to two issues: First, why was Mr Aderemi not regraded? And second, why, having raised a grievance, was he not moved to a different workplace? The ET hearing took place over eight days, including three days for the tribunal to consider its judgment. The tribunal found in Mr Aderemi's favour on both complaints. The respondents appealed.

The EAT, after careful and detailed consideration of the tribunal's judgment, concluded that the findings made could not stand. The case was remitted to be heard by a differently constituted ET. The EAT held that the tribunal had conflated two concepts (within the first limb of the burden of proof): first, less favourable treatment; and second, whether there was a prima facie case that it was on the ground of race. By so doing, it had fallen into the very trap that had been identified by the Court of Appeal in *Igen v Wong* (above). There had to be a finding that Mr McGill had treated Mr Aderemi less favourably before the second concept of there being a prima facie case on ground of race arose.

The EAT also emphasised the need for clear and comprehensive evidence on which to reach a finding of institutional or corporate racism. The EAT held that the tribunal's conclusion that TfL treated Mr Aderemi less favourably relied heavily on its finding of 'institutional, unconscious, attitudinal racism, at least in relation to persons of black African ethnicity' (para 44) within TfL, but this was a finding based on a collection of single incidents of limited scope not justifying a conclusion based on observation so broad in its scope. Thus the EAT found that the conclusion was unsound (following the case of *Commissioners of Inland Revenue and another v Morgan* [2002] IRLR 776, EAT).

UNFAIR DISMISSAL

The test of unfair dismissal and wrongful dismissal

It is common for complaints of unfair dismissal and wrongful dismissal to be brought together within the same claim. Both arise from the same facts, but it is important to remember that different legal tests apply and this can result in the seemingly paradoxical outcome of success with one complaint and not the other.

■ **London Central Bus Company Ltd v Nana-Addai and Nana-Addai v London Central Bus Company Ltd**
UKEAT/0204/11 and UKEAT/0205/11, 29 September 2011
Mr Nana-Addai was a bus driver. He was first driver of the day of a particular bus. Subsequently, two other drivers drove that bus and because the 'check links' were not on the wheels, the wheel nuts worked loose. Later in the day while the third driver was driving the bus, the wheel nuts came off and the near-side rear wheel fell off. At a subsequent disciplinary hearing, Mr Nana-Addai was summarily dismissed for gross misconduct. He brought a claim alleging unfair dismissal and wrongful dismissal (the latter seeking damages in respect of his notice pay period).

The tribunal found that Mr Nana-Addai was fairly dismissed and because of the potential seriousness of the consequences of his negligence, while no one was hurt, the decision to dismiss was within the band of reasonable responses. However, on consideration of whether or not he was wrongfully dismissed, the tribunal found that while Mr Nana-Addai had been negligent in not checking the wheels thoroughly, it was due to the prior failure of an engineer that the wheels had not been torqued properly and that a wheel fell off. The tribunal therefore found that Mr Nana-Addai had not committed an act of gross misconduct and had been wrongfully dismissed by his dismissal without notice. He was awarded 11 weeks' payment in lieu of notice.

On appeal, the EAT was concerned that the tribunal had failed to distinguish between the legal tests applying to unfair dismissal and wrongful dismissal. This would appear, certainly in large part, to have arisen from the tribunal's decision to refuse Mr Nana-Addai's application at the start of the tribunal hearing to call an expert witness as to whether the check links were on the wheels on the day in question. The tribunal refused, taking the view that whether or not there were check links on the bus was not the real issue: it stated that the issue was whether the bus company had sufficient evidence at the time to come to the conclusion that, on the balance of probabilities, there were no check links on the bus on that particular morning, and expert evidence was not likely to assist with this.

The EAT took the opportunity to spell out the differences in the two tests:
■ Unfair dismissal is a right created by statute. Cases such as *British Home Stores Ltd v Burchell* [1978] IRLR 379; UKEAT/108/78, 20 July 1978 made it clear that in an unfair dismissal case, it was for a tribunal to identify what was the reason for the dismissal and to decide whether or not the employer's decision to dismiss was based on a reasonable conclusion after making such enquiries and investigation as was appropriate, and then to ask if the dismissal fell within the band of reasonable responses.
■ Wrongful dismissal is a contractual right. The question is, has the employee committed a fundamental breach of his/her contract of employment so radical in its nature that it justified summary dismissal without compensation for notice? Thus in a case of wrongful dismissal it is for the tribunal itself to decide what happened, not the employer's perception of what happened. Furthermore, it was possible for a dismissal to be justified retrospectively if a breach of contract, while not known at the time of dismissal, was subsequently found to exist: *Boston Deep Sea Fishing & Ice Co v Ansell* [1888] 39 ChD 339.

Inconsistent treatment

In many cases of unfair dismissal it is common for a claimant to point to disparity of treatment as compared with other employees who have not been dismissed in the same or similar situations. However, if this argument is to be run, it is vital that clear evidence is obtained and provided to the tribunal rather than presenting what on its own can appear to be without substance, as the EAT reminds us in the following case.

■ **Kay v Cheadle Royal Healthcare Ltd t/a Affinity Healthcare**
UKEAT/0060/11, 12 September 2011
Ms Kay was a deputy ward nurse who was accused of bullying by a doctor. At the subsequent disciplinary hearing, it emerged that Ms Kay and another colleague had engaged in bullying behaviour against the doctor. Ms Kay was dismissed subsequently but no action was taken against the colleague. Ms Kay brought a claim of unfair dismissal alleging that the failure to discipline her colleague meant that there had been a disparity of treatment and that this rendered her dismissal unfair. The tribunal criticised Cheadle's failure to discipline the colleague, but found that Ms Kay's behaviour had been central to the bullying and that Cheadle was entitled to conclude that the colleague was not as much to blame as Ms Kay. The tribunal found that in the circumstances the inconsistent treatment was not such as to make the dismissal unfair. Ms Kay appealed.

The EAT rejected the appeal. It commented that it is well established that tribunals should concentrate on the question of whether or not it was reasonable in the circumstances to dismiss the employee whose claim was before it and should treat arguments based on disparity with care. There would not be many cases where the evidence supported the proposition that there were other truly similar cases or sufficiently similar to provide an adequate basis for submitting that there had been a disparity. On any appeal to the EAT, a challenge of such a finding was only likely to succeed if it could be shown that the tribunal's evaluation of the evidence before it had been perverse.

Time limits

A claim of unfair dismissal must be received by the ET within three months of the effective date of termination of the claimant's employment (Employment Rights Act (ERA) 1996 s111(2)(a)) or within such further period as a tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented within the three-month time limit (ERA s111(2)(b)). This is a question of fact for a tribunal to decide having looked at all the surrounding circumstances and considered and evaluated the claimant's reasons. In the following case, the EAT considered the situation where a claim for unfair dismissal was not presented until after the employee's appeal against his dismissal.

■ **John Lewis Partnership v Charman**
UKEAT 0079/11, 24 March 2011
Mr Charman was summarily dismissed by John Lewis on 13 March 2010. He appealed against dismissal, and that hearing taking place on 24 May 2010. On 28 June 2010 he was sent a letter advising him that his appeal had been dismissed. On 21 July 2010 he presented a complaint to the ET. The primary time limit under ERA s111(2)(a) had expired on 12 June and the question accordingly fell for consideration whether or not the tribunal had jurisdiction to entertain the claim.

The ET held that it had not been reasonably practicable for Mr Charman to present a claim before the determination of his internal appeal and that he had presented his claim within a reasonable period thereafter. The tribunal accordingly held that it had jurisdiction to hear the claim. The ET found specifically that Mr Charman was 'young and inexperienced', that before his dismissal he knew nothing about ETs or any right to claim for unfair dismissal, and that when he was dismissed he consulted his parents who also had limited knowledge of such matters and on their advice decided to await the outcome of the appeal before seeking legal recourse. As a result, the tribunal held that Mr Charman's ignorance of the time limits rendered it impracticable for

him to bring proceedings in time. He presented the claim within a further reasonable period once he had become aware of receipt of the appeal outcome letter.

John Lewis appealed to the EAT on the basis that case-law had established that the mere fact of a pending internal appeal itself was not sufficient to justify a finding that it was not reasonably practicable to present a claim to the ET (*Bodha v Hampshire Area Health Authority* [1982] ICR 200, EAT, approved by the Court of Appeal in *Palmer v Southend on Sea BC* [1984] IRLR 119).

The EAT distinguished *Bodha* and *Palmer* on the basis that both cases involved claimants who were advised by trade union officials. These were cases where the claimant was, or should have been, aware of the limits and, nevertheless, delayed claiming, whereas in this case the claimant was ignorant of the time limits.

PRACTICE AND PROCEDURE

Rights of respondent when no response entered

Under the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 SI No 1861 Sch 1 r9, a respondent who has not presented a response to a claim, or whose response has not been accepted, shall not be entitled to take any part in the proceedings except in very limited circumstances (eg, making a request under rule 30 for written reasons, making an application under rule 33 for review of default judgments, making an application under rule 35 for preliminary consideration of a review application, to be called as a witness by another person or to be sent a copy of any document or corrected entry).

■ VMI (Blackburn) Ltd v Camm
UKEAT/0011/11,
2 June 2011

The EAT held (following *NSM Music v Leefe* [2006] ICR 450, EAT; UKEAT/0663/05, 14 December 2005) that where as a result of rule 9 a respondent has not presented a response to a claim, or whose response has not been accepted, s/he is not entitled to take any part in the proceedings either as to merits or remedy.

CONTRACTUAL AND EMPLOYMENT RIGHTS

Right to representation

The Supreme Court has now considered the issue of whether or not article 6 of the convention can be interpreted as providing a right to legal representation at an internal disciplinary hearing: see the Court of Appeal report *R (G) v Governors of X School and Y (interested party)* [2010] EWCA Civ 1, 20 January 2010; [2010] IRLR 222, CA; June 2010 *Legal Action* 17. Article 6(1) provides that 'in the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing'.

■ R (G) v Governors of X School
[2011] UKSC 30,
29 June 2011,
[2011] IRLR 756

The claimant was a teaching assistant at X School. Disciplinary proceedings were brought against him alleging that he had kissed and had sexual contact with a 15-year-old male work-experience student. He requested to have his solicitors represent him at the disciplinary hearing, but this was refused. He was told that he could only be represented by his trade union representative or a work colleague. The disciplinary hearing found the allegations proved and summarily dismissed him. As a result, the matter was reported to the Independent Safeguarding Authority (ISA) which maintains a list of those persons to be barred from working with children and determines who should go onto the list.

The Supreme Court held that article 6(1) will apply to internal proceedings where the decision, although it is not strictly determinative, is likely to have a 'substantial influence or effect' on the outcome in other external proceedings (paras 69 and 90). However, it did not apply to the disciplinary proceedings in this case. The ISA is required to make its own findings of fact and bring its own independent judgment to bear as to their seriousness and significance before deciding whether it is appropriate to place a person on the barred list. There is no reason to suppose that it would be influenced profoundly or at all by the findings of the internal proceedings. As a result there was insufficient connection between the internal proceedings and the external ISA proceedings.

Comment: The importance of this case is not so much that it establishes a right to legal representation at internal hearings, but more to highlight that contrary to a commonly held view there is no general automatic right to such.

Annual leave

A worker does not lose his/her right to take annual leave under the Working Time Regulations (WT Regs) 1998 SI No 1833 because the worker has been off sick throughout the holiday year or through the last part of the holiday year, when s/he has not yet taken his/her full leave entitlement. An employer can refuse to allow a worker to take paid annual leave while on sick leave, but the worker must then be allowed to carry it over. If s/he cannot ever take the annual leave because s/he leaves the employment in a future holiday year without ever having returned to work, s/he must be paid in lieu for the whole period: *Stringer and others v HM Revenue and Customs sub nom Commissioners of Inland Revenue v Ainsworth and Schultz-Hoff v Deutsche Rentenversicherung Bund* C-520/06 and C-350/06, 20 January 2009; [2009] IRLR 214, ECJ. However, in order to enforce entitlement to leave outstanding for earlier years on termination of employment, the worker has to have requested it.

■ Fraser v Southwest London St George's Mental Health Trust
UKEAT/0456/10,
3 November 2011

Mrs Fraser brought a tribunal claim including a complaint of entitlement to unpaid statutory holiday pay in respect of the two previous leave years during which she had been away on long-term sickness absence. The EAT held, upholding the decision of the ET, that in order to be entitled to payment for annual leave under the WT Regs, a worker had to have given notice of any intention to take annual leave during the years in question as required by regulation 15.

WHISTLE-BLOWING

Causation

ERA s47B gives workers the right not to be subjected to a detriment other than dismissal

RECOMMENDED READING

IDS Employment Law Brief

- ☐ Holidays and sick leave: tribunal round-up 930
- ☐ Human rights and employment law – 1 933
- ☐ Human rights and employment law – 2 934
- ☐ Racial harassment in the workplace 937
- ☐ Bonuses: the legal issues 938

Other

- ☐ *Acas guidance on social networking*, available at: www.acas.org.uk/index.aspx?articleid=3375.

(which for employees is the subject of a separate right) because they have made a protected disclosure, commonly known as whistle-blowing. The Court of Appeal has considered what the correct test for causation is.

■ **NHS Manchester v Fecitt and others and Public Concern at Work (intervener)**
[2011] EWCA Civ 1190, 25 October 2011, [2011] IRLR 111, CA
The Court of Appeal held that the test of causation in cases of victimisation is also applicable to determining causation in cases of detrimental treatment (in other words victimisation) for whistle-blowing and to other forms of discrimination. The test in *Igen v Wong* (above) applies and this requires the employer to prove that the treatment was in no sense whatever on the ground of the protected characteristic. This also applies to victimisation for whistle-blowing.

The Court of Appeal took the view that as parliament has sought to offer protection to whistle-blowers, a broad view of the provisions should be taken for their protection. This means that once less favourable treatment amounting to a detriment has been shown to have occurred following a protected act, the employer has to show that the ground on which any act or deliberate failure to act was done and that the protected act played no more than a trivial part in the application of the detriment. The employer is required to prove on the balance of probabilities that the treatment was in no sense whatsoever on the ground of the protected act. The Court of Appeal also held that an employer may be vicariously liable for acts of victimisation by employees under the protected disclosure provisions.

1 BIS press release, available at: http://nds.coi.gov.uk/content/detail.aspx?NewsAreaId=2&ReleaseID=422195.
2. On 14 December 2011, the government published *Charging fees in Employment Tribunals and the Employment Appeal Tribunal. Consultation paper CP22/2011*, available at: www.justice.gov.uk/downloads/consultations/charging-fees-in-et-and-eat.pdf. The consultation will close on 6 March 2012.
3 The consultation and the government response are available at: www.bis.gov.uk/assets/biscore/employment-matters/docs/r/11-1365-resolving-workplace-dsputes-government-response.pdf.
4 Available at: http://equalityhumanrights.com/uploaded_files/EqualityAct/employercode.pdf.

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Recent developments in prison law – Part 1

Hamish Arnott, **Nancy Collins** and **Simon Creighton** continue the series of updates on the law relating to prisoners and their rights. Part 2 of this article will be published in February 2012 *Legal Action*.

POLICY AND LEGISLATION

The Parole Board's parole hub video-link project

The pilot for this project was due to start in May 2011 (see July 2011 *Legal Action* 22). After delays, the Board has announced that the pilot will now start in January 2012 and run for six months.

The hub at HMP Bristol will be linked to satellite prisons, the first four being HMP Garth, HMP Channings Wood, HMP Shepton Mallet and HMP Dartmoor, from which prisoners will give their evidence by video-link. Offender managers, report writers and victims will also be expected to give their evidence through local video-link facilities.

Indeterminate sentence prisoners: transfers to open conditions

The last two years have seen increasing problems in indeterminate sentence prisoners (ISPs) securing transfers to open conditions, once such a move has been approved by the Parole Board ('the Board'), due to lack of places. This has been caused by prison overcrowding generally, but also by the large increase in numbers of ISPs in the system due to the sentencing changes introduced by the Criminal Justice Act (CJA) 2003.

The position in September 2011 was that there were 600 ISPs awaiting a move from closed to open conditions following a Board recommendation. In response to this problem the National Offender Management Service (NOMS), in a notice to governors of public sector prisons and directors of private prisons, has made changes to the administration of such transfers (however, the policy has not yet been formalised into a Prison Service Instruction (PSI)).

The key changes are:

■ Responsibility for the transfer of ISPs to open prisons will be removed from individual prisons and given to the Population Management Section (PMS) at NOMS headquarters.
■ ISPs whose minimum term has expired will take precedence over those still serving the minimum term.
■ Those whose minimum term has expired will then be prioritised in line with the length of time they have been waiting for transfer, starting from the date on which the secretary of state approved the move to open conditions.

In order to deal with the backlog, the notice states that prisoners will be prioritised in tranches, and while offender managers 'will be consulted in this process to ensure that transfers are not made to wholly inappropriate locations … it will not necessarily be possible to take into account [a] prisoner's preferences in this process as this will create further delays'.

The document also states that transfers will take place during the parole process unless the proposed transfer is less than eight weeks before the hearing date. Where a transfer does take place once a referral has been made to the Board, then the normal expectation is that the sending prison will be responsible for compiling reports, 'unless there are exceptional reasons why the receiving establishment would be better placed to do so'.

Licence conditions

A new PSI 34/2011 was introduced in April 2011, which has replaced Chapter 14 of Prison Service Order (PSO) 6000 as the policy guidance on the imposition of licence conditions. The policy essentially consolidates existing guidance. The PSI includes guidance on the additional licence conditions that might be considered necessary for those convicted of terrorism offences. The terrorist notification requirements introduced by Part 4 of the Counter-Terrorism Act 2008 have also been consolidated into the *Public protection manual* through PSI 38/2011.

The polygraph pilot project has been ended (PSI 42/2011). Sex offenders released to those probation regions running the pilot scheme after 1 July 2011 will no longer be required to undergo testing and conditions

should not have been included in licences from that date.

Categorisation

The policies on the categorisation and allocation of prisoners have been consolidated (outside of category A reviews) through three new PSIs: PSI 39/2011 – women prisoners; PSI 40/2011 – adult male prisoners; and PSI 41/2011 – young male prisoners. PSI 39/2011 finally takes account of the decision to abolish semi-open conditions for women prisoners and confirms that women prisoners are simply categorised as category A, restricted, closed or open.

Prison discipline

The Prison and Young Offender Institution (Amendment) Rules 2011 SI No 1663 amend the circumstances in which cases are referred to independent adjudicators. Thus under rule 53A of the Prison Rules 1999 SI No 728 and rule 58A of the Young Offender Institution Rules 2000 SI No 3371, charges will be referred to independent adjudicators, not only where the seriousness of the charge requires that additional days should be awarded, but also where:

… it is necessary or expedient for some other reason for the charge to be inquired into by the adjudicator (Sch 1 para 5(a) and Sch 2 para 4(a)).

This amendment addresses the injustice faced by indeterminate prisoners facing serious disciplinary charges which would not previously have been adjudicated on by independent adjudicators. The new provisions reflect the Court of Appeal finding in *Tangney v Governor of HMP Elmley and Secretary of State for the Home Department* [2005] EWCA Civ 1009, 29 July 2005, that there might be cases where ISPs face charges so serious that article 6 of the European Convention on Human Rights ('the convention') will be engaged.

In addition, a new policy on discipline in prisons and young offender institutions has been issued in PSI 47/2011. This replaces the *Prison discipline manual*, but contains broadly similar information. One notable amendment is the requirement that prisoners, rather than the prison staff, provide their legal advisers with copies of documents relating to prison adjudications. It is only when a prisoner is granted legal representation that this obligation falls to the prison (para 2.9).

CASE-LAW

Indeterminate sentence prisoners

■ H v Parole Board

[2011] EWHC 2081 (Admin), 9 May 2011

■ R (Austin) v Parole Board

[2011] EWHC 2384 (Admin), 12 August 2011

■ R (Leach) v Parole Board

[2011] EWHC 2470 (Admin), 24 August 2011

The prisoner in H was tried on an indictment that included three counts of rape against his ex-partner. The first count involved a rape carried out in front of their five-year-old daughter while she was awake which was preceded by threats and violence. She was asleep on the occasion of the second of the three rapes and present but elsewhere in the house on the third occasion. He was convicted on the second and third counts, but the jury could not agree on the first which remained on file. He was given a life sentence.

The prisoner sought a transfer to open conditions at a hearing before the Board. Various materials before the Board, including an Offender Assessment System (OASys) risk assessment and probation reports, suggested that the prisoner had committed a rape that was witnessed by the child, and had used the violence that was associated with the count on the indictment which had not been proved against him.

The Board refused to recommend a transfer to open conditions. In its decision it relied on the fact that the prisoner had been inconsistent and that there was 'a vagueness as to what happened downstairs before the offences in the bedroom … [a]lso whether your daughter was awake' (quoted at para 26).

The judge quashed the Board's decision on the basis that it had proceeded on a basis of a material mistake of fact (applying the principles in *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, 2 February 2004). It was not open for the Board, in the light of the findings of the criminal court and the judge's sentencing remarks, to proceed on the basis that the violence associated with the first count on the indictment had been carried out, or that the prisoner's daughter had witnessed any rape. The Board's reliance on the prisoner's 'vagueness' about these matters indicated that its error was material.

In *Austin* and in *Leach* the prisoners both challenged refusals by the Board to make recommendations for a transfer to open conditions on the basis that it had improperly applied the secretary of state's directions to the Board relating to such transfers.

In both cases the court accepted, following *R (D'Cunha) v Parole Board* [2011] EWHC 128 (Admin), 1 February 2011; July 2011 *Legal Action* 26, that the secretary of state's directions are mandatory and to be followed by the Board.

Both cases also noted that the current directions in respect of the transfer of life prisoners to open conditions issued in 2004 had shifted the emphasis contained in earlier directions. While the directions still confirmed that the test as to whether an ISP should be transferred to open conditions was distinct from the statutory test for release (which relates solely to risk), and necessitated a 'balanced assessment of risk and benefits', they also stressed that the 'emphasis should be on the risk reduction aspect' (quoted in *Austin* at para 7).

In *Austin* the prisoner maintained his innocence of the murder of his wife. He argued that the Board in its decision had applied the wrong test as set out in the directions; had failed to balance risk against the benefits of transfer to open conditions; and had also unlawfully given too much weight to the fact of his denial of the offence.

The judge rejected these arguments. In relation to the directions he was satisfied from reading the Board's decision as a whole that it had given proper consideration to the matters they contained, and had sufficiently balanced risks against benefits. In relation to denial of guilt, the judge held that the Board's assessment that the prisoner still posed a risk to a future partner was not solely based on his denial. It had explicitly stated in its reasons that denial was not in itself a bar to progression, and had expressed concerns about the prisoner's lack of insight into the risks he might pose. The case was therefore very different to one where a prisoner who denied his offence could demonstrate that he would change the lifestyle associated with his offending (as in *R v Parole Board and Secretary of State for the Home Department ex p Oyston* [2000] EWCA Crim 3552, 1 March 2000).

Similarly in *Leach* the prisoner argued that the Board had failed properly to balance the risks against the benefits of a transfer to open conditions, and had failed to apply the proper test under the statutory directions. The court again rejected these arguments. Reading the Board's decision letter as a whole, even if it had not explicitly stated that it had balanced risks against benefits, it was clear that it had in mind the advantages of a move to open conditions given the evidence it had summarised, and that it had applied the directions as required.

Comment: The case of *H* demonstrates a problem often faced by prisoners. Risk assessments and reports, especially where

an indictment included multiple counts, sometimes stray into suggesting that prisoners are guilty of conduct which has not been established by the criminal court. This can be caused by reliance on written prosecution statements without proper consideration of the findings of the court. The lack of detail in sentencing remarks can also compound the issue. *H* is an important reminder of the principle that the starting point of the risk assessment carried out by the Board has to be the conduct relating to the offences for which the prisoner has been convicted.

Austin and *Leach* both demonstrate the court's unwillingness to interfere with the Board's decisions where detailed reasons have been given. The need to apply the statutory directions in the context of recommendations for open conditions does not require a verbatim recital of their terms. The court will look at decisions in the round. The cases, in noting the shift in emphasis of the 2004 directions, also suggest that earlier cases relying on the earlier directions (such as *R (Gordon) v Parole Board* [2000] EWHC 414 (Admin), 7 November 2000) will not be directly applied by the courts.

Oral hearings

■ R (Holdsworth) v Parole Board

[2011] EWHC 2924 (Admin), 14 November 2011

The prisoner was serving an indeterminate sentence for public protection (IPP) and the minimum term had expired. His case was referred to the Board for consideration of whether he should be released or transferred to open conditions. After disclosure of the dossier the prisoner's solicitors sent representations on his behalf to NOMS. These representations were not forwarded to the Board before its consideration of the case.

A panel of the Board decided that an oral hearing was not necessary to determine the referral, and that the prisoner should not be released on licence or recommended for open conditions. In line with its procedures it sent its decision to the prisoner and invited further representations on whether an oral hearing should be convened. The prisoner's solicitors wrote to the Board enclosing their earlier representations and stated that as they had not been considered the case should be referred to a fresh panel.

The matter was, however, only considered by a single member of the Board who considered the solicitors' letter as a request for an oral hearing and refused it.

The court accepted submissions that the Board had acted unfairly. As the original representations had not been considered by the panel, the points raised had never been properly weighed when considering whether the prisoner should be considered suitable for a move to open conditions. The focus of the single member's consideration was solely whether there was a case for an oral hearing, that is 'in the context of a decision on the appropriate procedure for the Board to adopt after its panel had already deliberated on his case and decided against him'.

The prisoner also argued that the Board had provided inadequate reasons for its decisions. The judge also upheld this challenge. The second decision of the Board, made after consideration of the solicitors' representations, did not properly address their contents. The representations expanded on several issues relating to the prisoner's state of mind, attitude and motivation and had not been considered by the panel which had made the substantive decision on suitability for open conditions. In the light of the importance of the decision relating to continuing detention this failure to provide, at either stage, reasons to show that the representations had been taken into account meant that the decision was also flawed for inadequate reasons.

Finally the judge also accepted – in the 'highly unusual' circumstances of this case – that, in line with the principles set out in *Osborn and Booth v Parole Board* [2010] EWCA Civ 1409, 15 December 2010; July 2011 *Legal Action* 23, fairness required the Board to hold an oral hearing before making a final decision. The decision letter refusing an oral hearing failed to make clear why one was not required to overcome the unfairness which, unknown to the panel, had infected the earlier decision.

Licence conditions

■ R (A) v National Probation Service and Secretary of State for Justice

[2011] EWHC 1332 (Admin), 27 May 2011

The claimant was released on licence from a nine-year sentence for offences of rape, kidnapping and false imprisonment. He was released on licence conditions which were set by the secretary of state on the recommendations of the Probation Service. The conditions included a requirement to reside at a probation hostel, a night-time curfew and reporting requirements during the day. These requirements were progressively relaxed after his release.

The night-time curfew was initially a period of ten hours, but this was subsequently reduced to seven. The reporting requirements during the period in issue in the proceedings were that he had to report to staff in the hostel every two hours from 26 January 2010 to 26 March 2010, every three hours until 17 May 2010 and every four hours thereafter.

In judicial review proceedings the claimant argued that the licence conditions amounted to a deprivation of liberty under article 5 of the convention; that they were unnecessary and disproportionate so as to breach article 8; and that there had been insufficient procedural safeguards relating to their imposition and review so that his rights under article 6 were also breached.

In relation to article 5, the court rejected the suggestion that the conditions amounted to a deprivation of liberty. While the judge accepted the claimant's argument that the length of the night-time curfew should not be regarded as determinative, and that the measures had to considered cumulatively (applying the control order case of *Secretary of State for the Home Department v JJ* [2007] UKHL 45, 31 October 2007; [2008] 1 AC 385), he did not accept the claimant's evidence as to the impact on him of the licence conditions. The key factual issue relied on in the case was whether the conditions had prevented the claimant from being able to work in his family business.

The judge, on the evidence (which was not clear as to the prisoner's proposed duties in the business), and in the light of the fact that the Probation Service had told the claimant's solicitors that the reporting requirement could be relaxed if this did prevent him from working, did not accept the claimant's assertion that the conditions amounted to a deprivation of liberty. Cumulatively they were not so 'destructive of the life [he] might otherwise have been living' as to breach article 5 (*Secretary of State for the Home Department v AP* [2010] UKSC 24, 16 June 2010; [2010] 3 WLR 51, para 4, quoted in *R (A)* at para 22).

The judge also rejected the challenge under article 8 for largely the same reasons as the article 5 challenge. The licence conditions did not prevent the claimant from undertaking any employment at all, and in relation to the family business he was not prevented from working but was 'at most inconvenienced in his participation in its affairs' (para 28). On this basis the judge held that the level of interference did not engage article 8. Even if article 8 was engaged, the judge also confirmed that he considered the conditions to have been imposed in accordance with the law and to be proportionate.

The procedural challenge also failed. Although the claimant had not had an opportunity to make representations before the licence conditions were imposed, the judge considered that the claim for judicial review itself was sufficient to meet the requirements of article 6. Accordingly article

6 did not require a dedicated mechanism such as a reference to the Board to review licence conditions after their imposition.

The judge considered that the task of probation officers in recommending licence conditions, involved making 'difficult judgments based on their experience and expertise' (para 37) and placed this context in the category where article 6 would be satisfied even though the reviewing court could conduct only a limited review of the facts (applying *Runa Begum v Tower Hamlets LBC* [2003] UKHL 5, 13 February 2003; [2003] 2 AC 430). As judicial review met the requirements of article 6, the judge considered that it was unnecessary for him to determine whether in fact the claim had engaged the claimant's civil rights under article 6.

Comment: This is a disappointing decision. While the evidential uncertainties allowed the judge to dispose of the arguments under articles 5 and 8 of the convention (and it is of note that in *R (Carman) v Secretary of State for the Home Department* [2004] EWHC 2400 (Admin), 30 July 2004, the court had rejected a claim that residence at a hostel with a night-time curfew and a reporting requirement of every two hours during the day breached article 8), the finding on the procedural aspect is more concerning. The finding that the availability of judicial review was sufficient in itself, notwithstanding the fact that there was no prior procedure at all to which the prisoner could contribute appears to conflict with cases such as *R (Gunn) v Secretary of State for Justice and another* [2009] EWHC 1812 (Admin), 21 July 2009. In *Gunn*, the court held that in relation to meetings held under the Multi-Agency Public Protection Arrangements (MAPPA), which make recommendations as to licence conditions, prisoners were at least entitled to a gist of the material to be considered and a right to make written representations before the meeting.

Foreign nationals and early release

■ R (Francis) v Secretary of State for Justice and Secretary of State for the Home Department

[2011] EWHC 1217 (Admin), 20 May 2011

The claimant was a Jamaican citizen liable to deportation on the completion of her sentence of two years' imprisonment. She sought to challenge a decision not to grant her home detention curfew (HDC) arguing that her application had not been properly considered. Her challenge arose from the interplay of the rules governing HDC and the statutory regime for the deportation of persons convicted for criminal offences. She mounted a number of arguments, the first being a challenge to the lawfulness of the part of the PSO dealing with HDC in respect of people potentially subject to deportation. She also sought a number of declarations concerning breaches of articles 5, 8 and 14 of the convention together with associated claims for damages.

The claimant had been convicted of a series of offences between 2001 and 2007 which culminated in the Home Secretary making a deportation order under Immigration Act 1971 s3(5)(a). This decision was the subject of a successful appeal on article 3 grounds on 25 June 2008 and she was granted discretionary leave to remain in the UK until 16 March 2009. However, following a further conviction, the claimant received a prison sentence of two years on 9 December 2008. She was invited to state why she should not be subject to automatic deportation under the provisions of the UK Borders Act (UKBA) 2007 and responded by claiming that her deportation would breach article 3.

On 23 July 2009, the secretary of state issued an authority to detain her in form IS91 stating that her deportation was under consideration according to the provisions of UKBA 2007 s35(2) and she was simultaneously detained under the powers contained in UKBA 2007 s36 pending this consideration. She became eligible for release under HDC on 27 July 2009. The following day her legal advisers appealed a decision of the prison governor to refuse release on HDC. Eventually, they were notified that the prison considered her to be ineligible for HDC because of the IS91 that had been issued.

The power to grant HDC is subject to statutory exclusions, one of which is where the prisoner is liable to removal (CJA 2003 s246(4)(f)). However the statutory definition of 'liable to removal' does not include those whose deportation is under consideration pursuant to the UKBA 2007. The policy issued to give effect to this requirement is contained in PSO 4630. It states that 'where an IS91 has been issued or there is a court recommendation for deportation the prisoner is statutorily excluded' from HDC (para 11.1). However, the court noted that this part of the policy was unlawful, as the issue of a form IS91 did not determine whether a prisoner was 'liable to removal' and so excluded from eligibility for HDC.

Following an exchange of correspondence, the prison first asserted that the claimant was ineligible for release because of the IS91 having been issued. It eventually agreed to process her application, and on 13 October 2009 agreed that she was suitable for HDC but could not be released until the views of the UK Border Agency had been sought because of the issue of the IS91. On 11 November 2009, the UK Border Agency notified the claimant that a decision had been made to deport her but this was appealed successfully on 22 January 2010, the claimant having obtained bail on 8 January 2010.

The secretary of state accepted that PSO 4630 contained an error in relation to the relevance of the form IS91 and the court confirmed that this was the case. A declaration to this effect was granted by the court despite the objections of the secretary of state, not least because there was no indication when an amendment would be made.

The remainder of the claims failed. The court considered that the original decision to refuse HDC because of the uncertainty about the claimant's immigration status was rational. Furthermore, the period of detention between the decision that she was suitable for HDC but could not be released due to the IS91 until the determination of her case by the UK Border Agency (the period from 13 October 2009 to 11 November 2009) did not breach article 5 as her detention was pursuant to a court order and was within the lawful exercise of discretion by the secretary of state. The article 8 claim was dismissed almost in consequence of this finding with the court simply stating that lawful detention necessarily carries an interference with article 8 rights. As the court had already found that the detention was in accordance with article 5, it did not see the need fully to examine the article 8 claim. Finally, the court refused permission to amend the claim to include the argument that the claimant had been subject to discrimination based on her nationality. It was noted that this claim would have involved a challenge to the compatibility of CJA 2003 s246(4)(f) and had been brought out of time. In any event, the court was unable to accept that a statutory exemption of people facing deportation from HDC could be compatible with the convention but the exercise of a discretionary power to authorise detention for the purpose of considering deportation was unlawful.

Comment: PSO 4630 has not yet been amended. The claimant has appealed the decision of the Divisional Court. The decision not to grant HDC did have a direct bearing on her continued detention as she was unable to apply for Immigration Act bail until she was released from the prison sentence. The court's decision to dismiss the claims for damages are not especially convincing as no distinction is drawn between the legal status of a policy and a statutory exemption. Although the justifications for a difference in

treatment may be powerful, the secretary of state did not actually file any evidence in relation to the rationale for the particular policy that was applied to the claimant.

■ R (Baicys) v HMP Maidstone and the Parole Board

[2011] EWHC 2833 (Admin), 11 October 2011

This was only a decision to refuse permission but concluded with a direction to provide a transcript at public expense as the judge would have granted permission on the merits had it not been for delay. It involved a challenge to a decision by the Board not to grant release on parole licence for a foreign national serving a prison sentence of 12 years so as to enable his deportation. In the absence of recommendation for release from the Board, the secretary of state had no power to release and deport the claimant.

The claimant was sentenced to 12 years' imprisonment on 21 September 2005 for offences involving wounding with intent and firearms. He became eligible for release on parole on 18 November 2010 and will reach his statutory release date on 17 November 2012. The Board considered his case in 2009 and 2010, and on both occasions decided that he was too high a risk for release. Before the first consideration of his case by the Board, the claimant had been considered too high a risk for removal under the early removal scheme in place for foreign nationals (a scheme intended to mirror HDC). The claimant actively wanted to be released and deported under this scheme but the prison assessment considered that he posed too high a risk. In consequence, the claimant could not be released and deported before his statutory release date unless the Board recommended his release to the secretary of state.

The Board's decision in December 2010 to refuse release referred to the claimant having been a high risk at the time of his sentence and went on to comment that limited offence-focused work had been completed in custody, and so the conclusion was that he still posed a high risk of serious harm. Ouseley J expressed concern that the Board had focused so tightly on the lack of offending behaviour courses having been completed. He noted that the claimant had enthusiastically completed those courses made available to him and had been assessed by prison staff as scoring too low in terms of risk to complete further courses. He expressed concern that the Board could not identify what further courses it would recommend and suggested that its decision was tantamount to accusing the secretary of state of operating an irrational risk assessment process.

Nevertheless, the judge refused to grant permission on the ground of delay. The claim had been issued more than seven months after the decision under challenge with no explanation of the reasons for delay. This meant that by the time of the hearing, the claimant was due to have his case considered by the Board within less than a fortnight.

Comment: The claimant was a litigant in person and the reasoning in the case was clearly led by the judge. There is a slight confusion in his commentary between the risk of re-offending and the risk of harm, but he does make the important point that if the Board does not accept the secretary of state's assessment of risk and the consequent threshold for entry to offending behaviour courses, then it is incumbent on the Board to explain the reasons for its difference of opinion clearly.

■ R (Nelson) v Secretary of State for Justice

[2011] EWHC 2468 (Admin), 1 September 2011

The question of which early release scheme applied to a prisoner convicted in Jersey but transferred to serve his sentence in England was examined in this case. The claimant had been convicted of drug offences in Jersey and received a prison sentence of six years in October 2008. In November 2008 an order was made for his transfer to serve his sentence in England under Crime (Sentences) Act (C(S)A) 1997 Sch 1 para 1(2). This type of transfer is referred to as a restricted transfer, meaning that the administration of the prison sentence remains subject to the Jersey authorities and so any early release decisions are made in accordance with the scheme operating in Jersey (C(S)A Sch 1 para 6(1)(a) and Transfer of Prisoners (Restricted Transfers) (Channel Islands and Isle of Man) Order 1998 SI No 2798 Sch 1 para 17(2)(b)).

The early release provisions in Jersey provide for release after two-thirds of the prison sentence has been served. These compare unfavourably with the provisions that allow prisoners sentenced in this jurisdiction to be released on licence after serving one-half of the sentence. Furthermore, the claimant could not be released early under HDC as this does not apply to him as a prisoner under a restricted transfer. He therefore argued that he should be entitled to a version of temporary release available in Jersey.

The Prison (Jersey) Rules 2007 r64 authorise a system of temporary release to be administered by the minister. The policy formulated under those rules allows for temporary release on a daily basis, but also contains a scheme described as HDC allowing for prisoners to spend up to four months before their release date in the community. The claimant sought to argue that the decision made by the secretary of state to exclude him from that scheme on the basis that it was a form of temporary release rather than an entitlement to early release was unlawful.

The court held that the HDC available to prisoners sentenced in Jersey was not to be regarded as an early release scheme but a version of temporary release and so did not apply to prisoners subject to a restricted transfer. This scheme for HDC fell to be administered by the Jersey authorities under wider powers concerning the general treatment of prisoners such as classification and discipline which clearly do not apply following a restricted transfer. The court went on to comment that even if the temporary release scheme making provision for HDC could be properly classified as an early release scheme, it was a matter for the Jersey authorities and not the secretary of state. In any event, it also required release to be to an address in Jersey, a requirement that the claimant could not fulfil. The court noted that the transfer arrangements contained in the C(S)A were not intended to create parity for all prisoners subject to such transfers as the consequences of a transfer had to be interpreted as a matter of statutory construction.

Comment: Given the clear finding on the appropriate statutory construction in this case, one possible solution for prisoners subject to restricted transfers is to apply to the secretary of state for temporary release on licence to match the scheme in the transferring jurisdiction. While such a decision would be wholly discretionary on the part of the secretary of state, it would allow for an equitable resolution to any disadvantage occurring as a result of a transfer.



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Recent developments in housing law

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

POLITICS AND LEGISLATION

New rules for social housing

In exercise of his powers under Housing and Regeneration Act 2008 s197, the Secretary of State for Communities and Local Government has issued new directions to the social housing regulator for England: *Implementing social housing reform: directions to the social housing regulator – consultation. Summary of responses*, Annex A (Department for Communities and Local Government (DCLG), November 2011).[1] The directions cover tenure, mutual exchange, tenant involvement, rent and quality of accommodation. They set out the requirements expected to be met by social landlords and to be enforced by the regulator. The form of the directions has been framed following a consultation exercise last year.

In light of the new directions, the current regulator (the Tenant Services Authority (TSA)) has issued a consultation draft of the new regulatory framework that will be adopted to give effect to them from April 2012: *A revised regulatory framework for social housing in England from April 2012. A statutory consultation* (TSA, November 2011).[2] The framework covers anti-social behaviour, tenure, quality of social housing, etc. Responses are invited by 10 February 2012.

The new separate arrangements for regulation of social landlords in Wales were brought into force on 2 December 2011: The Housing (Wales) Measure 2011 (Commencement No 1) Order 2011 WSI 2475.[3]

Social housing allocation

To coincide with the commencement of the allocation provisions of the Localism Act 2011 later this year (see page 23 of this issue), the UK government is expected to give further statutory guidance to English housing authorities under Housing Act (HA) 1996 s162. The housing minister has announced that the new guidance will invite local housing authorities in England to give more consideration to the needs of applicants seeking accommodation so that they can foster or adopt children: DCLG news release, 18 November 2011.[4]

This announcement follows an earlier commitment made to military service personnel that the UK government would 'give councils a duty to put heroes who want a home in their area at the top of the local waiting list': DGLG news release, 11 November 2011.[5]

Social housing fraud

The Audit Commission's latest report describes housing tenancy fraud as the largest category of fraud loss across local government: *Protecting the public purse 2011* (Audit Commission, November 2011).[6] It records a 75 per cent increase in the number of unlawfully occupied properties recovered by social landlords in 2010/11 compared with 2008/09 and gives examples of successful initiatives to repossess premises which have been sub-let.

Possession claims

The latest figures on county court housing possession claims in England and Wales show that while mortgage possession claims are falling, landlord possession claims are increasing: *Statistics on mortgage and landlord possession actions in the county courts in England and Wales – third quarter 2011* (Ministry of Justice (MoJ), November 2011).[7]

The Housing Rights Service in Northern Ireland has produced a useful video for homeowners facing possession proceedings, designed to encourage them to attend court hearings. It outlines court procedures and gives advice on available options.[8]

Court fees for housing cases

The MoJ is conducting a consultation on proposals to increase court fees for legal proceedings in the High Court and in the Court of Appeal (Civil Division): *Fees in the High Court and Court of Appeal Civil Division* (MoJ, Consultation Paper CP15/2011, November 2011).[9] Responses are invited by 7 February 2012.

Homelessness

Many applicants for homelessness assistance under HA 1996 Part 7 will be owed an 'advice and assistance' duty by the local councils to which they apply. In England and Wales, the content of such advice and assistance is the subject of guidance, not legislation. From 1 November 2011, new regulations in Northern Ireland have prescribed the appropriate forms of advice and the appropriate types of assistance: The Homeless Persons Advice and Assistance Regulations (Northern Ireland) 2011 SRNI No 339.[10] Advisers in other parts of the UK could utilise the lists as helpful check-sheets.

The *Live tables on homelessness* provide the latest, most useful or popular data on homelessness in England, presented by type, geographical area and on a temporal basis. They have recently been adjusted and updated.[11]

The Welsh Assembly Government (WAG) has commissioned research to help it decide how best to use its new law-making powers in relation to homelessness in Wales. The researchers will be arranging stakeholder meetings in 2012 and have issued a call for evidence to inform the review.[12]

Despite recent government initiatives, many people are still sleeping rough. The charity St Mungo's has published a report explaining why: *Battered, broken, bereft. Why people still end up sleeping rough* (St Mungo's, October 2011).[13]

Housing and anti-social behaviour

A commitment to bring into force in 2011 provisions extending the availability of gang injunctions to 14- to 17-year-olds was included by the UK government in its report: *Ending gang and youth violence* (Home Office, November 2011).[14] The report indicates that at least ten gang injunctions have been made against adults since county courts were given the power to grant such injunctions in January 2011.

The WAG is conducting a consultation exercise on a new mandatory power of possession for anti-social behaviour and whether or not such a power is needed in Wales: *A new mandatory power of possession for anti-social behaviour* (WAG, November 2011).[15] Responses are invited by 10 February 2012.

Housing facts and figures

The UK government has released the latest statistics on council housing in England: *Local authority housing statistics, England*,

2010–11 (DCLG, November 2011).[16]
The figures indicate that:
■ 87 per cent of councils now use choice-based lettings schemes;
■ 1.84m households are on housing waiting lists;

and that in 2010/11 councils in England:
■ evicted nearly 6,000 tenants; and
■ made 146,400 lettings.

Private rented sector

The Chartered Institute of Housing Northern Ireland, the Department for Social Development and SmartMove NI have jointly published *Making the most of Northern Ireland's private rented sector to meet housing need* (November 2011).[17] The paper aims to further the debate on the role of the private rented sector as part of the wider housing agenda in Northern Ireland and to raise awareness of the sector as a valuable housing option.

Service charges

The Royal Institution of Chartered Surveyors (RICS) and other professional organisations engaged in advisory work in the leasehold sector have jointly published new guidance on the reporting and accounting procedures for drawing annual service charge accounts: *Residential service charge accounts. Guidance on accounting and reporting in relation to service charge accounts for residential properties on which variable service charges are paid in accordance with a lease or tenancy agreement* (RICS, October 2011).[18]

SECURE TENANCIES

Right to buy

■ Francis v Southwark LBC

[2011] EWCA Civ 1418,
1 December 2011

Mr Francis was a secure tenant of a flat. He had a history of rent arrears, which led to various claims for possession, but he was able to avoid eviction by reducing or clearing the arrears. In 2003, he submitted a right to buy application. At that time, his maximum discount would have been £38,000. This application was rejected by the council, which stated 'you have breached the terms of a possession order'. Mr Francis then applied in existing possession proceedings for the revival of his secure tenancy, and for an order that he had been a secure tenant from 1 September 1999 onwards.

In March 2004, District Judge Wilding found against him, but granted permission to appeal. In June 2005, HHJ Behar allowed that appeal and declared that Mr Francis had been a secure tenant from April 2000. In the meantime, the council decided to demolish the block in which the flat was situated and in July 2004 it granted Mr Francis an introductory tenancy of another flat. He again accrued rent arrears, and in February 2006 the council began new possession proceedings. Mr Francis counterclaimed for damages for breach of statutory duty for the previous failure by the council to grant him the right to buy. HHJ Gibson dismissed the counterclaim. Mr Francis appealed.

The Court of Appeal dismissed the appeal. There was nothing in either HA 1985 s118 or s124 to suggest that parliament intended to create a remedy in damages. The mere fact that, in some circumstances, the remedy created by the Act was not complete, was not a justification for reading into it words which were not there.

POSSESSION CLAIMS

Suspension of warrants

■ Royal Bank of Scotland v Bray

Halifax County Court,
25 November 2011[19]

The claimant was granted a possession order in respect of Mrs Bray's home. The bank obtained, but then withdrew, five warrants for possession. It then obtained a further warrant. Mrs Bray wrote to the claimant's solicitors before the eviction date, offering to clear the arrears at lunchtime on 18 November 2011 as she had sold her car and would have cleared funds to make the payment. She did not apply to suspend the warrant. She heard nothing in response from the lender or its solicitors and went to work as normal on 18 November. Mrs Bray received a telephone call from her neighbours that morning indicating that they had seen someone in the garden. She ran to the house to discover the court bailiff, locksmiths and a dog handler at the property. Access had already been gained through the rear door. She explained that she could pay off the arrears and was advised by the bailiff to attend court to make an emergency application. Mrs Bray rushed to the court office and made an application to suspend.

The court officer referred the matter to the bailiff's clerk and the judge. The judge was incorrectly informed that the warrant had already been executed. As a result, the application to suspend was not heard and Mrs Bray was instead referred to the Citizens Advice Bureau. It made an emergency application to set aside the warrant on the basis that there had been oppression. Mrs Bray then sought to rely on the original application notice that she had completed at court on the morning of the eviction. She submitted that it had in fact been made before the warrant had been properly executed, on the basis that the bailiff had not given quiet possession to the claimant at the point that she made the application. Accordingly, the court still had its normal discretion under the Administration of Justice Acts to suspend the warrant. At the hearing, the bailiff confirmed that he had received a telephone call from the court informing him that the defendant was at the court asking to see the judge while he was still at the property and before it had been fully secured and both locks refitted.

District Judge Goldberg found that the warrant had not been executed at the time that Mrs Bray attended court and issued her application. He ordered that the warrant be suspended on payment of the arrears in full within seven days and thereafter on payment of instalments. (See Woodfall, *The Law of Landlord and Tenant*: 'not understood to be executed completely, [until] the sheriff and his officers are gone, and the plaintiff left in quiet possession'.)

LONG LEASES

Service charges

■ Church Commissioners for England v Koyale Enterprises

Central London County Court,
22 September 2011

Koyale Enterprises was the assignee of a 99-year lease of a flat. The lease contained a covenant to pay service charges. The claimant freeholder brought a CPR Part 7 claim for unpaid service charges. No acknowledgment of service or defence was filed and, in March 2011, a default judgment was entered for £7,919.50 in respect of rent, service charges, contractual interest and contractual costs. In April 2011, the claimant began a claim for forfeiture which was listed for hearing in June 2011. District Judge Lightman dismissed the claim on the ground that, even though the landlord had obtained default judgment in respect of unpaid service charges, the amount of the service charge payable by the tenant had not been finally determined within the meaning of HA 1996 s81. The Church Commissioners appealed.

HHJ Dight allowed the appeal. A default judgment is a determination for the purposes of section 81 (see *Southwark LBC v Tornaritis* Lambeth County Court, 11 May 1999 (HHJ Cox) and *Hillbrow (Richmond) Limited v Alogaily* Wandsworth County Court, 7 November 2005 (HHJ Rose)).

HOUSING ALLOCATION

■ R (Adams) v Commission for Local Administration in England

[2011] EWHC 2972 (Admin), 11 November 2011

In 2005 the claimant, a private sector tenant, applied for council accommodation in Lambeth and was placed in group F of the council's allocation scheme. In February 2009, her solicitors complained to the local government ombudsman that there had been maladministration in the handling of her application. In May 2009, the ombudsman expressed the provisional view that the complaint would be upheld. Eight days later the council agreed to move the claimant to group B and made an immediate offer of housing. That offer was accepted and the tenancy started in June 2009. The council also offered £2,000 by way of compensation, a figure proposed by the ombudsman. Given those responses, the ombudsman decided to discontinue the investigation.

The claimant applied for judicial review, seeking an order that the ombudsman should continue the investigation and, most particularly, recommend payment by Lambeth of her legal costs. Although she had been assisted under the Legal Help scheme she sought an order that would require Lambeth to provide reasonable remuneration for her solicitors' work at market rates.

Bean J dismissed the claim. The statutory scheme under which the ombudsman operated did not provide for costs orders of the type sought. Although this would mean that solicitors could not obtain anything better than legal aid rates, even when assisting a successful complainant, no other result could be derived from the legislation.

■ R (Babakandi) v Westminster City Council

[2011] EWCA Civ 1397, 2 November 2011

A transfer applicant challenged the legality of the council's social housing allocation scheme by way of judicial review. Nicol J rejected all four grounds advanced and the claim failed (see [2011] EWHC 1756 (Admin); August 2011 *Legal Action* 40). The claimant sought permission to appeal.

Sullivan LJ refused permission on the basis that none of the grounds had a reasonable prospect of success on appeal. On the first ground, an alleged failure to give the 'reasonable preference' categories of applicant (HA 1996 s167(2)) preference in the council's scheme at all times, he said: 'While of course the obligation to give reasonable preference is a continuing one and in that sense is absolute and required to be complied with at all times, it would be wrong to assess whether or not it is being complied with by simply taking a snapshot of the operation of the scheme on a particular day or a particular week' (para 3).

HOMELESSNESS

Whether homeless

■ Chawa v Kensington and Chelsea RLBC

Central London County Court, 19 July 2011[20]

Ms Chawa and her 11-year-old son lived in a privately rented studio flat. She applied for homelessness assistance under HA 1996 Part 7 but the council decided that, notwithstanding the overcrowding, it was reasonable for her to continue to occupy the flat: HA 1996 s175(3). The reviewing officer upheld that decision, having taken into account general housing circumstances in the area (HA 1996 s177(2)), most particularly the number of households on the council's waiting list with even more acute overcrowding.

HHJ Hand allowed an appeal. While it was open to a reviewing officer to draw on his/her experience with overcrowding in the council's area as part of the 'general housing circumstances', it was not permissible to conduct a comparative exercise and decide that the property was reasonable for the applicant to continue to occupy because 'there are others who are worse off than you'. This was particularly so when the comparators were those on the housing register who were, by definition, in the most housing need.

Temporary accommodation

■ Ngesa v Crawley BC

[2011] EWCA Civ 1291, 26 October 2011

Ms Ngesa was an unsuccessful asylum-seeker. She applied to the council for homelessness assistance in a false name and was provided with a non-secure tenancy of council housing as temporary accommodation. She fell into arrears. The council gave notice to quit, bringing an end to the tenancy, and then sought possession. No defence was entered and no point was raised relying on Human Rights Act 1998 Sch 1 article 8. Deputy District Judge Starke made a 28-day possession order and when that period expired the council obtained a warrant to execute it. District Judge Taylor granted a stay of the warrant but the council appealed. The council had by this stage discovered Ms Ngesa's deception and also contended that HA 1980 s89 imposed an absolute limit of six weeks for a delay in executing an order. HHJ Hollis allowed the appeal and gave leave to re-issue the warrant.

Ms Ngesa sought permission to appeal out-of-time, contending that HHJ Hollis ought to have applied article 8 of his own motion and ought to have adjourned to get a fuller picture of the facts. The application was refused. Rimer LJ held that Deputy District Judge Starke had had, in the absence of any defence, no alternative but to grant possession. Once the possession order had been made, the powers of the court were circumscribed by HA 1980 s89. The decision in *Hounslow LBC v Powell* [2011] UKSC 8; [2011] 2 WLR 287, in which the Supreme Court had decided that section 89 was not incompatible with article 8, spelt the end of Ms Ngesa's argument. HHJ Hollis had been right to lift the stay on the warrant.

Suitable accommodation

■ Abed v City of Westminster

[2011] EWCA Civ 1406, 9 November 2011

The council owed Ms Abed, who was homeless, the main housing duty in HA 1996 s193. In performance of that duty it offered her temporary accommodation in Ilford. She refused the offer on the basis that the accommodation was not suitable because she needed to remain in Westminster as daily carer to her disabled nephew who lived in the council's area. The council upheld the decision on review but compromised an appeal against that decision by undertaking a second review. The reviewing officer decided that the offer had been suitable and that the duty had ended: HA 1996 s193(5).

HHJ Baucher dismissed an appeal from that decision. On a second appeal, Ms Abed argued that the council had followed an unlawful process in offering the accommodation without having first made an assessment of its suitability for her, relying on *R v Newham LBC ex p Ojuri (No 3)* (1999) 31 HLR 452, and that this flaw was incapable of remedy on review.

The Court of Appeal dismissed the appeal. *Ojuri* had concerned a decision not capable of review under HA 1996 s202. Where, as here, a review process was available, and constituted a complete reconsideration of the facts, it was not fatal to the council's decision-making to show that suitability had not been considered before a section 193(5) offer was made. Just as in public law proceedings, once an initial decision had been wholly reconsidered on its merits, any public law challenge to the initial decision fell away. Any criticism had to be directed to the review decision. There had been no error in the review decision in this case.

■ Ikpowonba v Haringey LBC

[2011] EWCA Civ 1302,
6 October 2011

Ms Ikpowonba was homeless. The council owed her the main housing duty in HA 1996 s193. It provided her with temporary accommodation and registered her application for social housing. Under the council's choice-based lettings system, an auto-bidding mechanism caused her to be offered a property. She said that the property was neither suitable nor reasonable for her to accept. Both matters were decided against her on review. On appeal, she took the point that HA 1996 s193(7F) requires the issues of suitability and reasonableness to be considered to the satisfaction of the council before an offer is made.

HHJ Marshall QC found as a fact that there had been 'human intervention and consideration' between the auto-bid and the offer that was sufficient to meet the statutory requirement (para 4). Permission for a further appeal was refused by Arden LJ. There was no real prospect of upsetting the judge's finding that the relevant matters had been given proper consideration at the time of the offer.

Review procedure

■ Butt v Hounslow LBC

[2011] EWCA Civ 1327,
5 August 2011

A decision that Mr Butt had become homeless intentionally (HA 1996 s190) was taken by council officer S. When a review request was received, officer S wrote letters suggesting that he was conducting the review. He made the procedural arrangements for the review and granted an extension of time.

The review decision notification was signed by officer F, a senior officer who had not previously been involved in the application. Mr Butt complained that there had been an irregularity and that in reality officer S had taken both decisions.

HHJ Faber allowed officer F to give evidence in which he explained that he had made the review decision. On that basis an appeal against the review was dismissed.

Mr Butt sought permission to bring a second appeal, complaining that the judge ought not to have allowed oral evidence on a homelessness appeal. Refusing permission, Lord Neuberger MR said that once the question of who took the review decision was in issue the judge was entitled to take oral evidence and reach a conclusion on it.

Appeals

■ Bubb v Wandsworth LBC

[2011] EWCA Civ 1285,
9 November 2011

Ms Bubb was homeless. The council owed her the main housing duty in HA 1996 s193. It offered her accommodation under HA 1996 Part 6 which she refused on the basis that it was not suitable. The council could only treat the refusal as ending its duty if Ms Bubb had received a notice containing the information required by section 193(7) which provides: 'The local housing authority shall … cease to be subject to the duty under this section if the applicant, having been informed of the possible consequence of refusal and of his right to request a review of the suitability of the accommodation, refuses a final offer of accommodation under Part 6.'

Ms Bubb said that she had not received the notice but a reviewing officer decided that she had received it. On appeal, Ms Bubb argued that the judge should decide for himself the question of whether the notice had been received as it was a precedent fact to the determination of the statutory duty.

HHJ Ellis dismissed the appeal. The Court of Appeal dismissed a second appeal. It held that the judge only had to decide whether or not the conclusion of the reviewing officer had been wrong in law. He exercised a supervisory jurisdiction and was not entitled to reconsider the factual issues for himself. There had been no error of law in the review decision in this case and no error by the judge in his consideration of it.

1 Available at: www.communities.gov.uk/documents/housing/pdf/2017529.pdf.
2 Available at: www.tenantservicesauthority.org/server/show/ConWebDoc.21636.
3 Available at: www.legislation.gov.uk/wsi/2011/2475/pdfs/wsi_20112475_mi.pdf.
4 Available at: www.communities.gov.uk/news/housing/2032823.
5 Available at: www.communities.gov.uk/news/corporate/2028339.
6 Available at: www.audit-commission.gov.uk/SiteCollectionDocuments/AuditCommissionReports/NationalStudies/20111110-ppp-2011.pdf.
7 Available at: www.justice.gov.uk/downloads/publications/statistics-and-data/mojstats/mortgage-landlord-possession-stats-q3-11.pdf.
8 See: www.housingrights.org.uk/about-us/news/199-new-resource-for-homeowners-facing-court-action.html.
9 Available at: www.justice.gov.uk/downloads/consultations/appeal-high-court-fees-consultation.pdf.
10 Available at: www.legislation.gov.uk/nisr/2011/339/pdfs/nisr_20110339_en.pdf.
11 Available at: www.communities.gov.uk/housing/housingresearch/housingstatistics/housingstaticsby/homelessnessstatistics/livetables/.
12 See: www.cplan.cf.ac.uk/homelessness/have-your-say.
13 Available at: www.mungos.org/documents/7269.pdf.
14 Available at: www.homeoffice.gov.uk/publications/crime/ ending-gang-violence/gang-violence-detailreport?view=Binary.
15 Available at: http://wales.gov.uk/docs/desh/consultation/111118housingantisocialen.pdf.
16 Available at: www.communities.gov.uk/documents/statistics/pdf/2039199.pdf.
17 Available at: www.cih.org/resources/PDF/NI%20policy%20docs/Making%20the%20most%20of%20NI%20private%20rented%20sector%20to%20meet%20need.pdf.
18 Available at: www.icaew.com/~/media/Files/Technical/technical-releases/legal-and-regulatory/tech-03-11-residential-service-charge-accounts.ashx.
19 Carl Jackson, Calderdale Citizens Advice Bureau.
20 Lindsay Johnson, barrister and Gemma Marrs, solicitor, Alan Edwards & Co, London.

Nic Madge is a circuit judge. Jan Luba QC is a barrister at Garden Court Chambers, London. He is also a recorder. The authors are grateful to the colleagues at notes 19 and 20 for transcripts or notes of judgments.

The Localism Act 2011: allocation of social housing accommodation

The Localism Act (LA) 2011 received royal assent on 15 November 2011.[1] LA Part 7 will alter legislation governing the allocation of social housing, homelessness, security of tenure in social rented housing, housing finance, housing mobility, the regulation of social housing and many other housing provisions. In the second in a series of five articles exploring the content of LA Part 7, Tim Baldwin and Jan Luba QC consider the allocation of social housing accommodation.[2]

Introduction

When brought into force, LA Part 7 ss145–147 will amend the law on the allocation of social housing that is contained presently in Housing Act (HA) 1996 Part 6. Unlike the changes that the LA makes to HA 1996 Part 7 (homelessness), which were outlined in the first article in this series, the amendments to the law on the allocation of social housing described in this article are limited to England and do not apply to Wales. The LA deals with this division of HA 1996 Part 6, into separate elements for Wales and England, by retaining the existing provisions of this Part and applying them to Wales only, and then the LA inserts wholly new sections or subsections into HA 1996 Part 6 to deal separately with housing allocation in England. Self-evidently, this exercise renders HA 1996 Part 6 into a form that is unfamiliar and more difficult for any adviser to work with.

The changes introduced by LA Part 7 are designed to achieve two quite separate policy objectives in England, ie:

- to give local housing authorities the power to determine for themselves what classes of persons are – or are not – persons qualifying to be allocated social housing in their areas; and
- to take social housing tenants who are seeking non-priority transfers out of the statutory housing allocation arrangements.

These policy changes to allocation of social housing in England were first proposed in the consultation paper, *Local decisions: a fairer future for social housing. Consultation* (Department for Communities and Local Government (DCLG), November 2010).[3] Following responses to the consultation, the UK coalition government decided to legislate to give effect to its proposals: *Local decisions: next steps towards a fairer future for social housing* (DCLG, February 2011).[4] Projections of their likely effect are set out in published impact assessments.[5]

The sections of the LA that give effect to these policy changes (sections 145–147) are not yet in force. They will be brought into force later in 2012, on a day to be appointed in a commencement order made by the secretary of state (LA s240). Presumably, this order will explain how, if at all, the new provisions will affect applicants already subject to housing allocation schemes at the commencement date.

Nothing in LA Part 7 deals with direct lettings made by housing associations to new or existing social housing tenants (as distinct from nominations made to housing associations by local authorities). Such direct lettings will be governed by the housing association's own policies framed to fit with the new regulatory regime for social housing described later in this article.

Qualifying for an allocation

The recent history

Since April 1997, each local housing authority has been required by HA 1996 Part 6 to have a published statutory housing allocation scheme and to allocate social housing in keeping with that scheme. For the 16 years that these requirements have been in place, there has been debate over the extent to which controls might be properly imposed by local housing authorities to limit who should be eligible, or qualified, to apply for social housing through such allocation schemes.

One consistent theme has been that access should be restricted so that 'persons from abroad' (as defined by the legislation) should not be eligible. The new provisions of the LA dealing with such persons, inserted into HA 1996 Part 6 as s160ZA(1)–(5), do nothing to disturb that approach. The more contentious issue has been the extent to which it should be possible for those who have not come from abroad to be designated as eligible for, or be excluded from, local housing authorities' allocation schemes.

From 1997 to 2003, a local housing authority could exclude from its housing register those classes of applicant it chose to designate as non-qualifying persons (HA 1996 s161(4)), repealed by Homelessness Act 2002 Sch 2. This was a power to exclude members of a designated class and was not a power to specify the only classes who might be treated as qualifying.

Not all local housing authorities chose to use this power, and some used suspension of applicants from the housing register as a controversial alternative. However, where the power was used, it operated by excluding classes of applicants such as those in rent arrears (or owing other debts to the local housing authority) or those evicted earlier because of anti-social behaviour. There is considerable evidence that some local housing authorities adopted numerous classes of excluded applicants, including some of very dubious propriety.[6] There were also concerns about whether decisions about membership of the excluded classes were made fairly and lawfully.

With the repeal, in January 2003, of HA 1996 s162 and the abolition of the need for local housing authorities to keep housing registers, it became necessary for parliament to provide local housing authorities with an alternative mechanism to control or limit access to allocation schemes. The Homelessness Act removed the power of local housing authorities to exclude 'classes of persons' by the repeal of HA 1996 s161(4). This left local housing authorities with only a limited power to exclude individual applicants in circumstances falling within a narrowly drawn set of statutory provisions.

As a result, from 2003 to the present, a local housing authority in England and Wales has only had the ability to treat an applicant as ineligible for allocation as a result of his/her unacceptable behaviour or the behaviour of a member of his/her household (HA 1996 s160A). The current wording of HA 1996 s160A(7)–(8) prevents blanket exclusions and requires the local housing authority to assess the conduct of each individual applicant on a case-by-case basis. The local housing authority has to apply a two-stage test, ie:

- does the applicant meet both the two tight statutory conditions for disqualification in HA 1996 s160A(7); and, if so,
- should the local housing authority exercise its discretion against the applicant. The two statutory conditions designedly set a 'high test'.[7]

Few applicants have been wholly excluded

by local housing authorities in England from their allocation schemes in the exercise of the current statutory power. Several cases in which the conditions for exclusion have been treated as fulfilled have led to applications for judicial review. Local authorities have often preferred to permit access to their allocation scheme to all applicants, but then use other powers to remove the reasonable preferences in allocation which certain applicants would otherwise have enjoyed (HA 1996 s167(2C)).

The practical effect has been to create virtually open-access waiting lists of people who are eligible for, and seeking allocation of, social housing under local housing authorities' allocation schemes. In England, there were over 1.8 million applicants on local authority waiting lists on 1 April 2011.[8]

The policy change made by the Localism Act 2011

The LA amends HA 1996 Part 6 in England so as:

- to restore to local housing authorities the power that they enjoyed between 1997 and 2003, ie, to exclude by class, as described above; and
- to add a new power for such authorities positively to prescribe, by class, the only applicants entitled to be allocated social housing under their allocation schemes (LA s146, inserting HA 1996 s160ZA).

The current provisions enabling local housing authorities to decide that particular applicants are ineligible because of their past behaviour or to remove their reasonable preferences for the same reason are repealed. Instead, qualification for, or disqualification from, admission to a local housing authority's housing waiting list/allocation scheme may be regulated by the authority exercising a power to identify 'classes' of persons who are and/or are not qualifying persons for allocation of housing (HA 1996 s160ZA(7)). The only statutory limit on the exercise of these powers by the local housing authority is that they cannot be used to treat as qualifying persons those who are rendered ineligible by their immigration status (HA 1996 ss160ZA(2) and (4)).

The key consequence of this change is that either applicants will be in a class capable of joining the particular local housing allocation scheme or they will not, depending on the classes of person identified by the particular local housing authority. Even if a local authority chooses not to use the new power to designate classes who can apply, it may use the new power to identify particular classes who cannot apply.

The policy intention is to provide local housing authorities with the power to decide locally, based on local circumstances, which classes of applicants can or cannot access social housing in their area. There may be considerable variation between different local authority schemes about which classes are qualified or disqualified.

The differences in qualifying classes for allocation schemes between even neighbouring local housing authorities in England will likely create a patchwork of qualifying criteria. Advisers will need to make themselves familiar with the different approaches taken by the various local housing authorities with which they deal.

The scope for the adoption of restrictive qualifying classes or designation of broad non-qualifying classes is obvious. There is the clear potential for authorities effectively to exclude even those applicants who, if they were permitted to join the allocation scheme, would be entitled to a statutory 'reasonable preference'. As a potential restraint on any abuse of these new powers, the secretary of state has retained regulation-making powers:

- to prescribe classes of persons who are or are not to be treated as qualifying; and
- to prescribe criteria which cannot be used by local authorities to decide which classes of persons are not qualifying persons (HA 1996 s160ZA(8)).

A critical policy question will arise for the secretary of state relating to whether, initially, he will permit a free-for-all with total flexibility for local housing authorities in deciding what classes of applicant do or do not qualify, or whether he will exercise his power to make restraining regulations before the new powers take effect. In the Localism Bill's public bill committee stage, the minister Andrew Stunell said that: 'it is still appropriate for the secretary of state to have a backstop power to ensure that local authorities' allocation schemes do not result in a completely unreasonable exercise' (*Hansard* HC Debates col 763, 3 March 2011).[9]

The UK coalition government does not yet know whether or how local authorities might respond to the opportunity to change from 'open' to 'closed' waiting lists by developing their own classes of qualifying and non-qualifying applicants. *Localism Bill: a fairer future for social housing. Impact assessment*, states:

> *It is not possible to predict the way in which local authorities will respond to these new flexibilities, [for example,] in terms of what sort of selective criteria they might adopt. There could be significant local variation. We know, though, that many authorities are keen to give some greater weight to residency criteria. It is also conceivable that a number of authorities may decide to continue to operate open waiting lists, for instance, in areas where it might be thought necessary to stimulate demand for social housing* (page 19).[10]

The only safe predictions are that:

- there is likely to be significant variation between local housing authorities; and
- some local housing authorities may still operate a wholly 'open' allocation scheme.

Procedural requirements

All local housing authorities in England are likely to need to amend or recast their allocation schemes to reflect their policy choices about the exercise of these new powers. Identifying classes who do qualify and/or do not qualify will be highly likely to amount to a 'major change of policy' to any current allocation scheme. Such a change triggers an obligation to consult housing associations and other social landlords in the authority's area, whether the process of changing the current scheme is initiated before or after the LA's provisions are actually brought into force (HA 1996 s167(7) and new section 166A(13)). The present statutory guidance suggests that the process of developing new or amended allocations policies should go beyond this minimum statutory requirement for consultation with local housing associations into 'engaging with and involving local communities' more broadly (*Fair and flexible: statutory guidance on social housing allocations for local authorities in England* paras 39–46 (DCLG, December 2009)).[11]

Drafting the definitions of the new classes who qualify or do not qualify for social housing allocation will require careful consideration. The objective will be to produce terminology which is clear, fair and transparent (so that applicants can see readily precisely what classes the local housing authority has adopted) and also be applicable with certainty by local authority officers and staff. Two specific points will, for practical reasons, need to be addressed, ie:

- should the description of the class have a built-in override enabling a designated (senior) officer to waive the requirements in particular or exceptional cases; and/or
- should the description of the class apply to all allocations or be limited by reference to just part of the stock becoming available for allocation (for example, by limiting the non-qualifying class so that members of it can be allocated less desirable or hard-to-let stock)?

Obviously, in taking policy decisions about the parameters of qualifying and non-qualifying classes, local housing authorities will need to take account of their general equality duties under the Equality Act 2010 and the importance of avoiding provisions which may

be directly or indirectly discriminatory. Each authority must also take account of relevant content of the three specific sets of materials identified in HA 1996 s166A(12), ie:

- its current homelessness strategy under Homelessness Act s1;
- its current tenancy strategy under LA s150; and
- in the case of an authority that is a London borough council, the London housing strategy.

Once the policy decisions on the new classes have been taken, the consultation has been completed, the final wording has been adopted and the new allocation scheme has been published, it will fall to council officers to apply the new provisions to applicants for social housing allocation. If a local housing authority in England decides that an applicant is not a qualifying person for housing in its area by reference to new classes, it must notify the applicant of that decision in writing and the grounds for it (HA 1996 s160ZA(9) and (10)). This decision will carry the familiar right to a review by the local housing authority, and this right must be set out in the allocation scheme itself. The scheme must also provide for the applicant to be informed of the review decision and of the grounds for it (HA 1996 s166A(9)(c)).

There is no right of appeal to any independent court or tribunal. As now, any legal challenge to the review decision will need to be made by judicial review. Alternatively, the matter could be the subject of a complaint under the local authority's complaints procedure and, ultimately, a referral to the ombudsman.

It is to be hoped that there will be no return to the practices, adopted in some areas from 1997 to 2003, of deflecting genuine applicants to local authorities at their first point of contact by telling them (in person or over the telephone) that they do not meet the local qualifying conditions or they fall within a class which does not qualify and, therefore, should not apply.

It remains open to an applicant, who has been the subject of a decision that s/he does not qualify for social housing allocation, to make a fresh application for social housing to the same local housing authority if the applicant considers that s/he now qualifies for HA 1996 s160ZA(11)). The most obvious example will be where the initial application was made at the time when the applicant was unemployed and the local qualifying class was 'persons in employment'. The applicant may reapply as soon as s/he obtains employment.

Direct lettings by housing associations

Since an 'allocation' of social housing accommodation includes a local authority nomination of a tenant to a housing association (HA 1996 s159(2)(c)), the adoption of new qualifying and non-qualifying classes by particular local authorities will directly affect allocation of housing association properties under nomination arrangements with those authorities. If, for example, the qualifying class adopted locally for allocations is 'only applicants born in this district', nominations by that authority to local housing associations will only be made from among those within that class.

Many housing associations have retained arrangements for the direct letting of their available stock, under their own rules, for applicants who have not been nominated by local authorities. Of those associations, most already have rules excluding particular classes of applicant. These arrangements are not governed by HA 1996 Part 6 or by LA Part 7. Relatively tightly drawn guidance about exclusions from direct let schemes, issued by the Housing Corporation, was withdrawn by the social housing regulator in April 2010. The current regulatory standard issued by the Tenant Services Authority simply reads: 'Registered providers shall clearly set out, and be able to give reasons for, the criteria they use for excluding actual and potential tenants from consideration for allocations, mobility or mutual exchange schemes.'[12] Presently, the terms in which this provision should be reflected in guidance post-April 2012 is a matter open for consultation.[13]

Non-priority tenant transfers

The recent history

Under HA 1996 Part 6 as first enacted, the new allocation scheme requirements did not apply to tenants of social housing seeking transfers (HA 1996 s159(5)). Applications from existing tenants could be dealt with by landlords on separate transfer lists, maintained as they saw fit. However, in 2003 the definition of 'allocation' was extended by Homelessness Act s13 to include all transfers except those initiated by the landlord rather than the tenant (usually called 'management transfers') (HA 1996 s159(5), as revised). When making an allocation by way of a transfer on a tenant's application, a local housing authority must now comply both with the provisions of HA 1996 Part 6 and its own local allocation scheme.

The 2003 amendment put new applicants and current tenants broadly on a level playing field, with certain specified categories from each group being entitled to a 'reasonable preference' in the allocation scheme taken as a whole (HA 1996 s167(2)). However, the requirement for an overall reasonable preference was not infringed by an allocation scheme which made provision for a relatively small percentage of the available stock to be offered to non-priority transfer applicants (*R (Ahmad) v Newham LBC* [2009] UKHL 14).

The policy change made by the Localism Act 2011

Two perceptions have developed, ie:

- mobility among social housing tenants would be stimulated if existing tenants could more easily move around the sector; and
- such mobility is inhibited by the restraints contained in some allocation schemes, particularly those schemes giving applicants in greatest need the first call on any vacancies.

To address these perceptions, the LA amends once again the definition of 'allocation': this time to exclude non-priority transfer applicants from allocation schemes. LA s145 introduces two new subsections into HA 1996 s159 (allocation of housing accommodation), ie: subsections (4A) and (4B), which will apply in England. The effect of HA 1996 s159(4A) is that a letting to a person who is already a social housing tenant holding a secure or introductory tenancy with a local authority, or an assured tenancy with another social landlord, will not count as an allocation of social housing, and thus can be dealt with outside the allocation scheme. On its own, this provision would have turned back the clock to pre-2003 and enabled local housing authorities to revert to having quite separate transfer lists. Curiously, however, in addition the LA inserts HA 1996 s159(4B), which maintains the existing allocation scheme requirements for those tenant-initiated transfer applications where the transferring tenant falls into a 'reasonable preference' category. Those categories retain their familiar form in both England and Wales (HA 1996 s166A(3) for England, HA 1996 s167(2) for Wales).

It is not entirely clear how local housing authorities in England are to work out which tenant-initiated transfer applicants are in the reasonable preference categories, and thus covered by the existing allocation scheme, and which are not. Nor is there any guidance in the statute relating to how local housing authorities should set up and administer the lists of those falling into the category of non-priority tenant transfers.

Take the example of a transfer application made by a social housing tenant who has a satisfactory home, but presently is under-occupying and seeks a move to something smaller. The current statutory guidance suggests that under-occupation might be a criterion for admission to the reasonable preference category covering those in 'unsatisfactory housing conditions'.[14] If under-occupation is so treated by a local authority in its allocation scheme, the transfer

applicant will be embraced by that scheme. Only if the authority has declined to adopt the guidance in this respect will the transfer applicant fall outside the allocation scheme and into the new no-priority transfer class. Once the transfer applicant is in that latter class, it will be for the local housing authority to decide what prioritisation arrangements to apply. For example, will an offer be made first to the transfer applicant who has waited longest or to the individual under-occupying the largest accommodation?

Perhaps the even more critical question for the local housing authority will be whether to expose a newly available letting to applicants on the allocation scheme or, instead, offer it first to those on the non-priority transfer list.

The net effects of these amendments relating to transfers are not entirely clear. *Localism Bill: a fairer future for social housing. Impact assessment* states:

Taking transfer lettings by households without reasonable preference out of the allocations system is likely to raise mobility within the social sector, but by how much is highly uncertain. If the number of lettings to existing tenants returned to 2003 levels – equivalent to a rise in the share of lettings to existing tenants of 5 percentage points, to 35 per cent of total lettings – then this would deliver an additional 29,000 moves per annum. This figure is merely illustrative however; there is little evidence of the likely impact of taking existing tenants out of the allocation framework (pages 21–22).[15]

Conclusion

It is unclear what practical effect, if any, the new legislative changes will have and how the amendments to allocation schemes in England will be implemented and administered effectively.

Obviously, every local housing authority in England will now want to consider – in consultation – what changes, if any, to make to its local arrangements for allocation of social housing. The government has made some cost projections in the impact assessment:

All 326 local authorities are expected to incur a one-off cost from familiarising themselves with the new arrangements, at a cost of between £290,000 in the advantageous scenario and £1.2m in the disadvantageous scenario (central case £770,000).

Those authorities that decide to adapt their policies and procedures will also face costs; these could amount to as little as £400,000 or as much as £3.7m, depending on how many local authorities adapt their waiting list policies and how much staff time is involved (page 25).

The projection is that usually these costs will be offset, for those councils choosing to exercise their discretion to limit waiting lists, by the saved costs of receiving and processing current no-hope applications. Previous practice has been to issue new statutory guidance, under HA 1996 s169, along with any changes made to HA 1996 Part 6. This has led to a situation in which currently there are four separate sets of such guidance in England, reflecting earlier changes in law and policy. It is not yet clear whether the UK coalition government will seek to introduce a further code of guidance or consolidate all present guidance into one code, which seems to be the objective of the Welsh Government. On the other hand, it seems counterintuitive to the shift to local independence, which is the thrust of the policy of the LA, to introduce additional detailed statutory guidance from central government.

For advisers, there will obviously be an important role in offering contributions to local consultation exercises and helping local prospective applicants for social housing to come to terms with the changes. One of the additional difficulties which may face applicants is that these reforms are to be followed swiftly by a reduction in the scope of, and eligibility for, legal aid. The challenge for advisers will be to find creative means of testing and challenging the implementation and administration of new local policies on behalf of clients who appear to be prospectively or actually adversely affected by them.

1 The full text of the LA and explanatory notes are available at: www.legislation.gov.uk/ukpga/2011/20/contents/enacted.
2 For the first article in this series, see: Jan Luba QC and Liz Davis, 'Housing and the Localism Act 2011: homelessness', December 2011, *Legal Action* 21.
3 Available at: www.communities.gov.uk/documents/housing/pdf/1775577.pdf.
4 Available at: www.communities.gov.uk/documents/housing/pdf/1853054.pdf.
5 *Localism Bill: summary impact assessment*, DCLG, January 2011, available at: www.communities.gov.uk/documents/localgovernment/pdf/1829702.pdf; and *Localism Bill: a fairer future for social housing. Impact assessment*, DCLG, January 2011, pages 12–27, available at: www.communities.gov.uk/documents/localgovernment/pdf/1829768.pdf.
6 See *Exclusions from the housing register*, Northern Housing Consortium, May 2000; *Housing allocations and homelessness: a special report by the Local Government Ombudsman for Wales*, February 2006, available at: www.ombudsman-wales.org.uk/en/~/media/Files/Documents_en/Housing_Allocations_and_Homelessness.ashx; *Exclusions in Tyne and Wear: an investigation by Shelter's NEHAC into why applicants are excluded from social rented housing*, Shelter, April 2006, available at: http://england.shelter.org.uk/__data/assets/pdf_file/0005/39506/20824.pdf; *Am I on the list? Exclusion from and reinclusion on social housing waiting lists*, Chartered Institute of Housing Cymru, May 2008; and see in general Jan Luba QC and Liz Davies, *Housing allocations and homelessness: law and practice*, 2nd edition, Jordans, 2010, paras 1.60–1.64.
7 See *Joint Committee on Human Rights – first report: Homelessness Bill*, Appendix: Memorandum by the Department for Transport, Local Government and the Regions, October 2001, para 6.3, available at: www.publications.parliament.uk/pa/jt200102/jtselect/jtrights/30/3005.htm. See also, Jan Luba QC and Liz Davies, *Housing allocations and homelessness: law and practice*, 2nd edition, Jordans, 2010, paras 3.152–3.189 regarding how this exclusion is applied.
8 *Local authority housing statistics, England, 2010–11. Housing strategy statistical appendix (HSSA) & business plan statistical appendix (BPSA)*, November 2011, available at: www.communities.gov.uk/documents/statistics/pdf/2039199.pdf.
9 See: www.publications.parliament.uk/pa/cm201011/cmpublic/localism/110303/am/110303s01.htm.
10 See note 5.
11 Available at: www.communities.gov.uk/documents/housing/pdf/1403131.pdf.
12 *The regulatory framework for social housing in England from April 2010*, TSA, 2010, p26, available at: www.tenantservicesauthority.org/upload/pdf/Regulatory_framework_from_2010.pdf.
13 *A revised regulatory framework for social housing in England from April 2012: a statutory consultation*, TSA, 2011, available at: www.tenantservicesauthority.org/upload/pdf/statutory_consultation_20111121122417.pdf. The consultation closes on 10 February 2012.
14 See *Allocation of accommodation: code of guidance for local housing authorities* Annex 3, Office of the Deputy Prime Minister, November 2002, available at: www.communities.gov.uk/documents/housing/pdf/157737.pdf.
15 See note 5.


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Community care law update – Part 1

Karen Ashton and **Simon Garlick** consider policy and legislation relating to all aspects of adult social care. Part 2 of this article, covering recent developments in case-law, will be published in February 2012 *Legal Action*.

Introduction

Recent developments in both the social and health care fields reflect the coalition government's agenda of encouraging greater separation between provision of services and both central and local government control. New regulations and guidance on the provision of NHS care to those not ordinarily resident in the UK have been issued. In the courts there continue to be challenges to decisions of local authorities to raise their eligibility criteria for the provision of adult social care. Additionally, there have been important decisions on ordinary residence for the purposes of Mental Health Act (MHA) 1983 s117 aftercare, the freezing of fees paid by local authorities to care homes, and the test for 'care and attention' for the purposes of National Assistance Act (NAA) 1948 s21.

The reform of adult social care

Following the final report of the Law Commission on law reform in adult social care, the government has said that it will produce a white paper in spring 2012, at which point it is also committed to publishing a 'progress report' on funding reform. On 15 September 2011 the government launched an 11-week nationwide engagement exercise, *Caring for our future: shared ambitions for care and support*, which was described as a discussion with service users, carers, local authorities and care providers to identify the 'priorities for reform' in relation both to the funding proposals of the Dilnot Commission on Funding of Care and Support and the 'care and support system'.[1] The government identified six priority areas for discussion (although only five were set out on the website), and invited a 'key leader of the care and support community' to lead each discussion, the engagement exercise being web-based, incorporating blogs and web-chats. The five areas identified on the website were:

- improving quality and developing the workforce;
- increasing personalisation and choice;
- better integration of services around needs;
- supporting prevention and early intervention; and
- creating a more diverse and responsive care market.

It is unclear to what extent there was in fact 'engagement' in the process: roughly two-thirds of the way through the process the most popular topic – increased personalisation and choice – had attracted only 34 comments, and three of the five priority areas identified had fewer than ten.

Health and Social Care Bill

The Department of Health (DoH) has published two documents responding to critiques of the proposed changes to the functions of the Secretary of State for Health in the Health and Social Care Bill.

The first document is a note issued in August 2011, *Response to stakeholder questions on the future role and functions of the Secretary of State for Health*, in which the DoH maintains that there has been no dilution of the secretary of state's current duties as set out in the National Health Service Act (NHSA) 2006.[2] The DoH notes that the duty to promote a comprehensive health service remains, and that the duty in section 1(2) of the NHSA to 'provide or secure the provision of services in accordance with this Act', which is absent from the bill, is

> *… not fundamental to the comprehensive health service. It is simply a means of achieving the overarching aim of promoting a comprehensive health service; not the test of whether the aim is being achieved. This duty is not and never has been a stand-alone duty to provide or secure the provision of services* (para 4).

The DoH says that this change does not alter the responsibility or accountability of the secretary of state but merely reflects the practical reality that the DoH no longer 'provides' services and will not commission them (even through the present delegation arrangements to strategic health trusts and primary care trusts) once that responsibility has passed to the new NHS Commissioning Board and to clinical commissioning groups. The role of the secretary of state, explains the note, will be to 'set objectives for the NHS and to ensure that functions conferred on bodies lower down the system are being carried out effectively so as to meet those objectives' (para 7). The new section 1(2) duty is 'to exercise the functions … so as to secure that services are provided', which it is explained will oblige the secretary of state to take action 'to secure that provision of health services continues to take place if commissioners fail to do so' (para 8). The secretary of state will also

> *… remain legally liable for the exercise of his functions. This means that he could be the subject of a claim for judicial review by an affected member of the public if he fails to carry out his statutory duty under the legislation* (para 9).

The second document was published by the DoH on 6 September 2011, entitled *Response to opinion of Stephen Cragg, published by 38 Degrees, on duty of the secretary of state to provide a national health service*.[3] As the title states, the document is a response to the legal opinion of Stephen Cragg (produced on behalf of campaign organisation 38 Degrees) which criticised the changes that the bill would bring to the current arrangements for the legal responsibility of the secretary of state for the provision of health services.[4]

The department's second document covers much of the same ground as its August note. It reiterates the explanation that the changes to the secretary of state's current duty to provide, and to make directions, reflect its belief that it 'should not be the responsibility of ministers to provide or commission services directly' (para 4). The current duty in section 3 of the NHSA is on the secretary of state to 'provide … to such extent as he considers necessary to meet all reasonable requirements' a listed range of services. Clause 10 of the bill amends the Act by transferring the duty to clinical commissioning groups to 'arrange for the provision of [listed services] to such extent as it considers necessary to meet the reasonable requirements of the persons for whom it has responsibility'. The DoH response rejects the claim in the opinion that the secretary of state will no longer have sufficient control or influence over the

provision of services, explaining that those charged with the duty to commission services must in the government's view be left to 'use their professional expertise to act in the best interests of patients, free from political micromanagement' (para 6). The response also rejects criticisms that the reforms will lead to a lack of appropriate intervention on the part of the secretary of state, greater fragmentation of services and more potential for 'postcode lottery' provision problems.

Contracting Out (Local Authorities Social Services Functions) (England) Order 2011 SI No 1568

This order, which came into force on 1 August 2011, provides the statutory basis to enable a local authority in England to authorise another person or body to exercise social services functions in the context of an 'adult social work practice pilot' or a 'right to control pilot'.

In November 2010, the secretary of state announced plans to pilot 'social work practices' (SWPs) for adult care, building on what was regarded as a successful pilot of independent social work practices for children.[5] The invitation to local authorities to express interest explained:

The SWP programme supports the government's wider agenda of building the 'Big Society'. We want to devolve responsibility away from government and bring people closer to services as a result.

SWPs will be organisations that are led by social workers but are independent of the local authority (LA), and will provide social work services for adults. They should give more discretion to social work professionals to work closely with the people who use services. They will discharge statutory duties and responsibilities of the local authority in relation to these people.

Article 3 of the order permits local authorities included in the pilot to authorise third parties to exercise their social services functions, subject to conditions.[6] The functions are listed in a Schedule to the order and include assessment duties under National Health Service and Community Care Act (NHSCCA) 1990 s47 and the Carers and Disabled Children Act 2000, most provisions empowering or obliging local authorities to offer residential or domiciliary services, and charging provisions. The conditions include that the exercise of functions must be for participation in an adult social work practice pilot scheme; that the delegated functions must be exercised, or supervised, by a registered social worker, or failing that 'a person who has the qualifications or competencies which the local authority considers to be requisite for the exercise of the function'; and that the functions are exercised in accordance with relevant directions and guidance.

Article 4 of the order allows local authorities involved with the separate right to control pilot scheme, which began in December 2010,[7] to delegate their assessment and service provision functions (in respect of adults only) under NHSCCA s47(1)–(3) 'in relation to review cases' to third parties authorised by the local authority, subject to similar conditions.

Comment: In discharging their community care obligations, local authorities can of course contract with third parties to provide services, however their ability lawfully to delegate responsibility for assessment, to make service provision decisions or charge for services is extremely limited under existing community care legislation. Local authorities do already authorise third parties to carry out aspects of assessments. Common examples are the use of mental health professionals who may be employed by a trust, or independent occupational therapy contractors. However, it has always been the clear duty of the local authority to retain overall control of the assessment and support planning processes. The order affirms the coalition government's commitment to the personalisation agenda. In its report on the reform of adult social care, the Law Commission recommended that local authorities should continue to retain statutory responsibility for assessment and care planning, but that the Code of Practice to a new Act should set out guidance about the parameters of third parties being authorised to produce care and support plans. Although this order does not affect local authority duties under the relevant community care legislation, the 'contracting out' of, in particular, the assessment process is likely to involve a diminution of the control and influence of local authorities over the assessment process (see above for a similar direction of travel in the NHS).

Charging for hospital care

Following consultation, the government has now introduced the new National Health Service (Charges to Overseas Visitors) Regulations 2011 ('the charging regulations') SI No 1556, which came into force on 1 August 2011. The regulations only apply to hospital services. Detailed guidance accompanies the regulations, which systematically considers each of the regulations and covers most of the key issues.[8]

The regulations only apply where someone is not ordinarily resident in the UK. However, even where someone is not ordinarily resident, s/he may be exempt from charges. One of the exemptions, rather confusingly, applies when an individual has lived in the UK for the 12 months immediately preceding his/her treatment, and has spent no more than 182 days of that time abroad (see reg 7(1)). The exemption is not suggesting that someone with this length of residence is ordinarily resident – it is a provision that applies to exempt an individual with this history of presence in the UK who is, nonetheless, not ordinarily resident.

Ordinary residence means, broadly, living in the UK on a lawful, voluntary and properly settled basis for the time being. Paragraphs 3.4–3.16 of the guidance deal with this issue. They remind the reader that ordinary residence 'can be of long or short duration' (para 3.6). It also points out that a person does not become ordinarily resident simply by having British nationality, holding a British passport, being registered with a GP or having an NHS number.

Regulation 6 sets out the services that are exempt from charges. These include not only non-hospital services, but also accident and emergency services, family planning, treatment for specified diseases on public health grounds (excluding HIV), treatment for sexually transmitted diseases (but again excluding HIV, except in respect of the initial diagnostic test and associated counselling), treatment given to those who are liable to be detained under the MHA 1983 and treatment ordered by a court.

Regulations 7–24 deal with those who are exempt from charges, and will need to be considered in detail in any individual case. Those exempt from charges include refugees, asylum-seekers and failed asylum-seekers supported by the UK Border Agency (UKBA) under sections 4 or 95 of the Immigration and Asylum Act 1999. However, the exemptions do not expressly include failed asylum-seekers who, by reason of health or disability needs, are supported under NAA s21 or MHA 1983 s117. Presumably, this is an unintended omission which, nonetheless, may cause difficulties. There is also a gap for asylum-seekers who wish to make a fresh claim, but have not yet done so, and are not in receipt of any form of statutory support. However, where someone is already receiving a course of free treatment on the basis that s/he is exempt, s/he cannot be charged for the remainder of that course of treatment even if his/her status changes to chargeable part-way through (see regulation 3).

Chapter 4 of the guidance deals with the question of when NHS treatment should not be withheld even where the individual is not exempt. This includes 'immediately necessary

treatment', which is defined as that which a patient needs:

- to save their life, or
- to prevent a condition from becoming immediately life-threatening, or
- promptly to prevent permanent serious damage from occurring (para 4.5).

The guidance goes on to say that 'all maternity services, including routine antenatal treatment, must be treated as being immediately necessary' (para 4.7).

However, it is important not to make the mistake of thinking that immediately necessary treatment is treatment that is exempt from charges. A bill may well be received. Chapter 6 of the guidance deals with when a debt should be pursued or written off. In broad summary, the guidance is that the invoice should be raised, and reasonable steps taken to recover the debt, but where those steps have been taken and been unsuccessful, or it would not be cost effective to pursue the debt, the NHS body may write it off.

The guidance also deals with 'urgent treatment' which is not immediately necessary but cannot wait until the person can be reasonably expected to return home. NHS bodies are 'strongly advised' to try and secure payment before the treatment is scheduled, but, if unsuccessful, the treatment should not be delayed or withheld for the purpose of securing payment (para 4.9).

Personal care framework

The DoH has published best practice guidance, *Working for personalised care: a framework for supporting personal assistants working in adult social care* (27 July 2011), written in the context of the government's continuing commitment to enable all those eligible for community care services, by 2013, to have the opportunity of receiving a personal budget.[9] The framework's aim is said to be 'to support future growth of the [personal assistants (PAs)] workforce and their employers' (section 1.1). It is couched in general terms of provision of support to both PAs and employers (specifically service users or carers), but canvasses the proposal for a voluntary register of social care workers to be set up. Research findings set out in the framework show that a large majority of PAs employed through direct payments work less than 24 hours per week; the average hourly wage is £7.60 (said to be higher than the average for care workers otherwise employed), with ten per cent earning more than £10 per hour and eight per cent less than £6 per hour. Fewer than 40 per cent of PAs had received formal contracts. The framework sets out aspirations for progress in a number of areas including increasing understanding of the role of PAs, enhancing learning and development among PAs, support with employment issues for employers and support with risk management.

Personal health budgets

The piloting of personal health budgets continues, with regular evaluations published on the DoH website.[10] The most recent, *The cost of implementing personal health budgets* (DoH, July 2011), looks at the costs of the project based on information provided for the first 12 months of implementation in 20 of the 64 pilot sites.[11] The average implementation cost was £93,280, but there was significant variation with a range between £35,000 and £173,750. There is no indication to date that there is any intention to deviate from the planned roll out of the policy after 2012, despite the current economic climate.

Autism

Fulfilling and rewarding lives: the strategy for adults with autism – evaluating progress (April 2011),[12] described as best practice guidance, represents the coalition government's review of the first autism strategy issued in March 2010.[13] While affirming its commitment to the aims of the strategy, the document aims to place the development of the strategy within its mainstream approach to the provision of social and health care which it says involves 'putting ownership and responsibility … in the hands of professionals on the front line' and avoiding 'centralised target-setting' (page 2). The guidance sets out seven long-term outcomes for adults with autism – including that they should have better health and social care (including benefiting from the personalisation agenda), be more economically active, and be managed more appropriately in the criminal justice system – and three 'key ambitions', which are that local authorities and their partners know how many adults with autism live in their area; that a clear and trusted diagnostic pathway is available locally; and that health and social care staff make reasonable adjustments to services to meet the needs of adults with autism. Local authorities and other bodies are not, however, 'required to measure their performance against these outcomes' (page 5). The guidance then sets out '[ten] steps to progress', including appointing a local autism lead, which mirror the recommendations of the autism strategy.

In September 2011, the National Institute for Health and Clinical Excellence (NICE) published *Autism: recognition, referral and diagnosis of children and young people on the autism spectrum* covering people up to and including 19 years old.[14]

Adult safeguarding

On 16 May 2011, the DoH published a *Statement of government policy on adult safeguarding*.[15] The statement was made five days after the publication of the Law Commission's report on law reform in adult social care which recommended that the current framework, which is largely based on statutory guidance, should be replaced by a comprehensive legislative scheme. The statement gives no indication of any intention to do so. The government will follow one of the Law Commission's recommendations to legislate to make Safeguarding Adults Boards statutory, but, otherwise, the statement is said to build on the *No secrets* statutory guidance which will remain in place until at least 2013.[16] The statement sets out what are called 'principles' to 'benchmark existing adult safeguarding arrangements'. These are: empowerment, protection, prevention, proportionality, partnership and accountability. The statement also gives examples of outcomes which may evidence the application of these principles.

The statement goes on to set out what might be termed the 'ideological' context of its approach:

> *The government wishes to empower individuals to take responsibility for their own lives. This includes enabling them to protect themselves from harm and abuse, with and without assistance from others.*
>
> *The government also wishes to empower communities to make decisions and their own arrangements to suit local needs and priorities. This includes ensuring that we protect adults at risk of significant harm from abuse.*

With this as the starting point, it is hardly surprising that the government has no intention of moving to a prescribed statutory scheme.

Care Quality Commission

The DoH issued a letter on 21 September 2011 to local authorities and health bodies following the department's review of services at Winterbourne View Hospital and in anticipation of the Care Quality Commission's (CQC's) review of learning disability services.[17] The department has set up a review to consider, in the light of the Winterbourne case, the policy and practice of providers, commissioners, regulators and the government. The CQC review is to include 150 unannounced visits to hospitals providing for patients with learning disabilities.

The CQC also published *Dignity and nutrition inspection programme* on 13 October 2011 – arising from 100 unannounced visits

to acute hospitals – into the standards of care that older people receive in hospital.[18] The CQC found that significant numbers of hospitals were failing to meet the standards relating to dignity ('respecting and involving people who use services' (page 6)) and nutrition.

1 See: http://caringforourfuture.dh.gov.uk/.
2 Available at: www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_129483.pdf.
3 Available at: www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_129881.pdf.
4 Available at: http://38degrees.3cdn.net/75856a0564e9244f2a_rum6i66sh.pdf.
5 See: www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_122092.pdf.
6 Birmingham, Lambeth, north-east Lincolnshire, Shropshire, Suffolk and Surrey.
7 Barnet, Epsom and Ewell, Essex, Leicester, Newham, Reigate and Banstead, Barnsley, Sheffield, Bury, Manchester, Oldham, Stockport and Trafford. The pilot operates under the Community Care Services: Disabled People's Choice and Control (Pilot Scheme) (England) Directions 2010.
8 *Guidance on implementing the overseas visitors hospital charging regulations*, Gateway Reference 16191, DoH, 27 June 2011, available at: www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_127393.
9 Gateway Reference 16363, available at: www.dh.gov.uk/prod_ consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_128734.pdf.
10 See: www.dh.gov.uk/en/Healthcare/Personalhealthbudgets/DH_117916.
11 Available at: www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_128278.
12 Available at: www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_125724.pdf.
13 *'Fulfilling and rewarding lives': the strategy for adults with autism in England*, Gateway Reference 13521, DoH, 3 March 2010. Available at: www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_113369.
14 Available at: http://guidance.nice.org.uk/CG128.
15 Gateway Reference 16072, available at: www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_126748.
16 *No secrets: guidance on developing and implementing multi-agency policies and procedures to protect vulnerable adults from abuse*, available at: www.dh.gov.uk/dr_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4074544.pdf.
17 Available at: www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_130187.pdf.
18 Available at: www.cqc.org.uk/sites/default/files/media/documents/20111007_dignity_and_nutrition_inspection_report_final_update.pdf.


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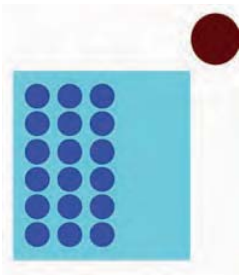
Using EU law to tackle anti-Roma discrimination: an update



■ *Centre on Housing Rights and Evictions (COHRE) v France* 63/2010, 28 June 2011.

'Using EU law to tackle anti-Roma discrimination', which was published in two parts in November and December 2011 *Legal Action* 21 and 33 respectively, considered how European law could be used to combat discrimination against Roma. Both articles discussed events in France in July 2010, when the French President, Nicolas Sarkozy, announced that the French government was going to close down 300 illegal sites, with specific attention given to those occupied by Roma. Over the following two months, 441 sites were cleared and around 1,000 people were returned to Bulgaria and Romania.

Complaint: COHRE alleged that the actions of the French government violated the rights protected by the revised European Social Charter (ESC) of the individuals who were evicted from the sites.

Decision: The European Committee of Social Rights found that the French government had failed to demonstrate that the forced evictions of Roma of Bulgarian and Romanian origin were carried out in conditions that respected their dignity. In fact, the evictions took place against a background of ethnic discrimination, involving the stigmatisation of Roma and the threat of expulsion from France. The committee ruled that the French government's decision to dismantle the camps amounted to a violation of article 31(2) (obligation to prevent and reduce homelessness) in conjunction with article E (non-discrimination) of the revised ESC.

The committee also found that there was a very close link between the evictions from the camps and the expulsions of Roma of Bulgarian and Romanian origin from France, and that the decision to return them was based on discriminatory provisions which directly targeted Roma individuals and their families. The French government had sought to justify its actions by invoking the 'voluntary' nature of the return, in which some Roma adults were given €300 to return (para 72). However, the committee rejected this argument. It found that consent to return was given against the backdrop of forced evictions, the real threat of expulsion from France and racial discrimination. The fact that some Roma adults were willing to accept €300 was held to demonstrate a 'situation of destitution or extreme uncertainty' (para 73). The absence of economic freedom posed a threat to the effective enjoyment of their political freedom to come and go as they pleased. Therefore, they could not be assumed to have waived their right to freedom of movement. The committee concluded that the actions of the French government amounted to a breach of article 19(8) (obligation that migrant workers and their families are not expelled unless they endanger national security or offend against public interest or morality) in conjunction with article E of the revised ESC.

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First steps towards abolition of UK right to reside test?

Pamela Fitzpatrick considers the recent action by the European Commission to curtail the UK right to reside test. See also November 2011 *Legal Action* 5.

Introduction

The European Commission has taken the first steps towards abolishing the UK right to reside test.[1] Having recently stated that the test indirectly discriminates against non-UK EEA nationals, and therefore contravenes EU law, the commission has requested that the UK stop its application (see 'UK rebuked over right to reside test', November 2011 *Legal Action* 5).

If the UK fails to accede to the request, the commission may commence proceedings in the European Court of Justice (ECJ). Should the ECJ agree with the commission's view, EEA nationals previously excluded from benefits under the test would become eligible. However, the process is likely to take some years and claimants who wait for the judgment before making a claim will find that they may fall foul of the UK anti-test case rules which can limit arrears of benefit to the date of the relevant judgment. The limit does not apply where a claim and appeal has already been lodged. It may therefore be advisable for claimants to lodge claims and protective appeals to protect their rights.

European Commission

The European Commission is a highly influential institution within the EU. It has responsibility for putting forward draft legislation and has the power to initiate an action itself where a member state is unwilling to fully comply with European law. In cases where gentle persuasion is not effective, the commission may take the matter before the ECJ. This process is referred to as infringement proceedings.

Before bringing an action, the commission must give the member state an opportunity to address its concerns. The request takes the form of a confidential 'reasoned opinion' under the EU infringement procedure.

Right to reside test

The right to reside test was introduced as a measure to prevent nationals from the new EU member states from gaining access to certain state benefits. The complexity of the test has led to problems from its inception. However, this complexity was exacerbated with the coming into force on 30 April 2006 of Directive 2004/38/EC.

Under UK social security law, certain benefits (child benefit (CB), child tax credit (CTC), state pension credit, income support, income-based jobseeker's allowance and income-related employment and support allowance) are only granted if the claimant has a 'right to reside'. UK nationals have the right to reside solely based on their UK citizenship. However, other EU nationals have to fulfil additional conditions in order to pass the right to reside test. In the commission's view, this means that the UK indirectly discriminates against nationals from other member states.

The nature of the discrimination

The discrimination constitutes an obstacle to the free movement and equality of treatment guaranteed by:

- article 21 of the Treaty on the Functioning of the European Union (TFEU); and
- article 4 of Regulation (EC) No 883/2004 (known as 'the co-ordination rules').

The commission considers that the EU habitual residence test is already a powerful tool for member states to ensure that social security benefits are only granted to those genuinely residing habitually within their territories. Consequently, the commission's view appears to be that the right to reside test is an unnecessary and discriminatory measure that should be abolished.

TFEU article 21

Article 21 provides all EU citizens with a right of residence in any member state. However, it is a qualified right subject to certain 'limitations and conditions'. There is now a considerable body of case-law on this matter. Both UK and EU case-law has held that the limitations and conditions referred to in article 21 are those now contained in Directive 2004/38/EC article 7, which states that a person who claims residence under article 21 must have:

- sufficient resources not to become a burden on the social assistance scheme of the member state in which s/he is living; and
- comprehensive sickness insurance.

However, the UK judiciary has consistently applied a very narrow interpretation in respect of the rights which flow from article 21. Arguably this approach is at odds with the developing ECJ case-law, which is placing a greater emphasis on citizenship.

European Commission guidance

The commission has issued guidance which states that:[2]

- the term 'comprehensive sickness insurance' for self-supporting EEA nationals and students means any insurance cover, private or public, contracted in the host member state or elsewhere, as long as it provides comprehensive coverage and does not create a burden on the public finances of the host member state;
- it includes insurance under the co-ordination rules. Most EU nationals are now insured under this regulation;
- the European Health Insurance Card can offer comprehensive cover;
- social assistance means basic social assistance (this is likely to mean a basic level of income support not including premiums or housing costs);
- only receipt of social assistance benefits (this would not include benefits deemed to be social security under the co-ordination rules, for example, family, pensions, invalidity, unemployment or injury benefits) can be considered relevant to determining whether the person concerned is a burden on the social assistance system. Therefore this does not include family benefits such as CB;
- an EU citizen will have sufficient resources where the level of his/her resources is higher than the threshold under which a minimum subsistence benefit is granted in the host member state. Where this criterion is not applicable, the minimum social security pension should be taken into account;
- member states are prohibited from laying down a fixed amount to be regarded as 'sufficient resources', either directly or indirectly, below which the right of residence can be automatically refused. Instead, the authorities of the member states must take into account the personal situation of the individual concerned;
- the resources do not have to be periodic and can be in the form of accumulated capital;
- resources from a third person must be accepted;
- in deciding whether an individual is or has become an unreasonable burden member states must carry out a proportionality test

comprising three basic criteria as set out in recital 16 of Directive 2004/38/EC.

Proportionality test

The following criteria should be used in the proportionality test (commission's guidance, para 2.3.1):

■ Duration
– For how long is the benefit being granted?
– Outlook: is it likely that the EU citizen will get out of the safety net soon?
– How long has the residence lasted in the host member state?
■ Personal situation
– What is the level of connection of the EU citizen and his/her family members with the society of the host member state?
– Are there any considerations pertaining to age, state of health, family and economic situation that need to be taken into account?
■ Amount of benefit granted
– What is the total amount of aid granted?
– Does the EU citizen have a history of relying heavily on social assistance?
– Does the EU citizen have a history of contributing to the financing of social assistance in the host member state?

The co-ordination rules

The second area of discrimination referred to by the commission relates to breaches of the co-ordination rules. These rules are an important area of EU law because without effective protection of social security rights, there is no actual right to free movement. The regulation, like its predecessors (Council Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72), guarantees that rights in the areas of sickness insurance, pensions, unemployment and family benefits are preserved in the event of moving within Europe. It also provides rights to special non-contributory benefits.

People covered

A person falls within the personal scope (article 2) of the co-ordination rules if:

■ s/he is or has been subject to the legislation[3] of one or more member states; and
■ s/he is a national of one of the EU member states (this does not include Norway, Iceland, Liechtenstein or Switzerland which remain subject to Council Regulation (EEC) No 1408/71 which has similar provisions); or
■ s/he is a refugee; or
■ s/he is a stateless person; or
■ s/he is a family member or a survivor of one of the above. This includes non-EEA family members.

Benefits covered

Most UK benefits fall under the scope of the co-ordination rules. The exceptions are housing benefit (HB), council tax benefit (CTB), working tax credit and the discretionary social fund. The rights given depend on the category of benefit but, for example, a person can take certain benefits abroad with him/her to other member states (the exportability principle) and can rely on contributions and residence in other member states to qualify for benefits in the UK (the aggregation principle). A fundamental principle as with all EU law is that there must be no discrimination on the ground of nationality.

The co-ordination rules and the UK right to reside test

Of the benefits affected by the right to reside test under the co-ordination rules most will fall into the category of a special non-contributory benefit. CB and CTC, however, are considered as family benefits under the rules. If a person is able to rely on the co-ordination rules, s/he is able to get family benefits for his/her family members even if his/her family is living in another EEA state.

Special non-contributory benefits are paid in the member state of 'habitual residence'. The concept of habitual residence for EU co-ordination rules purposes has been defined at EU level as the place where the habitual centre of interests of the person is located (see below).

EU definition of habitual residence

The new co-ordination rules provide a statutory definition of habitual residence: Regulation (EC) No 987/2009 article 11. If there is any dispute about residence, institutions of member states must establish the centre of interests of the person concerned based on an overall assessment of relevant facts, which can include:

■ the duration and continuity of presence in the member state concerned;
■ the person's situation; including:
– the nature and specific characteristics of any activity pursued, in particular the place where such activity is habitually pursued, the stability of the activity, and the duration of any work contract;
– his/her family status and family ties;
– the exercise of any non-remunerated activity;
– for students, the source of their income;
– his/her housing situation and how permanent it is;
– the state in which the person is deemed to reside for tax purposes.

If there is still no agreement about the place of residence, the deciding factor on a person's residence will be the intention of the person as it appears from the facts and circumstances of the case and the reasons for the move.

Interim payments

Member states must make interim payments if there is disagreement about to which state a person is the subject of legislation. This new provision is intended to avoid the problem of leaving people covered by the co-ordination rules without any benefit (Regulation (EC) No 987/2009 article 6(2)).

The majority of EEA nationals and their family members are now covered by the co-ordination rules. Consequently, if a person is refused benefit on the basis that s/he does not have a right to reside, s/he should appeal and ask for an interim payment while his/her residence is considered using the criteria above.

Implications for claimants

The UK has two months from the date of the opinion (29 September 2011) to inform the Commission of measures it has taken to bring its legislation into line with EU law. If the UK fails to do so, the Commission may refer it to the ECJ.

However, at the time of writing, it is not yet clear if any further action will be taken by the Commission. If the matter is brought before the ECJ it is likely to be many years before judgment is given. In these circumstances, in order to avoid the UK anti-test case provisions (see above), claimants may wish to lodge protective claims and appeals with a request that the appeal is stayed pending the outcome of any action by the Commission.

1 *Social security co-ordination: Commission requests United Kingdom to end discrimination of EU nationals residing in the UK regarding their rights to specific social benefits*, 29 September 2011, is available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1118&format=HTML&aged=0&language=EN&guiLanguage=en.
2 *Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states*, COM(2009) 313/4, available at: www.statewatch.org/news/2009/jul/eu-com-family-members-com-313.pdf.
3 Under earlier versions of the co-ordination rules a person was subject to the legislation of the member state in which s/he worked and paid national insurance contributions or their equivalent. Under the new co-ordination rules there is no longer any requirement to have worked. A person is subject to the legislation of a member state if s/he is or would be eligible for any social security benefits.

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Support for migrants update – Part 2

Sue Willman and **Sasha Rozansky** continue the series of updates on welfare provision for asylum-seekers and other migrants, supplementing the third edition of LAG's handbook, *Support for Asylum-seekers and other Migrants*, 2009. Part 1 of this article was published in December 2011 *Legal Action* 16.

POLICY AND LEGISLATION

Home Office statistics

The immigration statistics for the third quarter of 2011 show an increase in asylum applications, up to 4,912, which the Home Office states is due to an increase in applications from nationals of Iran, Pakistan and Syria. During this period there was also an increase in the number of people entering detention, amounting to 6,834 during this quarter alone. The figure included 30 children, despite the government's stated commitment to ending the detention of children. The number of removals and voluntary departures was 13,253, a reduction when compared with the same quarter in 2010.

At the end of September 2011, 20,639 asylum-seekers were receiving support under Immigration and Asylum Act (IAA) 1999 s95. Of these, 2,932 were receiving subsistence-only support and 17,707 were also receiving accommodation. The largest nationality group currently supported are nationals of Pakistan. At the end of September 2011, there were 2,393 refused asylum-seekers (excluding dependants) recorded as receiving support under IAA s4.

In 2010, 10 per cent (1,717) of main applicants were unaccompanied asylum-seeking children (UASCs). Despite UASCs only accounting for 12 per cent of all initial decisions, 68 per cent (1,096) of all grants of discretionary leave at initial decision were to UASCs aged 17 or under at the time of the decision. Over half (52 per cent) of these were to nationals of Afghanistan. However, UASC applications fell by 46 per cent between 2009 and 2010, and data from the third quarter of 2011 suggests a continued decrease, because of fewer applications from Afghan nationals.

CASE-LAW

Asylum support (section 4)

Further submissions

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

[2011] EWHC 1214 (Admin), 19 April 2011[1]

K was a refused asylum-seeker who had submitted further representations to the Home Secretary. She then applied for IAA support. The Home Office failed to make a decision on the section 4 application and so, after over one month, K made an application for a judicial review of the Home Secretary's policy not to consider a section 4 application until after further submissions had been considered. The court granted K permission to proceed to a final hearing, even though by this time she had been granted refugee status and was no longer eligible for section 4 support. At the permission hearing Judge Pelling QC stated:

> *So far as the policy itself is concerned, it seems to me at least arguable that the policy is itself unlawful on irrationality grounds, because it seems to me arguable that there is no necessary linkage between the determination of the fresh claim and the delay in determining the section 4 application. The section 4 application is designed to eliminate the risk of destitution. To decide as a matter of policy that section 4 applications will not be entertained until the fresh claim has been considered and resolved one way or the other seems to me is at least arguably irrational because it defeats the purpose for which section 4 was enacted at least in part – that is to avoid destitution occurring while fresh claim applications are pending* (para 9).

Decisions of the First-tier Tribunal (Asylum Support)

The background to these cases is that on 22 October 2010 the European Court of Human Rights (ECtHR) wrote to the UK government stating that it would seek to protect the rights of all Iraqis being removed to central Iraq and would act to try to prevent their removal, under rule 39 of the Rules of Court. The following month, the ECtHR reviewed this decision and decided to examine each rule 39 request from an applicant from central Iraq on a case by case basis.[2]

■ AS/11/04/26681

23 May 2011[3]

The appellant was an Iraqi national whose asylum claim, appeal and further representations had been refused. He had not sought to judicially review the refusal of his further representations. On 4 April 2011, he applied to the ECtHR, claiming that his rights under article 3 of the European Convention on Human Rights ('the convention') would be breached if he was returned to Iraq, and requested that the court adopt interim measures under rule 39 of the Rules of Court to prevent his removal. On 19 April 2011, the appellant applied for support under IAA s4 on the basis that it would be a breach of his rights under the convention if support was not provided as he was destitute and had made a rule 39 application; and that such support should be provided under regulation 3(2)(e) of the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations (IA(PAFAS) Regs) 2005 SI No 930, as it would be a breach of his convention rights if support was not provided. This application was refused and he appealed to the First-tier Tribunal (Asylum Support).

The Principal Judge decided that simply making an application to the ECtHR under rule 39 would not entitle someone to section 4 support, as s/he must demonstrate that the application has merit. She considered that as the ECtHR had reversed its position, and no longer required the UK to refrain from removing all Iraqis to Iraq, the appellant's rule 39 application was without merit. She also considered the appellant's reliance on the United Nations High Commissioner for Refugees' (UNHCRs') position on the risks faced by returnees to Iraq, but as this had been considered and rejected by the Upper Tribunal in *HM and others (Article 15(c)) Iraq* CG [2010] UKUT 331 (IAC), 22 September 2010, the appellant could not rely on this either. The judge did note that there was an appeal pending in the Court of Appeal of the decision in *HM*.

The judge set out a test for applicants who have an outstanding ECtHR application to demonstrate entitlement to section 4

support. She considered that the onus is on him/her to demonstrate that s/he has:

- exhausted all domestic remedies;
- lodged an application to the ECtHR that is individuated, fully reasoned, supported by all relevant documentation and has substance as opposed to being merely fanciful or speculative;
- raised the possibility of an imminent risk of serious and irreparable damage in the event of a return to his/her country of origin, which may or may not include a request for interim measures under rule 39.

The judge considered that as the appellant had not judicially reviewed the refusal of his further submissions he had not exhausted all domestic remedies and dismissed his appeal. The judge also stated that she considered that it would not be necessary for an applicant to receive a rule 39 indication from the ECtHR before section 4 support could be granted under regulation 3(2)(e).

■ AS/11/06/26857

24 August 2011[4]

The appellant was also an Iraqi national whose asylum claim and further submissions had been refused. He had evidence that he had been unable to get legal representation to challenge these decisions further, as there was no merit in doing so following the decision in *HM* (above). On 28 March 2011, he made a rule 39 application to the ECtHR. He applied for section 4 support and, on 28 April 2011, this was granted. On 25 May 2011, the section 4 support was discontinued. He appealed the discontinuation decision.

The Principal Judge restated the test to be applied for applicants with outstanding applications before the ECtHR seeking to establish entitlement to section 4 support under IA(PAFAS) Regs reg 3(2)(e), as set out in *AS/11/04/26681* (above). She decided that:

- the appellant had exhausted his domestic remedies, as he had been unable to get representation to judicially review the refusal of his further representations and at the time that he made the application to the ECtHR this was the only option available to him;
- he could rely on the presence of generalised indiscriminate violence in Iraq; and
- as it was by then known to the judge that the pending Court of Appeal's decision in *HM* may impact on the merits of the decision (ie, including the UNHCR's concerns about returnees in Iraq), the appellant's application to the ECtHR could not be without some merit.

She therefore substituted her own decision for the decision appealed against, and determined that the appellant was entitled to section 4 support under regulation 3(2)(e) to avoid a breach of his human rights.

Section 95 support awarded in section 4 appeal

■ AS/11/07/27113

22 July 2011[5]

The appellant made an application for IAA s4 support. The Home Secretary refused this application on the basis that the applicant was not a refused asylum-seeker as his asylum claim was still outstanding. She noted that he may instead be entitled to support under IAA s95. The Home Secretary also decided that the appellant was not eligible for support because he was not destitute. The appellant appealed this decision.

The tribunal substituted its decision for the decision appealed against and determined that the appellant was destitute and was entitled to section 95 support, as his asylum claim was still pending. This was despite him having only made an application for section 4 support.

Section 4 and temporary admission

■ AS/11/09/27448

5 October 2011[6]

The appellant had arrived in the UK in 2007 from Dubai, when he was 17 years old, as an unaccompanied child. In February 2009, the Home Secretary detained him and issued removal directions. He appealed this decision on the ground that he was a British citizen. In March 2009, he was released on temporary admission. In May 2009, the Home Secretary withdrew the decision to remove him and indicated that his case would be considered further, but he was still awaiting a decision at the time of the hearing. As a child and a care leaver he was looked after by Croydon Council's social services department under the Children Act (CA) 1989, but this ended when he became 21 years old. He had nowhere else to live and had been sleeping on the street. His application for support under IAA s4(1)(a) was refused and he appealed to the First-tier Tribunal (Asylum Support).

At the appeal hearing it was stated on behalf of the UK Border Agency (UKBA) that the policy on applications for support under section 4(1)(a) was still being drafted and would be published shortly. In the interim period, the Home Secretary would only exercise her discretion to support individuals under section 4(1)(a) in 'exceptional and compelling circumstances', and according to the following guidance:

The Secretary of State will exercise her discretion to support individuals under Section 4(1)(a) in exceptional and compelling circumstances. There is no precise definition of what amounts to exceptional and compelling circumstances as such a decision is dependent on the particular facts of the case being considered. However, as a rule of thumb, a claimant may demonstrate compelling circumstances where they have no other form of support available to them and where support is necessary to avoid a breach of our [convention] obligations. It is, however, exceptional that such a case will arise given the availability of other forms of support for vulnerable applicants and the fact that those who have been granted temporary admission have no immigration status, are liable to removal and can generally avoid a breach of their rights by returning home. It is the claimant's responsibility to return home and not the Secretary of State's responsibility to support those who chose to remain in the United Kingdom illegally (para 17).

The tribunal decided that the exceptional and compelling circumstances test was akin to the test set out in IA(PAFAS) Regs reg 3(2)(e), where an applicant is eligible for support if s/he has outstanding further submissions. As the appellant was found to be destitute and had outstanding representations, the tribunal decided that this was sufficient to meet the exceptional or compelling circumstances test and allowed the appeal. It substituted its own decision for the decision appealed against, holding that the appellant was entitled to section 4(1)(a) support.

Medical impediment to leaving the UK

■ AS/11/05/26717

18 May 2011[7]

The appellant was a refused asylum-seeker from Iran who had applied for section 4 support under IA(PAFAS) Regs reg 3(2)(b) on the basis that he was destitute and because his medical condition, namely his severe depression, mental impairment and mobility problems, rendered him unable to leave the UK. He had provided a medical declaration form completed by his GP in April 2011 which stated that he was unable to leave the UK for the foreseeable future, but that this could be reviewed in 12 months. The UKBA accepted that he was destitute but its medical adviser did not accept that his medical condition prevented him from returning to Iran, and so refused his application for support. He appealed that decision.

The tribunal obtained additional evidence which shed further light on the appellant's medical condition: he had a serious fracture to his heel requiring major surgery; his mobility was restricted due to constant lower back pain; he was unable to walk unaided; he was permanently deaf in one ear; and he had chronic depression and severe panic attacks. In light of the conflicting medical evidence, the tribunal preferred and accepted the

evidence of the appellant's GP, who had been treating him for five months, during which time he had been severely ill and homeless. The tribunal allowed the appeal and substituted its own decision for the decision appealed against, deciding that the appellant was entitled to section 4 support.

Community care

Adults

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

[2011] EWCA Civ 954, 10 August 2011[8]

SL was a refused asylum-seeker who suffered from mental illness and had been assessed by Westminster as having a need for weekly meetings with his social worker, counselling and a befriender. Despite this, Westminster decided that he did not have a need for care and attention and it therefore did not have a duty to provide him with accommodation under National Assistance Act 1948 s21. Mr Justice Burnett refused his judicial review application (see December 2010 *Legal Action* 15). He appealed to the Court of Appeal.

The Court of Appeal considered that Westminster was doing something for SL which he could not do for himself, namely weekly monitoring of his mental state so as to avoid a possible relapse or deterioration. It had also arranged help by voluntary sector counselling groups and befriending services. The court decided that this was sufficient to amount to a need for care and attention, and noted that this was not limited to acts carried out by a local authority's employees or agents; neither did it envisage any particular intensity of support. The court decided that, once a need for care and attention had arisen, there would be a duty to accommodate under section 21 if 'care and attention is not "otherwise available", unless it would be reasonably practicable and efficacious to supply it without the provision of accommodation' (para 38). SL's appeal was allowed, since, based on his condition, it would have been 'absurd to provide a programme of assistance and support through a care co-ordinator "without also providing the obviously necessary basis of stable accommodation"' (para 44).

Comment: Westminster has applied to the Supreme Court for permission to appeal.

Children

Children Act 1989 s17 and IAA s4 support

■ (1) R (VC and others) (2) R (K) v Newcastle City Council and Secretary of State for the Home Department (interested party)

[2011] EWHC 2673 (Admin), 24 October 2011[9]

K arrived in the UK in December 2004 and claimed asylum. Her claim was refused and her appeal was dismissed in December 2005. Shortly before her first child was born, in January 2008, Newcastle started providing her with accommodation and subsistence under CA 1989 s17. In May 2009, K submitted a legacy questionnaire to the UKBA. At the time of the hearing she was still waiting for a decision on that claim. Her second child was born in March 2010. In June 2010, Newcastle told K that unless she applied for support under IAA s4 within two weeks her section 17 support would be terminated. She duly applied for section 4 support but this application was refused and her appeal against that decision was dismissed. In November 2010, Newcastle again wrote to her, stating that unless she applied for section 4 support her section 17 support would be terminated. It later agreed to continue supporting her pending the outcome of the judicial review application of VC, another refused asylum-seeker from whom Newcastle had decided to withdraw section 17 support.

During VC's substantive hearing, it transpired that the facts of that case were different to those initially relied on, and the legal issue, as to whether section 17 support should be provided when there is the possibility of section 4 support, did not arise. Rather than abort the hearing the court agreed to permit K, whose case did raise this issue, to commence proceedings.

The court noted that it was implicit that K's older child (and possibly the younger child) had been assessed as being a child in need, since it was on that basis that Newcastle had been providing support to the family. The court considered whether, when a local authority has assessed a child as a child in need, it can decline to provide assessed services and support, including accommodation, on the basis that section 4 is or may be available. It decided that it can only do so if:

- first, the Home Secretary is actually able and willing (or can be compelled) to provide section 4 support; and
- second, section 4 support will suffice to meet the child's assessed needs.

The court further considered that as the Home Secretary's powers to provide section 4 support are residual a local authority may well have difficulty establishing the first condition. Additionally, given the 'very significant' difference between what is provided under section 4 and what is likely to have been assessed as required for the purposes of section 17, a local authority is unlikely to be able to establish the second condition (para 91).

Comment: The court declined to consider:

- whether a local authority must provide section 17 accommodation to a migrant family in order to comply with its obligations under the convention; or
- whether the Home Secretary is entitled to refuse to provide section 4 support to a new applicant family on the basis that they are not destitute since they are entitled to section 17 support. Families in receipt of support under IAA s95 are excluded from getting section 17 support by IAA s122.

Age assessments of unaccompanied minors

■ R (Y) v Hillingdon LBC

[2011] EWHC 1477 (Admin), 15 June 2011

Y claimed to have been born on 17 February 1993. She was trafficked to the UK when she was about five years old to work as a domestic helper. She spent the whole of her time in domestic servitude until she escaped from the family she was working for in 2008, when she was 15 years old. Shortly afterwards, Hillingdon social services department accepted a duty to her under CA 1989 s20 and placed her with a foster carer. When she was 16 years old, a dental age estimate was carried out, which concluded that it was more likely than not that she was over 18 years old. In April 2009, Hillingdon carried out an assessment of Y's age and found that she was at least 19 years old, based on her appearance, demeanour and body language; the dentist's conclusion that she was likely to be over 18 years old when he examined her; and various inconsistencies in the account she gave.

The Administrative Court granted her application for a judicial review of that decision. It followed the approach in *R (CJ) v Cardiff County Council* [2011] EWHC 23 (Admin), 17 January 2011 (see June 2011 *Legal Action* 21), that in age assessment cases it is for the claimant to show that s/he is or was a child at the time s/he asserts a duty was owed to him/her as a child. Accepting Y's stated age, the court considered that it would have been very difficult for Y, in light of everything she had been through, to be sure how old she was when particular things happened and for how long a particular state of affairs had lasted.

Furthermore, the court noted that it would not be surprising if Y's recollection varied at different times, and her recollection on particular topics would not have had to vary all that much for there to have been the inconsistencies which the assessing social workers identified. The court also noted that people of Y's approximate age, especially someone with her background, can often be imprecise when it comes to detail, and they sometimes need to be questioned very closely for the detail to come out correctly. Similarly, little weight was attached to variations in her use of language. The court was therefore reluctant to place particular weight on the inconsistencies the assessing social workers sought to rely on.

■ R (N) v Barnet LBC

[2011] EWHC 2019 (Admin), 29 July 2011

N was trafficked to the UK from the Democratic Republic of Congo and was sexually exploited here. She escaped and was placed by Barnet with foster carers under CA 1989 s20. While she was 15 years old, Barnet twice assessed her as being over 18. She sought a judicial review of these decisions.

The court decided that when considering age assessment cases, it must first consider all of the evidence, regardless of who has the burden of proof. Only if it was unable to determine the young person's age should it rely on the burden of proof, which was on the person who asserted the validity of precedent facts, who was likely to be the claimant. In the present case, on all the evidence, N was under 18 and there was therefore no need to apply the burden of proof.

Litigation friend in the Upper Tribunal

■ R (AM) v Solihull MBC

CO/2467/2011, 28 July 2011[10]

This decision finding that the Upper Tribunal would only appoint a litigation friend in an age assessment case in exceptional circumstances was reported in 'The Upper Tribunal and its power to appoint a litigation friend', September 2011 *Legal Action* 5.

Immigration

Section 55: best interests of child

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

[2011] EWHC 1850 (Admin), 25 October 2011

T came to the UK from Ecuador in August 2001 with her mother, V. Her daughter, A, was born soon after and they lived as a household. On 18 December 2008, T made an application for leave to remain in the UK under the 'seven year child concession' (DP5/96), which was withdrawn by the UKBA on 9 December 2008. The UKBA refused the application because the policy no longer applied and on the basis that the family had not established a sufficient connection to the UK to engage article 8 of the convention and displace removal in the interests of immigration control. T's request to the UKBA to reconsider its decision based on the factor which led to DP5/96 being introduced was also refused. T applied for judicial review of the refusal to grant her application for leave to remain in the UK. She argued that the Home Secretary had failed to have due regard to A's welfare so interfering with her rights under article 8.

Granting her application, Judge Anthony Thornton QC, sitting as a deputy High Court judge, gave guidance on how to provide for the duty to safeguard a child's best interests under Borders, Citizenship and Immigration Act (BCIA) 2009 s55. Applying the Supreme Court's decision in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, 1 February 2011; [2011] 2 WLR 148 (see June 2011 *Legal Action* 19), he summarised the section 55 duty on an immigration decision-maker as follows:

(1) When considering whether it is proportionate to grant or refuse a parent or grandparent of a child living with that person indefinite leave to remain in the United Kingdom or to remove that person from the United Kingdom, the decision-maker must balance the reason for expulsion or refusal against the impact upon the child, particularly when the child can reasonably be expected to follow the removed parent or grandparent.

(2) The child's best interests must be taken account of in undertaking this balancing exercise. These best interests that are referred to are the child's upbringing and well-being in general and whether it is reasonable to expect the child to live in another country.

(3) These best interests must be a primary consideration which should be considered first. These interests are, however, not paramount. However, any other consideration should not be treated as inherently more significant but the strength of these other considerations may, when taken together, outweigh the child's best interests.

(4) The nationality of the child must be taken account of. That nationality is of particular but not decisive importance, particularly if the child is British since deportation would deprive that child of her country of origin and the protection and support that she has acquired socially, culturally and medically from growing up in a British lifestyle and would also lead to a social and linguistic disruption and a loss of educational opportunities. Equally, the fact that a child is non-British may ensure that deportation is of less significance for her but her non-British nationality is not of decisive importance.

(5) The views of a child who is capable of forming her own views in all matters affecting her must be heard and due weight must be given to them in accordance with her age and maturity. Procedures should be adopted that ensure that those views are fully and freely obtained (para 13).

The judge went on to expand on Lady Hale's suggested approach in *ZH (Tanzania)*. For assessing the 'best interests' of the child, he proposed making reference to the *Every child matters: change for children statutory guidance*; and when considering the 'welfare of children' within section 55, he indicated that the statutory checklist provided for by CA 1989 s1 was a relevant consideration.

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

[2011] EWHC 2367 (Admin), 16 September 2011[11]

BN was a citizen of Malawi who sent her son and daughter to live with her sister in the UK in 2001 and 2002 respectively, because she was having difficulty in caring for them at the time. She followed them in 2004 and the children then spent the weekdays with her and the weekends with their aunt, who lived nearby, and at one stage next door. In 2010, BN was refused asylum under the fast track procedure, she was detained and her appeal was dismissed. Further representations were served on the UKBA, referring to its duty to act in the best interests of the children under BCIA s55. A few hours before BN was removed to Malawi, the UKBA sought the further views of the Office of the Children's Champion (OCC) about the appropriateness of separating the children from their mother, but a social worker's report finding that the children enjoyed family life with their mother was not forwarded. BN applied for judicial review of the failure to accept her human rights representations as a fresh claim or to delay her removal, taking into account her children's article 8 rights under the convention and the UKBA's section 55 duty as interpreted by the Supreme Court in *ZH (Tanzania)* (see above).

Granting the application, Stadlen J stated: 'Although there is no express statutory duty on the secretary of state or the UKBA to involve the OCC in these circumstances … it was not reasonable … to take the decisions that were taken … without the benefit of fully and properly informed advice from the OCC'

(para 155). In the context of deciding whether or not the further representations amounted to a fresh claim he went on to say that the point of involving the OCC in such decisions was 'to enable decisions to be taken in the light of informed advice by a semi independent unit whose remit is to consider the best interests of affected children' (para 157).

■ **Omotunde (best interests – Zambrano applied – Razgar) Nigeria**
[2011] UKUT 00247 (IAC), 25 May 2011

O was a Nigerian national who had lived in the UK for almost 20 years and was the carer of his child, born in 2005, who had become a British citizen. O was convicted of benefit fraud. The First-tier Tribunal upheld the UKBA's decision to deport him on the basis that he was a foreign national criminal within the meaning of UK Borders Act 2007 s32.

The Upper Tribunal found that this was an error of law because the Supreme Court's decision in *ZH (Tanzania)* (see above) had not been taken into account; the Supreme Court had decided that a child's welfare was the primary consideration and had stressed the importance attached to nationality as an indicator of where the child's best interests lay. The Upper Tribunal also recognised that O might have a right to reside in the UK under EU and national law by virtue of *Ruiz Zambrano v Office national de l'emploi* (ONEm) C-34/09, 8 March 2011; October 2011 *Legal Action* 24.

1 Platt Halpern, solicitors, Manchester and Ranjiv Khubber, barrister, London.
2 See 'Rule 39 – interim measures', available at: www.echr.coe.int/ECHR/EN/Header/Press/Links/Archived+news/ArchivesNews_2010.htm.
3 Asylum Support Appeals Project, London.
4 See note 3.
5 See note 3.
6 See note 3.
7 See note 3.
8 Joanna Thomson, solicitor, Pierce Glynn, London and Stephen Knafler QC and Jonathan Aubern, barristers, London.
9 Ben Hoare Bell, solicitors, Newcastle and Stephen Broach, barrister, London.
10 Karen Ashton, solicitor, Public Law Solicitors, Birmingham and Adrian Berry, barrister, London.
11 Richard Drabble QC and Declan O'Callaghan, barristers, London and Solange Valdez, solicitor, Sutovic and Hartigan, London.

Sue Willman is a partner and Sasha Rozansky is a trainee solicitor at Pierce Glynn Solicitors. Readers are encouraged to e-mail relevant cases to: SRozansky@pierceglynn.co.uk. The authors are grateful to the colleagues at note 1 and notes 3–11 for transcripts or notes of judgments.

Housing repairs update 2011 – Part 2

In this annual review, **Beatrice Prevatt** details policy, legislation and case-law concerning housing disrepair from January 2011 to date. Part 1 of this article appeared in December 2011 *Legal Action* 11.

POLICY AND LEGISLATION

Housing conditions in the private sector

In June 2011 a study was published on the extent of local authority enforcement of the Housing Act (HA) 2004 housing health and safety rating system in England.[1] It was prepared by Dr Stephen Battersby for Alison Seabeck MP, the then Shadow Housing Minister, and Karen Buck MP, the then Shadow Welfare Reform Minister. This study records that 'informal' action was the most common enforcement action taken by local authorities, despite the existence of the hazard awareness notice, which does not have any consequences for non-compliance and can be viewed as purely advisory. This makes it difficult to hold local authorities to account for their activities as it is unclear what form this informal action takes. The research indicated a general reluctance to use the powers available under the HA 2004, with more than 80 per cent of local authorities never having taken a prosecution. It also found that, in practice, most local authorities intervene on the basis of 'complaint or service requests, rather than as the result of ... any coherent strategic approach' (page 7).

CASE-LAW

Damages

■ **Eaton Square Properties Ltd v Shaw**
[2011] EWHC 2115 (QB), 29 July 2011, [2011] All ER (D) 9 (Aug)

Ms Shaw was a Rent Act 1977 protected tenant. Considerable work was needed at the premises, and Ms Shaw moved out having agreed with the landlord that she would relocate permanently to other accommodation to be let by the company on a Rent Act tenancy. Complex arrangements were made, including provisions for certain works to be undertaken at the new premises. Ms Shaw moved into the new home, but over a number of years disputes arose about whether or not works had been carried out in keeping with the agreement and what rent was payable. The landlord brought a possession claim for rent arrears. Ms Shaw counterclaimed for damages; she sought to add a claim for £14m, said to represent her lost income from a business that she would have pursued had she not had to spend so much time dealing with the need to get the landlord to comply with the agreement.

The High Court ruled that the amendment should not be permitted. The purpose of the move was to make the premises fit for her occupation, not to further or assist her business. The landlord owed the tenant a duty to do the works properly and in keeping with the specification. However, any economic loss which the tenant might be able to prove was unconnected to the relationship between them. The claimed loss could not be said to have arisen from any breach of the landlord and tenant relationship.

Quantum

■ **Grand v Gill**
[2011] EWCA Civ 554, 19 May 2011

(See also 'Housing repairs update 2011 – Part 1', December 2011 *Legal Action* 13 under 'Liability'.) The tenant rented a two-bedroom flat from her landlord from November 2004 at a rent of £850 per month. The flat suffered from a defective boiler which provided a wholly inadequate level of heat, namely, 15 degrees centigrade, and did not work at all for 207 days, give or take a day or so, between November 2004 and November 2007, when it was replaced. The flat was also affected by extensive dampness and mould growth which were so bad that the tenant's daughter had to move from the second bedroom into the living room. Largely, this was due to condensation dampness because of a design defect. There was also some damaged plaster because of water penetration for which the landlord was not

liable. The tenant sought damages for disrepair. The trial judge awarded damages of £5,600 on the basis of an award of the following:

- £1,750 for the 207 days when there was no heating;
- £2,900 for the remainder of the three years when there was inadequate heating (on the basis of an award of £1,200 per annum (less approximately £700 for the period covered by the award of damages for there being no heating at all), having regard to *Islington LBC v Spence* (2000) 6 September, Clerkenwell County Court; July 2001 *Legal Action* 26, in which the court awarded £1,100 per annum for defective heating);
- £600 for the contribution the defective heating had made to the damp and mould (the judge having found that if the landlord had been liable for all the damp and mould he would have awarded £2,000 per annum making a total award of £6,000 in this regard); and
- £350 for breach of the covenant of quiet enjoyment.

The tenant appealed on the basis that the judge was wrong to apply a 90 per cent discount to the damage caused by the damp as the landlord was 100 per cent liable for the damaged plaster.

The Court of Appeal found that the landlord was liable for the damaged plasterwork and was liable to compensate the tenant for this damage. The court assessed the plaster damage as representing £750 of the £6,000 that the judge would have awarded for the dampness; therefore, it substituted the figure of £1,275 (which was made up of £750 + £525 (ie, (£6,000 – £750) x 10%)) for the judge's award of £600, so that the overall damages award increased from £5,600 to £6,275.

Comment: The damages award made by the trial judge, particularly in relation to the defective heating, is low, especially when compared with more recent awards which have been made on the basis of diminution in value, see, for example, *Fakhari v Newman* January 2011 *Legal Action* 19, where 75 per cent of the rent was awarded for a lack of heating and 43 per cent of the rent was awarded for defective heating. In this case, the award amounts to less than 20 per cent of the rent over the three years when the heating was defective. This low award may have been because the tenant was unrepresented at first instance and did not rely on more recent authorities than the one produced by the landlord's counsel. The award in respect of defective heating was not at issue in the appeal to the Court of Appeal.

Equally, it might be thought that a higher percentage of the dampness may have been attributable to the lack of heating, but it is unclear what evidence was produced in this regard. Expert evidence may be available to enable a higher claim to be made.

■ Saleh v Rageh, Mohamed Mosa, Mohamed, Abdullah and Rahman Mohamed

Birmingham County Court, 22 February 2011[2]

The defendant tenants all lived in a three-storey building with rooms let out as a house in multiple occupation (HMO). The fifth defendant had not had access to his room since March 2008 and, from May 2009, the second defendant was excluded from his room. These defendants then shared with the third defendant. The landlord was held liable in damages from June 2008 to December 2010 when there was a change in ownership. All the defendants' rooms suffered from water penetration, with the fifth defendant's room also suffering from defective double glazing. In addition, there were defects to the common parts:

- The water supply to the toilet and wash-hand basin was inoperable as the taps were faulty.
- There were cracked tiles in the bathroom.
- The extractor fan was not working in the kitchen, and there were chronic leaks to the taps.
- The shower room suffered from damaged and uneven flooring, the window could not be closed and there was an ill-fitting door.
- The external door could only be opened and closed with difficultly.
- For two months when the gas supply was changed over to a pre-payment card meter system, the defendants were left without any heating or hot water.

Each defendant was awarded £500 for the boiler problem. In addition:

- The first defendant was awarded £1,000 per annum. The total award was £3,000, which equates to a 46 per cent rent reduction of £50 per week rent.
- The second defendant was awarded £1,250 per annum to May 2009 and £2,000 per annum after this date. The total award was £4,750, which equates to a 56 per cent rent reduction of £65 per week rent.
- The third defendant was awarded £1,600 per annum. The total award was £4,500, which equates to a 58 per cent rent reduction of £65 per week rent.
- The fourth defendant was awarded £1,000 per annum. The total award was £3,000, which equates to 58 per cent rent reduction of £40 per week rent.
- The fifth defendant was awarded £1,600 per annum. The total award was £4,500, which equates to a 69 per rent reduction of rent of £50 per week rent.

The total award was £19,750, which equated to a global rent reduction of 55 per cent.

■ Frederick and Simpson v Frame

Willesden County Court, 11 July 2011[3]

In a possession claim for rent arrears, the assured shorthold tenant of one room in a shared house, which was let at a rent of £130 per week, counterclaimed in respect of the disrepair she suffered throughout the tenancy (which began in November 2009) and continued until the date of trial in June 2011. District Judge Dabezies found the landlords liable. He awarded damages on the basis of a diminution in the value of the rent throughout the tenancy as follows:

- 15 per cent for a mouse infestation largely to the common parts;
- 30 per cent for a lack of hot water;
- 15 per cent for the lack of heating to the common parts; and
- 5 per cent for other miscellaneous defects.

He awarded a total of 65 per cent of the rent throughout the tenancy, which amounted to £7,417 and £131 in interest. After offsetting the arrears of £5,752 that were found to be due, the landlords had to pay the tenant the balance of £1,796 and were ordered to carry out remedial works within three months. The landlords were ordered to pay 80 per cent of the tenant's costs as she had not succeeded in her claim that the rent due was only £89 per week.

■ Harwood Properties Ltd v Remuinan

Brighton County Court, 18 October 2011[4]

In a possession claim for rent arrears, the tenant of a one-bedroom flat, which was let at a rent of £640 per month, counterclaimed in respect of disrepair suffered throughout the tenancy, which began at the end of May 2010. Deputy District Judge Bradly found the landlords liable for the following:

- A failure adequately to clean the carpets and decorate the walls in breach of an express agreement that this would be done for the whole period of the tenancy, ie, for a period of about 16 months.
- Sewage on the patio for a period of about two months with continuing leakage of waste water and smell for a further 14 months.
- A rat infestation from February to August 2011.
- A leaking toilet from February to April 2011.
- Cracked bath sealant which resulted in water leaking onto the bathroom floor between November 2010 and May 2011.
- A leaking bathroom tap throughout the tenancy.
- A defective patio door from July to October 2011.

Awarding damages on the basis of a diminution in value of rent, the judge awarded the following:

■ 20 per cent of the rent throughout the tenancy, which amounted to an award of £2,048 general damages; plus

■ an additional 20 per cent for the six-month rat infestation of £768 (which the judge considered to be more distressing than the other problems).

This made a total award of general damages of £2,816. After offsetting the agreed arrears of £940.78, the judge also awarded two per cent interest per annum on the balance from the date of the counterclaim.

The possession claim was dismissed. The landlord was ordered to pay all the tenant's costs of the action. The judge also made an order for remedial works to be carried out within six weeks of the order.

Ombudsman's reports

Local Government Ombudsman

Complaint

■ Lambeth LBC

09 014 729, 10 000 151 and 10 000 417, 11 July 2011

■ Ms Z complained that the council had failed to rectify serious disrepair in her flat, in particular, a leak through her bedroom ceiling because of defective guttering from April 2009 to August 2010. She said that she was kept awake when it rained or snowed because water dripped into her bedroom. She complained that she had taken time off work to sort out the problem and had been prescribed anti-depressant medication.

■ Mr Y complained that there had been excessive delay in repairing the windows in his home from May 2009 to May 2011, misleading information had been given and there had been a series of missed appointments and several failures to call him back or take follow-up action. Mr Y complained that he had suffered from lung infections and that living in an unsecured, draughty house with rotting windows and dealing with the stress had impacted on his health.

■ Ms X complained of a number of leaks that had affected her property, in particular, a leak into her toilet from 2007, which appeared to be coming from the leasehold flat above and another leak affecting the shed on her balcony from April 2009. The various leaks caused damage to the shed and the belongings stored inside it, and, internally, the toilet wall became saturated: the wallpaper and, eventually, the plaster crumbled away. Ms X was frustrated at the council's failure to keep her up to date.

The Ombudsman found maladministration. She recommended that the council should send a written apology to all three tenants, and in addition:

■ confirm to Ms X and Mr Y, and to her office, when the outstanding work was to be completed;

■ pay £1,000 compensation to Ms X to include redecoration costs;

■ pay £500 compensation to Mr Y; and

■ pay £1,000 compensation to Ms Z in addition to completing her kitchen and bathroom upgrade and other repairs that were originally ordered in February 2011.

Public Services Ombudsman for Wales

Complaint

■ Charter Housing Association

201001520, 18 October 2011

The applicants complained that their landlords had failed to keep in working order the underfloor heating system at their home, which had been installed at the recommendation of an occupational therapist to meet the needs of their disabled son, in working order over a two-year period. The housing association had made repeated, abortive repair attempts, sending engineers who had no specialist knowledge of the system despite the fact that the applicants asked for the heating system's manufacturer to be called. The applicants also complained that they had been without heating and hot water at times and that the abortive attempts to repair the heating system meant that they incurred higher energy bills.

The Ombudsman found that a prudent landlord would have involved the heating system's manufacturer at an earlier stage, particularly given the applicants' son's disability, and in this regard upheld the complaint. Undoubtedly there had been costs incurred during engineers' testing and the family had been inconvenienced greatly; however, a number of factors made it impossible to ascertain with certainty the level of energy costs for the family had there been no problems.

The Ombudsman recommended that the housing association should:

■ issue an apology to the applicants;

■ pay £1,300 compensation to the applicants;

■ engage the manufacturer to meet the applicants to provide full advice and guidance about operating the heating system; and

■ audit and review its complaint-handling process.

Local Government Ombudsman

Complaint

■ Northampton BC

10 009 338, 19 October 2011

This Ombudsman complaint does not involve disrepair, but gives an indication of compensation awarded for unsatisfactory housing conditions. The council received an application for a mandatory disabled facilities grant (DFG) to provide an extension to enable one of the applicants to be cared for, washed and bathed. The applicants lived in privately rented accommodation with no statutory long-term security of tenure. Although the conditions for the DFG were met, the council did not want to see £30,000 of grant monies expended on insecure private accommodation and suggested that the applicants move to adapted social housing. Two years later, the DFG had still not been paid, although the council had installed a stair lift, and a wet room on the first floor of the family home.

The Ombudsman found that the failure to pay the DFG to which the applicants had been entitled was maladministration. Recommendations made included £5,000 compensation for living in unsuitable housing conditions for two years longer than necessary.

Comment: It appears from these reports that the Ombudsman continues to make global awards for compensation without any consideration of the rent payable for the property. This appears to result in lower awards than would be obtained in legal proceedings, where a complaint is made of a failure to comply with repairing obligations.

Housing standards

■ Bristol City Council v Aldford Two LLP

[2011] UKUT 130 (LC), 30 March 2011

The council decided that a flat let by the respondent company constituted a category 1 hazard and it served an improvement notice. The council had decided that the heating arrangements (convector heaters) were inadequate and that a central or night storage heating system was required although the tenants were satisfied with the system. The landlord appealed. A Residential Property Tribunal (RPT) quashed the notice. The council appealed to the Upper Tribunal (Lands Chamber). The tribunal dismissed the appeal. The tribunal decided that the RPT had not been bound by the council's hazard assessment and should have made its own assessment, and that even if it had been satisfied that a category 1 hazard existed, the appropriate course of action on the facts was the service of a hazard awareness notice rather than an improvement notice.

■ R v Okumo

Reading Magistrates' Court, 3 November 2010

The defendant landlord was prosecuted for offences contrary to the HA 2004 and the Management of Houses in Multiple Occupation (England) Regulations (MHMO(E) Regs) 2006 SI No 372.

■ There was one offence under HA 2004 s11 (improvement notices relating to category 1 hazards), ie:

– failure to comply with an improvement notice requiring fire safety works to be done.

■ There were two offences under MHMO(E) Regs reg 4 (failure to take safety measures), including:

– the fire alarm system was not maintained in good working order.

■ There were six offences under MHMO(E) Regs reg 7 (failure to maintain the common parts, fixtures, fittings and appliances), which included:

– a missing window pane to the dining room;
– a broken toilet;
– a missing kitchen cabinet door; and
– dirty and poorly maintained common parts.

■ There were three offences under MHMO(E) Regs reg 8 (failure to maintain living accommodation), ie:

– poor repair of a bedroom window;
– a leaking ceiling; and
– a collapsed ceiling.

The 12 separate offences were proved and the maximum £5,000 fine imposed for each offence. Therefore, the total fine was £60,000. The magistrates also awarded the prosecuting authority, Reading Borough Council, its costs of £2,667.

■ Epsom & Ewell BC v Ciesco and Ciesco

Redhill Magistrates' Court, 6 June 2011

Joint landlords Mr Ciesco and his sister Ms Ciesco pleaded guilty to two offences under the HA 2004 of failure to licence an HMO (section 72) and failure to comply with a prohibition order (section 32) against using a loft room as sleeping accommodation which, in case of fire, lacked suitable fire protection and a safe means of escape. On 5 December 2010, a fire broke out at the property. The tenant staying in the loft room had to escape by exiting the property via the loft bedroom windows. The tenant suffered concussion and muscular skeletal injury and was taken to hospital for treatment. Six tenants were occupying the property at the time of the fire.

Mr Ciesco was fined £3,300 for breach of HA 2004 s32 and a further £10,000 for breach of HA 2004 s72. Ms Ciesco was fined £3,300 for breach of HA 2004 s32 and £5,000 for breach of HA 2004 s72. They were both also ordered to pay £1,121 towards the cost of the prosecution and £15 each towards a victim surcharge.

■ Bristol City Council v Digs (Bristol) Ltd

Bristol Magistrates' Court, 22 June 2011

On a prosecution brought by the council, Digs (Bristol) Ltd pleaded guilty to breaching HA 2004 s72(1) for not licensing a property. Digs (Bristol) Ltd was one of the largest property letting agents operating in Bristol and specialised in student accommodation. It managed over 100 properties across the city.

Digs (Bristol) Ltd was fined £4,000 and ordered to pay costs of £1,549.78 plus a £15 victim surcharge. The council has said that the implications of the conviction were that the company and its directors would no longer be considered to be 'fit and proper persons' under the HA 2004 and that the tenants could now make an application to the RPT for a rent repayment order.

■ R v Gentoo Group Ltd

Newcastle Crown Court, 30 June 2011

On a prosecution brought by the Health and Safety Executive arising from the death of a tenant in his home, the defendant social landlords pleaded guilty to breaching regulation 5(1) of the Management of Health and Safety at Work Regulations 1999 SI No 3242 by failing to make effective maintenance arrangements for solid fuel heaters in the homes they rented. The tenant had died as a result of carbon monoxide poisoning after the coal fire at his home became blocked, sending smoke back into his room. The landlords (formerly Sunderland Housing Company) were fined £40,000 with £25,000 costs.

■ Manchester City Council v Javaid

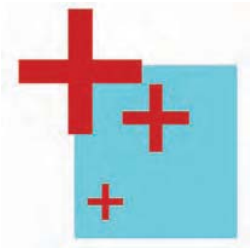
Manchester Magistrates' Court, 6 July 2011

On a prosecution brought by Manchester City Council and Greater Manchester Fire and Rescue Service, Mr Javaid pleaded guilty to 20 offences relating to defective private rented property. Local authority environmental health inspectors had discovered a serious fire risk, dangerous wiring, missing spindles on banisters resulting in gaps large enough for a person to fall through, broken windows and no working heating system in the premises. Conditions were so bad that an emergency prohibition order was served after the first inspection. Mr Javaid should, therefore, have closed the premises immediately and arranged new accommodation for his tenants; however, it was discovered later that not only had he kept the flats open, but moved in more tenants. The landlord was fined £33,750 and ordered to pay costs of £8,500.

1 *Are private sector tenants being protected adequately? A study of the Housing Act 2004, housing health and safety rating system and local authority interventions in England*, available at: www.sabattersby.co.uk/documents/HHSRS_Are%20tenants%20protected.pdf.
2 Michael Paget, barrister, London, instructed by Simon Foster, Tyndallwoods Solicitors, London.
3 Beatrice Prevatt, barrister, London, instructed by Ronald Daley, solicitor at Brent Private Tenants Rights Group, London.
4 Beatrice Prevatt, barrister, London, instructed by Rachel Cooper, solicitor at Brighton Housing Trust, Brighton.

Beatrice Prevatt specialises in housing law with the Housing Team at Garden Court Chambers. She is co-author, with Jan Luba QC and Deirdre Forster, of *Repairs: tenants' rights*, 4th edition, LAG, 2010. The author is grateful to the colleagues at note 2 for providing a note or transcript of the judgment.

Legal aid round-up



This series aims to give legal aid practitioners an overview of matters of interest and concern. In this article, Carol Storer provides practitioners with ten top tips on planning for the future.

Some of you may expect an article about planning for the future to be mercifully short. 'How can we plan for the future?', you are probably muttering. You bid for contracts and the decision is overturned, or contracts are extended or they may be terminated early. You firefight every day. You are recovering from an audit visit. An e-mail arrives from the Legal Services Commission (LSC): it sounds like the commission wants to carry out another audit. Does it? It does. And here is a letter from the bank wanting to discuss overdraft facilities. Three bills are returned from the LSC on the same day, all reduced but not by much. Should you appeal them all? Or just accept them? And here is a letter from your contract manager wanting to reduce your monthly payments to zero because you have not met the target rate with your monthly submissions. Has s/he included exceptional cases in this? Isn't there a backlog? Is that relevant?

Strategy/vision

Recently I spent over an hour talking to one of our members who was preparing for a partners' meeting away day to discuss the firm's plans for the next three to five years. The question is how do you have a strategy for the future? There are many proposals for the future (not least those contained in the Legal Aid, Sentencing and Punishment of Offenders Bill) and it is genuinely difficult to know how much work to put into planning on the basis of possibilities. Similarly, it is hard to rely on timescales. Think, for example, of the recent announcement that none of the civil cuts will come into force until April 2013 and that the best value tendering in crime consultation will not be published until autumn 2013.

Management

It is incredibly difficult to have a three- or five-year vision for the future when you carry out predominantly legal aid work, but the secret to success seems clear: good management. This means having a manager or a management team that, as well as all the other jobs involved in running a business, keeps on top of legal aid issues. What would be covered by this? January is a good time for lists, so here goes.

Ten top tips

1. Tenders: always have two or more people working on them and learn from the experiences of others. The recent family tender was a non-competitive bid round. Therefore, providing there were no skeletons in your contractual cupboard and your structures were sound (for example, you operate with correct supervision ratios), you should have succeeded. But over 100 organisations did not, why? A considerable number misunderstood the questions. Without joining the debate about the wording of certain questions, it does appear that some organisations left it to one person to complete the tenders.

So, rule number one of bidding is to have at least two people working on the bid. If necessary, pay for external consultancy. It is not only a huge responsibility for one person to carry, it is also impractical. If the person is ill, or becomes unavailable in the last few days, this will cause a crisis.

2. Get everyone signed up to the LSC e-mail alerts.[1] Everyone in the organisation who does legal aid work should be signed up to receive them. They come out about once a week and are very easy to speed read. If you do not do any criminal work you can ignore those sections. If you only do family work you can read any of the civil sections which are relevant.

3. Make sure everyone actually reads the LSC e-mail alerts. Be aware that increasingly the LSC is asking contract managers to check whether or not these e-mails have been opened and how relevant information has been distributed.

4. Read Vicky Ling's 'Recent developments in practice management' articles in *Legal Action* (see page 42 of this issue). They are invaluable and there is now a website which supports and supplements the *LAG legal aid handbook 2011/12*, edited by Vicky Ling and Simon Pugh.[2] I am not plugging these articles because they are in *Legal Action* but because they are relevant, concise and will save you endless worrying.

5. Try to avoid arguments with the LSC by writing contract compliance checks into your file review process and making sure that all fee-earning and billing staff are trained on important issues such as evidence of means, eligibility and the LSC's costs guidance. Do not just do it once, but have regular six-monthly sessions of one hour or so to go over the basics repeatedly.

6. Do not be afraid to appeal LSC decisions: unchallenged deductions on assessment can build up and affect your contractual key performance indicators.

7. Attend provider reference groups to help you plan for the future.[3] Make sure that you register for the meetings in 2012.

8. Civil practitioners should read the Civil Contracts Consultative Group (CCG) minutes and criminal practitioners should read the criminal CCG minutes.[4] Andrew Keogh's CrimeLine Updater is brilliant at covering everything of relevance, but the criminal CCG minutes give you a quick overview of how current practical problems are being tackled and what major changes are heading your way; similarly, with the civil CCG minutes.[5]

9. Look at the Law Society website and subscribe to its 'Legal aid update' e-mails.[6] Join LAPG and also receive regular updates.[7]

10. Do not let the stress of the job get to you. There are many organisations which can help if you feel that everything is getting too much, including the Law Society's pastoral care telephone help line for solicitors, which will refer you to a specialist adviser, and LawCare, an advisory and support service to help lawyers.[8]

1 See: www.legalservices.gov.uk/aboutus/how/subscribe_to_publications.asp.
2 See: www.legalaidhandbook.com.
3 See: www.legalservices.gov.uk/aboutus/provider_reference_groups.asp.
4 Available at: www.legalservices.gov.uk/civil/how/civil_contracts_consultative_group.asp and www.legalservices.gov.uk/criminal/contracting/criminal_contract_consultative_group.asp respectively.
5 See: www.crimeline.info/.
6 See: www.lawsociety.org.uk/practicesupport/legalaid.page.
7 See: www.lapg.co.uk/.
8 Telephone: 020 7320 5795 or visit: www.lawcare.org.uk.

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Recent developments in practice management

In these difficult times for legal aid practitioners, Vicky Ling sets out a ten-point plan to maximise the chances that organisations survive.

Legal aid is facing a period of unprecedented change. Legal aid practitioners have specialist knowledge which is directly relevant to the legal problems faced by the most vulnerable in society. Their ability to practise is threatened by the scale of the cuts to legal aid, and the key issue facing many is to ensure that their organisation survives. The scale of upheaval can seem daunting, but adopting a ten-point plan can help to make survival possible by breaking the overall objective down into manageable 'bite-size' chunks. Careful management, forecasting and monitoring will also help practitioners to identify where, sadly, survival may not be possible, and allow an orderly withdrawal from the market.

1. Identify what you need to change

Look at where your income has come from over the last year. How much of it was legal aid, and how much of it will be out of scope when the Legal Aid, Sentencing and Punishment of Offenders Bill comes into effect?

Think creatively about other sources of income. In private practice, privately paying clients are the most obvious source of income; however, there may be others, for example, training or consultancy.

2. Consult

This exercise should not be restricted to people with management responsibilities. It is important to gather ideas from individuals throughout the organisation, including partners/directors, trustees in third sector organisations, solicitors, caseworkers, secretaries and administrators. They all have valuable points of view.

3. Explain why change is needed

Most people working in legal aid long for the constant change to stop so that they can just focus on their clients. While this sentiment is understandable, it is not going to happen. The pace of change in modern life is relentless and, inevitably, legal aid is going to be part of the bigger shifts that are happening in the delivery of legal services. However, managing change effectively will give practitioners the best possible chance of continuing in practice and helping clients to access justice.

4. Involve managers and staff

Managers need to communicate clear messages and focus on the positive outcomes of the exercise. Undoubtedly, the legal aid cuts threaten access to justice for many people and the viability of numerous legal practices and specialist services; however, sending a message that the organisation is determined to stay around is more likely to be successful than concentrating solely on the negative impacts, which can become a self-fulfilling prophecy.

Most organisations have nagging issues that people put up with for years, but which are somehow not sufficiently important to change for their own sake. Is this an opportunity to put those issues on the agenda? Though they may be small things, if they result in better working methods and in making it easier for people to do their jobs, it is worthwhile adding them into the change plan. Often, there are some 'quick wins', such as reducing bureaucratic procedures, which will make people feel more positive.

5. Find champions

In any group, some people will see the benefits of change and others will not. It helps if those who are more positive are involved in piloting any changes, so that their colleagues can see the difference they make.

6. Offer training

You need everyone who will be involved to feel confident with any new ways of working. So, for example, in many legal aid firms only partners will have had much experience of dealing with privately paying clients, and as far as most fee-earners have been concerned, handling the funding of cases has been confined to explaining how the legal aid scheme works.

If fee-earners will have to 'sell' the firm's services and get money on account of costs in advance of carrying out work, it makes sense to provide them with training and to give them the opportunity to practise what they will say to clients, so that they feel comfortable and confident.

7. Seek and give feedback

This point is really important. It is unlikely that any change programme will get everything right straight away, and there are bound to be negative impacts given the cuts that practitioners are facing. Managers can encourage people to give feedback in team meetings, during one-to-one conversations and by e-mail, so that individuals have a choice of how they do so.

Managers need to encourage everyone to log any problems and contribute ideas for making things work better. Some comments may appear negative, but it is better to know what people think as then, where possible, you can make adjustments, and if this is not possible, explain why: at least this shows that people are being listened to.

8. Provide a role model

People with management responsibilities need to show that they are personally involved. This means that they are quickly aware of the strengths and limitations of planning and implementation, so that they can reinforce the positive aspects and work to resolve or minimise difficulties. Managers need to keep their promises, provide information and review how well any changes are working.

9. Follow up

The personal touch can really help: for example, short breakfast or lunch time meetings (with suitable refreshments) can provide the opportunity to identify how well things are being implemented and where further work may be required or things need to be done differently.

10. Acknowledge and praise achievements

Giving credit where it is due is a basic rule to encourage people to take the time and trouble to contribute their ideas. However, managers also need to be frank about issues of concern or where there may be problems.

Final thought

Creating and implementing a realistic plan for meeting the cuts will give your organisation the best chance of survival.

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

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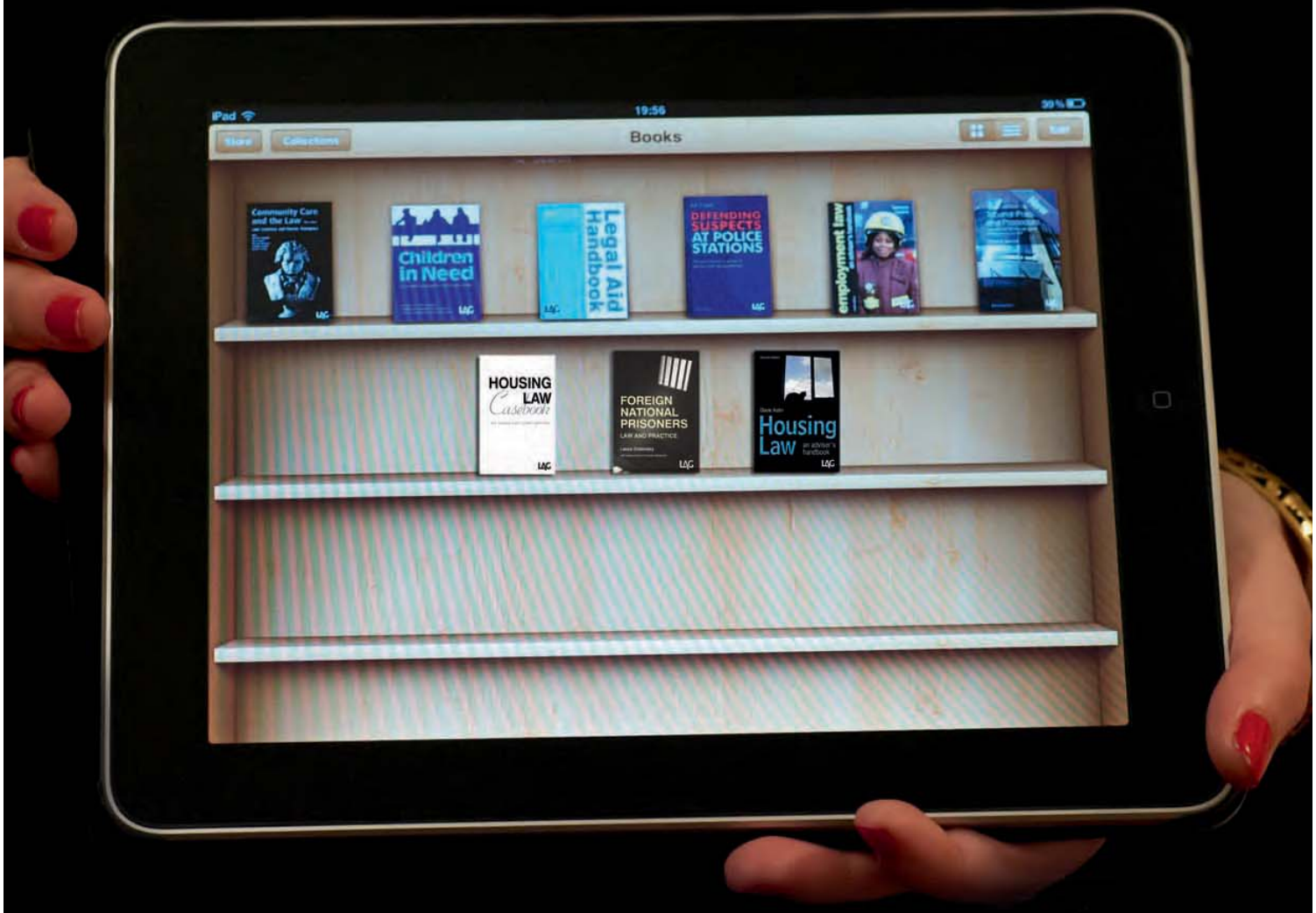

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