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FACING THE FUTURE:
LAG CONFERENCE REPORT

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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A civilised society?

It is never a good feeling to lose a case, at whatever level. Barrister Stephen Cragg, who represented Ms McDonald in her case against Kensington and Chelsea RLBC ([2011] UKSC 33, 6 July 2011), talked about his disappointment at the Supreme Court's decision at a special *Community Care Law Reports* (*CCLR*) practitioner seminar, 'Defining community care needs and assessments after *McDonald*', held last month. Steve Cragg's feelings might not have been helped by his opposite number in the case, Kelvin Rutledge, speaking from the audience to outline why he believed that the judgment was correct and there were no grounds for appeal (could this have been a case of getting in his retaliation first?).

The decision in *McDonald* was disappointing on a number of levels, above all for Ms McDonald herself: the onset of disability is one of the hardest things to face in life. In general, the media coverage of Ms McDonald's case was sympathetic. It seemed unfair for the council to withdraw care which enabled her to use the toilet at night, as without such assistance she would be forced to use incontinence pads. The council argued that the latter would be a reasonable option, as other people were prepared to do so and its duty was only to keep her 'safe'. LAG believes that it is unfair to expect someone who is not incontinent to wear incontinence pads: human dignity should be the main consideration in these cases, not cost.

Richard Gordon QC argues in an editorial in the next issue of LAG's *CCLR* that the courts got the law wrong when considering the case. At the Supreme Court he believes that the judges failed properly to apply the principles established in the leading case of *R v Gloucestershire CC ex p Barry* [1997] AC 584, 20 March 1997. Richard Gordon argues: 'Identifying a need may, according to *Barry*, factor in the resources available to an authority but once the need has been identified, the means of meeting it are not affected by resources save that the authority may select the most economical means of meeting the need that it has identified.'

The case caught the headlines because of Ms McDonald's successful career as a ballerina, but the issues that she is confronting are those that many of us will have to deal with as we grow older, as a result of improvements in medical science and life expectancy. The Equality and Human Rights Commission viewed that what was at stake was important enough to fund the Disability Law Service to continue with Ms McDonald's appeal at the Supreme Court.

McDonald was the first case that was purely about care needs to reach the Supreme Court or House of Lords in 15 years. The judgment could have put down some markers about where the law stands in relation to care needs, human dignity and individual choice. Even if the case was still lost, a proper analysis of discrimination and human rights law would have at least provided guidelines for the future on deciding cases in this increasingly important area of law. The fact that the Supreme Court's ruling did not do so is, perhaps, the greatest regret.

The question is what is the balance to be struck between the individual's care needs and the resources of the state to secure them? In her dissenting judgment, Lady Hale discussed the necessity to assess individual needs against the standards set by 'a civilised society'; however, this has no meaning in UK law. Article 8 (the right to a private family life) of the European Convention on Human Rights does though encompass dignity and autonomy. What is acceptable in one European country will vary according to cultural and economic factors; for example, poorer economies in some parts of Europe, as was pointed out by one speaker at the seminar, struggle to provide kidney dialysis to those who need it.

In the UK, the population's expectations of what a civilised society should provide are higher. An examination of the comments that *McDonald* has sparked would seem to suggest that a majority of the public believes that the state should take into account an individual's views on his/her dignity, particularly for such a personal function as using the toilet. So, it would seem that the law on this matter is out of step with public opinion.

In response to the Law Commission's project on adult social care, the government has said that it will introduce legislation in the next parliamentary session. This will be an opportunity to establish guidance for the courts to interpret and follow on what standard the UK wants to set in respect of an individual's care needs with regard to factors such as his/her dignity and autonomy. Let us hope that this guidance does not come too late for Ms McDonald and the thousands of people who are in similar circumstances.

■ The September 2011 issue of *CCLR* will include a discussion on the implications of *McDonald*. In addition, the judgment will be discussed at LAG's Community Care Law Conference, which will be held on 30 November 2011.

IAS goes into administration

Last month the Immigration Advisory Service (IAS) was put into administration as a result of financial problems. IAS was the largest provider of immigration law services in the legal aid sector. IAS has followed the same path as Refugee and Migrant Justice (RMJ), another large charity which provided publicly funded immigration services. RMJ went into administration last year after getting into financial difficulties related to the legal aid scheme (see July 2010 *Legal Action* 5). It is thought that IAS had over 25,000 live cases (over double the number of cases that RMJ had when it was placed into administration). Around 300 staff were employed by IAS; the service worked from 14 offices and had a further 12 outreach services hosted in other locations.

Both IAS and RMJ suffered cash-flow problems caused, in large part, by their dependence on legal aid income. LAG understands that these difficulties were caused by the change to fixed fees for legal aid work in 2008, which resulted in reduced income and delays in payment. In addition, and in common with many immigration law providers, both charities carried large liabilities for the cost of interpreters, experts and other third parties.

According to a statement on IAS's website, the charity was trying to negotiate repayment of money owed to the Legal Services Commission (LSC), but IAS's trustees took the view that as a consequence of the pending legal aid cuts, the service would not have sufficient cash in the future to pay off this debt. LAG believes that around 30 per cent of IAS's work involved non-asylum immigration advice, which is on the verge of being cut from scope. The charity would also have been hit badly by the ten per cent reduction in fees that is planned for the autumn.

A message on the LSC's website advises clients that '[w]e are now identifying alternative advice provision in the areas affected and arrangements for case transfer will follow as soon as possible'. IAS clients are also advised to 'visit IAS's website where updates on arrangements will be posted'. LAG has seen a copy of a letter from Jonathan Sedgwick, acting chief executive of the UK Border Agency written to the Immigration Law Practitioners' Association (ILPA). In the letter he assures ILPA that requests for adjournments of hearings in which IAS clients have not been able to find alternative representation 'will not be contested', but turns down its request to delay removals of IAS clients.

In response to the news of IAS's closure, Alison Harvey, general secretary of the ILPA, said: 'Clients, including in areas where there is little or no alternative provision, struggle to find alternative representation. We know from members that the LSC's "bulk transfers" of RMJ files has left many lawyers with boxes of unclaimed files: they have never seen the client, and no alternative representative has ever called for the file. These people are unrepresented, and at risk.' Steve Hynes, LAG's director, said: 'What has happened to IAS illustrates the folly of pursuing a strategy of trying to concentrate legal aid work between fewer larger suppliers, which is what the LSC has been trying to do in immigration law.'

Legal Aid Bill campaign round up

Last month, after hearing oral evidence over two days, MPs on the House of Commons Public Bill Committee on the Legal Aid, Sentencing and Punishment of Offenders Bill met to consider the bill's provisions in detail (see page 5 of this issue). There have been protests from both the Opposition and special interest groups, including LAG, that the government has not allowed sufficient time to consider the Legal Aid Bill. Those fears seem to have been confirmed at the committee's first scrutiny meeting: there was only enough time for it to consider clause one of the bill. LAG understands that the government might move to use a system known as 'internal knives' to curtail discussion of the Legal Aid Bill when the committee sits again in September. This mechanism would divide the time remaining for discussion of the bill into sections to which MPs would have to adhere strictly. The coalition government is aiming to send the bill to the House of Lords for consideration by 13 October 2011.

LAG and many of the organisations that are campaigning on the bill have produced amendments to it for which they are seeking support from MPs sitting on the Public Bill Committee. Also, on the Legal Aid Bill campaigning front:

- On 18 September 2011, the Liberal Democrat Lawyers Association will meet during its party's conference in Birmingham to discuss the Legal Aid Bill. LAG understands that the association is concerned that a motion against the legal aid cuts, which was passed at last year's Liberal Democrat party conference has so far been ignored by the coalition government.
- On 25 September 2011, Carol Storer, director of the Legal Aid Practitioners Group, has been invited to speak at the Society of Labour Lawyers meeting in Liverpool.
- This autumn, Justice for All and the Law Society's Sound Off for Justice campaign will be holding fringe meetings at the three main party conferences.
- Steve Hynes, LAG's director, will be speaking at events at the three main party conferences this autumn.

District Judge Nicholas Crichton, winner of this year's Legal Aid Lawyer of the Year outstanding achievement award, will deliver LAG's 2011 annual lecture, 'Drug and alcohol misusing families: getting them back on track', in London later this year.

IN BRIEF

Legal advice to Gypsies and Travellers

- The current proposals in the Legal Aid, Sentencing and Punishment of Offenders Bill will have 'disastrous' effects on advice and representation to Gypsies and Travellers, according to a briefing summary that has just been published by Community Law Partnership (CLP). CLP, with its Travellers Advice Team, has launched a campaign to retain legal aid for Gypsies and Travellers.

- For a copy of the briefing summary and information about the campaign, contact Chris Johnson, tel: 0121 685 8595 or e-mail: office@communitylawpartnership.co.uk. An online petition is available for signature at: www.petitiononline.co.uk/petition/no-mad-laws/3062.

New LAG opinion poll research

- This month LAG is conducting an opinion poll in London to test the public's views on the availability of social welfare law advice in the capital. The research will also include an overview of the funding problems that not for profit organisations are facing. The research, which is funded by Trust for London, will be published in the autumn.

news feature

Evidence to Legal Aid Bill committee reviewed

LAG and other organisations, including the Law Society, the Bar Council and Citizens Advice, were called to give evidence to the House of Commons Public Bill Committee, which is considering the Legal Aid, Sentencing and Punishment of Offenders Bill (see also page 4 of this issue).

Opposition motion for more scrutiny

Before the first oral evidence session, committee members considered the timetable for the bill's public committee stage. Opposition MPs Helen Goodman and Andy Slaughter, who is the Shadow Justice Minister, made the point that insufficient time had been allowed to hear evidence and to scrutinise the bill. However, a programme motion to allow more time for consideration of the bill's provisions was lost by eleven votes to eight.

The first day of oral evidence

In the committee's first sitting, it examined witnesses including Vicki Helyar-Cardwell, director of the Criminal Justice Alliance, Juliet Lyon, director of the Prison Reform Trust, and Frances Crook, director of the Howard League for Penal Reform. The witnesses who gave evidence during the committee's second sitting included: Linda Lee, outgoing president of the Law Society, Peter Lodder QC, chairperson of the Bar Council, and Carolyn Downs, chief executive of the Legal Services Commission (LSC).

Conservative MP Ben Gummer attempted to drive a wedge between the Law Society and the Bar Council: he asked Peter Lodder QC if he agreed with the Law Society's suggestion that fees should be capped at £250,000. Peter Lodder QC avoided the question, replying: 'I certainly do not want to appear to be arguing with Linda Lee. The point is that we are united in asserting that the proposals that the government have set down on the bill are deeply harmful to justice.'

There were heated exchanges between Linda Lee and Conservative MP Elizabeth Truss. Elizabeth Truss pursued a line of questioning on the cost of legal aid in common law countries, asserting that, in Canada, New Zealand and Australia, 'at roughly £10,000 income you do not receive legal aid in those countries. Is the British system not pretty generous in terms of the eligibility for legal aid and the scope that is being proposed under this bill?' Linda Lee tried to answer the question with reference to the difference between adversarial and inquisitorial jurisdictions, and though she observed that it was unreasonable for her to be expected to come to the committee with details of legal aid means tests in every country, conceded that the Law Society would provide figures for the three countries mentioned. Later in the evidence session, the committee returned to questions on international comparisons. In response to a question from Conservative MP Damian Hinds, Linda Lee pointed out that, compared with France, the UK had almost double the amount of criminal convictions. She also made strong points about the need for early advice in cases when asked by Andy Slaughter about the likely impact of the cuts: 'We very much feel that you are simply shunting the cost [of problems] away from the legal aid budget to somewhere else. The cost will be greater. Studies and the government's own impact assessment suggest that that will be the case.'

Andy Slaughter used the LSC's response to the legal aid green paper in an attempt to wrong foot Carolyn Downs when she was giving evidence. Quoting from the response, he said: '[W]e have concerns that fee cuts may result in market failure and premature exits from the market where, for example, a firm or not for profit [NFP] organisation becomes insolvent.' Carolyn Downs replied that the LSC was having on-going discussions with the Ministry of Justice (MoJ): 'I am satisfied that the conversations that we are having with the ministry, where we are raising real risks to implementation, are being taken on board.' Noting that the LSC's response referred to the threat posed to the NFP sector by the legal aid changes, Andy Slaughter raised the concern that NFP agencies, such as the Law Centre® in his west London constituency, were under threat from both cuts in local council grants and legal aid. Carolyn Downs responded that this was 'a matter for the ministry, and the Cabinet Office is taking a lead on that'. She went on to say that the LSC has plenty of providers: 'on civil … we have 3,370 providers. On crime we have 2,000 providers'.

The final day of oral evidence

The witnesses who gave evidence at the committee's fourth sitting included Gillian Guy, chief executive of Citizens Advice, Roger Smith, director of Justice, and Steve Hynes, LAG's director. Gillian Guy told the committee: 'The majority of the people who present themselves to Citizens Advice Bureaux come for debt, benefits, employment and housing advice. It will be those people, as a result of these proposals and the other squeeze [on alternative sources of funding], who will begin to get even further rationing of that advice.'

During this session, the committee again pursued points about international comparisons. Steve Hynes gave evidence on the qualification conditions for legal aid in New Zealand, referring committee members to the relevant regulations for civil legal aid which, if anything, showed that the qualifying conditions there are slightly more generous than in the UK. Roger Smith made a strong point on comparisons with Scotland's legal aid system which, he observed, was more generous than the scheme in England Wales, but cost less.

When questioned by Labour MP Yvonne Fovargue, who is chairperson of the All Party Parliamentary Group on Legal Aid, Steve Hynes said that it would be difficult to overestimate the devastating effect of the cuts. He also cited evidence on the impact of the cuts which was published in July 2011 *Legal Action* 9. He pointed out that the government' s own impact assessments acknowledge the devastating effect the proposed scope cuts will have on poor and marginalised communities. When asked about the proposed telephone gateway, Steve Hynes made the point that LAG's opinion survey, which was published in November 2010, indicated that people in social class DE, who were most likely to qualify for civil legal aid, were least likely to access such a service: 'There you have your answer. If you want a legal aid system that people do not use, deliver it through telephone advice.'


CAROLINE O'DWYER

The Justice minister says that the advice sector will pick up the slack left by legal aid cuts, while LAG's director, Steve Hynes, warns of a 'façade of rights'. Freelance legal journalist Fiona Bawdon reports from LAG's social welfare law conference.

Facing the future: LAG conference report

The government's defence

Jonathan Djanogly, the Parliamentary Under-Secretary of State for Justice, used the LAG conference to defend government plans to 'reframe' the legal aid scheme by removing most social welfare law, but insisted that an additional £20m in funding announced for the not for profit sector would help it to fill the gap.

Jonathan Djanogly described the reform plans, which will slash £350m from the budget, as 'far-reaching' and 'ambitious', but insisted that it is vital to move away from the current 'adversarial and litigious' approach to social welfare advice. 'A corollary of reframing legal aid must be a reframing of early generalist advice provision,' he said. The audience would welcome Justice Secretary Kenneth Clarke's earlier announcement of £20m in extra funding for the advice sector, he added. 'I and my ministerial colleagues are acutely aware of the need to redefine and reposition the future role of not for profit agencies and their work, which includes the very difficult question of sector funding in the current fiscal context.'

Separate from plans in the Legal Aid, Sentencing and Punishment of Offenders Bill, which had just had its second reading, Jonathan Djanogly insisted that he was committed to working with other government departments and key organisations to transform the role of the not for profit sector. 'I genuinely believe that it will be possible to define a new generalist social welfare law advice provision outside of the redrawn legal aid scheme,' he said.

'Why does the [Department for Work and Pensions] come along [to benefits tribunals] with qualified lawyers to defend its case – that's not procedural to me. There is a massive issue of equality of arms if you remove the right of people to have any legal advice at tribunals.'

Margie Butler, chief executive, Mary Ward Legal Centre

In among the general despondency about government plans for the publicly funded sector, Jonathan Djanogly had one piece of relatively good news. In response to a question, he confirmed that he had 'absolutely no intention' of removing the right to legal aid from those in the police station and that he was sympathetic to removing a clause in the bill which had caused alarm in some quarters as it would give the government power to do so if it wished. 'I would be happy to look at withdrawing the clause because we have no intention of using it,' he said.

'Economic and moral' case against cuts

Speaking later at the conference, Sadiq Khan, Shadow Justice Secretary, said that legal aid was facing 'a crisis of unprecedented proportions'. He took some pains to establish his civil liberties credentials with the audience, pointing out that he was a former legal aid solicitor and had been vice-chairperson of LAG at the time of the Access to Justice Act 1999 . 'This current bill is light years away from

'My understanding is that when cases get to [the welfare benefits] tribunal, it is very, very rare that it is a question of law as such – that it's always a pretty straightforward procedural type case.'

Jonathan Djanogly, justice minister

Jonathan Djanogly spoke of government plans to transform the not for profit sector.

'Some of my clients have learning difficulties; some have autism; some have head injuries or terminal illnesses; some are elderly with dementia. All are very vulnerable and unable to advocate for themselves. [Under the proposals] my clients will only be able to access legal advice via an unqualified telephone operator. Most of my clients can't access a phone; most of my clients don't even know what a phone is; most can't read; none can use e-mail. What my clients really need is early, face-to-face advice.'

Nicola Mackintosh, community care and mental capacity solicitor, Mackintosh Law

From left to right: Sadiq Khan MP; Poonam Bhari, LAG's chairperson; Andrew Dismore, Access to Justice Action Group; Steve Hynes, LAG's director; and Linda Lee, outgoing Law Society president.

anything we have seen before in terms of the negative impact it will have,' he said.

Sadiq Khan conceded that legal aid would have faced cuts even if Labour had been returned to power, but insisted that social welfare law would have been protected. He accused his Conservative opposite number of failing to fight the Ministry of Justice's corner in negotiations with the Treasury and pledged that Labour would fight the bill, which he said was being rushed through in an attempt to head off anticipated opposition from the House of Lords.

Sadiq Khan said that it is a 'no brainer' that early social welfare legal advice saves both money in the long term and human misery. There is an 'economic and moral case' that needs to be made against the changes, he added. Steve Hynes, LAG's director, also spoke about the 'legal and moral' weaknesses in the government's position, as its own impact assessment conceded that the cuts would have a disproportionate impact on the most vulnerable.

Steve Hynes reminded the audience that, for all Sadiq Khan rediscovering his radical roots, Labour's record on legal aid was not unblemished. Attacks on the scheme by the likes of former Prime Minister Tony Blair, who talked about derailing the 'legal aid gravy train', and former Justice Secretary Jack Straw, who talked about BMW-driving defence solicitors, had helped create a climate where the scheme had few friends among the media or public and which the Conservatives felt could be dismantled with impunity. Steve Hynes warned of a future with a 'façade of rights', where 'legal rights become irrelevant to the majority of the population because they have no means of enforcement'.

Richard Miller, head of legal aid at the Law Society, warned that, despite its highly praised campaign against the cuts, he did not want to hold out any false hope that the bill could be stopped entirely. It was likely to emerge from the House of Commons largely unscathed, but he was hopeful that opponents would be able to win 'small concessions' during its passage through the House of Lords.

'I was very struck by how much reliance on the advice sector the minister was displaying there. It's not the case that if an advice agency loses 10–15 per cent of its income it just scales down by that amount ... The situation now is a pack of cards financially in most agencies. Even a small withdrawal of funding could actually result in the whole edifice coming down.'

Steve Johnson, chief executive, AdviceUK

Sadiq Khan said legal aid was facing an unprecedented crisis

'I've had a wonderful career as a legal aid solicitor, but how awful is it that when my daughter originally said to me she wanted to be a legal aid solicitor, I begged her not to do it?'

Linda Lee, outgoing Law Society president

■ To read some of the key speeches from the conference, visit: www.lag.org.uk/legalaidconference.

LAG would like to thank the Law Society and Doughty Street Chambers for sponsoring the 'Facing the Future' conference and Justice for All for supporting the event.
Photographs: Robert Aberman.


CAROLINE O'DWYER

Freelance legal journalist Fiona Bawdon talks to District Judge Nicholas Crichton, winner of the outstanding achievement award at the 2011 Legal Aid Lawyer of the Year (LALY) awards, about the success of the Family Drug and Alcohol Court (FDAC) pilot project, which he was instrumental in setting up in 2008. See also July 2011 *Legal Action* 8 and page 4 of this issue.

District Judge Nicholas Crichton: a family justice pioneer

The 12-year-old boy had something very important he wanted to tell the judge ahead of his care hearing: 'If you send me home, I will kill myself.' 'He had not said it to anybody else – and he meant it,' recalls District Judge Nicholas Crichton. 'He was a very unhappy boy.'

Dealing with young children in the depths of despair, or parents who love their children but are inflicting terrible damage on them because of their own addictions to drugs and alcohol, is all in a day's work for any family judge. Few among the family judiciary would argue that the existing court system is perfect, but even fewer have made it their mission in life to try to improve it.

Tackling addiction

Nicholas Crichton, a former legal aid solicitor in north-west London, has been the driving force behind the innovative FDAC pilot at Wells Street Family Proceedings Court in central London. The idea came about after he got talking to a Californian judge at an international summit, who told him about the success this approach was having in America. He spent the rest of the conference hoovering up every detail that he could from the American judge, and came back to the UK determined to create something similar here.

In June, Nicholas Crichton's groundbreaking and unstinting work in bringing about FDAC was recognised when he won the outstanding achievement award at the 2011 LALY awards. (Fittingly, the presenter of his award was Doreen Lawrence, mother of the murdered black teenager, Stephen, who is herself a dogged and determined fighter for reform and justice.)

'FDAC takes a radically different approach. Rather than parents having to go out and find the help they need, the help comes to them in a timely and co-ordinated way. The FDAC judge works as part of a team, which includes social workers, nurses trained in substance abuse, child and adult psychiatrists, and even parent mentors (former addicts who have already been through the process).'

It is well recognised that addiction of one kind or another is a feature in nearly all care cases. Nicholas Crichton says that although research suggests that the national figure is 60–70 per cent of cases, in his court (and in other big conurbations) he reckons that in up to 90 per cent of care cases, parents will have problems with drugs and alcohol.

FDAC, which launched in January 2008, aims to tackle this problem head on. In the rest of the family justice system, the courts do little to help parents tackle their addictions (other than threaten to take their children away permanently if they do not). The thinking is that parents should demonstrate their commitment to turning their lives around by seeking out their own rehabilitation arrangements. The logic goes that those who fail to do this, clearly do not really want (or deserve) to have their children back.

Nicholas Crichton says that the approach of, at best, giving parents a list of rehabilitation centres to contact, is setting them up to fail. 'They can't do it; they haven't got the willpower. The very few, the one in ten who does make contact, will arrive and be told, "That's wonderful; we'd love to help you but there's a three-month waiting list".' He adds: 'If you are on the bottom rung of a very slippery ladder, with a wait of three months, you lose your grip and you fall into the mire.'

FDAC takes a radically different approach. Rather than parents having to go out and find the help they need, the help comes to them in a timely and co-ordinated way. The FDAC judge works as part of a team, which includes social

ROBERT ABERMAN

District Judge Nicholas Crichton receives his award for outstanding achievement at the 2011 LALY awards.

workers, nurses trained in substance abuse, child and adult psychiatrists, and even parent mentors (former addicts who have already been through the process). Participating parents are asked to sign a 'contract' and to come back to court every two weeks to see the same judge and report to him on their progress (or otherwise). (There are currently two judges involved, Nicholas Crichton and District Judge Kenneth Grant.) The process typically takes around nine months, after which around one in four parents going through the process will have their children returned to them.

Nicholas Crichton stresses that these are 'very high end' cases – parents with long-standing addictions who have already had their children removed. Sometimes even the most intractable, apparently hopeless addict can be transformed by FDAC, he says. 'We've had one mother who lost six children, who have all been adopted – and she has kept her seventh. She is now doing really well and we have other examples like that.'

There have been three London boroughs taking part in the FDAC pilot since the outset Camden, Islington and Westminster (and Hammersmith and Fulham has just joined, having previously acted as the 'control' borough for a study into the scheme). To get the FDAC off the ground, Nicholas Crichton had to secure support from the three boroughs, plus funding from the Department of Health, Ministry of Justice and Home Office Department for Education.

FDAC's success

Research from Brunel University and the Nuffield Foundation supports Nicholas Crichton's assertions that FDAC is producing highly positive results.* As well as showing that nearly twice as many mothers going through FDAC are reunited with their children compared with those in the control group (39 per cent, against 21 per cent); the research also found that a similar proportion of FDAC fathers (36 per cent) had stopped misusing drugs by the end of the process; the figure for fathers in the comparison group was zero. Where parents were clearly failing to beat their addictions, despite the FDAC team's best efforts, decisions to remove children permanently would be made more quickly than in other courts.

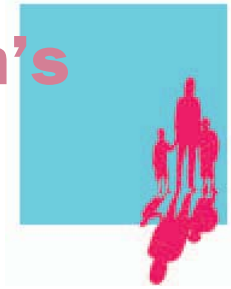
FDAC's budget runs out in March 2012 and Nicholas Crichton says he is now 'really beginning to sweat' about whether its funding will continue beyond the end of the initial pilot. Ideally, he would like to see it rolled out more widely, as it has been in the US, which now has around 400 of these courts.

Despite these straitened times, Nicholas Crichton says that he refuses to be pessimistic about the future prospects for FDAC. Keeping it going is, he says, a 'must do', 'a no brainer' – particularly for any government worried about its finances.

The cost of the FDAC pilot is half a million pounds a year; the cost to the taxpayer and society more generally of not helping addicted parents is incalculable. Nicholas Crichton says: 'I was sitting in a court corridor with a mother, 30 years ago when I was still a solicitor, and she was about to have her twins, her seventh and eighth children, taken into care because of her drug addiction. They were six months old. Her first child was in borstal, which is five times the cost of Eton; her second child was in a detention centre, four times the cost of Eton; third and fourth children had been adopted – with the adoption allowances and everything that goes with that; fifth and sixth children were in care, awaiting adoption, with the cost of foster carers and all the expense of that – and here were numbers seven and eight. The cost of police coming out because there was constant domestic violence; the cost to the NHS because of her ill health because of the drugs; the cost to social services of having to visit regularly and check on her children being safe. The cost to run a court – judge time, staff time; the cost to the legal aid services. Off the top of our heads, we thought she was costing the nation half a million pounds a year – and that was 30 years ago.'

* *The Family Drug & Alcohol Court (FDAC) evaluation project. Final report*, May 2011, available at: www.brunel.ac.uk/research/centres/iccfyr/fdac.

Family and children's law review



Nigel Humphreys and **Chris Graves** keep readers up to date with legislation, practice matters and case-law relating to family and children's law in their twice-yearly series.

POLICY AND LEGISLATION

Practice Guidance

Out of hours hearings

Sir Nicholas Wall, President of the Family Division, issued new Practice Guidance on 18 November 2010 in relation to out of hours hearings.[1] The guidance reminds practitioners that a High Court judge of the Family Division is on duty out of hours every day of the year, including all holiday periods, between 4.15 pm and 10.30 am the next day (Monday to Thursday) and between 4.15 pm each Friday to 10.30 am the following Monday.

The guidance makes the following points:

- The service is intended only for 'urgent' cases, and must not be abused.
- 'Urgent' means cases 'in which an order of the court is required to regulate the position between the moment the order is made and the next available sitting of the court in conventional court hours, that is, usually, 10.30 on the following morning' (para 2).
- An example of such an urgent case would be the need to require a judge to sanction life-saving medical treatment.
- The application must be capable of being reduced to a single A4 faxed sheet (or its e-mail equivalent), or a short telephone conversation.
- Examples of what would be unacceptable include an application which 'can plainly wait until the normal sitting of the court' or any application involving a 'substantial amount of documentation' (para 5).
- The judge cannot be expected to make arrangements to sit in court unless such a sitting is strictly necessary. The judge will be at home, and that home may not be in London.
- Practitioners are reminded that those who abuse the system may be subject to orders for wasted costs and may also be reported to their professional bodies for serious professional misconduct.

Children cases involving the Official Solicitor

In December 2010, Mrs Justice Pauffley issued guidance in cases involving the Official Solicitor, approved by Sir Nicholas Wall.[2] The Official Solicitor has experienced difficulties in accepting requests to act as a guardian ad litem or litigation friend for 'protected parties' in proceedings relating to children because of severe budgetary constraints on the Official Solicitor's office. This situation is unlikely to improve in the medium term and the current economic climate.

The guidance reminds solicitors that the Official Solicitor will need to be satisfied of the following criteria before accepting a case, which will need to be confirmed immediately on approaching the Official Solicitor's office:

- Satisfactory evidence or a finding, by the court, that the party lacks capacity to conduct the proceedings and is therefore a 'protected party'.
- Confirmation that there is security for the costs of legal representation.
- Confirmation that no other person is suitable and willing to act as a guardian ad litem or litigation friend.

The guidance also asks judges to indicate, wherever appropriate and with as much particularity as possible, the relative urgency of the proceedings and the likely effect on the child (and family) of delay. This will enable the Official Solicitor to give priority to appropriate cases.

Security for the costs of legal representation will be adequately provided if the party is eligible for legal aid funding. If s/he is not, however, the Official Solicitor will expect funds to be made available for the costs of representation.

The guidance supplements the fuller Practice Note, *The Official Solicitor: appointment in family proceedings* (2 April 2001).[3] A sample letter to a psychiatrist or general practitioner, together with a certificate of lack of capacity, is available from the Official Solicitor's office.

Interim report of Family Justice Review

Family Justice Review: interim report is probably the most fundamental in its assessment of the family justice system.[4] It follows the appointment of David Norgrove as chairperson of the Family Justice Review panel, which launched its 'call for evidence' in June 2010. The interim report of the review (228 pages) was published in March 2011 and invites responses so that the final report and recommendations will be published in autumn 2011.

This is by no means the first, nor the last, review into the operation of the family justice system. Some of its proposals echo the report of the Finer Committee back in 1971, which called for a single unified family court. The review concentrates, however, on the most controversial area of family law, namely, child care proceedings, and while it makes a large number of recommendations about other areas of family law, none of these are approached in so much detail as child care.

However, the most fundamental recommendation is that a Family Justice Service should be established, to be led by a chief executive 'with the skills and stature to lead a complex change programme, and to command respect among ministers, judges, lawyers, local authority managers and social workers, as well as the service's own staff' (para 25). The Family Justice Service should cover a much wider area of responsibilities than HM Courts and Tribunals Service (HMCTS) alone. It should:

- manage its own budget;
- provide court social work functions;
- ensure that the child's voice is adequately heard;
- procure publicly funded mediation and court ordered contact services;
- co-ordinate professional relationships and workforce development needs;
- co-ordinate learning, feedback and research across the system;
- ensure that there is robust, accurate, adequately comprehensive and reliable management information; and
- manage a coherent estates strategy.

The whole concept of a Family Justice Service is at the core of the panel's recommendations, but much of the detail has yet to come. There is no doubt that this panel has the support of the judiciary, and other professional bodies (such as the Law Society), in seeking to create an entirely new Family Justice Service, with its own objectives, its own budget and its own responsibilities; negotiation between government and the judiciary would determine just how wide-ranging these would be.

The report itself is comprehensive, and

recommends that judges should be appointed to take a much different role from that which they have held in the past. Qualities such as leadership and management skills are now identified as vital, together with the ability to run both a service and case management in a proactive way.

There are some breathtaking recommendations, in particular, the removal of magistrates from child care proceedings and also an acknowledgement that the child's own voice should be central. Just how that voice is to be heard is an issue that is only touched on, but the report also recommends that the traditional view of family courts and buildings might be brushed aside, as the Family Justice Service is to look towards technology to achieve more: 'in the most appropriate location, routine hearings should use telephone or video technology and hearings that do not need to take place in a court room should be held in rooms that are family friendly, as far as possible and appropriate' (para 48).

There is heavy criticism of the courts' reliance on the plethora of experts and of the 'culture, created by pressures from parents combined with decisions from the Court of Appeal (and perhaps part of a national trend), where the need for additional assessments and the use of multiple experts is routinely accepted' (para 63). There is further criticism of the habit of scrutinising care plans and the suggestion that local authorities are not trusted enough.

In its review of child care proceedings, the report concentrates on the need for judges to manage cases and ensure that they are processed in a far shorter period than the present average of 53 weeks. The difficulty, however, will lie in matching this objective against the already well-established culture of challenging local authority decisions, and of drawing on the best possible evidence to decide whether a court should authorise the most draconian of all orders, the removal of a child from his/her parents and the placement of that child with stranger adopters.

Beyond the review of child care proceedings are a number of further recommendations:

- The abolition of the charging of enormous fees to local authorities for conducting care proceedings.
- The 'tandem model' of guardian and solicitor should be retained, but the solicitor should perhaps be drawn from the salaried Children and Family Court Advisory and Support Service (Cafcass) legal service.
- There should be further development of alternative dispute resolution (ADR) in all types of proceedings regarding families.
- There should be no change in the requirement for grandparents (or other relatives) to seek leave to make an application to a court for an order regarding children.
- There should be '[a]n online information hub and helpline … to offer support and advice in a single, easy-to-access point of reference at the beginning of the process of separation or divorce', which should provide information online to parents (para 114).
- The divorce process should be changed and streamlined, so that undefended divorce becomes purely a paper exercise. The two-stage decree nisi/absolute process should be abolished, just as it is with dissolution of civil partnership.

Perhaps the most important commentary lies with the role of the courts themselves. Just as the Children Act (CA) 1989 placed responsibility with parents to decide what is best for their children, so the review reminds us that:

The state cannot fix fractured relationships or create a balanced, inclusive family life after separation where this was not the case before separation. Court is generally not the best place to resolve these disputes. Where possible, disputes should be resolved independently or using dispute resolution services such as mediation, when it is safe to do so. Parents who choose to use the court system must understand it will not be a panacea (para 105).

European Commission proposals

Matrimonial property regimes and the property consequences of registered partnerships

In March 2011, the European Commission published two proposed regulations affecting property and financial issues arising from the dissolution of marriages or registered partnerships in cases involving an international element: *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes* and *Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships*.[5]

These proposals could have profound consequences for our own family law. The proposals deal with:

- jurisdiction, ie, which court should deal with any litigated issues; and
- the applicable law, ie, which country's family law principles the court should apply.

The European Commission's objective is to provide greater certainty to those who have an international connection in their marriage or partnership, to prevent parallel proceedings and to discourage 'forum shopping'.[6]

In April 2011, the Ministry of Justice (MoJ) published a consultation paper, seeking views about whether the UK should opt in to the proposals and/or be a party to negotiations on them.[7] The consultation period ran from 15 April 2011 to 20 May 2011, and the MoJ is to publish its response by 22 August 2011.

In respect of married couples, the European Commission proposes that spouses should be able to choose whether the national court dealing with their divorce also has jurisdiction to deal with financial issues. If they do not make such a choice, the court with jurisdiction for financial issues will be determined (in order of priority) by:

- spouses' common habitual residence; or
- their last common habitual residence, if one of them still resides there; or
- the defendant's habitual residence; or
- the nationality of both spouses (or in the case of the UK and Ireland, their common domicile).

The proposal therefore envisages that the courts of different states may deal with the dissolution proceedings and with their financial consequences. Maintenance obligations are excluded specifically from the proposals, so it may also be possible for different jurisdictions to be dealing with different aspects of the couple's finances.

The government's view is that this might lead to more difficulty and confusion, and might also be the subject of tactical litigation.

The European Commission further proposes that spouses should have a choice of the applicable law referring to their 'matrimonial property regime'. In the absence of such a choice being made by spouses, the applicable matrimonial regime would be, in order of priority:

- the law of the state of spouses' first common habitual residence after their marriage; or
- the law of the state of spouses' common nationality at the time of their marriage; or
- the law of the state with which spouses hold jointly the closest links.

The proposals therefore also envisage the court of one jurisdiction applying the law of another jurisdiction, which is already the case, for example, in French courts. A French court dealing with property issues on divorce will apply the English 'matrimonial property regime' if the couple resided together in England immediately after their marriage.

As the consultation points out, a major difficulty here is that the concept of matrimonial property regimes does not clearly exist in England and Wales and Northern Ireland. Instead, the courts have a wide distributive discretion when considering ancillary relief (Matrimonial Causes Act 1973

s25). Although in *Miller v Miller*; *McFarlane v McFarlane* [2006] UKHL 24, 24 May 2006, the House of Lords introduced a concept of 'matrimonial property' into English law which approximates to some European property regimes, the practical operation of the law remains very different.

Furthermore, although the landmark case of *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 427, 20 October 2010 has given a significantly greater place to prenuptial agreements within England and Wales, this remains very different from the menu of alternative property regimes which couples can opt for before their marriage in, for example, France.

In the conclusion of its consultation paper, the MoJ states:

… to comply with the proposed regulations the UK would need to make significant changes to its laws and legal practices. The government will consider carefully the views of those consulted about these proposals.

So far as registered partnerships are concerned, the position is further complicated because not all member states permit registered partnerships, while some permit these for both heterosexual and homosexual couples. The European Commission's proposals with regard to jurisdiction in the case of registered partnerships do not allow the partners to make an alternative choice of jurisdiction. Finances will be dealt with either by the court dealing with the dissolution of their partnership, or in line with a sequence of priorities mirroring those applicable in the case of married couples, but substituting the place of registration of the partnership for the common nationality factor.

So far as applicable law is concerned, for registered partners the only law applicable is that of the member state which registered their partnership. In the case of registered partners, a court may decline jurisdiction if its law does not recognise the institution of registered partnership.

Family Procedure Rules 2010 SI No 2955

The introduction of a new set of Family Procedure Rules (FPR) on 6 April 2011 has represented a major change for family law practitioners.

There is now a single set of rules covering the following:

- Proceedings in all family courts. Previously there were separate rules applying to the family proceedings (magistrates') courts. The present rules cover the magistrates' jurisdiction, the county court and the High Court (including the High Court when exercising its appellate jurisdiction). Appeals to the Court of Appeal are, however, still governed by the Civil Procedure Rules (CPR) 1998 SI No 3132 and appeals to the Supreme Court by the Supreme Court Rules 2009 SI No 1603.
- All types of family proceedings. Previoiusly adoption and children proceedings were covered by separate procedural rules.

Modelled on the same structure as the CPR, the new FPR also rely heavily on accompanying Practice Directions which supplement, clarify and extend the rules themselves. The rules do not, however, cover civil proceedings, notably proceedings under the Trusts of Land and Appointment of Trustees Act 1996 resolving property issues between unmarried couples.

The overriding objective

The overriding objective of the new FPR, specified in rule 1.1, is to enable the court, ' … to deal with cases justly, having regard to any welfare issues involved …' 'Dealing with a case justly' includes (r1.1(2)):

- ensuring that it is dealt with expeditiously and fairly;
- dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;
- ensuring that the parties are on an equal footing;
- saving expense; and
- allotting an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Specifically this requires the court to look at proportionality, resources and expense. We may expect courts to scrutinise more closely than before requests for the instruction of experts, and rule 25.1 expressly requires the court to restrict expert evidence to '… that which is reasonably required to resolve the proceedings'.

Case management powers

The court is given wide case management powers under Part 4 of the FPR. They are more or less identical to the powers given to the civil courts under CPR r3.1. The court has power under rule 4.3, for example, to make orders of its own initiative, and under rule 4.7 to rectify procedural errors. The court will be expected to manage cases actively and to look at technical defects in the light of the overriding objective (see *Hannigan v Hannigan* and others [2000] EWCA Civ 159, 18 May 2000; [2000] 2 FCR 650 (CA)).

Mediation

Practice Direction 3A supplements Part 3 of the new rules by introducing a pre-application protocol for mediation information and assessment.[8] the protocol, all potential applicants for a court order in relevant family proceedings will now be expected, before making their application, to consider mediation, and (under Annex A rule 2) to have contacted a family mediator to arrange to attend an information meeting about family mediation. Annex C sets out circumstances in which an applicant would not be expected to attend a mediation information and assessment meeting. These include circumstances where:

- the other party is unwilling to mediate;
- the mediator determines that the case is not suitable for mediation;
- an allegation of domestic violence has been made resulting in a police investigation or the issuing of civil proceedings for the protection of any party within the last 12 months; or
- there are urgent and ex-parte applications.

Parties will generally, therefore, be expected to attend a meeting to learn about mediation and other forms of ADR before issuing proceedings. However, currently they are not required actively to participate in mediation, merely to attend an information meeting. The court also has a general duty under FPR r3.2 to consider ADR at 'every stage in proceedings'.

The combination of the overriding objective, active case management powers and the duty to consider mediation has already, in practice, started to affect the approach of the courts to applications in family proceedings, where litigants are now more likely to find the court discouraging continued litigation, questioning closely the need for expensive expert assessments or tests, and encouraging out-of-court conciliation or mediation.

New court forms

A comprehensive set of new court forms was also introduced, all of which are available online. There are significant changes in vocabulary, so that parties now make 'applications' rather than issuing summonses or petitions, and pleadings are generally referred to as 'statements of case'. 'Ancillary relief' becomes 'financial order/ remedy' and 'ex parte' becomes 'without notice'. The use of affidavits has been much restricted in Part 22 (relating to evidence) and in most cases documents must simply be verified by a 'statement of truth': 'I believe that the facts stated in this witness statement are true' (Practice Direction 22A para 6.4).[9] Under FPR r17.6,

proceedings for contempt of court may be brought against a person who makes a false statement in a document verified by such a statement of truth.

Transitional arrangements

As may be expected, the FPR are detailed and lengthy and practitioners will need to check them closely in respect of each application. Transitional arrangements are dealt with in Practice Direction 36A.[10] In general, any step taken in proceedings after 6 April 2011 must now be taken in line with the new rules, and the court will expect the new forms to be adopted.

The codification and rewriting of this extensive set of rules was a gargantuan task, and anomalies and difficulties will no doubt be identified as they bed in. For example, no provision has been made in the new rules for interveners in private law divorce proceedings, where the court will have to apply existing case-law and its general case management powers. Examples of interventions include cases where third parties claim a financial interest, such as a parent or family member of one spouse claiming a beneficial interest in what appears to be a matrimonial asset.

CASE-LAW

Residence and contact orders

■ Re: H (A Child)

[2011] EWCA Civ 585, 7 April 2011

This case involved an 11-year-old girl living with her mother. The father made an application for contact and, according to Lord Justice Thorpe when giving judgment in the Court of Appeal: 'There is clear evidence that the little girl wants to spend time with her father, and there is clear evidence that on occasions the mother has deliberately frustrated contact between her own daughter and the father' (para 1).

An initial order was made in May 2010 providing that the father should have unsupervised contact, even though the mother submitted that it should be supervised. The judge refrained from making detailed findings of fact about the mother's past conduct, taking the view that such findings were not strictly necessary to a determination of the issue before him and might prejudice the child's prospects of enjoying contact with her father. Subsequently, however, the matter came back to court to deal with alleged breaches of the contact order by the mother. The same judge (Recorder Fairwood) then made a series of findings and declarations based on the evidence he had heard previously.

The matter came to the Court of Appeal on the ground that there was fundamental procedural unfairness in the recorder introducing, into the later proceedings, findings of fact which he declined to make in the earlier ones. On this particular point, the Court of Appeal found that the recorder had been in error in making his findings of fact.

However, on a separate issue, it was submitted on behalf of the mother that since there was no residence order in place, there was nothing to which a contact order could be attached and, therefore, the contact order was invalid and unenforceable. In support of this point, counsel quoted Lord Justice Thorpe in the case of *Re: S (A Child)* [2010] EWCA Civ 705, 23 February 2010; [2011] 1 FLR 183: '… necessarily the contact order cannot be made unless it can be attached to a residence order providing there for the child to live with a person' (para 10).

In the present appeal, Lord Justice Thorpe made it clear that the CA 1989 does not require that in every case there should be a residence order to which a contact order attaches, but only that there should be a person defined or capable of definition with whom the child lives: 'So if the parents agree that, say, the mother should be the primary carer, but do not trouble to get a residence order enshrining her role, still a contact order can be made against her as the person with whom the child lives' (para 13).

Comment: This Court of Appeal authority settles the issue about whether a contact order can be made separately to a residence order and confirms that there is no illegality in this.

Test for removal of children in care proceedings

■ Re: GR (Children) and others

[2010] EWCA Civ 871, 29 July 2010

This appeal arose following care proceedings relating to four children, aged between five years and 16 years at the time of the appeal hearing. The local authority sought removal of all four children, and its application was heard by Mr Recorder Pulman QC in Chelmsford County Court in June 2010. He refused to grant interim care orders in relation to the younger two children, and the local authority appealed to the Court of Appeal.

In dealing with the younger two children, the recorder said, in relation to child C:

I do not consider that C's safety requires immediate separation. That may not be so at the final hearing. There is no risk to her immediate safety … Being dirty and unkempt is not a safety issue. Educational harm is not immediate (para 24).

In relation to child G, he said:

His emotional and physical needs were only just being met by his parents. The matters complained of do not come within 'immediate risk of safety'. There is no immediate risk to his safety (para 25).

Dealing with alleged violence to G, the judge found that evidence unreliable and said:

There are no injuries. I am not able to find an immediate risk to his safety … (para 26).

The recorder made clear in his judgment that, nevertheless, he did find the interim threshold met in relation to each child. Once the interim threshold is established, the court must go on to consider whether or not to exercise its discretion to remove the child. A significant question for decision by the Court of Appeal was the appropriate test for removal of children under an interim care order.

Lady Justice Black gave the judgment, and reviewed previous authorities, including *H (A Child)* [2002] EWCA Civ 1932, 12 December 2002 and *Re: L-A (Children)* [2009] EWCA Civ 822, 14 July 2009. In *H*, Lord Justice Thorpe said:

In my judgment, the articles 6 and 8 rights of the parents required the judge to abstain from premature determination of their case for the future beyond the final fixture, unless the welfare of the child demanded it. In effect, since removal from these life-long parents to foster parents would be deeply traumatic for the child, and of course open to further upset should the parents' case ultimately succeed, that separation was only to be contemplated if B's safety demanded immediate separation (para 36).

In the case of *Re: L-A*, Lord Justice Thorpe again said that: '… separation is only to be ordered if the child's safety demands immediate separation' (para 39). A decision of Mr Justice Ryder in *Re: L (care proceedings: removal of child)* [2008] 1 FLR 575; [2007] EWHC 3404 (Fam), 19 April 2008 was for some time thought by practitioners to have introduced a new test of 'an imminent risk of really serious harm' (para 39).

The Court of Appeal in the present case took the opportunity to restate that Ryder J's decision was not to be taken as having altered the law. The existing authorities which have already been referred to remain applicable, and the relevant test is whether the child's safety demands immediate separation.

Comment: It is interesting that some of

the examples given by the recorder, and approved apparently by the Court of Appeal in the present case, were not considered sufficient to pass this test. These include the following:

- consistent failure of the parents to ensure the child attended at school; or
- the child being dirty and unkempt.

The court also made it clear that an interim hearing should not be allowed to usurp or substitute for a trial, and should be confined to dealing with immediate interim issues. A full fact-finding expedition is not appropriate.

Role of the guardian in CA 1989 proceedings

A County Council v K and others

[2011] EWHC 1672 (Fam), 4 July 2011

This is an important judgment of Sir Nicholas Wall on the role of the children's guardian in care proceedings and the guardian's independence. The appeal hearing had actually taken place in January 2011, but it was not until 4 July 2011 that the judgment was handed down because of the difficulty the court encountered in deciding the appropriate principles.

Many of the facts were disputed, but the one point in the case about which everyone agreed was that steps taken to remove the guardian were not appropriate. The scenario would be familiar to any child care practitioner. It concerned a young boy with parents in their twenties and social work concerns about the parents' volatility and inconsistency in parenting. The local authority applied for an interim care order to remove the child. This was opposed by the parents, who were supported by the Cafcass guardian. Her view was that the child should remain with his parents, but under an interim care order.

The local authority, whose general policy was that a child should either be removed under an interim care order or remain with parents or carers under an interim supervision order, shifted its position and decided to ask the court to make the latter order. The justices considered the representations, and made the order sought by the guardian. There was agreement over the basis of what the parents should need to do while the child remained in their care.

The social workers returned to their office, and were overheard discussing the case by a local authority agency employee who was not involved in it, but was sufficiently worried about what she had heard to send an anonymous e-mail to a senior Cafcass official, indicating that she had read one of the witness statements and was very concerned about the position the guardian had taken. The result of this was that the senior official caused an investigation to be made, and subsequently wrote to the court, indicating that the guardian acknowledged that she had not read all the papers, that her recommendation may not be reliable, and that she had agreed to be removed from the case.

This was, as it turned out, completely contrary to the guardian's own version, which was clear that she had read all the papers, had made a very careful recommendation to the court, and had not agreed to be removed. However, her position was not made known to the court, which, relying on the Cafcass letter, appointed another guardian. None of this was known to the parents' representatives when the local authority then renewed its application to remove the child.

In the resulting appeal, a number of parties were allowed to intervene and make representations, including Cafcass, the National Association of Guardians and Reporting Officers (the guardian's professional body) and even the anonymous agency worker, who in fact admitted that she had never intended the consequences of her confidential e-mail. It was submitted on behalf of Cafcass that it could properly seek the removal of a guardian and notify the court that a new guardian should be appointed. This was not the view of the other parties, and the President, in his judgment, stressed that it was not the role of Cafcass management to overrule its own guardian and to remove a guardian.

The appointment of a guardian is for the court and only the court can authorise removal of a guardian. If there is a disagreement, then that is one that should be properly aired in court, at which all parties are notified of the circumstances and can be heard on the issue.

> *... there is nothing unhealthy or wrong about a disagreement between professionals in care proceedings ... there is frequently no unequivocally right answer in such cases* (para 106).

This decision upholds the independence of the guardian and of the functions vested in the guardian by section 41 of the CA 1989. The President also rejected the argument, put by Cafcass, that, as the employer of guardians, it was ultimately responsible for the allocation of those functions. A decision about whether or not a guardian is to be removed should be a wholly transparent process, and should be made by a court and no other body.

1 Available at: www.familylaw.co.uk/system/uploads/attachments/0001/3397/President_s_Guidance_Out_of_Hours_hearings.pdf.
2 Available at: www.familylaw.co.uk/system/uploads/attachments/0001/4515/Guidance_in_cases_involving_the_Official_Solicitor_-_December_2010.pdf.
3 Available at: www.justice.gov.uk/guidance/protecting-the-vulnerable/official-solicitor/acting-for-parents.htm.
4 Available at: www.justice.gov.uk/publications/policy/moj/family-justice-review.htm.
5 Available at: http://ec.europa.eu/justice/policies/civil/docs/com_2011_126_en.pdf and http://ec.europa.eu/justice/policies/civil/docs/com_2011_127_en.pdf respectively.
6 *Matrimonial property regimes and the property consequences of registered partnerships – how should the UK approach the Commission's proposals in these areas?*, available at: www.justice.gov.uk/downloads/consultations/matrimonial-property-registered-partnerships.pdf at para 7.
7 See note 6.
8 Available at: www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/family/practice_directions/pd_part_03a.htm.
9 Available at: www.familylaw.co.uk/articles/FPRPDs-FullList-16022011.
10 See note 9.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Recent developments in public law

Kate Markus and **Martin Westgate QC** continue their regular series surveying recent developments in public law that may be of more general interest to *Legal Action* readers. These articles will now be published on a quarterly basis in August, November, February and May. The authors welcome short reports from practitioners about unreported cases, including those where permission has been granted or that have been settled.

POLICY AND LEGISLATION

Mediation and judicial review

The Public Law Project has published *Mediation in judicial review: a practical handbook for lawyers*, following its research with the University of Essex on the dynamics of, and the use of mediation in, judicial review.* The handbook is intended to address the gaps in legal practitioners' understanding of how mediation can be used as an alternative to, or alongside, judicial review and to provide practical assistance to those advisers who are, or who may be, considering mediation as a route to resolving public law disputes, particularly judicial review claims.

Legal Aid Bill

The Legal Aid, Sentencing and Punishment of Offenders Bill received its first reading on 21 June 2011 and is expected to become law in April 2012. As anticipated, the bill makes sweeping changes to the scope of legal aid and removes many areas from scope. Judicial review remains within scope, but is subject to significant limitations for immigration cases and much tribunal casework has been removed from eligibility altogether, notably in respect of welfare benefits and education (though not including special educational needs).

CASE-LAW

Amenability to judicial review

■ **R (Cart) v Upper Tribunal and R (MR (Pakistan)) v Upper Tribunal (Immigration and Asylum Chamber) and Secretary of State for the Home Department**

[2011] UKSC 28, 22 June 2011

The appellants appealed against the decision of the Court of Appeal ([2010] EWCA Civ 859, 23 July 2010; November 2010 *Legal Action* 29) that judicial review of the Upper Tribunal was permitted only on the ground of outright excess of jurisdiction or denial of procedural justice, the effect of which was to prevent them appealing refusals by the Upper Tribunal of permission to appeal (decisions which were themselves unappealable). The Supreme Court dismissed the appeals, although it did not adopt all of the Court of Appeal's reasoning.

The Supreme Court agreed with Laws LJ in the Divisional Court ([2009] EWHC 3052 (Admin), 1 December 2009) that the statutory designation of the Upper Tribunal as a superior court of record could not, of itself, render the Upper Tribunal (or the Special Immigration Appeal Commission, which was the subject of that court's consideration) immune from judicial review. In relation to the scope of judicial review of the Upper Tribunal, Lady Hale set out the three possible approaches which could be taken, ie:

■ to accept the view of the courts below in these cases that the new system is such that scope of judicial review should be restricted to pre-*Anisminic* excess of jurisdiction and the denial of fundamental justice (and possibly other exceptional circumstances); or

■ to accept that nothing has changed following the introduction of the Tribunals, Courts and Enforcement Act (TCEA) 2007 and judicial review of refusals of leave to appeal from one tribunal to another has always been available; or

■ to adopt a course somewhere between those two options rejected by the Court of Appeal in *Cart* above, namely, that judicial review in these cases should be limited to the grounds on which permission to make a second-tier appeal to the Court of Appeal would be granted, that is, where an important point of principle or practice was raised or there was some other compelling reason for the case to be heard.

Lady Hale said that the first approach would lead back to the distinction between jurisdictional and other errors, which was effectively abandoned after *Anisminic*. Nevertheless, there was a real danger that in the specialist tribunal jurisdictions, points of law would never reach the higher courts so that the Upper Tribunal became, in reality, the final arbiter of the law, which is not what parliament has provided. The Court of Appeal's approach in *Cart* was too narrow and would leave the possibility that serious errors of law affecting large numbers of people would go uncorrected.

In considering whether or not the status quo ante should apply, in which unappealable decisions were amenable to judicial review, the real question was what level of independent scrutiny outside the tribunal structure is required by the rule of law. The mere fact that something had been taken for granted without causing practical problems did not mean that it should be taken for granted forever. Equally, the fact that the courts had found it difficult to deter repeated or unmeritorious applications did not mean that such applications should become virtually impossible; there had to be a principled but proportionate approach.

In relation to the third option, an important innovation in the TCEA was the Lord Chancellor's power under the Act to prescribe the same criteria for the grant of permission from the Upper Tribunal to the Court of Appeal as applied to second-tier appeals. Those criteria have now been prescribed for second-tier appeals from the Upper Tribunal. This gives an indication of the circumstances in which parliament considered that questions of law should be channelled into the legal system.

Sedley LJ's emphasis in *Cart* on the significance of the creation of the new unified tribunal structure went too far. There must be some risk that the amalgamation of very different jurisdictions in the new chambers would dilute rather than enhance the specialist expertise of the judges and members, and it is unlikely to have reduced

their capacity for error; no system of decision-making is infallible. The adoption of the second-tier appeal criteria would lead to a further check outside the tribunal system, while not being one which could be expected to succeed in the great majority of cases. This would be a rational and proportionate restriction on the availability of judicial review of refusal by the Upper Tribunal of permission to appeal to itself. It would recognise that the new tribunal structure deserves a more restrained approach to judicial review than before, while ensuring that important errors could be corrected. It is a test which the courts are used to applying; it is capable of encompassing the important point of principle affecting large numbers of similar claims and the compelling reasons presented by the extremity of the consequences for the individual. Lady Hale recommended that the Civil Procedure Rules Committee (CPRC) might wish to consider the scope for streamlining the procedure for considering applications for permission to apply for judicial review of these decisions.

The Supreme Court concluded that there was nothing in either *Cart*'s or *MR*'s case to bring them within the second-tier appeal criteria. In his supporting analysis and comments, Lord Phillips emphasised the potential burden of judicial review of unappealable decisions being available. He said that the stringency of the criteria that must be demonstrated will not discourage a host of applications in the immigration and asylum field which were without any merit. It would be disproportionate for there to be the four-stage system of paper and oral applications to the Administrative Court, and then, by way of appeal, to the Court of Appeal, to which ordinary judicial review procedure was subject. He considered that judicial review in these cases should be restricted to single paper applications, but that that was a matter for the CPRC. Lords Clarke and Dyson agreed with the latter point.

Although Lord Dyson thought that the case for unrestricted judicial review was formidable, there were three reasons why it could not be accepted, which were:

- the enhanced status and role of the Upper Tribunal;
- that the TCEA gives those who wish to challenge a decision of the First-tier Tribunal the opportunity to have the decision scrutinised on several occasions; and
- resources, ie, unrestricted judicial review would result in the courts being inundated with unmeritorious applications for judicial review in immigration cases. Floodgates arguments must be examined with care, but they cannot be ignored. See also page 25 of this issue.

R (Shoesmith) v Ofsted and others

[2011] EWCA Civ 642, 27 May 2011

Ms Shoesmith was the Director of Children's Services (DCS) for Haringey, a north London Borough Council. She was an employee of Haringey, but the position of DCS was created by statute (ie, the Children Act (CA) 2004). Ms Shoesmith could be removed from the post by a direction given by the secretary of state (then Ed Balls). Following the death of Peter Connolly, 'Baby P', Mr Balls required that the Office for Standards in Education, Children's Services and Skills (Ofsted) conduct an investigation into the council's social services department. The Ofsted report itself did not make findings about individuals, but was critical of the department. On 1 December 2008, the report was made public. That morning, two members of the Ofsted team met with Mr Balls and were highly critical of Ms Shoesmith. That afternoon, Mr Balls announced at a press conference that he was giving directions replacing Ms Shoesmith as DCS until the end of the month; Mr Balls also said that while her employment was a matter for Haringey, he would expect Ms Shoesmith to be dismissed. On 8 December 2008, she was dismissed, without notice or pay in lieu, by Haringey. The council's reasoning was that it had little choice given that Ms Shoesmith had been removed as DCS and so had no functions left to fulfil. On 19 December 2008, Mr Balls made his earlier decision permanent by directing Ms Shoesmith's replacement for three years. She had not been given an opportunity to comment or to defend herself before either decision.

The appellant brought proceedings for judicial review against Ofsted, the secretary of state and Haringey. Foskett J rejected each of the claims and she appealed. The lead judgment in the Court of Appeal was given by Maurice Kay LJ with whom the others agreed (except on one issue relating to Haringey (see below)). The claims against Ofsted and the secretary of state are addressed below under 'Procedural fairness'. The claim against Haringey involved three significant points:

- Was the decision to dismiss Ms Shoesmith from her employment one that was amenable to judicial review?
- Ought relief to be refused because she had available an alternative remedy in the employment tribunal (ET)?
- Was Haringey entitled to rely on the unlawful decision of the secretary of state in removing Ms Shoesmith as DCS to dismiss her from her employment?

On the first point, the court agreed with the judge that the decision was amenable. The position of DCS was one that was 'created, required and defined by and under statute' (ie, the CA 2004) (para 91). This brought the decision within the scope of judicial review on the basis that the appellant could be described as an office holder (the test in *Ridge v Baldwin* [1964] AC 40, 14 March 1963) or, alternatively, on the basis that there was a sufficient statutory underpinning (ie, the approach in *R v East Berkshire Health Authority, ex p Walsh* [1985] QB 152, 14 May 1984). Maurice Kay LJ rejected expressly the suggestion that the statutory underpinning in question had to relate to the power to dismiss (para 91). The alternative proceedings in the ET were not a sufficient alternative remedy and were not 'equally convenient and effective' (*R v Essex CC ex p EB* [1997] ELR 327 at p329, per McCullough J) (para 99). In particular:

- Ms Shoesmith's claim there would be limited to the statutory cap on compensation (about £60,000), whereas if she succeeded in her judicial review claim the decision to dismiss would be quashed and she would remain an office holder, and be entitled to her full salary, until her service was lawfully terminated.
- If Ms Shoesmith was forced to bring her claim in the ET, she would incur additional costs which would not be recoverable in the event of success and would take up her capped compensation.
- Permission having been granted to proceed against Haringey, 'everything pointed to the justice of the case requiring a decision on the merits in the application against Haringey, whatever that decision should be' (para 99).

On the merits, the court was divided. The claim succeeded, in any event, because of an appearance of pre-determination, but the contentious question was whether or not the authority could rely on the direction of the secretary of state that the court had found to be unlawful (see below).

Maurice Kay LJ considered that the authority could rely on the direction. Applying *Boddington v British Transport Police* [1999] 2 AC 143, 2 April 1998, he held that:

> *... there is an area, admittedly ill-defined but left open ... in which the act of a public authority which is done in good faith on the reasonably assumed legal validity of the act of another public authority, is not ipso facto vitiated by a later finding that the earlier act of the other public authority was unlawful. I consider the present case, which involves the termination of an employment relationship, is within that ill-defined area* (para 119).

Although the panel which dismissed the appellant knew that she said that the decision was unlawful, this was not

something on which the panel could rule and it was entitled to take the secretary of state's direction at face value. However, Stanley Burnton LJ and Lord Neuberger MR disagreed. Stanley Burnton LJ held that since the point was raised before the panel and there was no urgency, Haringey ought to have put the appellant to her election: either to challenge the direction by judicial review (the internal proceedings being stayed in the meantime) or to proceed on the basis the direction was valid (para 137). Lord Neuberger agreed and gave as additional reasons:

■ ' … it is Haringey, not Ms Shoesmith, who are seeking to invoke the principle. It seems to me that, at least in general, it should be easier for the principle to be invoked against the public body by a third party who has done something in reliance on the validity of the act, than against a third party by the public body' (para 143); and

■ ' … this is not a case where the consequences of holding the act of the public body to be invalid should have caused any particular prejudice to the public body'. It remained open to them to terminate the employment on appropriate notice (para 147).

Comment: This case raises many issues and the defendant secretary of state has sought permission to appeal to the Supreme Court. The claim against Haringey raised, as the judgments point out, a controversial issue about how far a public body may act in reliance on the invalid acts of another public body. The dicta in *Boddington* (above) suggest that ultimately this is a matter of construction concerning the powers of the second body. However, the majority here apply a much more flexible approach, taking into account all the circumstances.

Procedural fairness

■ R (Shoesmith) v Ofsted and others

[2011] EWCA Civ 642, 27 May 2011

(See above for the facts of this case.) The appeal in respect of the Ofsted report was rejected. Ms Shoesmith had been given a chance to comment on the gist of the concerns that Ofsted had had, and it was held that in the context this was sufficient. Ofsted was not engaged in a disciplinary procedure targeted at individuals, but in a general review of how the system worked as a whole. In view of this, the Court of Appeal agreed with the finding of the judge that Ofsted's common law obligation of fairness was simply to carry out a 'bona fide and open-minded inspection into what they found and to report accordingly' (para 37).

In respect of the secretary of state, the judge had held that there was no duty to give an opportunity to comment in view of the context and urgency and, in any event, such an opportunity would have made no difference. Maurice Kay LJ accepted that fairness could be affected by the context, being the protection of vulnerable children, and by the urgency of the case (para 60). However, urgency did not justify the failure to give the claimant an opportunity to answer the charge. This would have caused only a modest delay, and, in respect of the decision of 19 December, may have required no delay. Ms Shoesmith was not a front-line social worker who might have caused harm to individual children if left in place, and the position could have been safeguarded for sufficient time for fairness to be observed (para 61).

The context did not mean that ordinary standards of fairness did not apply. The respondent argued that the statutory structure establishing the position of DCS required that one person had responsibility and that s/he could not escape that duty by delegating to others. Therefore, personal blameworthiness was irrelevant and did not need to be considered to ensure fairness. Maurice Kay LJ rejected this assertion saying:

I find it a deeply unattractive proposition that the mere juxtaposition of a state of affairs and a person who is 'accountable' should mean that there is nothing that that person might say which could conceivably explain, excuse or mitigate her predicament. 'Accountability' is not synonymous with 'heads must roll'. I do not consider it likely that parliament when creating the position of DCS, intended those who may be attracted to such an important and difficult position to be volunteering for such unfairness in their personal position. Accountability requires that the accountable person is obliged to explain the state of affairs to which it attaches. The corollary is that there must be a proper opportunity to do so. If the explanation is unacceptable, then consequences will follow (para 66).

Nor could Mr Balls escape liability because he wrongly assumed that Ofsted had already given the claimant a chance to comment. This did not matter: 'The question is whether the procedure, taken as a whole, was objectively fair, not whether the secretary of state honestly believed that it was fairer than in fact it was' (para 62).

On the question of whether or not a fair procedure would have made any difference, the correct test was to ask whether or not inevitably the decision would have been the same. Ed Balls had a number of options open to him, and Maurice Kay LJ concluded that: 'this is not such a clear case that I feel able to say "no difference" without risking inappropriate encroachment into "the forbidden territory of evaluating the substantial merits of the decision"' (applying *R (Smith) v North Eastern Derbyshire Primary Care Trust* [2006] 1 WLR 3315 at 3321; [2006] EWCA Civ 1291, 23 August 2006) (para 74).

■ R (Bonhoeffer) v General Medical Council

[2011] EWHC 1585 (Admin), 21 June 2011

The claimant faced disciplinary proceedings against him brought by the General Medical Council (GMC) alleging that he had been guilty of serious sexual misconduct when undertaking work in Kenya. The main witness against him was witness A. The GMC's main reason for not calling witness A to give evidence in person was that, as a result, he would be at risk of homophobic attack in Kenya. The Fitness to Practise Panel (FTPP) accepted the GMC's application to use a hearsay statement from witness A instead of calling him. This was despite witness A's willingness to travel and despite the fact that there was no evidence that giving live evidence would put him at any greater risk than would be the case if his statement were read.

It was argued that in view of the extreme nature of the allegations, the impact on the claimant if the charges were found proved and the difficulties that he would have in defending himself if he could not cross-examine witness A, it was unfair and a breach of article 6 of the European Convention on Human Rights ('the convention') for him not to be called in person.

Stadlen J (with whom Laws LJ agreed) conducted a lengthy review of the domestic and convention cases. He concluded that on the facts of this case, it had not been open to the FTTP to admit the statement as hearsay (para 129). In relation to the common law requirements of fairness, his judgment sets out the following propositions:

■ There was no sole or decisive rule requiring the panel to refuse to admit the evidence of witness A without considering all the circumstances, including (in this case) the lack of any ability on the part of the GMC to make enquiries and disclosure of the kind that the police would be required to make in a criminal case of all matters that might undermine the evidence of the complainant (para 126).

■ '… in the absence of a problem in the witness giving evidence in person … fairness requires that in disciplinary proceedings a person facing serious charges, especially if they amount to criminal offences which if proved are likely to have grave adverse

effects on his or her reputation and career, should in principle be entitled by cross-examination to test the evidence of his accusers where that is the sole or decisive evidence … against him' (para 84).

This was also consistent with his approach under article 6 of the convention, in particular, at paragraph 108(viii). Stadlen J set out a similar proposition for disciplinary cases derived from the European Court of Human Rights' case-law.

■ R (Hindawi) v Secretary of State for Justice

[2011] EWHC 830 (QB),
1 April 2011,
July 2011 Legal Action 25

The claimant was a long-serving prisoner who had been convicted of a bomb plot in 1986. Following a hearing, the Parole Board ('the Board') recommended his release and that the claimant should be deported to Jordan. The defendant rejected the recommendation. He reversed the Board's finding that the claimant was a credible witness, on the basis of a report prepared by his officials. A number of issues were raised about how far the secretary of state was free to reject a recommendation from the Board, but the case is digested because of a point about the duty to put balanced submissions before him.

Thomas LJ held that it was not necessary for the secretary of state personally to consider all of the material and he was entitled to rely on the collective knowledge of his department (paras 72–74). However, in the circumstances, fairness required that the secretary of state's officials put before him 'the issues … in a balanced way so he could arrive at a decision that had a rational basis … He could not rely … upon a document which set out only the case for rejection of the panel's decision' (para 73). What was needed, therefore, was a document setting out the contrary case, demonstrating that there was an evidential basis for the Board's findings and showing that the points made in favour of rejecting the findings of credibility might be misconceived.

Irrelevant considerations

■ R (Evans) v Lord Chancellor and Secretary of State for Justice

[2011] EWHC 1146 (Admin),
12 May 2011

The claimant is a civil liberties campaigner and peace activist. In 2009, she had been successful in judicial review proceedings (*R (Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin), 25 June 2010 known as '*Evans No 1*') against the UK government relating to the transfer, by the administration of detainees, in Afghanistan, which would expose them to a real risk of torture. During those proceedings, the government had objected to the claimant's standing and had written to the Legal Services Commission (LSC) asking it to reconsider the grant of legal aid, but dropped those objections before the substantive hearing.

The present claim was an application for judicial review of amendments to the LSC's Funding Code which made ineligible for public funding a public interest challenge by way of judicial review where the claimant stood to gain no direct benefit for him/herself, unless the claim promoted real benefit for the environment. The amendments in question were preceded, in 2009, by a consultation. Before that consultation and shortly after the Treasury Solicitor had written to the LSC in *Evans No 1*, the Ministry of Defence (MoD) had written to the Ministry of Justice (MoJ) asserting that claims such as *Evans No 1* could be extremely serious for defence, security and foreign policy interests, and suggesting that the MoJ might reconsider the availability of public funding for judicial review applications in which the applicant was not affected personally. Further communications took place between the MoJ and the MoD regarding access to legal aid in such cases.

The Divisional Court rejected the claimant's submission that the Access to Justice Act 1999 did not authorise the formulation of a 'brightline' rule or criterion by which funding would be refused in every case where the applicant could not demonstrate a real benefit for him/herself, his/her family or the environment (para 13). The court also rejected the submission that it was irrational to allow funding for one type of public interest litigation (where it may benefit the environment) but not others. There was no legal obligation on the government to accommodate other forms of public interest challenge and a 'discretionary decision is not … vitiated by a failure to take into account a consideration which the decision-maker is not obliged by the law or the facts to take into account even if he may properly do so: *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172, 183' (para 19).

The court held, however, that although the government also took into account its concern about limited resources, the unease expressed in the correspondence referred to above and the MoD's concerns about the consequences of an adverse judgment exerted some influence in the promulgation of the amendment. With regard to this, Laws LJ said:

> *In plain language this seems to me to assert that the consequences of an adverse result in such a public interest judicial review is a good reason for the denial of public funding to bring the case. It needs no authority to conclude that by law such a position is not open to government. For the state to inhibit litigation by the denial of legal aid because the court's judgment might be unwelcome or apparently damaging would constitute an attempt to influence the incidence of judicial decisions in the interests of government. It would therefore be frankly inimical to the rule of law. The point is one of principle; it is not weakened by the fact that such litigation might be funded by other means* (para 25).

The court said that the state was not bound to fund such litigation and was entitled to promulgate criteria, such as the amendments under challenge, but only for legally proper reasons, which could include the reasonable prioritisation of scarce public resources. In the present case, the government had taken into account a legally inadmissible reason and the amendments must be quashed.

Consultation

■ Vale of Glamorgan Council v Lord Chancellor and Secretary of State for Justice

[2011] EWHC 1532 (Admin),
16 June 2011

■ R (Murray & Co) v Lord Chancellor

[2011] EWHC 1528 (Admin),
16 June 2011

These were separate judgments given in linked cases dealing with the closure of Barry Magistrates' Court and Sittingbourne Magistrates' Court respectively: both claims failed. The closure decisions had followed a review of court buildings in England and Wales. The statutory framework was that the defendant had a general duty to ensure that there was a sufficient system to support the carrying on of the business of magistrates' courts and a power to provide court houses to fulfil that duty (Courts Act 2003 ss1 and 3). There was no duty to consult in the event of closure, but a voluntary consultation had been carried out.

In *Vale of Glamorgan Council*, the claimants argued that the defendant had failed properly to consult on alternatives to the closure of Barry Magistrates' Court. The court rejected this argument. It held that 'there is no general principle that a minister entering into consultation must consult on all the possible alternative ways in which a specific objective might arguably be capable of being achieved. It would make the process of consultation inordinately complex and time consuming if that were so' (para 24). It was for the defendant, subject to rationality, to

identify the issues for consultation, and he was entitled to decide only to consult about the closures. It was open to any consultee to suggest alternatives, but the defendant was not then required to recirculate any such suggestion or to further consult on it.

Arguments based on failure to have regard to relevant considerations were rejected on the basis that it was not mandatory for the defendant to have regard to the factors identified. There was also an unsuccessful challenge based on a failure to give reasons (see below under 'Reasons').

In *Murray & Co*, initially the main complaint about consultation was that the defendant had not disclosed the criteria that it would adopt in deciding which courts to close. This submission was based on *R (Capenhurst and others) v Leicester City Council* [2004] EWHC 2124 (Admin), 15 September 2004, in which Silber J had said: 'it is important that any consultee should be aware of the basis on which a proposal put forward for consultation has been considered and will thereafter be considered' (para 46). However, the criteria (ie, the number of courtrooms, standard of custody facilities, standard of security, standard of victims' and witnesses' facilities, and Disability Discrimination Act compliance) were so obvious that they did not need to be spelled out in the consultation procedure; in argument, this was accepted by the claimant.

The claimant then sought to argue that the benchmarking criteria by which those matters were assessed ought to have been disclosed. This argument failed because the benchmarks had not been established at the start of the exercise, but only developed when the responses were being considered. The court held that there was no duty to provide this information. Having noted that there is not, in general, a duty to circulate submissions made in response to a consultation exercise (para 46), the court went on:

What of matters that emerge internally during a consultation? While they cannot be equated with matters that emerge as a result of external responses, there are some similarities. To require a public body engaged on a consultation exercise routinely to circulate information about the way its consideration of the matters before it is developing and afford an opportunity for further responses has the potential to lead to a never-ending dialogue and to be inimical to the principle that there must come a time when finality has to be achieved. It is clear from the decisions in Bushell v Secretary of State for the Environment *[1981] AC 75 at [para] 102, and* Edwards v Environmental Agency *[2006] EWCA Civ 877 at [para] 103[;] [200*8*]] UKHL 22 at [para] 44 that there is in general no obligation on a minister to communicate advice received from officials or internal material or information to consultees. There may, as we have stated, be exceptional cases, for instance, where the matters which have emerged lead the public authority to wish to do something fundamentally different from the proposals consulted upon, or fairness otherwise requires further consultation on a matter or issue that has been thrown up. One such situation may be where the internal material undermines the value of the responses that have been made to a consultation. We are, however, satisfied that this is not one of those exceptional cases* (para 47).

Legitimate expectation

■ Corporation of the Hall of Arts and Sciences v Albert Court Residents' Association and Westminster City Council

[2011] EWCA Civ 430, 13 April 2011

The appellant corporation managed the Albert Hall. It applied for a variation to its premises licence. Westminster City Council, as licensing authority, sent a letter to neighbouring residents inviting representations on the application. Albert Court was very close to the Albert Hall, but no resident of Albert Court received a letter. Nonetheless, a number of residents of Albert Court made representations opposing the application, but they were sent late, ie, after the deadline for receiving representations. Westminster declined to consider or to act on those late representations and granted the appellant's application.

On the Albert Court Residents' Association's judicial review of Westminster's decision: [2010] EWHC 393 (Admin), 2 March 2010, McCombe J held that the residents had a legitimate expectation that they would be notified of the corporation's application and that, in failing to comply with that expectation and deciding on a process of notification which did not include Albert Court, Westminster had acted irrationally and unlawfully. The judge quashed the decision.

On appeal by the corporation, which was the interested party in the judicial review application, Stanley Burnton LJ said that he had real doubts about whether the residents did have any legitimate expectation to be notified of the application, but was prepared to assume, either for that reason or otherwise, that Westminster's decision to send the letter to other residents in the neighbourhood, but not to those in Albert Court, was irrational. The relevant statutory framework was contained in the Licensing Act (LA) 2003 and regulations made under it. There was no statutory obligation on Westminster to advertise the application or to take any steps to notify anyone affected by it. This obligation was the corporation's and had been complied with. Nor was it contended that Westminster had not reasonably been 'satisfied that the applicant has complied with any requirement imposed on him' as required by the LA (para 23). It was accepted that Westminster did not receive any representations before the deadline as was also provided for by the LA. It followed that Westminster was obliged to grant the application to which the corporation had a right and which was enforceable at public law. The court could not grant any relief that would have the effect of preventing Westminster from complying with its statutory duty or deprive the corporation of its public law right to the grant of the application: an otherwise legitimate expectation cannot require a public authority to act contrary to statute. The appeal was allowed.

Reasons

■ Vale of Glamorgan Council v Lord Chancellor and Secretary of State for Justice

[2011] EWHC 1532 (Admin), 16 June 2011

See 'Consultation' above for consideration of the facts of this case. There was also a challenge based on the alleged inadequacy of the reasons. This failed because the reasons were adequate; however, the court rejected a submission by the defendant that there was no duty to give reasons:

It is true that the common law has not yet reached the point where reasons need be given for all administrative decisions: see Hasan v Secretary of State for Trade and Industry *[2008] EWCA Civ 1322, para 21 per Sir Anthony May, P. However, where there has been consultation the Minister is under an obligation properly to consider the responses, and in our view he is then obliged to give reasons sufficient to indicate why, notwithstanding submissions to the contrary, he has made the decision he has* (para 38).

* Available at: www.publiclawproject.org.uk/Publications.html.

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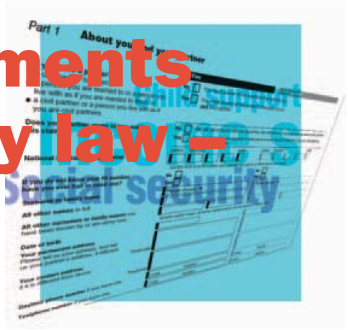
Recent developments in social security law – Part 1



Simon Osborne and **Sally Robertson** continue their six-monthly series. This article examines recent developments in case-law relating to overpayments, decisions and appeals (including tribunals), human rights and European Union law. Part 2 will be published in September 2011 *Legal Action* and will review case-law in means-tested and non-means-tested benefits (including right to reside) as well as tax credits. In addition, relevant decisions of the Administrative Appeals Chamber (AAC) of the Upper Tribunal will appear in summary form.

OVERPAYMENTS

Recovery of overpaid benefit requires two decisions: an 'entitlement' decision, that benefit has been overpaid, and an 'overpayment' decision, that the overpayment is recoverable. If the two decisions are not made at the same time, claimants can end up with entirely separate appeal hearings. Two decisions have considered whether in such cases, where the appeal against the entitlement decision was decided against the claimant, a tribunal hearing the later appeal against the overpayment decision was bound by the findings of the earlier tribunal. The decisions were consistent in answering that question in the negative.

■ Secretary of State for Work and Pensions v AM (IS)

[2010] UKUT 428 (AAC), 29 November 2010
(CIS/384/2010)*

In 2006, the claimant received an entitlement decision on her income support (IS) claim to the effect that she was not entitled to the benefit as she had been living together as husband and wife with someone who was in full-time work since 1999. Her appeal against that decision was rejected. In 2007, the claimant received an overpayment decision that the overpayment was recoverable from her on the basis that she had failed to disclose that she was cohabiting. Her appeal was successful. The tribunal did not consider itself bound by the decision of the previous tribunal; it found, on the basis of testimony from the claimant and her alleged partner, that they were not living together as husband and wife and the claimant had not been overpaid IS. The secretary of state appealed, arguing that the second tribunal ('the overpayment tribunal') was bound by the decision of the first tribunal ('the entitlement tribunal').

Judge Wikeley dismissed the secretary of state's appeal. The overpayment tribunal was not bound by the entitlement tribunal's decision, and had not erred in law. The secretary of state relied on the decision of Commissioner (as he then was) May QC in *CIS/4423/2006*, 24 May 2007, as authority for the argument that the original decision that the claimant was living together as husband and wife with someone was binding on the overpayment tribunal. The judge did not agree. He held that while decisions were final (under Social Security Act (SSA) 1998 s17(1)), the effect of section 17(2) was that findings of fact were not, in general, binding on a later tribunal (para 49). So, the overpayment tribunal was permitted to make its own findings of fact regarding the alleged cohabitation.

The judge remarked that 'it is entirely feasible that the tribunal hearing the appeal against the overpayment recoverability decision may reach a different conclusion on the underlying facts at issue in the entitlement decision to the tribunal which heard that earlier appeal' (para 50). There was a well-established line of authority to that effect, including a subsequent (albeit reluctant) acceptance of this in the context of overpayment recovery by Commissioner (as he then was) May QC in *CIS/3512/2007*, 10 July 2008 at para 8. Decisions of First-tier Tribunals were not binding on another tribunal at the same level, certainly regarding issues of fact. Furthermore, although the later tribunal may be considering the same factual issues, it may be doing so (as in the present case) on different evidence, for example, the presence of a witness who did not attend the earlier tribunal. The judge concluded that:

> *... an entitlement decision necessarily establishes that there has been an overpayment, because it proves that the amount paid during a particular period was more than the claimant was entitled to. But it does not establish that the overpayment is recoverable. That requires a misrepresentation or failure to disclose a material fact. To decide whether that has occurred, the tribunal dealing with the overpayment recoverability decision must first establish what the true facts were. Inevitably this involves consideration of the same matters as were considered in the entitlement decision* (para 52).

■ KJ v Secretary of State for Work and Pensions (DLA)

[2010] UKUT 452 (AAC), 16 December 2010
(CDLA/1491/2010)

The claimant had been receiving disability living allowance (DLA). In August 2008, a decision ('the entitlement decision') was made superseding the award and removing entitlement, with effect from November 2003, on the basis of an alleged change in circumstances, namely, an improvement in her condition. In September 2008, another decision ('the overpayment decision') was made that there had been an overpayment of DLA between 2003 and 2008, all of which was recoverable from the claimant as she had allegedly failed to disclose that her care and mobility needs had decreased. The claimant appealed against both decisions; however, the entitlement decision was heard first (and separately). This appeal was rejected. In the subsequent appeal against the overpayment decision, the claimant argued that she had not ceased to satisfy the conditions for DLA during the overpayment period. This appeal was also dismissed, but the claimant appealed further to the Upper Tribunal.

Judge Turnbull allowed the claimant's appeal. In so doing, he rejected an argument from the secretary of state that the tribunal was bound by the decision of the tribunal which considered the appeal against the entitlement decision, ie, whether or not the claimant satisfied the conditions of entitlement to DLA from 2003 to 2008 did not fall to be considered in the overpayment appeal. The judge held that that contention was not well founded. The effect of SSA s17 was that the tribunal's decision in the entitlement appeal was 'final', but the findings of fact and other determinations embodied in the ruling were not conclusive for the purpose of the tribunal considering the

appeal against the overpayment decision (para 13). The judge said: 'In my judgment the fact that the claimant was bound to accept, for the purposes of the overpayment appeal, that she had no award of [DLA] in respect of the period 2003 to 2008, and therefore that there had been an overpayment, did not mean that she was bound by the findings of fact made by the First Tribunal to the effect that she did not satisfy the conditions of entitlement to [DLA] during that period' (para 14).

Computer links between DWP offices

In general, it cannot be assumed that a fact known to one office of the Department for Work and Pensions (DWP) is also known to another office. So, claimants need to report changes of circumstance to the office that is handling the claim for the benefit concerned; although an exception may apply where there is an automatic computer interface between one office and another. However, the individual facts will be crucial, and the law is not completely settled, as the following decision demonstrates.

■ PT v Secretary of State for Work and Pensions (CA)

[2011] UKUT 103 (AAC), 14 March 2011
(CG/2739/2009)

The claimant was entitled to IS and carer's allowance (CA). She was overpaid CA after her mother was admitted into a care home on a permanent basis, and so the latter lost her entitlement to attendance allowance (AA). The claimant did not report the change to the carer's allowance unit, although she claimed that she had written a letter 'to DWP' saying that her mother had been admitted to a care home (para 4). The DWP decided that all of the overpaid CA was recoverable from the claimant as she had failed to disclose the fact that her mother had gone into the care home.

Judge Rowland held that the claimant had failed to disclose the fact that her mother had gone into care. In *R(SB) 15/87*, 10 November 1986 at para 26, the Tribunal of Commissioners held that disclosure had to be to 'an office of the department handling the transaction giving rise to the expenditure'. The letter 'to DWP' was insufficient to act as disclosure as it did not contain any addresses or reference number, so even if it had reached the carer's allowance unit in Preston, it would not have been linked to the claimant's case (paras 13–15).

It was argued for the claimant that the carer's allowance unit should have been deemed to have known about the change because of the existence of a computer link between that office and the attendance allowance unit. In the Tribunal of Commissioners decision in *CG/5631/1999*, 19 December 2000, the existence of such a link was pointed out. It was held that there could be no failure to disclose something which is already known to the person to whom the disclosure was otherwise due. Judge Rowland commented that: 'this area of law remains controversial' (para 20). In *GK v Secretary of State for Work and Pensions* [2009] UKUT 98 (AAC), 27 May 2009, it had been held that *CG/5631/1999* above had been overruled implicitly by the Court of Appeal's decision in *B v Secretary of State for Work and Pensions* [2005] EWCA Civ 929, 20 July 2005 (reported as *R(IS) 9/06*). However, this conclusion appeared to have been doubted in *WH v Secretary of State for Work and Pensions* [2009] UKUT 132 (AAC), 10 July 2009. *GK* above had also held that (in any case) the proposition that there cannot be a failure to report something already known to the relevant person is sound only if the individual otherwise under a duty to disclose is aware of the other person's knowledge. Judge Rowland had thought that this issue required clarification by a three-judge panel.

In the event, however, the issue of a computer link did not arise in this case because there was a combined payment of AA and retirement pension, with payment made by a pensions centre, and evidence from the DWP showed that in such cases the usual process under which AA decisions were sent automatically to the carer's allowance unit did not apply; instead, the pensions centre was notified of the AA decision. Judge Rowland held that this was clearly a lacuna, as the carer's allowance unit was not notified of the ceasing of AA in such combined-payment cases. However, any failure by the secretary of state to establish a link between the pensions centre and the carer's allowance unit did not remove the claimant's statutory duty to report the change to the latter. Therefore, the claimant's argument based on *CG/5631/1999* above fell simply because, in fact, there was no relevant computer link in this case (paras 21–29).

DECISIONS AND APPEALS

A couple of housing benefit (HB) decisions have confirmed that the Upper Tribunal has jurisdiction to consider appeals against First-tier Tribunal decisions on striking out appeals, admission of late appeals and other such 'interlocutory' decisions. *Information Commissioner v PS* [2011] UKUT 94 (AAC), 7 March 2011 below has some useful findings regarding the approach to be taken on admission of late appeals to First-tier Tribunals.

■ LS v Lambeth LBC (HB)

[2010] UKUT 461 (AAC), 22 December 2010
(CH/1758/2009)

The claimant had persuaded the judge making the 'interlocutory decision' (ie, the first tribunal judge) on whether or not to admit the appeals for hearing that, in fact, they were not late as the relevant HB decisions had not been properly notified and, therefore, the time limit had not actually expired (para 43). However, the judge hearing the appeals (ie, the second tribunal judge) considered that this was wrong (ie, the decisions had in fact been notified and the time limit for appealing had long expired); he also considered that this meant that the first tribunal judge simply had no power to make such a decision. Furthermore, he considered that for these reasons he could not hear the substance of the appeals – which he regretted – as he would have allowed them. Therefore, he struck out the appeals for lateness. The claimant challenged that decision by appealing to the Upper Tribunal and by lodging a judicial review with the tribunal, in case it considered that a 'strike-out decision' could only be challenged on judicial review (para 73).

Regarding whether or not the challenge was on appeal to the Upper Tribunal or on judicial review, the judges held that the Upper Tribunal had an in principle jurisdiction to consider appeals against 'interlocutory' decisions of First-tier Tribunals (para 95). Tribunals, Courts and Enforcement Act 2007 ss11 and 13 both provided a right of appeal against 'decisions' of tribunals, unless they were excluded explicitly (paras 88–93). Interlocutory decisions have, in general, not been excluded, and (regarding this case) decisions of First-tier Tribunals on permission to appeal fell within section 11(1). It remained open to refuse permission to appeal against an interlocutory decision on the ground that the appeal was premature. The circumstances of the individual case had to be considered; the First-tier Tribunal can treat an application for appeal against a direction as an application for a new direction if it is satisfied that the challenged direction is not appropriate (paras 79–97). The judicial review application in this case was, therefore, unnecessary and was dismissed.

Regarding the striking out of the appeals on the basis that they were late, by a majority, the Upper Tribunal judges decided that the second tribunal judge had erred in so doing, but only because he had done so on the basis that there had been no power to find that they were not late and, therefore, he had to revisit

the decision (paras 134–146). Under Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001 SI No 1002 reg 18(4), a tribunal judge plainly had the power to decide whether or not an appeal was brought within the time limit.

■ Information Commissioner v PS
[2011] UKUT 94 (AAC), 7 March 2011
(GIA/1488/2010)

This case is from the General Regulatory Chamber (information rights) of the First-tier Tribunal, but its comments on tribunal jurisdiction should apply to social security and tax credits cases too. Regarding whether or not a refusal to admit a late appeal is challenged at the Upper Tribunal by application for further appeal or by judicial review, Judge Wikeley referred to the decision of a three-judge panel of the Upper Tribunal in *LS* above. Broadly, that ruling held that there was a right of appeal to the Upper Tribunal against 'interlocutory decisions' of the First-tier Tribunal, unless they were one of the prescribed 'excluded decisions' (para 29). In the present case, the consequences of the decision in LS were that there was an adequate remedy by way of appeal to the Upper Tribunal, rather than by way of judicial review (paras 29–30).

Regarding the admission of a late appeal by a First-tier Tribunal, the First-tier Tribunal judge had made particular reference to rule 2 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules ('GRC Procedure Rules') 2009 SI No 1976, which provide that the 'overriding objective' of the rules was to enable the tribunal to deal with cases 'fairly and justly', and applied that principle to the question of whether or not to admit a late appeal (para 13). Judge Wikeley held that the tribunal judge had correctly identified the key provision in the GRC Procedure Rules, namely, the overriding objective at rule 2, and not any different or potentially narrower test, such as a 'good reason' test (para 36). An analogy could be drawn with the approach taken by Judge Lane regarding when the First-tier Tribunal could proceed with a hearing in the absence of the appellant in *JF v Secretary of State for Work and Pensions (IS)* [2010] UKUT 267 (AAC), 26 July 2010 (a social security case), in which the relevant rule was again informed by the 'overriding objective' rule (paras 36–38). A similar approach – applying the 'overriding objective' rather than a test set out in the Civil Procedure Rules – was taken by Judge Turnbull regarding admission of a late appeal in *CD v First Tier Tribunal (CICA)* [2010] UKUT 181 (AAC), 1 June 2010 (a criminal injuries case). Judge Wikeley agreed with Judge Turnbull's observation that 'the power to extend time is unfettered, and the circumstances which will be relevant in exercising it will vary from case to case' (para 50). Consideration of late appeals in other Chambers of the First-tier Tribunal (for example, *Pledger v Commissioners for HM Revenue and Customs* [2010] UKFTT 342, 22 July 2010 (TC)) had led to approaches that were entirely consistent with that line (paras 55–58).

Tribunals

If a claimant has requested an oral hearing, ie, to be present at the hearing, but does not attend on the day, how should a tribunal decide whether or not to proceed? The following decision gives some helpful guidance and emphasises the importance of the 'overriding objective' of the tribunal rules, which is to deal with cases fairly and justly.

■ WT v Secretary of State for Work and Pensions (DLA)
[2011] UKUT 93 (AAC), 7 February 2011
(CDLA/2156/2010)

The claimant requested an oral hearing of his appeal. He had limited social contacts, which were confined essentially to his church. A written submission from the claimant's representative explained that he had great fears about attending the hearing on his own, lack of funding meant that the advice centre could not provide representation at the hearing and the claimant's priest was unable to attend on the day appointed for the hearing. Consequently, whether the claimant would attend was uncertain. When he did not attend the hearing, the tribunal decided to proceed and disallowed his appeal.

Judge Ward allowed the claimant's appeal. He directed that a new tribunal liaise with the claimant and his representative about a date when the claimant could attend accompanied by his priest or another available person. The tribunal had erred in deciding to proceed, in that it had misapplied rule 31 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 SI No 2685, including by failing sufficiently to apply the 'overriding objective', which is set out at rule 2, of dealing with cases fairly and justly. Rule 31 allows the tribunal to proceed with the hearing in the event of a party failing to attend if it:

(a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and

(b) considers that it is in the interests of justice to proceed with the hearing.

Therefore, the tribunal had to consider if the conditions at limb (a) and limb (b) were met, and then if they were, consider the exercise of its discretionary power. Rule 2 was engaged because the overriding objective is relevant when interpreting any rule or practice direction. The requirement to deal with a case 'fairly and justly' provided guidance when considering what the 'interests of justice' were (paras 9 and 10). The judge said that the tribunal's reasons showed that it had given very careful consideration to whether or not it had sufficient information to enable it to reach a reasoned decision. However, that was not the only consideration and the tribunal had applied rule 31 too narrowly. The claimant had clearly stated his wish to attend, but because of a combination of factors, including mental ill health and the potentially embarrassing nature of the likely topics for discussion, had found it difficult to attend on his own, as was known to the tribunal. It was also relevant, particularly in the light of the written submission from the claimant's representative, whether there would be further useful evidence from the claimant and whether it was just to deprive him of his chance to give evidence in person (paras 11 and 12).

HUMAN RIGHTS AND EQUAL TREATMENT

Recent decisions have considered whether or not housing benefit (HB) rules have breached the human rights of claimants who are severely disabled and require an assessment based on a need for more bedrooms. In rejecting the challenges, the Upper Tribunal provides some commentary on the concept of when human rights require a person to be treated more favourably than others. Nevertheless, challenges continue and the law may develop further.

■ IB v Birmingham City Council v Secretary of State for Work and Pensions v EHRC (HB)
[2011] UKUT 23 (AAC), 13 January 2011
(CH/2823/2009)

The claimant was severely disabled and required the assistance of a team of carers, who did not live with him but stayed overnight. Under the rules that applied at the time of his claim, the claimant's HB at the local housing allowance rate was that for single- bedroom, self-contained accommodation, ie, not at the higher two-bedroom rate. The claimant's appeal was based on the contention that not to provide him with a higher rate constituted unlawful discrimination against him as a severely disabled person, under human rights legislation.

The relevant domestic legislation was

Housing Benefit Regulations (HB Regs) 2006 SI No 213 regs 13D(2) and (3) and Rent Officers (Housing Benefit Functions) Order 1997 SI No 1984 Sch 3B, as in force on 9 June 2008. The single-bedroom, self-contained rate was the maximum that could apply to the claimant as none of his overnight carers could be included as 'occupiers' of whom account could be taken. It was argued that that was in breach of the claimant's human rights as a severely disabled person, namely, under article 14 of the European Convention on Human Rights ('the convention') (prohibition of discrimination) read in conjunction with either or both article 8 (right to respect for private and family life and home) and article 1 of Protocol No 1 (peaceful enjoyment of possessions). Regarding article 14, the claimant's representative pointed out that it was now established that, in certain circumstances, it can be unlawful discrimination to take positive measures to treat people differently, as stated by the European Court of Human Rights (ECtHR) in *Thlimmenos v Greece* (2001) 31 EHRR 15; App No 34369, 6 April 2000, which was acknowledged and approved by the Court of Appeal in *AM (Somalia) v Entry Clearance Officer* [2009] EWCA Civ 634, 1 July 2009.

Judge Howell QC was unable to see that the HB calculation discriminated against the claimant as a disabled person, in the sense of treating him less favourably. The limitation of the room rates to 'occupiers' was unrelated to disability or to any other personal characteristic of the claimant and applied to all alike. It was not possible to identify how a non-disabled person in otherwise similar circumstances would have been treated differently (paras 27 and 35–36). Regarding a duty under article 14 for some people to be treated more favourably, the judge accepted that there could be such a duty as established under the principle in *Thlimmenos* above. In that case, the court had held that '[t]he right not to be discriminated against … is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different' (*Thlimmenos* at para 44). In the instant case, the judge considered that this principle had now become settled under the formulation adopted by the ECtHR in *Stec and others v UK* (2006) 43 EHRR 47; App Nos 65731/01 and 659000/01, 12 April 2006 at para 51, in which it was held that there could be such a breach 'in certain circumstances' where different treatment would be required to 'correct inequality' (para 38).

However in this case, article 14 had not been breached in this way either. Citing some of the principles applied by the Court of Appeal in *AM (Somalia)* above, the judge held that the principal focus here must be on the question of objective and reasonable justification. With that in mind, the judge considered that the additional financial help already available to disabled people under the benefits system was the 'most relevant factor', and that the benefits system was 'massive and complex', with the correction of errors and provision of additional resources being 'questions for the legislature and the executive' (paras 44 and 50 respectively). Therefore, the judge found that there was no violation of article 14 of the convention in the council's failure to provide more HB via the two-room rate.

Comment: This decision is now under appeal to the Court of Appeal. From 1 April 2011, a special provision for disabled people to allow for overnight carers has been introduced by the Housing Benefit (Amendment) Regulations 2010 SI No 2835.

■ KM v South Somerset DC (HB)

[2011] UKUT 148 (AAC), 30 March 2011
(CH/1334/2010)

Judge Mark held that the failure of the rules to make special provision for the disabled person in this case, so as to increase the size criterion in the light of her disability above that for a couple, was not in breach of her human rights. In so doing, he adopted the reasoning applied in a similar case, ie, *IB* above.

The claimant lived with her husband in a two-bedroom flat. They needed a second bedroom mainly because the claimant required a wheelchair, hoist and various other equipment around her bed. In her claim for HB, as she counted as a couple with her husband, the effect of HB Regs reg 13(D)(3) was that the calculation was on the basis that they were entitled to one bedroom only. The claimant was obliged to apply regularly for discretionary housing payments. She argued that this was in breach of the Human Rights Act (HRA) 1998 in that the benefit rules did not take into account the essential housing needs of all severely disabled claimants and, in particular, that she ought to receive benefit calculated on the basis that she needed two bedrooms.

In rejecting the claimant's argument, Judge Mark held that the HRA had not been breached either in the sense of less favourable treatment or because of unlawful failure to provide different treatment in her favour. There was no question of the claimant being treated less favourably than another claimant in a couple, as all couples came under the rule. The real issue was whether or not she ought to be treated more favourably (para 6). Judge Mark cited at length Judge Howell QC's decision in *IB*, in particular, the principle set out by the ECtHR in *Thlimmenos* above at para 44 that the right not to be discriminated against under convention rights was violated 'when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different' (para 8). However, Judge Howell QC had pointed to the wide margin of appreciation given to the state in such matters, and that the failure may be objectively and reasonably justified, and indeed that it was in that particular case (which involved a severely disabled student's claim that he should be given the two-bedroom rate in respect of his need for carers). In the present case, Judge Mark held that similar considerations applied. The failure to make special provision beyond the provision of limited funds by way of discretionary housing payments did not involve a breach of the claimant's human rights (para 9).

Comment: *RG v Secretary of State for Work and Pensions and North Wiltshire DC* (HB) [2011] UKUT 198 (AAC), 5 May 2011 is another case about an alleged breach of human rights law concerning severely disabled people. The facts there concerned a claimant with a son and two disabled daughters, where the nature of the disabilities was such that the sisters could not reasonably be expected to share a room. However, under the rules the rent was limited to the rate for a three-bedroom property. The argument that this was in breach of the claimant's human rights was rejected by Judge Turnbull, applying (like Judge Mark) the reasoning of Judge Howell QC in *IB*; nevertheless, the judge also indicated that he would be willing to grant permission for appeal to the Court of Appeal.

EUROPEAN UNION LAW

Social security for migrant workers

Following a recent decision of the European Court of Justice (ECJ), there is now the somewhat odd position that although the care component of DLA is 'exportable' within Europe, the mobility component is not. The basis of the distinction is that the ECJ considered the mobility component – unlike the care component – to be a 'special non-contributory benefit' (para 16). Arguably, the reasons for this distinction remain unclear and the decision seems to contradict *European Commission v Germany* C-206/10, 5 May 2011, another decision of the ECJ that was made on the same day about the exportability of German disability benefits. It

is understood that an application for a further reference to the ECJ about the mobility component of DLA may yet be made.

■ **Bartlett and others v Secretary of State for Work and Pensions (social security for migrant workers)**

[2011] EUECJ,
C-537/09,
5 May 2011

In this decision the ECJ held that the mobility component of DLA is (unlike the care component) not exportable within the European Economic Area. The matter had been referred to the ECJ in a number of cases in which claimants' entitlement to the mobility component of DLA had been withdrawn on the ground that (having gone to live elsewhere in Europe) they no longer satisfied the rules on presence in GB. Specifically, the ECJ had, in effect, been asked to consider whether or not the mobility component was, nevertheless, payable in (ie, exportable to) the new country, under article 10 of EC Regulation 1408/71, or whether it was non-exportable under article 4(2a) on the basis that it was a 'special non-contributory benefit' (para 25). (In *Commission of the European Communities v European Parliament and Council of the European Communities* C-299/05, 3 May 2007, the ECJ had held that the care component of DLA was exportable, as it was a 'sickness benefit' rather than a special non-contributory benefit (para 15).)

The ECJ noted that it had already held, in Commission of the European Communities above, that the mobility component of DLA was 'severable'; therefore, it could be regarded as a 'benefit' for the purposes of EC Regulation 1408/71 (paras 19–23). The ECJ also held that the mobility component was a special non-contributory benefit: there was no dispute that it was 'non-contributory' (para 24). In relation to whether or not the mobility component was special, the ECJ noted that it had already held, in *Commission of the European Communities*, that the component could be so considered. Furthermore, the ECJ noted the following:

■ The mobility component provided specific protection for disabled people 'since it pursues solely the objective of promoting the independence and social integration of disabled persons and also, as far as possible, of helping them to lead a life similar to that of non-disabled persons' (para 27).

■ The amount of the mobility component 'is closely linked to the social environment of that person' (para 28).

■ The mobility component was awarded 'in the overwhelming majority of cases to persons who cannot work because of their disability' (para 29).

■ For those reasons, the ECJ ruled that it must be held that the mobility component must be regarded as a special benefit (para 30).

■ Furthermore, the ECJ noted that the mobility component is now included by the UK as a special non-contributory benefit in Annex X to Regulation (EC) No 883/2004, which is the successor to EC Regulation 1408/71. Also, there was nothing in article 10a that was incompatible with the principles of the free movement of persons under EC legislation (para 40).

* File reference numbers are included only to assist with accessing decisions. The file number may for instance be used when accessing decisions on the Administrative Appeals Chamber's database. Readers should note that the file number is neither the official citation nor part of it.

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Maintaining the rule of law in tribunals

In June, the Supreme Court gave its decisions in *R (Cart) v Upper Tribunal and R (MR (Pakistan)) v Upper Tribunal (Immigration and Asylum Chamber) and Secretary of State for the Home Department* [2011] UKSC 28, 22 June 2011; July 2011 *Legal Action* 4 (see also page 15 of this issue) and *Eba v Advocate General for Scotland* [2011] UKSC 29, 22 June 2011; July 2011 *Legal Action* 4. Edward Jacobs discusses the judgments and highlights the issues the Supreme Court has left unresolved.

The issue for the court was whether, and if so in what circumstances, a decision of the Upper Tribunal refusing permission to appeal would be subject to judicial review or, in Scotland, the court's supervisory jurisdiction. At first, the answer seemed to depend on the significance of the status of the Upper Tribunal as a superior court of record (Tribunals, Courts and Enforcement Act (TCEA) 2007 s3(5)). This was how the government's case was presented to the Divisional Court in *R (Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin), 1 December 2009, in which Mr Cart challenged a grant of permission to appeal on limited grounds only. The court rejected the government's argument, but held that, essentially, judicial review was available on pre-*Anisminic* (*Anisminic Ltd v Foreign Compensation Commission and another* [1969] 2 AC 147, 17 December 1968, HL) grounds or for a fundamental failure of due process. On appeal, the Court of Appeal produced a very similar result, albeit that it was expressed differently ([2010] EWCA Civ 859, 23 July 2010).

Meanwhile, the same issue had arisen in Scotland, which has no concept of a superior court of record. In *Eba v Advocate General for Scotland* [2010] CSIH 78, 10 September 2010, the Court of Session decided that the supervisory jurisdiction of the court over a refusal of permission to appeal to the Upper Tribunal could be exercised on general principles and without restriction. Both cases were the subject of appeals to the Supreme Court, where they were joined on a leap-frog appeal by an English asylum case: *R (MR (Pakistan)) v Upper Tribunal and Secretary of State for the Home Department*, in which the Administrative Court had applied the reasoning of the Court of Appeal in *Cart* to a refusal of permission to appeal.

What the Supreme Court decided

All the judges except for Lord Rodger gave their own reasons, whether or not by way of emphasis. The following is an attempt to distil the overall reasoning behind the court's decisions.

The court began by rejecting the arguments that judicial review and supervision should be available:

- only for pre-*Anisminic* excess of jurisdiction and denial of justice; or
- on general principles without restriction.

Conveniently, Lord Dyson summarised the court's reasons for so doing:

> *The problem with the exceptional circumstances approach is that, although it recognises the need to restrict the scope of judicial review, it does so in a way which creates its own problems and does not target arguable errors of law of general importance. The problem with unrestricted judicial review is that it captures all arguable errors of law without discriminating between them notwithstanding the countervailing factors to which I have referred* (para 128).

Then the court turned to the principles that should apply. The foundation of its reasoning lies in the rule of law (recognised by Constitutional Reform Act 2005 s1(a)) and the function of judicial review and supervision to ensure that the rule runs in tribunals. However, the rule of law does not operate in a vacuum. The courts operate with limited resources and have to deploy those resources proportionately. The status of the Upper Tribunal and the nature and scope for the correction of error with the new tribunal structure make it less likely that mistakes will go undetected or uncorrected. Those features favoured a restriction on the oversight from the courts. The search then was for a defensible principle setting the limits of the courts' oversight. Here, the legislative context of the rule of law is relevant. The court adopted the criteria set out in TCEA s13(6), which empowers the Lord Chancellor to limit the cases in which an appeal is allowed from decisions of the Upper Tribunal:

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

These are the standard second appeal criteria that govern an application for permission to appeal for a case which has already been the subject of an appeal from one judicial body to another. Those criteria apply in England and Wales (under section 13(6) as a result of the Appeals from the Upper Tribunal to the Court of Appeal Order 2008 SI No 2834) and in Scotland (as a result of the Act of Sederunt (Rules of the Court of Session Amendment No 5) (Miscellaneous) 2008 SSI No 349 para 7(6)). The significance of these provisions was best summarised by Lord Brown when he asked:

> *If, then, the rule of law allows certain errors of law in substantive decisions of the Upper Tribunal on appeal from the First-tier Tribunal to go uncorrected, why as a matter of principle should it not similarly allow this in respect of decisions of the Upper Tribunal refusing leave to appeal to itself from the First-tier Tribunal?* (para 100)

What the Supreme Court's decisions leave unclear

There are a number of issues that the Supreme Court's decisions leave unresolved:

First, does the same reasoning apply throughout the UK? The decisions rule authoritatively on the law for England and Wales, and for Scotland, but not for Northern Ireland. It is, though, unlikely that the courts there would take a different approach from the rest of GB.

Second, to which tribunals does the court's reasoning apply? *Cart and MR (Pakistan)* and *Eba* involved the Upper Tribunal, and the judges were influenced by the new structure created by the TCEA. Some tribunals remain outside the First-tier Tribunal and Upper Tribunal structure, notably, employment tribunals and the Employment Appeal Tribunal. It would be anomalous for those tribunals at least to be treated differently, as they share most of the features of the tribunal structure under the TCEA.

Third, to what types of decision does the court's reasoning apply? *Cart and MR (Pakistan)* and *Eba* involved refusals of permission to appeal. In *Cart and MR*

(Pakistan), Lord Phillips took the trouble to emphasise that his reasoning applied 'particularly' to refusals, while, in *Eba*, Lord Hope emphasised that they formed a 'special category' (paras 92 and 49(c) respectively). However, the court's reasoning, while developed in the context of refusals of permission, was not so limited; in particular, the court did not limit its reasoning to those cases in which the statutory second appeal criteria applied. This would have produced anomalies, as there are second appeals that come to the Upper Tribunal that are not covered by the statutory criteria: appeals from the Mental Health Review Tribunal for Wales are an example. For such cases, the reasoning of Hale LJ (as she then was) in *Cooke v Secretary of State for Social Security* [2002] 3 All ER 279; [2001] EWCA Civ 734, 25 April 2001 at para 17 applies, and the Administrative Appeals Chamber of the Upper Tribunal operates the statutory criteria by analogy.

However, there are two types of cases that may not be covered by the Supreme Court's reasoning. Some cases come before the Upper Tribunal from the First-tier Tribunal, but not by way of appeal. Cases decided on a referral by the First-tier Tribunal under TCEA s9(5)(b) are an example. Although these cases are not strictly second appeals, they have been subject to judicial scrutiny at two levels. It is likely that the Supreme Court's reasoning applies to these cases as being closely comparable, in substance, to second appeals. Other cases come before the Upper Tribunal without being the subject of any previous judicial scrutiny, whether by the First-tier Tribunal or another tribunal: examples are cases under the Forfeiture Act 1982, where a case is referred to the Upper Tribunal by the Secretary of State for Work and Pensions, and under the Safeguarding Vulnerable Groups Act 2006, where the appeal lies direct from the decision of the Independent Safeguarding Authority. For these cases, the Upper Tribunal is the first judicial scrutiny and it is arguable that the Supreme Court's reasoning does not apply.

Fourth, do the second appeal criteria provide a clear guide? The concept of a compelling reason is (intentionally) vague, open-ended and essentially a matter for judgment in an individual case. For England and Wales, Lord Dyson was the only judge to give any indication of what it might mean. He was cautious about giving examples, but suggested two possibilities: '(i) a case where it is strongly arguable that the individual has suffered … "a wholly exceptional collapse of fair procedure" or (ii) a case where it is strongly arguable that there has been an error of law which has caused truly drastic consequences' (para 131). These examples combine an error that is serious in its nature or impact with a high degree of certainty (ie, 'strongly arguable') that the error can be established. Obviously these were chosen as extreme examples, but they suggest that 'compelling' is a high hurdle to overcome. This would be appropriate for a second appeal criterion that, by definition, is stricter than the test for first appeals. As the Court of Appeal decided in *Re B (Residence: Second Appeal)* [2009] 2 FLR 632, [2009] EWCA Civ 545, 11 June 2009 at paras 10–12, it is not a compelling reason that the decision was 'arguably plainly wrong'. However, in *Hall v Hall* [2008] 2 FLR 575; [2008] EWCA Civ 350, 18 March 2008, Thorpe LJ said that 'the correction of manifest injustice must be a compelling reason for the grant of a second appeal' (para 7). It may, though, be a mistake to pay too close attention to the wording of the reasons given by judges in cases that are so heavily dependent on their individual circumstances.

For Scotland, in *Eba*, Lord Hope gave the judgment of the court. He also gave two examples of compelling reasons: 'where it was clear that the decision was perverse or plainly wrong or where, due to some procedural irregularity, the petitioner had not had a fair hearing at all' (para 48). This language is much closer to the test for first appeals, although tightened by the addition of 'clear that' and 'at all'. The apparent contrast with the language used for England and Wales may arise merely from differences of expression and choice of examples, but Lord Hope's words perhaps suggest a less stringent test than Lord Dyson envisaged. This could be used to create a standard for Scotland that was different from the rest of GB, and at some time counsel will, no doubt, argue that it does.

However, it is reasonable to assume that the judges intended that the tests should be the same throughout GB and that they did not intend to create different standards, without expressly saying so, through the contrasting choice of examples. Even on that basis, Lord Hope's examples water down the apparent stringency of Lord Dyson's examples. If nothing else, this contrast of language and examples will provide an opportunity for counsel to argue about the precise scope of the concept.

Managing the workload

The court was aware of the impact of applications by failed asylum-seekers. The advantage of clear and strict criteria is that they help to deter applications and do not divert resources from other court users. The 'compelling reason' test will certainly not deter many failed asylum-seekers. Mindful of this, the court gave some advice on how the lower courts might deal with such cases. In *Cart and MR (Pakistan)*, for England and Wales, the judges favoured the Civil Procedure Rules Committee considering an abbreviated procedure, with perhaps a paper consideration and no further right to oral reconsideration or appeal (paras 58, 93, 101, 106 and 132). In *Eba*, for Scotland, Lord Hope drew attention to procedural devices for handling applications efficiently (para 49).

Conclusion

The decisions in *Cart and MR (Pakistan)* and *Eba* leave unanswered many questions about the scope of judicial review and supervision of decisions of the Upper Tribunal, in terms of:

- the scope of the principles that apply;
- the types of decision to which they apply; and
- their application to individual cases.

Even for refusals of permission to appeal to the Upper Tribunal, the decisions of the Supreme Court may not be the final word. For Lord Phillips, his support for the extent of supervision set by the court applied 'at least until we have experience of how the new tribunal system is working in practice' (*Cart and MR (Pakistan)* para 92).

Edward Jacobs, one of the founding judges of the Upper Tribunal, is assigned to the Administrative Appeals Chamber. He is author of *Tribunal practice and procedure*, 2nd edition, LAG, June 2011, £50.

Recent developments in immigration law – Part 1

Jawaid Luqmani reports on recent developments in politics and legislation relating to immigration. Part 2 covering significant immigration case-law will be published in September 2011 *Legal Action*.

POLITICS AND LEGISLATION

Statutory instruments

Immigration and Nationality (Fees) Regulations 2011 SI No 1055

These regulations, which came into force on 6 April 2011, in conjunction with Immigration and Nationality (Fees) Order 2011 SI No 445, in force from 18 February 2011, increased fees for a significant number of immigration and nationality-based applications made from within the UK or at a post overseas and confirmed that no fee would be payable in respect of:

- an asylum claim that has not been determined or has been granted (reg 14(a));
- those granted humanitarian protection (reg 14(b));
- those granted limited leave following an unsuccessful asylum claim (reg 14(c));
- dependants of any of the above applying for leave to enter or remain within the Immigration Rules (reg 14(d));
- a child of one of the persons listed in reg 14(a)–(c) and born in the UK (reg 14(e));
- applications for indefinite leave as a victim of domestic violence where it appears to the secretary of state that at the time of making the application the applicant is destitute (reg 15);
- applications by persons who are nationals of states which have ratified the Council of Europe Social Charter or the Council of Europe Revised Social Charter, where the applications are for sectors-based employment, Home Office approved training, seasonal agricultural workers, limited leave for work permit employment and Tier 1 migrants (whether by post or in person) who previously had permission under the Highly Skilled Migrant Programme (reg 16);
- applications by persons under the European Community Association Agreement (reg 20);
- applications for a variety of purposes made on arrival for variation of leave to enter or remain leading to entry for up to six months (reg 17);
- most applications made on behalf of a child who is provided with assistance by a local authority (the exception only applies to applications falling within certain categories and will not extend to citizenship applications) (reg 18);
- a single fee only would be payable where more than one application is made to the Home Office (in which case the higher of the fees would be payable) (reg 19);
- a person seeking to extend his/her employment as a Tier 2 migrant having previously had leave as a Qualifying Work Permit Holder with the same employer (reg 21).

Somewhat controversially, regulation 29 enables a fee to be charged for applications made at the Public Enquiry Office or for expediting the issuing of a residence card to a family member of an EEA national. Practitioners will be aware that such documents are to be issued within six months of application but that the deadline is exceeded in many cases (see Immigration (European Economic Area) Regulations (I(EEA) Regs) 2006 SI No 1003 reg 17(3)). It is unclear whether the imposition of such a fee is lawful given that it is commonly understood that imposing a charge on an EEA national may involve the imposition of an unlawful discriminatory measure.

Although the exceptions are not set out within it, a useful table outlining the level of fees now payable appears on the UK Border Agency (UKBA) website.[1]

Accession (Immigration and Worker Registration) (Revocation, Savings and Consequential Provisions) Regulations 2011 SI No 544

These regulations came into force on 1 May 2011 and revoked Accession (Immigration and Worker Registration) Regulations 2004 SI No 1219, subject to transitional provisions. The earlier regulations imposed the requirement for A8 nationals to register their employment for an initial period of 12 months. The transitional arrangement will continue to apply until 30 April 2012 for those persons in employment who would have been subject to a registration requirement as at 30 April 2011 and whose registration had not been completed. However, for persons starting employment on or after 1 May 2011, registration will no longer be required.

Asylum Support (Amendment) Regulations 2011 SI No 907

These regulations set out revised levels of support under the National Asylum Support Service as from 18 April 2011.

Asylum and Immigration (Treatment of Claimants etc) Act 2004 (Remedial) Order 2011 SI No 1158

This Order came into force on 9 May 2011 and repealed the provisions of the Asylum and Immigration (Treatment of Claimants etc) Act (AI(TC)A) 2004, requiring any persons with limited leave subject to immigration control who marry in a place other than the Church of England, or who undertake a civil partnership, to obtain a certificate of approval (where the person subject to immigration control does not have entry clearance in a capacity for marriage or civil partnership). The repeal had been widely predicted following the decision of the House of Lords in *R (Baiai and others) v Secretary of State for the Home Department* [2008] UKHL 53, 30 July 2008; [2009] 1 AC 287, which upheld the conclusion of the Divisional Court that AI(TC)A s19 was incompatible with a right under the European Convention on Human Rights (article 12).

Anecdotally, one of the consequences of the repeal was a reported increase in difficulties for persons holding certificates of approval issued before 9 May 2011 being able to persuade registrars that production of such a certificate was sufficient evidence to enable a marriage or civil partnership to take place. Different registrars appear to be relying on different documents and, at the time of publication, there does not appear to be any clear national guidance issued to registrars about the procedure to adopt for verifying the identity of persons seeking to marry. To date seventy-six specific offices have been designated by the Identity and Passport Service to facilitate giving notice of intention to marry or form a civil partnership where one or both persons are subject to immigration control, but there remains no comprehensive guidance about what evidence must be produced to satisfy one of the designated offices.[2]

UK Borders Act 2007 (Commencement No 7 and Transitional Provisions) Order 2011 SI No 1293

This Order brought into effect UK Borders Act 2007 s19 from 23 May 2011 but will not apply to hearings pending at that date, although it is said to apply to appeals before that date where a hearing had not taken place. The effect of the section is to prevent appellants from relying on evidence that was not presented at the time of the initial application in a points-based system appeal. The transitional provision appears to act retrospectively and to distinguish artificially between appeals in which there has been a hearing and where no hearing has yet taken place. The Immigration Law Practitioners' Association raised this in correspondence with the UKBA, pointing out the lack of legal certainty of appeals altered midstream. In a response dated 27 May 2011, the Head of Central Appeals and Litigation, Amelia Wright, defended the stance and appeared not to engage with the question of whether the effect of the provision would be retrospective. It remains to be seen whether the commencement order might be challenged for those cases pending (but without a hearing having taken place) on 23 May 2011.

Immigration (European Economic Area) (Amendment) Regulations 2011 SI No 1247

These regulations came into force on 2 June 2011 and amend I(EEA) Regs reg 4(4), which relates to persons who are self sufficient or students by permitting EEA nationals and family members to be treated as having sufficient resources even if they fall below the threshold for social assistance. Regulation 8 is amended in line with the decision of the European Court of Justice in *Metock and others v Minister for Justice, Equality and Law Reform* C-127/08, 25 July 2008; [2008] ECR I-6241, enabling an EEA national and his/her extended family members to reside in the UK regardless of whether they have previously resided in another EEA state (lawfully or otherwise) or elsewhere.

Immigration Services Commissioner (Application Fee) Order 2011 SI No 1366

This Order came into force on 8 July 2011 and sets the levels of fee payable for those advisers registered under the Office of the Immigration Services Commissioner scheme, with the fee structure varying according to the number of advisers within a particular organisation.

Statements of changes in Immigration Rules

Statement of changes in Immigration Rules HC 863

HC 863 took effect on 6 April 2011 and introduced a significant number of amendments. It also included, for the first time, a process specifying that the changes are to be reviewed every five years to assess whether they have met any objectives set (no doubt avoiding the terminology 'fit for purpose').

The changes include the following:

■ Creating a new category for the spouse or civil partner of a person with leave as a refugee or with humanitarian protection where the marriage or civil partnership is formed post flight. (In *FH (Post-flight spouses) Iran* [2010] UKUT 275 (IAC), 13 July 2010, the Upper Tribunal drew the secretary of state's urgent attention to the lack of a relevant rule dealing with this situation.) For this purpose the spouse or civil partner is required to meet a language requirement (unless s/he is from an English-speaking country or possesses an academic qualification from a list of relevant countries). Importantly, maintenance and accommodation are required elements of the rule, while they are not for pre-flight spouses and civil partners under paragraph 352FA. If successful, the applicant is to be granted 63 months' leave to enter.

■ Creating a new category for unmarried or same-sex partners of post-flight successful asylum applicants to whom similar rules about a language requirement as well as maintenance and accommodation apply. The period of leave granted would also be for 63 months. Applicants in this category should be distinguished from the pre-flight partners under paragraph 352FD.

■ Persons in these new categories can apply for settlement once the sponsor relative has been granted settlement or obtained citizenship, provided that they have spent at least two years in the UK in this capacity.

■ Creating a new category for minor children of persons given leave as refugees or with humanitarian protection. They must be under 18 and conceived after the person granted asylum or humanitarian protection left his/her country to seek asylum in the UK. If successful, the child is to be granted 63 months' leave but, in this category, it is necessary to meet the maintenance and accommodation requirements. It is important to distinguish this category from the existing category under paragraph 352D which relates to children forming part of the household prior to the asylum claimant fleeing. The three new categories of post-flight family members can lead to settlement.

■ Creating a new category of Tier 1 (Exceptional Talent) migrants intended for those internationally recognised as world leaders or potential world-leading talent in science and the arts who wish to work in the UK. Prior entry clearance is required and will be granted for a period of three years and four months. Where an applicant has been sponsored by an overseas government or international scholarship agency, the unconditional written consent of such government or agency is required. For those already in the UK seeking leave to extend their stay in this capacity, leave will be granted for a period of two years. The category can lead to settlement and, not surprisingly, given other changes being introduced at this stage, the need to be free of any unspent convictions is included. A designated competent body to endorse applicants in this category is also created under the rule change and, for the period 6 April 2011 to 5 April 2012, there are to be a maximum of 1,000 endorsements, 700 in the field of science and 300 in the arts. The designated body is required to give its endorsement by reference to criteria agreed with the UKBA and in conformity with UKBA guidance. Additionally, those applying in this category are permitted a more basic language requirement and are excluded from the financial attributes requirement under Appendix C (or Appendix E for family members).

■ Creating a new category of prospective entrepreneurs, who are also included in the list of persons to be granted limited leave to enter or remain as special visitors. The category is created to enable individuals to secure funding from venture capital firms, seed fund organisations or UK government departments to enable them to set up, take over or be actively involved in the running of a UK-based business. To qualify in this capacity an applicant is required to produce a letter dated not earlier than three months before the application from the individual or persons with whom financial negotiations are ongoing, indicating a commitment of a minimum of £50,000 within six months of the applicant entering the UK. The individual is to be refused entry in this capacity unless s/he is able to show that s/he will not remain in the UK beyond six months, unless seeking to remain as a Tier 1 (Entrepreneur) migrant before the expiry of any leave granted.

■ Introducing a new time bar of two years on return to the UK under paragraph 320(7B) for persons who leave the UK voluntarily at the expense of the secretary of state within six months of being appeal exhausted or after receipt of a removal notice. This is a lower period than the five years which had otherwise been applicable to this category,

thereby providing limited incentive to depart before being detected.

■ Recasting Tier 2 (Intra-Company Transfer) migrants as a distinct scheme, enabling multinational employers to transfer existing employees based outside the EEA to a UK branch for positions that cannot be filled by British or other EEA workers. It identifies four sub-categories: short term; long term (more than 12 months); graduate trainee; and skills transfer. Only applicants who have been employed overseas with the same employer for at least 12 months would be eligible in the long or short term sub-categories. The applicant must be at least 16 years old and, where the individual is under 18, the application must be supported by parents or guardians who are also required to consent to the travel, reception and care arrangements in the UK. For those seeking a certificate of sponsorship, minimum salary rates are specified:

– £40,000 based on a 48-hour week for the long term sub-category and the job must appear on a list of graduate-level occupations, on the list of jobs skilled to National Qualifications Framework (NQF) level 3, or be that of a senior care worker or established entertainer. The leave to enter is granted for up to three years and one month. An application can be made for an extension of leave and, after five years, settlement can be applied for provided that the salary level remains above the minimum level set by the UKBA;

– £24,000 based on a 48-hour week for the short term, graduate trainee or skills transfer sub-categories. For the short term and graduate trainee sub-categories, leave will be granted for the period of engagement plus one month, up to a maximum of 12 months, whichever is shorter. For the skills transfer sub-category, leave will be granted for the period of engagement plus one month, up to a maximum of six months, whichever is shorter. An employer cannot issue more than five graduate trainee certificates of sponsorship in the period 6 April 2011 to 5 April 2012 and the individual needs to show that s/he has worked for the employer outside the UK for at least three months immediately before the application.

■ Removing the temporary cap on persons seeking leave to remain as Tier 1 (General) migrants (in *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2010] EWHC 3524 (Admin), 17 December 2010, the imposition of interim limits was ruled unlawful). Those seeking entry in this capacity will be granted two years if applying under the rules in force at 6 April 2010. Those seeking entry in this capacity may be granted leave for up to three years and such persons may apply for indefinite leave after five years, subject to the requirement not to have any unspent convictions.

■ Restricting the entitlement to persons seeking indefinite leave after five years as work permit holders to those whose remuneration is at a rate not lower than that set by the UKBA in the code of practice for Tier 2 sponsors.

■ Amending the rules more generally to prevent persons with unspent convictions from being able to obtain indefinite leave. This requirement is rolled out to almost every category with the notable exception of those applying under the terms of the HSMP ILR (Highly Skilled Migrant Programme indefinite leave to remain) judicial review policy; including spouses, civil partners, same-sex or unmarried partners and children (including adopted children).

■ Removing the reference to a previous criminal record from the list of factors to be taken into account in the long residence rule (paragraph 276B) and making it a specific condition.

■ Making a series of amendments across a range of primarily points-based applications, including:

– amending the definitions of 'established entertainer' and 'senior care worker';

– amending requirements for meeting the language and knowledge of life tests for some commercial categories;

– extending the time period to six months for Tier 1 (Entrepreneur) migrants to register their businesses with Her Majesty's Revenue and Customs;

– preventing blood relatives seeking to join pre-flight partners, who have leave as a refugee or with humanitarian protection, under the unmarried or same-sex provisions, although curiously this requirement has not been applied to the new post-flight partner category;

– adding Oman to the list of visa national countries except for those with diplomatic and special passports issued for the purpose of a general visit, a dispensation also granted to citizens of Qatar and the United Arab Emirates;

– clarifying that any qualifications or earnings received while in breach of the immigration laws cannot be counted for assessing Tier 1 (General) migrant applications;

– subject to limited exceptions, removing the availability of points for a Bachelor's degree or earnings below £20,000 for Tier 1 (General) migrants between 31 March 2009 and 5 April 2010;

– tightening up the evidence required to establish proof of allowances for remuneration or self-employed persons and introducing a requirement that earnings for the purposes of establishing UK experience must be made while the individual is physically present in the UK (excluding the Isle of Man and the Channel Islands);

– Tier 1 (Entrepreneur) migrants are able to satisfy requirements with £50,000 (as opposed to £200,000), where funds are from one of the specified sources. They have an opportunity to apply for settlement after three years, instead of five years, if they are responsible for creating ten or more full-time jobs or for a net increase in income of £5m or more within a three-year period;

– creating entrepreneurial teams, which permit two people to apply rather than just one, where the interest in the business is shared;

– Tier 1 (Investor) migrants are also able to apply for settlement earlier, according to a sliding scale by reference to their assets: from personal assets of at least £20m, where the specified continuous period is two years, down to personal assets of at least £2m, where the specified continuous period is five years;

– subject to limited exceptions, there is a minimum salary level of £20,000 for Tier 2 (General) migrants with differing routes depending on whether the job is on the shortage occupation list, for the same employer, for post-study work or if it passes the resident labour market test. There is an additional route for those seeking to enter on salaries of £150,000 plus;

– creating a Tier 2 (General) limit which, for the period 6 April 2011 to 5 April 2012, is set at 20,700 certificates of sponsorship with provisional monthly allocations of 1,500, although Tier 2 (General) migrants earning in excess of £150,000 are not included in these limits;

– when maintenance funds for Tier 4 (General) students depend on the length of the course, the length of the course is rounded up to the next full month.

Many of these changes to the points-based scheme were introduced following the Court of Appeal's decision in *Secretary of State for the Home Department v Pankina and others* [2010] EWCA Civ 719, 23 June 2010, in which the court concluded that the secretary of state was not permitted to give the guidance as to the operation of the points-based scheme the force of the Immigration Rules. As a consequence, the secretary of state has tightened up and transferred elements of the guidance into the rules themselves, notwithstanding that the Explanatory memorandum issued with HC 863 states:

The secretary of state considers that the rules and guidance as currently structured are lawful. However, for the avoidance of any

doubt and without prejudice to any future position the secretary of state may take in litigation on this point … (para 7.16).

Statement of changes in Immigration Rules HC 908

HC 908 was laid just over a fortnight after HC 863 and included some changes which also took effect on 6 April 2011 and others which took effect on 21 April 2011. Some are drafting errors or omissions arising from HC 863; others tighten up provisions in respect of students as it remains the secretary of state's view that the immigration system is abused by this category (Explanatory memorandum to HC 908, para 3.1).

Those changes which took effect on 6 April 2011 include the following:

■ Five years' residence, as opposed to four years, for settlement for those who were granted HSMP ILR Judicial Review Policy Document leave between 3 April 2006 and 7 November 2006.

■ Insofar as any were omitted from HC 863, spouses, civil partners, unmarried or same-sex partners seeking entry for settlement or indefinite leave must not have any unspent convictions; this provision also being introduced as a requirement for victims of domestic violence seeking settlement.

Those changes which took effect on 21 April 2011 include the following:

■ Definitions under paragraph 6 now include 'B-rated sponsor'.

■ Tier 4 (General) students issued with a confirmation of acceptance for studies may be required to be examined or interviewed to establish that they have sufficient language proficiency to meet the required standard to have been issued with such confirmation.

■ Such students are also prevented from studying anywhere other than the sponsoring institution and its partner institutions.

■ Tier 2 (Minister of Religion) migrant sponsoring organisations will need to be A-rated unless the applicant is seeking leave to remain (as opposed to leave to enter) in the same capacity and for the same employer. A similar requirement is introduced for Tier 2 (Sportsperson) migrants and Tier 5 migrants (unless last granted leave as a Tier 5 migrant, an Overseas Government Employee or a Qualifying Work Permit Holder).

■ A limit is imposed on the number of confirmations of acceptance for studies allocated to certain sponsors (limited sponsors) other than those who are highly trusted sponsors. The limit is based on the numbers historically assigned during the period 1 March 2010 to 28 February 2011, with a pro rata calculation being carried out for organisations which did not hold a Tier 4 sponsor licence throughout the calculation period, or a further calculation for organisations which did not hold a licence at all during that period.

■ A sponsor organisation which is able subsequently to fulfil the criteria for being highly trusted and subject to inspection may apply to be exempt from the limit.

■ A Tier 4 (General) student embarking on a new course will only be able to obtain confirmation of acceptance for studies from an organisation that is A-rated or highly trusted.

■ Points will only be awarded for courses on or after 21 April 2011 at NQF level 3 with a highly trusted sponsor or NQF level 4 otherwise. For those in Scotland, the course must be accredited at level 6 in the Scottish Credit and Qualifications Framework (SCQF) for highly trusted sponsors or otherwise at level 7. Points will also be awarded if the course is part of the qualification at an overseas institution; where the course is an English language course at level B2 or above; or where the course is a foundation programme for postgraduate doctors or dentists.

■ Appendix C is amended so that in assessing whether the financial attributes test is met for Tier 4 (General) students or Tier 4 (Child) students, only the assets of the individual (including joint accounts), his/her parents or legal guardians, or a government sponsor or international organisation can be considered (this would appear to reverse the effect of *CDS (PBS: 'available': article 8) Brazil* [2010] UKUT 00305 (IAC), 23 July 2010).

Statement of changes in Immigration Rules HC 1148

HC 1148 came into effect in part on 4 July 2011, with the remainder due to come into effect on 1 October 2011.

Those changes in effect from 4 July 2011 include the following:

■ A new category is created for persons seeking leave to enter or remain as a child relative of someone with limited leave to remain as a refugee or with humanitarian protection where there are serious and compelling family or other considerations which make exclusion undesirable. This category does not apply to children of the person with leave but may include nephews, nieces or siblings under 18 who are unmarried and not living independently. Maintenance and accommodation requirements will apply and there is also a requirement that the child has no unspent convictions. Leave is to be granted for five years and can lead to settlement.

■ A new category is created for parents, grandparents and other dependent relatives of persons with limited leave as refugees or with humanitarian protection. These rules largely mirror the requirements of paragraph 317 except for the requirement about settled status and the fact that the initial grant is for a limited period. It enables applications to be made for other members of the family, including children over 18, but only where the refugee or humanitarian protection sponsor can maintain and accommodate that family member. If successful, leave to enter is to be granted for a period of five years but prior entry clearance is mandatory. The category can lead to settlement provided that the sponsor has either obtained settlement or become a British citizen and continues to be financially responsible for the dependent relative.

■ 'Post-graduate level study' is defined for the purposes of Part 8 of the Immigration Rules (although Part 8 relates to family members so this may be another typographical error).

■ 'Overseas higher education' is defined for the purposes of those organisations having links with UK partner institutions and will be restricted to organisations where not more than half of the degree is taught in the UK.

■ The time period for Tier 2 (Intra-Company Transfer) migrants being extended to two years or the period of engagement plus 14 days will include those granted leave in this capacity before the changes introduced by HC 863.

■ The amended rules remove the restriction which limited below degree-level courses that involve an element of work placement or courses at NQF level 3 or level 6 SCQF to highly trusted sponsors.

■ The apparently subjective element of the secretary of state's opinion about whether an individual has a physical or mental condition preventing him/her from meeting the language requirement, or that there are exceptional and compassionate circumstances preventing him/her from meeting this requirement, is removed.

■ Those with a Master's degree or a PhD are also now exempt from the need to provide alternative evidence of their ability to meet the language requirement.

■ Where an individual is here as a Tier 4 (General) student, entry clearance or leave to remain for his/her partner or child will only be granted if the remaining study is for more than six months. Where the course is either for less than 12 months or below degree level, then they will be prohibited from taking up employment.

■ The interim limit for Tier 4 (General) students will also not be applied to overseas higher education institutions with highly trusted sponsor status.

■ There is a relaxation about the production

of documents where a Tier 4 (General) student applicant is sponsored by a highly trusted sponsor and is a national of a country on an approved list (including availability of funds which the highly trusted sponsor can confirm), although the secretary of state reserves the right to request such documents. The list of countries on that approved list appears at new Appendix H. The financial attributes can also be confirmed by a highly trusted sponsor in respect of Tier 4 (Child) students.

- From 1 July 2011, for confirmation of acceptance for studies to be valid, the sponsor must confirm that the student has been making progress, except for those students resitting an examination or where there is a transfer to a new institution to continue with a course started elsewhere.
- Appendix C is amended so that evidence of available funds for a person seeking leave to enter or remain being held over a 90-day period (in the case of Tier 1 migrants, Tier 2 migrants and Tier 5 (Temporary Worker) migrants) or a 28-day period (Tier 4 migrants) must be dated not earlier than 31 days before the making of the application.
- Other changes are made which tighten up the requirement to produce verifiable evidence to the satisfaction of the UKBA to meet the financial requirements under Appendices C and E (the latter relates to family members of points-based applicants).

The changes that will take effect from 1 October 2011 include the following:

- Persons seeking entry clearance or leave to remain as Tier 4 (General) students for one of the subjects listed in Appendix 6 of the rules will be able to apply (subject to meeting other requirements) even if the course is at undergraduate level where that course does not start until on or after 1 January 2012.
- Appendix 6 is amended to reflect further Doctorate or Master's courses commencing on or after 1 January 2012 in limited science and engineering subjects.

New forms

From 20 June 2011, the forms for applying for registration certificates, residence cards or permanent residence for EEA nationals and their family members were changed.[3] Practitioners will be aware that the use of the forms is certainly not compulsory and it is questionable whether a rejection due to the use of a previous form would be lawful where an individual is able to demonstrate that s/he is a qualifying person with an extended right of residence.

On the same date, revised forms and guidance were published for Bulgarian and Romanian students and self-employed persons, clarifying the documentary evidence required.

Asylum report

The UKBA published the Asylum Improvement Project report on progress on 26 May 2011 with the somewhat ambitious claim that: 'The asylum system is performing better now than it has for many years.'[4] The Asylum Improvement Project was prompted by a desire on the part of government to 'explore new ways to speed up the processing of asylum applications'.

Practitioners may be both surprised and interested to learn that, according to the report:

- every unconcluded asylum claim from the backlog of over 450,000 in 2006 has now been reviewed;
- on average, 60 per cent of applications are being decided within 30 days;
- changes are proposed to the physical environment at the screening unit to make it more user friendly;
- consideration is being given to the use of non-verbatim records of asylum interviews;
- consideration is being given to reducing the amount of 'unnecessary detail' in refusal letters.

Tribunal data

Practitioners may be aware that the First-tier Tribunal has a target for listing bail hearings within three days. Information produced by the tribunal for the Immigration and Asylum Stakeholder user group meeting demonstrated that between April 2010 and December 2010, the target was met in 50.4 per cent of cases, an improvement on the previous period of April 2009 to December 2009 where the target was met in 45.3 per cent of cases, but that in eight per cent of applications a bail listing was given seven or more days later. In the same nine-month period, bail was granted in 19.3 per cent of cases with 34.1 per cent of cases being withdrawn either before or at the hearing, although the figure does not specify the reason for withdrawal, which in some cases will be the fact that the individual has already been released.

Data for the same period demonstrated that while in the First-tier Tribunal the number of determined appeals was greater than the number of appeals received, both the applications for permission to appeal and appeal hearings by the Upper Tribunal was less than the number of applications or appeals pursued.

1 See: www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/fees-table-spring-2011.pdf.
2 See: www.direct.gov.uk/en/Governmentcitizensandrights/Registeringlifeevents/Marriagesandcivilpartnerships/DG_175717.
3 Available at: www.ukba.homeoffice.gov.uk/eucitizens/documents-eea-nationals/applying/.
4 Available at: www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/reports/asylum-improvement-project/.

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Recent developments in prison law – Part 2

Hamish Arnott, **Nancy Collins** and **Simon Creighton** continue the series of updates on the law relating to prisoners and their rights. This article summarises the current position on UK prisoners and the right to vote, and reviews significant case-law relating to home detention curfew (HDC), categorisation and sentence calculation. Part 1 of this article appeared in July 2011 *Legal Action* 22. Part 3 of this article will be published in September 2011 *Legal Action*.

POLICY AND LEGISLATION

Prisoners' voting rights

The problems concerning prisoners' right to vote remain unresolved (see also June 2011 *Legal Action* 5). In November 2010, the European Court of Human Rights (ECtHR) imposed a six-month time limit on the coalition government to introduce legislative proposals to amend Representation of the People Act (RPA) 1983 s3 (*Greens and MT v UK* App Nos 60041/08 and 60054/08, 23 November 2010). Shortly after this decision, *Chester v (1) Secretary of State for Justice (2) Wakefield MBC* [2010] EWCA Civ 1439, 17 December 2010 reached the Court of Appeal. The appeal was brought by a post-tariff mandatory life sentence prisoner. It attempted to progress the issue by arguing that he was entitled to a declaration of incompatibility in relation to RPA s3 or, in the alternative, confirmation that in the light of the further developments in the ECtHR's case-law, voting rights could only be removed by judicial decision. This appeal was refused as the Court of Appeal considered that it would require the court to provide an advisory opinion on the legislative changes. Given that this was a political task on a controversial issue, it was not appropriate for the court to make such an intervention. While the court reaffirmed that the current blanket ban was impermissible, it declined to issue a fresh declaration of incompatibility.

Shortly after these decisions, the claims for compensation brought by a large number of prisoners in relation to the ongoing failure to amend the legislation were the subject of a strike-out application (*Tovey and Hydes and others v Ministry of Justice* [2011] EWHC 271 (QB), 18 February 2011). In granting the application, the court held that it was bound by the current statute and, as it could not be ascertained to which class of prisoners the right to vote would be extended, there was no basis on which to found a compensation claim. A total of 588 prisoners had been joined in the proceedings and individual costs orders of £76 were made against each prisoner. This sequence of cases indicates clearly that the domestic courts are not prepared to intervene further in the matter pending a decision by parliament, which leaves any judicial oversight firmly in the hands of the ECtHR itself.

CASE-LAW

Home detention curfew

■ R (Young) v Governor of HMP Highdown and Secretary of State for Justice

[2011] EWHC 867 (Admin), 6 April 2011

This challenge was brought to the operation of the power to release prisoners on HDC, who are otherwise 'presumed unsuitable' by the relevant policy documents. The claimant received a prison sentence of two years' imprisonment for offences of robbery and possession of a knife. The claimant had one previous conviction for which he had received a non-custodial sentence. Shortly after his conviction and sentence, the claimant received a notification containing the parameters for release on HDC. The notification contained the phrase 'when you are released on HDC', but subsequently the claimant was informed by the prison governor that his application had been refused. He was informed that in line with Prison Service Instruction (PSI) 31/2003, he was deemed unsuitable for HDC as a result of his conviction for possession of an offensive weapon, being a sharp-bladed instrument. The claimant's solicitors asked for the decision to be reconsidered and set out exceptional circumstances to be taken into account, including the substantial mitigation advanced at the time of sentencing and the claimant's excellent progress in prison. The application was refused on the basis that the points raised did not constitute exceptional circumstances.

By way of background to the claim, the current HDC scheme is provided for in Criminal Justice Act 2003 ss246 and 253. The general power to grant HDC is vested in the secretary of state and is supplemented by policy statements. These contain a list of offences for which HDC will not usually be granted on the ground that the prisoner will be presumed unsuitable for consideration; this list of offences includes possession of an offensive weapon. The guidance issued on the type of cases that may be considered 'exceptional' is non-prescriptive, but PSI 31/2006 indicates that the following features are likely to amount to exceptional circumstances, ie:

- an extremely small likelihood of reoffending; and
- the applicant has no previous convictions; and
- the applicant is infirm by reason of disability or age or both.

The claimant made a number of challenges both to the lawfulness of the policy and the procedure followed in his case. It was submitted that the policy was irrational and discriminatory as the list of offences that are presumed unsuitable did not have a sound basis and potentially could disentitle people simply because of the differing Crown Prosecution Service (CPS) practices in the way that offences are charged. By way of example, it was pointed out that possession of a firearm (without intent) was not excluded and, furthermore, that exclusion from the scheme might depend on the vagaries of the decisions made in respect of the original charges.

The court accepted the defendants' submissions that the list of offences was drawn up by the secretary of state to reflect public concern at anti-social and serious offending, and so was within the discretion afforded to him by parliament. Furthermore, CPS policy was designed to ensure consistency, and so the evidence provided on behalf of the claimant about a small number of cases was insufficient to establish that there was inconsistency in charging. The court did not accept that there was an appropriate comparator group, and in any event the certainty of reaching HDC decisions based on actual convictions was considered to be rational.

In dealing with the discrimination point, the

court also noted that it was not open to the claimant to argue that there had been a breach of article 14 of the European Convention on Human Rights ('the convention'). The court stated that there was no principle to establish that a prisoner serving less than 15 years has 'other status' under article 14, and in any event the House of Lords' decision in *R (Clift) v Home Secretary* [2006] UKHL 54, 13 December 2006, which had held that the length of a prison sentence did not confer other status was binding even though subsequently the ECtHR had disagreed with that decision (*Clift v UK* App No 7205/07, 13 July 2010).

A further challenge was based on an argued breach of article 8 of the convention as the decision had breached the claimant's right to his private and family life. This was dismissed rather summarily on the basis that the original sentence of imprisonment satisfied both article 5 and fell within the permitted exceptions of article 8(2), as the sentence was imposed for the prevention of disorder or crime. Subsidiary challenges to the fairness of the procedure were dismissed with brief comments, the court noting that an oral hearing had not been requested and was not required on the facts of the case.

Comment: The underlying rationale for the decision drew very heavily on the fact that the operation of the HDC scheme is discretionary. The case of *Re Findlay* [1985] AC 318, 15 November 1984 – where a broad statutory power allowing almost total discretion to the secretary of state was found not to be amenable to challenge even when the policy was changed to the detriment of the prisoner – was cited. The previous cases which held that HDC does not engage article 5 of the convention (for example, *Mason v Ministry of Justice* [2008] EWHC 1787 (QB), 28 July 2008) made the convention arguments extremely difficult.

However, the dismissal of the article 14 argument was brief and did not deal properly with the discrepancy between the Lords and the ECtHR in *Clift*. While it is true that the Lords decided that the length of a prison sentence does not amount to 'other status', Lord Bingham said that this was because Strasbourg had not yet made that finding and domestic law should defer to the ECtHR on the issue. As the ECtHR did make that finding on the same case, the question of whether or not the length of a prison sentence confers 'other status' for the purposes of article 14 clearly requires further consideration by the domestic courts.

■ R (PA) v Governor of HMP Lewes

[2011] EWHC 704 (Admin), 28 February 2011

The question of exceptional circumstances for prisoners to be released on HDC who are within the presumed unsuitable category was also explored in this application. The prisoner was sentenced to three years' imprisonment for offences of grievous bodily harm and child cruelty. These offences meant that he was to be presumed unsuitable for HDC. The prisoner sought to argue that he fell properly within the criteria to be considered as an exceptional case (see PSI 31/2006), ie:

- he had no previous convictions; and
- he was considered to pose a low risk of reoffending; and
- he suffered from social phobia, a disability that affected social interaction.

(He sought to contend that this satisfied the third criterion, in that he was infirm by nature of his disability.)

The prison obtained further reports and noted that the claimant had declined a move to open conditions because of his disability, having expressed a preference to remain in a closed prison where he felt just about able to cope with the support he was being given. In response to a further psychiatric report submitted on the claimant's behalf, which described his phobia as 'intense and debilitating', the governor commissioned a medical report. This report concluded that the claimant had been able to engage in some social situations both within and outside of prison and that while his condition limited his activities, it was a relatively common disorder that could be treated effectively in prison custody. Relying on this report, the governor concluded that the claimant was not infirm.

The court considered that the governor's assessment was correct. The word 'infirm' was not considered to be a formal medical term and involved a value judgment being made. As such, it was not possible to conclude that the only likely decision was that the claimant was infirm, and so the finding was within the reasonable range of responses available to the governor.

Categorisation

Category A reviews

■ DM v Secretary of State for Justice

[2011] EWCA Civ 522, 12 May 2011

The secretary of state had appealed against a finding made by the Administrative Court that the prisoner was entitled to an oral hearing before the category A review committee to determine his security categorisation ([2010] EWHC 2013 (Admin), 30 July 2010; February 2011 *Legal Action* 13). The prisoner had been convicted of murder in 1989 and had served his 20-year minimum term; he had a previous conviction for manslaughter. The prisoner maintained his innocence of the murder conviction, and so had been unable to attend the usual prison offending behaviour programmes.

Following a parole hearing in 2009, the Parole Board ('the Board') had noted that there had been some work completed to address his risk factors. The Board did not feel that there had been a significant reduction in risk, but went on to comment that a move to a category B training prison might be constructive. The judge had quashed the secretary of state's decision and found that an oral hearing should have been granted in the light of the Board's conclusions.

By the time the appeal was heard, the secretary of state had conducted a further review without an oral hearing and had reaffirmed the decision that the prisoner should remain category A. The Court of Appeal was extremely critical of this course of action. The court considered that it was open to it to dismiss the appeal, but in the event decided that it was in the interests of all parties for the appeal to determine the merits of the case.

In considering the appeal, the Court of Appeal quoted with approval the observations made by Cranston J in *R (H) v Secretary of State for Justice* [2008] EWHC 2590 (Admin), 9 September 2008 where he had explained that oral hearings are not required in all category A cases, but equally the decision concerning whether or not an oral hearing should be held is not whether the case is exceptional but whether it is necessary to ensure fairness. Examples of where fairness would be likely to require an oral hearing included those where there was a clear difference in opinion between the Board and the secretary of state about risk, or where there was an inconsistency between the prison's view on the appropriate categorisation and that of the director of high security prisons (the director makes these decisions on behalf of the Secretary of State for Justice). It was noted further that an oral hearing might be necessary to resolve a genuine impasse case, for example, where the decision to keep a prisoner as category A prevents him/her from being able to access relevant offending behaviour courses.

On the facts of this case, it was held that the Board's comment in relation to a move to a category B prisoner being constructive did not amount to support for downgrading. Taken as a whole, the view expressed was that there had not been a significant reduction in risk and the reference to the progressive move being constructive was too equivocal to require an oral hearing to be held in the

category A review.

Comment: Although the secretary of state's appeal succeeded, the decision is important for affirming the criteria established in *H* above for an oral hearing as being correct. The test for an oral hearing in this context is not whether the case is exceptional, but whether such a hearing is needed as a matter of procedural fairness. The examples given concerning when this is most likely to arise are those where there is a difference of opinion between one expert body and another. This cannot be seen properly as defining the limits of when there should be an oral hearing and, applying the common law standards of fairness, it must be the case that other situations will arise, such as a difference of opinion between experts that cannot be resolved fairly on the papers, where an oral hearing is necessary.

■ R (Willmott) v Secretary of State for Justice

[2011] EWHC 1109 (Admin), 18 March 2011

The claimant was a category A prisoner serving a discretionary life sentence following his conviction for offences involving the shooting and wounding of his former partner and an off-duty police officer. He had previous convictions for offences of violence and possession of firearms with intent. His minimum term of 12 years had expired in 2000.

The category A reports indicated that the claimant had made progress in addressing his risk factors and the local advisory panel at the prison recommended to the director of high security prisons that he should be downgraded. This would facilitate the next stage of the proposed sentence planning, which was to undertake a relationships programme in a category B prison. An independent psychologist's report also supported downgrading. This recommendation was rejected by the director in a five-page letter. The decision noted the positive recommendations and material in support of downgrading, but concluded that there was clear evidence that the claimant 'had not achieved satisfactory progress and insight into his highly violent offending' (para 18). He concluded that:

- the relationships programme was a long-term target;
- downgrading should not occur before the risk factors had been addressed properly; and
- further in-depth psychological testing was needed.

The claimant's challenge to the decision was threefold, ie:

- the decision was inadequately reasoned;
- there was an error of fact on the director's part; and
- fairness required an oral hearing.

In relation to the reasons challenge, it was accepted by all parties that a duty to give reasons does exist, but there was a difference of opinion concerning how extensive the duty is. The claimant argued that in the light of the importance of the decision, the duty was akin to that imposed on the Board. By contrast, the secretary of state contended that the duty was less onerous. The judgment is not prescriptive about the standard to be applied, although it appears to lean more towards the secretary of state's position than the claimant's:

> *In my view, reasons have to be appropriate to convey the reason why a decision has been taken to those who need to read the reason and to understand the reason. Where, as here, the reasons are addressed to a Category A prisoner, they need to be sufficiently clear for the Category A prisoner to understand why the decision has been taken as it has. That does not require any particular formality, nor does it require any particular length. It does not necessarily require that the prisoner be told of every single consideration that has entered into the mind of the decision maker that has either been adopted or dismissed. One cannot expect the quality of draftsmanship in a decision such as this which one would expect in a trust deed or a judgment of the Court of Appeal. One cannot even necessarily expect the quality that one would find in the reasoning of a tribunal* (para 26).

With that standard set, the court went on to find that the reasons given had been sufficient and had dealt properly with the material before the director. The second ground of challenge was that the director had drawn conclusions from the material before him that were not justified and which had influenced his opinion. Although the judge considered that the support for those conclusions was 'thin' (para 39), there was no material misapprehension of fact.

The final ground of challenge related to the need for an oral hearing. The judgment rejected a straightforward analogy with the standard to be applied in parole recall cases on the ground that the assessment of risk is different from the assessment of facts. It was held that although it was a finely balanced assessment for the court to conduct, the nature of the risk that had to be established could be completed fairly without an oral hearing.

Comment: It is noteworthy that this judgment was handed down before the Court of Appeal's decision in *DM* above. Although the same legal principles were applied, it is possible that the indication given by the Court of Appeal to differences of opinion between the local advisory panel and the director as being within that range of cases which might require an oral hearing could have tipped the balance in the claimant's favour. It is also questionable whether common law really confines the need for an oral hearing so closely to factual disputes. The comments of Sedley LJ in *R (Osborn & Booth) v Parole Board* [2010] EWCA Civ 1409, appear to set a wider test than that applied by the judge in this case: 'I do not doubt that there are cases where an oral hearing before the Parole Board has real value in, for example, enabling a panel which includes a psychologist or psychiatrist to discuss the prisoner's prospects open-mindedly with the responsible professionals, *quite irrespective of whether there are evidential conflicts*' ((para 62) authors' emphasis added).

■ R (Ferguson) v Secretary of State for Justice

[2011] EWHC 5 (Admin), 11 January 2011

This was a further challenge to a category A decision by a prisoner serving a life sentence. The basis of the challenge was that the decision-maker, the director of high security prisons, had relied on information, in the form of a report from the trial judge and advice from a prison psychologist, which had not been disclosed and, therefore, rendered the decision procedurally unfair.

The offence involved rape and murder, and it was alleged that it also involved a significant amount of pre-planning and possibly necrophilia. The claimant maintained his innocence of the offence. The reports disclosed for the category A review indicated that there was some concern about offence paralleling through the claimant's behaviour in custody. However, an experienced independent psychologist considered the claimant to be a low risk of violent offending, a moderate risk of sexual offending and did not consider that he required the highest conditions of security. The independent report was rejected by the director of high security prisons in a decision made in 2009. In his decision, the director stated that the presence of extremely high levels of violence and deviant sexual arousal made risk very difficult to treat; he considered that the report had underestimated the level of risk. Attached to his decision was a report submitted by the trial judge to the Home Secretary following conviction, which the claimant stated that he had not seen previously. It also transpired that advice had been sought from a prison psychologist before the decision was made. The secretary

of state contended that the views of the trial judge were in the public domain and had in any event been disclosed. He submitted further that he was entitled to obtain internal advice and this did not form part of the material which was required to be disclosed.

The procedural position was complicated as after the judicial review had commenced the defendant carried out a further review ('the 2010 review'). The 2010 review involved disclosure of the trial judge's report and also a psychologist's report addressing the conclusions of the independent report. The claimant made submissions repeating the reliance on the independent psychology report and stating that the conclusions of the 2009 review should not be used as a starting point for the 2010 review. The 2010 review concluded that the claimant should remain category A. Permission was sought to challenge this decision on the grounds that the 2009 decision provided the starting point for the 2010 review and, as such, the decision-maker was already entrenched in his view.

In reaching a decision, the court confirmed that there was a duty to disclose relevant material, but that this duty had not been breached. The report of the trial judge did no more than summarise information already known to the claimant as a result of his participation in the criminal trial, and in any event that it had been referred to in previous categorisation decisions. The advice from the psychologist was considered to have been treated properly as internal advice, and so was exempt from disclosure (see, for example: *R (Burgess) v Secretary of State for the Home Department* [2000] Prison LR 257, 3 November 2000). Turning to the 2010 review, the court considered that it had been conducted appropriately, taking into account the concerns expressed about the 2009 review. As the nature of the challenge had been about procedural unfairness because of non-disclosure, the disclosure of this material for the 2010 review cured any defect.

Comment: The decision highlights the difficulties that can be caused by the delays in the Administrative Court when seeking to challenge decisions subject to further review. The complex factual matrix that can arise does little to aid clarity about the considerations which have borne on the decision-maker. The ruling illustrates further the importance of taking into account all historic material, including the personal knowledge of the prisoner seeking to challenge the decision, rather than just relying on what might have been more limited formal disclosure during the review itself.

Foreign nationals and categorisation

■ R (Omoregbee) v Secretary of State for Justice

[2011] EWCA Civ 559,
13 April 2011

The Court of Appeal upheld the Administrative Court's decision ([2010] EWHC 2658 (Admin), 22 October 2010) concerning the lawfulness of Prison Service Order (PSO) 4630 in relation to the categorisation of foreign nationals. The prisoner was a foreign national convicted of offences of dishonesty. Although no notice of intention to deport had been served on him, he was liable to automatic deportation. Although he was considered a low risk to the public, he was refused category D status because of the potential risk of absconding by reason of his deportation status. The prisoner claimed that paragraph 14.4 of the PSO, which emphasised that although each case would be considered on its merits, the need to protect the public and to ensure that deportation would not be frustrated 'is paramount'. The prisoner argued that in making the deportation issue 'paramount', the prison governor effectively lost the power to exercise individual discretion for any prisoner facing deportation.

The Court of Appeal did not refer to the Administrative Court's decision, other than to explain that permission to appeal had been given because of the frequency with which the arguments were being raised in the Leeds District Registry. The court held that the PSO made it clear that individual consideration has to be given to each case and that the use of the word 'paramount' cannot be read as being 'overiddingly decisive' of the decision (para 11). The question of whether or not foreign nationals who are subject to this additional concern are actually detained or deported at the end of their prison sentence – the evidence submitted was that very often they are released pending a final decision on deportation – was held to be irrelevant.

Comment: The judgment in this case was exceptionally brief. It highlighted the difficulties that foreign nationals face in relation to securing access to rehabilitation and resettlement while in prison by placing primary emphasis on immigration status. The dismissal of the evidence concerning the practice after the prison sentence has been served is surprising given that the restriction on moving to open conditions is justified by reference to the need to enable deportation take place at the appropriate time. This consideration does not change simply because the prisoner has completed the custodial sentence.

■ Oge-Denge v Secretary of State for Justice

[2011] EWHC 266 (Admin),
21 January 2011

In another case concerning the categorisation of foreign nationals, a prisoner with refugee status challenged a decision to refuse him category D status. Originally he advanced two grounds: first, that PSO 4630 was ultra vires and, second, that the decision was based solely on his deportation status and so was irrational. In the light of the Administrative Court's decision in *Omoregbee* above, the first ground was abandoned. At the hearing, a third ground was advanced: that there had been a failure to conduct six-monthly reviews of the claimant's categorisation during the last 30 months of his sentence as is required by PSI 16/2008.

The claimant was serving a prison sentence of 11 years imposed for drug importation offences. In April 2010, a review board at the prison appeared to endorse a move to open conditions; it noted the claimant's positive progress made during the sentence, the low risk posed and the fact that he had refugee status. The following day, notification was received from the UK Border Agency (UKBA) indicating that consideration was being given to revoking the claimant's refugee status and deporting him. This led to an immediate reconsideration of the initial decision by the prison governor who concluded that, in the light of this information, there was a significant increase in the risk that the claimant would not comply with open conditions.

In July 2010, the UKBA notified the claimant that it intended to terminate his refugee status. However, it was accepted that until such time as this was completed, the claimant continued to have refugee status, which had a significant impact on the state's ability to actually remove him (and although it was not the subject of this review, the judge accepted that it may provide an insuperable barrier to his removal). It was submitted on behalf of the claimant that while he retained refugee status he had no incentive to abscond as this would weigh heavily against him in his appeal against deportation. It was argued that these relevant facts had been overlooked by the defendant and that the decision on categorisation was overly influenced by the stated intention of the UKBA. By the time of the hearing, the UKBA had reached a decision to seek to deport the claimant, and this was under appeal.

It was evident from the facts of the case that the claimant met the criteria for downgrading to category D, save for the concerns raised about his deportation status. As noted in *Omoregbee* above, the relevant

policy document (PSO 4360 para 14) stated that the need to protect the public and to ensure that the decision to deport is not frustrated 'is paramount' when reaching a decision. The secretary of state sought to maintain that the decision was a rational one based on a careful consideration of the various competing factors. However, the court rejected these submissions. It commented that the case 'has all the appearance of the [UKBA's] decision to consider withdrawal of refugee status being the overriding determinative matter to the exclusion of all else' (para 33). In consequence the decision was quashed, although it was noted that the effect of the UKBA's notification of its decision to deport the claimant (subject to his right of appeal) may have a bearing on the reconsideration of the case.

Sentence calculation

■ **R (Webb) v Swindon Crown Court** *(2011) 19 April, unreported, Divisional Court*

This case concerned the proper calculation of a sentence imposed on a prisoner who had been made subject to a return to custody order imposed under Powers of Criminal Courts (Sentencing) Act 2000 s116(2). The claimant had been released on licence and committed a burglary. The sentencing judge ordered that the claimant serve the remainder of his sentence in relation to the previous offence, but did not specify a term. Later the sentence imposed for the new offence of burglary was appealed successfully.

The claimant understood that the return to custody order was to run from the date that it was imposed, which resulted in a new prison sentence of 232 days. The prison considered that the order ran from the date that the burglary was committed, which resulted in a sentence of 533 days. The Court of Appeal refused to hear an appeal on the ground that it did not have jurisdiction, and the Criminal Cases Review Commission refused to refer the matter back to the Court of Appeal despite the ambiguity.

The Divisional Court stated that the correct approach was to ascertain what order had actually been made by the sentencing judge, not what his intention had been. In keeping with the general principle requiring ambiguity affecting the liberty of the subject to be construed in favour of the individual, the court found that the sentence should have been read favourably and that the shorter period of 232 days was the correct sentence.

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Recent developments in housing law

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

POLITICS AND LEGISLATION

Reforming social housing law

The House of Lords completed the committee stage of the Localism Bill on July 2011, just before the summer recess. The topics of the housing-related amendments tabled for debate included:

- tenancy deposits;
- Gypsy and Traveller sites;
- homelessness;
- security of tenure; and
- social housing allocations.

The House of Lords Library produced a useful free review of the bill's provisions as they stood before the committee stage: *Library Note: Localism Bill (HL Bill 71 of 2010–12) LLN 2011/019* (House of Lords, May 2011).[1] The report and third reading stages in the House of Lords have been scheduled for September 2011 and the bill is expected to receive royal assent later in the autumn.

New directions for social housing

New statutory directions are to be issued to the Social Housing Regulator for England by the Secretary of State for Communities and Local Government under Housing and Regeneration Act 2008 s197. These will direct the regulator to set national standards on tenure, mutual exchange, tenant involvement and empowerment, rents and quality of accommodation. They will replace all the directions issued to the regulator by the last government. A consultation paper has been published by the Department for Communities and Local Government (DCLG) containing the new directions in draft: *Implementing social housing reform: directions to the Social Housing Regulator. Consultation* (DCLG, July 2011).[2] The consultation period closes on 29 September 2011.

New inspection arrangements for testing social landlords' performance against the regulator's current national standards have been introduced by the Tenant Services Authority (TSA): *Investigating regulatory concerns: inspecting the TSA standards* (TSA, June 2011).[3] The TSA has also issued statutory guidance on its intended enforcement of the current national standards: *Statutory guidance on the use of enforcement powers under Chapter 7 Housing and Regeneration Act 2008* (TSA, June 2011).[4] The chief executive of the TSA wrote to all social landlords on 23 June 2011 to outline the latest moves towards a replacement regulator in April 2012.[5]

Social housing tenants

The proposed new directions to the Social Housing Regulator (see above) include a revised Tenant Involvement Standard which is intended to give opportunities to tenants, with the agreement of landlords, to be involved in the management of housing repair and maintenance services, and to share in any savings made. The UK government is calling this a Tenant Cashback scheme for social housing tenants in England. An impact assessment of these proposals has been published: *Tenant Cashback scheme: impact assessment* (DCLG, July 2011).[6]

The UK government intends that every social landlord will establish a representative 'tenants' panel'. It has announced a £535,000 package of funding to deliver training to the 1,500 social housing tenants due to sit on these new tenants' panels: Press notice (DCLG, 14 June 2011).[7]

Housing and legal aid

The UK government's response to the submissions received on its consultation paper about legal aid reform deals with housing cases at pp98–100 and 129–132: *Reform of legal aid in England and Wales: the government response* (Ministry of Justice, June 2011).[8]

The Legal Aid, etc Bill, designed to take most housing cases out of scope of the legal aid scheme, received a House of Commons second reading on 29 June 2011. The housing work proposed to remain in scope of the civil legal aid scheme is identified in

Schedule 1 paras 27–32. The bill is now being considered in a House of Commons public bill committee which will resume its deliberations in September 2011. (See pages 4 and 5 of this issue.)

While the bill is going through parliament, the Legal Services Commission (LSC) will implement the detailed income cuts for civil legal aid suppliers in housing law that will come into force on 3 October 2011. This will involve an across-the-board reduction by ten per cent in fees and rates paid for civil legal aid services. The necessary legal basis for the change will be achieved by secondary legislation.

Housing and anti-social behaviour

The Chartered Institute of Housing (CIH) has launched a new management standard for use by social landlords on anti-social behaviour: *Respect: ASB charter for housing* (CIH, June 2011).[9] This new non-statutory code (replacing the old DCLG-produced *Respect Standard for Housing Management*) is intended to improve performance on tackling anti-social behaviour by social landlords. An online sign-up procedure for social landlords has been made available.[10]

The Home Office has begun examining the many hundreds of responses received to its consultation on the tools and powers to tackle anti-social behaviour: *More effective responses to anti-social behaviour* (Home Office, February 2011).[11] Submissions received include those of the Social Housing Law Association (SHLA).[12] Legislation to implement the proposed changes will be brought forward in the 2012/2013 parliamentary session.

Housing and domestic violence

A 12-month pilot scheme for use of Domestic Violence Protection Notices (DVPNs) and Domestic Violence Protection Orders (DVPOs) began on 30 June 2011 in the areas covered by Greater Manchester, West Mercia and Wiltshire police. The intention is to use the notices and orders to stop alleged perpetrators from contacting victims or returning to their homes for up to 28 days. In effect, they achieve instant exclusion for up to a month. Interim guidance has been published for use by police authorities and magistrates' courts in the pilot areas about how the new scheme will operate: *Domestic Violence Protection Notices (DVPNs) and Domestic Violence Protection Orders (DVPOs): sections 24–33 Crime and Security Act 2010. Interim guidance document for police regional pilot schemes: June 2011 – June 2012* (Home Office, June 2011).[13] After the 12-month pilot period, there will be an evaluation against a number of success criteria. The UK government has announced that a decision to roll out the DVPO scheme nationally will only be taken once the evaluation is complete: Press notice, (Home Office, 30 June 2011).[14] The Criminal Defence Service (General) (No 2) (Amendment) Regulations 2011 SI No 1453 provide that for the purposes of legal aid, proceedings relating the DVPNs and DVPOs under the Crime and Security Act 2010 are to be regarded as criminal proceedings. The LSC has issued a briefing note to assist advisers acting for alleged perpetrators: *Domestic violence prevention orders/notices* (LSC, June 2011).[15]

The UK government has published *Domestic violence – assistance for adults without dependent children – final report* (DCLG, June 1011).[16] This study explores the type of assistance provided by local authorities and also other specialist agencies to victims of domestic violence.

Mortgage Rescue Scheme

All purchases by housing associations from defaulting homeowners under the 'old' Mortgage Rescue Scheme (MRS) for England were expected to have been completed by 30 June 2011, but exceptional cases have been given longer completion dates.

A report by the National Audit Office (NAO) found that the government had seriously underestimated the likely take-up of the purchase variant of MRS, under which housing associations buy out borrowers and let the homes back to them. As a result, the MRS had cost almost £93,000 for every rescue completed instead of the projected £34,000 per home: *Department for Communities and Local Government – The Mortgage Rescue Scheme: Report by the Comptroller and Auditor General*, HC 1030 Session 2010–2012 (NAO, May 2011).[17]

Homelessness applications to local authorities in England

The local government ombudsman (LGO) has published a report highlighting the serious mistakes some councils in England make when dealing with people seeking assistance with homelessness: *Homelessness: how councils can ensure justice for homeless people. Focus report: learning the lessons from complaints* (LGO, July 2011).[18] The report notes that the LGO receives more than 300 complaints every year in which people claim to have been denied access to help or interim accommodation for no legitimate reason when homeless.

Housing conditions in the private sector

Dr Stephen Battersby has produced a new study of the extent of the enforcement of the Housing Health and Safety Rating System (contained in the Housing Act (HA) 2004) by local authorities in England: *Are private sector tenants being protected adequately?* (June 2011).[19]

Protection for private rented sector tenants

The property ombudsman (TPO) is introducing new codes of practice for those letting agents and managing agents who participate in the TPO scheme. The new Lettings Code issued by the TPO took effect from 1 August 2011: *Code of Practice for Residential Letting Agents* (TPO, June 2011).[20]

Housing cases in the civil courts

The latest judicial statistics from the Ministry of Justice (MoJ) indicate that county court bailiffs executed 54,000 warrants for possession of property in England and Wales in 2010 – more than 1,000 homes per week: *Judicial and court statistics 2010* (MoJ, June 2011).[21] Although the number of claims for mortgage possession had declined, claims for possession by private landlords had increased 16 per cent compared to 2009.

The Housing Law Practitioners Association (HLPA) has submitted a response to the MoJ consultation paper *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system, focussing on the courts' management of housing cases.*[22]

Housing statistics

A mass of new statistical information on housing was released in England in July 2011 by the DCLG. The relevant publications include:

- *English housing survey: housing stock report 2009*, dealing with the state of the housing stock itself.[23]
- *English housing survey: household report 2009–10*, dealing with the circumstances of occupiers.[24]
- *Public attitudes to housing in England: report based on the results from the British Social Attitudes survey* summarises public opinion across a wide range of housing issues and subjects.[25]
- *English housing survey bulletin: issue 4* provides an overview of the whole batch of new statistics.[26]

Squatting

The UK government is conducting a consultation exercise on proposals for the criminalisation of squatting in residential premises and on other amendments to the

laws relating to trespass to land: *Options for dealing with squatting* (MoJ, July 2011).[27] The consultation closes on 5 October 2011.

Housing tribunals

The Residential Property Tribunal Service (RPTS) became part of HM Courts and Tribunals Service (HMCTS) on 1 July 2011. The RPTS will keep its branding and logo for the first year after the transfer, and, subject to parliamentary approval, will then be absorbed into a new Property, Land and Housing Chamber within HMCTS in spring 2012.

Rights of long leaseholders

The UK government is undertaking a consultation on proposals for updating the property value limits which are used to determine whether certain statutory rights are available to residential long leaseholders: *Updating leasehold value limits: consultation* (DCLG, June 2011).[28] These are leaseholders' rights:

- to remain in properties as assured tenants when leases come to an end (Local Government and Housing Act 1989 Sch 10); and
- to extend the leases or to purchase the freeholds, ie 'enfranchise' (Leasehold Reform Act 1967). The consultation period ends on 12 September 2011.

HUMAN RIGHTS

Article 6

■ Destilacija plc v Bosnia and Herzegovina

App No 11683/08,
17 May 2011

After the death of his grandfather, DN remained in occupation of his grandparents' flat as his home. The company with rights to allocate the flat sought and obtained a possession order from a court and DN was evicted. The Constitutional Court of Bosnia and Herzegovina found a violation of DN's right to respect for his home, quashed the lower court decision and ordered that he be reinstated in the flat. The company was informed of that decision through the housing authorities and complained to the European Court of Human Rights (ECtHR) that there had been an unlawful interference with its rights under article 6 of the European Convention on Human Rights ('the convention') because it had not been a party to the human rights claim in the national courts.

The court rejected the complaint as inadmissible. The company did not own the flat. Although it had a say in the process of the privatisation of the flat, it could not veto that process or gain any pecuniary interest from it. Although it could have let the flat to one of its employees if DN had not been reinstated, that right was not a 'civil right' within the meaning of article 6(1), since any rent would have to be paid to the Republika Srpska Housing Fund. Accordingly, the proceedings before the Constitutional Court were not decisive for the determination of the company's civil rights and obligations. Article 6 did not apply.

Article 8 and article 1 of Protocol No 1

■ Orlič v Croatia

App No 48833/07,
21 June 2011

Mr Orlič was granted a specially protected tenancy of a flat. He and his family lived in the flat from November 1991. In 1996, the state brought a civil claim for possession. In 2000, the municipal court found in the state's favour and ordered him to vacate the flat. It found that the state owned the flat and that Mr Orlič had no legal entitlement to occupy it because the decision to grant the tenancy was null and void, and could not serve as a valid legal basis for acquiring a specially protected tenancy. After unsuccessful appeals, Mr Orlič was evicted in October 2004. He complained that, by ordering and enforcing his eviction, the domestic courts had violated his right to respect for his home under article 8.

Following previous authority, the ECtHR noted that:

- the concept of 'home' within the meaning of article 8 is not limited to those premises which are lawfully occupied or which have been lawfully established;
- whether a property is to be classified as a 'home' is a question of fact and does not depend on the lawfulness of the occupation under domestic law. The court referred to the need for 'the existence of sufficient and continuous links with a specific place';
- the eviction amounted to an interference with his right to respect for his home;
- the national courts' decisions ordering his eviction were in keeping with domestic law. The interference in question pursued the legitimate aim of the economic well-being of the country; and
- the central question was whether or not the interference was proportionate to the aim pursued and thus 'necessary in a democratic society' (para 63). This requirement raises a question of procedure as well as one of substance (*Connors v UK* App No 66746/01).

In this case, the national courts had confined themselves to finding that occupation by Mr Orlič was without legal basis, but made no further analysis about the proportionality of the measure to be applied, namely, his eviction. However, the guarantees of the convention require that interference with an occupant's right to respect for his home be not only based on the law, but also be proportionate under article 8 to the legitimate aim pursued. Consideration should be given to the particular circumstances of the case (para 64). Where national authorities do not give any explanation or put forward any arguments demonstrating that an occupant's eviction is necessary, the state's legitimate interest in being able to control its property comes second to the occupant's right to respect for his or her home. Moreover, where the state has not shown the necessity of the occupant's eviction in order to protect its own property rights, the court places a strong emphasis on the fact that no interests of other private parties are at stake (para 69).

The ECtHR concluded that the national courts did not afford Mr Orlič adequate procedural safeguards. There was, therefore, a violation of article 8. It held that the most appropriate way of repairing the consequences of that violation was to reopen the complained of proceedings.

■ Yevgeniya Vladimirovna Rokhlya v Ukraine

App No 46014/07,
17 May 2011

Ms Rokhlya was the widow of a member of the armed forces. The army rehoused her from military married quarters to a flat. She was later evicted from the flat when it was realised that the rehousing had not been authorised properly. She complained to the ECtHR that there had been an unlawful interference with her right to respect for her home. The government delivered a unilateral declaration which admitted breaches of article 8 and article 1 of Protocol No 1 and agreed to pay €22,000 in compensation.

The court stated that that sum appeared sufficient to enable her to purchase decent accommodation in the town of her residence or in another comparable town in Ukraine. It considered that the proposed settlement would '"put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach" (see *Iatridis v Greece (just satisfaction)* [GC], App no 31107/96, [ss]32, ECHR 2000 XI)'. Against that background, it was no longer justified in continuing the examination of this part of the application (article 37(1)(c)). The court struck the application out of its list of cases.

SECURE TENANTS

Death and succession

■ **Solihull MBC v Hickin**

[2010] EWCA Civ 868,
27 July 2010,
[2010] 1 WLR 2254,
September 2010 Legal Action 36,
[2010] UKSC 0239,
24 March 2011

The Supreme Court granted Ms Hickin permission to appeal on 24 March 2011.

HARASSMENT AND EVICTION

■ **R v Qureshi**

[2011] EWCA Crim,
17 May 2011,
(2011) Times 21 June

Mr Qureshi served notice on two tenants. When the notice expired, his son and five other men visited the property and acted in a threatening manner. He was charged with two counts of harassment contrary to Protection from Eviction Act 1977 s1(3A). Recorder Lucraft found that he had no case to answer. The prosecution appealed.

The Court of Appeal dismissed the appeal. In section 1(3A), the words 'does acts' suggest the requirement of actual participation by the defendant. Accordingly, the recorder was correct to rule that he could not be convicted on the basis of vicarious liability.

RENT ACT 1977

■ **Crown Estate Commissioners v Governors of the Peabody Trust**

[2011] EWHC 1467 (Ch),
10 June 2011

In February 2011, the Crown Estate Commissioners sold the reversionary interest in a number of residential properties to Peabody, a housing association within the meaning of Housing Associations Act 1985 s1 and a not for profit private registered provider of social housing within the meaning of the Housing and Regeneration Act 2008. The occupants were tenants who had been subject to and entitled to protection under the Rent Act 1977. All agreed that those Rent Act tenancies came to an end on transfer of ownership. However, a dispute arose regarding whether they became secure tenants under Housing Act 1985 Part IV and also housing association tenants within the meaning of Rent Act 1977 s86 or assured tenants under the Housing Act (HA) 1988.

After a lengthy tour d'horizon of the relevant legislation from 1977 onwards, Charles Hollander QC, sitting as a deputy judge, found that the words of HA 1988 s38(5)(d) were clear. On the transfer of interest the occupants became assured tenants.

UNPROTECTED TENANTS

Notice to quit

■ **Kinnear v Whittaker**

[2011] EWHC 1479 (QB),
10 June 2011

Mrs Whittaker was the freehold owner and occupier of Marks Tey Hall, Colchester. In 2007, she sold the property to Mr Kinnear, a property developer, for £750,000. She remained in occupation of the house and garden. A tenancy agreement purported to grant her an assured shorthold tenancy for a fixed term of 12 months at a monthly rent of £1. It was later accepted by all parties that a tenancy at such a low rent could not be an assured shorthold tenancy within the meaning of the HA 1988. Mr Kinnear obtained a mortgage on the property, but defaulted on the payments and receivers were appointed. The receivers served two notices to quit on 8 March 2010. The first stated: 'The landlord gives you notice to quit and give vacant possession of the property on the next date being at least four weeks from the service of this notice on which a complete period of your license or your tenancy expires.' The second stated: 'The landlord requires possession of the Property at the end of that period of your tenancy which will end next after the expiration of two months from the service upon you of this notice.' HHJ Lochrane made a possession order. He found that 'one way or another the Defendant … has been served with a valid notice to quit the property, the term of which has comfortably expired by now'. Mrs Whittaker appealed. She argued that that the tenancy, although not an assured shorthold tenancy, was a yearly tenancy at common law; it therefore required at least six months' notice to terminate; such notice was never given; and by a tenant's notice dated 4 May 2011 (two days before the first hearing of the appeal) Mrs Whittaker renewed the tenancy unilaterally.

Bean J found that, after the expiry of the fixed 12-month term, the tenancy became a monthly, not an annual, tenancy (*Alder v Blackman* [1953] 1 QB 146). Accordingly, the first notice to quit was effective to terminate the tenancy on 30 April 2010; however, if not, then the second notice to quit (perhaps more by luck than judgment) was effective to terminate it on 30 April 2011. Although the second notice did not contain the statutory reminder to the tenant of her rights under the Protection from Eviction Act 1977, the first one did. Bean J held that where the two notices are served simultaneously that is sufficient. The notice served by Mrs Whittaker on 4 May 2011 was too late. There was by then no tenancy to renew. Even if both these arguments were wrong and the landlords were required to serve a single notice to quit giving a period of at least six months' notice and containing the statutory warnings, it would be wrong to allow this point to be raised for the first time on appeal. He refused permission to reamend Mrs Whittaker's defence and counterclaim to raise these points.

However, the facts surrounding assurances said to have been given by Mr Kinnear to Mrs Whittaker before sale which she said had created a proprietary estoppel or a constructive trust in her favour were not sufficiently clear for the case to be suitable for summary determination. The claim was 'genuinely disputed on grounds which appear to be substantial' within the meaning of CPR 55.8. Bean J allowed the appeal, set aside the order for possession and remitted the case to the county court.

ANTI-SOCIAL BEHAVIOUR

■ **Clift v Slough BC**

[2010] EWCA Civ 1484,
21 December 2010,
February 2011 Legal Action 44,
[2011] UKSC 0020,
11 April 2011

The Supreme Court has refused Slough permission to appeal.

CHALLENGE TO COMPULSORY PURCHASE ORDER

■ **Greenwood v Bristol City Council**

[2011] EWHC 263 (Admin),
1 February 2011

Ms Greenwood made an application under Acquisition of Land Act 1981 s23 challenging the validity of a compulsory purchase order (CPO). The CPO was made under Housing Act 1985 s17. It related to 23 plots, one of which included a prefabricated bungalow which Ms Greenwood rented as a secure tenant. She argued that there was no evidence to support the Inspector's conclusion that the property did not meet the Decent Homes Standard and that the local authority failed to provide reasons as to why it did not.

Frances Patterson QC, sitting as a Deputy High Court Judge, dismissed the application. Following *Powell v Secretary of State for Communities and Local Government* [2007] EWHC 2051 (Admin), Ms Greenwood had to show that the balance struck by the secretary of state was one which was legally irrational

or perverse or that there was some other error of law, before the court could intervene. The convention does permit interference both with property rights and family rights in line with the law in appropriate cases, in particular, where it is necessary to do so in the public interest. In this case, it was perfectly open to the Inspector to come to the view that the evidence that he heard from the council, absent any other evidence from Ms Greenwood, was sufficient to enable him to conclude that the property failed to meet the appropriate standard.

HOUSING ALLOCATION

■ R (Babakandi) v Westminster City Council

[2011] EWHC 1756 (Admin), 6 July 2011

The claimant, his wife and his two young daughters occupied a small studio flat he rented from the council. He applied for a transfer to a larger property and was placed in Band B of the council's Choice Based Lettings Scheme and awarded over 500 priority points. Three years later, he had not been successful in bidding for any properties. For part of that period, he had been suspended from bidding because of his rent arrears. During another period, a limited number (or 'quota') of overcrowded Band B applicants had been given additional priority and moved to Band A.

He sought judicial review of the council's allocation scheme, contending that:

■ operating a quota scheme was inconsistent with the notion of statutory reasonable preference in relation to all the council's stock (HA 1996 s167(2));

■ there was no reference to the quota in the published scheme itself (HA 1996 s167(1));

■ the scheme was not 'transparent' because the ad hoc operation of quotas meant that applicants could never know when they might actually get an allocation even if they knew what band they were in and what points they had; and

■ the provision in the allocation scheme that tenants in rent arrears would all be suspended from bidding was an unlawfully strict fetter on the discretion to take account of past tenant behaviour (HA 1996 s167(2A)(b)).

Nicol J dismissed the claim. He held that:

■ The reasonable preference requirement did not mean that such preference must be given at all times and in relation to all properties. 'It is sufficient if such preference is given over the course of a reasonable period' (para 22).

■ The quota was dealt with in the council's annual report to which the allocation scheme made reference. It may be cumbersome to have to look at two (or possibly more) documents but it was not unlawful.

■ Confining bidding for specific properties to particular groups did mean that the operation of the Scheme was not as transparent as it might otherwise be, but the council was entitled to decide that this disadvantage was outweighed by the advantage of a more equitable distribution of its scarce accommodation.

■ Although applicants in arrears were normally suspended from bidding, the scheme provided that the Director of Housing could exercise discretion 'in exceptional circumstances' (para 24) to allow applicants with rent arrears to bid or to receive offers. This was a lawful application of HA 1996 s167(2A)(b). Automatic suspension had practical advantages. It took effect swiftly and effectively, and at a time when the arrears were likely to be at a relatively modest level so that there was a better chance of them being paid off. The scheme was not unlawful simply because it did not set criteria for what were exceptional circumstances in which the rule could be waived.

Public Services Ombudsman for Wales

Complaint

■ Isle of Anglesey CC

200902138, 29 June 2011[29]

In early 2000, a private rented sector tenant (Ms A) applied to the council for allocation of social housing. She made a number of contacts with the council over the following years to progress her application and raised issues of overcrowding, disrepair and anti-social behaviour in her current home. Ms A complained to the ombudsman about the length of time she had been waiting to be offered a property and about how the council dealt with her housing application. Although the council had accepted that it owed her the main homelessness housing duty (HA 1996 s193) in November 2004, it had mislaid her file, had not progressed her application for four and a half years and had not moved her to temporary accommodation until June 2009.

The investigation found serious shortcomings in the way that the council dealt with the homelessness and housing applications. The council had failed repeatedly to consider all of the available relevant information in keeping with its allocations policy. This led to Ms A not being offered an available council property in September 2005. The investigation also uncovered serious deficiencies in the council's record-keeping.

The ombudsman found systemic maladministration. He recommended that the council apologise to Ms A and her family for its failings and offer her a redress payment of £1,500. He also made a number of recommendations for further action by the council, including the production of up-to-date written procedures on housing allocations and homelessness and further training for relevant officers.

HOMELESSNESS

Accommodation for homeless households

■ Charles Terence Estates Ltd v Cornwall Council

[2011] EWHC 1683 (QB), 28 June 2011

The company brought a claim against the council for unpaid rent in respect of accommodation it had let to the council for use by homeless persons. The council denied liability under the agreements (which had been made by two previous district councils for the area in which it was the new unitary authority). The agreements were alleged by the council to be invalid and unenforceable because they:

■ had been entered into for the improper purpose of taking advantage of the housing benefit scheme; or

■ were ultra vires; or

■ had been made under mistake of fact or law. A trial was fixed to start on 11 July 2011.

On 13 June 2011, the council applied for permission to rely on expert valuation evidence of the open market rents of the properties that were subject to the agreements.

Coulson J rejected that application because the evidence was not reasonably required to resolve the issues of liability and there was no justification for the delay in making the application. The consequences of refusing the application were outweighed by the likely consequence of allowing it, ie, the adjournment of the trial.

■ McQuillan v Tower Hamlets LBC

Bow County Court, 14 April 2011[30]

The claimant was a vulnerable, single, unemployed young woman in her mid-twenties. In her teens she had been in a violent and abusive relationship with a man. Since 2006 she had been provided with temporary accommodation under the homelessness assistance provisions of HA 1996 Part 7. In 2010, the council made her an offer of the tenancy of a flat under HA 1996 Part 6. It was located about 1.5 miles from the man's home in an area the claimant understood to be frequented by his family and friends. On her

refusal of the offer the council decided, on review, that it had been suitable and reasonable for her to have accepted; accordingly, its duty had ended: HA 1996 s193(7). The reviewing officer had taken account of representations that the offer was unsuitable because of the depression and anxiety the claimant was suffering but, following advice from Dr Keen, had decided that it was suitable.

Recorder Steynor allowed an appeal. Although the reviewing officer had made an objective assessment of the medical evidence – for the purpose of deciding 'suitability' – the issue of whether or not it was reasonable to accept the accommodation (HA 1996 s193(7F)) required a decision on whether or not, subjectively, the claimant's belief that her anxiety and depression about her circumstances were likely to be affected adversely was genuine. Had that approach been taken, the inevitable outcome was a finding that it was not reasonable to expect the claimant to accept the offer. The reviewing officer's decision was varied to one that the section 193 duty had not ended.

Eligibility

■ Amin v Brent LBC

Wandsworth County Court, 7 July 2011[31]

The claimant was a widow with three children and was a Danish Citizen. She applied to Brent for assistance as a homeless person. At the date of her application she was unemployed. The council decided that she was not eligible for homelessness assistance: HA 1996 s185(1). However, between that initial decision and a later review decision made under HA 1996 s202, she obtained part-time work as a customer care assistant working 16 hours a week and earning £92.80 per week.

The review was undertaken by Mr Minos Perdios (see below). Relying on the decision of Social Security Commissioner Rowland in *CH 3314/2005*, he found that the work did not provide enough income to cover what he considered to be 'reasonable living expenses'. He found, therefore, that the employment was not 'effective' and, consequently, that the claimant was not a 'worker' within the meaning of article 39 of the Treaty of Rome.

Allowing an appeal under HA 1996 s204, HHJ Rylance held that it was clear – from the jurisprudence of the European Court of Justice (ECJ) and the decision of the Court of Appeal in *Barry v Southwark LBC* [2009] ICR 437 – that the question of whether work is 'effective' is to be looked at from the point of view of the value of the work to the employer and not to the employee. The formula propounded in *CH 3314/2005* and adopted by Mr Perdios was wrong.

Reviews and second appeals

■ Karaj v Three Rivers DC

[2011] EWCA Civ 768, 13 June 2011

The claimant sought a review of a decision that he was not a homeless person: HA 1996 s175. The review was conducted by Mr Minos Perdios of Housing Reviews Ltd on behalf of the council. The point was taken on an appeal to the county court that Mr Perdios had no legal authority to make a review decision for the council.

HHJ Faber dismissed the appeal. On a renewed application for permission to bring a second appeal, the Court of Appeal was satisfied that an appeal on the point was seriously arguable. However, the claimant also had to meet the additional threshold for a 'second' appeal: CPR 52.13.

Rimer LJ said that:

[the judge's] judgment reflects not only the first judicial consideration of the contracting out point but what it is to date the only consideration of it. In those circumstances to regard what would in form be a second appeal to the Court of Appeal as a true second appeal, appears to me to be unsound. It would in substance be a first appeal (para 6).

Permission to bring a second appeal was therefore granted.

Costs on appeals

■ Brown v Richmond upon Thames LBC

Wandsworth County Court, 10 June 2011[32]

The council decided that the claimant did not have a priority need for homelessness assistance: HA 1996 s189. She sought a review. On 13 October 2010, her solicitors notified the council by fax that her son was in full-time education at a further education college. The council responded the same day indicating that it would need documentary evidence of that fact. On 14 October 2010, the council made a review decision that there was no priority need. On 15 October 2010, the solicitors provided the evidence required and indicated that if the review decision was not withdrawn, an appeal would be lodged. Absent a response, notice of appeal under HA 1996 s204 was filed and served. The review decision was then withdrawn. The claimant sought her costs of the discontinued appeal.

HHJ Knowles held that if the appeal had been pursued to a hearing it would have succeeded, Alternatively, a reading of the papers demonstrated that the council was very likely to lose and the claimant likely to succeed. On either basis the claimant was entitled to her costs.

HOUSING AND CHILDREN

To determine whether or not an applicant is a 'child in need' of accommodation for the purposes of Children Act (CA) 1989 ss17 and 20, a local authority must ascertain his/her age. Challenges to age assessment decisions are made by way of judicial review. If permission is granted, substantive claims are now being transferred from the Administrative Court to the Upper Tribunal for trial. The following decisions, noted briefly, concern recent judgments from the courts:

■ R (AE) v Croydon LBC

CO/3520/2010, 1 July 2011

The claimant arrived in the UK in September 2009. He claimed asylum and gave his age as 14 and his date of birth as 3 September 1995. The council carried out a series of age assessments to determine his actual age and to what accommodation and other services he was entitled. The final assessment concluded that he was two years older than claimed and was born in September 1993. Deputy High Court Judge Frances Patterson QC allowed a judicial review of that assessment and, after a trial, decided that his correct date of birth was 3 September 1994.

■ R (F) v Lambeth LBC

[2011] EWHC 1754 (Admin), 17 June 2011

The claimant arrived in the UK in May 2009. He claimed asylum and gave his age as 14. The council carried out an initial assessment and decided that he was 16. After issue of a claim for judicial review, the council agreed to make a full age assessment to determine his actual age and to what accommodation and other services he was entitled. There was a long delay. Eventually the full assessment confirmed the initial assessment of 16 and decided that he was now 18. On the unusual facts of the case, Sales J rejected an application for permission to seek a judicial review of the new assessment. It had been made after consideration of reports from Dr Birch and Dr Stern (see below) and with input from teachers and social workers who had dealt with the claimant for two years. Applying the test for permission set out in *R (FZ) v Croydon LBC* [2011] EWCA Civ 59, the claim had no realistic prospect of success.

■ R (Y) v Hillingdon LBC

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

As a very young girl, the claimant was brought to the UK to work as a domestic helper. Many years later, in 2008, she escaped from domestic servitude and slept rough. She was found and referred by the police to social services. She gave her date of birth as 17 February 1993 and was provided with accommodation under the CA 1989. In April 2009, the council's social workers assessed her as being an adult aged over 19. She sought judicial review of that assessment. The claim was allowed and a declaration granted that her date of birth was the date she had given. In the course of his judgment, Keith J made a number of observations about the conduct of age assessment judicial reviews. He expressed the firm view that there was a burden of proof in such cases and that it is for claimants to show that they are of an age entitling them to the benefits of the CA.

■ R (R) v Croydon LBC

[2011] EWHC 1473 (Admin), 14 June 2011

The claimant arrived in the UK in May 2008 and claimed asylum. He said that he was only 15. The UK Border Agency (UKBA) referred him to the council which assessed his age as over 18 and referred him back to the UKBA, which accommodated him. In October 2008 he sought judicial review of his assessment. The claim was stayed to await the outcome of other test cases on age assessment. In December 2010, the council conducted another age assessment which concluded that he was 'an adult 18+' (para 13). Kenneth Parker J heard evidence, including expert evidence, over two days. The only firm assessment he could make was that the council had been right to decide the claimant was 18 in December 2010. A declaration was granted that he was now 18 years and five months old. The judgment contains an interesting treatment of the evidence of the paediatricians Dr Diana Birch and Dr Colin Stern.

■ TL v Angus Council and Glasgow City Council

[2011] CSOH 98, 7 June 2011

The claimant arrived in the UK as a stowaway and claimed asylum. The UKBA referred him to Angus Council, which in January 2011 assessed his age as over 18. The claimant said that he was only 15 and in March 2011 sought judicial review of his assessment. The claim was scheduled for hearing on 24 June 2011. He sought an interim order requiring Glasgow Council to accommodate him until trial on the basis that he was a child. The Court of Session held that the balance of convenience did not favour such an order. There was no special urgency.

HOUSING AND COMMUNITY CARE

■ R (Tiller) v East Sussex CC

CO/14455/2009, 29 June 2011

The council decided to withdraw 24-hour on-site warden provision from a sheltered housing scheme and to make alternative arrangements for the necessary support to tenants. On a claim for judicial review, the tenants claimed that:

- there had been no proper consultation, because retaining the status quo had not been put forward as an option; and
- the decision was unlawful for failure to have regard to the duty in Disability Discrimination Act 1995 s49A.

Thirlwall J dismissed the claim. The consultation had not been flawed by omitting the status quo when one option proposed was for even more generous provision. Although section 49A had not been mentioned in any of the council's documentation or reports, the duty under that section had in fact been performed: applying *R (Brown) v Secretary of State* [2008] EWHC 3158 (Admin).

1 Available at: www.parliament.uk/documents/lords-library/Library%20Notes/2011/LLN%202011-019%20LocalismBillFP.pdf.
2 Available at: www.communities.gov.uk/documents/housing/pdf/1936126.pdf.
3 Available at: www.tenantservicesauthority.org/upload/pdf/IRC-full.pdf.
4 Available at: www.tenantservicesauthority.org/upload/pdf/Decision_Instrument_6_June_2011.pdf.
5 Available at: www.tenantservicesauthority.org/upload/pdf/CLJ_letter_to_CEO_June_11.pdf.
6 Available at: www.communities.gov.uk/documents/housing/pdf/1936156.pdf.
7 Available at: www.communities.gov.uk/news/corporate/1922282.
8 Available at: www.justice.gov.uk/downloads/consultations/legal-aid-reform-government-response.pdf.
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12 Available at: www.shla.org.uk/cmsfiles/file/SHLA%20Consultation%20Question%20Responses%20April%202011.pdf.
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16 Available at: www.communities.gov.uk/documents/corporate/pdf/1923453.pdf.
17 Available at: www.nao.org.uk/publications/1012/mortgage_rescue_scheme.aspx.
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25 Available at: www.communities.gov.uk/documents/housing/pdf/1936769.pdf.
26 Available at: www.communities.gov.uk/documents/housing/pdf/1937305.pdf.
27 Available at: Available at: www.justice.gov.uk/downloads/consultations/options-dealing-with-squatting.pdf.
28 Available at: www.communities.gov.uk/documents/housing/pdf/1922040.pdf.
29 Available at: www.ombudsman-wales.org.uk/uploads/publications/536.pdf.
30 Stephen Cottler, barrister, London and Esther Williams, TV Edwards, London.
31 Sean Pettit, barrister, London and Tony Owen, TV Edwards, solicitors, London.
32 Beatrice Prevatt, barrister, London and Ronald Daley, Brent Private Tenants' Rights Group, London.

Jan Luba QC is a barrister at Garden Court Chambers, London. He is also a recorder. Nic Madge is a circuit judge. The authors are grateful to the colleagues at notes 30–32 for transcripts or notes of judgments.

Recent developments in education law – Part 3

Angela Jackman and **Eleanor Wright** continue this twice-yearly series of articles considering the changes and developments in the law relating to school admissions and admission appeals, and disability discrimination, children out of school, school governors, the duty of care to school staff, school attendance and unlawful exclusions. Parts 1 and 2 of this article appeared in June and July 2011 *Legal Action* 10 and 38.

POLICY AND LEGISLATION

School admissions and admission appeals codes of practice

The Department for Education (DfE) has issued draft school admissions and school admission appeals codes for consultation.* In keeping with government aims to reduce bureaucracy for schools, both draft codes are substantially shorter than the current versions. It was also stated that the new codes aim to reduce confusion, particularly by clarifying what admission authorities must or must not do. The main changes proposed are as follows:

Draft school admissions code

■ Local authorities would no longer be required to co-ordinate in-year admissions. Where these are required, the role of local authorities would be simply to inform parents of schools with vacancies and to provide forms; thereafter, applications would be dealt with by the schools concerned.

■ Schools should be free to increase their published admission number without having to secure local authority approval. If there are objections, these should be referred to the Schools Adjudicator.

■ The use of random allocation, ie, lotteries, for allocating school places, will only be possible in very limited situations.

■ There would be two further exceptions to the rules limiting infant class sizes to 30 pupils, namely, twins and other multiple-birth children, and the children of UK service personnel. Consideration will also be given to removing the requirement for admission authorities to take corrective measures to bring class sizes back to 30 at the end of the year.

■ The current requirement for admission authorities to consult publicly on proposed admission arrangements every three years would be changed to require this only every seven years, provided that no changes to the arrangements are proposed.

■ Academies and Free Schools will be permitted where their funding agreement allows to give priority to children who are eligible for free school meals (in future, children who attract the pupil premium).

■ Schools will be able to give priority to children of school staff.

■ The deadline for objections to the Schools Adjudicator about admission arrangements will be brought forward to 30 June (currently it is 31 July), ie, before the end of the summer term to enable schools to respond to requests for information from the adjudicator in time.

■ Current limitations on those who are able to object to admission arrangements for maintained schools will be removed.

School admission appeals code

■ The requirement for appeal panels to refer unlawful admission arrangements to the Schools Adjudicator will be removed. Instead, such arrangements should be referred to the local authority and the admission authority, if applicable, so that they can be reconsidered in the next admissions round.

■ There will be more flexibility in the appeals timetable, within an overall framework requiring cases to be heard within a specified time. Parents should have 30 working days to lodge an appeal.

■ Instead of the current two-stage process for appeals other than infant class size appeals, there should be three stages:
– First, the panel should consider the lawfulness and correct application of the arrangements.
– Second, it should judge whether or not there would be prejudice to the school if more children were admitted.
– Third, the panel should balance this against the parents' arguments.

■ If one member of the appeal panel dealing with multiple appeals withdraws, it will no longer be necessary for all appeals to be reheard. Instead, the remainder should be postponed until the panel member returns or the admission authority appoints a replacement.

■ Parents may be requested to submit initial evidence when lodging an appeal, and have a further specific opportunity to do so before the hearing. Parents will be informed that information or evidence not received before the hearing may not be considered at the appeal, and panels must consider whether or not to accept any evidence submitted late.

■ There will no longer be a requirement to advertise for lay members every three years, but admission authorities must ensure that panel members continue to be independent.

■ Current guidelines preventing the use of school premises as appeal venues will be relaxed.

■ Training requirements will be relaxed. Panel members will have to be trained before serving on the panel, but thereafter this will be a matter for agreement between individual members of panels and the admission authorities.

The consultation on the changes to the admissions framework will close on 19 August 2011. The DfE proposes to publish new codes by the end of September 2011 with a view to them coming into force in early 2012.

CASE-LAW

Disability discrimination

■ CP v M Technology School (SEN)
[2010] 314 UKUT (AAC), 25 August 2010

This disability discrimination appeal arose from the permanent exclusion of a child, C, who had mental health issues that caused him major anxiety. The school confirmed, in response to case-management directions, that it did not dispute that C was disabled within the meaning of Disability Discrimination Act (DDA) 1995 s1. However, the First-tier Tribunal decided to consider this issue as a preliminary point. C's parents, who were not represented, did not request an adjournment, but the First-tier Tribunal adjourned for a short time during which they were given copies of the relevant parts of the DDA guidance to read in a waiting room. The First-tier Tribunal panel considered whether or not C had a clinically recognised diagnosis of mental impairment. It concluded that he was not

disabled and dismissed the claim. C's parents appealed to the Upper Tribunal.

The Upper Tribunal held that the First-tier Tribunal was not bound by the school's concession; the latter tribunal had an inquisitorial function and might need to investigate for itself. However, it had failed to follow a fair procedure. First-tier Tribunals had a duty when dealing with unrepresented parents to consider whether or not an adjournment was needed in circumstances such as these, and the power to adjourn was a fundamental aspect of fair procedure. The short adjournment granted here was insufficient, and the decision was set aside.

Comment: The Upper Tribunal commented that it was 'understandable' that the First-tier Tribunal raised the issue of disability as C's statement of special educational needs did not state a diagnosis (para 8). This is surprising given that it is well established following, in particular, *J v DLA Piper UK LLP* [2010] ICR 1052; UKEAT/0263/09, 15 June 2010, that there is no requirement for proof of a clinically recognised illness to be provided to enable a finding of disability to be made.

■ DR v Croydon LBC (SEN)

[2010] UKUT 387 (AAC), 26 October 2010

This disability discrimination appeal was in relation to a child, C, with a diagnosis of selective mutism and mild specific learning difficulties. There was evidence that C showed selective mutism and other difficulties in 2007 and 2008, and the claim related to discriminatory acts before April 2009. The local authority did not dispute that C was disabled; however, the First-tier Tribunal decided to take this as a preliminary issue and judged that she was not disabled. In so doing, the tribunal focused on C's experience after starting at a new school in autumn 2009. The evidence was that C had made progress at the new school, there were no issues with her speech and she was happy at the school. The First-tier Tribunal found that this indicated that C's needs are not long-term and could be remedied.

The Upper Tribunal held that the First-tier Tribunal had misapplied the law when deciding whether or not there was a long-term and substantial adverse effect on C. The First-tier Tribunal was wrong to focus on events after the alleged discriminatory acts had occurred, and it had failed to consider whether or not C's condition was likely to recur. This reflects the provisions of DDA Sch 1 para 2 (which is repeated in Equality Act 2010 Sch 1 para 2) that an impairment may constitute a disability even if it has ceased to have an adverse effect on a person's ability to carry out normal day-to-day activities, if that effect is likely to recur. The Upper Tribunal also found that there was a potential breach of principles of natural justice: the case-management directions given by the First-tier Tribunal did not mention the disability issue, and there was nothing that would have alerted the parties to the need to bring evidence or to call witnesses on this matter.

Comment: In each of these cases, the parents in question were unrepresented. This confirms the principle that, in this event, special care should be taken to operate a fair procedure; the tribunal may take a different attitude to represented parents. Parents also need to be aware that even if the local authority concedes the issue of discrimination, this may not necessarily be accepted by the tribunal.

Children out of school

■ R (KS and ZU) v Croydon LBC

[2011] ELR 109

The claimants were looked after children under Children Act 1989 ss22 and 23 as they were unaccompanied asylum-seekers aged 14, who had been placed in foster care by the defendant council. They applied for judicial review of the council's failure, as their corporate parent, to make suitable provision for their education under Education Act (EA) 1996 ss7 and 19, as they and their foster parents were unable to find school places. By the time the case came to hearing, the council had arranged for the claimants to join other asylum-seekers attending a language college on a part-time basis, as it only provided English language teaching on short courses.

The court held that local authorities have a clear duty under section 19 to provide suitable full-time education, and what constitutes suitable education is a question for them: the test was one of reasonable practicability, and the court should be slow to usurp their role in this connection. Section 19 provision was a 'long-stop measure' and by its nature was exceptional provision. However, local authorities must take into account children's individual abilities and needs, including factors such as their history and their ability to write and speak English. In this case, the local authority had failed to prove that it had considered specifically and resolved the question of what would be suitable education for each of the claimants; instead, the council simply treated them as members of a group of unaccompanied asylum-seekers all of whom could be treated the same. The court took into account, in particular, the principle that the highest priority was required to be given to looked after children. The defendant council was therefore required to comply with its duty under section 19 by reconsidering the matter and, at an early stage, putting suitable educational provision in place for the claimants.

Comment: This decision is helpful clarification of what is required under EA s19. The court will be prepared to accept that this is exceptional provision which need not, of itself, comprise either full-time education or the provision of the full national curriculum. This reflects practitioners' general experience of court practice in such cases, where the courts tend to accept interim education in the region of 10–15 hours a week while suitable full-time provision is identified. What it is essential for any local authority to demonstrate is that it has considered the individual circumstances of the child in question and made proper and reasoned provision for him/her.

School governors

■ (1) McLaughlin (2) Martin (3) Davies v (1) Lambeth LBC (2) Khan

[2011] ELR 57, [2010] EWHC 2726 (QB), 2 November 2010

This defamation action between members of a school governing body and a local authority was based on alleged libel of former and current head teachers and governors of the school when Lambeth's auditor sent e-mails which, it was contended, alleged that they had mistreated and failed to make proper provision for newly qualified teachers, and that there were improper arrangements between the school and a company owned by one of the claimants, under which he had benefited financially.

Lambeth sought to strike out the claim on the basis of *Derbyshire CC v Times Newspapers Ltd* [1993] AC 534, HL, contending that the governors constituted a governmental body and, therefore, were prevented from suing for libel. Lambeth further sought to strike out the claim for breach of privacy under article 8 of the European Convention on Human Rights ('the convention'), on the basis that the governing body had no individual right of privacy. Finally, it was alleged that the action was a smokescreen to apply pressure on the local authority in relation to a separate, long-running dispute.

The strike out application failed. The court held that the decision in Derbyshire CC did not prevent action being taken by individuals and, in any event, it was not clear-cut that the potential defamation was confined solely to the governing body's official activities. For similar reasons, the court was not prepared to say at this stage that the potential meaning of the alleged libels could not affect the right to privacy of individual governors.

There was inadequate evidence of the alleged attempt to pressurise the local authority.

Duty of care to school staff

■ Vaile v Havering LBC

[2011] EWCA Civ 246, 11 March 2011

The claimant was a former teacher at a special school for children with learning difficulties, who claimed against her local authority employer for damages for personal injuries sustained as a result of an assault by a pupil. Previously the child had attacked the claimant by biting her, and on the occasion in question stabbed her with a pencil and shook her head violently. The claimant alleged that the authority was negligent and had failed to provide a safe system of work, ie:

■ the child should either have been identified as autistic or treated as if he was; and

■ the school should have carried out an appropriate risk assessment; and

■ the school should have removed the child from her class following the first assault or at least obtained specialist assistance in dealing with him.

The first instance judge found that the child had an autistic spectrum disorder (ASD) and that the local authority had failed to take account of this and to put in place appropriate procedures. However, he dismissed the claim on the basis that although the claimant had not received training in using specialist strategies as a safe system of work, there was no evidence that the teaching methods used for the child were inadequate or that a safe system of work had not been provided for the claimant.

The Court of Appeal held that the factual findings must mean that no safe system of work had been provided. There should have been a system for identifying pupils with ASD and informing teachers, and ensuring that everyone teaching such pupils was properly instructed in appropriate techniques. There had been a long-term failure to provide a safe system of work and causation was proved; although, potentially, it was difficult for the claimant to show precisely what the school should have done to avoid the incident in question, the likelihood was that she could have avoided injury if she had been properly instructed in suitable techniques for dealing with children with ASD.

School attendance

■ Islington LBC v D

[2011] EWHC 990

This was an appeal against an acquittal by a magistrates' court of a parent in respect of a charge of failing to ensure that her child attended secondary school regularly contrary to EA s444(1). The child attended 20 out of 88 available sessions, no reasons being given for the absences. The parent said that the child had long-term and unresolved behavioural and mental health difficulties. By the time of the hearing, the child had been diagnosed with social phobia, was being treated for special educational needs and was receiving appropriate schooling. The magistrates found that the parent had done all she could, given the child's difficulties, to ensure his attendance at school. The local authority argued that the difficulties encountered by the parent were insufficient as a defence to a charge under section 444(2A).

The court considered the potential defence that the child was prevented from attending by reason of sickness or any unavoidable cause. It found that the fact that there was reasonable justification for the child's non-attendance did not necessarily constitute an unavoidable cause for the purposes of section 444; in particular, the fact that the parent had been unable to persuade the child to go to school did not justify a finding to that effect. The magistrates had, therefore, applied the wrong test in considering whether or not the parent had done all she could to ensure the child's attendance, this being purely a mitigation point. The appeal was therefore allowed; however, the court decided not to remit the case for further consideration as the child was now over 16 years old and the issue regarding his education was resolved.

■ R (O) v Hammersmith and Fulham LBC

[2011] EWHC 369 (Admin), 16 February 2011

The court gave guidance concerning the approach to be taken in cases concerning the placement of severely disabled children in appropriate accommodation, including schools. It was recognised that such cases were, in general, seen as urgent, but that local authorities might need time to respond properly to challenges on the basis that the placements were unlawful or a child should be sent to a particular school. Specifically, the court was concerned that if an interim order was made in favour of placement in a particular school that, in effect, was a substantive order because it would be difficult for the child to be removed from the school when the full case was heard.

The court found that interim relief by way of a placement should not be granted on paper or at a short notice hearing; instead, there should be an urgent directions hearing at which the placement was not discussed, but which would enable the parties to explain the claimant's immediate needs so that the court could decide whether there should be an interim relief hearing or an early rolled-up hearing. The hearing could also consider whether interim measures short of a placement decision were required or appropriate. It was stated that this was the practice which should be followed routinely.

■ R (O) v Hammersmith and Fulham LBC

[2011] EWHC 679 (Admin), 23 March 2011

O was a severely autistic child with a tendency to high levels of anxiety and requiring constant supervision by adults. His aggressive behaviour at home was causing intense difficulties. The local authority issued a statement naming a specialist day school, Queensmill; the parents placed him at their expense at a weekly residential school, LVS Hassocks, and appealed against the statement. The appeal failed, the tribunal finding that there was no educational need for a waking-day curriculum. O remained at LVS, but his behaviour deteriorated. The family became unable to cope, and felt that O's difficulties with transitions meant that LVS was no longer suitable. Psychiatrists who had known O since early childhood advised that he now needed a 52-week residential placement. The local authority carried out a core assessment which accepted this and that it had a duty to accommodate O under Children Act 1989 s20. It proposed that he be placed at night at a specialist residential school, and that he attend Queensmill during the day. The judicial review application requested a mandatory order for placement at Purbeck View, a school able to offer a 52-week placement.

An interim order for placement at Purbeck View was sought and was refused by the court in the earlier hearing. The court gave guidance about the approach to be taken in such cases: it was recognised that such cases were, in general, seen as urgent, but that local authorities might need time to respond properly to challenges based on assertions that the proposed placements were unlawful or that the child should be sent to a particular school. If an interim order was made in favour of a particular school that, in effect, was a substantive order, as it would be difficult for the child to be removed from that school when the full case was heard. Therefore the appropriate approach was not to grant interim relief by way of placement either on paper or at a short notice hearing: instead there should be an urgent directions hearing which would enable the parties to explain the claimant's immediate needs so that the court could decide whether there should be an interim relief hearing or an early rolled-up hearing, and whether interim measures short of a placement decision are

required or appropriate. This should be routine practice in such cases.

At the interim relief hearing which took place five weeks later, the court held that the local authority's decision was irrational. It had placed undue weight on the tribunal's decision, which was inappropriate since that had been based solely on the lack of educational need for a residential school. Furthermore, this was overtaken by the core assessment's acceptance that a residential placement was now required and its recognition that O needed an arrangement involving stability and minimal transitions. The local authority's proposal would involve daily transitions and would give rise to the possibility that O would be the odd one out in the residential school, which would heighten his anxiety. The court ordered the local authority's decision as to placement to be set aside, but declined to order placement at the 52-week residential school as this was not the only available legal option.

Unlawful exclusion

■ Ali v UK

[2011] All ER (D) 96 (January); App No 40385/06, 11 January 2011

This case was previously reported in *Legal Action* and summarised the history of the applicant's exclusions, including those which were unlawful. This case had been before the domestic courts as *Ali v Head Teacher and Governors of Lord Grey School* [2006] UKHL 14, 22 March 2006; [2006] 2 AC 363; May 2006 *Legal Action* 15. The applicant applied to the European Court of Human Rights (ECtHR) on the ground that his exclusion from school had violated his right to education, contrary to article 2 of Protocol No 1 to the convention.

The application was dismissed on the grounds that the exclusion did not amount to a denial of the right to education and was not disproportionate to the legitimate aim pursued. The court ruled that article 2 of Protocol No 1 guaranteed a right of access to educational institutions existing at a given time; however, this access only constituted a part of the right to education. To be effective, the right to education required the individual, who was the beneficiary, to have the opportunity of drawing profit from the education received, namely, the right to obtain and conform to the rules in force in each state, giving official recognition of the studies s/he had completed. The right to education was not, however, absolute, but might be subject to limitation: contracting states have a certain margin of appreciation, but have to ensure that the restrictions do not impair the essence of the right. The court had to be satisfied that any restrictions were foreseeable for those concerned and pursued legitimate aims. A limitation would only be compatible with article 2 of Protocol No 1 if there was a reasonable relationship of proportionality between the means employed and the aims sought to be achieved. Article 2 of Protocol No 1 did not necessarily entail a right of access to a particular educational institution or exclude disciplinary measures, such as expulsion, in order to ensure compliance with an educational institution's internal rules.

The imposition of disciplinary penalties was an integral part of the process whereby a school sought to achieve the object for which it was established, including the development and moulding of the character and mental powers of its pupils. Article 2 of Protocol No 1 requires the UK to guarantee every child of compulsory school age, such as the applicant, access to an educational institution or facility which would provide an education in keeping with the national curriculum.

The applicant's exclusion had not amounted to denial of the right to education and was not disproportionate to the legitimate aim pursued. The court noted, in particular, that the applicant had only been excluded until the determination of the criminal investigation. On the facts, once the head teacher had received written confirmation of the conclusion of the criminal proceedings, she invited the applicant's parents to a meeting to facilitate his reintegration. The court noted that the applicant and his parents did not attend the meeting and made no further efforts to contact the school for several weeks, by which stage the applicant's name had been removed from the roll.

The court also held that the applicant had been offered alternative accommodation during the period of exclusion, but had chosen not to avail himself of the offer. Although the alternative education did not cover the full national curriculum, in the view of the court, it had been adequate in the light of the fact that the period of exclusion had at all times been considered temporary pending the outcome of the criminal investigation.

The court held that article 2 of Protocol No 1 did not require schools in the UK to offer alternative education covering the national curriculum to all pupils who had been temporarily excluded. The situation could be different if the pupil had been permanently excluded from one school and had been unable to secure full-time education, in line with the national curriculum, at another school. The court concluded that the applicant's exclusion was a proportionate measure which did not interfere with the substance of the right of education.

Comment: This is a disappointing decision, partly because it fails to give any weight to the fact that for periods of time the applicant was unlawfully excluded. Furthermore, the sweeping statement that temporarily excluded pupils should not necessarily access the national curriculum is concerning, especially as exclusions of this nature can be lengthy.

* Available at: www.education.gov.uk/consultations/index.cfm?action=consultationDetails&consultationId=1744&external=no&menu=1.

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