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'RECENT DEVELOPMENTS IN HOUSING LAW' AT 25

LAG

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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The rumour mill

It has been a worrying summer for all legal aid providers and a catastrophic one for the many who were not successful in applications for legal aid contracts. Criminal firms fared the best, with only around five per cent failing to get new contracts; worst hit were the 1,100 family law firms that were not successful in obtaining contracts. There is a mixed picture in the other areas of civil law, with many immigration and mental health providers getting contracts but not necessarily the number of new matter starts they wanted. In social welfare law, there has been a similar mixed picture (see page 4 of this issue). Many providers are appealing against the decision not to award those contracts. LAG hopes that the dedicated providers that were unsuccessful first time around will have more luck on appeal; however, we believe that things are about to get much worse.

LAG understands that the government is looking to make £500 million in cuts to legal aid in the four-year spending review period beginning in April 2011. Providers commencing their hard-won contracts next month might soon be facing contract termination notices from the Legal Services Commission as the government scrambles to save cash by cutting back on scope and eligibility. As yet all we have are rumours and off-the-record briefings about what the government is looking to cut from the legal aid budget. It is hinted strongly that welfare benefits, debt and employment law might be removed from scope. Immigration law might also be in the firing line, as the government is suggesting that those areas of law which do not engage human rights principles directly will not be a priority for legal aid funding.

Not for profit (NFP) agencies are especially at risk of having their funding squeezed from all sides by both the threatened legal aid cuts as well as cutbacks by local authorities and charitable trusts. Many NFP agencies, for example, face losing Financial Inclusion Fund grants in March 2011. LAG has also heard of a number of agencies that are in danger of losing all their local authority grants.

For private practice solicitors, the squeeze on legal aid funding is coming at a time when private work is still hit badly by the recession. Conveyancing, the mainstay of many high street practices, is still in the doldrums in many parts of the country. Part of the reason for the available legal aid work being so oversubscribed is the understandable desire by firms to take on more legal aid cases in order to offset the decline in private work. Particularly in family law, we are seeing more work concentrated in the larger firms to the detriment of many smaller firms that are struggling to survive and, ultimately, client choice. Family law could also experience draconian cuts to scope to help find the savings which the government is seeking.

Taking out divorce and ancillary relief from scope is something the Ministry of Justice looked at under the last government; this is likely to be one of the major cuts options floated by the coalition government when it publishes its expected paper on the proposed budget cuts in the next few weeks. LAG suggests that practitioners will need to engage with the government to try and minimise the damage to access to justice which these pending cuts will cause; this will involve discussing some difficult choices. For example, few argue that advice on divorce should be prioritised above a person's freedom or having a roof over his/her head, but what about those cases of women in violent relationships who need legal help? Pragmatic solutions will have to be found to such problems.

Police station duty work is also rumoured to be under scrutiny. Advice on less serious cases might be further limited to telephone advice only. However, slashing police station advice could be open to legal challenge in the European Court of Human Rights (see, for example, *Salduz v Turkey* App No 36391/02, 27 November 2008). It is more likely that the government will opt for both a further squeeze on criminal fees and the sort of cull of criminal firms which the family law legal aid sector has just experienced. LAG has warned consistently that concentrating legal aid funds into fewer firms impacts on access to justice and stores up problems for the future as large firms would effectively dictate the price of services.

The only bright spot on the horizon is that the government wants to look at alternative methods of funding for legal aid. It is also open to suggestions about improving the justice system to bring about savings and better outcomes for clients: replacing funding for debt work with a levy on the finance industry is the most obvious example of alternative funding which is doing the rounds. There is also much talk of client account interest being used to supplement the legal aid budget. However, any such suggestions will need to be acted on quickly as the savings need to be made within the next four years.

‘Stunned’ London Law Centre appeals failed bid

Camden Community Law Centre

Camden Community Law Centre® (CCLC) in north London is facing a 25 per cent drop in income if CCLC is unsuccessful in its appeal against the Legal Services Commission’s (LSC’s) decision not to award the Law Centre any new matter starts in social welfare law (SWL). Although CCLC, which employs 13 people including four solicitors, secured contracts for immigration and employment work, the loss of legal aid income as a result of its failed bid for contracts in housing, welfare benefits and debt will place the Law Centre’s future into question.

Pip Cosin, a housing caseworker at CCLC, told *Legal Action*: ‘We are stunned. The Law Centre has an excellent reputation and has always scored well in LSC audits.’ Pip Cosin, who has worked at CCLC for 36 years, believes that the Law Centre might have been scored down as it does not have a debt casework supervisor in post.

On the other hand, Stoke-on-Trent Citizens Advice Bureau is one bidder that is happy with the result of the SWL bid round. The Citizens Advice Bureau has been awarded new contracts in housing, welfare benefits, debt, immigration and employment law. Simon Harris, the bureau’s chief executive, told *Legal Action*: ‘The bureau was allocated virtually everything we asked for. Overall, we feel quite relieved.’

Meanwhile, the LSC has advised LAG that around 70 per cent of existing social welfare law providers have been contracted to undertake Legal Help work from October (see August 2010 *Legal Action* 5). LAG understands that a high percentage of firms and not for profit organisations which have not received contracts have appealed. The LSC will not release details of the suppliers in each procurement area until the results of the appeals are known.

LAG understands that a number of suppliers are considering judicial review proceedings against the LSC. Some suppliers have told *Legal Action* they believe that one selection criterion which had a discriminatory impact on their bid and could be used to bring judicial review proceedings was the marking down of providers with supervisors who attended their offices for fewer than five days a week.

IN BRIEF

Alliance for Legal Aid calls public meeting

On 11 September 2010, the Alliance for Legal Aid (AfLA) will hold a public meeting from 11 am to 12.30 pm. The meeting will take place in the Diskus Room at 128 Theobald’s Road, Holborn, London, one of the London head office’s of Unite the union.

‘The meeting is an opportunity for advice workers, lawyers and the public to meet and discuss defending access to justice as the government prepares to make a 25 per cent cut in legal aid,’ said an AfLA spokesperson. E-mail: shynes@lag.org.uk for further details.

All Party Parliamentary Group on Legal Aid: date of next meeting

The next meeting of the All Party Parliamentary Group on Legal Aid will be held on 13 September at 5 pm in Committee Room 10, House of Commons, London. The theme of the meeting will be the issues of quality services and meaningful advice. E-mail: carol.storer@lapg.co.uk for further details.

Manchester City Council Community Legal Advice Service

At the time of going to press, the Legal Services Commission confirmed to LAG that the announcement regarding the successful bidder(s) for Manchester City Council Community Legal Advice Service (CLAS) was ‘imminent’. The CLAS will consist of tenders to run six advice centres in three areas of the city. Existing providers, including the city’s Citizens Advice Bureaux and Law Centres, have submitted tenders. The announcement of the successful bidder(s) has been delayed since June.

21st century welfare consultation

In July, the Secretary of State for Work and Pensions, Iain Duncan Smith, launched the consultation paper, *21st century welfare*. The paper includes a series of options which could see major reform of the number and type of tax credits and benefits available.

■ Available at: www.dwp.gov.uk/docs/21st-century-welfare.pdf. The consultation period ends on 1 October 2010.

LAG legal aid conference: *Social welfare law matters*

On 12 November 2010, LAG will bring together practitioners and advisers to discuss the future of social welfare law services at a time when, increasingly, people are faced with problems relating to debt, employment, welfare benefits, housing and immigration, but the government is considering deep cuts to legal aid and advice services’ funding.

Speakers at the conference will include:

- Sir Bill Callaghan, chairperson of the Legal Services Commission;
- Gillian Guy, chief executive of Citizens Advice;
- Katherine Craig, solicitor, Christian Khan;
- Afua Hirsch, the *Guardian*’s legal affairs correspondent;
- Des Hudson, chief executive of the Law Society;
- Vicky Ling, a consultant specialising in legal aid practice; and
- Roger Smith, director of Justice.

■ See back page of this issue for further details.

RMJ files transferred to new providers says LSC

The Legal Services Commission (LSC) has reported that it has transferred all live files from Refugee and Migrant Justice (RMJ) to other legal aid providers. The LSC stated that, as at 12 August, the 12,500 files on which the refugee charity's staff were working at the point when the organisation went into administration (see July and August 2010 *Legal Action* 5 and 4) have been either closed (if no further work was needed on them) or allocated to new representatives.

Hugh Barrett, executive director for commissioning at the LSC, said: 'When a legal aid-funded organisation runs into financial difficulty on this level, the impact on the clients can be potentially devastating. We have done everything we can to smooth the transition of cases to other providers in as short a time as possible. This will ensure that these individuals can continue to receive the high-quality service they need.'

news feature

Law Society takes action on family law contracts

The Law Society has just announced that it has begun judicial review proceedings against the Legal Services Commission (LSC) over the commission's handling of the tender process for the family law contracts. Practitioners and the Law Society were surprised by the outcome of the tender process which was announced last month. The LSC confirmed that 1,100 firms failed to secure new contracts for family law, leaving only 1,300 to cover the country. LAG understands that the Law Society has been under pressure from firms which had bid successfully for contracts not to challenge the tender process. Resolution, the family lawyers' association, has not joined the judicial review proceedings.

However, Linda Lee, the Law Society's president (pictured), cited the society's duty to act in the public interest. She said: 'We fear that access to justice is in peril' because of the reduction in the number of firms. 'In some areas of the country, vulnerable clients will now be forced to travel long distances to find a solicitor, and in some areas there will be too few firms to represent clients, causing conflicts of interest where several parties to a dispute need and are entitled to independent representation.'

The LSC told *Legal Action* the family legal aid tender was a 'competitive process' that decided which firms should be awarded contracts. The LSC also said that only after 'discussions with the representative bodies' was it decided to adopt accreditation as a selection criterion to choose which firms should be awarded contracts. 'Under the new contracts, the LSC will commission the same level of help as last year, therefore, contracting with fewer legal firms does not equate to providing less access to justice'.

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Linda Lee, Law Society President

Call for 'three-month hiatus'

The LSC claimed that the main reason for the reduction in the number of providers was that firms had made bigger bids: 'Providers' bids were based on their capacity to deliver. Because most of the highest scoring providers chose to bid for an increased amount of new matter starts, overall, fewer of those scoring less highly obtained a contract than expected.'

Carol Storer, director of the Legal Aid Practitioners Group, does not accept that the selection criteria weeded out the weaker firms: 'Many very good firms did not get contracts, some firms specialising in child protection and domestic violence cases with excellent reputations might have to leave the legal aid system if they do not win their appeals.'

Steve Hynes, LAG's director, said: 'The Law Society is right to put the issues around access to justice for the public above the interests of many of their members who have gained from the tender process. The essential fact remains that an overnight reduction in the number of outlets providing family legal aid services risks members of the public not being able to find a lawyer when they need one. We are particularly concerned about the availability of legal aid in domestic violence and child protection cases'.

'It is only once the results are known of the appeals which the many unsuccessful bidders have lodged will the true pattern of provision be revealed. LAG also suggests that firms which have overbid should negotiate reduced contracts with the LSC. This would allow more firms back into the system. We would argue that a delay in the commencement of the contracts would give more time for all concerned to gain a better understanding of the availability of legal aid locally. LAG is proposing that, together with both the winners and losers in the contract process, the government and the LSC need to agree to a three-month hiatus for this to happen,' he said.

Family lawyers' survey results

Meanwhile, Resolution has just published the results of a survey of its members about the impact of the family law bid round. Of 561 respondent firms that had bid for a family contract:

- 41 per cent were 'wholly unsuccessful' in their bid';
- 86 per cent of those firms said that they would be appealing; and
- 542 redundancies are expected, in total.

For details of Resolution's survey findings, visit: www.resolution.org.uk/site_content_files/files/family_legal_aid_contracts_survey.pdf.

Stephen Knafler QC, a barrister from Garden Court Chambers, reports on LAG's community care conference, which took place in London in July 2010. Stephen Knapfler chaired the opening and closing sessions of the conference.

Protecting liberties: LAG conference report

The keynote speech, 'What price dignity?', was delivered by Lord Justice Munby and started with the question: 'How to ensure individual dignity, happiness and human rights are central to decisions relating to the social welfare and affairs of those who lack capacity to make their own decisions?' After a survey of international human rights instruments, and domestic and international case-law, Lord Justice Munby advanced the following propositions:

- The proper basis for the local authority's involvement is that it is the servant of those in need of its support and assistance and not their master. 'Working together' requires much more than merely requiring carers to agree with a local authority's decision, even if, let alone just because, it may be backed by professional opinion.
- The proper functions of the local authority are providing care, help and services to those who need them and protecting the vulnerable from self-harm, and abuse or exploitation by others.
- The process by which the local authority should proceed must be one that engages meaningfully with the person (P), his/her partner, relatives and carers. The wishes and feelings of P are not irrelevant because P lacks capacity; the weight to be attached to those wishes and feelings depends on the particular context.
- The guiding principle is P's best interests and his/her welfare, but that is extended beyond safety and physical health and requires a wide range of ethical, social, moral, emotional and welfare considerations to be taken into account. Risk avoidance should not be accorded undue weight: 'What is the good of making someone safer if it merely makes them miserable?'
- It is vital that care, in particular, feeding, toileting and other basic care, is provided in a compassionate manner: 'The compassion of the carer is itself a vital aspect of our humanity and dignity. At the end of the day we must treat P with respect, as a human being, and with the dignity we would wish for ourselves. P is not the mere passive object of paternalistic decision-making; s/he is someone like us.'

ROBERT ABERMAN

Lord Justice Munby delivers the keynote speech

Lord Justice Munby was followed by Judge Lush, Senior Judge of the Court of Protection. Judge Lush provided an informative and witty history of the development of incapacity law, illustrated by a number of case references, including cases in which he had presided. Judge Lush focused, in particular, on the contrasting approaches to decision-making on behalf of incapacitated adults, comprised in the UK's objective 'best interests' approach, on the one hand, and the 'substituted judgment' approach (ie, based on what P wants, or would have wanted) found in other jurisdictions, notably in the United States and, arguably, in the UN Convention on the Rights of Persons with Disabilities. He drew attention to the old case of *ex p Whitbread, in the Matter of Hinde, a Lunatic* (1816) 2 Mer 99 (a decision that forms the basis for much American jurisprudence on substituted judgment in end-of-life decisions), the Law Commission's 1995 report *Mental incapacity* and the recent decision of *Re S and S (Protected Persons), C v V* [2009] WTLR 315; [2009] LS Law Med, all of which raised interesting tensions between the two approaches.

Professor Luke Clements of Cardiff Law School chaired the late morning session on deprivations of liberty and adult safeguarding. Counsel Paul Bowen from Doughty Street Chambers, author of *Blackstone's Guide to the Mental Health Act 2007*, spoke on 'Deprivations of liberty in the health and social care context' and examined in detail the question: 'What is a deprivation of liberty (DoL)?' Paul Bowen examined the range of factors relevant to ascertaining whether or not there is a DoL, focusing, in particular, on whether restrictions on liberty might be less likely to amount to a DoL if the purpose was to provide care. He drew attention to *Re MIG and MEG, Surrey CC v CA and LA* [2010] EWHC 785 (Fam), in which Parker J had had limited regard to the reasons for restrictions when deciding that two children with learning disabilities, placed with foster carers and in a residential home, and subject to a high degree of supervision, had not been deprived of their liberty. The key to Parker J's conclusion was probably that: 'Within those homes, they are not objectively deprived of their liberty. In neither of those homes are they there principally for the purpose of being

"treated and managed". They are there to receive care' (para 230).

He also drew attention to a recent decision of Mr Justice Munby (as he then was) in *A Local Authority v A (a child) and another* [2010] EWHC 978 (Fam), in which attention was drawn to the importance of taking into account the place of confinement, and the identity of the persons imposing restrictions, when deciding that restrictions placed on a vulnerable child and adult, in their own home, by their families, in their best interests, did not amount to a DoL. Attention was drawn also to the positive obligations on public authorities under article 5 of the European Convention on Human Rights, set out in *A Local Authority*, including the duty to investigate potential DoLs and to take reasonable measures to bring DoLs to an end.

ROBERT ABERMAN

Delegates at LAG's Protecting liberties *conference*

Michael Mandelstam, author of *Community care practice and the law* and *Safeguarding vulnerable adults and the law* spoke on the topic of 'Safeguarding vulnerable adults: "No secrets"'. He criticised the lack of statutory underpinning for local authority safeguarding work and also drew attention to the lack of statutory guidance for the NHS. He argued that these 'legal black holes at the centre of safeguarding' were troubling in the light of evidence about a lack of awareness of safeguarding issues in local authorities and the NHS, the increased personalisation of care services and the retreat of the welfare state, and the overall complexity of the statutory picture. He suggested that there was a 'wilful unawareness of state-perpetrated harm'.

After the lunch interval, there were four workshops. Counsel Bethan Harris from Garden Court Chambers dealt with 'Personalisation: the transformation of adult social care'. She drew attention, in particular, to the new 2009 direct payments guidance (*Guidance on direct payments. For community care, services for carers and children's services, England 2009*), the new assessment guidance (*Prioritising need*, February 2010) and the new charging guidance (*Fairer contributions guidance. Calculating an individual's contribution to their personal budget*, July 2009) as well as the forthcoming pilot schemes for *The right to control* under the Welfare Reform Act 2009.

Solicitor Anne McMurdie from Public Law Solicitors spoke about 'Living independently: tenancies and mental incapacity'. She emphasised the legal and human importance of independent living, that tenancies can lawfully be granted to persons who lack relevant capacity, if it is in their best interests. She illustrated the arrangements that might need to be made in such cases. She also questioned whether or not it remained good law, in the light of the Mental Capacity Act 2005, that an incapacitated person was unable to make a valid homelessness application.

Counsel Catherine Casserley from Cloisters Chambers spoke about 'Equality and disability law and social care'. She considered the existing law under the Disability Discrimination Act 1995 and the changes pending as a result of the Equality Act 2010, focusing on reasonable adjustments and the case of *Royal Bank of Scotland Group PLC v Allen* [2009] EWCA Civ 1213. She also examined recent cases on the general disability equality duty and the potential effects of the UN Convention on the Rights of Persons with Disabilities.

Solicitor Simon Garlick from Ben Hoare Bell solicitors spoke about 'Supporting autism'. He considered the nature of autism, the relationship between social and health care in relation to autistic people, the likely impact of the Autism Act 2009 and of the secretary of state's autism strategy (*'Fulfilling and rewarding lives'. The strategy for adults with autism in England* (2010), March 2010) published under the Act, DoLs involving autistic persons, and how personalisation and the Law Commission's proposals were likely to impact on persons with autism.

After the lunch interval, Frances Patterson QC, Public Law Commissioner, spoke about the Law Commission's proposals for social care law reform (see 'Reforming adult social care: Law Commission consultation', March 2010 *Legal Action* 6). Currently, what is envisaged is a 'policy-neutral legal framework' capable of accommodating current and future policy changes. Thus, there would be a statutory assessment duty, but the details of the process and of any resulting care/support plan would be set out in regulations; the statute would provide for a single eligibility framework, but again the detail would be set out in regulations as would the circumstances in which a personal budget was to be provided. There would be a statutory safeguarding duty and, possibly, new co-operation duties (for example, in safeguarding cases), a single code of practice, a list of statutory principles, ordinary residence criteria for all community care services, closer integration of services under Mental Health Act 1983 s117 with community care services, duties to provide community care services in prisons and a right for young people to assessment and services under adult legislation. Consultation has closed and the Law Commission is in the process of completing its final recommendations. New legislation is possible in 2012.

The conference was brought to a close by three counsel, Ian Wise QC from Doughty Street Chambers, Zia Nabi from 1 Pump Court and Michael Fordham QC from Blackstone Chambers. Ian Wise QC summarised old and new case-law on children and human rights (including asylum-seeking children, school children and children in custody); Zia Nabi focused on the community care entitlements of families subject to immigration control in the light of new case-law developments; and Michael Fordham QC looked at the different ways in which the courts have considered the question of resources in the recent past and how practitioners should confront the problems of community care disputes in an era of economic hardship.

Spare conference packs can be ordered online at: www.lag.org.uk/careconference or telephone: 020 7833 2931, price £50 (including p&p).

This issue of *Legal Action* marks the 25th anniversary of the 'Recent developments in housing law' articles by Jan Luba QC and Nic Madge. In this special feature, John Gallagher, principal solicitor at Shelter, writes about *Legal Action*'s most prolific and enduring writing team.

'Recent developments in housing law' at 25

Twenty-five years ago, according to a well-substantiated urban myth, two youthful housing lawyers walked into LAG's offices and suggested that *Legal Action* might like to publish regular articles on recent developments in housing law. The first of a quarterly series 'designed to keep advisers abreast of recent changes in housing law and practice' appeared in September 1985. In those early days, the authors met to compile the articles in a wine bar near Kings Cross beloved of the voluntary sector. Their well-lubricated efforts were recorded on manual typewriters, though the reaction of other denizens of the hostelry to the intellectual activity taking place in their midst is not recorded.

The establishment has now gone upmarket, to the extent that even a QC and a judge (which the two young lawyers have now become) would struggle to afford its prices. However, with e-mail replacing the manual typewriters, though possibly not the red wine, the series has gone from strength to strength. In July 1998, the ever-lengthening quarterly articles became monthly, with the promise of shorter but more regular summaries. Yet such is the volume of material and the insatiable appetite of readers that each monthly article is now longer than the original quarterly articles.

In the beginning

The landscape of housing law looked very different a quarter of a century ago, compared with the present-day vista. Housing law anoraks of a certain age tend to stroke their greying or non-existent locks and think fondly of those halcyon days. There was security of tenure for most occupiers in both the public and private rented sectors, and there were fair rents for protected tenants. Private landlords were given to pretending that they had a right to share their tenants' homes or to put other people into the accommodation, and to claim that those tenants were therefore mere licensees. The right to buy, introduced by the Housing Act (HA) 1980, had not quite yet plundered all the best council homes. Legal aid (then administered by the Law Society) was relatively plentiful and its bureaucracy negligible compared with present-day Community Legal Service forms.

The foundation of 'Recent developments in housing law' has always been the case-law, both the breadth of cases reported and the authoritative case summaries, which contain just the right amount of detail. The *Legal Action* citation is readily accepted by judges, whether as a digest of fully-reported cases or as a source of case-law unreported elsewhere. In the early days, case reports were hard to come by, and the authors encouraged readers to contribute transcripts of judgments and accounts of their own cases. The standing invitation has continued to the present day, and has resulted in a unique and invaluable fund of county court and magistrates' court decisions, and of higher court cases which have settled without judgment. This practice has been particularly important in reporting the amount of damages awarded or criminal sanctions imposed, both in cases of harassment and illegal eviction, and in disrepair cases before the latter was given its own billing in a separate *Legal Action* series.

Yet the articles are about much more than the case-law. Each one gathers together changes in legislation, guidance and briefings, ombudsman's reports, policy papers, consultations, press statements and campaigns, and much more of interest to the housing worker. A trawl through the 'Recent development in housing law' articles published in the past 25 years reveals a wealth of information about the issues which preoccupied the housing world at various times and provides a fascinating insight into what it was like – and what it is like now – to practise as a housing lawyer or adviser.

The late 1980s show the courts still struggling to free themselves of the assumption that the written agreement is conclusive, especially with regard to that 1980s device, the 'non-exclusive occupation' agreement, which, along with bogus holiday lets, was more often than not a sham or pretence. During the same period, the march of deregulation culminated in the HA 1988, whereby the private rented sector and housing association world changed utterly with

the advent of assured and assured shorthold tenancies. A broad consensus which had existed since 1915 regarding security of tenure in the private sector had been shattered.

Ironically, in 2010 we find the private rented sector increasingly heralded by local authorities as an alternative housing option and even as a provider of permanent accommodation, despite the fact that the bizarrely-named assured shorthold tenancy is now the norm and the legal infrastructure of long-term security has disappeared. The HA 1988 also brought us well-publicised thrills such as housing action trusts and the 'pick a landlord' scheme for council tenants, which have now become obsolete.

© COUNSEL

Jan Luba in 1986

The first of many

The first 'Recent developments in housing law' article in September 1985 included reports of two seminal cases: one on disrepair and condensation (*Quick v Taff Ely BC*) and the other on judicial review in homelessness cases (*R v Hillingdon LBC ex p Puhlhofer*), together with the first round of county court cases on tenancies masquerading as licence agreements in the wake of the House of Lords' decision in *Street v Mountford*.

The late 1980s and early 1990s brought a regular diet of cases concerning damages claims for unlawful eviction as some landlords, seduced by the prospect of letting on the new shorthold tenancies at market rents, predictably sought to remove protected tenants who wished, inconveniently, to remain in their homes at fair rents. The article in June 1988 *Legal Action* includes the 18-rated subheading 'The chain-saw eviction'. It records an incident in the Isles of Scilly in which a landlord used a chainsaw to enter a rented cottage and saw through the wooden legs on which the cottage stood. The local ombudsman found maladministration in the council's failure to take any steps to address the landlord's behaviour. The same article noted that the secretary of state had confirmed compulsory purchase orders made on four properties owned by the notorious landlord Nicholas van Hoogstraten on the ground of harassment alone.

While the 1980s and 1990s witnessed some truly Rachman-like abuses, there continues to be an undercurrent of harassment in the private rented sector even now, although fewer claims are brought and even fewer prosecutions. The paradox of assured shorthold tenancies is that their very insecurity appears to encourage a minority of landlords to believe that all controls are off or at least that there will be no comeback.

From homelessness to human rights

Two particular themes emerge from the 1990s and early 2000s. First, there is the inclusion in the HA 1996 of a new test of eligibility for homelessness assistance based on immigration status. The criteria for European Union nationals are based on a right of residence under the EC Treaty and its Directives, which has required housing advisers to immerse themselves in EC law. Since April 2000, all but a few asylum seekers have been excluded from mainstream homelessness assistance. Second, ever more weapons in the legislative armoury have been deployed to address housing-related anti-social behaviour, including introductory, demoted and (more recently) family intervention tenancies, the remodelling of grounds for possession and anti-social behaviour injunctions.

The prevailing theme of the last decade, however, has been housing and human rights. Following commencement of the Human Rights Act 1998 on 2 October 2000, 'Recent developments in housing law' has taken us on a monthly rollercoaster of high expectation and free-fall disillusionment. Initial optimism that article 8 of the European Convention on Human Rights might provide a free-standing defence to possession proceedings has to date been confounded. The tension between European Court of Human Rights' (ECtHR) decisions such as *McCann v UK* and domestic law, notably in the House of Lords' cases of *Harrow LBC v Qazi*, *Lambeth LBC v Kay* and *Doherty v Birmingham City Council* seems set to continue in forthcoming decisions of the Supreme Court and Strasbourg. In the meantime, however, the monthly round-up of housing-related cases from the ECtHR, which has become a feature of 'Recent developments in housing law', serves to remind us that it would not be the end of the world as we know it if possession claims by public bodies were to be subjected to a proportionality review.

The articles have tracked every nuance of the law of homelessness since 1985. A random sample of influential cases must start with *Puhlhofer* (see above), in which Lord Brightman's assertion that he was 'troubled at the prolific use of judicial review' in homelessness cases has had a baleful effect on the courts' willingness to scrutinise local authority decisions generally and is still regularly quoted by the representatives of public authorities. In 1988, *R v Tower Hamlets LBC ex p Monaf* was a case in which, for the first time, authorities sought to treat as intentionally homeless families who had left accommodation overseas and exercised their right to join their settled fathers in the UK. In 1998, *R v Camden LBC ex p Pereira* attempted to make sense of the notion of 'vulnerability' by means of a comparison with a notional 'ordinary homeless person who [is] able to cope' without confronting the questions that are at the heart of all vulnerability decisions, ie, to what degree must the applicant be less able to fend for him/herself in order to be considered vulnerable, and what are the characteristics of the 'ordinary homeless person'.

Before the 1995 House of Lords' decision in *R v Brent LBC ex p Awua*, it was accepted that the housing duty owed by a housing authority to a homeless person continued until the person was permanently rehoused, but that judgment restricted the period of the duty to whatever the authority considered suitable. This ruling was soon overturned by the HA 1996, which limited the housing duty to two years. Now, since the Homelessness Act 2002, the duty is once again a duty to accommodate indefinitely, subject to discharge in prescribed circumstances. In addition, the HA 1996 produced two far-reaching structural changes. First, it introduced a strict demarcation between the functions of homelessness and of allocations: homeless persons would be entitled to 'reasonable preference' in assessing their priority for permanent accommodation, but the only route to such accommodation is through the allocation scheme. Second, the HA 1996 provided a new process for

challenging adverse homelessness decisions by a statutory review, followed by an appeal to the county court on a point of law, where previously there had been only judicial review.

Improvements and missed opportunities

What improvements can we identify in 25 years? The housing health and safety rating system, which replaced the concept of fitness for habitation, and licensing of houses in multiple occupation (though limited in scope), both introduced by the HA 2004, deserve a welcome. The funding of duty advocate schemes for county court possession hearings has been a huge success (though no sooner have the schemes been established, than they are now threatened by the current tendering process and by contracts which impose unrealistic administrative burdens). However, there have been few positive reforms in substantive law, and those that can be welcomed are beset by uncertainty (the Unfair Terms in Consumer Contracts Regulations 1999 SI No 2083) and disastrous drafting (tenancy deposit schemes).

One major missed opportunity stands out. The Law Commission's *Renting homes: the final report* and draft Rented Homes Bill (Cm 6781-ll, May 2006) sought to simplify and codify housing law. Enactment of the draft bill, or similar reforms, would, at a stroke, bring some sanity to the present jumble of common law and statute, and greater access to justice for many tenants, especially those in the private sector. The draft bill remains on the shelf, still as necessary as ever, waiting to be dusted off and implemented by any government seeking to rationalise and clarify the law in an area which so closely affects its citizens' lives.

Same as it ever was

Some things, regrettably, have not changed in 25 years, and familiar abuses re-surface in different forms. In June 1987 *Legal Action*, 'Recent developments in housing law' records complaints that insufficient time is allowed for county court possession hearings. Some private landlords exploit the power of the market and increasingly attempt to build all kinds of additional charges into their tenancy agreements. Mandatory possession Ground 8 (two months' rent arrears) is still used by some housing associations. In a perversion of a legislative scheme which aims to safeguard and promote the welfare of children, children's services departments still threaten routinely to take a homeless child into the care system rather than accommodate the parent and child together.

Nic Madge

Those who think that local authority 'gatekeeping' in homelessness cases is a post-millennium development may be interested to know that similar practices, though perhaps less subtle than present-day techniques, were abroad in the late 1980s. For example, in 1987/88, three London authorities closed their homeless persons units to personal callers, allowing access by telephone only: in December 1988 *Legal Action*, 'Recent developments in housing law' describes a successful challenge brought by Camden Community Law Centre® against the local council's use of such manoeuvres in order to reduce the volume of homeless applications. (See also page 4 of this issue.)

The 'tolerated trespasser' doctrine

The benefit of hindsight gives us a perspective on issues that once loomed large, but which have been overtaken by changes in legislation or policy. By far the most striking example is found in the December 1987 *Legal Action* report of the case of *Thompson v Elmbridge BC*, in which the Court of Appeal held that a secure tenancy came to an end as soon as there was a breach of the terms of a suspended possession order. The case gave rise (via the House of Lords in *Burrows v Brent LBC* in 1996) to the doctrine of the 'tolerated trespasser', a judicial creation which was to haunt the corridors of housing law for most of the past 25 years. The authors' prescient comment on *Thompson* anticipated the chaos in store:

> *This extraordinary decision has considerable implications. It effectively undermines [the legislative scheme] ... It is certainly inconsistent with precedent in the private sector ...* (p13).

Twenty-three years later, these were exactly the arguments used by the Supreme Court in *Austin v Southwark LBC* (see August 2010 *Legal Action* 34) to discredit the reasoning in *Thompson* and subsequent cases. In *Austin*, Lord Walker, commenting on the 'definitive obituary of the "tolerated trespasser"' candidly acknowledged the damage done by this concept of an 'unfortunate zombie-like creature [which] achieved a sort of half-life only through a series of judicial decisions in which courts failed ... to face up to the theoretical and practical contradictions inherent in the notion' (para 43). By a strange collusion of events, the tolerated trespasser has been despatched to oblivion twice over within the last 12 months, once by the Housing and Regeneration Act 2008, and more recently – lest the creature should somehow rise from the grave – by judicial recognition that it should never have existed.

Twenty-five years of housing law articles

'Recent developments in housing law' is a phenomenon, and its 25th anniversary is something to be justly celebrated. Whenever the history of housing law and policy in England and Wales comes to be written, the raw material is already there in the pages of *Legal Action*. It remains a mystery to the ordinary mortal how Jan and Nic survive the treadmill of compiling their material, reading and summarising the cases and producing their monthly copy, in addition to their day jobs.

However, for practitioners and advisers, their articles will continue to be what they have always been: an indispensable mine of information and guidance – arguably more essential than any textbook – and a cornerstone of access to justice in the housing world. Those early sessions in the Kings Cross wine bar have created a dependency culture of the best possible kind. As readers, we acknowledge our dependency and look forward to the next 25 years of *Legal Action* and of 'Recent developments in housing law'.

■ See page 34 of this issue for the latest 'Recent developments in housing law' article.

Housing benefit law update

This annual series by **Bethan Harris**, **Desmond Rutledge** and **David Watkinson** is designed to keep readers up to date with legislation, case-law and other recent developments in housing benefit (HB) law.

POLICY AND LEGISLATION

HB changes announced in June 2010 budget[1]

The new measures are as follows:

■ From April 2011, local housing allowance (LHA) rates will be capped at:
– £250 per week for a one-bedroom property;
– £290 per week for a two-bedroom property;
– £340 per week for a three-bedroom property; and
– £400 per week for a four-bedroom or more property.

■ From April 2011, the £15 weekly HB excess that some claimants can receive under LHA will be removed. (This was announced in the 2009 budget but deferred until April 2011.)

■ From October 2011, LHA rates will be set at the 30th percentile of rents in each broad rental market area rather than the median.

■ From April 2011, by amendment to the size criteria for LHA, where a HB claimant or his/her partner has an established need for overnight care, and that care is provided by someone outside the household, and they occupy a property with an additional bedroom, there will be funding for the additional bedroom.

■ In April 2011, deductions for non-dependants will be uprated on the basis of prices. This will reverse the freeze in these rates since 2001–2.

■ In 2011–12, the government's contribution to discretionary housing payments will be increased by £10 million, and then £40 million in each year from 2012–13.

■ From April 2013, housing entitlements for working-age people in the social sector will reflect family size.

■ From April 2013, HB awards will be reduced to 90 per cent of the initial award after 12 months for claimants receiving jobseeker's allowance.

■ From 2013–14, LHA rates will be uprated in line with the Consumer Prices Index.

The changes relating to the capping of LHA rates, removing the £15 HB excess, setting LHA at the 30th percentile of local rents and funding for an additional bedroom for carers are set out in draft regulations and a draft order: the Housing Benefit (Amendment) Regulations 2010 and the Rent Officers (Housing Benefit Functions) Amendment Order 2010 which will amend the existing LHA scheme.

Furthermore, the changes relating to the capping of LHA rates, removing the £15 HB excess and setting LHA at the 30th percentile of local rents will apply to new claimants from the date they come into effect and to existing claimants from the anniversary of their claim unless they have a change of circumstances which requires the local authority to redetermine the maximum rent.

The Work and Pensions Select Committee is holding an inquiry into the impact of the changes. It has invited submissions from interested organisations by 6 September 2010.[2] The Social Security Advisory Committee will be considering the draft amendments. The committee will be receiving representations until 10 September 2010.[3] Citizens Advice has published an analysis of the impact of these changes on low-income households.[4] Shelter has highlighted the likely increase in homelessness and the additional burden on homelessness and social services, as well as the poor value for the tax payer in the long term.[5]

The Department for Work and Pensions (DWP) has published an equality impact assessment.[6] This is regarded as an initial assessment. It concludes that 99 per cent of cases assessed for LHA will be affected in some way by the changes to LHA with an average loss of £12 per week. Furthermore, families are likely to be affected disproportionately by the overall caps in LHA rates and the removal of the five-bedroom rate and it may become more difficult for some HB claimants to find suitable accommodation.[7] The total reduction in spending by 2014/15 as a result of the HB changes is anticipated to be £1.8 billion a year.[8]

Child benefit no longer taken into account when calculating HB entitlement

With effect from 2 November 2009, HB Regs 2006 Sch 5 was amended so that payments of child benefit are now disregarded for the purposes of income other than earnings. This change is as a result of Housing Benefit and Council Tax Benefit (Child Benefit Disregard and Child Care Charges) Regulations 2009 SI No 1848.

New DWP guidance[9]

Paying LHA direct to landlords

In general, payments of HB in the form of LHA are to be made to the claimant and not to the landlord (HB Regs 2006 regs 95(1) and 96). The power to pay directly to the landlord is restricted to where specific criteria apply (reg 96). In response to concerns expressed by Shelter, Crisis, the national charity for single homeless people, and landlords' organisations that local authority decisions about when to make direct payments to landlords were inconsistent, the DWP has amended the guidance in the *Local housing allowance guidance manual* with changes which are set out in an explanatory circular Housing Benefit and Council Tax Benefit (HB/CTB) A26/2009 on the application of the criteria.[10] See also the DWP's *Local Housing Allowance: paying benefit and applying the safeguards. A good practice guide.*[11] The circular contains the useful reminder that when a tenant is in eight weeks' rent arrears, the security of direct HB payments (under reg 95(1)(b)) can provide an alternative to seeking possession on the mandatory ground.

Other DWP guidance

DWP guidance has been issued to local authorities on the right to reside and pregnancy, and EEA and A2/A8 workers in HB/CTB general information bulletin G2/2010 and on the national insurance number condition of entitlement to HB, with reference to recent case-law, in HB/CTB circular A13/2010.

CASE-LAW

The references below are to the Housing Benefit Regulations (HB Regs) 2006 SI No 213 unless stated otherwise.

Circumstances in which a person is or is not to be treated as occupying a dwelling as his home (reg 7)

Student treated as occupying parent's home when absent for less than 13 weeks during term time; right of appeal against basis for referral to rent officer

■ **SK v South Hams DC**

[2010] UKUT 129 (AAC), CH/2197/2009, 29 May 2010

C lived with her son, who left for university where he had a place in a hall of residence, but was expecting to return to his mother's home within 13 weeks. The local authority asked the rent officer to determine the maximum eligible rent on the property in respect of one person, instead of two. As a result, C's HB was reduced on the basis that her son was no longer occupying the premises as his normal home. An appeal tribunal upheld that decision. C appealed to the Upper Tribunal.

As there is no right of appeal against a decision to refer rent to a rent officer (Child Support, Pensions and Social Security Act 2000 Sch 7 paras 1(2) and 6(1)) the preliminary issue of whether or not there was an appealable decision fell to be considered. Judge Mesher held that the information the authority provided to the rent officer concerning the number of people occupying a dwelling was a determination or 'building block' on the way to an 'outcome decision'. An appeal against that outcome decision required the tribunal to reconsider matters afresh and this included the number of occupiers included in the reference to a rent officer.

It was held that the application of the 13-week test did not require consideration of the question of which dwelling was normally occupied. If the conditions were met, the person was deemed to be occupying the dwelling as his/her home. As C's son had intended to return to the dwelling he normally occupied as his home within 13 weeks and his room in that property had not been sublet, he satisfied the 13-week temporary absence test in regulation 7(13).

A submission that the 13-week rule could not apply if a student was eligible to receive HB on term-time accommodation under regulation 7(3) was rejected. While such a student would not count as occupying the parental home during term time, the deeming provision under regulation 7(13) remained available in respect of him/her.

Comment: On the question of whether or not there was an appealable decision when the factual basis of the rent officer's determination was being challenged, the same conclusion was reached (ie, there was an appealable decision) in *Bexley LBC v LD* [2010] UKUT 79 (AAC), CH/270/2009, 11 March 2010.

Convicted prisoner serving 15 weeks in prison and undergoing medical treatment was not entitled to HB during absence from home

■ **Torbay BC v RF**

[2010] UKUT 7 (AAC), CH/1986/2009, 14 January 2010

C was sentenced to a prison term of 12 months but was expected to serve 14–17 weeks. He was released on licence after 15 weeks. Throughout the period of imprisonment he suffered active Crohn's disease requiring continuous medication. A tribunal dismissed C's argument that he should be entitled to HB during the period of absence from his home under the 13-week rule in regulation 7(13); however, it held that C was entitled to HB under the 52-week rule, on the basis that he was undergoing medical treatment in accommodation other than residential accommodation (reg 7(16)(c)(iii)). The council appealed to the Upper Tribunal.

Allowing the council's appeal, the Upper Tribunal held that the 13-week rule was not satisfied because the period of absence was likely to exceed 13 weeks. Nor did C come within the 52-week rule because it required a direct connection between the absence and the specific circumstances listed in regulation 7(16)(c). There was no connection between the reason for C's absence from home, due to his being in prison, and his undergoing medical treatment.

Circumstances in which a person is to be treated as liable/not liable to make payments in respect of a dwelling (regs 8 and 9)

Landlord's failure to take possession proceedings did not of itself mean that there was no liability to pay rent or that the agreement was non-commercial

■ **FH v Manchester City Council**

[2010] UKUT 43 (AAC), CH/2263/2009, 15 February 2010

In November 2003, C had made a claim for HB which was not determined until over six months later, in June 2004, when the council paid arrears of just over £2,000, and then continued paying HB direct to the landlord's agent until September 2005. At that point the council made a decision to end the claim based on the mistaken belief that C had vacated the premises. C was unaware that her HB had been terminated in 2005 until she went into the council's offices in October 2007 and was told that her claim had been 'cancelled'. C put in a further fresh claim but the council asked for further information about the identity of her landlord. In January 2008, the council decided that C's tenancy agreements were sham documents and that from April 2004 she had no legal liability to pay rent within regulation 8(1); alternatively, the arrangement was non-commercial in nature under regulation 9(1). In February 2008, C appealed. The council did not deal with the appeal until November 2008. A First-tier Tribunal dismissed C's appeal.

On C's further appeal, Judge Wikeley commented that the council's delay of just over nine months in preparing the appeal was 'plainly far too long' (para 15) and endorsed the comments in *CH/3497/2005* at paragraph 6, that 'it is wholly unacceptable to the proper operation of the system of appeals in housing benefit and council tax benefit appeals that delays of this sort should occur' (para 14).

Allowing the appeal, he held that the fact that a tenant lives in a property without paying rent for a period, even an extensive period, does not of itself mean that there is no legal liability to pay rent or that the agreement is non-commercial in nature. The landlord's apparent inactivity in taking any steps to recover unpaid rent for over two years between 2005 and 2007 had to be seen against the delay in the council sorting out the initial claim and handling the appeal. The landlord may well have taken a rational economic view, borne of actual experience in the present case, that he was more likely to see his money if he desisted from seeking to press for the tenant's eviction and gave C time to pursue her appeal. See also page 17 of this issue.

Liability to a close relative/partner who also resides in the dwelling (reg 9(1)(b))

Liability arising by tenancy by estoppel with only one of the two owners of the dwelling

■ **CH/334/2009**

12 March 2010

C occupied a flat with his partner and younger daughter. In support of his claim for HB, he produced a tenancy agreement by which his elder daughter was expressed to be the landlady and him to be the tenant. The elder daughter did not live at the flat. The local authority found that the both daughters were registered as long leaseholders at the Land Registry. It then applied regulation 9 (1) (b) (liability is to a person who also resides in the dwelling and who is a close relative of his or his partner) so that C was treated as not liable to make payments in respect of the dwelling. The First-tier Tribunal upheld the decision to refuse him HB on this basis.

The Upper Tribunal allowed C's appeal and

remitted the case for a rehearing. The tribunal had not considered whether or not there was a binding tenancy agreement between the elder daughter and her father notwithstanding that the younger daughter was not a party to the tenancy agreement. There was a possibility of a tenancy by estoppel between the elder daughter and her father: a person who had no or only a partial interest in land could, nevertheless, grant a tenancy to another that was binding between him/her and that other person, although not binding on the true owners. The First-tier Tribunal should also consider whether or not any other head of regulation 9(1) applied and whether or not the local authority knew the true position about ownership from the outset so that C could rely on an official error.

Comment: For a leading case on tenancy by estoppel, see *Bruton v London and Quadrant Housing Trust* [2000] 1 AC 406, HL, 24 June 1999.

Persons from abroad (reg 10)

Right to reside of parents of children in education

■ Harrow LBC v Ibrahim and Secretary of State for the Home Department

C-310/08,
23 February 2010,
April 2010 Legal Action 25

■ Teixeira v Lambeth LBC and Secretary of State for the Home Department

C-480/08,
23 February 2010,
April 2010 Legal Action 26

In order to qualify for HB, a claimant must have a right to reside in the UK, the Channel Islands, the Isle of Man or the Republic of Ireland (reg 10). In both of the above cases, which were decided in relation to homelessness legislation, the European Court of Justice (ECJ) held that the schoolchildren of EU nationals who had worked in the UK, and the parents of such children, had freestanding and unconditional rights to reside in the UK under article 12 of Regulation (EEC) No 1612/68.

The ECJ's decisions apply equally to the right to reside in the HB context. HB/CTB circular A10/2010 contains DWP guidance on their effect on HB cases. See April 2010 *Legal Action* 25 and 26 for the facts of these cases. See also page 18 of this issue.

Determination of LHA (reg 13D)

Foster children are occupiers for the purposes of LHA size criteria

■ Wirral MBC v AH and Secretary of State for Work and Pensions

[2010] UKUT 208 (AAC),
CH/1608/2009; CH/3000/2009; CH/247/2010,
24 June 2010

Two of the appeals concerned whether or not a child who was subject to a fostering arrangement under Children Act 1989 s23(2)(a) should be taken into account when determining the number of bedrooms to be reflected in the calculation of a claimant's HB in the form of LHA. The third appeal concerned the treatment for LHA purposes of a child who spent equal time with each of two separated parents.

Judge Ward rejected the argument asserted on behalf of the three claimants that the LHA scheme in regulations 13C and 13D was a self-contained regime to which other parts of the regulations were not relevant. He found in favour of the claimants in the first two appeals: whereas regulation 21(3)(a) meant that a foster child could not be treated as a member of the claimant's household, a foster child was, nevertheless, occupying the dwelling within regulation 7(1)(a) and, therefore, was a person who was occupying as a home the dwelling to which the claim related for the purposes of regulation 13D(12). The judge found against the claimant in the third appeal: regulation 20 applied with the effect that the child was treated as normally living with the father and not the claimant, as it was the father who received the child benefit.

Comment: The DWP has issued HB/CTB general information bulletin G11/2010, amended by HB/CTB general information bulletin G12/2010, stating that the decision is contrary to the department's policy and that amending regulations are planned for autumn 2010.

Time and manner in which claims are to be made (reg 83)

What constitutes a 'claim' for HB?

■ Novitskaya v Brent LBC and Secretary of State for Work and Pensions

[2009] EWCA Civ 1260,
1 December 2009

This case establishes that a claim for HB can be made without the use of explicit wording to indicate that a claim for that benefit is being made. C was an asylum-seeker who, when granted refugee status, became entitled to claim HB backdated to when her asylum claim was first recorded if she made a claim within 28 days of notification of the grant of refugee status. C also became entitled to income support (IS) and any claim for HB made within 28 days of a claim for IS would be deemed to be made on the first day of entitlement to IS. She did not submit a completed claim form for HB within either period, but within the second period, on 10 June, she gave the DWP a statement headed 'HB and income support' in which she wrote: 'I would like my benefits income support or whatever else I am [entitled] to, to be backdated from the date I became asylum seeker ...' (para 5). On 24 June, she delivered a completed claim form. The question for the court was whether or not by the statement of 10 June C made a claim, albeit a defective one.

By Housing Benefit (General) Regulations 1987 SI No 1971 reg 72, if a claim was defective, for example, because it was not on an approved form, the local authority could provide the claimant with a copy of the approved form. In addition, the claim was to be treated as having been made when the defective claim was received, if the properly completed form was received within four weeks or such longer period as the authority considered reasonable (see now the almost identical provisions in HB Regs 2006 reg 83(8) and (8A)).

The court held that: a claim must be in writing; it must be clear that a claim is being made; and clarity may be obtained from the document itself or the document interpreted in its context.

C's statement referred to HB and the reference to backdating showed that a claim was being made. It was not necessary that every benefit being claimed was named expressly. It was sufficient if a reasonable official receiving the document could understand which benefits were being claimed.

The claimant might, after all, not know the correct name of the benefit that she needed. It cannot have been the intention of parliament that she should go without the benefit because she did not know the right name (para 28).

The 10 June statement therefore constituted a claim for HB. It was a defective claim and was therefore cured by the delivery of the duly completed form 14 days later.

Comment: The judgment is also useful for its approach to interpreting welfare benefits legislation:

Social security legislation is enacted primarily for the benefit of social security claimants. Its meaning can therefore be tested from the perspective of such a claimant, or ... adviser (para 10).

The DWP has issued guidance on the decision in decision makers' guide memo 03/10.

Estimate of average weekly earnings (reg 29); defective claims (reg 83); evidence and information (reg 86)

Failure to comply with a request for information on earnings before an initial decision on a claim has been made

■ **NC v Tonbridge & Malling BC**

[2010] UKUT 12 (AAC),
CH/978/2009,
19 January 2010

In October 2007, C started work at Woolworths. On 16 November 2007, she submitted a HB claim form stating that she worked for 16 hours per week at £5.52 per hour and was paid on a four-weekly cycle and a letter from Woolworths confirming these details. In the section headed 'proof of earnings', the claim form stated that if C was paid monthly and did not have her last two pay slips, her employer could complete a certificate of earnings. The local authority decided that the claim form was not completed properly and on 20 November 2007 sent C a letter asking her to provide pay slips for November and December as soon as she received them. The letter also stated that if a reply had not been received within one month, it would be assumed that C no longer wished to proceed with her claim and it would be withdrawn. C did not reply and the local authority refused her claim on the basis that she had not made it in the correct way and had not provided all the information the local authority needed to make a proper decision on the claim. C's appeal to the First-tier Tribunal was dismissed.

On her further appeal to the Upper Tribunal, the appeal was allowed. It was held that:

■ the local authority already had a good estimate of her likely weekly earnings in the form of the letter from Woolworths offering her employment; and

■ regulation 29(2)(b) put the obligation to obtain an estimate of earnings on the local authority; it could not put the burden of asking the employer for the estimate on the claimant.

Accordingly, C's claim form had been completed properly for the purposes of regulation 83(1). The local authority was not entitled to regard the claim as defective or to request any further information or evidence under regulation 83(7)(a) (ie, form not properly completed). If a local authority requested information before an initial decision had been made on a claim, in a case where regulation 83(7)(a) could not be invoked, there was no direct sanction for failure to comply, save where the result was that the evidence was not sufficient to support there being entitlement to benefit, but that was not the case here.

Recoverable overpayments (reg 100)

Defence of 'official error' where there are overpaid amounts of HB arising from separate and distinct causes

■ **SN v Hounslow LBC**

[2010] UKUT 57 (AAC),
CH/2297/2009,
18 February 2010,
August 2010 Legal Action 8

Whereas in *R (Sier) v Housing Benefit Review Board of Cambridge City Council* [2001] EWCA Civ 1523, 8 October 2001 it was held that an overpayment was recoverable if the claimant was substantially responsible for it, *SN* makes clear that the question of whether or not an overpayment arose in consequence of an official error (regulation 100(2)) should be applied separately to any overpaid amounts within the overall total which can be identified as due to separate and distinct causes. See August 2010 *Legal Action* 8 for the facts of this case.

Official error: whether claimant could not reasonably have been expected to realise it was an overpayment (reg 100(2))

■ **CH/1903/2009**

29 October 2009

In August 2007, C made a new claim for HB in which she declared that she received child benefit and provided bank statements which also showed that she received child benefit. One of the authority's officials visited her to help complete the form and provided C with an estimate of the amount of benefit to which she probably would be entitled. One month later, the authority sent a notification letter which enclosed five pages of calculations set out in what the judge said 'might be described as a "user-unfriendly" way' (para 3). These calculations did not in fact refer to C receiving child benefit. In October 2007, C contacted the authority to query why the benefit awarded was less than the estimate provided during the home visit and again stated that child benefit was in payment. In response, the authority sent a further five-page batch of calculations. It then made further queries about C's husband which resulted in a further 20 pages of calculations being sent to her in October 2007; in February 2008, a further five pages were sent to C. The authority only realised that it had failed to take the child benefit into account when C completed a review form in August 2008. While the resulting overpayment of £410 clearly had been caused by official error, the authority decided that it was recoverable as C could reasonably have been expected to realise that there was an overpayment (reg 100(2)). A tribunal upheld the decision on the basis that C had received instructions to check the details and that the mistake related to the absence of a source of income rather than problems with the arithmetic; such an omission should have been 'readily apparent'.

Judge Levenson held that the instant case had taken inadequate account of the complexity of C's financial affairs, including the mass of calculations with which she had been faced. It had also ignored the further disclosure made by the claimant in October 2007. The tribunal chairperson appeared to have assumed that because the omission of a source of income was 'readily apparent' to the tribunal, it must have been 'readily apparent' to C. The judge substituted a decision that at the time of receiving payment or any notice relating to it, this particular claimant could not reasonably have been expected to realise that there was an overpayment.

Whether a HB decision-maker is bound by a decision made by the DWP

■ **GB v Hillingdon LBC**

[2010] UKUT 11 (AAC),
CH/1987/2009,
18 January 2010,
August 2010 Legal Action 9

On C's appeal against the decision of a First-tier Tribunal that she was liable for a substantial overpayment of HB and CTB, Judge Wikeley dealt with the question of how far a local authority deciding a HB or CTB claim is bound by a DWP social security decision-maker's award of IS.

In *R v Housing Benefits Review Board of Penwith DC ex p Menear* (1992) 24 HLR 115, it was held that a local authority was bound for HB purposes by the decision of the DWP on capital and income issues (see Sch 4 para 12 and Sch 5 para 4). While agreeing with *ex p Menear* in principle, the Court of Appeal in *R v South Ribble BC Housing Benefit Review Board ex p Hamilton* (2001) 33 HLR 104 held that that was not the case if IS had been awarded as a result of fraud or dishonesty by the claimant. The claimant must be 'lawfully' receiving IS.

In this case, Judge Wikeley conducted a review of the case-law (paragraphs 21–33) from which the following principles can be extracted:

■ If the DWP has considered whether IS was lawfully awarded and is not persuaded otherwise, the local authority is bound by that decision in respect of the award of HB (see *ex p Menear*).

■ If the DWP has decided that IS was not lawfully awarded, the local authority is entitled to decide the same.

■ However, the local authority continues to be bound by the DWP decision to make an award until the department has concluded its

consideration; the fact that the DWP is actively considering the position does not entitle the local authority to revise the award of HB.

If the DWP decides to take no action because it has insufficient evidence (for example, because papers are lost) the local authority can open up the issue that IS was not lawfully obtained, producing relevant evidence (*see ex p Hamilton*).

It was not necessary for the local authority to show that a claimant had been convicted of an offence of fraudulent or dishonest conduct in relation to his/her IS claim. The burden of proof on the local authority when alleging fraud or dishonesty was the balance of probabilities, not the criminal standard or an enhanced balance of probabilities (paras 36–37). See August 2010 *Legal Action* 9 for the facts of this case.

Sums to be deducted in calculating recoverable overpayments (reg 104)

Local authority failed to calculate an underlying HB entitlement

■ **HN v Brent LBC**

[2009] UKUT 289 (AAC), CH/225/2009, 11 December 2009

C claimed HB as a lone parent when in fact she was living with her husband, who was working. The local authority calculated an overpayment in respect of HB over five years of £58,797. However, regulation 104(1) (sums to be deducted in calculating recoverable overpayment) had not been considered.

On appeal to the Upper Tribunal, Judge Lane directed that C's underlying entitlement to HB be calculated, taking into account the amount of her husband's wages and the fact that a further child had been born to the couple. As a result, the overpayment of HB was reduced to £3,572.

Comment: In an overpayment case, the claimant's underlying entitlement to HB is overlooked sometimes; however, when taken into account, it may reduce the amount of the overpayment considerably.

HB overpayments and the Limitation Act 1980

Recovery of overpaid HB statute-barred after six years

■ **Joseph v Newham LBC**

[2009] EWHC 2983 (Admin), 20 November 2009, August 2010 Legal Action 8

See August 2010 *Legal Action* 8 for the facts and comments in relation to this case.

The High Court held that a local authority's right to recover an overpayment of HB by way of deductions from future HB was lost after six years from the date of notification of the overpayment. This was because Limitation Act 1980 s9 operated to make the overpayment no longer recoverable. The ruling is a departure from the orthodox view that the statute bar operates only in relation to actions in the courts and not to recovery by deduction from benefit.

HB overpayments and debt relief orders

Recovery of overpayments where claimant is subject to a debt relief order

■ **R (Cooper and Payne) v Secretary of State for Work and Pensions**

[2010] EWHC 2162 (Admin), 26 July 2010

The claimants were subject to debt relief orders (DROs). They faced recovery from their social security benefits of an overpayment of incapacity benefit and a social fund loan respectively. On their challenges by judicial review to the decisions to recover from their benefits, the court held that the making of a DRO precluded the secretary of state from recovering overpayments of benefit or social fund loans from ongoing entitlement to benefit because that would be exercising a 'remedy in respect of the debt' within the meaning of Insolvency Act 1986 s251G(2)(a). Given the differences between the DRO scheme and bankruptcy, benefit authorities could not simply adopt the approach in previous case-law, namely that the right to make deductions continued until the debts were discharged: *R v Secretary of State for Social Security ex p Taylor and Chapman* [1997] BPIR 505 considered. The secretary of state has been granted a stay of execution of the judgment pending an expedited appeal.[12]

PRACTICE AND PROCEDURE

Date for the taking effect of decisions superseding earlier decisions, when based on an award of a qualifying benefit (Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001 SI No 1002 regs 7(2)(i) and 8(14))

HB increase backdated three years, to date claimant first qualified for DLA

■ **HR v Wakefield MDC**

[2009] UKUT 72 (AAC), CH/3524/2008, 28 April 2009

In March 2007, C wrote to the council asking for his HB to be reassessed because he was receiving disability living allowance (DLA). This benefit had been awarded since January 2004. The council reassessed his HB award, taking into account the DLA award from April 2007, when the letter was received, on the basis that entitlement to that benefit had been notified more than one month after the award of DLA had effect (Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations (HB & CTB (Decisions and Appeals) Regs) 2001 reg 9 (late notification)). C relied on HB & CTB (Decisions and Appeals) Regs reg 8(14), which provides that a superseding decision shall take effect from the date on which entitlement to the qualifying benefit (here, DLA) arises. An appeal tribunal dismissed C's appeal.

On C's further appeal, the council argued that either regulation 9 or regulation 8(3)(b) and (c) (effective date following a late notification) should apply. Judge Jupp disagreed. The judge held that regulation 8(14) applied and substituted a decision that C's HB was to be increased with effect from his entitlement to DLA in January 2004.

1 *Budget 2010* is available at: www.hm-treasury.gov.uk/d/junebudget_complete.pdf and see note 6.
2 Visit: www.parliament.uk/business/committees/committees-a-z/commons-select/work-and-pensions-committee/inquiries/impact-of-the-changes-to-housing-benefit-announced-in-the-june-2010-budget/.
3 The DWP's *Explanatory memorandum for the Social Security Advisory Committee* and equality impact assessment of the changes, and a copy of the draft regulations, are available at: www.ssac.org.uk/pdf/housing-regulations-2010.pdf.
4 *The coalition budget 2010: key welfare changes and their impact on low income households*, July 2010, is available at: www.citizensadvice.org.uk/index/campaigns/policy_campaign_publications/consultation_responses/cr_benefitsandtax credits/the_coalition_budget_2010.htm.
5 Visit: http://england.shelter.org.uk/housing_issues/local_housing_allowance.
6 *Equality impact assessment housing benefit: changes to the local housing allowance arrangements and housing benefit size criteria for people with non-resident overnight carers* is available at: www.dwp.gov.uk/docs/lha-and-carers-eia.pdf.
7 See note 6 at pp8, 11 and 12.
8 See note 4 at p8.
9 DWP circulars, bulletins and other guidance are available at: www.dwp.gov.uk. Readers should note that although they can provide a useful guide, the documents are not necessarily an authoritative statement of the law.
10 Available at: www.dwp.gov.uk/docs/lha-guidance-manual.pdf.
11 Available at www.dwp.gov.uk/docs/lha-good-practice-guide.pdf.
12 Urgent bulletin U5/2010 has been issued by the DWP in respect of this judgment. It is available at: www.dwp.gov.uk/docs/u5-2010.pdf.

Bethan Harris, Desmond Rutledge and David Watkinson are barristers at Garden Court Chambers, London.

Recent developments in social security law – Part 2

Simon Osborne and **Sally Robertson** continue their six-monthly series. This article reviews recent case-law developments in both non-means-tested benefits (including employment and support allowance) and means-tested benefits as well as tax credits. In addition, relevant decisions of the Administrative Appeals Chamber of the Upper Tribunal from December 2009 to June 2010 appear in summary form. Part 1 of this article was published in August 2010 *Legal Action* 8.

NON-MEANS-TESTED BENEFITS

Employment and support allowance

This decision, the second in this category, provides a timely reminder that the wording used in questionnaires and medical reports is not the same as, and may be narrower than, the statutory test.

Mental health descriptors: activity 19: coping with social situations

■ **JE v Secretary of State for Work and Pensions (ESA)**

[2010] UKUT 50 (AAC), CE/2373/2009, 23 February 2010

The claimant had been found not to have limited capability for work. She was ill because of anxiety attacks and depression. Following submission of her ESA50 questionnaire and after being examined, with an ESA85 medical report issued, she was not awarded any points under the mental health descriptors. At the First-tier Tribunal, she was awarded six points under those descriptors for problems with 'getting about' (activity 18), but none for 'coping with social situations' under activity 19.

Judge Williams allowed the claimant's appeal and remitted the case to a new tribunal. The tribunal had erred in not dealing with activity 19 properly, in particular, in adopting the evidence of the ESA50 questionnaire and the ESA85 medical report without considering differences between the wording used in those documents and the wording used in the descriptors under activity 19 itself, the latter of which is the statutory test. In particular, the descriptors include reference to being precluded from engaging in 'normal activities', with examples such as visiting new places or engaging in social contact. The ESA50, however, asks only about 'problems mixing with other people' and 'meeting new people or going to new places'. The ESA85 deals with the descriptors under 'adapting to change – activity outcomes', and although various descriptors were brought forward from elsewhere in the form, some which were apparently relevant to the actual wording of the descriptors were not. The tribunal had not dealt with all this adequately.

The judge reproduced evidence from the secretary of state regarding medical services policy on the application of activity 19. This included that the activity 'is intended to reflect lack of self-confidence in social situations that is greater in its nature and its functional effects than mere shyness or reticence', and that 'normal activities' may include visiting new places or engaging in social contact and activities such as using 'public transport; shopping; talking to neighbours; use of phone; hobbies and interests; social interaction with family' (para 13). The judge did not comment specifically on the list except to say that 'the test of "normal activities" is potentially wide', and that the activities contemplated were those of '"normal" people, not the previous activities of the claimant'. However, the 'overwhelming fear or anxiety' referred to in the descriptors did not have to occur in all normal activities or to occur continually (para 15).

Industrial injuries disablement benefit

Exactly what constitutes an 'accident' for the purposes of this benefit continues to generate case-law. This Court of Appeal decision in effect restores the notion that an accident must be an external event which was distinct from the injury that it caused.

Industrial accident: work-related stress and cardiac arrest

■ **Secretary of State for Work and Pensions v Scullion**

[2010] EWCA Civ 310, 23 March 2010

The Court of Appeal allowed an appeal against the decision of then Commissioner Bano in *CI/2842/2006*, 11 January 2008, with the effect that the claimant's cardiac arrest, resulting from work-related stress, was not itself an industrial accident for the purpose of industrial injuries benefit. The commissioner had held that the claimant's cardiac arrest counted as an accident, on the basis that in cases of an unexpected injury which is causally connected with work (both of which, held the commissioner, applied in this case) there was nothing requiring the claimant to show in addition that his injury was caused by some identifiable and exceptional event. However, the Court of Appeal rejected his analysis. Lord Justice Pill held that the relevant case-law, including, in particular, *Chief Adjudication Officer v Faulds* [2000] UKHL 26, 11 May 2000, reported as *R(I) 1/00*, established that there was a distinction between accident, in the sense of a 'causative event or incident', and injury. That applied to a cardiac arrest as it does to a stress-related disorder, and meant that the claimant's argument that the cardiac arrest was itself an accident could not be accepted (para 20).

Lord Justice Aikens added that 'there is a clear line of House of Lords authority … in which judges of the highest authority had insisted on the distinction between the "accident", which must be external, and the resulting "injury" to the claimant, whether the type of personal injury suffered by the claimant was of an expected type or an unexpected type' (para 49). Instead of holding that cardiac arrest to have been an accident, the commissioner ought to have asked, 'what external event or series of events (allied or not to some action by the claimant) had some physiological or psychological effect on the claimant?' (para 53). Here, there was no evidence that any external event, such as lifting a very heavy pile of papers, opening a file drawer which had stuck, or even lifting an arm to get heavy papers from a shelf, caused the cardiac arrest.

MEANS-TESTED BENEFITS AND TAX CREDITS

Income and capital: equal pay settlements

There is no statutory provision for determining what is to count as income and

what is to count as capital, both terms requiring to be given their ordinary, natural meaning. The following decision concerning the treatment of an equal pay settlement as income, with disadvantageous benefit results for the claimant, may seem counter-intuitive not least because it seems to treat the money both as wages and (in another context) as compensation. Permission to appeal has been sought in this case. It is understood that permission to appeal has been granted in an earlier decision which it cites at length.

■ Secretary of State for Work and Pensions v JP (JSA)

[2010] UKUT 90 (AAC), CJSA/0475/2009, 25 March 2010

The claimant's employer made her an offer of settlement under the Equal Pay Act (EqPA) 1970, to the effect that she would be paid ten per cent of the offer and could either accept the offer as a whole and be paid the remaining 90 per cent or reject it, in which case she would keep the ten per cent but have that treated as already paid on account of any award from an employment tribunal (ET). The claimant rejected the offer. For jobseeker's allowance (JSA), the ten per cent (around £700) was treated as earnings (although not in the form of a compensation payment) but the appeal tribunal, although agreeing that it was not compensation, decided that it should not be treated as earnings as 'the payment is to compensate for possible past historic inequalities and should not have been used to affect the appellant's entitlement to income support in the future (see *CIS/590/1993*)' (para 9).

Judge Jacobs held that the tribunal had erred in law, holding that, on the facts of this case, the settlement money was earnings, and they were to be applied to a future period. It was not a compensation payment within the meaning of Jobseeker's Allowance Regulations (JSA Regs) 1996 SI No 207 reg 98(1)(b) and (3)(a), but it was earnings. In this case, the ten per cent was in itself a one-off payment, but was in anticipation of a later award by the ET. The essence of her claim there was for the amount she would have been paid had her employer honoured the equality clause that was part of her contract as a result of the EqPA, ie, for 'wages that she ought to have been paid' (para 26).

This was in contrast to (and therefore to be distinguished from) an earlier case, *EM v Waltham Forest LBC* [2009] UKUT 245 (AAC), 26 November 2009, which concerned a payment in settlement (accepted with a compromise agreement) of a potential claim under legislation regarding prevention of less favourable treatment for part-time workers and concerned arrears of bonus payments.

In that case (cited at length by Judge Jacobs), Judge Wikeley held that the payments were capital payments for a breach of the relevant regulations and were not paid in respect of clear contractual liability for a past period. In contrast, for Judge Jacobs, the payment in the present case was essentially in regard of earnings to which the claimant was entitled under her contract, and therefore income.

Turning to how the income was to be attributed, first, there was no specific past period to which the unpaid wages had been related. Therefore, they fell under JSA Regs reg 94(2)(b) to be applied so as to deprive the claimant of JSA for the maximum number of weeks. Regarding when this period was, in *CIS/590/1993* (cited by the tribunal) the commissioner interpreted the equivalent income support (IS) provision so as to attribute earnings to the past period in which they would have been paid. However, the judge disagreed, at least regarding application of that to the present case. It was not a 'late payment of money that was due earlier', but 'compensation' in a 'lump sum' and not paid in respect of any period (para 33). Therefore, it fell to be treated under reg 96(1)(b) as paid on the first benefit week in which it is practicable to take it into account after payment.

Housing benefit

Claimants who have their rent considered a 'sham' or otherwise not on a commercial basis do not get housing benefit (HB) and are therefore particularly vulnerable to ill-considered decision-making. This decision provides some helpfully clear thinking on why certain facts can have more than one explanation.

Liability: 'sham' agreements and non-commercial basis

■ FH v Manchester City Council (HB)

[2010] UKUT 43 (AAC), CH/2263/2009, 15 February 2010

The claimant, a lone parent with five children, was held not to be entitled to benefit and an overpayment was raised. Ultimately (ie, as before the judge) this was on the basis that her tenancy agreement was a 'sham' and therefore she was not liable to pay rent, or alternatively that she was liable but the tenancy was not on a commercial basis. The reasons for this were that she had not paid any rent (other than that paid by HB) and the landlord had not taken any steps to enforce possession. The First-tier Tribunal had disallowed the claimant's appeal. It held that the tenancy was not on a commercial basis or had been created to take advantage of the HB scheme.

Judge Wikeley allowed the claimant's further appeal. He substituted a decision that the claimant was entitled to benefit as she was liable to pay rent, the agreement was on a commercial basis and it had not been created to take advantage of the HB scheme. The tribunal had erred in holding that the tenancy was not commercial or had been created to take advantage of the HB scheme. Although it was true that the claimant had not paid rent for some time, that did not of itself mean that there was no legal liability to pay rent. That it did mean that there was no legal liability to pay rent 'simply cannot be right as a matter of law and amounts to an error of law' (para 30).

It was also true that the landlord had not sought enforcement of rent owed from the 2005 to 2007 period. However, on the facts of the case the landlord's inactivity must be seen against the considerable delays that had occurred both in sorting out the initial claim and in handling the claimant's appeal. The landlord was also aware of the claimant's difficult personal circumstances. That might explain the inactivity, but did not mean either that there was no liability or that the agreement was non-commercial (*CH/0296/2003* and *CH/3586/2005*, 26 May 2006 cited). Similarly, the landlord's repayment of overpaid benefit was not proof of that as there were several plausible explanations for it (including ignorance of what had happened). Bearing in mind the facts, the judge was not satisfied that the local authority had shown that the tenancy agreement was a 'sham', as explained in *R(H) 3/03*, 5 September 2002. See also page 12 of this issue.

Income support

Among the dwindling number of categories of claimant who can still claim IS, currently there remains an important one for young persons who are estranged from their parents or otherwise have to live away from them or anyone acting in their place. This decision provides some helpful detail on what it means to be acting in the place of a parent.

■ NP v Secretary of State for Work and Pensions

[2009] UKUT 243 (AAC), CIS/976/2009, 25 November 2009

The claimant was aged 16 (and counted as being in 'relevant education'). She had had to leave home and was staying with her boyfriend at his father's house. She claimed IS, and her entitlement depended on her having to live away from her parents and 'any person acting in place of' her parents: Income Support (General) Regulations 1987 SI No 1967 reg 13(2)(d).

On her claim for IS, she told the Department for Work and Pensions (DWP) that the boyfriend's father did not provide

supervision, care or guidance, although she conceded that he did provide some shelter and food. That was in essence confirmed by the father, who said that he had no intention of claiming benefits for her or supporting her financially further once the IS claim was completed, although he conceded that he did provide 'social [and] moral guidance' and that she was content to follow house rules. The DWP refused the IS claim on the basis that the claimant was not living away from 'any person acting in place of' her parents, and so failed to satisfy reg 13(2)(d). That decision was upheld by the tribunal, which made reference to the 'social [and] moral' guidance and the following of house rules, and concluded that the boyfriend's father was acting in a 'parent-like role'.

Judge Wikeley allowed the claimant's further appeal. He held that she was indeed living away from her parents and anyone acting in their place, and was therefore entitled to IS. The tribunal had taken an incorrect view of what amounted to acting in the place of someone's parents. The leading decision on the matter is *R(IS) 9/94*, 21 June 1993. It was held there that the claimant's sponsor for immigration purposes was not acting in his parents' place as her duties were 'limited and do not equate with the duties of a parent or person in loco parentis' (para 13 of *R(IS) 9/94*). The latter expression means, for example, 'a person taking upon himself the duty of a father of a child to make provision for that child (*Bennet v Bennet* 10 Ch D 477 per Jessel MR)' (para 21). For the judge, the statutory test 'suggests some degree of parity or equivalence between the parent and any person who may be acting in the parent's place' (para 22). That did not require formal parental responsibility but 'the adult must in practice be acting broadly in a way that a parent would' (para 23). In the present case, the boyfriend's father was simply doing what was reasonable in all the circumstances, he had expressly disclaimed parental responsibility and refused to treat her as part of his household for benefit purposes, and his conduct lacked 'the greater degree of permanence and commitment' required to amount to acting in the parents' place (para 24).

Right to reside and habitual residence test

Primary carer of child in education

Two decisions of the European Court of Justice (ECJ) have confirmed a very important right to reside for the primary carers of a child in education, where the child is the child of a migrant European worker. On their facts, the decisions concern the rights of European nationals who were not from the accession states (so-called A8 and A2 nationals); however, it is very arguable that they also apply to such people, and a domestic decision on this was awaited at the time of writing.

■ **Ibrahim (European citizenship) [2010]** *C-310/08, 23 February 2010*

The ECJ held that there was a right to reside for the primary carer. That right was derived from article 12 of Regulation (EEC) No 1612/68, which had not been removed, contrary to some domestic case-law, by the coming into force in April 2006 of Council Directive 2004/38/EC, otherwise known as the 'Citizenship Directive'. As such, the court confirmed the continued existence of this right to reside of the primary carer, as confirmed originally in the court's decision in *Baumbast and R v Secretary of State for the Home Department* C-413/99, 17 September 2002; [2002] ECR I-7091.

The claimant (the mother) was a Somali national married to the father of their children, a Danish citizen. He came to the UK in 2002 and worked until 2003 when he fell ill. The claimant arrived (with their three children) to join her husband shortly before he fell ill (ie, while he was still working); two of the children attended state schools and a fourth child was born in the UK. The husband left the UK in 2004, and then the claimant separated from him. She was never self-sufficient, was dependent on social assistance and did not have comprehensive sickness insurance. She was refused housing assistance on the basis that she did not have a right to reside. She argued that she did as, applying the *Baumbast* principle, she was the primary carer of the children of an EU citizen who was a migrant worker, and the children were in education. The matter was referred to the ECJ by the Court of Appeal.

The ECJ held, in response to the questions posed by the Court of Appeal, that:

■ it was not the case that the claimant and her children enjoyed a right of residence only if they came within the terms of Directive 2004/38/EC;

■ they did enjoy a right of residence derived from article 12 of Regulation (EEC) No 1612/68; and

■ it was not required that they had access to sufficient resources so as not to become a burden on the social assistance system or that they had comprehensive sickness insurance cover.

The *Baumbast* decision had established that:

> *the children of a citizen of the Union who have installed themselves in a member state during the exercise by their parent of rights of residence as a migrant worker in that member state are entitled to reside there in order to attend general educational courses there, pursuant to article 12 of Regulation No 1612/68. The fact that the parents of the children concerned have meanwhile divorced, the fact that only one parent is a citizen of the Union, and the fact that that parent has ceased to be a migrant worker in the host member state are irrelevant in this regard* (para 29).

Also, where the children continued to enjoy their right to education, they had the right to be accompanied by the person who is their primary carer and 'that person is able to reside with [them] in that member state during [their] studies' (para 31). These rights were not affected by Directive 2004/38/EC, which had not repealed article 12 of Regulation (EEC) No 1612/68, which was intended to secure freedom of movement for workers and made no reference to the need for independence from social assistance or for sickness insurance.

■ **Teixeira (European citizenship) [2010]** *C-480/08, 23 February 2010*

This ECJ decision is in very similar terms to that of *Ibrahim* (see above). The claimant, a Portuguese national, was refused housing assistance on the basis that she was not considered to have the right to reside. The claimant contended that she did, on the basis of being the primary carer of a child in education who was the child of a migrant EU worker.

The ECJ held that the claimant did have the right to reside as she claimed. Its reasoning was identical to that in *Ibrahim*. In addition, the ECJ clarified that it was not required that the child first entered education when the EU citizen was a worker in order to have a right to reside under article 12 of Regulation (EEC) No 1612/68. There was nothing in the wording of the article that required that and it was 'enough that the child who is in education in the host member state became installed there when one of his or her parents was exercising rights of residence there as a migrant worker' (para 74).

Also, the ECJ considered the issue of whether or not the right of residence ends when the child reaches the age of majority, as although the daughter was aged 15 when the application for housing assistance was made, she was aged 18 by the time of the court's decision. The court held that article 12 made no explicit reference to age, and as it extended to higher education, the date the child completed his/her education may be after reaching the age of majority and after ceasing to be dependent on his/her parents, so that the child could retain the right to

reside until completing higher education. Regarding the primary carer, the court held at paragraph 86 that his/her right to reside may extend beyond the age of majority of the child, 'if the child continues to need the presence and the care of that parent in order to be able to pursue and complete his or her education'. See also page 13 of this issue.

Workers

Recent decisions have emphasised the distinction between the right to reside of someone who retains his/her worker status while unemployed, and that of someone referred to in the domestic rules as a 'jobseeker'. However, according to the domestic courts at least, it would seem that workers may only retain that status while unemployed if they were an employed worker, rather than self-employed.

Retained worker status: involuntary unemployment: whether required to have claimed JSA successfully

■ Secretary of State for Work and Pensions v FE

[2009] UKUT 287 (AAC), CIS/184/2008, 18 December 2009

The claimant, a French national, came to the UK to work in 2005. She was made redundant in May 2006, at which point she started looking for part-time work, and eventually claimed IS. In her interview regarding the habitual residence test, she stated that she was seeking work, including on documents which were handed in to the jobcentre. She was refused IS on the basis that she did not have the right to reside.

However, the appeal tribunal allowed her appeal, on the basis that she had the right to reside as someone who had retained worker status in involuntary unemployment. Specifically, she came under article 7(3)(c) of Council Directive 2004/38/EC, otherwise known as the 'Citizenship Directive', which provides a right to reside as someone who has retained worker status for someone who is 'in duly recorded involuntary unemployment … having become involuntarily unemployed during the first twelve months and has registered as a jobseeker with the relevant employment office …'

A three-judge panel of the Upper Tribunal held by a majority that the tribunal had not erred in law. The claimant did come under article 7(3)(c), and therefore in domestic law counted as a 'qualified person' (ie, with the right to reside) under Immigration (European Economic Area) Regulations (I(EEA) Regs) 2006 SI No 1003 reg 6(2)(b). For this to apply it was not necessary, as the DWP argued, for the claimant successfully to have claimed JSA. On the facts, she had, by submitting a form to the jobcentre indicating that she was looking for work, registered officially as such a person. Although for IS it was true that someone reliant on the status of 'jobseeker' could not qualify (and would need instead to have claimed JSA), that category of residence came from a different part of the domestic legislation, namely a 'jobseeker' under reg 6(1)(a), as defined in reg 6(4). However, that was different from someone retaining status as a worker, as provided for in article 7(3)(c) and reg 6(2)(b), which could apply to an IS claim.

Self-employed: no right to reside as an unemployed worker

■ R (Tilianu) v Social Fund Inspector and Secretary of State for Work and Pensions

[2010] EWHC 213 (Admin), 15 February 2010

In this judicial review decision of the High Court, it was held that someone working formerly on a self-employed basis did not have a right to reside as an unemployed worker. The judge held that that right to reside, provided for by article 7(3)(b)-(d) of the Citizenship Directive 2004/38/EC, applies only to former workers who were employed.

The claimant was a Romanian national, who had worked on a self-employed basis in the UK for less than a year before having to stop work because of illness. When he left hospital, he claimed both JSA and, pending a decision on that, a crisis loan. Both were refused eventually on the basis that he did not have the right to reside. The claimant's argument was that he had a right to reside under article 7(3)(c) of the Directive, ie, that he retained his right to reside as a self-employed person, as a result of being someone who had worked for less than a year and was now in 'duly recorded involuntary unemployment'. It was argued for the claimant that the wording of article 7(3)(c) did not apply specifically only to people who had been employed rather than self-employed.

The judge rejected the claimant's argument. Subparagraphs (b)-(d) of article 7(3) applied only to unemployed workers who had been employed, not self-employed. The language in subparagraphs (b)-(d) included references to 'employment', and only subparagraph (a) (on retention of right to reside while temporarily unable to work) applied also to those who had been self-employed. He drew support from the similar position taken on this question regarding subparagraphs 7(3)(b), (c) and (d) by Judge Rowland in *CJSA/2687/2007*, 23 March 2009. Also, the domestic legislation implementing the Directive (the I(EEA) Regs) reflected such a view.

Family members

For a right to reside on the basis of being a dependent family member of someone with the right to reside, does it matter if the dependence only arose in the host state (ie, the UK)? The Court of Appeal has held that it does not (subject to a distinction in the relevant rule between different categories of family member).

■ Pedro v Secretary of State for Work and Pensions

[2009] EWCA Civ 1358, 14 December 2009

The claimant was a Portuguese national who came to the UK in 2004 to join her son. She lived with him and had been for the most part financially dependent on him since her arrival, though they had not lived together in this way in Portugal. When she claimed pension credit, she was refused on the basis that she was held not to have the right to reside. The appeal tribunal reversed that decision. It held that she did have the right to reside as the dependent family member of an EU national with worker status, under the terms of the Citizenship Directive 2004/38/EC. Under article 2 of the Directive, 'family member' means the spouse, registered partners (excluding opposite-sex partners, who come instead under article 3), 'direct descendants' who are under the age of 21 or are dependants, and 'dependent direct relatives in the ascending line'. However, on further appeal, the deputy commissioner had held that she did not have such a right to reside.

The Court of Appeal considered whether or not the claimant had a right to reside as a 'family member' under article 2. In particular, it considered whether or not the fact that the dependency had not existed in Portugal, but was only formed in the UK, meant that she was excluded. The court concluded that it did not. The court reviewed relevant case-law on dependency in this context. In particular, it emphasised the importance of the ECJ decision in *Metock and others v Minister for Justice, Equality and Law Reform* C-127/08, 25 July 2008; [2009] QB 318. That case considered the precise language of article 2(2), and emphasised that the aim of the Directive was to strengthen the right of free movement and residence of EU citizens, that the Directive cannot be interpreted restrictively, and that it did not require that 'the Union citizen must already have founded a family at the time when he moves to the host member state in order for his family members who are nationals of non-member countries to be able to enjoy the rights established by that Directive' (*Metock* para 87).

It was true that other case-law had suggested that in some contexts there was a requirement for dependency to have existed

in the state of origin, in particular, the ECJ decision in *Jia v Migrationsverket* C-1/05, 27 April 2006; [2007] QB 545. That decision had been held to be good law by the Court of Appeal in *KG (Sri Lanka)* and *AK (Sri Lanka) v Secretary of State for the Home Department* [2008] EWCA Civ 13, 25 January 2008 and in *Bigia and others v Entry Clearance Officer* [2009] EWCA Civ 79, 19 February 2009.

However, those decisions concerned a different context to the present one, including the right to reside of 'other family members' under article 3 of the Directive. There, the language of the provision was different, in that in article 3(2)(a) the reference to 'other family members' was to those who did not count as 'family members' under article 2(2) and who 'in the country from which they have come' are dependants or members of the household of the Union citizen.

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Decisions of the Upper Tribunal Administrative Appeals Chamber: significant cases between December 2009 and June 2010

Bereavement and death

Secretary of State for Work and Pensions v FS

CIS/2729/2006; [2010] UKUT 18 (AAC), 27 January 2010

Social fund – funeral expenses – claimant in prison at material time, so not receiving a qualifying benefit – reviews prisoner exclusions – finds no direct discrimination – no finding made on indirect discrimination as, if there was any, it was justified – any discrimination is not disproportionate to the aim of focusing entitlement on those family members with limited income or other resources through using qualifying benefits rather than a means-testing regime – see August 2010 *Legal Action* 11.

PA v Secretary of State for Work and Pensions

CIS/1751/2009; [2010] UKUT 42 (AAC), 12 February 2010

Social fund – funeral expenses – SF Regs reg 10(1)(a) requires deducting assets of the deceased that are available to the person taking responsibility for the funeral without probate or letters of administration – the evidence before the tribunal was incapable of supporting an inference that the value of the deceased's estate was of any particular amount, or that it was available to the claimant – as reg 10 specifies the deductions to be made from a funeral payment, the burden of showing that reg 10 applies falls on the secretary of state.

Secretary of State for Work and Pensions v LD

CIS/2648/2009; [2010] UKUT 77 (AAC), 12 March 2010

Social fund – funeral expenses – whether claimant was the partner of the deceased at the date of death – living in separate accommodation but seeing each other daily and intending to resume living together – temporarily living away – continued to be treated as members of same household.

GC v Secretary of State for Work and Pensions

CIS/3494/2008; [2010] UKUT 100 (AAC), 8 April 2010

Social fund – funeral expenses – whether receiving qualifying benefit – tax credits – test is satisfied if an initial award is made before the date of a decision on a claim to funeral expenses and that the tax credit award covers the date of claim.

SB v Secretary of State for Work and Pensions

CG/230/2010; [2010] UKUT 219 (AAC), 29 June 2010

Bereavement benefit – entitlement – polygamous marriage – sole surviving wife, so claimant was the only widow in Islamic law – validity of marriage in English law (a condition of entitlement to bereavement benefit) is dependent on late husband's domicile at the time of his marriage to the claimant, his third wife – if at that time he was domiciled in Bangladesh that marriage was valid, but if domiciled in the UK the marriage was void in English law – domicile is also explained in *CP/3024/1999*.

Disability living allowance

BK v Secretary of State for Work and Pensions

CDLA/3255/2008; [2009] UKUT 258 (AAC), 2 December 2009

Practice and procedure – appeals – consideration of an existing unappealed element of an award and substituting adverse decision – fairness of process reviewed at length – nature of tribunal's discretion – not for UT to fetter FTT's discretion – in an obvious case would be an error not to consider an unappealed element – insensitive or embarrassing questions, if relevant to an issue, do not result in an unfair hearing or a breach of natural justice – difficult to foresee circumstances in which a tribunal pursuing a relevant line of questioning will have failed to provide a fair hearing.

RR v Secretary of State for Work and Pensions

CDLA/1961/2009; [2009] UKUT 272 (AAC),

11 December 2009

Mobility component – lower rate – SSCBA s73(1)(d) – unfamiliar routes – tribunal ignored statutory question – focused on an ability to get back home somehow – not clear from tribunal's reasoning how a person who finds himself in strange places without knowing how he got there can fail to qualify for lower rate mobility component.

MW v Secretary of State for Work and Pensions

CDLA/2235/2009; [2010] UKUT 85 (AAC), 8 March 2010

Mobility component – severe discomfort and pain – authorities considered – adequacy of reasons considered against the detailed background – useful exposition.

SF v Secretary of State for Work and Pensions

CDLA/1991/2009; [2010] UKUT 78 (AAC), 11 March 2010

Care component – qualifying periods – whether availability of aids or adaptations solves the need for attention or supervision from another person – as at date of original decision consider whether the aid or adaptation would be available within the six-month prospective qualifying period.

SC v Secretary of State for Work and Pensions

CDLA/1621/2009; [2010] UKUT 76 (AAC), 11 March 2010

Mobility component – severe mental impairment – evidence of approved disability analyst adduced by SSWP was of no evidential value – arrested emotional or functional development that has a physical cause falls within DLA Regs reg 12(5) even if that cause is not related to the development of the brain.

MP v Secretary of State for Work and Pensions

CDLA/2818/2009; [2010] UKUT 103 (AAC), 14 April 2010

Practice and procedure – refusal to set aside tribunal decision under FTTS Rules r37 – whether decision appealable – r37 decisions not excluded expressly by TCEA s11(1) – point conceded and jurisdiction accepted – r37 acts as a safeguard to correct unfairness caused by mistakes and mishaps – both the substantive and set aside decisions were wrong in law – not sensible but not an error to send enquiry notice to claimant only and not to her solicitor – but breach of natural justice to hold the paper hearing before the expiry of time for submitting medical evidence.

NR v Secretary of State for Work and Pensions
CDLA/2260/2009; [2010] UKUT 111 (AAC), 16 April 2010
Mobility component – virtual inability to walk – severe discomfort – effect of a short walk – if unable to repeat effort on the same day, cannot be said to be able to walk that distance most of the time.

JM v Secretary of State for Work and Pensions
CDLA/2321/2009; [2010] UKUT 135 (AAC), 27 April 2010
Overpayment – care component – claimant always able to cook a main meal – payment always on mistaken basis – duty to report the mistake not proved – no express duty to make the required disclosure was specifically imposed on the claimant – *R(IS)9/06* followed.

MP v Secretary of State for Work and Pensions
CDLA/2803/2009; [2010] UKUT 130 (AAC), 4 May 2010
Supersession – care component – blind claimant – arguably entitled to middle rate on basis of *Mallinson v Secretary of State*, reported as *R(A) 3/94* but paid at the lower rate during the 14 years since *Mallinson* – awarded increase only from date supersession applied for – error of law not to consider claim under *Mallinson* – DA Regs reg 7(6) applies, so possible to backdate to date of the *Mallinson* judgment – outlines factual requirements for establishing past entitlement.

Incapacity

CB v Secretary of State for Work and Pensions
CIB/1222/2008; [2010] UKUT 20 (AAC), 27 January 2010
Evidence – adequacy of findings – failure to make the findings that were necessary to tribunal's inferences and conclusions – must make findings on direct challenges to an examining doctor's findings before it can properly reach a view on the evidential weight to be given to that doctor's report – must identify exactly what treatment the claimant should have sought before inferring that failure to seek such treatment meant his condition was not as bad as he said.

JE v Secretary of State for Work and Pensions
CE/2373/2009; [2010] UKUT 50 (AAC), 23 February 2010
Employment and support allowance – limited capability for work – mental health and associated descriptors 17, 18 and 19 – coping with social situations – different tests in ESA50, ESA85 and in descriptor 19 itself – calls for careful fact-finding and a balance to be struck between different types of social situations – scope of normal activities is potentially wide – overlap with descriptor 18 considered – see page 16 of this issue.

AE v Secretary of State for Work and Pensions
CIB/2230/2009; [2010] UKUT 72 (AAC), 8 March 2010
Supersession – at the material time, supersession under DA Regs reg 6(2)(g) was available only on basis of evidence from a doctor – approved disability analyst used – agrees with *CSIB/340/2009* that supersession not available on this basis, but decision may be corrected by tribunal and remade on a different basis. Note: from 30 October 2008 an amendment substituted 'health care professional' for 'doctor'.

SW v Secretary of State for Work and Pensions
CIB/2151/2009; [2010] UKUT 73 (AAC), 9 March 2010
Practice and procedure – fair hearing – breach of natural justice – real risk of perceived bias in composition of tribunal – judge had recently retired as partner from solicitors' firm that was still handling claimant's criminal injuries claim which was in respect of the same assault as had given rise to the incapacity benefit claim – case-law, domestic and international codes of judicial conduct considered.

IP v Secretary of State for Work and Pensions
CIB/3061/2009; [2010] UKUT 97 (AAC), 1 April 2010
Personal capability assessment – activity 14 consciousness – epilepsy – adequacy of reasons – context is everything – here, one examining doctor had believed the claimant, another had not – tribunal should have addressed the earlier finding and opinion when explaining its own finding of no credibility.

SC v Secretary of State for Work and Pensions
CIB/60/2009; [2010] UKUT 108 (AAC), 14 April 2010
European law – whether receiving Italian civil invalidity benefit can count as equivalent to receiving short-term UK incapacity benefit – not possible as on analysis it was not a social security benefit but was a special non-contributory benefit – decide issue by examining nature of the benefit by reference to the criteria in Council Regulation (EEC) No 1408/71 article 4(2a) – follows approach taken in *CPC/1648/2009*, see *EC v Secretary of State for Work and Pensions* below.

RB v Secretary of State for Work and Pensions
CIB/2882/2009; [2010] UKUT 128 (AAC), 29 April 2010
Practice and procedure – sleep apnoea and other conditions – personal capability test – adequacy of reasons – previous favourable medical assessment not referred to – queries raised by current negative assessment not considered, for example, surprising to describe someone as obese as claimant as being of normal build – also inadequate reasons for rejecting claimant's own evidence.

ZO v Secretary of State for Work and Pensions
CIB/2431/2009; [2010] UKUT 143 (AAC), 12 May 2010
Practice and procedure – on third attendance for a hearing, official interpreter missing – tribunal refused to let claimant's son interpret – no consideration of whether he understood the role – instead, claimant offered Hobson's choice of adjourning yet again or a decision on the papers – chose latter – breach of natural justice and the right to a fair hearing.

Income support

ST v Secretary of State for Work and Pensions
CIS/3770/2008; [2009] UKUT 269 (AAC), 10 December 2009
Severe disability premium – whether someone normally resides with another is a purely factual question – no judgment required on the quality of that residence – overstayer – illegal nature of son's residence not directly in issue nor decisive.

HA v Secretary of State for Work and Pensions
CIS/997/2009; [2009] UKUT 288 (AAC), 30 December 2009
Overpayment – child's capital – ambiguous wording of instructions to report – insufficiently clear to impose a duty to disclose – but misrepresentation made out until expiry of the time needed to put a later notification into effect – thereafter operative cause of the overpayment was the department's failure to act.

GJ v Secretary of State for Work and Pensions
CIS/2650/2009; [2010] UKUT 107 (AAC), 15 April 2010
Overpayment – failure of local office to act on basis of the information supplied to it – the relevant fact had been on the claimant's file for some years, a review procedure was in place, plus no evidence to explain the inaction – in the circumstances, failure to prove that the overpayment was caused by the claimant's failure to disclose – explains why the obiter comments in paragraph 48 of *Morrell v Secretary of State for Work and Pensions*, reported as *R(IS) 6/03*, are wrong.

Secretary of State for Work and Pensions v JS
CIS/339/2009; [2010] UKUT 131 (AAC), 7 May 2010
Right to reside – former worker begins period of study, becomes pregnant, works again but as an agency worker – has to cease work in later stages of pregnancy – whether worker status retained – no ongoing employment relationship or right to maternity leave – retention of worker status is codified in Directive 2004/38/EC article 7(3) – pregnancy not within article 7(3) – Regulation (EEC) No 1612/68 article 7(2) does not help – worker status lost.

Industrial injuries

Secretary of State for Work and Pensions v NH
CI/1553/2009; [2010] UKUT 84 (AAC), 19 March 2010
Reduced earnings allowance (REA) – transfer to retirement allowance – meaning of 'giving up regular employment'– seasonal worker – REA refused from start of first off-season after reaching 65 years – off-season was longer than five weeks – no entitlement to REA – authorities considered – REA test is different to the equivalent jobseeker's allowance test.

FA v Secretary of State for Work and Pensions
CI/2992/2009; [2010] UKUT 142 (AAC), 10 May 2010
Prescribed disease – A11 vibration white finger – adverse decision on diagnosis followed by new claims – tribunal restricted when deciding date of onset to day after the adverse decision – solution is to treat claim or appeal (depending on content) as an application for supersession of the adverse decision and adjourn for that application to be considered.

DB v Secretary of State for Work and Pensions
CI/1810/2009; [2010] UKUT 144 (AAC), 12 May 2010
Accident – fire-fighter – exposure to toxic substances at a fire – whether chronic fatigue syndrome caused by that exposure – inadequate reasons for rejecting evidence of claimant's expert – not appropriate for UT to exercise its power to remake the tribunal's decision – need to evaluate and resolve conflicting medical evidence – fact-finding is the province of the FTT assisted by the experience and expertise of its medical members – discussion of the approach needed when evaluating expert evidence.

Jobseeker's allowance

Secretary of State for Work and Pensions v JB
CJSA/2280/2009; [2010] UKUT 4 (AAC), 6 January 2010
Sanctions – increase in prescribed period where a sanction has been applied within the previous 12 months – the 12 months is to be measured from the date of the previous to the current determination, not from the dates of each offence.

Secretary of State for Work and Pensions v JP
CJSA/0475/2009; [2010] UKUT 90 (AAC), 25 March 2010
Resources – whether capital or income – no definition in JSA Regs – implementation of single status agreement – equal pay – non-returnable sum paid in hope of compromising (for a larger sum) a claim for past pay inequalities and any employment tribunal claims within the next three years – paid on account of eventual settlement figure or employment tribunal award but paid before an equal pay claim – on analysis the non-returnable sum was income – to be attributed according to JSA Regs reg 94(2)(b) – take into account for the number of weeks equal to the number obtained by dividing the sum by the jobseeker's allowance received plus appropriate income disregards (with the effect of repaying the state for equivalent past benefit) – see page 17 of this issue.

Pension credit

EC v Secretary of State for Work and Pensions
CPC/1648/2009; [2010] UKUT 95 (AAC), 31 March 2010
Residence and presence – resident in EU state – whether benefit exportable under Council Regulation (EEC) No 1408/71 (the regulation co-ordinating the social security systems of the member states) – not conclusive that Annex IIa lists it as a special non-contributory benefit – on analysis its purpose and funding mean pension credit is properly categorised as a special non-contributory benefit and as such not exportable.

LA v Secretary of State for Work and Pensions
CPC/1492/2009; [2010] UKUT 109 (AAC), 14 April 2010
Right to reside – meaning of EEA Regs reg 9 – a UK national who has worked in an EEA state is treated as an EEA national so as to afford a right to reside in the UK to a dependent family member – whether claimant was dependent – relevant factors considered.

AM v Secretary of State for Work and Pensions
CPC/2582/2009; [2010] UKUT 134 (AAC), 6 May 2010
Resources – capital – method of valuation – joint interest in former matrimonial home, now occupied by separated spouse – department and tribunal should have followed *R(IS)5/05* and considered the depressed market value of the premises subject to the spouse's continued rights of occupation.

KS v Secretary of State for Work and Pensions
CPC/2696/2009; [2010] UKUT 156 (AAC), 19 May 2010
Habitual residence – claimant left UK to volunteer abroad – put goods in storage and gave up tenancy – tribunal focused on wrong question – should have considered whether he had ever lost habitual residence – substitutes own decision that he had not.

Retirement pension

Secretary of State for Work and Pensions v TB v HMRC
CP/1674/2006; [2010] UKUT 88 (AAC), 24 March 2010
Practice and procedure – jurisdiction – appeal involving questions about contributions conditions – DA Regs regs 11A and 38A are mandatory – require reference to NICO, part of HMRC, once it becomes clear a formal decision is needed – much scope for mishap in the formal procedure – alternative faster method recommended – TCEA s22(4)(c) with UT Rules rr2 and 5 authorise tribunals to take steps (that were not previously possible) to ensure proceedings are handled quickly and efficiently – tribunal can direct that a matter is referred directly to NICO, that NICO respond directly to the tribunal and, if necessary, may add HMRC as a party to the appeal.

Tax credits

PF and SF v HMRC
CTC/1853/2009; [2010] UKUT 49 (AAC), 22 February 2010
Child tax credit – no entitlement while claimant, who was receiving incapacity benefit, lived in Sweden until Regulation (EC) No 883/2004 replaced EC Regulation 1612/68 in May 2010 – being means-tested, child tax credit was outside the old definition of family allowances – since May 2010, it is within the scope of the definition of family benefit.

PD v HMRC and CD
CTC/1699/2009; [2010] UKUT 159 (AAC), 19 May 2010
Practice and procedure – joint claim – appeal by one member of a couple means that the other is a respondent and must be notified separately.

Tribunals

DL-H v Devon Partnership NHS Trust v Secretary of State for Justice
M/1653/2009; [2010] UKUT 102 (AAC), 12 April 2010
Practice and procedure – scope of appeal to UT – not limited to the grounds in the application on which permission to appeal was given – TCEA s11 and the UT Rules apply to the whole of the work of the UT – would not be desirable to hinder the neutral and objective approach taken by the SSWP, often identifying issues favourable to a claimant – the UT has ample powers to control the issues to be considered on an appeal.

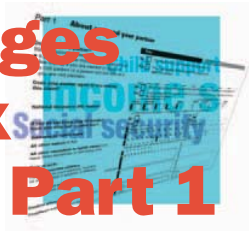
RM v St Andrew's Healthcare
HM/0837/2010; [2010] UKUT 119 (AAC), 23 April 2010
Practice and procedure – patient detained under MHA s3 – FTT hearing – whether disclosure of information would cause patient serious harm – covert medication – issues and law considered at length – non-disclosure would involve more than a compromise between justice and openness – would sacrifice the patient's right to challenge his detention effectively.

CD v First-tier Tribunal
JR/1927/2009; [2010] UKUT 181 (AAC), 1 June 2010
Practice and procedure Criminal Injuries Compensation Authority – judicial review of refusal to extend time for appealing – unfettered discretion – not appropriate to import the approach in the Civil Procedure Rules r3(9) – Note: see also *Neary v Governing Body of St Albans Girls' School* [2010] ICR 473 to similar effect in the employment tribunal jurisdiction.

Abbreviations

DA Regs = Social Security and Child Support (Decisions and Appeals) Regulations 1999 SI No 991
DLA Regs = Social Security (Disability Living Allowance) Regulations 1991 SI No 2890
EEA = European Economic Area
EEA Regs = Immigration (European Economic Area) Regulations 2006 SI No 1003
FTT = First-tier Tribunal
FTTS Rules = Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 SI No 2685
HMRC = Her Majesty's Revenue and Customs
JSA Regs = Jobseeker's Allowance Regulations 1996 SI No 207
MHA = Mental Health Act 1983
NICO = National Insurance Contributions Office
SF Regs = Social Fund Maternity and Funeral Expenses (General) Regulations 2005 SI No 3061
SSCBA = Social Security Contributions and Benefits Act 1992
SSWP = Secretary of State for Work and Pensions
TCEA = Tribunals, Courts and Enforcement Act 2007
UT = Upper Tribunal
UT Rules = Tribunal Procedure (Upper Tribunal) Rules 2008 SI No 2698

Budget 2010: changes to benefits and tax credits reviewed – Part 1



In June, the Treasury published the *Budget 2010* report which, among other things, detailed changes to social security benefit payments and claims.[1] Elizabeth Weil outlines the current system, summarises the planned reforms and sets out their implications for claimants. Part 2 of this article will be published in October 2010 *Legal Action*.

Child benefit

Child benefit (CB) is a universal benefit paid to everyone with a child(ren) who meets the criteria. Currently, CB is paid on a weekly basis for:

- the eldest or only child (higher rate £20.30); and
- each additional child (£13.40).[2]

From April 2011, both rates will be frozen, ie, they will remain at the current rates until April 2014.

Comment: There will be no rise in CB in line with inflation during the three-year freeze. The savings made here will be used to fund increases in the child element of child tax credit (CTC) (see below).

Child tax credit and Working tax credit

CTC is a payment for people with children whether they are in or out of work. The amount of CTC awarded will depend on the claimant's circumstances and income. Working tax credit (WTC) is a means-tested benefit for people who work 16 hours a week or more and have a low income. Claimants must meet additional criteria for both CTC and WTC.

At present, CTC is made up annually of the following elements:

- The family element (£545) is the basic payment families with at least one child or qualifying young person receive if they have an income of £50,000 or less. This is the second income threshold for the family element.
- The baby element (£545) is paid to a claimant who has had a baby. The baby element can be paid in addition to the family element until the child is one.
- The child element (£2,300) for each child or qualifying young person.
- The disability element (£2,715) for each child receiving disability living allowance (DLA), or who is registered as blind or has been taken off the register in the last 28 weeks.
- The severe disability element (£1,095) is extra payment paid in addition to the disability element for each child receiving the highest rate care of the DLA.

From April 2011, the threshold for the family element will be reduced to £40,000. In addition, the baby element will be removed and the child element will be increased by £150 above the Consumer Prices Index (CPI), and then in April 2012 to £60 above CPI.

Advisers should note that the £4 supplement in the child tax credit for each child aged one and two, which was due to begin in April 2012, will not be introduced. There will be no change to the disability element or the severe disability element.

From April 2012, those with an income of £30,000 a year and over will not receive CTC and those earning £25,000 a year will receive a reduced family element of £460. In addition, the family element of the CTC will be withdrawn immediately after the child element.

Comment: CTC will not be paid to families with an income over £40,000. Most middle-income earners will lose CTC and further reductions in the threshold will mean that many families will not receive CTC or will receive the reduced rate. This may lead to the eventual abolition of the family element. The idea that high-income earners may be the losers in relation to tax credits is an unnecessary consideration as families with an income of between £25,000 and £30,000 can hardly be described as high- or middle-income earners. Furthermore, for some claimants with an income of between £30,000 and £40,000 this usually represents the combined income of joint-claim couples.

Abolishing the baby element will hit those on the lowest incomes, for example, lone parents. This will result in a need gap as those who will no longer get the baby element (which is usually used to pay for a pram and other expenditure for a child under one) will struggle financially.

Although there is an increment in the child element rate, nevertheless, the increase does not compensate for the other losses in CTC. The £4 supplement in the child tax credit was announced in the March 2010 Budget as an attempt by the previous government to meet a new target of ending child poverty by 2020.

Local authorities are expected to play their parts in the eradication of child poverty despite having to operate under tight financial constraints. Cuts in their budgets of around 25 per cent over the next four years were announced in the *Budget 2010* report (para 1.40).

On 25 May 2010, new duties for local authorities in England under Part 2 of the Child Poverty Act (CPA) 2010 came into force. Local authorities and other delivery partners are to work together to tackle child poverty, conduct a local needs assessment, produce a child poverty strategy and take child poverty into account in the production and revision of their sustainable communities strategies (see the CPA).

The *First national evaluation report – Child Poverty Unit of the Local Authority Innovation Pilot* (LAIP) was published in February 2010.[3] The pilot consisted of ten local authorities: Cornwall, Hammersmith and Fulham, Islington, Kent, Knowsley, North Warwickshire, Sefton, Tyne Gateway, Waltham Forest and Westminster. The pilot seeks to develop different approaches to tackling the causes and consequences of child poverty and improve the outcomes for children and families living in poverty at local level. The pilot is progressing and will end in March 2011 with the publication of its final report.

In June, the coalition government appointed Frank Field MP to lead an independent review on poverty which will make recommendations on potential action to tackle the underlying causes of poverty and enhance life chances. A consultation has been launched with a range of lobby groups, poverty experts, delivery organisations, charities, parents and children. The deadline is 1 October 2010.[4] The Review on Poverty and Life Chances will report to the Prime Minister by the end of the year.

WTC contains several elements, including additional amounts for the following:

- working people with a disability;
- people with a severe disability; and
- the cost of registered or approved childcare.

The award of WTC depends on the claimant's income. Readers should note that only the 50 plus element is referred to in this article.

Currently, the 50 plus element is paid to anyone who is 50 or over and who has returned to work after receiving a qualifying

out-of-work benefit for at least six months. This element only applies for the first 12 months:

- 16–29 hours (£1,320); and
- 30 hours or more (£1,965).

From April 2012, the 50 plus element will be removed from the WTC; however, from April 2011 people aged 60 and over will qualify for WTC if they work at least 16 hours a week, rather than 30 hours as currently.

Comment: There is no proposal to replace the 50 plus element with anything which would assist this age group to take on low-paid jobs. The proposal in relation to those aged 60 and over was also in the previous government's March 2010 budget report.

Income thresholds and withdrawal rates of CTC and WTC

The maximum tax credits are calculated by adding together all the tax credits elements that apply to a claimant. The maximum tax credit award is then calculated by comparing income to income thresholds, and then applying any relevant reductions. The higher the income, the more tax credit will be reduced. The income thresholds and withdrawal rates are as follows:

- The first income threshold (£6,420) applies to people who receive WTC only or both WTC and CTC. If income exceeds this threshold, the tax credit award will be reduced by 39 per cent of the excess income, which is the first withdrawal rate or first taper.
- The first threshold for those entitled to CTC only is £16,190. Families with income above this figure will have their CTC reduced by 39 per cent of the excess income, which is also referred to as the first withdrawal rate or first taper.
- The second income threshold is £50,000, which applies to households that receive only the family element of CTC. Where a household's income is more than this figure, the family element is reduced by £1 for every £15 of income in excess of £50,000, ie, at a rate of 6.67 per cent, which is the second withdrawal rate or second taper.

From April 2011, the first and second withdrawal rates or tapers will be increased from 39 per cent and 6.67 per cent to 41 per cent. The second income threshold will be reduced from £50,000 to £40,000.

Income disregard for income increases

Tax credits awards are usually based on the claimant's current circumstances and previous tax year income. The claimant has to report a change of income during the current year, only if it is more than £25,000 higher than the previous year.

The £25,000 disregard is applied in the following way:

- If the current year's income is greater than the previous year's income by £25,000 or less, the previous year's income is used to assess the current year's entitlement.
- If the current year's income is less than the previous year's income, the current year's income is used.
- If the current year's income is greater than the previous year's income by more than £25,000, the current year's income less £25,000 is used.

'Current year's income' means the income of the year of the claim. As a precaution, claimants should always inform HM Revenue and Customs (HMRC) of all changes to their income to avoid overpayment of tax credits and having to repay them.

From April 2011, the level of in-year income rises that will be disregarded will decrease from £25,000 to £10,000, and then from April 2013 the level will decrease further to £5,000.

From April 2012, an income disregard of £2,500 will be introduced for in-year falls in income.

Comment: There is a possibility that the level of in-year rises of income that could be disregarded from the calculations of tax credit entitlement may result in some claimants being overpaid tax credits, which HMRC can recover.

The new income disregard will mean that any fall in income of less than £2,500 in a year (after the claim has been made) will have no impact on the amount of WTC paid to the claimant. S/he will get the same amount of WTC.[5]

Backdating payments of CTC and WTC

Claims for tax credits and some changes of circumstances (which are likely to increase tax credits awards, for example, having another child), can be backdated up to a maximum of three months (93 days) before the date the claim was received by HMRC if all the entitlement conditions are met and the claimant would have been entitled to tax credits. In certain circumstances, tax credits claims may be backdated for more than three months.

From April 2012, the backdating of claims will be reduced to one month.

Comment: The reduction in the backdating of claims will be seen as penalising those people, who through no fault of their own, failed to make a claim or to inform HMRC of changes in their circumstances on time; for example, individuals who may be ill, or who do not have access to advice or for whom English is not their first language will lose out.

Income support and jobseeker's allowance

Lone parents claiming income support

On 24 November 2008, the Social Security (Lone Parents and Miscellaneous Amendments) Regulations (SS(LPMA) Regs) 2008 SI No 3051 introduced changes to the conditions of entitlement to income support (IS) for most lone parents. The current rule is that most lone parents whose youngest or only child is under ten can claim IS. From 25 October 2010, this age limit is due to be lowered to seven. The SS(LPMA) Regs state that from October 2010, lone parents with a youngest child aged seven or over will no longer be entitled to IS only on the ground of being a lone parent. Instead, those able to take up paid employment may claim jobseeker's allowance (JSA), and those with a disability or health condition may claim employment and support allowance (ESA). These changes will apply to all new or repeat IS claims.

Exceptions: where some parents may still get IS if they:

- are a foster parent, with a foster child living with them;
- are receiving carer's allowance (CA);
- have a dependent child in receipt of the middle or highest rate care component of DLA.

Anyone who does not meet the eligibility criteria or exempt will be expected to claim jobseeker's allowance (JSA). IS is a means-tested benefit paid to people who are not expected to be available for work. Whereas for JSA a claimant must sign a jobseeker's agreement and fulfil obligations showing that s/he is available for and actively seeking work. Every two weeks, the claimant must attend a Jobcentre Plus office to sign on and to show that these steps have been taken. It is normally a condition of entitlement to JSA that claimants are willing and able to take up employment of at least 40 hours per week (Jobseeker's Allowance Regulations (JSA Regs) 1996 SI No 207 reg 6(5)). When entering into a jobseeker's agreement, lone parents with caring responsibility for a child can place restrictions on their availability for work connected to their caring responsibilities and other restrictions which may not necessarily relate to those responsibilities so far as they can show that they have reasonable prospects of obtaining employment with all of their restrictions (JSA Regs reg 8).

From 26 April 2010, most lone parents (in addition to the other restrictions contained in JSA Regs reg 8) who are:

- responsible for a child under the age of 13; and
- a member of the same household as the child may further restrict their availability for

work to the child's normal school hours (JSA Regs reg 13A, as amended by Jobseeker's Allowance (Lone Parents) (Availability for Work) Regulations 2010 SI No 837 reg 2).

The right to restrict availability in this way only applies while the child is at school and does not carry over into the school holidays. During the school holidays, parents will be expected to look for work outside the child's usual school hours. Please note that parents who have exercised their rights under regulation 13A must be willing to take up any employment that fits within these hours (JSA Regs reg 5(4)). Readers should refer to the relevant law for full details of the rules relating to single parents.

From October 2011, lone parents whose youngest or only child is aged five or over will have to claim JSA rather than IS.

From April 2012, lone parents who are currently receiving IS and whose child(ren) are at school will be transferred to JSA.

Comment: The Department for Work and Pensions (DWP) has said that there are still almost 700,000 lone parents claiming some form of IS without any obligation to look for work. In the *Budget 2010* report, the government estimates that 'this could move up to 15,000 lone parents into employment which will help reduce child poverty' (para 1.101).

There is a possibility that lone parents:

- may be forced to take low-paid jobs with less job security;
- may not be able to find flexible, affordable and appropriate childcare during term-time and school holidays; and
- may lack the confidence, skills and experience to compete in the labour market for better paid work.

There is the likelihood that most lone parents may only be able to find temporary work, which means that they will be in and out of work. If they fail to comply with their jobseeker's agreement without good cause their benefits can be sanctioned.

Lone parents who are aged 16 or over; working at least 16 hours a week, either as an employee or self-employed; who has responsibility for at least one child or young person; and who is not subject to immigration control (certain exceptions apply), can claim WTC. They will (in addition to other elements they may be entitled to) receive:

- the lone parent element of £1,890; and
- the childcare element, which is paid at the rate of 80 per cent of the eligible childcare costs up to a maximum cost of £175 per week for one child and £300 per week for two or more children ('eligible childcare' means registered or approved childcare. The carer must be registered with Ofsted in England or through the Care Standards Inspectorate for Wales).

Even with this help, parents will still have to find the other 20 per cent. Childcare costs are expensive and may be unaffordable for most parents. Furthermore, the costs for specialist childcare for children with disabilities are more expensive and difficult to find.

Sure start maternity grant

This benefit helps people on a low income with the extra costs of having a new baby, such as buying a pram or cot. It is paid from the social fund as a lump sum and does not have to be repaid. The grant is £500 for each baby. Claimants must meet certain criteria to be eligible for the grant.

From April 2011, the grant will be restricted to the first child only (or children where there is a multiple birth).

Comment: The group that benefits most from this grant are those on the lowest incomes, in particular, single parents on benefits and others in very low-paid jobs. For this group, those parents who have completed their family will not be affected by the restriction of the grant, but others will have to recycle items from the first child to pass on to any subsequent children.

Health in pregnancy grant

The health in pregnancy grant (HIPG), which was introduced in April 2009, is a one-off payment of £190. The HIPG is made irrespective of income to a woman who is at least 25 weeks pregnant and meets additional criteria for the grant.

In January 2011, the HIPG will be abolished; however, women who reach the 25th week of their pregnancy before 1 January 2011 will still be entitled to the grant if they satisfy its conditions (*Budget 2010* report paras 2.45 and 1.105).[6]

Comment: The HIPG's eligibility criteria could have been restricted to only those on the lowest incomes rather than abolishing the grant altogether.

IS, income-based JSA, income-related ESA and pension credit

Homeowners who are getting any of these benefits may be able to get help with mortgage interest payments, which is often referred to as support for mortgage interest (SMI). The rate at which SMI is paid is set at 1.58 percentage points above the Bank of England base rate and it has been frozen at 6.08 per cent since 2008.

From October 2010, the standard interest rate used to calculate SMI payments will be set at a level equal to the Bank of England's published monthly average mortgage interest rate.

Comment: This means that from 1 October 2010, the SMI rate will be reduced from 6.08 per cent to the Bank of England average, which is currently 3.67 per cent. Claimants' payments are likely to fluctuate whenever the Bank of England rates fluctuate.

Child Trust Fund

The Child Trust Fund (CTF) was introduced as a long-term savings and investment account for children born on or after 1 September 2002. Every child born on/after this date, who meets the additional criteria, was eligible to a £250 savings voucher with a further payment when s/he reached seven. Children from families with lower incomes receive £500 and children with a disability receive extra payments of either £100 or £200 depending on the rate of DLA of the care component which the child receives. Families and friends can make additional, tax-free contributions of up to £1,200 a year.

On 24 May 2010, the government announced that it intends to reduce and then stop government payments to CTF accounts. Payments will be phased out for children born between August and December 2010. **From January 2011**, all payments will stop.

Comment: The changes to the CTF will mean that children born after 1 August 2010 will receive £50 and those from lower-income families will receive £100. From 1 August 2010, there will be no additional payment when children reach the age of seven. From January 2011, the CTF will be abolished. The changes will require legislation to be passed by parliament.

1 Available at: www.direct.gov.uk/prod_consum_dg/groups/dg_digitalassets/@dg/@en/documents/digitalasset/dg_188581.pdf. The Spending Review, which will be published in October 2010, will set out the administration's spending plans from 2011–12 to 2014–15.
2 See 'Non-means-tested benefit rates', *Welfare Benefits and Tax Credits Handbook 2010/2011*, 12th edition, Child Poverty Action Group.
3 Available at: http://publications.education.gov.uk/eOrderingDownlaod/DCSF-RR208.pdf.
4 To submit your views, visit: http://povertyreview.independent.gov.uk/submit-views.aspx.
5 Tax credit rates. See note 2. HMRC has an online calculator which can be used to find out how much CTC or WTC may be awarded. Visit: www.hmrc.gov.uk/taxcredits/payments-entitlement/entitlement/question-how-much.htm.
6 Visit: www.hmrc.gov.uk/budget2010/individuals.htm.
7 Visit: www.dwp.gov.uk/newsroom/top-stories/.

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Recent developments in inquest law and practice

Leslie Thomas and **Adam Straw** examine recent case-law relevant to inquests in the domestic courts and the European Court of Human Rights (ECtHR).

CASE-LAW

Army deaths

■ **R (Smith) v Secretary of State for Defence and another**

[2010] UKSC 29,
30 June 2010

Private Smith died of hyperthermia while serving in Iraq. His mother brought proceedings seeking an order quashing a coroner's inquisition into the death. She argued that the inquest had to, but did not, satisfy the procedural requirements of article 2 of the European Convention on Human Rights ('the convention').

The court held that unless they were on a UK military base, British troops on active service overseas were not within the jurisdiction of the UK for the purposes of the convention. Assuming a soldier on active service does come within the UK's jurisdiction, his/her death does not inevitably give rise to the article 2 procedural duty. However, in Private Smith's case the coroner was wrong to hold that his was not an article 2 inquest because it was arguable that there was a breach of the state's substantive obligations under this article. The evidence raised the possibility that there was a failure in the system that should have been in place to protect soldiers from the risk posed by the extreme temperatures in which they had to serve.

Comment: Practitioners should approach this judgment with caution: there were nine Justices and it has 340 paragraphs. The Ministry of Defence accepted that article 2 applied in this case, and that there should be an article 2 compliant inquest, and so a lot of the judgment is not binding.

The majority of the court doubted whether there is any difference in practice between a *Jamieson* and a *Middleton* inquest, other than the verdict. This is of use to those representing families. For example, in terms of the scope of the inquest, *R (D) v Home Secretary* [2006] 3 All ER 946; [2006] EWCA Civ 143, 28 February 2006 found that for an inquiry to comply with article 2, the representatives of the family of the deceased 'must be given reasonable access to all relevant evidence in advance' (para 46). It would appear to follow that the same is required at a domestic inquest.

Whether or not the procedural duty arises for soldiers dying in other circumstances was not decided, and it was noted that further litigation may be necessary to resolve disputes about specific cases. However, four of the Justices appear to have agreed that the reasons why the procedural duty arises for suicides in custody apply equally where a recruit committed suicide during initial military training. Those reasons are that persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Similarly, where, as with Private Smith, a soldier suffers so badly from heatstroke, while in his/her living accommodation, that s/he dies shortly afterwards, the procedural duty will arise automatically. However, there would be no procedural duty to investigate the death of a fully trained soldier who was killed by a roadside bomb.

Another comment of interest was made by Lord Hope, who observed that the procedural duty arises automatically for a suicide of anyone 'subject to compulsory detention by a public authority, such as patients suffering from mental illness who have been detained under the Mental Health Acts' (para 98).

Lord Phillips, apparently agreed with by a majority, observed that the inquest is not the appropriate forum for discharging the article 2 procedural duty in all cases. He suggested that it would not be the appropriate means of determining state responsibility for the 'Bloody Sunday' killings, or for considering the competence with which military manoeuvres were executed. He continued:

An inquest can properly conclude that a soldier died because a flack jacket was pierced by a sniper's bullet. It does not seem to me, however, that it would be a satisfactory tribunal for investigating whether more effective flack jackets could and should have been supplied by the Ministry of Defence (para 81).

Given that these comments are strictly obiter, and it is not clear to what extent the other Justices agreed with them, it seems that they will make little difference to the scope of future inquests. The article 2 obligation would have to be discharged by an investigation initiated by the state in some form, even if not by an inquest.

Some, though not all, of the Justices were of the view that the procedural duty only arose where there is an arguable breach of the substantive duty. This is not correct: see, for example, *Lazar v Romania* App No 32146/05, 16 February 2010 (below) and *Šilih v Slovenia* App No 71463/01, 9 April 2009; (2009) 49 EHRR 37 (para 158). The pending Strasbourg judgment in *Al-Skeini v UK* is expected to consider the jurisdiction issue.

Bias

■ **R (Pounder) v HM Coroner for the North and South Districts of Durham and Darlington and (1) Youth Justice Board (2) Serco Home Affairs Ltd (3) Lancashire CC (interested parties)**

[2010] EWHC 328 (Admin),
23 February 2010

This was a second judicial review claim relating to the inquest into the death of 14-year-old Adam Rickwood, who killed himself after being restrained by staff at a secure training centre where he was detained (the first case was [2009] EWHC 76 (Admin), 22 January 2009; [2009] 3 All ER 150).

The coroner had stated that:

■ there was no evidence to support a finding that the restraint was causative of Adam's death; and

■ he thought that the witnesses from the training centre honestly believed that the restraint was lawful.

Both matters were open to question at the inquest. This gave rise to an appearance of bias, and so the court ordered the coroner to recuse himself from the inquest.

Comment: This is one of three recent cases in which an inquest was ordered to take place in front of a different coroner because of the appearance of bias (see also *R (Butler) v HM Coroner for the Black Country District* [2010] EWHC 43 (Admin), 21 January 2010 and *R (Dowler) v HM Coroner for North London* [2009] EWHC 3300 (Admin), 6 November 2009, both reported in March 2010 *Legal Action* 36). They are useful examples for those seeking to have a new coroner presiding over an inquest.

Public funding

■ R (Humberstone) v Legal Services Commission and HM Coroner for South Yorkshire (West) (interested party)

[2010] EWHC 760 (Admin), 13 April 2010

The decision of the Legal Services Commission (LSC) not to recommend public funding for legal representation for the mother (H) of a deceased ten-year-old at the inquest into his death was quashed. The coroner, Christopher Dorries, told the LSC that he was concerned about his ability to maintain a proper and fair investigation if H was not represented, because a central issue would be whether or not H's conduct, particularly her supervision of her son's asthma therapy, caused the death.

The court held that the LSC should assume that where any inquest is called, the duty to investigate under article 2 arises. Any death in the care of medical professionals triggers that article 2 procedural duty, and it need not be shown that there is a possibility of a breach of the substantive article 2 duties.

The LSC was wrong to find that the article 2 procedural duty was not engaged in this case. The fact that there was, as yet, no real evidence of wrongdoing that could amount to a breach of the substantive article 2 duties was not determinative because one purpose of the investigation is to ascertain whether or not there is a breach.

The procedural duty requires an investigation that is 'practical and effective'. Whether or not that requires funding to be made available depends on an assessment of all the relevant circumstances, and no single factor can be determinative in every case. For example, even if the inquest is not complex, representation may be necessary. However, one factor that will not be relevant is restrictions on available public funds.

The coroner's view relating to whether he could perform an effective investigation without a particular party being represented was a matter for special consideration. The LSC could only rationally come to a different view to the coroner's if it gave cogent reasons for so doing. The LSC failed to take proper account of relevant factors, in particular:

- the nature and seriousness of the allegations against H;
- that other interested parties, who were state agents, would be represented, some at public expense; and
- that H was 'of limited faculties and experience' and suffered from depression (para 99).

In consequence the decision was unlawful.

Comment: The two most important factors in the court's decision were the coroner's intervention, and that allegations were likely to be made against H at the inquest. The judge suggested that the state will come under a duty under article 2 to provide public funding for representation, if that is necessary to ensure an effective investigation for any contentious death. He observed that: 'the trend in these cases is towards recognising that the state has an obligation to ensure that an effective investigation is conducted into *any* death in which there may be doubt as to the circumstances' (para 52, court's emphasis). This is arguably supported by the cases which find that a 'reduced' procedural obligation arises where medical negligence led to death, for a patient who was not detained; and also by the observations of Lord Phillips in *R (Smith)* (see above) that: 'Any effective scheme for protecting the right to life must surely require a staged system of investigation of deaths, under which the first stage takes place automatically in relation to every death, whether or not there are grounds for suspecting that there is anything untoward about the death' (para 70). However, this appears to be the first case to find that public funding may be required where only the reduced, or the 'first stage', procedural duty arises.

Coroners Act 1988 s13 applications

■ Jones v HM Coroner for Southern District of Greater London and Virdi (interested party)

[2010] EWHC 931 (Admin), 28 April 2010

This was an application under Coroners Act (CA) 1988 s13 in respect of an inquest into the death of David Jones. He had been prescribed two patches of Fentanyl, a recently introduced opioid painkiller, on three occasions in the six days before his death. The cause of his death was given at post-mortem as Fentanyl toxicity and pneumonia.

The application was successful for two reasons. First, there had been an insufficiency of inquiry. The coroner had investigated whether Fentanyl was a cause of death but had assumed that the amount of that drug prescribed was insufficient to cause death, so the deceased must have found more elsewhere. The court was of the view that he failed properly to investigate how the deceased came to have such a high concentration of the drug in his body. He should have investigated further whether the quantity of Fentanyl prescribed could have been fatal in the circumstances and consistent with the post-mortem findings. If so, it would have been necessary to enquire into the actions of the doctors and pharmacists, in particular, how it came about that the decisions had been made to prescribe the deceased the drug.

Second, in the light of new information available showing a high incidence of death by unintended overdose of Fentanyl, there was a wider public interest in a full inquiry. That information included warnings from the US manufacturers of Fentanyl and from the US Food and Drug Administration that there is a risk of unintended overdose, and reports from the Medicines and Healthcare Products Regulatory Agency of numerous Fentanyl-related deaths.

The court held that the inquest should cover a number of issues, including the degree to which the medical profession at large is aware of the risks posed by Fentanyl, and the circumstances surrounding the prescriptions given to the deceased. While those issues had been addressed in a report and investigation conducted by the primary care trust, that had not taken place in public so an inquest was necessary.

Comment: This is an example of the High Court taking a broad approach about what an inquest should investigate. It is consistent with the recent authorities which state that an inquest's scope must be broad enough to investigate a rule 43 report, that is, whether there are systemic problems which may lead to future deaths, even if those problems did not lead to the death under investigation.

Furthermore, the evidence which led the court to decide that an investigation was necessary into the general understanding of the risks of medication was not particularly compelling. It largely came from abroad. The case is a good reminder of the importance for practitioners representing families to investigate the systemic issues surrounding each inquest thoroughly.

■ Duggan v Coroner for the Northern District of Greater London

[2010] EWHC 1263 (Admin), 20 May 2010

The deceased (D) travelled to Germany to a conference which he believed to be about the problems in Iraq. However, the conference was organised by the cult-like 'LaRouche movement', headed by a convicted fraudster. Shortly before his death, D made telephone calls to his family indicating that he was terrified and needed help to escape from the movement. The inquest, conducted by Dr Dolman, concluded that D had died after running into the road and being hit by two cars.

The High Court quashed an inquest and ordered a fresh inquest to take place before another coroner, under CA 1988 s13. This was because it was possible that fresh evidence obtained since the inquest could alter the verdict and, in any event, it was very much in the interests of justice that the evidence should be considered carefully

and analysed at a fresh inquest. The new evidence raised issues about causation and whether or not the death did result from the deceased being hit by a car. It put in issue the question of whether or not there may have been foul play. The court concluded that a fresh inquest was necessary, if for no other reason than it should seek to allay suspicions which have been raised naturally by all the evidence which had now been produced to the court.

Comment: Although the court was of the view that there was a possibility of a different verdict, it indicated that a new inquest may be ordered under s13 simply to allay suspicions, even where there was no possibility of a different verdict.

■ **Connah v (1) Plymouth Hospitals NHS Trust (2) HM Coroner for the County of Greater Manchester (3) HM Coroner for Plymouth and South West Devon (4) HM Coroner for the County of Cornwall**

[2010] EWHC 1727 (Admin), 12 July 2010

The claimant's application under s13, which listed three coroners as defendants, was refused. This was because the first and second coroners did not at any stage have jurisdiction to hold an inquest. The third coroner could only bring about an inquest by s15(1)(a): that is, she could make a report to the secretary of state if she had reason to believe that death had occurred in such circumstances that an inquest ought to be held. The coroner looked into the matter in detail, but decided that there was nothing to show that an inquest ought to be held, so did not make the s15 report. The court concluded that, in consequence, 'it manifestly cannot be satisfied of any of the matters specified in s13(1)(a) or (b)' (para 22).

Comment: The court proceeded on the basis that a refusal to make a report under s15 could lead to the condition in s13(1)(a) being satisfied, that is, the coroner 'refuses or neglects to hold an inquest which ought to be held'. However, the standard of review of a coroner's decision not to make a report under s15 was not clear. The judgment suggests that it is enough that the coroner has properly investigated whether or not to make a report. It was not argued that the coroner's decision under s15 was unlawful for other reasons, such as being irrational, but it is likely that had her decision not to make a report been so unlawful, the condition in s13(1)(a) would have been satisfied.

Article 2 civil claims

■ **Savage v South Essex Partnership NHS Foundation Trust**

[2010] EWHC 865 (QB), 28 April 2010

S, who had a long history of mental illness, committed suicide on 5 July 2004 after absconding from hospital where she had been detained under Mental Health Act (MHA) 1983 s3. Her daughter made a civil claim for damages for breach of article 2.

The High Court concluded that there had been a breach of the article 2 operational duty, and awarded S's daughter £10,000 damages. The test for causation for breach of article 2 'is not the English "but for" test, but a looser one; the claimant does not have to show that had the trust acted appropriately there would probably have been no death, but merely that she has "lost a substantial chance of this"' (para 82). In this case there was a real prospect or substantial chance that had S been made subject to level two observations at 15 or even 30-minute intervals, she would not have slipped away unnoticed and then killed herself.

The trust either knew or ought to have known that there was a real and imminent risk to S's life. She had been assessed as a suicide risk in October 2001, and in November 2001 absconded from hospital and was found walking between the cars on an A-road, which was seen as a significant attempt to kill herself. On 22 March and 13 April 2004, she tried to jump out of a window in apparent response to command hallucinations. On 14 and 29 April 2004 she indicated that she wanted to harm herself, and on 16 June 2004 she tried to abscond.

The trust failed to do all that could reasonably be expected of it to protect S:

■ There was no proper risk assessment.
■ Staff failed to review the level of observations, and that level was too low.
■ Staff did not adequately study her medical notes.
■ Staff assumed wrongly that her attempts to abscond were superficial attempts to go home.

The claimant was entitled to bring the action as a victim, even though she was not representing the estate of the deceased or affected directly by the violations.

Comment: The most useful aspect of this case is the decision about the test for causation for breach of article 2. This has relevance to inquests, if it is accepted that the article 2 inquiry must ascertain whether or not there were failures breaching article 2 (as suggested in cases such as *Humberstone* (see above)). It would appear to follow that the inquest verdict must include failures which had a substantial chance of causing death.

This case is also an interesting illustration of how a domestic court will approach article 2 civil claims. The evidence of a 'real and immediate risk' of suicide was not particularly strong. It did not appear that S made a suicide attempt other than in November 2001, and there was no evidence of suicidal ideation during the last two months of her life, although she remained ill. There was little or no risk on the ward, only if she absconded.

■ **Rabone (in his own right and as personal representative of the estate of Melanie Rabone deceased) and Rabone (in her own right) v Pennine Care NHS Trust**

[2010] EWCA Civ 698, 21 June 2010

MR suffered from a depressive disorder, and killed herself while on leave from a hospital, where she was a voluntary patient. A civil claim for damages for breach of article 2 in respect of the death, made by her parents, was dismissed. Her parents appealed against that decision.

The court held that:

■ the article 2 operational duty arises for those detained under the MHA 1983, but not for voluntary patients;
■ if the operational duty had existed, there was a real and immediate risk of suicide and the decision to allow MR leave from hospital breached the duty;
■ there was no breach of the article 2 investigative duty. As a result of civil litigation, an inquest and a Serious Untoward Incident investigation, there was nothing more which could be learnt from further investigation;
■ in general, the parents or a child of the deceased, in respect of whose death there was a breach of article 2, can make a civil claim as victims in their own capacity. This is so even if they are not claiming on behalf of the estate and are not themselves directly affected by the breach;
■ however, if the claimant had brought a claim in the domestic courts in respect of matters which form the basis of the convention claim and was successful, whether by court order or settlement, s/he may be deprived of victim status. That will happen if the older claim afforded 'effective redress for the convention breach', taking into account whether liability for the offending conduct was accepted by the state, or established by the court, and the level of compensation (para 105). MR's parents had received effective redress, and so could no longer claim victim status. This was because the trust had admitted negligence (which would also have constituted a breach of article 2), apologised and paid £5,000 in settlement.

Comment: Whether or not other family

members can claim victim status was not considered explicitly, but the ECtHR cases which found that siblings and a nephew could do so were cited with approval. The court decided that awards of £5,000 for each claimant would have been appropriate, but the fact that the claimants had already received a settlement for their claims under the common law is relevant.

European Court of Human Rights

■ Lazar v Romania

App No 32146/05, 16 February 2010

The applicant's son died after alleged negligent medical care. The defects suggested included the decision about which department was appropriate. The deceased was not detained in hospital. The court noted that it could not 'speculate as to the causes of his death' and so did not examine whether there had been a breach of the substantive article 2 duty.

However, the court held that there was a breach of the procedural obligations under article 2, because of the following reasons:

■ proceedings lasted four years and five months, so were not prompt;

■ the expert evidence obtained was inadequate; and

■ the various state investigations into the death had not produced a complete record and an objective analysis of clinical findings.

The various investigations did not satisfy the procedural duty because they were not sufficiently independent and an action for damages would have been very uncertain to succeed.

Comment: This is another case where a breach of the procedural duty is found where there is no suggestion of any breach on the part of the state in relation to its substantive obligation to protect life. It indicates that the availability of civil proceedings will not necessarily satisfy the procedural duty in such cases, and that a failure to obtain expert evidence may breach the duty.

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Recent developments in immigration law – Part 3

Jawaid Luqmani reports on recent developments in politics and legislation relating to immigration. Parts 1 and 2 of this article covering recent developments in immigration case-law were published in July and August 2010 *Legal Action* 16 and 12 respectively.

POLITICS AND LEGISLATION

Refugee and Migrant Justice

Most practitioners will be aware that Refugee and Migrant Justice (RMJ) (formerly the Refugee Legal Centre) went into administration on 15 June 2010 because of financial difficulties in meeting its debts. These difficulties were to a large extent blamed on the payment arrangements with the Legal Services Commission (LSC), which included an inability to bill for work in progress on a significant number of cases and the shift towards graduated fixed fees, as already applied in the private sector.

Despite a vigorous and spirited campaign, including a lengthy debate in the House of Commons on 17 June 2010 and litigation in the High Court, the organisation finally closed in July. Interim relief was sought in *R (DMM and others) v Legal Services Commission and others* [2010] EWHC 1896 (Admin), 30 June 2010, but the application was rejected by Mr Justice Mitting. The judge declined to grant an order that would enable RMJ to remain open to ensure a more effective transition of files. He concluded that it would be better for all concerned for the transfers not to be delayed. While the arrangements about the transfer of files was an issue of considerable concern given the large volume of cases, the initial response of the tribunal judiciary was to grant adjournment requests in many cases in order that appellants represented previously by RMJ would have the opportunity of finding representation elsewhere.

Interim relief was also sought against the Home Secretary to prevent the making of adverse immigration decisions in certain categories of cases, essentially any non-points-based claims. The judge was not persuaded that such an approach was necessary, especially as the Home Office had given an assurance that any cases involving proposed interviews of unaccompanied minors would be postponed for a three-week period. Although not dismissed formally, the claim was adjourned to enable the parties to return to court if it became apparent that there was some other element of unfairness arising from RMJ's closure that would impact detrimentally on clients above and beyond the normal disruption caused by any supplier closing down.

On 12 July 2010, an internal memo was circulated within the UK Border Agency (UKBA) by Hugh Ind, director of the New Asylum Model, restating the general principle that decisions do not have to be delayed because individuals are unrepresented, but pointing out that discretion should be exercised for exceptional cases. Reference to the agreement to delay interviews for unaccompanied minors is repeated with that guidance with an indication that such interviews might be postponed for a longer period, if necessary. The memo also contains a reminder to UKBA staff that refusal to agree to extensions or to defer interviews in particular cases might be subject to judicial scrutiny.

Much criticism was made of the LSC's response to *DMM* in issuing guidance on 1 July 2010 that sought to restrict the transfer of cases only to those in which appeals were pending and not also to other cases. That initial guidance was superseded by amended guidance issued on 8 July, but there remain some concerns about the revised guidance.[1] In particular:

■ suppliers were cautioned against taking on cases awaiting a decision, the suggestion being to inform the client to return once a decision had been made unless there had been a change of circumstances;

■ although there was an agreement in principle to consider sympathetically an increase in the allocation of new matter starts for absorbing RMJ cases, this was not the certainty that many practitioners would have preferred, despite the LSC's own estimate of approximately 7,800 unused cases allocated previously to RMJ; and

■ where funds had been authorised for a particular disbursement but not actually incurred by RMJ, it remains necessary to seek reapproval of that disbursement authorisation.

New legal aid contracts

Practitioners will be well aware of the significant delays in the announcement of the new contract arrangements in the immigration category, beginning in October 2010. The announcement was made eventually after RMJ closed down, leading some practitioners to believe that this was the real motivation for the delay, although it is understood that timetables for other bids have also been delayed.

The outcome of the new arrangements left many suppliers with considerably fewer case starts than those for which they bid (in some cases receiving only one-third of the number sought), with concerns that the allocation had been made on a subjective and arbitrary basis rather than on the basis of objective criteria, a matter denied strenuously by the LSC.

Many suppliers that have been allocated far fewer case starts than they sought may need to consider whether or not it is viable for them to continue, hampered by these restraints, particularly where immigration legal aid work is increasingly not considered financially viable when operating within limited parameters**.** Concern has also been expressed by the Immigration Law Practitioners' Association that the limited new matter starts released to suppliers did not take account of the significant number of cases that would otherwise have been allocated to RMJ before the organisation went into administration. According to information disclosed by the LSC on 27 July 2010, 47,744 immigration and 48,761 asylum new matter starts were awarded in the tender round to 252 providers, with a 19 per cent increase in the number of offices applying for immigration work.

Out of country appeal correspondence reminder

As from 2 August 2010, practitioners are reminded that any correspondence for out of country appeals should be despatched to the First-tier Tribunal (Immigration and Asylum Chamber), PO Box 7866, Loughborough LE11 2XZ, fax number: 01509 221403.

However, appeal forms for out of country appeals are to be lodged at the First-tier Tribunal (Immigration and Asylum Chamber), PO Box 6987, Leicester LE1 6ZX, fax number: 0116 249 4214.

In country appeal forms and correspondence should continue to be sent to the First-tier Tribunal (Immigration and Asylum Chamber), Administrative Support Centre Birmingham, PO Box 14619, Birmingham B16 6FQ, fax number: 0121 450 6391.

Statutory instruments

Immigration (Leave to Enter and Remain) (Amendment) Order 2010 SI No 957

This Order came into force on 25 March 2010 and amends the Immigration (Leave to Enter and Remain) Order 2000 SI No 1161 by adding a new category of person who can be given leave to enter or remain without the need for a written decision. The new category applies to those given leave, by passing through an automated gate, as general, business, academic, sports or entertainer visitor; persons seeking entry for private medical treatment; or persons seeking leave as parents of children at school in the UK.

They are treated as having been given leave for a period of six months and any decision to permit entry through an automated gate will be valid for up to two years, but may be varied or withdrawn without notice. The onus rests on the individual to show that his/her entry was as a result of such authorisation should the question of his/her entry be challenged subsequently.

Comment: Although for some this will reduce delay, there remains a real danger for such individuals unable to establish that they have entered in keeping with that authorisation through an automated gate, especially when they may have no means of knowing whether or not the authorisation remains in force.

UK Borders Act 2007 (Commencement No 6) Order 2010 SI No 606

This Order brought into force UK Borders Act 2007 s24 from 1 April 2010. This provision gave power to enable cash to be seized by immigration officials in the same way that powers exist under the Proceeds of Crime Act 2002. This power applies not only in relation to immigration offences, but also to a wider range of offences including conspiracy to defraud, perjury, theft, handling stolen goods and bigamy (the applicable offences are listed at Asylum and Immigration (Treatment of Claimants, etc) Act (AI(TC)A) 2004 s14(2)).

Immigration and Nationality (Fees) Regulations 2010 SI No 778

These regulations came into force on 6 April 2010 and regulate fees for a wide variety of applications, differentiating between fees payable for applications made in person as opposed to those made by post. The regulations also specify additional fees for dependants applying at the same time whether on the same, or on a separate, form.

The regulations confirm that no fee is payable in connection with claims for asylum or humanitarian protection or from those already granted humanitarian protection, or for their dependants. This exception also applies to those granted leave outside the rules following rejection of an asylum claim, ie, those given discretionary leave on an asylum as opposed to an article 8 of the European Convention on Human Rights ('the convention') basis. In addition, applicants seeking leave as victims of domestic violence continue to be permitted to apply without a fee, but only where there is evidence of destitution provided at the time of the application.

Others exempt from the fee regime include persons under 18 who are being provided with assistance by a local authority, those seeking entry clearance as family members to join those granted asylum or humanitarian protection, or those in circumstances where the secretary of state chooses to waive the fee. The regulations also state that where a fee is required but is not paid, the application is not treated as being made validly. It is understood that problems have sometimes arisen where an applicant has submitted a cheque that has not cleared. The regulations clearly stipulate that such an application would not be valid.

Also included within the regulations is the level of fee, set at £15,000, where an application for leave to remain is made on a premium case working basis which involves a UKBA representative attending the premises of an applicant and making a decision on the same day. Lest it be thought that the coalition government is embarking on a process of privatising immigration control, practitioners are reminded that these regulations were brought into effect by the previous government.

Immigration and Nationality (Cost Recovery Fees) Regulations 2010 SI No 228

These regulations also came into force on 6 April 2010. They provide for the levels of fees payable for Tier 5 (Temporary Worker) Migrants and confirm that fees are not payable for persons seeking variation in that capacity for a period up to six months on arrival.

The regulations also list fees payable for entry clearance for persons seeking entry as visitors, including academic visitors, and for entry as Tier 1 (General) Migrants already granted approval under the Highly Skilled Migrant Programme, Tier 1 (Post Study Work) Migrants, Tier 4 student migrants and the dependants of either. Fees are also set for

the document recording biometric data and for sponsorship licenses for Tiers 2, 4 and 5.

These regulations also envisage UKBA activities taking place other than at UKBA or consular premises or out-of-hours services, at a rate of £130 per hour up to a maximum of £939 per day. It will come as no surprise to most practitioners that the rate is significantly greater than that payable under the legal aid contract for work carried out at UKBA premises. The regulations also introduce a comparatively modest fee (£100) payable for an individual seeking reconsideration of a decision to refuse naturalisation or registration, refundable where the reconsideration results in the grant of naturalisation or registration.

By replacing the Immigration and Nationality (Cost Recovery Fees) Regulations 2009 SI No 421, the fee for the certificate of approval required under AI(TC)A s19(3)(b) or for those seeking to register a civil partnership is removed. In any event, on 26 July 2010, the government announced its intention to abolish the certificate of approval scheme altogether from either the end of 2010 or early 2011.[2]

British Nationality (General) (Amendment) Regulations 2010 SI No 785

The British Nationality (General) (Amendment) Regulations (BN(G)(A) Regs) 2010 came into force on 7 April 2010 and amended the British Nationality (General) Regulations 2003 SI No 548 to ensure that in order to demonstrate knowledge of language and life in the UK, the person has attended an accredited college using particular set material and has gained a specific qualification. Another method of satisfying the test would be for an applicant to show that s/he had already passed the way of life test in connection with an application for indefinite leave to remain.

UK Border Agency (Complaints and Misconduct) Regulations 2010 SI No 782

These regulations came into force on 7 April 2010. Like the UK Border Agency (Complaints and Misconduct) Regulations 2009 SI No 2133 now repealed, these regulations place the conduct of UKBA staff in serious cases under the scrutiny of the Independent Police Complaints Commission (IPCC), which has similar powers of investigation to those exercisable in the investigation of complaints against the police. The scope of the investigatory powers is also extended to UKBA officials exercising customs revenue functions.

The IPCC will not investigate all complaints but only those referred to it by the UKBA on the ground of the gravity of the subject matter or exceptional circumstances. In addition, the IPCC will have a freestanding power to investigate cases resulting in death or serious injury, serious assaults, sexual assaults, serious corruption, criminal offences aggravated by discriminatory behaviour or a complaint of a breach of article 3 of the convention.

The report produced by John Vine, the Independent Chief Inspector of the UKBA, published on 27 July 2010, made a number of criticisms about aspects of the UKBA's performance.[3] In particular about:

- a lack of planning in terms of welfare and other needs when seeking to remove families;
- a lack of understanding of the importance of collating data about families in the removals process;
- a lack of evidence to substantiate whether dawn raids were effective or proportionate as a means of assisting in the removals process; and
- poor file management and incomplete audit trails.

A number of recommendations were made largely reflecting concerns expressed within the report, including:

- the need for interpreting services at the time of family arrests;
- ensuring that the number of officers involved is proportionate with the nature of a family arrest;
- the need for a consistent approach to ensure that enforcement is used as a last resort when other methods to persuade individuals about the possibility of assisted voluntary returns or other mechanisms for return have proved impossible;
- ensuring a consistent approach to reviewing the length of detention by officers of sufficient seniority and that each review considers the rationale for detention of the family unit;
- reviewing the training of staff in awareness of cultural issues when dealing with family units.

Asylum Support (Amendment) Regulations 2010 SI No 784

These regulations came into force on 12 April 2010 and set the new financial entitlements for those receiving support under the National Asylum Support Service.

Judicial review and injunctions

'Recent developments in immigration law – Part 2', March 2010 *Legal Action* 12 reported on the new *Judicial review and injunctions* policy (chapter 60 of the Enforcement Instructions), which permitted less than 72 hours' notice to be given in 'exceptional cases' where removal was planned. That policy was challenged in *R (Medical Justice) v Secretary of State for the Home Department* [2010] EWHC 1925 (Admin), 26 July 2010. Silber J quashed the exceptions policy on the basis that the fundamental right of access to the court and a lawyer would be seriously impeded, particularly where it was accepted that 72 hours was, even on the Home Office's own analysis, a tight timetable.

A revised policy on *Judicial review and injunctions* was issued on 26 July 2010 which removes the reference to exceptional cases.[4] In giving judgment, Silber J emphasised that nothing was to be taken as suggesting that the general policy of 72 hours' notice could be challenged as defeating those fundamentally important rights. The secretary of state was granted permission to appeal to the Court of Appeal by the High Court given that the issue is one of public importance, and consequently this debate will return at a future date.

Statements of changes in Immigration Rules

Statement of changes in Immigration Rules HC 439

HC 439 took effect for the most part from 6 April 2010 with the remaining provisions taking effect from 7 April 2010. These changes do the following:

- tighten up rules on which colleges can be approved and stipulate not only the material used for the purposes of meeting the English as a Second or Other Language requirement (consistent with the BN(G)(A) Regs above), but also benchmark what is used to demonstrate 'relevant progress' on the course;
- enable overseas doctors and dentists who took their degree course at an approved body in the UK to be employed in training;
- reduce the initial period of entry clearance for persons seeking to enter as Tier 1 (General) Migrants from three to two years, with the period for an extension of leave (subject to meeting the requirements) increased from two to three years;
- require consent from the parent or guardian of a person aged between 16 and 18 coming to the UK as a Tier 2 or Tier 5 migrant;
- create new sub-categories of 'Skills Transfer' and 'Graduate Trainee' within the category for Tier 2 (Intra-Company Transfer) Migrants, entry clearance for the former being limited to six months and the latter to 12 months;
- remove the entitlement for persons under the Tier 2 (Intra-Company Transfer) route to obtain settlement;
- reduce back to 18 (from 21) the age requirement for applicants or their spouses, civil partners, fiancé(e)s or proposed civil partners, unmarried or same-sex partners,

where either are serving members of HM forces;
- remove the requirement for asylum claimants to sign the interview record;
- permit an immigration officer to suspend, rather than discontinue altogether, an asylum interview involving a child over the age of 12 and to decide whether to continue with the interview on the same day or another day;
- amend the availability of points dependent on qualifications, previous earnings and age for the points-based system as well as the level of funds required for Tier 4 migrants;
- add Monaco to the list of countries from which applications can be made for Tier 5 Youth Mobility Scheme.

Statement of changes in Immigration Rules HC 59

HC 59 came into force from 19 July 2010 with a transitional provision for persons with pending applications under Tier 1 (General) Migrants to have them determined by the rules in force at 18 July. This is the first statement of changes by the coalition government and to some extent was foreshadowed by much of the debate before the election on capping migration. It is consistent with the announcement in *The coalition: our programme for government* on 20 May 2010 to limit the size of non-EU economic migration by placing an upper limit on applications for entry clearance in Tiers 1 and 2. The changes do not apply to applications for leave to remain for those already in the UK. The changes:
- create a 'grant allocation' and a 'relevant grant allocation period';
- state that applications that would have been granted but for the fact that the grant allocation had been met in a particular grant allocation period, will be considered at the next grant allocation period;
- increase the number of points required for persons seeing entry under Tier 1 but those seeking leave to remain who have been granted leave either under Tier 1 or as highly skilled migrants, writers, composers, artists or self-employed lawyers will not be penalised retrospectively by this change.

Statement of changes in Immigration Rules HC 96

HC 96 also took effect from 19 July 2010 and is designed to place a cap on the number of certificates of sponsorship issued for the purposes of Tier 2 migrants. The cap is supposed to operate on a monthly basis but the UKBA website has not disclosed the size of the cap for either scheme.

A consultation process on the issue of capping is due to end on 17 September 2010 with a separate consultation being undertaken by the Migration Advisory Committee, which is due to end on 7 September 2010.[5] The intention will be for permanent levels of the cap to be in place from 1 April 2011.

Statement of changes in Immigration Rules HC 382

HC 382 came into force in part from 23 July 2010 with the remainder coming into force from 12 August 2010. Practitioners will be well aware that one of the most frustrating elements of the introduction of the points-based system is the rigidity with which the provisions are applied as well as the fact that reference was made to separate documents and, consequently, it was often difficult to establish precisely what was required. One of the cornerstones of the system was that the UKBA said that the guidance documents were to have the force of the Immigration Rules, even though they were extraneous to them.

In *Secretary of State for the Home Department v Pankina and others* [2010] EWCA Civ 719, 23 June 2010, the Court of Appeal took a very different view. It concluded that guidance can be no more than guidance and does not have the same force as law.

The issue in this case related to the requirement within the rules to meet a financial test (the availability of funds at the date of application) by reference to guidance which required the funds to be held for every single day for a three-month period. As the court concluded at paragraph 46: 'If the Home Secretary wishes the rules to be blackletter law, she needs to achieve this by an established legislative route.'

The change made within HC 382 adopts the same requirement which was in the guidance, with the consequence that applicants are still required to meet the strict financial test of having evidence of funds for a consecutive 90-day period ending not more than a month before the application is submitted (or a 28-day period in the case of a Tier 4 Migrant or his/her partner or child) and a requirement that evidence is provided.

The issue for the Court of Appeal was not whether the rules were proportionate, merely whether it was possible to require an application to be governed by provisions outside the rules themselves. It is not envisaged that any challenge could succeed against the rule change since the effect of the judgment in *Pankina* was to criticise the approach of treating the extraneous guidance as binding. The basis for the court's intervention was the mechanism by which the secretary of state was seeking to achieve the objective, not the objective itself.

Although the Home Office indicated initially that an appeal to the Supreme Court was being contemplated, it is understood that no appeal will proceed.

Other changes to the rules under HC 382 include:
- permitting Tier 4 students to study at 'Highly Trusted Sponsor' institutions while awaiting formal approval for applications to change to one of those institutions, provided that they had leave at the time of seeking that change;
- clarifying that a general ground of refusal will be the fact that an applicant did not have current leave at the time of an application;
- requiring students to meet a minimum language requirement unless from a majority English-speaking country or intending to come to the UK for the purposes of learning English.

To coincide with the changes that came into effect on 23 July to reflect the judgment in *Pankina*, the UKBA published *Points-based system maintenance (funds): policy document*.[6] The document applies only to those persons who sought entry clearance under the points-based system between 23 June 2010 and 22 July 2010 and who were refused on maintenance grounds; and to those persons lawfully in the UK who applied up to and including 22 July 2010, were refused on maintenance grounds and who still have lawful leave.

The effect of the policy is that:
- for those out of country who have pending applications made between 23 June 2010 and 22 July 2010, their applications will be considered with reference to the requirement to show that they met the requirements on any one day in the month preceding the making of the application;
- those applicants out of country whose claims were decided within that timeframe and whose reviews have been dismissed are asked to contact the entry clearance officer with details and for the cases to be reconsidered in the light of this policy;
- for those with pending applications in country at 22 July 2010, if they are able to show that they met the maintenance requirement for any single day in the month preceding the application, then their application is to be granted;
- for those refused either without an appeal or following rejection of an appeal before 23 July 2010, if the refusal was on maintenance grounds, then they are asked to submit details of their case for a further consideration but only where the evidence provided originally showed that they were able to meet the financial requirement for one day during the month before the making of the application (ie, not new evidence) and where they remain lawfully present in the UK;
- for those with pending appeals or judicial review challenges in country, the applications will be considered consistently

with that approach.

The policy is to remain in force until 22 June 2011 giving potential claimants almost a year to seek a review of any decision made. Applications made on or after 23 July 2010 will be determined by the amendments in HC 382.

Other news

New form

The UKBA has issued a SET (Protection Route) application form to be completed by persons with refugee status or humanitarian protection and whose leave is due to expire.[7] Practitioners may recall that in July 2005 the policy of granting indefinite leave to those recognised as refugees came to an end and was replaced by the limited term of five years. This new form is to be used and is fee-exempt. Guidance issued by the UKBA indicates that it expects to reach decisions within six months of the date of application and that the making of an application will trigger an active review to establish any reasons why the individual should not be granted indefinite leave.

It is understood that initially the LSC was of the view that completion of the application may amount to little more than 'form filling' and at the time of going to press a definitive view was being sought about whether such work would fall within or outside the scope of legal aid funding. Many practitioners may find it hard to comprehend such an approach given that the potential consequence of incorrectly completing the application or, where relevant, failing to provide material information, may result in a negative decision and the potential loss of a crucial right of residence.

On 22 July 2010, Nick Clegg, the Deputy Prime Minister, made plain the government's intention to end the detention of children for immigration purposes, although without a clear indication of precisely when that objective would be achieved.[8]

On 26 July 2010, Damian Green MP, the minister for immigration, confirmed that the government intends to introduce a compulsory English language test from 29 November 2010 for spouses, civil partners, fiancé(e)s and proposed civil partners, and unmarried and same-sex partners coming from non-English-speaking countries to join sponsors in the UK or who seek leave to remain in the UK in that capacity.[9] The requirements will not apply to EU nationals.

On 28 July 2010, the Supreme Court unanimously dismissed the secretary of state's appeal in *R (ZO (Somalia) and others) v Secretary of State for the Home Department* [2010] UKSC 36 and confirmed that asylum claimants with second or subsequent claims would be permitted to be considered for permission to work in keeping with article 11 of Council Directive 2003/9/EC. Fuller details will follow in a future 'Recent developments in immigration law' article.

1 *Refugee and Migrant Justice (RMJ) – updated urgent guidance (supersedes the guidance dated 1 July 2010, which is now archived)*, available at: www.legalservices.gov.uk/docs/cls_main/RMJ TransferGuidanceAmended080710DS.pdf.
2 See: www.ukba.homeoffice.gov.uk/sitecontent/newsfragments/32-coa-changes.
3 See *Family removals: a thematic inspection*. January-April 2010, available at: http://icinspector.independent.gov.uk/wp-content/uploads/2010/07/Family-Removals-A-Thematic-Inspection.pdf.
4 Available at: www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/chapter60_11012010.pdf?view=Binary.
5 *Limits on non-EU economic migration. A consultation*, UKBA, June 2010, available at: www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/limits-on-non-eu-migration/ and Consultation by the Migration Advisory Committee on the level of an annual limit on economic migration to the UK, June 2010, available at: www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithus/mac/mac-consultation-annual-limit/.
6 Available at: www.ukba.homeoffice.gov.uk/sitecontent/documents/news/pbs-pol-guid-maintenance.pdf.
7 Available at: www.ukba.homeoffice.gov.uk/settlement/applicationtypes/completing_set_protection_route/.
8 See, for example, www.homeoffice.gov.uk/media-centre/news/yarls-wood-family-unit.
9 See: www.ukba.homeoffice.gov.uk/sitecontent/documents/news/wms-english-tests-partners.pdf.

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Recent developments in housing law

Nic Madge and **Jan Luba QC** continue their monthly series. They would like to hear of any cases in the higher or lower courts relevant to housing. In addition, comments from readers are warmly welcomed. See also page 8 of this issue.

POLITICS AND LEGISLATION

Housing and legal aid

The results of the bid rounds for legal aid contracts to undertake new housing work from October 2010 were delayed initially and then distributed gradually in late July 2010. A verification of the arrangements for successful bidders was due to be undertaken in August 2010. Free-standing housing contracts were not available. Contracts were only awarded for the following:

- housing with family; or
- social welfare law (which includes debt and benefits work with housing).

Over 30 per cent of current providers failed to secure a contract, including a number of very high-profile specialist firms and agencies, and many others received fewer matter starts than they had sought or expected. As a result, scores of appeals were lodged. The latest update is available at the Legal Services Commission's (LSC's) website.[1]

The latest statistics from the LSC show that in 2009/10 the number of specialist housing providers had already fallen to 501: *Statistical information* 2009/2010 (LSC, July 2010).[2] The figures also indicate that the number of full legal aid certificates issued in 2009/10 for housing cases fell slightly to 11,958. Of 11,202 certificated housing cases concluded in the year, 66 per cent had brought substantive benefits for the assisted person.

Housing and human rights

The government has reported on progress with the implementation of adverse human rights judgments delivered by the European Court of Human Rights (ECtHR) and the domestic courts in *Responding to human rights judgments: government response to the Joint Committee on Human Rights' fifteenth report of session 2009–10* (TSO, July 2010).[3] The report sets out the government's current position on three significant housing cases: *McCann v UK* [2008] HLR 40; App No 19009/04, *Connors v UK* [2004] HLR 52; App No 66746/01 and *Morris v Westminster City Council* [2006] 1 WLR 505; [2005] EWCA Civ 1184.

Social housing tenancy exchanges

In August 2010, the government announced its intention to create a National Affordable Home Swap Scheme enabling tenants of social housing to exchange homes with other such tenants across the country: Communities and Local Government (CLG) news release, 4 August 2010.[4] Presumably the scheme will enable greater use of the statutory right to exchange enjoyed by secure tenants: Housing Act (HA) 1985 ss91–92. The announcement accompanied publication of the *Report of the Mobility Taskforce* (National Housing Federation (NHF), August 2010) which indicated that at least 200,000 tenants were already registered on existing exchange schemes.[5]

Annual reports by social landlords

The national standards for social landlords published by the Tenant Services Authority require that an annual report for tenants is published by every social landlord on or before 1 October 2010. The report is intended to measure landlords' performance against the national standards and progress towards adopting local standards (known as 'local offers'). *The annual report to tenants: a toolkit* (NHF, July 2010) offers help on the content of reports, for both landlords and tenants.[6]

Protecting tenants of mortgage borrowers

The Mortgage Repossessions (Protection of Tenants etc) Act 2010 comes into force on 1 October 2010: Mortgage Repossessions (Protection of Tenants etc) Act 2010 (Commencement) Order 2010 SI No 1705. The Act requires lenders to give occupiers notice of intention to execute possession orders obtained against borrowers.

The Dwelling Houses (Execution of Possession Orders by Mortgagees) Regulations 2010 SI No 1809 prescribe the form and content of the notice to be served on any tenant or other occupier when the landlord's mortgage lender seeks to enforce a possession order by obtaining a warrant for possession. The notice makes tenants aware that a warrant for possession is being sought and advises them of their rights and the need to seek advice. From 1 October 2010, the Civil Procedure Rules (CPR) are amended to accommodate the changes introduced by the new Act: Civil Procedure (Amendment No 2) Rules 2010 SI No 1953. New CPR 55.10(4A) provides that unauthorised tenants may apply for suspension of possession orders. New County Court Rules Ord 26 r17(2A) requires lenders applying to execute possession orders to certify that notice has been given in keeping with the new regulations.

Help for homeowners

In July 2010, the government's review of arrangements for helping homeowners who are unable to pay their mortgages produced a series of announcements: CLG news release, 20 July 2010.[7] First, the Mortgage Rescue Scheme (MRS) for England is to be refocused and the amount of subsidy available to housing associations purchasing properties under the scheme is to be reduced. The government has already ended the special fast track MRS arrangements (provided by a team in Birmingham). The fast track MRS team has not taken new applications since the end of June and closed over the summer. Ordinary applications for help under the MRS can still be made in the usual way through local housing authorities. Second, the Homeowners Mortgage Support (HMS) scheme, which is run by the major lenders, is to close at the end of the financial year. Reportedly, the HMS scheme has assisted only 34 borrowers in a year of operation. The key features of both the present schemes are set out in *Evaluation of the Mortgage Rescue Scheme and Homeowners Mortgage Support: interim report* (CLG, July 2010).[8]

The prospects for further mortgage default and repossession are outlined in *Modelling and forecasting UK mortgage arrears and possessions: report* (CLG, July 2010).[9]

The Social Security (Housing Costs) (Standard Interest Rate) Amendment Regulations 2010 SI No 1811 provide that from 1 October 2010 the standard rate of interest which will be met on mortgage interest repayments made through income support and other means-tested benefits will

be the effective interest rate for loans to households ('the average mortgage rate') published by the Bank of England in August 2010.

Housing and equality

The Equality and Human Rights Commission (EHRC) is pressing on with preparations for the intended commencement of the Equality Act (EqA) 2010 in October 2010. The EHRC has published four new guides for service providers (including landlords) and users (including tenants) about the prohibitions on discrimination and requirements to make reasonable adjustments contained in the EqA.[10]

Housing in Wales

On 22 July 2010, the National Assembly for Wales (Legislative Competence) (Housing and Local Government) Order 2010 SI No 1838 came into force. The Order extends the legislative competence of the National Assembly for Wales to make laws (known as Measures of the National Assembly for Wales) in relation to almost all aspects of social housing. One of the first measures is likely to be the enactment of a new regulatory regime for social housing providers in Wales. The Welsh Assembly Government (WAG) is running a consultation exercise on its latest proposals for a regulatory framework for housing associations: *Developing a modern regulatory framework for housing associations in Wales: i) 3rd phase consultation – an approach to regulatory assessment and performance judgements* (WAG, July 2010). The deadline for responses is 17 September 2010.[11]

Rough sleeping

The government is undertaking a consultation exercise on proposals to review methods of counting rough sleepers in England: *Proposed changes to guidance on evaluating the extent of rough sleeping: consultation* (CLG, July 2010).[12] Responses should be provided by 3 September 2010. The consultation follows the announcement that while the official count published earlier this year showed that there were 440 rough sleepers in England, additional official experimental estimates suggest that the figure could be as high as 1,247: CLG news release, 23 July 2010.[13]

There is a new guide for GPs, health professionals and probation staff dealing with rough sleepers with mental health problems: *Meeting the psychological and emotional needs of homeless people: non-statutory guidance on dealing with complex psychological and emotional needs* (National Mental Health Development Unit and CLG, May 2010).[14]

Gypsy and Traveller sites

On 6 July 2010, by exercise of delegated powers under Local Democracy, Economic Development and Construction Act 2009 s79(6), the Secretary of State for Communities and Local Government achieved the immediate revocation of regional spatial strategies pending primary legislation to abolish them: *Hansard*, HC Written Ministerial Statement cols 4WS–5WS, 6 July 2010. The strategies will no longer form part of local authority development plans for the purposes of Planning and Compulsory Purchase Act 2004 s38(6). They had been major drivers in requiring site provision for Gypsies and Travellers.

On the same day, a letter was sent by CLG to all planning authorities explaining the impact of the change; however, in relation to Gypsy and Traveller sites it stated: 'We will review relevant regulations and guidance on this matter in due course.'[15]

HUMAN RIGHTS

Article 8

■ Belchikova v Russia

App No 2408/06,
5 December 2005

In February 2000, Ms Belchikova's sister was given a rent agreement for an apartment for a term of one year. Ms Belchikova lived with her sister in the apartment. In April 2000 her sister died. By her will, the sister bequeathed the apartment to Ms Belchikova. In May 2002, the Pushkinskiy District Court declared the sister's will invalid on the ground of her insanity. In February 2005, the district court heard a claim by the owner of the apartment to have Ms Belchikova evicted. It noted that the agreement had expired in February 2001 and that Ms Belchikova no longer had any right to live in the apartment. It also noted that the owner and his family did not own any other accommodation and wanted to live in the apartment. It considered that Ms Belchikova was not in need of accommodation, since she owned a house in the Crimea, and had, until 2002, owned an apartment in the Murmansk Region and then sold it. Having regard to these considerations, the court considered that the eviction order requested was an appropriate and necessary measure which was justified by the interests of the owner of the apartment. Ms Belchikova complained about the outcome of the eviction proceedings to the ECtHR, relying on articles 6, 8 and 13 of the European Convention on Human Rights ('the convention').

The First Section of the ECtHR observed that:

> *... the loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under article 8 ... notwithstanding that, under domestic law, his or her right of occupation has come to an end (*McCann v UK *Application no 19009/04, and* Paulić v Croatia *Application no 3572/06). [However, in this case] the domestic courts specifically weighed the conflicting interests of the applicant and the plaintiffs. Having regard to the fact that the plaintiffs were the owners of the apartment, had the intention of residing in the apartment at issue and had no other housing, whilst the applicant did not have any right under the domestic law to remain in that apartment and moreover owned a house elsewhere, the courts decided that ... the applicant's eviction had been an appropriate and justified measure.*

The court found that the interference with Ms Belchikova's article 8 rights was compatible with the requirements of article 8(2), in that it was lawful and necessary in a democratic society for the protection of the interests of the owners. There was no reason to believe that the proceedings did not comply with the requirements of the convention. The court found that the application was manifestly ill-founded and declared the application inadmissible.

■ Oluić v Croatia

App No 61260/08,
20 May 2010

Mrs Oluić was an owner-occupier of part of a building. Another part of the building was being run as a bar. Mrs Oluić complained to the local authority about the noise generated by the bar, late into the night. Numerous official sound measurements were taken over a lengthy period demonstrating that noise in excess of permitted levels could be heard in her home. Some sound insulation was installed, but it was not to an adequate standard. She complained to the ECtHR that the failure of the authorities to stop the excessive noise amounted to an infringement of her right to respect for her home under article 8.

The court held that although there is no explicit convention right to a clean or quiet environment, if an individual is directly and seriously affected by noise or other pollution, the state may be obliged to adopt measures designed to regulate the behaviour of private parties in order to prevent a violation. In this case, the noise levels were such that the state had failed to discharge its positive

obligation to guarantee Mrs Oluić's right to respect for her home and her private life (*Moreno Gómez v Spain* App No 4143/02; (2005) 41 EHRR 40). The ECtHR awarded her €15,000 in damages, plus costs.

■ **Poplar HARCA v Howe**

[2010] EWHC 1745 (QB), 13 July 2010

Mr and Mrs Howe were joint assured tenants. They separated and the council rehoused Mrs Howe as a homeless person. She then signed a 'termination of tenancy' form. Mr Howe applied to the council's housing management panel for rehousing. The panel made four offers of rehousing but he refused all of them as being unsuitable. Poplar HARCA sought possession against Mr Howe relying on *Hammersmith and Fulham LBC v Monk* [1992] 1 AC 478, HL. Recorder Wright QC made an order for possession. Mr Howe sought permission to appeal. He argued that *Monk* was incompatible with article 8 and that service of the notice to quit was unlawful.

Rafferty J refused the application. With regards Gateway (a), while *Harrow LBC v Qazi* [2003] UKHL 43; [2004] 1 AC 983 remained good law, such a defence could not succeed; *Qazi* defeated the incompatibility challenge. The recorder's decision was 'unimpugnable'. With regards Gateway (b), Rafferty J adopted the recorder's findings that Poplar HARCA had no responsibility to provide accommodation or to assist with Mr Howe's removal expenses.

SECURE TENANCIES

Death and succession

■ **Solihull MBC v Hickin**

[2010] EWCA Civ 868, 27 July 2010

In 1980, the council let a house to Mr and Mrs Hickin on a weekly secure tenancy. They lived there together with their daughter, Elaine Hickin. In 2001, after the failure of their marriage, Mr Hickin left the house, never to return. Elaine Hickin continued to live in the house with her mother, as their only or main residence. In 2007, Mrs Hickin died. Following her death, the council served a notice to quit on Mr Hickin, and then issued possession proceedings against Elaine Hickin. District Judge Hammersley made a possession order. HHJ Oliver-Jones QC allowed an appeal. The council appealed to the Court of Appeal.

The Court of Appeal allowed the second appeal. On the death of Mrs Hickin, the tenancy of the house vested in Mr Hickin as a result of the doctrine of survivorship. Mr Hickin did not reside in the property, and so the tenancy ceased to be a secure tenancy. It was therefore effectively determined by the notice. Miss Hickin was neither entitled to succeed to the tenancy under the provisions of HA 1985 ss87–90, nor remain in the house once the notice had expired.

■ **Sheffield City Council v Wall (No 2)**

[2010] EWCA Civ 922, 30 July 2010

Mr Wall was fostered when he was six months old and by the time of the court hearing was aged 39. In 1986, his mother was granted a secure tenancy of a two-bedroom house on the basis that it was to be occupied by her and her 'son'. Mr Wall lived at the property with his foster mother continuously, apart from term time when he was a student. In September 1999, he obtained a training contract with solicitors in Sheffield and continued to live 'at home'. However, in September 2001, the solicitors gave him a temporary, six-month contract in London, which was later extended until June 2002. Accordingly, he leased a flat in London for one year as he was unable to find a tenancy for a shorter time. In November 2001, he was admitted as a solicitor. When his contract ended, he physically returned to live in the house in Sheffield and moved all of his belongings back on 6 July 2002. He continued to live there with his mother until she died on 21 June 2003. The council claimed possession. Mr Wall defended on the basis that he had succeeded to his foster mother's tenancy (HA 1985 s87). A recorder made a possession order because he was not satisfied that Mr Wall had been in residence for the 12 months immediately preceding his foster mother's death. Mr Wall appealed. However, he did not seek a stay of execution and vacated the premises as he was ordered to do. In 2005, the council let the property to Mr and Mrs Ingham on a secure tenancy. The Court of Appeal then allowed Mr Wall's appeal and remitted the case for a rehearing ([2006] EWCA Civ 495; May 2006 *Legal Action* 31).

Mr Wall applied to have the matter restored. However, the council then changed its position and informed him that it no longer disputed his assertion that he satisfied the residence requirement for succession. Mr Wall then applied to join Mr and Mrs Ingham and issued his own claim for possession against them. HHJ Bullimore dismissed the council's claim against Mr Wall for possession, but likewise dismissed Mr Wall's claim for possession against Mr and Mrs Ingham. Mr Wall appealed.

The Court of Appeal dismissed the appeal.

■ The words 'a person is a member of another's family within the meaning of this Part if …' in HA 1985 s113 are to be construed to mean that he is *only* a member of the family if he can bring himself within its ambit (court's emphasis). The word 'child' must be limited to the closed categories stipulated in s113(2), namely blood relationships, step children and illegitimate children.

■ There was no doubt that Mr Wall's article 8 rights were engaged. The Court of Appeal was also prepared to accept that the enjoyment of those rights was discriminated against on the ground of his birth or status as a foster child. However, the crucial question was whether or not such difference in treatment had an objective and reasonable justification. Council housing is a precious and limited resource. It is for the authority concerned to decide its allocation schemes and who is qualified to be allocated housing accommodation by it. The exclusion of foster children was objectively justified. The legislation was compatible with Mr Wall's convention rights.

Setting aside warrants

■ **Hammersmith and Fulham LBC v Pill**

West London County Court, 26 May 2010[16]

Ms Pill was the secure tenant of premises owned by Hammersmith and Fulham. She lived there with her two children. Previously her partner, the father of her children, had been violent towards her. As a result of Ms Pill's increasing rent arrears, the council sought possession of the premises. In August 2008, a possession order, postponed on terms, was granted. In December 2008, a date for possession was fixed as 16 January 2009. There were then a series of warrant suspensions. The council was aware of the defendant's problems at home because they were described in the suspension of warrant applications. More recently, however, some progress had been made by social services in improving the relationship between Ms Pill and her partner and it was clear from her rent account that she had started to make regular payments of her rent contribution and arrears during November and December 2009.

However, in January 2010, Ms Pill's partner committed suicide by hanging himself. This suicide had a devastating effect on her and her son. She 'stopped functioning', ceased to manage her affairs and did not open letters or read them properly. From early January 2010, she stopped paying her rent contribution. The council sent her letters telling her that it was going to seek a further warrant of possession. In February 2010, the council applied for a further warrant. The court sent Ms Pill notification of the forthcoming eviction date. She saw the letter but did not take in the contents. In early February 2010, her housing officer was told about the effect of the suicide. The housing officer, while sympathetic, indicated that the eviction would

go ahead and did not arrange to visit Ms Pill. On 4 March 2010, the housing officer, accompanied by bailiffs, took possession of the premises when Ms Pill and her family were out. On 5 March 2010, her solicitors made an application to set aside the warrant of possession on the ground of oppression. It became clear that the council's officers had acted in a manner which was contrary to their own policies by applying for the eviction before senior management approval had been obtained and by failing to mention the recent bereavement and its effect in the report seeking approval for the eviction.

At the hearing of the application, District Judge Nicholson found that there had been oppression in the execution of the warrant and set aside the warrant. He held that maladministration by a local authority can be a relevant factor which the county court is entitled to consider in an oppression case (*Southwark LBC v Sarfo* (1999) 32 HLR 602, CA, at 608, *Jephson Homes Housing Association v Moisejevs* (2001) 33 HLR 594, CA, at 601 and 602 and *Southwark LBC v Augustus* February 2007 *Legal Action* 29). There had been maladministration here because the council had failed to follow its own rent arrears procedures, which had reduced the level of protection offered to Ms Pill. In any event, the district judge considered that common sense dictated that a housing officer coming across news of such a suicide and the effect on the family had a duty to investigate by making efforts to contact the tenant on a face-to-face basis. The failure to do that also represented maladministration. The defendant was denied a proper opportunity to tell the housing officer why she had not been paying the rent. He considered that the council was at fault and criticism could be levelled at it to a very high degree.

FULLY MUTUAL HOUSING ASSOCIATIONS

■ Mexfield Housing Co-operative Ltd v Berrisford

[2010] EWCA Civ 811,
15 July 2010

In 1993, Mexfield Housing Co-operative granted Ms Berrisford a tenancy. On 11 February 2008, Mexfield served a notice to quit terminating the tenancy on 17 March 2008. It began a possession claim. Mexfield's primary submission was that the tenancy fell outside the provisions of the HA 1988 because it was registered under the Industrial and Provident Societies Act 1965 and was a fully mutual housing co-operative association within the meaning of HA 1985 s5(2) and Housing Associations Act 1985 s1(2) and so it could not be an assured tenancy (HA 1988 Sch 1, para 12(1)(h)). It applied for summary judgment. HHJ Mitchell dismissed that application. Mexfield appealed. Peter Smith J allowed the appeal and made a possession order ([2009] EWHC 2392 (Ch); December 2009 *Legal Action* 15).

Ms Berrisford appealed to the Court of Appeal. She argued that as one clause provided that the landlord would only terminate the tenancy if the rent remained unpaid 21 days after it became due and there had been no finding of fact that she was in arrears, the claim for possession should be dismissed. Mexfield, however, claimed that the contractual limitation on giving notice to quit rendered the entire agreement void as being for an uncertain term (*Prudential Assurance Company Ltd v London Residuary Body* [1992] 2 AC 386).

The Court of Appeal, by a majority, dismissed the appeal. In view of the decision in *Prudential Assurance Company Ltd*, the agreement was incapable of taking effect as a lease. The maximum term of the lease was uncertain and, therefore, void. The uncertainty invalidated the agreement both as a contract and as a lease: equity would not enforce an uncertain contract. Ms Berrisford occupied the property as a tenant under a common law monthly periodic tenancy, with no restrictions on the circumstances in which it could be terminated.

NUISANCE

■ Brumby v Octavia Hill Housing Trust

[2010] EWHC 1793 (QB),
15 July 2010

Ms Brumby was an assured tenant of a one-bedroom flat on the lower ground floor of a block of flats. She claimed that, over a period of nearly four years, she had suffered from nuisance caused by visitors to another flat in the building as they passed through the common parts. Her case was that she had complained to the landlord and that it had failed to take reasonable steps to abate the nuisance (*Sedleigh-Denfield v O'Callaghan* [1940] AC 880, HL). The landlord applied to strike out the claim under CPR 3.4 and/or CPR 24.2. HHJ Gibson dismissed the application. The landlord appealed to the High Court.

Mackay J dismissed the appeal. Whether or not the landlord had failed to take reasonable steps to prevent or abate the nuisance was an acutely fact-sensitive issue which could only be determined at trial. The rule in *Sedleigh-Denfield* was not affected by the decisions in *Smith v Scott* [1973] 1 Ch 314, *Hussain v Lancaster City Council* [2000] 1 QB 1; (1999) 31 HLR 164, CA and *Mowan v Wandsworth LBC* (2001) 33 HLR 56, CA. If the judge took a favourable view of the evidence, liability in tort could be established.

ASSURED SHORTHOLD TENANCIES

Tenants' deposits

■ UK Housing Alliance (North West) Ltd v Francis

[2010] EWCA Civ 117,
24 February 2010

Mr Francis entered into a sale and leaseback contract relating to his home with UK Housing Alliance. He was paid 70 per cent of the sale price on completion and would receive the balance of 30 per cent after ten years on giving up possession. The contract provided that UK Housing Alliance might retain 30 per cent of the purchase price if it terminated the tenancy.

The Court of Appeal decided that this provision was not an unfair term within the meaning of Unfair Terms in Consumer Contracts Regulations 1999 SI No 2083 reg 5. The court also held that the payment of the final 30 per cent to Mr Francis was not a deposit within the meaning of the HA 2004. The references in that Act to 'paid', 'received', 'repay' and 'transfer of property' were 'inapt … to describe a situation in which a tenant pays nothing but is the person to whom money is paid' (para 9).

■ Green v Sinclair Investments Ltd

Clerkenwell and Shoreditch County Court,
11 June 2010[17]

In December 2008, the defendant let a property to the claimant on an assured shorthold tenancy for a fixed term of one year. The claimant paid a deposit of £2,100. The defendant did not deal with the deposit in keeping with the HA 2004 provisions at any time. In July 2009, the tenancy ended by surrender. In September 2009, the claimant sent a letter of claim for the return of the deposit and the payment of a sum equal to three times the deposit under HA 2004 s214. In response, the defendant sent a cheque for the full deposit to the claimant's solicitors. The cheque was received by the solicitors just after the claim was issued on 27 October 2009, but before it was served. The solicitors refused to accept the cheque, and returned it to the defendant. The defendant paid the monies into the claimant's bank account in February 2010. This payment was accepted by the claimant. The defendant argued that the court could not make any order under s214(3), either for the return of the deposit or for its protection, because the tenancy had ended and the deposit had been repaid in full.

It claimed that the court could not make an order for payment of three times the deposit under s214(4), because a subsection (4) order can only be made in addition to a subsection (3) order, and not on its own.

District Judge Manners accepted this submission and dismissed the claim. After referring to *Draycott and Draycott v Hannells Letting Ltd* [2010] EWHC 217 (QB); April 2010 *Legal Action* 25, she said: 'In my judgment, if breach of the requirements of section 213 can be remedied by late protection of the deposit and compliance with the information provisions of that section, it can also be remedied by repayment of the whole of the deposit … as the whole of the deposit has now been returned the court is unable to make an order under section 214(3) (a) or (b) and is consequently not able to make an order for payment of three times the deposit under section 214(4).'

TRAVELLERS' SITES

■ Brent LBC v Corcoran

[2010] EWCA Civ 774,
8 July 2010

In 1997, Brent granted Ms Corcoran and her sister licences to occupy pitches on a Traveller site. By the licences, they were prohibited from parking more than one vehicle on each pitch, causing harassment to staff, or selling or supplying drugs. The police discovered that Ms Corcoran's son and nephew were using additional caravans on the pitches for selling or supplying drugs. Brent terminated the licences and began possession proceedings. HHJ Copley made orders for possession but adjourned consideration of whether or not they should be suspended. Although possession orders were made in mid-May 2008, it was not until September 2009 that judgment was given on whether or not they should be suspended in keeping with Caravan Sites Act 1968 s4. HHJ Copley suspended the orders for 12 months on undertakings. Ms Corcoran and the council both appealed to the Court of Appeal.

The Court of Appeal dismissed Ms Corcoran's appeal. In rejecting arguments about a possible public law defence, Jacob LJ made it 'absolutely clear that public law attacks of the technical and over-theoretical sort advanced here have no merit whatsoever in this sort of case' (para 12). Brent's reasons for terminating the licences were 'clear and obvious. Both licensees were in severe and multiple breach of the terms of their licences' (para 14). In those circumstances, it was: '… entirely far-fetched to suppose that a local authority should think that racial discrimination considerations could come into play … If Brent had decided not to serve a notice … on the ground of race it would most likely have been exercising unlawful positive racial discrimination – treating a particular ethnic minority more favourably than other ethnic groups' (para 19).

The Court of Appeal allowed Brent's appeal. It was highly critical of the delay in considering whether or not the orders for possession should be suspended. Brent had already established its entitlement to possession: 'A final decision was crying out to be made. A local authority cannot properly conduct its management functions … if access to the courts can be delayed so much. Courts must make every endeavour to hold early hearings in cases such as these …' (para 27).

The judge had erred in disregarding or downgrading serious breaches of the licence agreements and a serious incident when staff had been abused; his exercise of discretion was flawed. After considering *Bristol City Council v Mousah* (1998) 30 HLR 32, the Court of Appeal exercised the discretion itself by removing the suspension of the possession orders.

TRESPASSERS

■ Mayor of London v Hall and others

[2010] EWCA Civ 817,
16 July 2010

The defendants took possession of Parliament Square Gardens in London to establish a 'Democracy Village' peace camp. The Greater London Authority Act (GLAA) 1999 vested title to the gardens in the Queen, but gave management and control to the Greater London Authority, acting through the mayor. The mayor sought a possession order. The defendants argued that the mayor could not maintain a possession claim in the absence of a right to possession or, alternatively, that a possession order would infringe their rights to assemble and protest. Griffith Williams J made a possession order and granted injunctions ordering the occupants to dismantle structures which they had erected.

The Court of Appeal upheld the possession order in relation to most of the defendants. The court held that:

■ Griffith Williams J had been correct in refusing an adjournment. Although the time between the issue of proceedings and the start of the trial was 'undoubtedly very short' (para 15) (ie, only 19 days), no prejudice was caused to any defendants.

■ The statutory scheme made by the GLAA implicitly gave the mayor the right to seek possession. Lord Neuberger MR rejected the contention that a claim for possession can only be successfully maintained if the person seeking possession can establish title of some sort to a legal estate in the land: '… the modern law relating to possession claims should not be shackled by the arcane and archaic rules relating to ejectment, … it should develop and adapt to accommodate a claim by anyone entitled to use and control, effectively amounting to possession, of the land in question …' (para 27).

■ Articles 10 and 11 of the convention were engaged. The defendants were entitled to have the proportionality of making a possession order assessed by the court. This was ultimately a matter for the court, not for the mayor. However, there were no grounds for attacking the judge's conclusion that the making of a possession order was 'a wholly proportionate response' (para 47).

■ Where only part of what could be fairly described as one piece of land was occupied by a defendant, the owner of the land can claim possession of the whole piece (*Secretary of State for Environment, Food and Rural Affairs v Meier* [2009] UKSC 11; [2009] 1 WLR 2780). Furthermore, where the whole piece of land was occupied by trespassers and it was difficult to identify precisely who occupied what part, it was particularly unrealistic to expect the claimant to identify which part each defendant occupied.

HOMELESSNESS

Eligibility

■ Lekpo-Bozua v Hackney LBC

[2010] EWCA Civ 909,
28 July 2010

The claimant was a British citizen. Her dependent niece was a French national. On a claim for homelessness assistance, the question arose whether or not the claimant's niece would count for the purposes of determining priority need: HA 1996 s185. Initially, Hackney decided that the claimant had no priority need because her niece was an ineligible person. On review, the council decided that it did owe the claimant a limited duty as a 'restricted person' in light of the amendments made to s185 by Housing and Regeneration Act 2008 s314. Her appeal against the review decision was dismissed by HHJ Mitchell.

The Court of Appeal dismissed a second appeal. It held that the niece was not exercising any right to reside in the UK given under the EU Treaty or the relevant EU Directives. She was therefore a person subject to immigration control and required leave to enter or remain (which she did not have). Accordingly, the niece did not confer

priority need on her aunt under the pre-amended version of HA 1996 s185. On the assumption (made by the council on review) that the HA 1996 applied in its post-amendment form, the claimant was not owed the main housing duty in the form usually owed to a person with a priority need because hers was a 'restricted person' case: HA 1996 s193(7AA).

HOUSING AND CHILDREN

■ R (P) v Barnet LBC

[2010] EWHC 1765 (Admin), 15 June 2010

The claimant sought asylum in the UK and claimed to be an unaccompanied minor entitled to housing and other assistance under Children Act (CA) 1989 s20. The council conducted an age assessment which concluded that he was aged 19 and not entitled to assistance.

Blake J dismissed a claim for judicial review of that decision. Although a dispute in relation to a person's age was ultimately for the court to decide, 'a very careful and thorough assessment [had been] conducted by the defendant of the question of age' (para 40). The authority's decision was upheld.

■ EA v GA and Westminster City Council

[2010] EWCA Civ 586, 27 May 2010

The claimants, two young children aged eight and six, were born in Ireland and were Irish nationals. In March 2010, their mother removed the children from Ireland and brought them to the UK. She had no right to remain in the UK. She had no entitlement to benefits and applied to Salford City Council for help. It housed her for four weeks, but then funded travel costs to London on condition that the trip was one way. The children's father applied in the family court for their return. A judge gave directions for a hearing of the application, but meanwhile directed Westminster City Council to house the mother and children, exercising the power to give directions contained in Child Abduction and Custody Act (CACA) 1985 s5. Westminster sought an order that Salford bear the costs of accommodating.

The Court of Appeal held that the CACA did enable an order to be made requiring a council to accommodate the family. Any application for such an order should be made on notice to the council concerned and any issue concerning which council was to accommodate or pay should be decided by the family court judge.

■ C v Nottingham City Council

[2010] EWCA Civ 790, 1 July 2010

The claimants were two young adults who had been accommodated (separately and later together) under duties owed to homeless people in HA 1996 Part 7. They claimed that while still children they should have been accommodated under children's services functions: CA 1989 s20. They sought a declaration that they were entitled to care-leaver services. HHJ Inglis, sitting as a High Court judge, refused permission to seek judicial review. The claimants appealed.

The Court of Appeal dismissed the appeal. Without admission of liability, the council had agreed voluntarily to provide the claimants with the services they would have had as care-leavers. The court was not prepared to entertain what had thus become an academic appeal.

HOUSING AND COMMUNITY CARE

■ R (Mwanza) v Greenwich LBC and Bromley LBC

[2010] EWHC 1462 (Admin), 15 June 2010

The claimant lived with his wife and children. They had no settled accommodation and were not UK nationals. He had been admitted to, and later discharged from, compulsory treatment for mental health problems under the Mental Health Act (MHA) 1983. He claimed that Greenwich was obliged to house the family as part of its aftercare duty in MHA s117. Alternatively, Bromley had to accommodate the family under National Assistance Act (NAA) 1948 s21.

Hickinbottom J rejected a claim for judicial review. Greenwich had long since lawfully discharged its aftercare duty and Bromley owed no duty because the claimant had no need of 'care' as he was cared for by his family.

■ R (Buckinghamshire CC) v Kingston upon Thames RLBC

[2010] EWHC 1703 (Admin), 12 July 2010

A disabled adult was placed by the defendant at a special residential centre in the claimant's area pursuant to its duties under NAA s21. On a later needs assessment, the defendant agreed to help the disabled person move to more independent living on an assured shorthold tenancy in a nearby shared house. However, the disabled person continued to need help with her special needs. Once the move had been arranged, the defendant informed the claimant that the disabled person was now resident in its area and had become its responsibility. The claimant sought judicial review of the placement decision contending that the defendant had been under a duty to consult it before undertaking the placement in a shared supporting people scheme.

Wyn Williams J rejected the claim that the defendant had been under a duty to warn or consult the claimant. There had, however, been a failure to resolve the housing benefit position in relation to the new placement. To that extent only, the claim succeeded.

1 Visit: www.legalservices.gov.uk/civil/tendering/social_welfare_family.asp.
2 Available at: www.legalservices.gov.uk/docs/stat_and_guidance/Stats_Pack_0910_23Jul10.pdf.
3 Available at: www.official-documents.gov.uk/document/cm78/7892/7892.pdf.
4 Available at: www.communities.gov.uk/news/housing/1664130.
5 Available at: www.housing.org.uk/Uploads/File/Policy%20briefings/Neighbourhoods/Mobility%20Taskforce%20report%20August 2010.pdf.
6 Available at: www.housing.org.uk/Uploads/File/Policy%20briefings/Neighbourhoods/Annual%20report%20for%20tenants%20-%20July%20 2010.pdf.
7 Available at: www.communities.gov.uk/news/corporate/1643931.
8 Available at: www.communities.gov.uk/documents/housing/pdf/1648140.pdf.
9 Available at: www.communities.gov.uk/documents/housing/pdf/1643676.pdf.
10 Visit: www.equalityhumanrights.com/legislative-framework/equality-bill/equality-act-2010-guidance/.
11 Available at: http://wales.gov.uk/docs/desh/consultation/100721housingphase3en.pdf.
12 Available at: www.communities.gov.uk/documents/housing/pdf/1648341.pdf.
13 Available at: www.communities.gov.uk/news/corporate/1648579.
14 Available at: www.nmhdu.org.uk/silo/files/meeting-the-psychological-and-emotional-needs-of-people-who-are-homeless.pdf.
15 Available at: www.communities.gov.uk/documents/planningandbuilding/pdf/1631904.pdf.
16 Gail Bradford and Jennifer Stokes, Hammersmith and Fulham Community Law Centre®, Jim Shepherd, barrister, Doughty Street Chambers.
17 Gillian Ackland-Vincent, barrister, London.

Nic Madge is a circuit judge. Jan Luba QC is a barrister at Garden Court Chambers, London. He is also a recorder. The authors are grateful to the colleagues at notes 16 and 17 for the notes of the judgments.

Recent developments in practice management

Vicky Ling summarises the annual training requirements for legal aid solicitors.

It is the season when solicitors ensure that they are up to date with their annual 16 hours' training as required by the Solicitors Regulation Authority (SRA). There are useful and flexible guidelines available on the SRA's website.[1] However, for legal aid practitioners there are further requirements in the Unified Contract (the Standard Contract 2010 from October) and the Specialist Quality Mark (SQM) 2010.[2] Unfortunately, the SQM is a bit less flexible than the SRA requirements, and there is a greater emphasis on Continuing Professional Development (CPD) accredited training. This is probably because the Legal Services Commission (LSC) wants the added quality assurance of CPD accreditation wherever possible, as these courses have to meet certain standards in terms of having documented objectives, course notes and delegate evaluation. However, the LSC requires only six hours' training in a 12-month period, as opposed to the 16 hours required for solicitors by the SRA, so in practice solicitors will be able to comply with the requirements of both bodies without all their training being accredited formally.

SQM D5.1: training requirements

This requirement states that:

All training should qualify for CPD hours (ie, be CPD-accredited or approved by an [Investors in People] organisation), and any training that does not must be justified on the following grounds:

- *CPD-qualifying training was not available (usually owing to geographical location or subject matter).*
- *CPD-qualifying training was not desirable (usually because an individual in your organisation is qualified to deliver training in the subject area or because training that was more appropriate to your needs was available from a non-CPD accredited source).*

To qualify towards the hours required, courses that are not CPD-accredited (including in-house courses and seminars) ***must*** meet the following requirements:

- *Sessions last at least 30 minutes and a record of the title and purpose are made where sessions last between 30 minutes and one hour.*
- *Supporting course material is available for all courses lasting longer than one hour.*

Non-interactive training (eg, correspondence courses or training by video) should qualify for CPD hours and ***must*** *include a documented discussion with the supervisor (and ideally with other caseworkers) of the issues raised (or review of exercises completed).*

There is a useful website which helps practitioners find out whether courses are available in a convenient location.[3] It lists a comprehensive range of courses from all leading providers. Searching the site serves a dual purpose, as it will help to find a suitable course if one is available, and justify non-CPD accredited training if one is not. It is worth considering whether a course provider will deliver a course in-house at a convenient location, as it could be possible to reduce costs by offering places to other organisations locally.

SQM D3.3: supervisors' training

The LSC's requirements for supervisors are very similar to those above, but note that there are limits on some types of training and development activity:

- *... non-interactive training (eg, video) cannot exceed four of the six hours required (and qualifies only where consideration of the issues is additional and documented).*
- *... courses that do not qualify for CPD hours ... where they can be justified on grounds that CPD training was not readily available, or that the alternative was more suitable, and only where training lasts for two hours or longer and is supported by course material.*
- *Delivering training courses (externally or in-house), but only where supported by course material, and only for a maximum of three of the six hours required.*
- *Discussions of technical legal issues within regional or national practitioner associations, but only where supported by evidence of what was discussed and when (eg, dated handouts or notes of cases/ issues discussed).*
- *Publications by the supervisor, but only where written for other practitioners, promoting best practice (ie, not comment or editorial), and published in an externally edited publication form, and then only to a maximum of four of the six hours required (with the hours equivalent agreed with the auditor).*

Solicitors, to be 'qualified to supervise' under rule 5.02 of the SRA Solicitors' Code of Conduct, have to have done a minimum of 12 hours' training in management skills.[4] However, the SRA allows wide discretion in the type of course that is acceptable in meeting this requirement. It is not necessary to check with the SRA in advance if a course would be acceptable 'unless the course is unusual and outside the mainstream of management training' (guidance note 44 to r5.02). Consideration should also be given to continuing training in management for those with responsibility for management and supervision so that they maintain a level of competence appropriate to their work and level of responsibility under rule 5.01(1)(i) of the code of conduct.

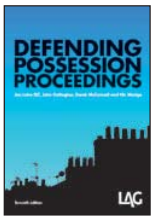
SQM D2.3: training and development

These requirements are precise: 'The plans **must** outline what is to be achieved (ie, aim), how it is to be achieved (ie, method), and over what timescale.' This means that a short note at the end of an appraisal record along the lines of 'look out for courses on advocacy' will not be sufficient. In this example, the aim would be 'to develop advocacy skills', the method would probably be a combination of attending a course and shadowing an experienced advocate, and the timescale would be whatever appeared to be reasonable given the individual's training and experience. Finally, clause 5.2(c) of the Standard Contract 2010 requires organisations to have an equality and diversity training plan, so everyone will need to do some equality and diversity training appropriate to the scale and type of the organisation.[5]

1 See: www.sra.org.uk/solicitors/cpd/solicitors.page.
2 See: www.legalservices.gov.uk/criminal/contracting/specialist_help.asp.
3 See: www.sourcethecourse.co.uk/index.asp.
4 See: www.sra.org.uk/code-of-conduct.page.
5 See: www.legalservices.gov.uk/docs/civil_contracting/100210StandardTermsFINALTOPUBLISH.pdf.

Vicky Ling is a consultant specialising in legal aid practice and a founder member of the Law Consultancy Network. E-mail: vicky@vling.demon.co.uk.

▶ New books from LAG



Defending Possession Proceedings

Seventh edition

Jan Luba QC, John Gallagher, Derek McConnell and Nic Madge

■ Pb 978 1 903307 75 5
■ 1008pp ■ August 2010 ■ £55

'For the novice and the seasoned performer, this work should only be removed from the desk for the purpose of carriage to court.' *New Law Journal*

'If defending possession proceedings is the task facing you, then this is the book to use.' *Solicitor's Journal*

'... a treasure trove of law and tactics in perfect harmony'. *Journal of Housing Law*

Defending Possession Proceedings is the key 'homelessness prevention' handbook: a comprehensive guide to all aspects of the law relating to possession proceedings.

Dealing with the three principal types of occupier: social housing tenants, private tenants and mortgage borrowers – *Defending Possession Proceedings* focuses on practice and procedure and the relevant substantive law. This invaluable text is written in a user-friendly way, so that it contains information which is of use to the most experienced legal practitioner, yet is still understandable to the least experienced housing adviser.

Employment law: an adviser's handbook

Eighth edition

Tamara Lewis

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■ 904pp ■ September 2009 ■ £35

'There is probably no other book that provides so much information for such a reasonable cost.' *Adviser*

Employment law: an adviser's handbook is the definitive text on employment law for the adviser. Uniquely focused on the claimant, it provides up-to-date coverage of UK and European employment and discrimination law.

Support for Asylum-seekers and other Migrants

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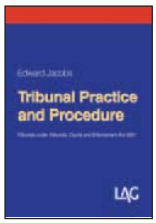
■ 864pp ■ September 2009 ■ £45

'... invaluable, indeed essential, for practitioners, administrators [and] welfare workers.' *Justice of the Peace*

Support for Asylum-seekers and other Migrants is the only handbook focusing exclusively on the welfare and legal rights of asylum-seekers. It has now been expanded to cover the welfare needs of other migrants, in particular refused asylum-seekers at the end of the process and EU nationals.

Now includes EU nationals' entitlements.



Tribunal Practice and Procedure

Edward Jacobs

■ Pb 978 1 903307 73 1
■ 900pp ■ October 2009
■ £40

Tribunal Practice and Procedure is the only book that covers the structure, proceedings and law governing the integrated tribunal system created by the Tribunals, Courts and Enforcement Act 2007. As well as dealing with the rules of procedure, this book contains practical advice for tribunal members and those who appear before them. It deals with obtaining and assessing evidence, writing decisions, applying for adjournments, questioning and tribunal advocacy.

Written by a judge of the Upper Tribunal, this is essential reading for tribunal judges and panel members, lawyers and anyone who appears before tribunals or is interested in how they work.

Repairs: tenants' rights

Fourth edition

Jan Luba QC, Deirdre Forster and Beatrice Prevatt

■ Pb 978 1 903307 67 0
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■ January 2010

'A very useful, concise and well-written guide to this complex area and a must for the busy practitioner.' *Law Society Gazette*

Repairs: tenants' rights has long been recognised as an essential text for all housing advisers and lawyers dealing with disrepair and other adverse conditions affecting residents in rented housing accommodation. As well as focusing on repairs it deals with a range of other issues such as infestations, hazards and absence of amenities.

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Employment Tribunal Claims: tactics and precedents

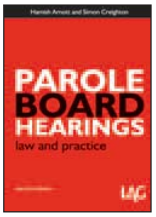
Third edition

Naomi Cunningham and Michael Reed

■ Pb 978 1 903307 70 0
■ 416pp ■ January 2010 ■ £35

'I would have given my eye teeth for this book as a newly-qualified employment lawyer representing claimants.' *SCOLAG*

Employment Tribunal Claims: tactics and precedents brings together an extensive collection of precedents to equip claimants and their advisers with the tools and tactics to win their cases. This edition has been extensively rewritten and clarified for improved ease of use. There is substantial new material on preparing for a hearing; more detailed guidance on preparing a schedule of loss; and enhanced guidance on drafting claims and witness statements.



Parole Board Hearings: law and practice

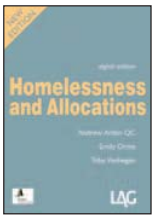
Second edition

Hamish Arnott and Simon Creighton

■ Pb 978 1 903307 64 9
■ 416pp ■ January 2010
■ £30

'This is a quite superb book, written with clarity and authority, ideally suited to anyone looking for an introduction to this intellectually stimulating and fast-paced area of law.' *Andrew Keogh, Crimeline*.

Parole Board Hearings: law and practice is the only book dedicated to explaining the decision-making powers and procedures of the Parole Board. The second edition is up to date to include the Parole Board (Amendment) Rules 2009.



Homelessness and Allocations

Eighth edition

Andrew Arden QC, Emily Orme and Toby Vanhegan

■ Pb 978 1 903307 74 8
■ 900pp ■ March 2010
■ £48

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

Homelessness and Allocations has established itself as the definitive guide to the rights of the homeless. Housing practitioners and advisers seeking authoritative, accurate and accessible guidance on local authority duties need look no further.

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Community care

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27 September 2010
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Karen Ashton, Luke Clements, Stephen Cragg, Phil Fennell and Pauline Thompson
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£195 + VAT
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Steve Broach and Mitchell Woolf
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8 December 2010
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Steve Broach and Mitchell Woolf
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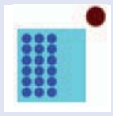

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Level – Intermediate
Completion of a course such as this is mandatory for membership of the Mental Health Review Tribunal (MHRT) panel.
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Jonathan Manning
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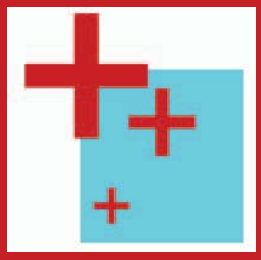

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