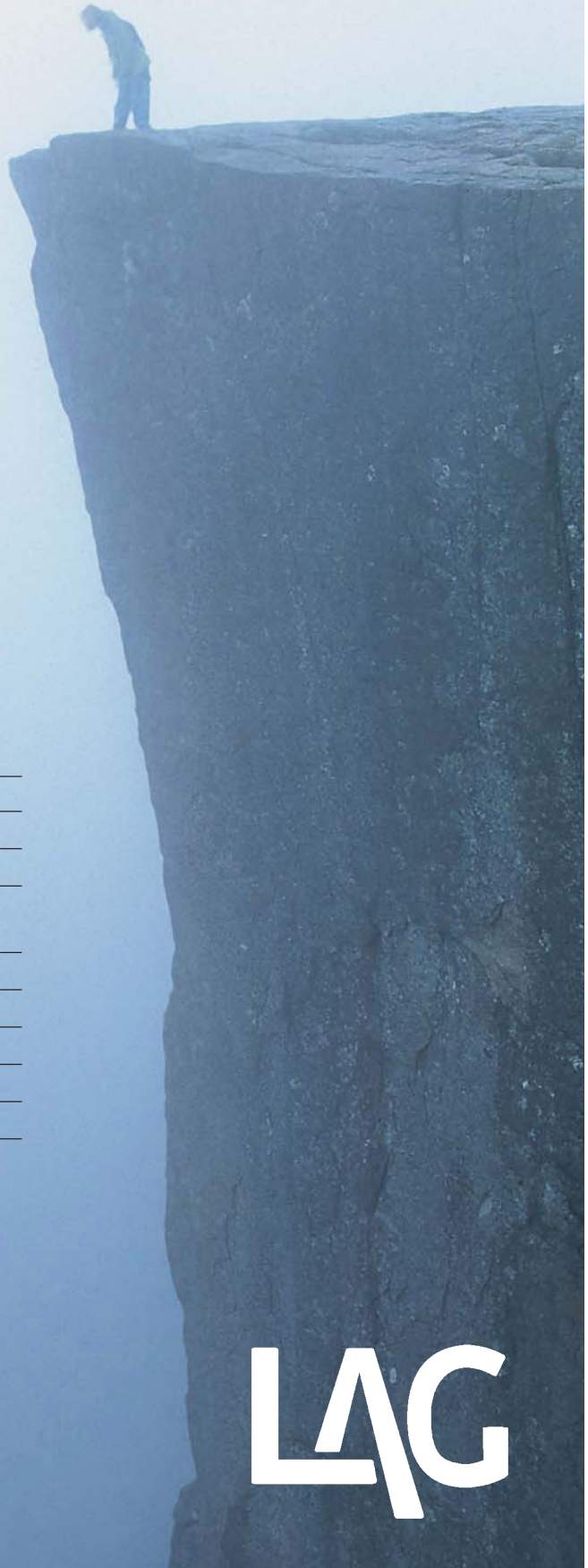
MARCH 2009 Journal of Legal Action Group

LegalAction

www.lag.org.uk



ON THE EDGE OF THE ABYSS:
LEGAL AID FROM 2010 – PART 1

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.

LAG
242 Pentonville Road
London N1 9UN
Telephone: 020 7833 2931
Fax: 020 7837 6094
E-mail: legalaction@lag.org.uk
Visit: www.lag.org.uk/legalaction

Cover photograph: LOOK Die Bildagentur der Fotografen GmbH/ Alamy

Published by LAG Education & Service Trust Ltd, a registered charity incorporated in England (1095065), 242 Pentonville Road, London N1 9UN

Designed by Mick Keates and Tom Keates-Miles
Typeset by Boldface Typesetters Ltd
Printed by Reflex Litho Ltd
ISSN 0306 7963

(In)equality of arms at the ET

Usually costs are not awarded to the successful party in employment tribunals (ETs). LAG believes that if costs were awarded routinely, this would act as a barrier to access to justice by deterring many employees with strong cases from bringing claims against their employers.

ETs are a particularly daunting forum for unrepresented applicants as their procedures are analogous to those of the civil courts rather than to those of other social welfare tribunals. The problem that faces many claimant employees is how to pay for representation with little prospect of recovering costs from the other side.

Damage-based contingency fees in employment cases: a survey of practitioners by Richard Moorhead and Rebecca Cumming confirms that, all too often, employees seeking redress are outgunned by employers' legal representation.* The research points out that employers' expert resources in employment law outweigh those of employees by a factor of three to one. LAG has been made aware by practitioners in the field that it has become the norm for most employers to be represented by either a solicitors' firm or employment law consultants, with their services often paid for by an insurance policy. Now that the maximum award for unfair dismissal is £66,200 and with no limit on awards for discrimination, it makes good business sense for employers to manage the risk of employment litigation through insurance-backed legal services.

LAG argues that unfortunately there are few viable, alternative funding sources for the majority of claimant employees. While some people will be covered by legal expenses insurance sold as an add-on to household insurance policies, it is still rare for employees' representation to be paid for in this way. Also, many employees in low-paid, insecure jobs are unable to afford such insurance premiums.

Representation before ETs is outside the scope of legal aid and many potential claimant employees fall foul of the means test. One of the great iniquities of legal aid is that employees cannot get publicly-funded advice to save their job; such assistance is only available once they are dismissed and so qualify for legal aid. Of course many trade unions offer representation, but union members make up only one in four of the workforce and are concentrated in the public sector.

So, where can an unfairly-dismissed employee go for advice and how will it be paid for? S/he might be lucky enough to live in an area with a not-for-profit agency that is funded to provide representation or has links to a pro bono provider. According to the research, many employees who are not able to access such services are turning to damage-based contingency fees (DBCFs). DBCFs involve a percentage being taken from any ET award, typically 30–40 per cent, if the claim is successful. While DBCFs are common in the USA, they are rare in the UK. The research points out that low-value, high-risk cases lose out as representatives are not prepared to take them on under DBCF arrangements. Also, clients are often forced to settle claims if their adviser deems it appropriate to do so, and have little chance of challenging such decisions. At the heart of DBCFs is the ethical dilemma that the adviser has a stake in the client's case: there is a danger that rather than risk losing at a hearing and not being paid, s/he will advise the client to take a settlement.

While some respondents to the survey which was conducted as part of the research had used DBCFs for many years, they concluded that the use of these arrangements has only increased significantly in the past five years: around 11 per cent of cases are now funded in this way. LAG agrees with the researchers' recommendation that DBCFs need to be better regulated to iron out anomalies around the charges. For example, many firms using DBCFs base their fee on the award the ET makes before any deductions for earnings and benefits. This would make sense if DBCFs use is set to grow, but by their nature the use of such arrangements excludes a large number of low-paid claimant employees. While the average unfair dismissal award is around £8,000, the median award is only £3,800. Many practitioners told the researchers that cases with a value of less than £6,000 were not economical to take on; however, such cases make up over 60 per cent of all ET claims.

So, it would seem that DBCFs do not provide improved access to justice for the majority of claimants. The research states that 72 per cent of employers as opposed to 42 per cent of employees are represented at hearings. LAG has argued for many years that the extension of legal aid to representation at ETs would be a starting point in addressing this fundamental inequality of arms before the law.

* Available at: www.law.cf.ac.uk/researchpapers/papers/6.pdf.

CDS Direct 'must try harder'

Defence solicitors have been calling for 'a full and independent review' of the controversial helpline for those detained at police stations, despite a clean health check following a LAG 'mystery shopper' test (see box on right). Criminal Defence Service (CDS) Direct has been providing telephone advice to suspects since 2005, and calls are routed through the Defence Solicitor Call Centre (DSCC). In a damning report, legal academics Lee Bridges and Professor Ed Cape argued that CDS Direct was of 'questionable legality' under domestic law as well as possibly contravening the European Convention on Human Rights (see November 2008 *Legal Action* 5).

Following the Bridges/Cape report, *CDS Direct: flying in the face of the evidence*, LAG asked the Legal Services Commission (LSC) to provide a random sample of CDS Direct files to assess the quality of the advice given. The Law Society also expressed concerns and wrote to the Ministry of Justice calling for a 'full and independent review of the operation of both schemes, with all options, including the possibility of abolition'. 'We have come to the position of accepting, albeit not particularly happily, the role of CDS Direct to deal with the duty solicitor, telephone-only calls,' commented Richard Miller, the Law Society's legal aid manager. 'However, the whole infrastructure of the DSCC in order to filter off "own solicitor" cases is just a monstrous bureaucracy that is seriously getting in the way of advice that they need when they are getting arrested.'

Under the old system, if a suspect requested his/her own solicitor the police would ring that lawyer, but now calls are directed through the DSCC. 'Once the solicitor has been contacted by the call centre, they then have to phone into the police station,' commented Richard Miller. Reports from practitioners suggest it can be 'hellishly difficult to get the police to answer the phone'.

'There is a lot of government spin to suggest that CDS Direct is working well,' said Andrew Cosma of Martin Murray & Associates. He reckons that helpline advisers are having major problems getting through to stations as well. 'At some stations, 50 per cent of the detainees that are requesting advice in respect of CDS Direct cases are not getting it. The LSC will say that this is because the police are not answering the phone, but in some cases it is because they are not trying hard enough.' Andrew Cosma has been defending clients for 20 years. 'And I have always managed to get through to police stations. It might take some time but I would never leave a suspect without advice.'

According to John Sirodcar, London regional director at the LSC and head of national accounts, CDS Direct saves the taxpayer around £8 million a year. The service handles approximately 11,800 cases a month. 'Private practice would cost us £30.25 a call. We are getting £18 or £19. That saves us £1 million, and the rest of the savings come from the lawyers who used to have to go to a station and now do not.' John Sirodcar reports that one of the benefits of CDS Direct is that it can measure the responsiveness (or not) of the police. The service can take up the issue directly with local police, as opposed to individual practitioners who might be reluctant to put their head above the parapet. 'The worst police stations are getting close to not answering half the time and the best do not answer 10–15 per cent of calls,' John Sirodcar reports. 'It is likely that a police station has a lot of other issues other than answering their telephones, if they are failing to pick up.'

Mystery shopper test

At LAG's request, the LSC provided nine CDS Direct files selected at random. Leading defence lawyers Andrew Keogh of Keogh Solicitors and Tony Edwards of TV Edwards LLP Solicitors reviewed the files for LAG.

Andrew Keogh found 'some minor issues', but taking the sample as a whole found the quality 'extraordinarily high'. 'Superb outcomes that I know I would not have achieved if I had conduct of these matters, and I very much doubt many others would have either,' he said. He added that one 'has to be careful' with samples, even 'random' ones. In particular, Andrew Keogh noted 'very good links with agencies that normally do not come up on defence radar'; notable criticism of police 'that shows in the remarkably pro-active management of the cases'; and 'persistence in face of initial knock-backs'.

'If they are a true sample, they are truly impressive and working at a standard far above anything that private practice would or, indeed for the fee, could do,' said Tony Edwards. 'There are a number of cases at excellent level and only one at competent with all the others at competent plus.' He found 'just one error of law' (where the adviser needed to be updated on new prison recall rules under Criminal Justice and Immigration Act 2008). 'On the basis of this sample, I would be strongly opposed to the return of this work to mainstream practice.'

LSC consults on prison law funding

The Legal Services Commission (LSC) has begun a consultation on the funding of prison law, which in the past seven years has risen from £1 million to £19 million. According to the LSC, by 2011/12 the cost of prison law services to the legal aid budget could be as much as £45 million and such an increase was 'unsustainable'. 'These cases involve important decisions affecting prisoners' lives,' Carolyn Regan, the LSC's chief executive, said. 'The proposals would change the way in which these services are funded and supplied. Ensuring sustainable and experienced service providers deliver high-quality advice and representation for clients, and at the same time providing value for taxpayers, is a priority.'

The proposed reforms would be made in two phases. Proposals for the first phase include:

- introducing matter starts for prison law cases;
- revising the funding criteria to ensure that only cases with a 'realistic prospect of a positive outcome' are taken forward;
- introducing a fixed-fee or standardised payment scheme; and
- limiting work to firms with a prison law track record and employing a supervisor with a minimum of 350 hours of prison law work.

Phase two proposals include:

- introducing a dedicated telephone helpline;
- introducing a duty solicitor scheme;
- increased use of video-conferencing facilities; and
- 'block contracting' for firms to bid to provide services for all work at a specific prison.

■ *Prison law funding: a consultation paper* is available at: http://consult.legalservices.gov.uk/inovem/gf2.ti/f/157314/2421125.1/pdf/-/PrisonLawFundingAConsultationPaper10FebFinalv.4.pdf. The consultation ends on 5 May 2009.

2010 contracts plans 'too vague' warns Law Society

Plans for the new civil legal aid contracts would 'do more harm than good' by further shrinking the number of legal aid lawyers and denying access to justice, the Law Society has warned (see also page 6 of this issue). The Legal Services Commission (LSC), in its proposals for the 2010 bid round, plans to introduce minimum contract sizes, category combination requirements and restrictions to limit solicitors to assisting clients within geographical areas.

'Whilst we understand the potential benefits to clients of providing a higher level of "integrated services", the reality is that the proposals are likely to do more harm than good by pushing a number of smaller firms out of legal aid and making it harder for some of the most vulnerable members of our society to gain access to justice,' commented Richard Miller, the Law Society's legal aid manager. 'The demand for civil legal aid services from solicitors is going to be higher than ever as we go into recession, yet the current proposals put forward by the LSC will result in fewer solicitors being able to provide legal aid services.'

The society has submitted its response to the LSC's consultation on the 2010 civil legal aid bid round. It argues for improved referral arrangements between existing providers as a 'simpler and more effective solution to ensuring that clients are able to access all the services they need'.

Richard Miller said that the society was 'not convinced by the LSC's idea that small firms should band together to form consortia in order to obtain contracts'. 'These proposals are too vague about the practical and legal issues posed by consortia and do not allow enough time for consortia to be developed and set up before 2010,' he added.

■ *Civil bid rounds for 2010 contracts: a consultation* is available at: http://consult.legalservices.gov.uk/inovem/gf2.ti/f/137474/2185765.1/pdf/-/CivilBidRoundsfor 2010Contracts_Final_withcovers.pdf. The consultation ended on 23 January 2009.

EHRC to act over lack of domestic violence services

The Equality and Human Rights Commission (EHRC) is planning to take legal action against more than 100 local authorities over their failure to provide specialised services for women who have experienced violence. The threat comes after a new report, published by the EHRC and End Violence Against Women, reveals 'a major funding gap for services that help women escape violence and abuse'. The report found that:

- over 100 local authorities in Britain have no specialised support services;
- nearly one-quarter of rape crisis centres feared closure or cuts in services because of lack of funding; and
- almost two-fifths of crisis centres fear closure or service cuts in 2009/2010.

Map of gaps 2: the postcode lottery of violence against women support services in Britain is available at: www.endviolenceagainstwomen.org.uk/data/files/map_of_gaps2.pdf.

news feature

Citizens Advice calls for action to fight recession poverty

Several, diverse contributions were made at the Citizens Advice social policy conference, 'Tackling poverty – taking action now', which was held in London last month on reducing the impact of poverty. Representatives from Citizens Advice Bureaux (CABx) from around the country attended the event.

A panel session chaired by social policy journalist Polly Toynbee heard contributions from politicians and other commentators. Conference speakers, including David Blunkett MP, were in agreement that benefits should not be recycled into interest payments for lenders. In the keynote speech, Martin Narey, chief executive of Barnardo's and chairperson of the End Child Poverty coalition, said that many low-income families were paying extortionate rates of interest to loan sharks. While Martin Narey welcomed the government's efforts to reduce poverty, he argued much still needed to be done: 'A third of children, almost three million, still live below the poverty line. According to research from the Joseph Rowntree Foundation, the average family for an acceptable standard of living needs an income of £419 a week, but many have to survive on £240 per week after benefits.'

Lisa Harker, co-director of the Institute of Public Policy Research, spoke during the conference panel session. She made three policy suggestions to ease poverty: 'With low inflation figures likely, the government should break its own rules and uprate benefits ahead of inflation to address hardship. More investment is needed in social housing to build more and to refurnish the stock as there has been a horrifying low level of building in recent years. Stop people who lose their jobs from automatically losing their entitlement to family credit and childcare as this traps them in unemployment.' Lisa Harker praised CABx. She said that the service was 'the eyes and ears of what is happening at a local level', and that CABx were 'one-stop shops before the government started talking about one-stop shops'.

As would be expected, the audience of mainly CAB advisers were well informed on poverty issues and many expressed concerns about the impact of the recession. Ian Tyes from Cambridge CAB talked about the problems of the structure of the benefits system. He said that it discriminated against families by paying more to couples who live apart and led to intrusive investigations into the status of people living in the same households. David Blunkett made one of the most amusing comments in the discussion by saying that he was often asked by the media to live on benefits for a week: 'I was brought up in a low-income household, I do not need to go back to know what it is like.' He also discussed the difficulties of reforming a housing benefit system which often traps people in poverty as they cannot afford to take work. Polly Toynbee added that 'Right from Beveridge's day, they have being trying to sort out housing benefit.'

Inevitably, perhaps, delegates spoke about the bail-out of the banks and the smaller sums of money needed to alleviate poverty. Polly Toynbee argued that the rescue of the banks 'was a one-off situation and the capital to bail out the banks would be paid once; it is the on-going cost of tackling poverty that the government finds hard to afford'. Martin Narey argued that the best estimate of the cost of ending child poverty was £3 billion per year and this was a price which could be afforded.

In this the first of two articles, Gareth Mitchell and Stephen Pierce, solicitors at Pierce Glynn, look at the likely impact of the Legal Services Commission's (LSC's) proposals for non-family civil legal aid from 2010. The second article, which examines the research evidence relied on by the LSC to justify its proposals, will appear in April 2009 *Legal Action*.

On the edge of the abyss: legal aid from 2010 – Part 1

In October 2008 the LSC published *Civil bid rounds for 2010 contracts: a consultation*.[1] The consultation closed on 23 January 2009. The consultation paper suggests that the proposals contained within it are designed to 'maintain and improve client access to advice' (para 1.3).

This article considers whether the LSC is likely to achieve that objective, focusing by way of illustration on the provision of housing advice and representation in particular, although the concerns set out in this article also apply to all five of the categories of law which the LSC refers to as 'social welfare law' (SWL), namely housing, debt, benefits, community care and employment.

What the LSC is proposing from April 2010

The principal features of the proposed contracting arrangements are as follows:

First, that suppliers are compelled to carry out a minimum volume of controlled (ie, non-certificated) work, failing which their contracts are at risk of being terminated (para 4.29). For housing, benefits and debt this is 100 controlled work matter starts in each category per year (para 4.25). Controlled work means fixed-fee work. Currently, the fixed fee for a housing case is £174, benefits £167, and debt £200. (For an explanation of how fixed fees reduce access to justice to the most vulnerable see: 'Carter: the dumbing down of legal aid', November 2006 *Legal Action* 8.)

Second, that all housing-only, debt-only, and benefits-only contracts will not be renewed (para 4.4). Instead, suppliers wanting to carry out legal aid work in these categories will have to deliver advice in all three areas, either directly or through consortia (para 4.10).

The only exception is that those wanting to continue to carry out housing work can avoid the need to provide the housing, benefit and debt bundle if they also offer family advice. However, this route is not without drawbacks given the on-going reform of family legal aid (including proposals for fixed fees for certificated private law family work from 2010) and given that it is proposed that such suppliers will be excluded from carrying out housing possession court duty scheme (HPCDS) work (para 6.12).[2] Going down this route would also appear to decrease significantly the prospects of securing a housing contract if the number of bids in a procurement area exceeds the supply of matter starts on offer, because then preference is to be given to suppliers offering the highest number of SWL categories – and a housing/family supplier would only be offering one SWL category (ie, housing) as against the three categories offered by a supplier bidding for a SWL bundle (para 6.43).

Community care and employment suppliers relieved that they are not caught by SWL 'bundling' are only given a temporary reprieve. The LSC says that it is only prepared to continue to 'buy these categories on their own in the short term' (*Initial impact assessment*, para 5.17).[3]

Third, while the LSC does not propose an overall reduction in the level of spending on SWL in each procurement area, the proportion of each procurement area's budget allocated to each category of law will be changed to match the national average spend on each area of law (paras 5.60–5.61). So, if an inner-city area currently has a disproportionately high number of housing matter starts and disproportionately few debt matter starts, the starting point will be that the housing matter starts in that procurement area will be cut in order to fund an increase in debt matter starts (even though the current number of housing matter starts may reflect disproportionately high local levels of housing need).

The current national average spend on each area of SWL is not clear, however, the number of matter starts per SWL area for 2007/08 points to a roughly equal division of matter starts between housing, benefits and debt in each procurement area, with a much smaller proportion of matter starts for community care and employment (housing 127,257; benefits 126,589; debt 111,463; employment 22,638 and community care 4,853: *LSC annual report 2007/08*, *Statistical annex*, p4) – which implies a significant redistribution of matter starts per SWL category in some procurement areas.[4]

Fourth, key performance indicators (KPIs) are to become mandatory, with as yet unspecified sanctions for breaching them (para 8.22). The current KPIs are:

- a 40 per cent controlled work success rate (albeit with the bizarre rule that any controlled work case which converts into a certificated case is treated as a failure regardless of the eventual outcome);
- controlled and certificated work costs

claims must not be assessed down by the LSC by more than ten per cent on average (even though suppliers' concerns about the quality of LSC costs assessments persist);
- a maximum 20 per cent fixed-fee margin (ie, the maximum percentage by which the controlled work fixed fees that have been claimed can exceed the costs that would have been payable under the old, relevant, hourly rates system); and
- 85 per cent minimum matter start usage.

Fifth, in most urban areas suppliers will only be allowed to provide housing, community care, mental health or immigration and asylum advice if they employ a solicitor and offer all levels of service from Legal Help to Legal Representation (paras 4.57–4.58). This would appear to be targeted at removing smaller, not-for-profit organisations which have offered Legal Help advice in these areas and then referred on if certificated work becomes necessary. Such organisations have often been particularly skilled at getting advice to hard-to-reach groups, for example minority ethnic communities.

Sixth, the LSC proposes that peer review scores will play no role in deciding which suppliers are awarded contracts. This is particularly surprising given the central role that peer review was supposed to play in driving up standards and given legal aid minister Lord Bach's mantra that 'poor advice is worse than no advice at all' (*Focus* January 2009, p4). It is also surprising given that there is clearly a significant, on-going problem with the standard of civil legal aid advice with only three per cent of civil providers scoring PR1 (excellence) and the majority of suppliers only scoring PR3 (borderline competence) (see overall confirmed ratings, January 2009).[5] This information was only published by the LSC following a Freedom of Information Act 2000 request. The peer review scores for Community Legal Advice (CLA) telephone suppliers indicate that only 40 per cent of CLA telephone providers have achieved PR1 or PR2.[6]

Those are the highlights. There are other important proposals about supervisor ratios (paras 4.38–4.40), compulsory outreach provision in some procurement areas (para 5.57), changes to payments on account for certificated work (paras 8.23–8.28), and some ill-conceived and potentially very damaging proposals to HPCDS contracts (paras 5.58, 5.67–5.71). There will also be further, as yet unspecified, changes to the terms of the current unified contract to convert it into the 2010 contract (para 8.1).

Suppliers will need to bid for 2010 contracts by summer 2009 (para 3.32). The contracts will run for three years, unless the LSC decides to terminate all the social welfare contracts in a procurement area midway through the contract term to make way for a Community Legal Advice Centre (CLAC) or Community Legal Advice Network (CLAN) or some other form of price-competitive tendering (paras 3.33–3.34). The areas in which phase 2 of the CLAC/CLAN pilots and the LSC's other price-competitive tendering pilots will be rolled out will not be announced until summer 2009 (para 3.33).

The LSC has not yet said what the remuneration rates will be under the 2010 contract. A consultation paper on remuneration rates is due in 'early 2009' (paras 2.16, 3.28). Perhaps that is where the good news will be hidden, perhaps not.

The impact of the proposals

The consultation paper was accompanied by an initial impact assessment, signed off by Lord Bach as representing 'a fair and reasonable view of the expected costs, benefits and impact of the policy'. The authors of this article disagree.

The steady decline in civil legal aid providers is well known. For example, in April 2000 when the Community Legal Service was launched there were 840 housing contracts (*LSC annual report 2000/01*, p6). In March 2008 there were 542 (*LSC annual report 2007/08*, *Statistical annex*, p3).

'The consultation paper was accompanied by an Initial impact assessment, *signed off by Lord Bach as representing "a fair and reasonable view of the expected costs, benefits and impact of the policy". The authors of this article disagree.'*

The LSC is fond of saying that it is less interested in suppliers than in the overall level of supply. Yet, for example, between March 2007 and March 2008 the five per cent fall in housing contracts was mirrored by a five per cent fall in housing controlled work matter starts – even after CLA telephone advice had been factored in (*Statistical annex*, p4).

Since March 2008 the LSC has boasted about receiving £47 million of bids for £10 million of new controlled work matter starts. However, that figure is meaningless if, as now appears to be the case, many of those bids were speculative and the suppliers who secured them are now unable or unwilling to deliver them.

The LSC's initial impact assessment appears to predict a 17 per cent reduction in civil suppliers in 2010 as a result of the proposals (Figure 1). For housing the figure is nine per cent, benefits 15 per cent and debt 20 per cent.

A further, significant decline in SWL providers of nine to 20 per cent is worrying enough given the chronic undersupply of face-to-face advice and representation in many areas, and the rapidly escalating demand for SWL advice as the economy goes into recession. (For example, in the third quarter of 2008 the number of mortgage possession orders rose by 24 per cent as compared with the third quarter of 2007,[7] and in the fourth quarter of 2008 the number of personal bankruptcies rose by 22 per cent as compared with the fourth quarter of 2007.[8])

However, the initial impact assessment then explains:

> *The impacts … have been calculated on the assumption that all providers in debt, housing and welfare benefits delivering at least 75 per cent of the proposed minimum new matter start size would expand or join consortia. This is on the basis that they are currently doing a significant enough amount of work to make it in their interest to form a consortium with others. We have made a similar assumption for the delivery of legal representation advice in housing (an Integrated Services A requirement) ie, if providers are doing 75 or more matter starts presently, it will be worth their while, through a consortium or employing a solicitor, to make changes to their existing services* (para 5.18).

Nowhere in the consultation paper or initial impact assessment does the LSC say how many SWL providers currently hold

contracts in housing, benefits and debt. However, looking through the CLA online directory the answer seems to be very few.

That assertion is supported by the data on civil contracts by provider type in the LSC's most recent annual report. As at March 2008, there were 370 solicitors' firms holding housing contracts, but only 136 solicitors' firms holding debt contracts and 126 solicitors' firms holding welfare benefits contracts. The same figures for the not-for-profit sector were housing 164, debt 262 and welfare benefits 302 (*LSC annual report 2007/08, Statistical annex*, p3).

So, it appears that the majority of SWL providers will not secure contracts from 2010 unless they expand into new areas of law or enter into consortia. Incredibly, the LSC's initial impact assessment assumes that every single SWL provider conducting 75 or more controlled work matter starts in either housing, benefits or debt will do so. That is a breathtaking assumption.

POWERED BY LIGHT RF/ALAMY

How are suppliers likely to respond?

Expansion

There is a very good reason why housing suppliers have tended to shy away from benefits and debt work: these categories are predominantly funded as controlled work (rather than certificated work) and controlled work fixed fees have turned this work from being financially undesirable to financially disastrous. For example, how is a social security claimant in an appeal before a three-judge panel in the Upper Tribunal (the judicial equivalent of a High Court trial) to be represented on a fixed fee of £167?

There is an escape for exceptional cases (payment at hourly rates where the work at hourly rates exceeds the fixed fee by a multiple of three), but the very low numbers of exceptional case claims that have been submitted to date (only 850 cases were claimed as exceptional in the first year of fixed fees according to 'NFP legal aid agencies under threat', February 2009 *Legal Action* 3 – a tiny percentage of the total number of Legal Help cases undertaken during that period) illustrates graphically how the exceptional cases thresholds have been set too high and how the additional remuneration from crossing the thresholds is hopelessly inadequate (ie, payment by controlled work hourly rates which have not been increased since 2001). As a result, the most vulnerable clients and those with the most intractable cases are falling through the net; either failing to secure any assistance or only securing assistance that is superficial and ineffective.

A well-trained benefits solicitor or adviser providing PR1 or PR2 standard of advice might be expected to complete 125 benefits cases per annum. With a fixed fee of only £167 per welfare benefits case, the supplier could expect to generate gross fee income of only £20,875 per annum, with only very limited potential to cross-subsidise through certificated work and inter partes costs orders. Unless the advice is delivered by low-skilled, poorly-trained, poorly-supervised and poorly-paid paralegals, the sums do not add up. Furthermore, what is the point of delivering advice in that way if 'poor advice is worse than no advice at all'?

Low remuneration is but one reason against expansion into new SWL areas. Others include: the non-availability of credit to fund expansion; the decreasing ability of many solicitors' firms to cross-subsidise their legal aid work with their private work contracts; the difficulties recruiting experienced SWL advisers and solicitors; and the risk of expanding into new SWL areas but not meeting the minimum matter start thresholds in those new areas and losing the entire SWL bundle as a result.

In addition, given that suppliers have been told that if a CLAC or CLAN or some other form of price-competitive tendering is introduced in their area only one bid will succeed, and that all those who make unsuccessful bids will have their legal aid contracts terminated, the LSC cannot seriously expect good quality suppliers to invest and expand so as to increase their dependence on legal aid income when faced with such a high level of risk.

So, the LSC faces the prospect of very substantial numbers of housing, benefits and debt suppliers leaving legal aid work – unless consortia work.

Consortia

Consortia have not been piloted and the initial impact assessment makes no attempt to model likely supplier behaviour (ie, by looking at the mix of SWL providers in each procurement area and potential consortium combinations).

Why it is critical for the LSC to do that is best illustrated by a simple example. In a procurement area with one debt provider, one benefits provider and three housing providers it makes sense for the debt provider and the benefits provider to team up together with one of the housing providers, but not with the other two (because the bigger the consortium the greater the administrative complexity and the greater the risk). So, that hypothetical procurement area would face a two-thirds reduction in housing supply. The LSC response to this is that the one housing supplier that remains will be offered additional matter starts to try to compensate for this, but why would that one remaining housing supplier want to increase its reliance on legal aid work in

the current climate?

As described currently, consortia beg a raft of questions. The consultation paper says that formal mergers will not be required, but that consortia contracts will be 'separate but linked' (para 4.10). There is no explanation of what that means.

Would one consortium member's performance of the contract impact on the other members of the consortium? Take the example above. Having 'rationalised' the supply in that procurement area, what happens if the one remaining housing supplier drops out of the legal aid system part way through the three-year contract term (for example, for financial reasons, or because it fails a peer review, or because it does not deliver the volume required by the contract)? How, if at all, would this impact on the other consortium members? Would they all lose their contracts? Would they be expected to find a new consortium partner midway through the contract term?

What form of contractual relationship will there be between consortium members relating to the performance of a consortium's linked contracts? Will not-for-profit and private sector suppliers be willing and able to enter into such joint venture contracts? How will they work? Will suppliers be willing and able to meet the additional costs of negotiating, forming, administering and performing a consortium contract, for which no additional funding is to be made available? And why will suppliers want to take the risk of investing in consortia when the LSC's message seems to be that these are merely a stop gap measure pending the roll-out of CLACs and CLANs?

'At a time of rising demand for legal aid advice, and evidence of declining standards, why is the LSC putting forward proposals which are likely to drive more and more good-quality, specialist providers out of non-family civil legal aid?'

New market entrants

If consortia do not take off as the LSC expects, what then? The LSC states that where suppliers do drop out it hopes that new market entrants will fill the gaps (*Initial impact assessment*, para 5.22). However, the only organisations that are expanding are the handful of large, private sector providers with business models based on delivery through low-paid, inexperienced and poorly supervised advisers (typically, paralegals and trainees) who, by definition, are least well-equipped to deliver the skilled, seamless, holistic advice that the LSC apparently seeks.

This new breed of low-skill, high-volume (LSHV) provider may well seek to expand in 2010. However, there are currently only two or three such LSHV providers nationwide and 134 procurement areas in England and Wales in which gaps in SWL provision are likely to emerge. If the LSHV providers are expected to expand their own operations to meet this need, the scale of recruitment and premises acquisition that will be required makes the expectation seem unrealistic. If they are expected to expand by merger with existing suppliers, again, the scale of negotiations between providers and consequent reorganisation involved seem to make the expectation unrealistic.

At the very least this augurs a widespread dislocation of existing SWL services in 2010. Even if these LSHV providers could expand into so many new procurement areas by 2010, it is difficult to see how clients will benefit from the LSC's increasing dependence on two or three large private sector providers, providers who seem more interested in winning contracts than in high quality service delivery, and whose market share is going to enable them increasingly to dictate and veto the LSC's reform agenda.

Conclusion

In responding to Lord Carter's ill-conceived proposals for civil legal aid, the then Constitutional Affairs Select Committee was particularly scathing in its remarks on the LSC's SWL proposals, commenting that:

> *In the light of this uncertainty and the general lack of data, the DCA/LSC's intention of a nationwide imposition of fixed fees followed rapidly by competitive tendering across the entire legal aid system is a breathtaking risk … This risk might be justified where the whole system is in utter crisis but large parts of the system (especially non-family civil legal aid) are stable in cost terms* (p83).[9]

Much the same could be said about the LSC's current proposals. At a time of rising demand for legal aid advice, and evidence of declining standards, why is the LSC putting forward proposals which are likely to drive more and more good-quality, specialist providers out of non-family civil legal aid?

The LSC's answer seems to be that dramatically reducing the number of legal aid suppliers (and with it client choice) is necessary because of the evidence it has obtained about problem clusters and referral fatigue which make 'one-stop-shop' advice provision essential, no matter what the cost. That evidence and the use (and misuse) of it by the LSC is the subject of the second part of this article.

1 Available at: consult.legalservices.gov.uk/inovem/consult.ti/2010Contracts/listdocuments.
2 Available at: consult.legalservices.gov.uk/inovem/consult.ti/FamilyFees2008/consultationHome.
3 Available at: consult.legalservices.gov.uk/inovem/gf2.ti/f/137474/2185509.1/pdf/-/InitialImpactAssessment.pdf.
4 Available at: www.legalservices.gov.uk/docs/about_us_main/Webstats0708_v2Final.pdf.
5 Available at: www.legalservices.gov.uk/docs/cls_main/PeerReviewConfirmedFacetoFaceResultsJan2009.pdf.
6 Available at: www.legalservices.gov.uk/docs/cls_main/CLAPeerReviewResultsNov2008.pdf.
7 Ministry of Justice, *Statistics on mortgage and landlord possession actions in the county courts – third quarter 2008*, p2. Available at: www.justice.gov.uk/docs/stats-mortgage-landlord-qu3-2008.pdf.
8 Insolvency Service, *Statistics release: insolvencies in the fourth quarter 2008*. Available at: www.insolvency.gov.uk/other information/statistics/200902/index.htm.
9 *Implementation of the Carter review of legal aid. Third report of session 2006–07*, available at: www.publications.parliament.uk/pa/cm200607/cmselect/cmconst/223/223i.pdf.

Recent developments in inquest law and practice

Leslie Thomas and **Adam Straw** examine the Coroners and Justice Bill, cover recent developments in case-law and provide advice on preparing for, and taking part in, pre-inquest hearings.

POLICY AND LEGISLATION

Coroners and Justice Bill

The Coroners and Justice Bill was introduced on 14 January 2009, and had its second reading on 26 January, giving an extremely limited time for consultation.[1] The bill contains significant changes from the draft Coroners Bill that was produced in 2006.

Many of the provisions in the bill, such as the power of coroners to order disclosure and the systems of governance, are very welcome. However, in some important respects the bill fails to reform fully a system which even the government has recognised is 'fragmented, non-accountable, variable in its processes and its quality, ineffective in part, archaic in its statutory basis …' and unfairly marginalises families of the deceased.[2] Examples of particularly significant problems are as follows.

Scope

Clause 5 defines the purposes of the investigation. They include ascertaining who the deceased was, and when, where and how the deceased came by his/her death. The purposes should be expanded, in particular to include allaying public suspicion and inquiring into circumstances that create a risk of other deaths occurring. Each purpose is legally well established, and no credible inquest system could exclude these as legitimate purposes. They should be explicit within the bill to avoid legal ambiguity.

Jury

The jury provisions are of concern, not least because the number of jurors is reduced to between six and nine, and a majority verdict may be given by five out of eight jurors. Such a verdict would be unlikely to attract public confidence, contrary to an important function of a jury inquest. The involvement of members of the public is essential in sustaining public confidence in the state in controversial cases.

Certified inquests

This is one of the most controversial aspects of the new bill. The provisions rejected by parliament last year in the Counter-Terrorism Bill on secret inquests are regurgitated in clause 11 (see 'Inquests and Part 6 of the Counter-Terrorism Bill', May 2008 *Legal Action* 10). The clause remains a serious incursion into open justice and the impartiality of the coroner's court, which is largely unjustified. The secretary of state has a power to certify an inquest if, in his/her opinion, it is necessary to prevent a matter being made public in order (among several other grounds) to prevent real harm to the public interest. A certified inquest is carried out by a High Court judge chosen by the Lord Chief Justice, there is no jury, and clause 34(4) makes provision for rules requiring the judge to exclude people, except those of a prescribed description, from the inquest. This is likely to mean that a judge will be required to prevent the public, family, press and the family's legal representatives from attending the inquest in certain cases.

It is argued this will be used in comparatively few cases, but 'comparatively' is misleading. It is likely to be very difficult to challenge the secretary of state's opinion. This will leave it open to the secretary of state to order a 'secret' inquest in many of the most controversial cases, such as police shootings or army deaths. In such cases, the secretary of state directing a 'secret' inquest is likely seriously to undermine public confidence, while one of the critical functions of the inquest in these cases is to do the opposite. If it is not necessary, such an undemocratic provision should not be passed into law.

Appeals

Clause 30 gives interested persons the power to appeal to the Chief Coroner against specified decisions. The power to appeal is welcome. However, the list is limited, and in some respects unclear. For example, it is not clear whether a coroner's decision about what witnesses or evidence will be called, or what disclosure made, can be appealed under clause 30(2)(h). All decisions should be open to appeal, not least because otherwise interested persons will challenge decisions that cannot be appealed by way of judicial review.

Funding

The bill makes no provision for increased public funding for families. The current system is unfair and unrealistic. Often, families are refused funding while one or several interested persons/parties are given public funds. This inequality of arms means that public funding will be targeted against the important public interest of reducing the risk of deaths in future. A coroner cannot properly represent the interests of families, as this would detract from his/her apparent impartiality, and create conflicts of interest.

CASE-LAW

Positive duties under article 2

■ Savage v South Essex Partnership NHS Foundation Trust

[2008] UKHL 74,
10 December 2008,
[2009] 2 WLR 115

Mrs Savage was detained under Mental Health Act (MHA) 1983 s3. She absconded and committed suicide by throwing herself under a train. Her daughter brought a civil claim alleging that the defendant trust had violated her mother's rights under article 2 of the European Convention on Human Rights ('the convention'). The House of Lords heard a preliminary point of law, namely what was the test for establishing a breach of article 2 on the facts of this case.

The Lords rejected the trust's submission that the claimant had to show gross negligence. They held that the positive duties under article 2 include, in the context of medical care, a general duty compelling hospitals to take appropriate measures for the protection of patients' lives (para 44). This involves complementary obligations:

- For health authorities to ensure that the hospitals for which they are responsible employ competent staff, who are trained to a high, professional standard (para 50).
- To ensure that the hospitals adopt suitable systems of work. For example, there is a duty on the hospital to take precautions, and put in place systems, to avoid the possibility of injury occurring to patients who, it knows, or ought to know, have a history of mental illness (para 47).
- The duty to protect detained patients from self-harm and suicide. This derives from fact

that detained patients are at raised risk of suicide (para 49). Systems, plant and equipment have to be reasonably adapted to the risk, as should decisions by medical staff on the appropriate treatment, therapeutic environment and supervision (para 50).

Provided the above are complied with, where the patient is not detained, acts of negligence by medical staff, such as where a nurse negligently left his/her post and a patient took the opportunity to commit suicide, will not normally breach article 2.

However, there is a distinct and additional 'operational' duty, which arises in certain well-defined situations (sometimes known as the *Osman* duty, from *Osman v UK* App No 23452/94, 28 October 1998; (1998) 29 EHRR 245). For a patient detained under the MHA, acts of medical staff will breach article 2 if the authorities did not do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge.

Comment: This case is significant in emphasising that the positive article 2 duty is multifarious. There are various duties with distinct characteristics which arise in specific circumstances. An important consideration for whether or not a duty arises, and if so what the duty is, was the practical justification for the duty. For example, the particular duties that arise for detainees were due to factors such as detainees being generally known to be more vulnerable, and that the state exercises far greater control over them. Similarly, specific duties arise to protect military conscripts, owing to the (somewhat vague) stressful nature of some military activities and the 'human element' when the state relies on citizens (para 37). It may be possible to argue that positive duties arise in other contexts because of analogous factors.

Savage has by no means defined what duties will arise in all other contexts. For example, is a local authority under an *Osman*-operational duty to protect looked after children, or those leaving care, from suicide? Following the approach in *Savage*, given the vulnerability and dependency of such children, it is arguable that it should be.

It is not entirely clear whether the *Osman*-operational duty only applies where the risk to the life of a patient detained under the MHA is of suicide. It appears, from Baroness Hale's judgment, to apply to any risk to life, including from health problems. All other Lords agreed with Baroness Hale. She noted that the *Osman* duty applies to 'patients detained in hospital under the Mental Health Act as it applies to persons detained under other powers in other institutions' (para 97). This was not restricted explicitly to where the risk is from suicide. Baroness Hale had noted earlier that *Tarariyeva v Russia* App No 4353/03, 14 December 2006, which involved risk through ill health, not through suicide, found that article 2 could be breached by individual operational failings of the health care given to prisoners and not simply the systems that were in place (para 86).

However, it is clear that the *Osman* duty does not apply where the person is not detained and the real and immediate risk arises from natural causes, such as ill health.

The significance of this case to inquests is indirect. Lord Roger, with whom the other law lords largely agreed, noted 'nothing I say is intended to have any application to the article 2 procedural obligation'. The procedural duty is most likely to arise where there is an arguable breach of the positive duties defined in *Savage*. However, a procedural duty of some form may arise in other circumstances. For example, it is arguable that an enhanced article 2 duty to investigate should arise in all cases for detained patients who commit suicide, by analogy to *R (JL) v Secretary of State for the Home Department* (see below).

One question left open explicitly was what positive duties would be owed to other patients deprived of their liberty by the state, such as 'Bournewood' patients who lack capacity and are voluntarily detained.

Article 2 inquiries in near-miss cases

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

[2008] UKHL 68,
26 November 2008,
[2008] 3 WLR 1325

This case concerned the attempted suicide of a young man in custody, who in consequence suffered permanent brain damage. An internal investigation took place initiated by the local area manager, and carried out by a retired governor. The claimant successfully sought judicial review of the secretary of state's refusal to set up an independent investigation. The law lords dismissed the secretary of state's appeal, as had the Court of Appeal.

The lords rejected the secretary of state's submission that, in cases of near suicide, the article 2 procedural duty arose only where there was an arguable breach of the substantive article 2 duties. Different circumstances will trigger the need for different types of investigation with different characteristics (para 31).

They held that a near-suicide of a prisoner in custody, which leaves him/her with the possibility of a serious long-term injury, automatically triggers an obligation on the state under article 2 to institute an enhanced investigation as soon as possible. The investigation must be:

- fully independent, from the earliest possible time (thus, article 2 cannot be discharged by an internal investigation of the facts);
- promptly and expeditiously conducted;
- initiated by the state;
- effective; and
- involve the family.

In relation to public scrutiny, the majority held that generally the inquiries need not be in public, although the report should generally be made public. However, article 2 requires a sufficient element of public scrutiny in respect of the investigation or its results to secure accountability in practice as well as in theory; to maintain public confidence in the authorities' adherence to the rule of law, and to prevent any appearance of collusion in, or tolerance of, unlawful acts. In near-miss cases, whether parts of the investigation need be public depends on the above considerations, and is a decision for the investigator.

While some of the above features are inflexible, such as independence, others are not. In terms of those others, it is up to the investigator to decide the form of the investigation. The investigator should ensure the essential article 2 objectives are achieved, which will need consideration to be given to all relevant matters, such as the level of public concern and the particular nature of the incidents. If all witnesses give their evidence readily, the course of events appears clear, there is no conflict of evidence and the circumstances in which the attempted suicide took place are shown to involve neither a possible defect in the system for preventing suicide nor a possible shortcoming on the part of anyone in operating that system, the initial investigation may satisfy the requirement of efficacy without the need for further inquiry.

The objects of the investigation include, where relevant, calling the Prison Service to account, ascertaining whether or not there has been fault, and also (even where there is no fault at any level, ie, neither operational nor systemic) learning from experience, particularly of potential systemic problems. Lord Phillips noted that the scope of an investigation into a near-suicide will normally be considerable.

As accepted by the secretary of state, the lords held that the internal inquiry in this case did not satisfy article 2. The reasons were that no one representing the victim's interests was involved during the investigation, the report was not published, some issues called for further investigation (para 49) and, perhaps most importantly, it

was not sufficiently independent. It appears that the investigator should not be employed by the Ministry of Justice (para 75 and may not 'use Prison Service officials to carry out inquiries on his behalf' (para 78).

Comment: For inquests, the important aspect of this case is that it does not decide the scope of the investigation required for an actual suicide. Lord Roger comments that even in cases of actual suicide there may not be a need for a *D*-type inquiry (paras 79–83), the main difference being that the examination of the evidence takes place in public. These comments are not binding: the point was not at issue, full argument was not heard and the majority confined themselves to near-miss cases, noting reasons why more extensive inquiries should take place for actual suicides.

Nevertheless, the minimum requirements of a near-miss case are likely to apply with more force to an inquest. Thus the broad objects of the investigation should also apply to actual suicides.

Independence was a matter of great importance to the lords. It seems also to be a separate requirement from the need for the investigation to be effective. This means that even if the lack of independence does not appear to undermine the investigation's effectiveness as a whole, it will be unlawful. (See also 'The investigative obligation under article 2' on page 37 of this issue.)

Coroner's responsibility to direct jury on issue of legality

■ R (Pounder) v HM Coroner for the North and South Districts of Durham and Darlington

[2009] EWHC 76 (Admin), 22 January 2009

This claim arose from the inquest into the death of Adam Rickwood at Hassockfield Secure Training Centre (STC). Adam was the youngest person to die in penal custody in recent times, aged 14. Six hours before his death, Adam had refused an order to return to his cell, protesting that he had done nothing wrong. He sat down and was not causing, threatening or inciting violence or disorder. Officers then physically restrained him, carried him to his cell, and while doing so used a 'pain-compliant technique' of applying force to his nose with one hand, while pushing the back of his head with the other hand as a counter force. This caused significant bleeding and swelling. Similar techniques were used regularly at Hassockfield STC.

The main decision under challenge was the defendant's refusal to direct the jury on the lawfulness of the restraint used. This meant that interested persons were prevented from asking questions arising from this issue. This decision was held to be unlawful for the following reasons;

- Blake J noted first that the law was clear, and the order to remove Adam, the restraint and the use of the pain-compliant technique were unlawful – an assault – and amounted to degrading treatment in contravention of article 3 of the convention.
- Next, the lawfulness of restraint was relevant to issues which the court held fell within the scope of the inquest, in particular the propriety and proportionality of the force used on Adam. The coroner was plainly right to explore whether and how the force applied to Adam contributed to his death, and thus formed part of the circumstances in which he came by his death.
- Given that the issue came within the scope of the inquest, it should have been explored properly, in part because investigation of it may lead to prevention of repetition. Proper investigation required a ruling by the coroner on whether the restraint, about which the evidence was undisputed, was lawful. The legality of the force was relevant to two legitimate issues: whether or not the force was appropriate and proportionate, and whether or not it made a material contribution to that death. That is, if the use of force was unlawful and degrading, the jury would be more likely to find the use of force contributed to Adam's death. In a note written just before his death, Adam was clearly concerned about whether or not the use of force was proper.
- A coroner should direct the jury on an issue of legality, if legality makes one resolution of a legitimate issue more probable. To put it another way, the coroner should answer a question of legality unless it could have no impact on the jury's consideration of legitimate issues.
- Blake J also effectively found that the actions of the Youth Justice Board (YJB) for an extended period before Adam's death should be investigated. He found it astonishing that the use of such restraint techniques seems to have aroused no query or concern from the YJB, which was responsible for enforcing the Secure Training Centre Rules 1998 SI No 472. This was a very serious breach of the YJB's duty, and could only be characterised as a gross failure. The inquest did not investigate this failure fully, and there was a strong public interest in the YJB being held to account.
- Finally, it was held to be sufficient to set aside the inquisition that the narrative verdict might have been different but for the coroner's error. Other relevant considerations were that the ruling might have changed the jury's views of the credibility of some witnesses; that it might have led the jury to find the restraint made some contribution to the death, which itself may effect government policy; and that these matters could not be properly corrected by the court.

This is another highly critical judgment by the courts of the various public authorities involved in Adam's death.

Conferring and collaboration between police officers

■ R (Saunders) v Independent Police Complaints Commission

[2008] EWHC 2372 (Admin), 10 October 2008

These were claims against the Independent Police Complaints Commission (IPCC) and others in respect of the investigation into two deaths caused by police shooting. The main point was about conferring. In both cases the principal officers were permitted to confer with one another. The claimant submitted that the IPCC should have issued instructions designed to prevent, so far as possible, any conferring between the principal officers.

The IPCC had recommended previously that conferring and collaboration were highly undesirable in the case of incidents where action by police officers had caused death to members of the public, and that police instructions should be reviewed accordingly. The IPCC was actively pursuing the abolition of conferring/collaboration by agreement with the Association of Chief Police Officers (ACPO).

The judge affirmed the general principle that the authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident. Any deficiency in the investigation which undermines its ability to identify the perpetrator or perpetrators will risk falling foul of this standard.

In the case of a fatal shooting by police officers, the state may be held to have violated article 2 if adequate steps were not taken to prevent the police officers directly concerned from conferring before producing their first accounts of the incident, and that is so even if it cannot be shown that they in fact did confer. A practice of permitting principal officers to collaborate generally in giving their first accounts is highly vulnerable to challenge under article 2.

However, there was no breach of article 2 in this particular case. This was because the ultimate question is always what will conduce to the most effective investigation achievable in the particular circumstances. The IPCC's decision that a direction was more likely to hinder than to promote an effective investigation in these cases because there was a high risk that officers would as a result

refuse to co-operate with the investigation, was correct.

Comment: Since this case, ACPO has agreed to change its guidance permitting officers to confer in cases of police shootings. This is fairly unsurprising. The argument that the police would refuse to co-operate if conferring were banned is difficult to support in the long term.

In paras 13–16, the judge outlined reasons why conferring may undermine the ability of an investigation to establish the facts, and also reasons why it may assist that aim. He also noted that in cases of death and serious injury, an important consideration is that conferring is likely to reduce public confidence. The reasoning behind the judgment may be extended to other aspects of the investigation of deaths caused by the use of force by state agents. For example, if it can be shown that the practice of showing officers relevant evidence before they give their first account undermines the effectiveness of the investigation, that too may breach article 2.

On the particular facts in *Saunders*, the failure to interview certain officers who had provided statements did not breach article 2. There is a great deal of case-law, particularly from the European Court of Human Rights, deciding whether or not particular failures amounted to breaches of article 2.

Properly interested person and coroner's decision on article 2

■ R (Platts) v HM Coroner for South Yorkshire (East District)

[2008] EWHC 2502 (Admin), 2 October 2008, [2008] 172 JP 632

The deceased, M, had, at the time of his death, mental health difficulties and depression. The day before he died he stabbed himself and was admitted to hospital. In hospital he was immediately assessed as having no mental health problems and not at risk of suicide. Thereafter his behaviour became bizarre, he threatened to kill himself and his girlfriend, became agitated and violent, and the police were called. It would have been normal for a further assessment to be done in these circumstances, but none took place and he was discharged. He was taken into police custody overnight and then to court the next morning, during which he intimated he wanted to die. He was released after the court appearance, when he went and killed himself by stepping under a lorry.

The coroner decided to limit the investigation to the road traffic aspect, and decided the claimant was not a properly interested person under Coroners Rules (CR) 1984 SI No 552 r20(2)(h). Both decisions were challenged, and both were quashed, on the following grounds:

■ **Rule 20(2)(h)**: The claimant had lived with the deceased for over a year as his girlfriend, and they had separated about a month before his death. Referring to earlier case-law, the court recognised that it should be slow to interfere with a discretionary decision of the coroner, but found that his decision was *Wednesbury* unreasonable, and failed to have regard to relevant considerations. The coroner had failed to engage with issues, including that the deceased's mental state was central to the couple's relationship ending; the deceased left their home only a few days before his death, at the start of a train of events and behaviour which led to his death. The coroner had failed to consider whether or not the very close connection with the claimant, that behaviour and that outcome, made her properly interested.

■ **Article 2**: The judge noted that the procedural duty arises where there is an arguable or possible breach by the state of the substantive article 2 duties, and that this is a low threshold. The coroner was plainly wrong – that is *Wednesbury* unreasonable – to find there was no such arguable breach. The papers suggested a senior house officer had failed to carry out a psychiatric assessment before discharge, and arguably the trust or Crown Prosecution Service should have given further consideration to whether or not it was safe to release him. It was plainly arguable that the state in one or other of its manifestations was at fault in failing to address M's mental condition and, in particular, his repeated statements that he wanted to die, all of which were made within a matter of hours of his apparently deliberately causing a road accident in which he was killed.

Comment: The decision reaffirms how broad r20(2)(h) is, and that many considerations may bring someone within the provision, including that s/he has a close connection to the circumstances of the death. This judgment preceded the decision in *Savage*. It is therefore understandable that the judge did not carry out the more structured analysis of what particular article 2 duties arose. The deceased was never detained under the MHA 1983, so the operational duty which arose in *Savage* would not do so in respect of the hospital here, unless some other grounds for it could be found, such as that he was admitted following self-harm. It is arguable that the standard of review applied by the judge of the coroner's decision that the article procedural duty did not arise, of *Wednesbury* unreasonableness, was too low, and that a court should make the decision about whether or not the article 2 procedural duty arises again for itself: *Huang v Secretary of State for the Home Department* [2007] UKHL 11, 21 March 2007; [2007] 2 AC 167, para 13.

Medical care: article 2 procedural duty

■ Moss v HM Coroner for the North and South Districts of Durham and Darlington

[2008] EWHC 2940 (Admin), 28 November 2008

The deceased was given a lethal dose of morphine by his general practitioner (GP) while being treated for cancer. Concerns had been raised to the health authority about the GP's prescription of morphine to terminally ill patients in the past.

The inquest was adjourned while criminal proceedings against the GP took place, which ended with acquittal. The coroner decided not to resume the inquest under Coroners Act 1988 s16(3), and the claimant applied to review this decision.

The court held that the decision would be unlawful if there was anything, not properly explored in the criminal proceedings, which required further investigation under the article 2 procedural duty. Different forms of procedural duty would arise depending on the character of the failings:

■ In cases of simple negligence, there was a reduced procedural duty that would be discharged by a domestic inquest. This is also true of arguable gross negligence in the judgment of an individual practitioner.

■ For the full procedural duty to arise, the character of the failings has to be different from the careless judgment of an individual. For example, the full duty would arise where there was deliberate killing, and in at least some cases of systemic or institutional failure.

In this case, deliberate killing could not form a basis for resuming the inquest, as it had been considered fully at the criminal trial. However, the arguable failure by the authorities to take sufficient steps to investigate concerns raised about the GP's practice did give rise to the full procedural duty. A fresh inquest was ordered.

Comment: This analysis must be restricted to medical cases where the deceased was not detained. The finding demonstrates that the full procedural duty will arise even if the arguable systemic failings were comparatively remote from the death. The court was well aware that the failures to investigate were old: they took place at least a year before the death. However, they were not too remote to require investigation. It was also impossible to know from the evidence

before the coroner whether or not there was any real basis to the complaints. Yet, all the claimant needed to establish was that there was a real question about whether or not reasonable steps were taken by the authorities to investigate the concerns about the GP.

It is a little difficult to reconcile this case with *R (Takoushis) v HM Coroner for Inner North London* [2005] EWCA Civ 1440, 30 November 2005; [2006] 1 WLR 461, where there were arguable systemic failings in medical care, but the full procedural duty was not held to arise. Given the finding in *Savage*, this aspect of *Takoushis* may now be open to doubt.

Also of interest, the court found that GPs, despite being independent practitioners, were still agents of the state whose acts or omissions must comply with article 2. Finally, if the inquest found gross negligence, this could be framed as a narrative verdict.

No exercise of article 1 jurisdiction by UK in Iraq

■ R (Al-Saadoon) v Secretary of State for Defence

[2009] EWCA Civ 7, 21 January 2009

The appellants were detained by British forces in Iraq for alleged war crimes. The Court of Appeal decided that the detention of the appellants by the British forces at Basra did not constitute an exercise of article 1 jurisdiction by the UK. This was primarily because, given the legal basis for the presence of the British armed forces in Iraq, the UK was not exercising any power or jurisdiction in relation to the appellants other than as agent for the Iraqi court. It was not exercising, or purporting to exercise, any autonomous power of its own as a sovereign state.

PRACTICE AND PROCEDURE

This is a new section in this recent developments article. The purpose of this section is to provide some practical tips and suggestions on inquest practice and procedure. In future articles the authors would welcome suggestions and comments about matters of practice and procedure in which readers would be interested. This month the authors look at the pre-inquest hearing (PIH).

The pre-inquest hearing

The rationale behind the PIH is that it is effectively a case-management conference. It ensures that the inquest runs smoothly. It allows the coroner to be aware of issues or themes which may be of concern to interested persons. It is an opportunity to get the evidence in order and to obtain disclosure. It should lead to a spirit of co-operation between interested persons. The aim of all sides ultimately should be to get to the truth. The PIH allays suspicion and brings more than one mind to the investigation. It helps the coroner. There is no rule about how many PIHs there can be. It is a matter for the coroner.

How to prepare for the PIH

The following areas need to be considered. This is a suggested list.

■ Identify the inquest advocate as early as possible so that s/he can have some input in the pre-inquest review hearing.
■ Seek some disclosure before the first pre-inquest hearing if it is to be effective and not a waste of time.
■ Lawyers should 'crunch' the papers carefully.
■ Lawyers should attempt to identify themes to be explored at the final hearing.
■ The legal team, including the client counsel, should discuss which of the identified themes can be shared with the coroner and other interested persons. Obviously, practitioners need to be careful that forensic mistakes are not made which could damage effective questioning later on.
■ Lawyers should consider whether the inquest is an article 2-type inquest.
■ Is this (whether article 2 is engaged) something that is likely to be disputed by the coroner or other interested persons? Furthermore, does this need to be argued? Should the lawyer prepare his/her argument in letter format or wait for the pre-inquest hearing?
■ Is a jury required or not?
■ Is an assessor required or not?
■ Are experts required or not?
■ What issues have the IPCC or Prisons and Probation Ombudsman (PPO) or other statutory agencies identified?
■ Have the family any ideas of what they want explored?
■ Lodge a good skeleton argument in advance with authorities. It is sometimes better to serve in advance so the coroner has had an opportunity to read the materials before the hearing.
■ Arrange a meeting/conference with family.
■ Lawyers should decide before the hearing which witnesses they want called.
■ Lawyers should decide who they want read under CR 1984 r37.
■ Lawyers should decide who is irrelevant.
■ Are there gaps in the evidence that need plugging?
■ Does the lawyer have the criminal investigations or investigations (reports) by other bodies, eg, the IPCC, the PPO or the Health and Safety Executive?

The typical PIH agenda

The coroner will also need to decide (in no particular order):

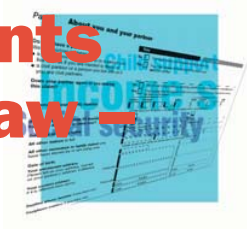
■ Which witness to call.
■ Which witness to read (r37).
■ Seek agreement on the r37 witnesses if possible.
■ Which witnesses are irrelevant.
■ Whether article 2 is engaged.
■ Hear argument on article 2 if in dispute.
■ Whether to exclude witnesses during each other's evidence.
■ How do deal with missing witnesses.
■ What expert evidence is necessary.
■ Do all sides have disclosure?
■ Is a jury required or not?
■ Scope of this inquiry: is article 2 engaged or not?
■ The length of the hearing.
■ Is a site visit needed?
■ Are there any witnesses abroad?
■ Does the hearing merit transcription services (LIVENOTE)?
■ Are interpreters needed?
■ Does the coroner need video or audio facilities for playing of tapes, 999 calls or CCTV evidence?
■ Are photos of the scene required?
■ If photos of the body are required, which ones are appropriate?
■ Length of time for each witness.
■ What exhibits are necessary, eg. forensic evidence, clothing, etc.
■ What written evidence is admissible.
■ Who is going to prepare the bundles?
■ Is there to be a separate bundle for the jury?
■ Are there any public interest immunity applications or secret evidential issues to be decided?
■ Does the coroner have an appropriate venue to hear the case given the number of witnesses and the fact that a jury may be required?
■ Have all the properly interested persons been informed?
■ Do they need representation; is their conduct likely to be called into question?

Ultimately, the PIH is an opportunity not to be missed. It is now an important part of coronial procedure, and much can be gained if the PIH is prepared for properly.

1 Available at: www.justice.gov.uk/publications/coroners-justice-bill.htm.
2 Foreword to the draft Coroners Bill 2006. Available at www.justice.gov.uk/docs/coroners_draft.pdf.

Adam Straw is a barrister at Tooks Chambers, London. Leslie Thomas is a barrister 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 means-tested and non-means-tested benefits, and tax credits. In addition, significant Social Security Commissioners' and Upper Tribunal judges' decisions from June to December 2008 are summarised. Part 1 of this article appeared in February 2009 *Legal Action* 23.

NON-MEANS-TESTED BENEFITS

Disability living allowance mobility component: child who refuses to walk

■ **CDLA/3839/2007**

8 May 2008

This case concerns a child with autism, and his entitlement to the high rate of the mobility component. He often needed direction and support when walking, and sometimes refused to walk, and had to be encouraged to do so. The appeal tribunal held that he 'was not virtually unable to walk due to his autism but was exercising his choice'.

The commissioner held that the tribunal had not explained its decision adequately. It may also have drawn a false distinction between physical disablement and conscious volition. First, the inability of the claimant to control the direction of his walking was not relevant for the high rate of the mobility component: *R(M) 3/86*. The refusal to walk may, however, be relevant. In particular, in *R(M) 2/78*, which concerned a disabled child who refused to continue walking, the Chief Commissioner envisaged that it might be as a consequence of his physical condition (thus relevant for the high rate), or that it was a consequence of his mental state.

Subsequently, the Tribunal of Commissioners in *R(M) 3/86* stated that, on the facts of that case, 'the criterion was whether the claimant could not walk, as distinct from would not walk'. But the commissioner in the present case did not read that as qualifying *R(M) 2/78*, or as saying that the only possibilities in any case were of conscious choice or physical disablement: 'It was merely working out a particular example, not setting out a comprehensive statement of the law.' That observation had been made in *CM/005/1986*, and *CSDLA/4565/2003* was, according to the commissioner, mistaken in failing to appreciate that *R(M) 3/86* was not a definitive statement of the law. In *CM/098/1989*, which concerned a claimant with brain damage, the commissioner held that the tribunal must give very clear reasons for attributing the behavioural problems in question to something other than the brain damage (ie, to physical disability).

The commissioner instructed the new tribunal to ignore difficulties regarding the claimant's inability to control the direction of his walking. However, difficulties arising from his refusal to walk could be taken into account, with the tribunal needing to decide if he is 'unable to walk or just unwilling to walk in a particular direction'. There was no dispute that autism was a physical condition, but the tribunal would need to disentangle and disregard walking difficulties that arise from mental disability.

Incapacity for work: exceptional circumstances – major surgical operation

■ **CIB/1381/2008**

18 June 2008

In this case, the commissioner held that both the Department for Work and Pensions (DWP) and the tribunal had taken a wrong approach to the relevant law regarding the exceptional circumstance for someone awaiting a major surgical operation, as provided for in regulation 27(2)(c) of the Social Security (Incapacity for Work) (General) Regulations 1995 SI No 311.

Since amendment in 1997, regulation 27(2)(c) provides that an exceptional circumstance applies if 'there exists medical evidence that he requires a major surgical operation or other major therapeutic procedure and it is likely that that operation or procedure will be carried out within three months of the date of a medical examination carried out for the purposes of a personal capability assessment'. In the context of the present case, it was particularly important that the provision requires that it was 'likely that' the operation would be carried out within three months of the medical, and not (as was previously the case) 'will be'.

The tribunal decision, the electronic form IB85 used by the examining doctor, the tribunal submission and the *Incapacity Benefit Handbook for Approved Doctors* all erroneously used the pre-1997 wording of the provision, which required that the operation 'will be' carried out within three months. The commissioner disagreed with the secretary of state's submission that the tribunal was entitled to use hindsight with regard to whether or not the operation would be carried out within three months of the operation, and was authorised to do so by the decision in *CIB/5978/1997*. That decision was concerned with the pre-1997 'will' test, and was made at a time when tribunals could consider facts down to the date of hearing. Use of hindsight was not appropriate on the current wording and tribunals were restricted to facts at the date of the original decision: therefore *CIB/5978/1997* was no longer authority on this point.

MEANS-TESTED BENEFITS AND TAX CREDITS

Housing costs: accommodation more suited to the special needs of a disabled person

In general, housing costs are not awarded where a loan, etc is taken out in a 'relevant period', eg, while on income support. Exceptions apply, one of the most important of which regards accommodation for a disabled person.

■ **CIS/102/2008**

22 May 2008,
R(IS) 12/08

The claimant was a lone parent with a son who had Asperger's Syndrome. While on income support, she took out a mortgage to help purchase a property and live with the claimant's mother (his grandmother). The claimant was refused housing costs. The tribunal held that the exception that the mortgage was in order to purchase a home 'more suited to the special needs of a disabled person than the accommodation which was occupied before the acquisition by the claimant', as per paragraph 4(9) of Schedule 3 to the Income Support (General) Regulations 1987 SI No 1967, did not apply.

Deputy Commissioner Wikeley held that it was wrong to require that the 'physical structure' of the new property was more suited to the nature of the son's disability, that that ground should be the only or the main reason for buying the property, and to

apply a test of reasonableness to the exclusion of the actual test.

The deputy commissioner reviewed previous case-law on the 'disabled person' rule, in particular the decisions of Commissioner Mesher in *CIS/14551/1996* and Commissioner Levenson in *CIS/16250/1996*, both of which were approved. The deputy commissioner highlighted the following considerations for the new tribunal:

- The disabled person must count as a disabled person at the date the loan was taken out (*R(IS) 20/98*).
- There is no requirement of immediacy linking the time the loan is taken out, the time of acquisition and the time of moving in (*CIS/3295/2003*).
- Being more suited to the special needs of the disabled person needs only to be one of the reasons for the acquisition (*CIS/14551/1996*).
- The new accommodation only has to be more suited, there is no test of reasonableness (*CIS/14551/1996*).
- The special needs of the disabled person must stem from his/her disability (*CIS/14551/1996*).
- The statutory test is not whether the new property has been adapted in a structural sense (*CIS/16250/1996*).
- Although structural modifications may be relevant, the test may also involve consideration of wider social issues, eg, closer proximity to family members providing support (*CIS/14551/1996* and *CIS/16250/1996*).
- Within these limits, the application of the rule is ultimately a matter of fact for decision-makers and tribunals (*CIS/14551/1996* and *CIS/3383/2006*).

Income and capital

Means-tested benefit rules say very little about deciding when money or assets are to be treated as income or capital. Some recent decisions have thrown some light on situations such as when money/assets held by the claimant really is their capital, and at what point accumulated income becomes capital.

Capital: when income becomes capital

■ CIS/3101; 3102; 3103; and 3104/2007

3 April 2008,
R(IS) 9/08

The claimant, a foster-carer for young asylum-seekers and refugees, was paid money by the local authority which consisted of a 'boarding out allowance' for the costs of the child and a 'fee' for the tasks carried out by the foster-carer. She did not always spend all of the money, and it accumulated in her main bank account. She also received separate payments from relatives of the children, to be used for their benefit, which she paid into a separate bank account. The claimant did not disclose the accumulating foster funds to the DWP, and when it found out overpayment recovery decisions were issued.

The commissioner held that the tribunal erred in that it failed to make clear acceptance of concessions by the DWP that the money from relatives in the separate bank account was money held on trust for the children and so did not form part of the claimant's capital, and that the local authority payments could not be taken into account either as income or capital before the period to which they related. However, the tribunal was right to find that the local authority payments into the main bank account were not held on trust for the claimant, and that they became the claimant's capital at the point they remained unspent after the period for which they were paid.

Regarding the trust issue, it was generally accepted that the 'fee' paid to the claimant was hers and not held on trust. Also, the boarding out allowance was not held on trust, because a trust involves a particular fund or specific amount of money, whereas it was impossible to be precise with this payment about the amount spent on the children and the total left outstanding. Furthermore, it was (in contrast to the money from the relatives) not separated out from her other money as would be expected if a specific and exclusive fund for the children were being created.

Regarding when the local authority money turned from income to capital, the commissioner adopted the finding in *R(IS) 3/93* that that occurred at the end of the period in respect of which it was paid. The contrasting view in *CIS/0515/2006* (that capital must be assessed periodically, eg, yearly) was rejected. The commissioner preferred the approach in *R(IS) 3/93* for a variety of reasons, including that it was a reported decision and that he considered its reasoning was sound.

Capital: former matrimonial home – meaning of 'estranged'

■ CH/3777/2007

7 October 2008

This decision concerns the rules under which a claimant's share of the former matrimonial home can be ignored as capital when the former partner still lives there. The claimant in this case remained a joint owner of the matrimonial home, although she now rented a flat as her own home. She and her husband had an amicable agreement 'around the children' under which both parents attended school meetings, met at football matches and talked frequently on the telephone regarding those arrangements. She was hopeful that the separation might not be permanent. When assessing the claimant's capital for her housing benefit claim on the flat, the local authority disregarded her share of the former matrimonial home for 26 weeks, not longer.

The commissioner agreed that the claimant's share of the home should be disregarded only for 26 weeks from the date of separation from her husband. The claimant was 'estranged' from her husband. The relevant rule was at paragraphs 4(b) and 25 of Schedule 6 to the Housing Benefit Regulations 2006 SI No 213. Under paragraph 4(b), the capital value of the former home is disregarded indefinitely where it is occupied as his/her home by the former partner, 'but this provision shall not apply where the former partner is a person from whom the claimant is estranged or divorced …'. In such a case, the more limited 26-week disregard under paragraph 25 applies.

The commissioner approved authority (*CH/0117/2005*; *R(IS) 5/05*) which held that 'estranged' in this context is not simply a matter of whether or not a separated couple remain on good terms with one another, but depends on the reasons why they are living apart and, in particular, whether or not the normal relationship between them as a couple is continuing or has broken down. Without attempting an exhaustive definition, he held that:

> *… the word 'estranged' in this context implies no more than that the reason for the two people concerned no longer living together as a couple in the same household is that the relationship between them has broken down. It is not a necessary, or for that matter a sufficient, requirement to come within the term that dealings and communications between the two of them should be acrimonious.*

Capital: whether money which must be repaid, including overpaid benefit, is capital – diminishing capital rules and procedures

■ CIS/2287/2008

15 September 2008

This case deals with a number of issues regarding the assessment of capital, including the situation where the claimant is obliged to repay money. The claimant was refused income support on the ground of capital. He had been found, a few months previously, to have possessed at some point over £40,000 in capital. This finding led to a decision that he had been previously overpaid income support and that over £19,000 was

recoverable from him. There was also a decision that he had been overpaid housing benefit.

The commissioner held that the claimant still possessed capital above the income support limit. In so holding, he considered three questions:

- Whether the decision of the Court of Appeal in *Leeves v Chief Adjudication Officer*, reported as *R(IS) 5/99*, applies to capital as well as to income.
- Whether in the absence of a formal diminishing capital rule for actual capital, it can still be treated as diminishing over time.
- Whether the rule on quarterly diminution of capital at regulation 14 of the Social Security (Payments on account, Overpayments and Recovery) Regulations (PAOR Regs) 1988 SI No 664 does anything more than reduce the amount of an overpayment that is recoverable.

Regarding the first question, the commissioner held that the decision in *Leeves* applies to capital as well as to income. In *Leeves*, it was held that a student's grant did not count as his/her income from the point when s/he was under a 'certain and immediate' liability to repay it. There was no reason why that principle should not apply to capital too. The broadly similar decision in *CIS/2943/2000* was approved, and the contrary decision in *CH/3729/2007* was disapproved, but, held the commissioner, *Leeves* only applied 'at the moment of receipt or attribution [ie, of the money] and for the purpose of classification. It does not apply thereafter.' If the demand for repayment arose after the money had become the claimant's capital, it was outside the scope of *Leeves*.

Regarding the second question, although there was no rule allowing for the diminution of capital actually possessed by the claimant, there was no reason why, as part of the usual fact-finding process, he could not be treated as having used the capital for living expenses, if he was not spending money for that purpose from any other source. The evidence might show that the income available (including benefit) was not sufficient 'to pay for the claimant's life-style', in which case it might be right to infer some expenditure from capital. However, all would depend on the facts.

Finally, regulation 14 of the PAOR Regs applied to reduce the amount of a recoverable overpayment that has arisen on account of the claimant's capital. Yet it does not do more than that, and does not treat the capital as reduced for any other purposes – ie, it does not reduce the amount of capital that the claimant retains for the purposes of a later claim. In such a later claim, his capital is the amount actually held by him, not as notionally reduced for the purpose of overpayment recovery by regulation 14.

Right to reside and habitual residence test

A number of decisions have analysed further the relationship, for right to reside purposes, between domestic and European law. In the main, these have been to uphold the legality of domestic provisions, but European provisions have come to claimants' aid regarding long-past residence as a workseeker, and in retaining worker status.

A8 nationals: 12-month registered work requirement

■ Zalewska v Department for Social Development

[2008] UKHL 67,
12 November 2008

In this decision of the House of Lords, it was held by a majority that the requirement that nationals of 'A8' European Union (EU) member states must have been in uninterrupted, registered work for 12 months before acquiring full EU rights (including regarding the right to reside having ceased such work) was lawful. The argument that the requirement was in breach of European law was rejected. In so holding, the Lords in essence upheld the previous decision of the Northern Ireland Court of Appeal in this case, as well as those of Commissioner Rowland in *CIS/160/2007* and other cases.

The Lords rejected the appellant's arguments. The requirements established by the Accession (Immigration and Worker Registration) Regulations (A(IWR) Regs) 2004 SI No 1219 were not incompatible with European law, and the effects of them (ie, including the denial of income support to the appellant) were not disproportionate. However, in so holding the Lords did reject an argument for the Department for Social Development that the very question of whether the national rules were disproportionate restrictions of European rights did not arise. As Lord Hope held: 'It is not open to the United Kingdom to impose restrictions on workers who are nationals of other member states that are incompatible with the fundamental rules of Community law.' However, in this case the restrictions were not incompatible with those rules.

Permanent right after five years: under community law not domestic law

■ McCarthy v Secretary of State for the Home Department

[2008] EWCA Civ 641,
11 June 2008

In this immigration case, the Court of Appeal considered whether a right to reside on the basis of having lived legally in the UK for a continuous period of five years could be gained by an EEA national merely by having lived in the country legally (ie, under UK domestic law) for that time, or whether it had to be via having lived here for that time in exercise of a right under EC law as set out in the main residence directive, Directive 2004/38/EC. The court held that it had to be under the latter, ie, EC law under the Directive, and that mere legal residence was insufficient.

The lawful residence contemplated in article 16 of the Directive, held the court, 'is residence which complies with community law requirements specified in the Directive and does not cover residence lawful under domestic law by reason of United Kingdom nationality'. It referred to residence in compliance with conditions laid down in the Directive. The court also held, however, that an EU citizen who has always resided here and (unlike the claimant in this case) who had been here in compliance with the Directive could take advantage of it, without the need to have moved to the UK from another EU member state.

Right to reside: not in breach of European law on unlawful discrimination

■ CPC/1072/2006

11 June 2008

In this decision it was held that the 'right to reside' requirement, although within the scope of certain European law regarding discrimination on the ground of nationality, was not in breach of that law.

The claimant, a Latvian citizen, was refused pension credit on the grounds that she did not satisfy the right to reside test. At her appeal, she relied on article 3(1) of Council Regulation (EEC) 1408/71, which provides that people within the scope of the regulation 'shall be subject to the same obligations and enjoy the same benefits under the legislation of any member state as the nationals of that state'. Her argument was that article 3 prohibited discrimination on the ground of nationality, and as all UK nationals have the right to reside it was in breach of that provision to find that she did not have the right to reside.

Commissioner Rowland rejected that argument. The right to reside test was not in breach of article 3(1). The secretary of state had conceded (rightly) that both the claimant and pension credit were within the scope of Council Regulation (EEC) 1408/71. However, the commissioner held that the discrimination was justified and therefore lawful. The basic principle of Community law that 'persons who depend on social assistance will be taken care of in their own member state' (as stated

in *Trojani v Centre public d'aide sociale de Bruxelles* C–456/02, 7 September 2004; [2004] ECR I-7573) was key. A modern European state may provide social assistance to its own citizens without any obligation to provide social assistance to the same extent to nationals of other member states. The right to reside test provided for that, but it was still possible for some nationals of other member states to satisfy it (ie, via domestic or European law) and so there was no provision simply that only UK nationals could satisfy the test.

Comment: This case is now before the Court of Appeal as *Patmalniece*. Therefore, there remains the possibility that the test is in breach of article 3(1), although appeals depending on this will no doubt be stayed pending the court's decision.

Lawful residence as a jobseeker before 2 October 2000

■ CIS/4299/2007

23 May 2008

The claimant was a French national. She worked in the UK between April 2000 and May 2002, but may have been looking for work before April 2000. She left for France at the end of February 2005, having lost her job. She returned in December 2005. She claimed income support in November 2006, and was refused on right to reside grounds. The tribunal held that she had established the right of permanent residence before she left for France (and, being absent from the UK for less than two years, retained it); in so doing, and against the argument of the DWP, it took account of residence in the UK before 2 October 2000, ie, before the relevant domestic legislation came into force.

The commissioner held that the tribunal was right to consider that it was possible that residence before 2 October 2000 could count towards permanent residence, and that included time spent as a jobseeker. Specifically, jobseekers had been held, as a result of the decision of the European Court of Justice in *R v Immigration Appeal Tribunal ex p Antonissen* C-292/89, 26 February 1991; [1991] ECR 1-745, to have an implicit right to reside under EC law that was not contained in domestic legislation. In the present case, the claimant may have been a jobseeker before 2 October 2000, and it was right to consider that relevant.

Comment: This decision is now under appeal to the Court of Appeal, as *Lassal*.

Retained worker status

■ CIS/4304/2007

13 May 2008

This decision covers a number of points, including, in particular, when a claimant may retain a right to reside by continuing to count as a worker under different definitions of that term. The claimant was a Dutch national who worked in the UK for a few months during 2005 for two hours a day, five days a week, before the job ended. She claimed and received jobseeker's allowance (JSA). Her youngest daughter enrolled at school. The JSA award continued until 2007, when she became ill and claimed income support. That was refused on right to reside grounds, but her appeal was successful.

The commissioner held, among other things, that it was possible that the claimant had a right to reside with reference to European (not domestic) provisions regarding inability to work because of illness. The tribunal had not dealt with the argument for the claimant that she had the right to reside as someone with retained worker status. The relevant rules were at article 7(3) of Directive 2004/38/EC, and at regulation 21AA(4)(c) of the Immigration (European Economic Area) Regulations 2006 SI No 1003. The reconvened tribunal should first establish whether or not the claimant was ever a 'worker', applying the commissioner's own analysis of that term in *CIS/1793/2007*. If she was a worker, did she retain that status under the terms of article 7(3) of the Directive (ie, when she claimed JSA and after)? Regulation 6(2)(b)(iii) provides retained worker status, in effect, to someone entitled to JSA.

Did the claimant continue to retain her status as a worker when she became ill? First, there was nothing to prevent a claimant from doing so by moving from one provision of regulation 6(2) to another. Second, it was possible that at this stage she retained her status as a worker under regulation 6(2)(a), ie, as someone 'temporarily unable to work as the result of an illness or accident'. That provision implements article 7(3)(a) of the Directive, and must be interpreted in its European, rather than domestic sense. Inability to work is a concept used in EC law, and therefore must be interpreted in a uniform way among member states: it cannot depend on domestic incapacity benefit legislation. The particular context was that the Directive provides continuity of worker status for someone who would otherwise be employed or looking for work; therefore, the relevant question for the tribunal is: 'can she fairly be described as unable to do the work she was doing or the sort of work that she was seeking?'.

A8 national: worker while on maternity leave

■ CIS/4237/2007

28 August 2008

In this decision, it was confirmed that a worker on maternity leave retains a right to reside under European law. The claimant was a Polish national who came to the UK in 2004 and started registered work, but had to start again in November 2005 following a break of more than 30 days. The claimant became pregnant and went on maternity leave in May 2006; the child was born in June 2006 and she received maternity pay until November 2006. Also in that month (and more than a year after she started work again) she claimed income support as a lone parent. The claimant was considered not to have a right to reside. This decision was upheld by the appeal tribunal which thought that as she was not literally working while on maternity leave, she had not satisfied the relevant right to reside conditions for A8 nationals.

The commissioner held that she did have the right to reside. She had satisfied the relevant right to reside conditions for A8 nationals, and had a right to reside as a worker. The relevant rule for A8 nationals was at regulation 2 of the A(IWR) Regs which themselves defined 'worker', 'work' and 'working' with reference to article 39 of the EC Treaty, and that encompassed someone on maternity leave.

Specifically, the commissioner held that, 'a person who is on maternity leave is still a "worker" for the purposes of article 39 of the Treaty – the secretary of state conceded as much in *CIS/185/2008* – and it follows that such a person is to be regarded as "working" for the purposes of the 2004 Regulations'. Therefore, the claimant had been legally working in the UK without interruption for a period of 12 months and had therefore ceased to be an A8 national requiring registration by the time of her claim for income support. Furthermore, she still had a right of residence (ie, as a non-A8 EU national) as a worker when she claimed income support, as she would have been entitled to additional maternity leave for 26 weeks after the end of her ordinary maternity leave.

Simon Osborne is a welfare rights worker at Child Poverty Action Group. Sally Robertson is a barrister at Cloisters Chambers, London.

Social Security Commissioners' and Upper Tribunal judges' decisions: significant cases between June and December 2008

Carers allowance

CG/607/2008

30 August 2008

Earnings limit – part-time work designed to earn no more than the earnings limit each week – paid monthly but not on same day of month – calculation of weekly amount of earnings and potential problems arising under COE Regs explored and explained – focus on the underlying earnings, not the payments – *R(IS) 10/95* not followed.

Disability living allowance

CDLA/496/2008

30 June 2008

Mobility component – epilepsy, panic attacks and seizures – unpredictable and variable pattern – fluctuating walking ability – seizures did not invariably occur when she walked outdoors – for most of the time she satisfied lower rate test only – could not say that 'throughout' the period of an award she would be virtually unable to walk.

CDLA/884/2008

7 July 2008

Practice – tribunal made decision less favourable to the claimant than the one being appealed – tribunals should refrain from making less favourable decisions except in the most obvious of cases – tribunal in difficult position: a warning sufficiently robust to alert a claimant to a real risk to his existing award so as to enable proper consideration of the prospects and evidence, may suggest it has prejudged the matter – failing to explain why it exercised its discretion to consider points not at issue between the parties may suggest an improper exercise of discretion – a tribunal should be slow to supersede another tribunal's decision after an oral hearing when it has not been asked to do so.

CSDLA/168/2008

5 September 2008

Appeals to commissioner (now to the Upper Tribunal) – a late request for a statement of reasons was refused – claimant then applied for a correction – wrongly granted by clerk but, in any event, time is not restarted when a correction follows refusal of a late request for a statement of reasons, only if there has been no such request.

CDLA/1461/2008

7 October 2008

Residence and presence – effect of failure to disclose residence in Cyprus – until amendment from 24 September 2007, DA Regs reg 3(5)(b) and (c) gave no power to revise on the basis of ignorance or mistake of material fact if that error was not related to the disability conditions – supersession effective only from the date of the superseding decision.

CDLA/1525/2008

24 November 2008

Mobility component – anorexia nervosa – clear physical disabilities resulting from that psychiatric condition – causation of the physical disablement and that it might be obviated by eating are not relevant to the statutory test.

CDLA/2955/2008; [2008] UKUT 24 (AAC)

27 November 2008

Mobility component – severe mental impairment – need for structured and controlled environment at school – no intervention required at school, but if intervention is regularly required in an uncontrolled environment DLA Regs reg 12(6) may be satisfied – to say otherwise mixes up the tests in reg 12(6)(b) and (6)(c) – (6)(b) requires intervention, whereas (6)(c) does not.

CDLA/2195/2008

11 December 2008

Mobility component – walking speed – cautionary note on turning virtual inability to walk into an arithmetical test – procedurally unfair to conduct test of claimant's ability to estimate time without telling him – defects in the test considered – close to breaching ban on physical examinations.

CDLA/2300/2008

12 December 2008

Care component – severe memory impairment – living in supported accommodation – insufficient facts and reasoning on why the input claimant received with his cognitive functions did not amount to 'frequent attention'.

Incapacity benefit

CIB/3542/2007

17 June 2008

Contributions conditions – interaction between decision-making by HM Revenue and Customs and by the secretary of state – mistakes and errors – useful summary of the correct procedure.

CIB/1381/2008

18 June 2008

Personal capability assessment – treated as incapable – exempt categories, IFW Regs reg 27(2)(c) – major surgical operation or therapeutic procedure likely within three months – the official submissions to the tribunal and the commissioner, the standard wording on the IB85 electronic report, and the *Incapacity Benefit Handbook for Approved Doctors* all wrongly reflected the pre-1997 version of this regulation and not the current test – on the current test, hindsight is impermissible – correct approach explained – see page 15 of this issue.

CIB/2533/2008

17 September 2008

Practice and procedure – fairness – tribunal failed to check whether claimant had been given a notice of refusal to postpone dated that day – no chance to waive breach of DA Regs reg 51.

CSIB/495/2008; [2008] UKUT 29 (AAC)

26 November 2008

Personal capability assessment – mental health descriptor 18(a) – cannot look after himself without help from others – provision of counselling and repeat prescriptions of anti-depressants lack the immediacy and intimacy which 18(a) requires.

Income support

CIS/1599/2007

30 June 2008

Practice and procedure – fair hearing – the same tribunal chairperson decided appeals against decisions on entitlement and on the resulting overpayment – test for apparent bias not satisfied – to be reported as *R(IS) 1/09*.

CIS/3746/2006 (T)

4 July 2008

Appeal – no right of appeal against a tribunal decision refusing to allow a late appeal – see February 2009 *Legal Action* 24.

CSIS/21/2008

10 July 2008

Practice and procedure – failure to disclose work and earnings – fair hearing – whether working as karaoke singer in pubs – neither the officials taking or witnessing the signed statements, nor the witnesses giving evidence of the claimant's work, were produced for cross-examination – claimant's representative did not request an adjournment to cross-examine witnesses – tribunal took into account the absence of those witnesses when it assessed and weighed all the evidence – no breach of rules of natural justice.

CIS/3512/2007

10 July 2008

Practice and procedure – whether living together as husband and wife – tribunal dealing with the overpayment decision was entitled to come to the opposite decision on that factual question to the tribunal dealing with the entitlement decision.

CIS/731/2008

31 July 2008

Resources – income from the Public Lending Right scheme is to be treated as earnings – analogous to royalty payments.

CIS/185/2008

11 August 2008

Right to reside – recognised by issuing and not revoking a residence permit – alternatively, five years' residence as a worker before 30 April 2006 confers a right of permanent residence under EC Treaty article 18(1).

CIS/492/2008

20 August 2008

Housing costs – linking rule between claims – IS Regs Sch 3 para 4 – loan not incurred when on income support – irrelevant that it had been agreed when he was – on a fresh claim made more than 26 weeks after the last day of income support housing costs would be allowable – not excluded by having made an unsuccessful claim during that 26 weeks.

CIS/4237/2007

28 August 2008

Right to reside – A8 national – work and worker encompasses someone on maternity leave – see page 18 of this issue.

CIS/546/2008
1 September 2008
Overpayment – lone parent – failure to declare cohabitation – entitled to offset the income support she would hypothetically have been entitled to at that time as the claimant for a couple if she had declared that she was living with a partner – see February 2009 *Legal Action* 24.

CIS/2095/2008
10 September 2008
Overpayment – lone parent notified department about starting a full-time course, including details of grants – no failure to disclose – catalogue of errors by department and tribunal unpicked – see February 2009 *Legal Action* 24.

CIS/2287/2008
15 September 2008
Resources – capital – no explanation for the disappearance of capital – non-co-operative claimant – no diminishing capital rule for actual capital on the new claim but may achieve a similar effect by use of inferences – see page 16 of this issue.

CIS/2074/2008; [2008] UKUT 8 (AAC)
5 November 2008
Living together – sex and perception.

Industrial injuries

CI/1654/2008
31 July 2008
Accident – fall when taking shower at workplace – was reasonably incidental to her duties, so arose in the course of employment – but did not arise out of her employment – not exposed to any additional hazards beyond the norm – authorities reviewed.

CI/2897/2008; [2008] UKUT 12 (AAC)
5 November 2008
Prescribed disease – A12 carpal tunnel syndrome – requiring a particular degree of flexion of the wrist is not part of the prescription test – may be relevant to questions of medical condition, causation or disablement – important to keep the questions separate.

CI/2428/2008
8 December 2008
Prescribed disease – C23 primary neoplasm of epithelial lining of urinary tract – whether claimant's disease caused by exposure to a particular chemical agent in a prescribed occupation – the instructions to the Government Chemist should have been provided – Government Chemist's letter failed to answer the statutory question – tribunal on claimant's evidence of work exposure was entitled to find prescription test satisfied.

Invalid care allowance

CG/645/2008
11 July 2008
Earnings limit – claimant was paid for herself and her job share partner – latter was 'off the books' – nature of contract unclear – detailed directions to help tribunal sort out the complexities.

Jobseeker's allowance

CJSA/1556/2007; [2008] UKUT 21 (AAC)
20 November 2008
Resources – assets subject to a restraining order pending a confiscation order – beneficial interest retained but market value nil – permitted withdrawals were sums of capital, not of income, so did not affect benefit.

Retirement pension

CP/3638/2006
1 July 2008
Persons living abroad – uprating of pension – marriage after spouse's pension frozen – broadly, on spouse's death, his widow was entitled to pension based on the uprating position as at the date of marriage – PA Regs reg 5 explored at length.

CP/891/2008
9 July 2008
Category B pension – Yemeni resident – whether claimant married to the man she said was her husband – confusing picture – tribunal failed to apply the balance of probabilities test – failed in its written reasons to consider and assess any of the evidence that might support her case – detailed discussion, relying on the guidance in *CP/4062/2004*, 5 July 2005 – see February 2006 *Legal Action* 18.

CP/1792/2007
22 July 2008
Contributions and credits – jurisdiction – another useful explanation and exploration of relevant law and bureaucracy – see February 2009 *Legal Action* 25.

CP/327/2008; [2008] UKUT 16 (AAC)
5 November 2008
Claim for adult dependant – made on original claim to retirement pension – separate claim required – prescribed form sent but not received – sending the form is sufficient for it to be 'supplied' by the secretary of state – no backdating possible.

CP/2611/2007
8 December 2008
Guaranteed minimum pension – whether it should be deducted from the total additional pension or only that attributable to the period in relevant contracted-out employment – former position correct – reviews history of pensions legislation – for parliament to correct the anomaly.

Tax credits

CTC/591/2008
7 August 2008
Child tax credit – late claim – accounts not finalised – ignorant of practice of accepting protective claims early – no power to backdate except to the date of an award of disability living allowance or, where refugee status granted, to the date of the asylum claim – complaint of race discrimination in latter respect – tribunal lacks jurisdiction to consider claims under the Race Relations Act 1976.

CPC/1072/2006
11 June 2008
State pension credit – right to reside – European law – discrimination on the ground of nationality – see page 17 of this issue.

CPC/1872/2007
22 July 2008
State pension credit – whether subject to immigration control – maintenance undertaking – exceptionally, discretion had been exercised granting claimant indefinite leave to remain outside the immigration rules – for secretary of state to show that leave was granted as a result of the undertaking.

CPC/1446/2008
23 September 2008
State pension credit – allowance for severe disability – whether 'normally residing with' a non-dependant – living in annex to son's house – enough that the kitchen facilities were shared.

CPC/2021/2008; [2008] UKUT 15 (AAC)
11 November 2008
Overpayment – elderly disabled claimant living in care home – no requirement to disclose end of self-funding as position not made clear in leaflet INF4(PC) – no failure to disclose cessation of attendance allowance as secretary of state failed to prove INF4(PC) sent to claimant – the knowledge of her financial adviser was not to be attributed to claimant – he became her appointee after the material time – Upper Tribunal judge decides claim himself given the overriding objective to deal with cases fairly and justly.

Abbreviations
COE Regs = Social Security Benefit (Computation of Earnings) Regulations 1996 SI No 2745
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
IFW Regs = Social Security (Incapacity for Work) (General) Regulations 1995 SI No 311
IS Regs = Income Support (General) Regulations 1987 SI No 1967
PA Regs = Social Security Benefit (Persons Abroad) Regulations 1975 SI No 563

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. Comments from readers are warmly welcomed.

POLITICS AND LEGISLATION

Housing cases in the courts

From 6 April 2009, judicial review proceedings in housing cases will be capable of issue and determination at four court centres outside London (Birmingham, Cardiff, Leeds and Manchester). The detail is in the new Practice Direction 54D Judicial Review (Administrative Court (Venue).[1]

Other amendments to the Civil Procedure Rules (CPR) and the Practice Directions to be made on the same date contained in the 49th Update to the Civil Procedure Rules include several applicable to housing cases (see February *Legal Action* 51).[2] For example, minor changes are made to CPR 55 (possession claims), County Court Rules (CCR) Ord 26 r17 (possession warrants) and CPR 52 (appeals).

Commencing new housing legislation

Communities and Local Government (CLG) has published its annual schedule of commencement dates for various housing measures: *Common commencement dates: annual statement of forthcoming regulations* (CLG, January 2009).[3]

Among those which will come into effect on 6 April 2009 are:

- The provisions of the Housing and Regeneration Act (H&RA) 2008 (s299 and Sch 11) which prevent the creation of more tolerated trespassers and provide current tolerated trespassers with replacement tenancies (see also page 27 of this issue). A new statutory instrument – the Housing (Replacement of Terminated Tenancies) (Successor Landlords) (England) Order 2009 – will deal with cases in which there has been a stock transfer since the tenant became a trespasser.
- H&RA 2008 s300, which removes the low-rent test as a means of determining eligibility for the right to enfranchise (ie, buy the freehold) in relation to shared-ownership houses. The test will remain for some purposes, eg, when the claim is for a lease extension (as opposed to acquiring the freehold). The test will continue to apply to existing shared-ownership house leases.
- H&RA 2008 ss301–302, which deal with shared-ownership leases in protected areas and set out prescribed conditions and exemptions from enfranchisement.
- Regulations amending the prescribed forms used when a tenant exercises the right to enfranchise in relation to a house.

Not commencing new housing legislation

Housing advisers are keenly awaiting the commencement of H&RA 2008 s314 and Sch 15, which will repeal Housing Act (HA) 1996 s185(4) – the only provision of housing law declared incompatible with the European Convention on Human Rights ('the convention') by a domestic court: *R (Morris) v Westminster City Council* [2005] EWCA Civ 1184; [2006] 1 WLR 505. However, no commencement date appears in the CLG publication mentioned above.

The government has recently explained how it thinks that the replacement provisions will make good the deficiency in homelessness law which led to s185(4) being declared incompatible: *Responding to human rights judgments* Cmnd 7524 (TSO, 2009).[4]

There is similarly no news on a commencement date for the provision designed to extend security of tenure to residents on local authority Gypsy and Traveller caravan sites: H&RA 2008 s318.

More housing cases

The Legal Services Commission's extended deadline for applications from legal advice providers for new housing matter-starts will expire on 31 March 2009: LSC news release, 8 January 2009. Details of how to apply are given on the 'tenders' page of the LSC's website.[5]

Family intervention tenancies

The government has published non-statutory guidance for social landlords (local authorities and registered social landlords) on the use of these new forms of tenancy: *Guidance on the use of family intervention tenancies* (CLG, January 2009).[6] The guidance helpfully attaches the relevant regulations and orders as well as a checklist of issues for prospective landlords and tenants to consider.

Regulation and redress in housing

A research project reviewing regulation and redress arrangements in the housing market has reported to government that 'the highest degree of consumer dissatisfaction … is in private rented accommodation which is also the sector that has the least regulated services and very limited redress opportunities': *Government review of regulation and redress in the UK housing market: final report to the Department for Communities and Local Government (CLG) and the Department for Business, Enterprise and Regulatory Reform (BERR)* (CLG, January 2009).[7] The report concludes that there is scope for reform, extension and rationalisation in regulation and redress.

Representing tenants' interests

The government has accepted the recommendations of a project group, chaired by Professor Steve Hilditch, which has been working on the establishment of a national tenants' organisation to be known as National Tenant Voice: *Citizens of equal worth: the project group's proposals for the National Tenant Voice* (CLG, February 2009).[8] The next stage of the group's work will be the establishment of the National Tenant Council later this year.

Meanwhile, the Tenant Services Authority (TSA) has launched a nationwide consultation exercise to ask social housing tenants what they think the new national standards for social housing should contain. The TSA has statutory power to fix national standards required to be observed by social landlords in the letting and management of the homes they provide: H&RA 2008 s193. The standards will be enforceable by fines and compensation. The consultation exercise is called the 'National Conversation' and involves a programme of meetings around the country (driven by 33 specially-trained 'trailblazer' organisations) and other opportunities for participation: TSA news release 02/09, 14 January 2009.[9]

Council housing

On 21 January 2009, the government announced new arrangements under which local authorities will be free to build council

housing again and keep the full rents received (or the proceeds of sale under the right to buy): CLG news release, 21 January 2009.[10] The detail is set out in a consultation document: *Changes to the revenue and capital rules for new council housing: consultation on excluding new council housing from Housing Revenue Account Subsidy and pooling* (CLG, 2009) to which responses are sought by 17 April 2009.[11]

On the following day the government published the latest statistics on the current stock of local authority housing: *Local authority housing statistics, England 2007/08* (CLG, January 2009).[12] The figures cover waiting lists, choice-based letting schemes, decent homes delivery and the total stock holdings.

April 2009 rent increases

Before it was wound up, the Housing Corporation issued guidance to registered social landlords about rent increases for the financial year 2009/10: Housing Corporation Circular 04/08: *Rents, rent differentials and service charges for housing associations* (see January 2009 *Legal Action* 21).[13]

In January 2009 the new TSA reminded housing associations that they are not required to impose on tenants the full 5.5 per cent maximum guideline rent increase mentioned in that guidance.[14]

Disability and housing

A new report published by the National Aids Trust (NAT) notes that decisions on the priority given to individuals with HIV for social housing are often based on out-of-date criteria such as whether or not someone has an AIDS diagnosis or the presence of certain 'symptoms': *Housing and HIV* (NAT, January 2009).[15] This approach fails to address HIV as a recognised disability and a long-term condition which involves continuing vulnerability and very often fluctuating health.

The House of Commons Select Committee on Work and Pensions has been taking oral and written evidence on how the issues arising from the decision of the House of Lords in *Lewisham LBC v Malcolm* [2008] UKHL 43; [2008] 3 WLR 194 should be addressed in the forthcoming Equality Bill. The evidence of, among others, the Housing Law Practitioners' Association and the Discrimination Law Association has been published on the internet.[16]

Home ownership

Faced with the prospect of repossession for mortgage default, some owners have been attracted to the possibility of remaining in their homes as tenants. A new scheme for England, the Mortgage Rescue Scheme, was launched nationwide in January 2009 and enables those homeowners who would be in priority need if actually made homeless to become tenants of registered social landlords: CLG news release, 16 January 2009.[17] CLG has set up a 'Questions & Answers' webpage for those seeking more details about the new scheme.[18]

Under the Mortgage Rescue Scheme in Wales, grants can be used by housing associations to buy a share of the mortgage or buy properties outright, and then rent them back to the former owner: Welsh Assembly Government news release, 15 January 2009.[19]

For other homeowners, private sector companies have been offering 'sale-and-rent-back' arrangements under which the firms buy properties at a significant discount, and then rent them back to the former owners under tenancy agreements. The Office of Fair Trading (OFT) has issued formal notices to 16 such firms asking them to substantiate claims they make in their advertising. The firms have been given 14 days to reply. Based on their replies, the OFT will make a decision whether or not to take further action (including prosecution): OFT news release 8/09, 30 January 2009.[20]

From 6 April 2009 owners selling their homes must have completed a property information questionnaire (PIQ) giving basic information about their properties which is likely to be of help to prospective buyers. The PIQ must be prepared before marketing a property for sale: see February 2009 *Legal Action* 32. The Home Information Pack (Amendment) Regulations 2009 SI No 34 correct an omission from earlier regulations introducing this new aspect of home information pack requirements.[21]

Local housing authorities have discretionary powers to waive some of the council tax which would otherwise be payable by owners for empty properties. A recently published government-commissioned research report considers the impact of the exercise of that power on the number of empty homes in the country: *Application of discretionary council tax powers for empty homes* (CLG, January 2009).[22]

The long leases of retirement flats bought by the elderly sometimes provide that, on any later sale of the lease, the tenant will pay a 'transfer fee' to the original builder/developer. The OFT has taken the view that such a term may be 'unfair' and thus breach the Unfair Terms in Consumer Contracts Regulations 1999 SI No 2083. The major builder McCarthy & Stone plc has agreed with the OFT that it will not enforce such terms in its existing leases and will amend the terms of the future leases it offers to new purchasers. OFT news release 1/09, 14 January 2009.[23]

The housing stock in England

The latest statistics on all aspects of housing in England show continued expansion of the private rented sector and a reduction in the percentage of the housing stock in owner-occupation. The details, and figures on a range of other housing-related issues, are given in the newly-published *Survey of English Housing preliminary report: 2007/08* (CLG, January 2009).[24]

Separate statistical information on the physical condition of England's housing is given in *English House Condition Survey 2007: headline report* (CLG, January 2009).[25] The content of both sets of data is summarised in *Housing Surveys Bulletin No 4* (CLG, January 2009).[26]

The government's target is that every social housing tenant should have a 'decent' home by 2010. In recent years there have been discrepancies in the statistics used to record and monitor moves towards that target. The government has now published *Decent homes in the social sector: statistics reconciliation project 2008* (CLG, January 2009), seeking to reconcile the statistics in order to demonstrate precisely what progress has been made.[27]

HUMAN RIGHTS

Article 8 and possession claims

■Ćosić v Croatia

App No 28261/06,
15 January 2009

Ms Ćosić was a teacher. In 1984, the school in which she taught provided her with a flat which it had temporarily leased from the Yugoslav People's Army. The lease expired in 1990. In 1991, the state took over all army property. Ms Ćosić continued to live in the flat, paying a monthly rent to the state. In 1999, the state brought a civil action against the school and Ms Ćosić seeking her eviction. The court ordered her to vacate the flat in 15 days because the lease had expired. It found that there was 'no legal basis for [Ms Ćosić] to have acquired any rights on the flat'. An appeal was dismissed. She complained to the European Court of Human Rights (ECtHR), alleging that there was a breach of article 8.

The ECtHR found that there was a breach of article 8. The obligation to vacate the flat was an interference with her right to respect for her home. The national courts' decisions were in accordance with domestic law and the interference in question pursued the legitimate aim of protecting the rights of the state as the owner of the flat. The central question was whether or not the interference was proportionate to the aim pursued and thus 'necessary in a democratic society'. This

raised a question of procedure as well as one of substance. Following *Connors v UK* App No 66746/01, 27 May 2004; (2005) 40 EHRR 9 and *McCann v UK* App No 19009/04, 13 May 2008; (2008) 47 EHRR 40, the court continued:

The first-instance court expressly stated that … its decision had to be based exclusively on the applicable laws. The national courts thus confined themselves to finding that occupation by the applicant was without legal basis, but made no further analysis as to the proportionality of the measure to be applied against the applicant. However, the guarantees of the Convention require that the interference with an applicant's right to respect for her home be not only based on the law but also be proportionate … to the legitimate aim pursued, regard being had to the particular circumstances of the case. … [T]he court reiterates 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 … [In] the present case the applicant was not afforded such a possibility. It follows that, because of such absence of adequate procedural safeguards, there has been a violation of article 8 (paras 21–23).

■ Wandsworth LBC v Dixon

[2009] EWHC 27 (Admin), 15 January 2009

In 1983, Wandsworth granted Mr Dixon and his sister a joint tenancy. In 2005, his sister served a notice to quit, determining the joint tenancy. After executing two separate search warrants, police found small quantities of cocaine and herbal cannabis in the flat, resulting respectively in a fine and a caution. In May 2006, Wandsworth wrote that in view of his conviction for an arrestable offence, the council would no longer consider his request for a discretionary tenancy and required vacant possession. In August 2006, District Judge Tilbury made an order for possession on the basis that the defendant was an unauthorised occupant. In March 2007, Wandsworth notified Mr Dixon that he was ineligible for an allocation of housing accommodation. His claim for judicial review of that decision and a renewed application for permission to appeal were dismissed ([2008] EWCA Civ 595; July 2008 *Legal Action* 22). The defendant subsequently applied to set aside the possession order and/or to stay or suspend the execution of the warrant for possession.

HHJ Bidder QC, sitting as a deputy judge of the High Court, refused the application. After reviewing all the recent authorities on article 8 of the convention, he stated that it could 'hardly be doubted that parliament must be assumed to have left unqualified the right of an owner to recover possession where one of two joint tenants has served notice to quit'. There would be obvious practical problems if the question of proportionality were to result in the common law rule being displaced. It would be undesirable if one tenant were to be prevented from terminating his/her interest in a tenancy and, thus, be forced to continue to pay rent. Alternatively, the difficulty would arise as to one tenant paying the full rent or the landlord being faced with only one tenant paying half the rent.

In this case, the situation was, in principle, no different from the position of the appellants in *Lambeth LBC v Kay*; *Leeds City Council v Price* [2006] UKHL 10; [2006] 2 AC 465, and was distinguishable from the position in *McCann v UK* App No 19009/04, 13 May 2008; (2008) 47 EHRR 40. Mr Dixon had no right to remain in the property, not simply because of the common law but because parliament had chosen not to bring his case within the statutory scheme of protection. On the other hand, *Birmingham City Council v Doherty* [2008] UKHL 57; [2008] 3 WLR 636 was the type of exceptional case envisaged in *Kay* because of the discriminatory effect of the statutory scheme which applied at the time the possession order was sought.

HHJ Bidder QC was 'satisfied, for the reasons expounded by Lord Bridge in *Hammersmith and Fulham LBC v Monk* [1992] 1 AC 478 which appear to have been accepted by all in *Harrow LBC v Qazi* [2003] UKHL 43; [2004] 1 AC 983, *Kay* and *Doherty* as being compatible with article 8, that the domestic law strikes a proper and unassailable balance between the rights of joint tenants and their landlords and that it is not arguable that the rule in *Monk* is incompatible with article 8'. Furthermore, *Kay* was binding authority that the decision made by Wandsworth to seek summary possession against Mr Dixon in reliance on its clear right to possession under domestic law may only be challenged on the basis that its decision was one that no reasonable person could consider justifiable, ie, the test enunciated in *Wandsworth LBC v Winder* [1985] AC 461, HL.

In this long-running case, Wandsworth had afforded Mr Dixon the opportunity to make extensive representations about the factual matters that the council should take into account when making its decision about whether he was ineligible for housing accommodation because he was guilty of unacceptable behaviour within HA 1996 s160A. It was 'simply unarguable that the claimants [had] not properly considered whether to continue with the possession claim … [It was] clear that, in reaching that decision, they [had] performed the very balancing exercise that is required by article 8(2).'

Article 6 and discretionary housing payments

■ R (Brown) v South Oxfordshire DC

[2008] EWHC 3378 (Admin), 13 August 2008

Mr Brown was the lessee of a houseboat and received housing benefit. He applied to the council for a discretionary housing payment because there was a difference between his housing benefit and the rent assessed by the rent service. His application was refused. On appeal, an appeals panel, comprising five councillors, again refused to make a discretionary housing payment. Mr Brown sought permission to challenge that decision. He argued that there was a breach of article 6. He claimed that the award of discretionary housing payment was a civil right and that the panel, composed of councillors making decisions in relation to the council budget and perhaps affected by political considerations, could not be independent or impartial.

Ouseley J dismissed the application. He distinguished *Tsfayo v UK* App No 60860/00, 14 November 2006; [2007] HLR 19. That decision was concerned with the independence of the housing benefit review board of a local authority, which was making decisions of fact that bore on the entitlement of a claimant to a housing benefit which was administered by the council. The claim here was to a discretionary payment that the council was not obliged to grant. He held that the circumstances were much more akin to those in *Begum v Tower Hamlets LBC* [2003] UKHL 5; [2003] 2 AC 430. The contention that article 6 applied was 'unarguable'. He also rejected the contention that there was actual or apparent bias on the part of at least one member of the panel.

LONG LEASES

Service charges

■ Leicester City Council v Master

LRX/175/2007, 29 October 2008

Mr Master was a secure tenant who exercised the right to buy. The long lease granted to him included a covenant 'to pay on demand … at such times and in such manner as the lessor shall direct a fair proportion … of the reasonable costs or estimated costs

(including overheads) of any services incurred'. Leicester, through the service charge provisions, sought to set up a reserve fund for future expenditure on repairs. Mr Master disputed this and applied to the Leasehold Valuation Tribunal (LVT) under Landlord and Tenant Act 1985 s27A for a determination about the amount of service charge properly payable. The LVT determined that the covenant to pay service charges did not permit Leicester to set up a reserve fund. Leicester appealed.

HHJ Huskinson allowed the appeal. Where a lessor seeks to recover money from a lessee, there must be, on ordinary principles, clear terms in the contractual provisions which entitle the lessor to do so. In this case, in view of the terms of the covenant, Leicester was entitled to demand a fair proportion of the reasonable estimated costs of repairs to be incurred in the future in observing and performing the repairing obligations under the lease. This was not limited to the cost of services which had been performed, nor to the cost of services which had been identified as already being required, although not yet performed. There was nothing in the covenant to indicate that estimated costs had to be incurred within any specific accounting year, or within any particular time frame. The words 'at such times and in such manner as the lessor shall direct' were sufficiently wide to entitle Leicester to demand that the fair proportion of the reasonable estimated costs of future repairs be paid not in a single payment but in instalments. Leicester was entitled to build up a reserve fund through the service charge against the estimated cost of future repairs that were not yet needed, but which would be needed in due course. However, demands could only be justified if there was a properly prepared, reasonable estimate of the costs of repairs to be incurred.

TRESPASSERS

Adverse possession

■ St Pancras & Humanist Housing Association Ltd v Leonard

[2008] EWCA Civ 1442, 17 December 2008

Around 1973, Camden LBC sought to acquire two houses. Before it could do so, squatters moved in. In 1975, Mr Leonard, who was described as 'a seasoned squatter', broke into one of the garages, patched it up and put a padlock on the entrance gates. He claimed that 12 years' adverse possession started from that date. Later, Camden granted long leases of the houses, the gardens and the garage to a housing co-operative comprising squatters and local residents. In 1999, the co-operative transferred its interest to St Pancras & Humanist Housing Association. In 2007, St Pancras began a possession claim in respect of the garage. HHJ Marshall QC found that Mr Leonard had established 12 years of adverse possession. However, she also found that because, at co-operative meetings, Mr Leonard created the impression that he accepted that the garage was communal property, he was estopped from denying St Pancras's right to possession of the property.

Mr Leonard appealed and St Pancras cross-appealed. Both appeals were dismissed. There was cogent evidence to support the judge's conclusions.

HOUSING ALLOCATION

■ R (Alam) v Tower Hamlets LBC

[2009] EWHC 44 (Admin), 23 January 2009[28]

Mr Alam applied to Tower Hamlets for homelessness assistance (under HA 1996 Part 7). It provided interim accommodation (HA 1996 s188) but in due course decided that although he was eligible, homeless and not intentionally homeless, he did not have a priority need. His application for a review of that decision failed and an appeal was dismissed. The council's only duty under Part 7 was to provide him with advice and assistance.

Mr Alam also applied for an allocation of social housing (under HA 1996 Part 6). Tower Hamlets' choice-based letting scheme placed applicants in 'community groups'. The terms of Group 2 provided that it included '[t]hose assessed by the council as homeless under the Housing Act Part 7 and other homeless households who have an assessed priority need'. The council placed Mr Alam's application in the lower Group 3.

Mr Alam sought judicial review contending, first, that he was entitled to be accorded a reasonable preference in the allocation scheme because he was 'homeless' (see HA 1996 s167(2)(a)), and, second, that he met the terms of the first limb of the words of Group 2.

Timothy Brennan QC, sitting as a deputy judge of the High Court, quashed the decision. Rejecting a number of submissions made by the council, he held that:

- Mr Alam had not ceased to be 'homeless' because he was being provided with interim accommodation under HA 1996 s188. He was still 'homeless';
- the class of the 'homeless' in HA 1996 s167(2)(a) was not confined to those who had applied to a local authority for assistance under HA 1996 Part 7;
- the fact that Mr Alam had made such an application and the council had found that it did not owe a housing duty under HA 1996 Part 7 did not take him outside the term 'homeless'; and
- on a true construction of the scheme, Mr Alam met the terms of the first limb of the words of Group 2 and should have been included in that group.

HOMELESSNESS

Considering applications

■ Basildon DC v McCarthy

[2009] EWCA Civ 13, 22 January 2009

The claimants were numerous Gypsies who were the owners of plots of adjacent green belt land on which they had stationed their homes. Planning permission for such development was refused (for both permanent and temporary use), appeals were dismissed and enforcement notices were issued. The council decided to evict all the occupiers onto the roadside by use of its 'direct action' powers under planning legislation. The claimants sought judicial review of that decision on the basis that, inter alia, the council had failed to consider the responsibilities it might owe under the provisions of HA 1996 Part 7 (Homelessness).

Collins J quashed the decision on the ground that, inter alia, the council had failed to consider that on any homelessness application it might find that:

- it owed the main housing duty (s193(2)); and
- that duty could only be lawfully performed by provision of a site rather than by bricks-and-mortar (see *Codona v Mid-Bedfordshire DC* [2004] EWCA Civ 925; [2005] HLR 1). Had it taken that matter into account it might not, at least in those cases, have decided to evict.

The Court of Appeal allowed an appeal. On the facts, the council had been mindful of its responsibilities under Part 7 in reaching its decision to clear the whole site. Before actually implementing the eviction, it would need to receive and consider any homelessness applications made and make arrangements for performing any duties arising. Armed with the information gleaned from such an applications, it could then determine whether to proceed with eviction in any particular case. (See also page 43 of this issue.)

Accommodation pending review

■ **R (Hassan) v Croydon LBC**

CO/97302008,
13 January 2009[29]

The claimant left her matrimonial home with her children and applied to Croydon for homelessness assistance. It decided that she had become homeless intentionally. She applied for a review, contending that she had become homeless as a result of domestic violence. When the temporary accommodation provided under the council's duty under HA 1996 s190 expired, she applied for accommodation to be continued pending the outcome of the review: HA 1996 s188(3). The council declined to exercise that power in her favour and she brought a claim for judicial review of that decision. An interim injunction and permission to apply for judicial review were granted.

HHJ Mackie QC, sitting as a deputy judge of the High Court, dismissed the claim. In addition to fact-specific grounds, the claimant had contended that the council, a unitary authority, had been wrong to decline to exercise the s188(3) power without considering the obligations it might have to the children of the family under Children Act (CA) 1989 ss17–20 read with article 8 of the convention. The judge held that to impose such requirements would be to add unnecessary complexity to the decision required by s188(3). Although the two departments – housing and social services – of a unitary authority were required to co-operate (see HA 1996 ss213–213A) they were undertaking separate statutory functions.

Priority need

■ **Holmes-Moorhouse v Richmond upon Thames RLBC**

[2009] UKHL 7,
4 February 2009

A family court ordered the claimant to leave the home that he occupied with his partner and their four children. By consent, the order provided that the three youngest children would reside with each parent for alternate weeks and half of all holidays (a 'shared' residence order). On his application for homelessness assistance, Richmond decided that the claimant was homeless but did not have a priority need. It rejected his claim that the children might 'reasonably be expected to reside' with him: HA 1996 s189(1)(b). That decision was upheld on review. HHJ Oppenheimer dismissed an appeal against that decision.

The Court of Appeal allowed an appeal on the basis that the reviewing officer had misdirected himself by referring to 'staying' rather than 'residing with' in his decision letter. The council's appeal to the House of Lords was allowed. It held that:

- the functions of (a) the family court in making orders concerning residence of children, and (b) the local authority concerning homelessness and priority need, were entirely different;
- while the order of a family court (and the reasons for its making) would be of relevance and assistance to an authority in deciding whether a child might 'reasonably be expected' to reside with an applicant, it was not determinative;
- in considering whether a child might reasonably be expected to live with an applicant, a local authority was entitled to take account of the fact that the child may already have a home with the other parent and that the consequence of awarding priority might be the provision of accommodation to the applicant which would be under-occupied for much of the time;
- as a result, 'it will be only in exceptional circumstances that it would be reasonable to expect a child who has a home with one parent to be provided under Part VII with another so that he can reside with the other parent as well' (para 21);
- such 'exceptional circumstances' might arise where there is a disabled child and care of both parents is imperative;
- although the reviewing officer in the instant case had wrongly construed the court order, that was an immaterial error.

The speeches of Baroness Hale (on the role of the family court in making residence orders) and of Lord Neuberger (on the correct approach to be taken on HA 1996 s204 appeals to the reasons given for review decisions) were described by Lord Hoffman as 'required reading' for family and county court judges.

Discharge of duty

■ **Miles v Redbridge LBC**

[2008] EWCA Civ 1561,
30 October 2008

Redbridge accepted that it owed Mr and Mrs Miles the main housing duty: HA 1996 s193(2). It offered them a tenancy of a two-bedroom house. That offer was rejected on the basis that the premises were insecure to the side and rear and Mrs Miles suffered from anxiety for her personal safety. Redbridge decided that the refusal of the offer had brought its duty to an end. Mr Miles sought a review. The reviewing officer upheld the council's decision. She relied on a drive-by assessment from a council environmental health officer that the property did not give rise to any unacceptable security risk. HHJ Platt dismissed an appeal.

An application for permission to appeal to the Court of Appeal was put on the basis that:

- Mr and Mrs Miles had not been granted access for their advisers to assess the security risk; and
- the reviewing officer had not dealt with the medical dimension.

Tuckey LJ dismissed the application. He held that:

- there had been no clear, written request for access by any adviser (and, in any event, there was no reason why an adviser could not have made a drive-by assessment of security); and
- the reviewing officer's decision had referred to the asserted medical dimension but medical reports Mr Miles had promised to provide concerning his wife's state of anxiety had not emerged.

HOUSING FOR CHILDREN

■ **R (A) v Coventry City Council**

[2009] EWHC 34 (Admin),
22 January 2009

The claimant was a teenager estranged from his parents and a child in need (CA 1989 s17). He was provided with accommodation by the mother of a friend. He claimed that the council owed him an accommodation duty under CA 1989 s20 and that accordingly it should pay an allowance to the mother to meet his living expenses if he remained with her. The council declined to meet his living costs on the basis that the friend's mother had voluntarily taken him in. He therefore had 'accommodation' with her and no s20 duty had arisen. Alternatively, there had simply been a private fostering arrangement.

Anthony Edwards-Stuart QC, sitting as a deputy judge of the High Court, quashed that decision. He held that:

- this was, on the facts, a case where a local authority had allowed a proposed foster parent to believe that she would receive financial support for looking after a child, as opposed to having to do so at her own expense and that, accordingly, the council was be taken to have exercised its powers and duties as a public authority under s20; alternatively
- the council's decision that it had not owed a duty to secure accommodation for the claimant under s20 was flawed. A child was owed that duty if s/he lacked 'suitable' accommodation. Accommodation which is uncertain as to duration because it is not founded on any secure financial footing is not accommodation that can be said to be suitable for a 15 year old, who is a child in need, however caring the prospective family may appear to be. Accordingly, a child in that situation lacks suitable accommodation. The council had simply failed to consider that

issue once the claimant had been taken in by his friend's mother.

HOUSING AND COMMUNITY CARE

■ R (Scott) v Hackney LBC

CI/08/1226,
20 January 2009

The claimant, a disabled adult, brought a claim for judicial review relating to the council's decision-making about his community care needs and the failure to provide a care plan: National Assistance Act (NAA) 1948 s21. Permission to apply for judicial review was granted but, before trial, the council produced a care plan and the judicial review claim was withdrawn. The judge decided to make no order for costs. The claimant appealed.

The Court of Appeal dismissed the appeal. The judgment reviews the principles under which the courts should deal with the costs of judicial review claims which are determined by settlement or withdrawal.

■ R (Walcott) v Lambeth LBC

[2008] EWHC 2745 (Admin),
6 October 2008

The claimant applied to Lambeth for homelessness assistance (HA 1996 Part 7). It concluded that although he was homeless, eligible and in priority need he had become homeless intentionally. He then applied for accommodation under NAA s21. The council made an assessment that if he were accommodated he would be supplied with a care package: National Health Services and Community Care Act (NHSCCA) 1990 s47. However, it declined to provide accommodation because it was not satisfied that he was in need of 'care and attention not otherwise available'. In particular, help was available to him through the NHS and welfare benefits. The claimant sought judicial review and obtained an interim injunction requiring accommodation to be provided.

Ouseley J dismissed a renewed application for permission to apply for judicial review. He held that the decision on 'care and attention' had sufficiently addressed the threshold identified in *R (M) v Slough BC* [2008] UKHL 52; [2008] 1 WLR 1808 and had been lawfully reached. The fact that a person is identified as needing a low-level care package does not automatically bring him/her within s21 if his/her needs can be met by other service providers. Although there may be circumstances in which the absence of provision under HA 1996 Part 7 may trigger responsibilities under s21 for a person needing a package of care which could only be provided if s/he were accommodated, that was not this case. The injunction was extended a further 28 days to give the claimant some reasonable 'packing-up time'.

■ R (N) v Coventry City Council

[2008] EWHC 2786 (Admin),
17 October 2008

The claimant, a South African, applied unsuccessfully for asylum. His appeals were dismissed. He remained in the UK, living with and supported by a cousin. The claimant was HIV positive and had been diagnosed with tuberculosis, TB meningitis and syphilis.

Following in-patient hospital treatment, he continued to attend outpatient clinics and take antiretroviral medication and painkillers. When the cousin asked him to leave and could no longer support him, the claimant applied to Coventry for accommodation under NAA s21. It decided that because his medication was effective and would continue and because he was able to complete most daily living tasks he was not in need of 'care and attention'. If that was wrong, such care and attention could be secured by his return to South Africa and, in any event, he was disqualified from NAA 1948 s21 assistance by s21(1A). He applied for judicial review of that decision.

Neil Garnham QC, sitting as a deputy judge of the High Court, dismissed the claim. He held that the decision on 'care and attention' had sufficiently complied with the approach in *R (M) v Slough BC* [2008] UKHL 52 and had been lawfully reached. If that was wrong, he would have held that the case was one of 'destitution plus' in the sense that if the claimant had still been an asylum-seeker his needs would not have solely arisen from destitution but rather from his medical condition: NAA s21(1A). In any event, the claimant was a former asylum-seeker and, given that he was free to return to South Africa, it could not be said that refusal of assistance to him would infringe his convention rights: Nationality Asylum and Immigration Act 2002 Sch 3 para 3.

1 Available at annex C of: www.justice.gov.uk/civil/procrules_fin/pdf/preview/cpr_update_49_PD_amendments.pdf.
2 Available at: www.justice.gov.uk/civil/procrules_fin/index.htm.
3 Available at: www.communities.gov.uk/documents/corporate/pdf/1135077.pdf.
4 Available at: www.justice.gov.uk/docs/responding-human-rights-judgments.pdf.
5 Available at: www.legalservices.gov.uk/aboutus/tenders.asp.
6 Available at: www.communities.gov.uk/documents/housing/pdf/familyintervention tenancies.pdf.
7 Available at: www.berr.gov.uk/files/file49743.pdf.
8 Available at: www.communities.gov.uk/documents/housing/pdf/projectgroupreport.pdf.
9 There is a dedicated website at: www.nationalconversation.co.uk.
10 Available at: www.communities.gov.uk/news/corporate/1125206.
11 Available at: www.communities.gov.uk/documents/housing/pdf/capitalruleschanges.pdf.
12 Available at: www.communities.gov.uk/documents/statistics/pdf/1126284.pdf.
13 Available at: www.housingcorp.gov.uk/upload/pdf/Circular_04-08_Rents_printer-friendly.pdf.
14 Available at: www.tenantservicesauthority.org/server/show/ConWebDoc.16647/changeNav/13640.
15 Available at: www.nat.org.uk/Media%20library/Files/Policy/Poverty%20and%20Social%20Disadvantage/NAT%20Report%20-%20Housing%20and%20HIV-6.pdf.
16 Available at: www.publications.parliament.uk/pa/cm200809/cmselect/cmworpen/memo/equbill/contents.htm.
17 Available at: www.communities.gov.uk/news/housing/1120655.
18 Available at: www.communities.gov.uk/housing/buyingselling/mortgagerescuemeasures/mortgagerescuefaq/.
19 Available at: new.wales.gov.uk/news/topic/housing/2009/2870288/?lang=en.
20 Available at: www.oft.gov.uk/news/press/2009/08-09.
21 Available at: www.opsi.gov.uk/si/si2009/pdf/uksi_20090034_en.pdf.
22 Available at: www.communities.gov.uk/documents/localgovernment/pdf/1127769.pdf.
23 Available at: www.oft.gov.uk/news/press/2009/01-09.
24 Available at: www.communities.gov.uk/documents statistics/pdf/1133551.pdf.
25 Available at: www.communities.gov.uk/documents/statistics/pdf/1133548.pdf.
26 Available at: www.communities.gov.uk/documents/statistics/pdf/1133593.pdf.
27 Available at: www.communities.gov.uk/documents/housing/pdf/decenthomes reconciliation.pdf.
28 Robert Latham, barrister, London.
29 Emily Orme, barrister, London.

Nic Madge is a circuit judge. Jan Luba QC is a barrister at Garden Court Chambers, London. He is also a recorder. Readers can visit their personal websites at: www.nicmadge.co.uk and at: www.gardencourtchambers.co.uk/barristers/jan_luba_qc.cfm.

Conditional possession orders after *Knowsley Housing Trust v White*

Robert Latham considers how conditional possession orders should be framed in the light of the House of Lords' judgment in *Knowsley Housing Trust v White* [2008] UKHL 70, 10 December 2008 and the amendments which are to be introduced by the Housing and Regeneration Act (H&RA) 2008 in April this year.

Introduction

In *Knowsley Housing Trust v White*, the House of Lords held that the concept of tolerated trespasser has no relevance to assured tenancies. An assured tenancy continues for so long as the tenant remains in occupation of his/her dwelling. From 6 April 2009, when H&RA Sch 11 is brought into force (which makes provision about possession orders and their effect on secure tenancies, introductory and demoted tenancies including provision about the status of existing occupiers), the same rule will apply to secure tenancies. (See also page 21 of this issue.)

Since 3 July 2006, most county court judges have opted for the use of Form N28A (the postponed possession order) to avoid the creation of a new generation of tolerated trespasser. The question is whether or not they now resume the use of Form N28 (the suspended possession order)? While any assured or secure tenancy will subsist for so long as the tenant remains in occupation, regardless of whether Form N28A or Form N28 is used, there are important procedural differences when it comes to the enforcement of either order.

The H&RA received the royal assent on 22 July 2008. One reason for the delay in bringing s299 (possession orders relating to certain tenancies) into force was to provide Her Majesty's Courts Service (HMCS) the opportunity to review whether or not a new template for a conditional possession order or any amendments to Civil Procedure Rule (CPR) 55 are desirable; however, no changes are proposed. One problem is the £30,000 cost of putting a new electronic form on the Caseman system. Given the financial difficulties faced by HMCS, it seems that there has been no proper consideration about whether or not any changes are required. This article argues that it is in the interests of both landlord and tenant that the courts continue to use Form N28A where possession is sought on a discretionary ground and a judge has concluded that a conditional order is appropriate. It is apparent that some district judges are reverting to the use of Form N28 when making conditional possession orders against assured tenants. It is less clear whether they are aware of the consequences of this.

The law

Section 85 of the Housing Act (HA) 1985, which is mirrored in section 9 of the HA 1988, gives the court an extended discretion when possession is sought on a discretionary ground. Section 85(2) provides that:

> *On* ***the making of an order for possession*** *of such a dwelling-house on any of those grounds, or at any time* ***before the execution of the order****, the court may[:]*
>
> *(a)* ***stay*** *or* ***suspend the execution of the order****, or*
>
> *(b)* ***postpone*** *the* ***date of possession****,*
>
> *for such period or periods as the court thinks fit* (emphasis added).

In *Knowsley Housing Trust v White*, Lord Neuberger held that the words 'stay' and 'suspend' are synonymous.

Form N28 (the suspended possession order)

The current Form N28 was introduced on 15 October 2001 by HMCS to coincide with the then new CPR 55 which provided for possession claims. Previous templates for Form N28 had been issued in 1982 and 1993**;** albeit that these were also described as 'suspended possession orders', their effect was rather to 'postpone the date of possession' (see HA 1985 s85(2)(b)).

The team responsible for drafting the new template, which included experienced district and circuit judges, strove for the use of plain English which would be comprehensible to the tenant against whom the order would be made. They had no contemplation of the dangers of such an approach in the 'chaos of verbal darkness' which is to be found in the Rent Acts and Housing Acts.* Thus they inadvertently created the new sub-class of the blameless tolerated trespasser (see *Harlow DC v Hall* [2006] EWCA Civ 156, 28 February 2006; [2006] 1 WLR 2116).

It is to be noted that this is the first time that a template for a conditional possession order had the effect of suspending the execution of the order (HA 1985 s85(2)(a)) rather than postponing the date of possession (HA 1985 s85(2)(b)). Traditionally, applications to suspend the execution of the order were only to be made when a warrant for possession had been issued. The legal effect of this template was not what had been contemplated by its drafters who had thought that a specific reference to 'rent', as opposed to 'mesne profits', would make it clear that a postponed possession order was intended whereby the tenancy was to continue until any breach of the conditions occurred.

Should the tenant breach the conditions specified in a Form N28, it is open to the landlord to apply to the county court for a warrant of possession to be issued. The landlord completes Form N235 (request for warrant of possession of land), and certifies that the tenant has breached the terms of the order. A warrant is then issued by the court bailiff as an administrative act.

There is no requirement for the landlord to give notice to the tenant of the application for a warrant. There is no provision for the tenant to dispute the landlord's contention that the order has been breached. There is no judicial determination about whether or not the eviction should proceed. The application for the warrant may be made up to six years after the possession order was made before the permission of the court is required (CCR Ord 26 r5). Yet, there is no opportunity for any judicial determination about whether or not the eviction is still reasonable and/or proportionate in the light of the circumstances that have arisen since the order was made.

In *Southwark LBC v St Brice* [2001] EWCA Civ 1138, 17 July 2001; [2002] 1 WLR 1537, the Court of Appeal held that these procedures are not incompatible with articles 6, 8 and 14 of the European Convention on Human Rights. However, the challenge did cause HMCS to introduce the new N54 (notice of eviction) in June 2001. Once the warrant for possession has been issued, the tenant must be notified of this fact and the date fixed for the eviction. The tenant must also be notified of his/her right to make an application to further postpone the date of possession or to suspend the execution of the order under HA 1985 s85(2) or HA 1988 s9(2).

These procedures depend on the tenant receiving notice of the proposed eviction, which may occur only a few days before the eviction is to proceed. *Leicester City Council v Aldwinckle* [1992] 24 HLR 40 is a cautionary tale where the tenant was absent from her home. She suffered from ill health and spent substantial periods away from her flat while attending hospital for operations and other treatment. On 18 July 1989, the landlord applied for a warrant for possession. This was issued on 31 July and executed on 15 August. The tenant returned on 23 November to find that all her belongings had disappeared. Ms Aldwinckle's application to set aside the warrant failed as she was unable to establish any oppressive conduct by either the landlord or the court in the execution of the order.

In *Aldwinckle*, the landlord had been entitled to a warrant for possession. The position would have been different had the landlord made an error in completing Form N325. In a rent arrears case, there could be a simple error in computing the arrears. In a case of nuisance, the existence of a breach may turn on a dispute of fact. The landlord may act on a complaint by a neighbour which later proves to be malicious and false. Where Form N28 is used, the landlord must bear the responsibility for any error. If it later transpires that there was no breach, the eviction will be unlawful. The absent tenant who returns to find that his/her dwelling has been re-let will not be able to secure readmission. S/he will rather have a substantial claim for unlawful eviction, equivalent to the value of a secure tenancy.

The use of Form N28 also causes administrative problems for local county courts. Applications by tenants under HA 1985 s85(2) or HA 1988 s9(2) will be inevitably made shortly before the warrant for possession is to be executed. The court must decide such applications, even if only on an interim basis, before the eviction. Such emergency applications must take priority over the other cases listed for hearing. Often, the tenant will appear in person, his/her lawyer having had insufficient time to make a proper application or to arrange representation. A final problem is that this template omits the phrase 'this order shall cease to be enforceable when the total judgment debt is satisfied'. This was done with the express intention of avoiding the trap of the entrenched tolerated trespasser, an absurdity which has been ended by Lord Neuberger's speech in *Knowsley Housing Trust v White*. As a result of the omission, even when the arrears are cleared, it is open to the landlord to apply to evict if new arrears arise. This situation could arise years after the possession order has been made.

In the author's opinion, this phrase should now be added to any suspended possession order that is made based on Form N28. HMCS could and should have added these words to the electronic version of the template. It is an unnecessary administrative burden for the courts to do this manually.

Form N28A (the postponed possession order)

Form N28A was introduced by HMCS on 3 July 2006 to avoid the blameless tolerated trespasser that arose from the judgment in *Harlow DC v Hall* (above). No date for giving up possession is specified in the order. A green light for such an order was provided by the Court of Appeal in *Bristol City Council v Hassan* [2006] EWCA Civ 656, 23 May 2006; [2006] 1 WLR 2582. Brooke LJ emphasised that when the landlord applies to fix a date, the court will have no jurisdiction to revisit whether it had been reasonable to make the original possession order.

Should the tenant breach the conditions of a Form N28A, it is open to the landlord to apply to the county court for a date to be fixed. CPR Practice Direction (PD) 55 section IV provides a summary procedure for fixing a date. At least 14 days and not more than three months before making the application, the landlord must give notice to the tenant of the alleged breach. The tenant then has seven days in which to respond either agreeing or disputing the breach. The landlord's application notice to fix a date must be accompanied by both notices and supporting evidence to establish the breach. A district judge will then determine the application on the papers, without a hearing, and fix a date for possession as the next working day. However, the judge may decide that a hearing is necessary.

This procedure was considered recently in *Wandsworth LBC v Whibley* [2008] EWCA Civ 1259, 14 November 2008. In considering the paper application, Sedley LJ held that a district judge has a duty to consider whether or not to make an order and to examine the circumstances. However, a bare denial of a breach by the tenant will not suffice: s/he must rather establish a real triable issue regarding whether or not there has been a breach. Save in exceptional circumstances, the court will expect details, since a tenant who has already, by definition, breached the terms of the agreement has to have a cogent answer once there is prima facie evidence of repetition.

It is also open to the tenant to apply under HA 1985 s85, even if the breach is admitted, if s/he contends that there are grounds for a further postponement or suspension of the warrant of possession. Court time is saved if the tenant's application is heard at the same time as the landlord's application to fix a date.

Form N28A includes the clause 'this order shall cease to be enforceable when the total judgment debt is satisfied'. Thus, if the arrears are cleared, the tenant will no longer be at risk of eviction. In a nuisance case, it is desirable that any order should be time limited.

Enforcing judgments

On 26 April 2009, the tenth anniversary of the introduction of the CPR will be celebrated. However, the enforcement of possession orders in the county court is still governed by County Court Rules (CCR) Ord 26 r17 and in the High Court by Rules of the Supreme Court (RSC) Ords 45 and 46.

In *Leicester City Council v Aldwinckle* (see above), Leggatt LJ noted that CCR Ord 26 r17 does not require the landlord to give notice to the tenant of its application for a warrant for possession. The Court of Appeal could not, on its own motion, insist on such notice. He expressed the hope that the rules in the county court should be brought into line with those in the High Court which required both the giving of notice to the tenant and the need to obtain the leave of the court before a warrant for possession can be enforced. In *Bristol City Council v Hassan* (see above), Brooke LJ noted that it was not permissible under CCR Ord 26 r17 for a landlord to make a combined application to fix a date and request a warrant for possession.

Currently, there are no prescribed templates for possession orders based on anti-social behaviour. District judges do their best to adapt the templates for Form N28 and Form N28A. *Wandsworth LBC v Whibley* [2008] EWCA Civ 1259, 14 November 2008 (see below) is a cautionary tale of a landlord who failed to check that the order had been drawn up correctly by the court.

There are no impending changes to bring the enforcement procedures in the CCR and RSC into line. Again, the problem seems to be lack of resources. All work on bringing the remaining CCR and RSC procedures into line seem to have ground to a halt; this is a matter of regret.

Guidance from the Court of Appeal

In *West Kent Housing Association Ltd v Davies* (1998) 31 HLR 415, Robert Walker LJ, with whose judgment Lord Bingham LCJ agreed, described the approach to be adopted where possession is sought under HA 1985 or HA 1988 under a discretionary ground:

… , the court has potentially three issues, although a determination of one issue in favour of the tenant may make further issues

academic: first, to decide whether grounds for possession are made out, which is an issue of fact; second, to decide whether it is reasonable to make an order for possession, which involves the exercise of judicial discretion, but with a substantial element of judgment as to whether or not the making of the order is reasonable; and third, to decide whether to postpone the date for possession or to stay or suspend execution, which involves a further exercise of judicial discretion.

Although there has been increasing emphasis on the exercise of this judicial discretion as being a judgment, rather than an unfettered discretion, the Court of Appeal has given no consistent guidance on how possession orders should be framed.

In *Knowsley Housing Trust v McMullen* [2006] EWCA Civ 539, 9 May 2006; [2006] HLR 43, Neuberger LJ suggested that it would be appropriate only in exceptional cases for a court to add a term to a conditional possession order requiring the landlord to apply to a court for permission before applying for a warrant. This was a possession order based on nuisance caused by the tenant's son. The Court of Appeal did add a clause to the postponed possession order which required the landlord to apply for permission to issue a warrant, but this was because the tenant was a disabled person with learning difficulties.

In *Wandsworth LBC v Whibley* (see above), a decision of the Court of Appeal in which *Knowsley Housing Trust v McMullen* was cited by counsel, Sedley LJ commended the approach of adapting Form N28A and CPR PD 55, which are framed to deal with rent arrears, to a case involving nuisance. He noted that in rent arrears cases, a breach is likely to be a matter of record dependent on the landlord's rent account. In nuisance cases, there is more likely to be a real dispute about whether or not there has been a breach. Sedley LJ stated:

In a nuisance case there is obvious good sense in following a similar procedure: if, on being notified of the impending application and invited to respond, the defendant remains silent or puts in a plainly spurious or irrelevant response, an order may properly be made summarily. But if, as is more probable in nuisance cases, an issue is raised which is capable of affecting the court's decision, ***justice will require the defendant to be given an opportunity to put his or her case****. The court will of course be astute not to let merely factitious or obstructive responses impede a summary disposal; but, inconvenient though it will be for the lessor and for a time nightmarish for the neighbours, it is not permissible for a tenant who has a possible tenable answer to lose his or her home unheard* (para 12) (emphasis added).

In *Bristol City Council v Hassan*, Brooke LJ noted that it would be a matter for the discretion of the judge regarding what order to make, subject to any templates which the Rules Committee or HMCS may prescribe. The only templates currently available are Form N28 and Form N28A.

While it is open to a judge to devise his/her template, this puts administrative burdens on both the courts and the parties to ensure that any court order is drawn up accurately. The unfortunate reality is that regularly errors are made in drawing up possession orders. Such errors are frequently overlooked by the parties. It is not satisfactory to seek to correct such errors when the landlord is contemplating an application for a warrant for possession. A tenant who is subject to a conditional possession order is entitled to know precisely what s/he is required to do and the consequences of any breach.

Conclusions

If a court is satisfied both that a ground for possession is proved and that it is reasonable for a possession order to be made, it will have three options:

- a postponed possession order (the current template available being Form N28A);
- a suspended possession order (the current template available being Form N28); or
- an outright order.

Form N28A is the template which should normally be used for a conditional possession order. This provides an enforcement procedure which is both just and expeditious. However, a landlord should be permitted by the CPR to make a combined application to fix a date and request a warrant for possession.

Form N28 should only be used in a particularly bad case where the facts come close to justifying an outright order. This is consistent with the approach before October 2001 when courts only suspended the execution of an order after a warrant had been issued.

It is desirable that the enforcement procedures in the county court and High Court are brought into line in a new CPR. There should be a common rule which requires that the tenant is given notice and that leave of the court needs to be obtained before a warrant for possession can be enforced.

The wording of the current templates, which only relate to rents arrears, should be reviewed. A separate template should be prepared for a conditional possession order in respect of nuisance.

Consideration should be given to whether or not it is appropriate to 'suspend the execution of the order' at the time when a possession order is made. Alternately, should this be restricted to suspension of the execution of a warrant for possession, which was the historic position before the unfortunate drafting error that led to the introduction of the current template for Form N28 in October 2001.

* The quote comes from the judgment of MacKinnon LJ in *Winchester Court Ltd v Miller* [1944] KB 734.

Robert Latham is a barrister at Doughty Street Chambers, London. He is Legal Aid Barrister of the Year 2008.

Recent developments in prison law – Part 2

Hamish Arnott, **Nancy Collins** and **Simon Creighton** continue the series of updates on the law relating to prisoners and their rights. Part 2 of this update reviews the latest policy initiative and ruling concerning prison discipline, and developments in case-law regarding parole and indeterminate sentences, tariffs, home detention curfew (HDC), sentence calculation and the use of force in secure training centres (STCs). Part 1 of this article appeared in February 2009 *Legal Action* 13.

POLICY AND LEGISLATION

Prison discipline

Independent Adjudicators' guidelines on the imposition of additional days as punishment

Prison disciplinary charges are referred to Independent Adjudicators (IAs) where governors are of the view that additional days may be a suitable punishment. IAs are district judges from the magistrates' court system, who are administered from the Office of the Chief Magistrate at the City of Westminster Magistrates' Court in Horseferry Road, south-west London. The Office of the Chief Magistrate has recently issued guidelines to IAs on the punishment of additional days. These guidelines set out starting points for each charge together with a guideline range. The guidelines state that IAs should adopt the following approach:

- Adjudicators should first decide the starting point for the punishment. This starting point will normally be within the guideline range. The starting point suggested is for a prisoner:
  – with no previous findings of guilt on adjudications; and
  – following a not guilty plea.
- The starting point should be increased to reflect any aggravating features of the offence itself and of the offender (such as previous findings of guilt) to ascertain the provisional punishment.
- The starting point may exceed the range if the aggravating features justify this, in which case the IA should make the appropriate entry on the punishment sheet.
- The provisional punishment should then be adjusted to reflect any personal mitigating factors.
- Having thus ascertained the provisional punishment that takes into account all aggravating and mitigating factors, the punishment should then be reduced by one-third to reflect a discount for a timely plea of guilty if that has been entered.
- Punishment may be suspended for a period not exceeding six months.

The starting points and guideline ranges for each offence are set out on page opposite.

CASE-LAW

Prison discipline

■ R (Haase) v Independent Adjudicator

[2008] EWCA Civ 1089, 14 October 2008

The prisoner appealed against the judgment in the Administrative Court that article 6 of the European Convention on Human Rights ('the convention') did not require an independent prosecutor as well as an independent tribunal in the prison disciplinary context when charges are referred to IAs. The practice in prison disciplinary hearings is that the evidence against the prisoner is presented by the reporting officer, who will often also be giving disputed factual evidence to the IA.

The Court of Appeal rejected the appeal. Although the need for an independent prosecutor had been established in the context of military discipline (*R v Stow* [2005] EWCA Crim 1157, 10 May 2005 (a decision the court indicated should be treated with caution)) the court did not accept that article 6 imposed a general requirement for prosecutorial independence. In particular, the prison context did not require such independence. The Court of Appeal agreed with the Administrative Court's decision which had distinguished the prison context from the military as:

- the military system involves potentially more serious charges and punishments;
- disciplinary offences should be dealt with speedily; and
- the proceedings are inquisitorial rather than adversarial.

Comment: The prison disciplinary system was based on the structure of military discipline in the late 19th century. The analogy with military discipline and the need for a speedy hearing in both contexts was, in the early days of the development of prison law, relied on by the state in saying that legal representation should not be as of right: '[w]e all know that, when a man is brought up before his commanding officer for a breach of discipline, whether in the armed forces or in ships at sea, it never has been the practice to allow legal representation. It is of the first importance that the cases should be decided quickly' (*Fraser v Mudge* [1975] 1 WLR 1132). It is somewhat ironic that arguments for a fairer system are now refused by a rejection of the comparison between the two processes.

The confirmation that prison disciplinary hearings remain, to a degree, adversarial even where article 6 applies and the charge is heard by an IA is important in the way that hearings proceed. For example, it will remain incumbent on the tribunal to ensure that relevant witnesses known to the authorities but not to the prisoner are called (*R v Blundeston Board of Visitors ex p Fox Taylor* [1982] 1 All ER 646. Although a tactical decision by a prisoner not to call a particular witness will not render a hearing unfair: *R (Lake) v Governor, HMP Highdown* [2007] EWHC 3080 (Admin), 20 December 2007).

■ R (O'Neil) v An Independent Adjudicator

[2008] EWHC 1371 (Admin), 3 June 2008

A prisoner challenged a finding of guilt on two charges of possession of an unauthorised article. The items were a battery charger and an aerial for a mobile telephone. The battery charger was brought to the hearing, but although the reporting officer stated that he had placed the aerial in an evidence bag, he could no longer find it and so it was not produced at the hearing.

The prisoner was found guilty on both charges. Although Prison Service Order 2000 states at paragraph 5.7: '[i]t is important that physical evidence, including photographs, is retained and produced at the hearing', the IA took into account the fact that the officer described finding the article, was able to describe its appearance and his attempts to preserve it as evidence.

The prisoner challenged the finding of guilt in relation to the aerial on the basis that the IA should not have made a finding of guilt in the absence of the physical evidence. However, the court held that such a finding could be made, although the IA 'must look

Rule 51 para	Disciplinary offence		Starting point (days)	Range of added days
1	Commits any assault:			
	(a) Upon staff:	Push	8	5–15
		Deliberate blow	28	21–42
		Spitting	28	21–42
		Weapon used	32	28–42
		Sustained attack	32	28–42
	(b) Upon inmate:	Push	5	3–10
		Deliberate blow	16	10–30
		Weapon used	32	28–42
		Sustained attack	32	28–42
1A	Racially aggravated assault – add to above days.		+7	+7
2	Detains any person against his will.		28	21–42
3	Denies access to any part of the prison to any officer or other person (other than a prisoner) who is at the prison for the purpose of working there. [Dependent on duration].		20	10–42
4	Fights with any person. [If sustained treat as a sustained attack as in '1' above].		14	7–28
5	Intentionally endangers the health or personal safety of others or, by his conduct, is reckless whether such health or personal safety is endangered.			
		Intentional:	32	28–42
		Reckless:	20	14–35
6	Intentionally obstructs an officer in the execution of his duty, or any person (other than a prisoner) who is at the prison for the purpose of working there, in the performance of his work.		14	6–30
7	Escapes or absconds from any prison or legal custody.	Escapes:	32	28–42
		Absconds:	22	14–42
8	Fails to comply with any conditions upon which he is temporarily released under Rule 9.		16	10–30
9	Administers a controlled drug to himself or fails to prevent the administration of a controlled drug to him by another.			
		Class A:	32	28–42
		Class B/C:	12	7–21
		Non-prescribed medication:	12	7–21
10	Is intoxicated as a consequence of knowingly consuming any alcoholic beverage.		20	14–30
11	Knowingly consumes any alcoholic beverage other than that provided to him pursuant to a written order under Rule 25(1).		15	10–30
12	Has in his possession: (a) any unauthorised articles, or (b) a greater quantity of any articles than he is authorised to have.			
		Weapons:	32	28–42
		Class A drugs:	32	28–42
		Class B/C drugs:	12	7–21
		Item to cheat mandatory drug testing (MDT):	32	28–42
		Camera 'phone:	38	35–42
		Mobile 'phone and/or accessory:	32	28–42
		Alcohol:	22	14–42
		Other item:	13	5–30
13	Sells or delivers to any unauthorised person any unauthorised article.		18	10–35
14	Sells or, without permission, delivers to any person any article which he is allowed to have only for his own use.		10	6–21
15	Takes improperly any article belonging to another person or to a prisoner.		18	10–35
16	Intentionally or recklessly sets fire to any part of a prison or any other property, whether or not his own.			
		Intentionally:	32	30–42
		Recklessly:	20	14–35
17	Destroys or damages any part of a prison or any other property, other than his own.	Intentionally:	28	21–42
		Recklessly:	12	7–21
17A	Destroys or damages any part of a prison or any other property, other than his own, when racially aggravated. Add to above days:		+7	+7
18	Absents himself from any place he is required to be or is present in any place where he is not authorised to be.		16	10–42
19	Is disrespectful to any officer or other person (other than a prisoner) who is at the prison for the purpose of working there, or any person visiting a prison.		10	6–21
20	Uses threatening, abusive or insulting words or behaviour.		14	5–30
20A	Uses threatening, abusive or insulting racist words or behaviour. Add to above days:		+7	+7
21	Intentionally fails to work properly or, being required to work, refuses to do so.		10	5–21
22	Disobeys any lawful order:			
		MDT:	32	28–42
		Other:	16	10–30
23	Disobeys or fails to comply with any rule or regulation applying to him.		6	3–14
24	Receives any controlled drug, or without the consent of an officer, any other article during the course of a visit (not being an interview such as is mentioned in Rule 38).		32	28–42
24A	Displays, attacks or draws on any part of a prison or on any other property, threatening, abusive or insulting racist words, drawings, symbols or other material.		22	15–36

with some care as to why the evidence has not been retained and produced'. In this case, the IA had sufficient evidence to find that the item was a mobile telephone aerial.

The judge also rejected a submission that the IA misdirected herself about whether the prisoner was properly in possession of the item. The aerial had been found in a shared cell and both prisoners were charged with possession. The other prisoner's finding of guilt was quashed by consent. The court did not accept that this demonstrated that the IA's finding that both prisoners were in 'control' of the aerial was flawed, as the quashing of the other decision was based on a concession.

Comment: While at first sight it is alarming that prison officers can lose physical evidence and still prosecute disciplinary charges successfully, it is clear that IAs and governors must take proper care to establish the existence of the item in such cases. The same approach applies when the item is never found (for example, where CCTV shows conclusively an unauthorised article being passed on a visit but the subsequent strip search finds nothing, a prisoner may still be found guilty (*R (Lashley) v An Independent Adjudicator and another* [2008] EWHC 1853 (Admin), 18 July 2008). Here, the officer gave detailed evidence of how the item was found and its appearance. Clearly there will be times when the officer's evidence, in circumstances where the alleged unauthorised item either is never found or lost, is inadequate to prove the charge to the criminal standard.

Parole and indeterminate sentences

■ R (Lee) and R (Wells) v Secretary of State for Justice

[2008] EWHC 2326 (Admin), 25 July 2008

Both prisoners were serving sentences of indeterminate detention for public protection (IPP) imposed under section 225 of the Criminal Justice Act (CJA) 2003. Following the Court of Appeal's decision in *Secretary of State for Justice v Walker; Secretary of State for Justice v James* [2008] EWCA Civ 30, 1 February 2008, the prisoners sought to argue that the failure to provide relevant offending behaviour programmes made their detention unlawful and in breach of article 5(1) of the convention (right to liberty).

They had received very short minimum terms (163 days and 370 days respectively) and had not been provided with relevant offending behaviour programmes while in custody. In Mr Lee's case, a breach of article 5(4) by reason of that failure was admitted. In Mr Wells' case, there had already been one finding of such a breach at an earlier stage and a declaration that there had been a further such breach was sought on the updated facts of his case. This was resisted by the secretary of state on the basis that Mr Wells had been denied access to such courses because of his own behaviour; however, on this issue Moses J found that there had been a further breach of article 5(4), the poor behaviour being attributable to the failure to provide the courses he was motivated to attend.

The important issue under scrutiny was whether or not the original purpose of imprisonment, ie, the protection of the public from a dangerous person, was broken in cases where there was simply insufficient material on which to make that assessment. The argument flows from the dissenting judgment of Arden LJ in *R (Cawser) v Secretary of State for the Home Department* [2003] EWCA Civ 1522, 5 November 2003, where she had summarised her view that 'in a very exceptional case the failure by the secretary of state to provide a particular prisoner with an appropriate treatment course, which in practice is a condition of release, may, if sufficiently prolonged, break that causal link and render the detention unlawful' (para 47).

The Court of Appeal's decision in *Walker* (see above) had made it clear that the simple finding of dangerousness at the time when the sentence was imposed did not mean that the prisoner would remain dangerous indefinitely, so it could not be assumed that there remained a danger. If the Parole Board (the Board) was unable to make that assessment because relevant coursework had not been provided, this is where there might be a breach of article 5(1). In Mr Lee's case, a parole hearing was taking place at the same time as the judicial review but Moses J felt, nevertheless, that on the material available to him, there was adequate evidence to enable the Board to make a finding on dangerousness. In Mr Wells' case, there was evidence of poor behaviour in custody. While it was accepted that this was probably because of the frustration of not being able to progress, this did mean that there was also evidence in his case on which to found an assessment of whether or not he remained dangerous. Both applications were dismissed.

Comment: Moses J clearly had a great deal of sympathy for both claimants, even though ultimately he shied away from finding the breaches of article 5(1) that they sought. The difficulty with the analysis of article 5(1) that the judge had adopted is that there will very rarely be a situation where there is simply no material about a prisoner to enable an assessment of risk to be made. The test proposed by Arden LJ was arguably a subtler one that could lead to a break in the causal link between offending and detention where the sentence ceases to serve its purpose simply by failing to treat the prisoner.

The extremely short sentences that both these prisoners received helped to illustrate how difficult it is to access offending behaviour work before the tariff expires. Section 225 of the CJA 2003 was amended by the Criminal Justice and Immigration Act 2008 as from 14 July 2008, so as to introduce a new s225(3B) requiring the minimum term to be at least two years to justify the imposition of IPP. Mr Lee has appealed against both the judicial review finding and his criminal sentence.

■ R (Smith) v (1) Secretary of State for Justice (2) Parole Board

[2008] EWHC 2998 (Admin), 5 December 2008

The claimant received an indeterminate sentence of IPP with a tariff of 15 months, which expired in September 2007. He sought declarations that his rights under article 5(4) of the convention had been breached by both defendants. He complained that the first defendant had failed to provide him with the coursework necessary to demonstrate a reduction in risk before his tariff expired, the same complaint as had been made in the *Walker* line of cases (above). The particular course needed in this case was 'Controlling anger and learning to manage,' and at the time of the hearing, he was still awaiting a place.

In respect of the second defendant, his complaint was that although directions had been made for the hearing of his case on 22 November 2007, these directions were not circulated until 3 January 2008. One of the directions made by the Board was for a full psychological assessment to be conducted but the interview with the psychologist did not take place until 23 October 2008. By the time of the hearing, on 5 December 2008, this report was still not ready and the Board had not listed a hearing date.

The period of delay complained about was from November 2007. In light of the case-law over the last year, there was no real defence open to the first defendant, although he did seek to argue that efforts had been made to act speedily. The Board for its part suggested that there had been no default by its failure actively to case manage its own directions, and even if could have been more pro-active, this would have had no practical benefit for the claimant as it was the secretary of state who was responsible for providing the course. This argument was rejected. The court noted that the Board had failed to take any steps at all actively to case manage its own directions

in breach of the duty that was held to exist in *R (Cawley) v (1) Parole Board and (2) Secretary of State for Justice* [2007] EWHC 2649 (Admin), 29 October 2007.

Comment: The case provides an interesting further slant on the problems facing IPP prisoners through its concentration on the inaction of the Board. The intensive case management (ICM) system introduced by the Board last year was intended to save money by ensuring cases are only listed once they are completely ready for hearing. This process was intended to save money by preventing deferrals and adjournments. It has been criticised in some quarters for institutionalising delay as the initial ICM takes place without any input from the prisoner and effectively puts a block on the case progressing until all of the material requested has been received. As the Board has no power to require that material to be prepared and served, it can leave cases in limbo as happened in this case.

■ R (Roberts) v Parole Board

[2008] EWHC 2714 (Admin), 7 November 2008

The claimant, who was serving a life sentence for the murder of three police officers, had been subject to a parole hearing at which a special advocate procedure had been adopted. The power to utilise the special advocate procedure had been authorised by the House of Lords, although there remained room for some debate about whether or not the Lords had sanctioned the use of this procedure to make final decisions regarding the claimant's suitability for release (*R (Roberts) v Parole Board and another* [2005] 2 AC 738; [2005] UKHL 45, 7 July 2005). The Board had gone on to make a decisive finding on the closed material that the claimant was unsuitable for release or open conditions, but on the open material alone had suggested that he could safely be moved to an open prison.

After this decision had been made, the closed material had been leaked to the claimant and his case was referred back to the Board for fresh consideration. He sought declarations that the last decision of the Board had been unlawful in common law and in breach of article 5(4) of the convention as it had relied decisively on the closed material to reject his release application and his application to be moved to open conditions. In particular, he relied on a preliminary finding by the Board that the 'minimum' requirement of fairness in his case was for a gist to be disclosed to him as the findings on the closed material effectively meant he was unlikely to ever be released. However, that decision had been reversed some months later, when the panel decided that the safety of the sources of the closed material could not be guaranteed and so, in balancing their interests against the claimant's, disclosure should not be made after all. He further sought to argue that the panel hearing his case had been unable to hear the open evidence against him fairly as panel members had already been influenced so heavily by the closed material that they could not rule this out of their mind.

The application was resisted by the Board and the Secretary of State for Justice as an interested party. It was argued on their behalf that as release had been rejected on the open material as well as the closed material, article 5(4) was not engaged. Furthermore, it was suggested that the closed proceedings had been fair as the special advocates had been able to test the evidence effectively on the claimant's behalf. The fact that the claimant had guessed the likely sources of the evidence, although not the nature of the evidence itself, meant that the special advocates had not been disadvantaged significantly. On the bias challenge, it was submitted that an experienced panel chaired by a High Court judge was perfectly able to separate out the closed and open material and there was no evidence to suggest that it had been unable to do so in this case.

The claim was dismissed. The Board's defence was accepted in its entirety. The judgment of the Court of Appeal in relation to the use of the special advocate procedure for control orders was given as this case was being argued, and it proved to be decisive in this case (*Secretary of State for the Home Department v AF and others* [2008] EWCA Civ 1148, 17 October 2008). Wyn Williams J considered himself to be bound by the Court of Appeal's decision that there is no core irreducible minimum requirement of disclosure and that 'fairness' is a flexible concept. In this case, the original decision to order disclosure was capable of being reconsidered in light of the interests of the other persons involved in the parole review process. Thus, if the situation of the sources changed, this in turn could lead to a rebalancing of the competing rights and interests and result in no disclosure. The confirmation that there are no *absolute* standards of fairness was explained in the following terms:

> *... All the cases in which the role of special advocates has been considered recognise the potential difficulties inherent in the system for the [specially appointed advocate]. They also acknowledge and proceed on the basis that the person from whom material is withheld inevitably suffers a detriment or disadvantage which is sometimes considerable. However, short of adopting a position to the affect that there is 'an irreducible minimum' of disclosure and if that is not given the procedure will be unfair, decision-makers and reviewing courts can only seek to balance conflicting interests and reach conclusions about fairness in circumstances in which complete fairness to all those interested in the decision in question simply cannot be achieved* (para 100).

In light of these findings on the points of principle, it was held that the Board had done everything it could to ensure fairness to the claimant and that there could be no suggestion of bias.

Comment: The finding that there is no 'irreducible minimum' of disclosure is a depressing one in the context of decisions affecting the liberty of the subject. It seems extraordinary that currently the law allows decisions of this nature to be made following a procedure in which fairness to the imprisoned person might not be achievable. The general difficulties that arise when there is no hard-edged standard of fairness are even more problematic when dealing with closed evidence. The very fact that the evidence remains closed means that it is never fully and fairly tested, and so the question of whether or not fairness has been or could be achieved will always remain debatable.

The test applied by Wyn Williams J is to examine whether or not the decision-making body felt that fairness was achieved, and then to look for objective evidence to the contrary. This is tantamount to allowing that body to be its own arbiter of what has been fair, which makes challenges to these decisions nigh on impossible. The judgment does not add greatly to the general debate in what is now such a fraught area of law. There is no attempt to analyse the Lords' speeches in Mr Roberts' earlier case, which seems extraordinary given the context of this application. Instead, total reliance was placed on the Court of Appeal's decision in *AF and others* (above). As *AF and others* is itself due to be heard by the Lords in March 2009, a final determination of the issues raised in this application may not be available for some time yet.

■ Re Doherty (Northern Ireland)

[2008] UKHL 33, 11 June 2008

A prisoner serving a life sentence in Northern Ireland had been released in April 1996, and then recalled in March 1997 following allegations of sexual abuse by his nieces. The criminal charges were withdrawn in January 1998 but his subsequent applications for release were rejected. His case was referred

back to the new statutory body, the Life Sentence Review Commissioners, in November 2001. A final decision was made in August 2005 to refuse release. The commissioners effectively have the same status as the Board in this jurisdiction and are the court-like body that has the power to direct the release of prisoners serving life sentences. In the proceedings before the commissioners, they held that:

- the burden of proof rested on the secretary of state to prove, on the balance of probabilities, that the prisoner posed a risk of serious harm; and
- it was reasonable to rely on hearsay evidence and video recordings made of the complainants' allegations without calling them to give evidence in person. The commissioners noted that the prisoner's solicitors had declined to obtain a subpoena to secure the attendance even when that opportunity was offered.

The commissioners went on to conclude that they were satisfied on the balance of probabilities that the prisoner had committed serious sexual assaults on the complainants. The prisoner complained that:

- the seriousness of the allegations demanded a higher standard of proof;
- the failure to allow cross examination of the complainants was unfair;
- the delay in determining the case breached article 5(4) of the convention; and
- there was insufficient causal connection between the original offence and the new matters to justify detention.

All the claims save for the delay were dismissed at first instance. In the Court of Appeal, an appeal was allowed on the issue concerning the standard of proof. The court considered that greater cogency of evidence was needed in cases where the allegations are more serious, an analysis which they thought properly applied the principles established in *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563.

The Lords dismissed the prisoner's appeals on the question of witness attendance and article 5(1) in a very peremptory fashion and concentrated on the other two issues. The Lords overturned the finding made by the Court of Appeal, which they thought muddied the waters in relation to the question of cogency of evidence with the standard of proof. They confirmed that there is a single standard of proof in civil matters (ie, the balance of probabilities) and it is the application of that standard that is flexible. Thus, for a more serious allegation the standard of proof does not change, but the strength or quality of the evidence needed to prove the allegation may need adjustment.

The finding that there had been undue delay was also dismissed. The Lords held that although the length of the proceedings caused 'disquiet', various problems with the case, including a change of solicitors and difficulties in securing funding, meant there was no point where the commissioners could be blamed for unreasonable delay.

Comment: The case serves as a reminder that the enormous flexibility allowed in parole proceedings can allow for outcomes that would never be permitted in criminal proceedings. This is exceptionally harsh in cases where the criminal proceedings have been abandoned leaving the Board as the sole arbiter of fact. That said, it is also a timely reminder of the dangers of seeking to gain advantage from the flexibility of the proceedings by preferring to make representations on the weight that should be attached to evidence rather than by taking all possible steps to confront it head on. The discussion on the standard of proof in Lord Brown's speech is particularly interesting as he explores the practical difficulties that arise from trying to separate out the need for 'more cogent evidence' from actually applying a different standard. He suggests that in certain civil cases, it might be more appropriate to apply the criminal standard, although, interestingly, he seems quite content to exclude parole from the category which requires the criminal standard even when dealing with factual allegations of this nature.

■ R (Bates) v Parole Board

[2008] EWHC 2653 (Admin), 7 October 2008

The claimant sought to challenge a decision of the Board not to recommend his transfer to open conditions. Originally, he had been sentenced to a discretionary life sentence for manslaughter in 1969, the offence being the killing of his wife. He was diagnosed as having an organic brain disorder at the time of the offence. The claimant had been released in May 1981, but recalled two months later having been arrested for threatening his girlfriend with a knife. He refused to participate in sex offending treatment programmes as recommended by Prison Service assessments. In 2005, the Board recommended the claimant's transfer to an open prison but this was rejected by the secretary of state.

At the subsequent review, the Board declined to make the same recommendation. It preferred to accept the secretary of state's view that there remained significant, unaddressed treatment needs. There were two main grounds of challenge:

- The first was an argument that the panel had applied the wrong test in law as it had focused exclusively on risk without conducting the wider balancing exercise required in such cases.
- The second was a bias challenge which included a complaint that the panel did not have a medically-qualified member and so had been unable properly to understand the complex psychiatric evidence presented to it. The first ground of challenge was substantially based on a complaint that the decision of the panel was irrational in light of the evidence presented to it. This had included favourable evidence from two psychiatrists. In relation to the second ground, one psychiatrist felt that the panel's chairperson had approached his evidence with a closed mind, and the claimant felt that the chairperson had already formed opinions about his case.

The application was refused on the basis that the panel's decision letter was within the range of reasonable responses to the evidence presented. Although the decision letter was perhaps not as detailed as it might have been, the court did not consider that the reasoning had been flawed by the application of the wrong test.

On the bias challenge, it was held that the panel was experienced and competent to assess the expert evidence. The chairperson's attitude may have been brisk, but it did not give rise to an objective complaint of bias.

■ R (Ashford) v Secretary of State for Justice

[2008] EWHC 2734 (Admin), 16 October 2008

■ R (Loch) v Secretary of State for Justice

[2008] EWHC 2278 (Admin), 2 October 2008

In *Ashford*, the claimant received a life sentence with a tariff of four years for armed robbery. He progressed to open conditions but experienced difficulties, and after a breach of his licence and an abscond he was returned to a closed prison. Following a hearing in 2007, the Board recommended his return to open conditions where it was considered he could undertake a thinking-skills course and make further preparations for release. This was accepted by the secretary of state who set the next review to take place two years later. After spending 12 months in open conditions, Mr Ashford had completed the new course and applied to have his parole review advanced. This was resisted by the secretary of state who argued that:

- the challenge should have been brought to the original decision on the timing of the review; and
- there was insufficient time for an earlier review to be convened and that insufficient

progress had been made to justify an earlier review.

The objections raised on the timing of the challenge and the lack of resources to convene an earlier review were both rejected. The court noted that the question to be decided was whether or not the prisoner's progress justified an earlier consideration of his case. This is an objective question to be answered without reference to resources. However, on the merits of the case, the court did not consider that the progress made was compelling enough to suggest that the secretary of state's decision was unjustified or unreasonable.

Loch also concerned a decision on the timing of a parole review of a prisoner serving a life sentence. The offence was committed in 2002 and a tariff of five years was set. Mr Loch's tariff expired in August 2007, and by the time his case was reviewed by the Board in November 2007, he had made sufficient progress to receive a recommendation for a transfer to open conditions. This was accepted by the secretary of state in January 2008, and the next review was fixed to conclude 18 months later in June 2009. Mr Loch's offending had been underpinned by drug use, but by this stage there were no further offending behaviour courses identified to complete and the time in open conditions was to establish a release plan, to develop relapse prevention strategies and to test trustworthiness.

It was argued on Mr Loch's behalf that 12 months was more than sufficient for such testing. The secretary for state suggested that the practicalities of providing the necessary risk assessments which had to precede such testing meant that 12 months would be insufficient time for these to be completed before the next parole review. However, having reviewed the authorities, the court held that the recognition that Mr Loch had made excellent progress, combined with the fact that there were no further offending behaviour courses to complete, meant that an 18-month review did breach article 5(4) of the convention.

Comment: These two cases apply the long-standing principles that there is nothing objectionable in setting reviews for lifers at between 12–24 months and that each decision must be determined on its own merits. The decision in *Ashford* is a welcome reminder that the question of what period of time between reviews is compliant with article 5(4) is one which must remain under review. However, the dismissal of the claim on the substantive ground of challenge is somewhat pre-emptory; it uses the slightly confusing language of 'reasonableness' when previous cases have suggested that when reviewing an article 5(4) decision of this nature, the court is able to retake the decision itself as opposed to simply reviewing the rationality of the original decision (for example, *R (Day) v Secretary of State for the Home Department* [2004] EWHC 1742 (Admin), 24 June 2004). The *Loch* decision appears to have applied this approach more faithfully. An interesting footnote to *Loch* is that a delay in approving the Board's recommendation and arranging the transfer to open conditions threatened to undermine the practical benefit to the claimant. However, the court decided that the appropriate ruling was to grant the declaration sought and to require the secretary of state to retake the decision taking into account the intervening factors.

■ R (Downing) v Parole Board

[2008] EWHC 3198 (Admin), 1 December 2008

In a case where a breach of article 5(4) had been found in relation to delays in hearing an application for parole and a declaration issued for the prisoner, a claim for damages under article 5(5) was rejected. The claimant had not sought release, but instead had been successful in obtaining a recommendation for a move to open conditions. The court held that in the absence of any evidence of particular mental suffering and bearing in mind the seriousness of the original offence, just satisfaction did not require damages to be awarded for the delay in being moved from one category of prison to another.

Comment: The refusal to award damages in the absence of identifiable loss, such as loss of liberty or mental suffering, is consistent with the approach of the domestic courts. Nevertheless, the decision does not appear to have considered properly the impact of a delay in moving a prisoner to open conditions on his/her liberty and the question of whether or not this can constitute special damages. The judgment does not refer to the Court of Appeal decision in *Karagozlu v Commissioner of Police of the Metropolis* [2006] EWCA Civ 1691, 12 December 2006, where a prisoner serving a determinate prison sentence claimed he had been wrongly removed from open conditions as a result of incorrect information supplied by the police. In that case it was held that for a claim in misfeasance in public office, the 'significant loss of the liberty which he would have enjoyed if he had remained a Category D prisoner' could properly be classified as special damages. Arguably, the impact on a lifer is significantly more severe.

Tariffs

■ Bieber (aka Coleman) v R

[2008] EWCA Crim 1601, 23 July 2008

A lifer, who had been convicted of the murder of one police officer and the attempted murder of two others as well as various firearms offences, appealed against the trial judge's decision to impose a whole-life tariff. The trial judge had accepted that the statutory starting point for the offence was a 30-year tariff; however, he considered that the aggravating features of the case, where one injured officer had then been shot in the head, justified a departure from that starting point and the imposition of a whole-life order. The appellant argued that as a matter of principle, the whole life term was objectionable as it breached article 3 of the convention (prohibition of torture or inhuman or degrading treatment or punishment) and that, on the facts of his case, the departure from the starting point was unjustified.

The Court of Appeal decided to quash the sentence. It accepted that even though the offence was horrific, it was difficult to suggest that the nature of the killing took it from one statutory starting point to the next. The court noted that the 30-year bracket assumes an intention to kill a police officer and the appropriate question was to establish how much should be added in the case of a 'gratuitous execution'. Taking into account all of the aggravating features, the Court of Appeal's view was that a 37-year term was appropriate.

Although the court reached this decision on the particular facts of the case, the majority of the judgment is taken up with an exploration of whether or not a whole life sentence is compatible with article 3. It was noted that in domestic law, when the power to set lifers' tariff rested with the secretary of state, the House of Lords had considered that it was lawful to impose a whole life tariff (*R v Secretary of State for the Home Department ex p Hindley* [2001] 1 AC 410; [2000] UKHL 21, 30 March 2000) because the length of the sentence would be kept under review. The more recent decision of the European Court of Human Rights (ECtHR) in *Kafkaris v Cyprus* App No 21906/04, 12 February 2008 (see July 2008 *Legal Action* 15) affirmed this approach and established the following general points of principle:

a) The imposition of a sentence of life imprisonment will not involve a violation of article 3 if the sentence is reducible.

b) The fact that the offender may be detained for the whole of his life does not involve a violation of article 3.

c) The imposition of a life sentence that is irreducible may raise an issue under article 3 (para 27).

As domestic law provides the secretary of state with the power to release a prisoner on compassionate grounds: Crime (Sentences) Act 1997 s30, the sentence of whole life

imprisonment could not be classified as irreducible and so did not breach article 3.

Comment: The main principle decided by the case was the question of whether or not a whole life term breaches article 3, and this had been effectively determined by the ECtHR earlier in 2008. The Court of Appeal did not consider it appropriate to move ahead of Strasbourg case-law when looking at pure convention issues of this type. The worrying aspect of the decisions in this case and in *Kafkaris* is the very ethereal nature of the provision that potentially allows for early release. It is a decision that rests solely at the discretion of the executive, and domestically is a power that has tended to be circumscribed to very specific circumstances relating to fatal illnesses. However, when sentences as long as 37 years are being imposed, the distinction between this term and a whole life order may prove to be more of a technical than practical one.

Home detention curfew

■ R (Primrose) v Secretary of State for Justice

[2008] EWHC 1625 (Admin), 11 July 2008

The prisoner challenged the fact that early release on electronic tag (HDC) was not available for prisoners seeking to be released to an address in Scotland. He argued that this was unlawful discrimination under article 14 of the convention in combination with article 5 (the right to liberty).

The court rejected the suggestion that Scottish nationals were disproportionately prejudiced by the failure to allow release to an address in Scotland. The prisoner had been offered an address in England ('Clearwater' accommodation) to which he could be released on HDC. In addition, there were other categories of prisoner who would also have to make the choice between this kind of accommodation and more time in prison. There was therefore no indirect discrimination.

Any direct discrimination was directed to those who did not have an address in England in Wales to which they could be released for HDC purposes, but did have an address elsewhere. Discrimination was justified on the basis that this class of prisoner could not be monitored at the preferred address, unlike those with an address in England and Wales.

Comment: On 20 October 2008 the Prison Service issued Prison Service Instruction 41/2008, which introduced a scheme whereby prisoners can be released to Scotland for HDC purposes on a form of restricted transfer (effectively, where the Scottish authorities continue to administer the English sentence).

■ Mason v Ministry of Justice

[2008] EWHC 1787 (QB), 28 July 2008

This was another case charting the applicability of article 5 to the administration of determinate sentences. The court was considering a preliminary issue regarding whether or not article 5 of the convention was engaged by the HDC process in the context of a claim for compensation in the consideration of the claimant's eligibility.

The court decided the preliminary issue in favour of the defendant. It agreed with the analysis in *R (Benson) v Secretary of State for Justice* [2007] EWHC 2055 (Admin), 20 August 2007, that article 5 was not engaged when a prisoner applied for release on HDC. The court distinguished cases where it had been held that article 5 applied to the administration of determinate sentences (such as *R (Johnson) v Secretary of State for the Home Department and another* [2007] EWCA Civ 427, 9 May 2007) as these involved situations where the Board was charged with making a decision about release based on an assessment of risk. HDC was different as its eligibility period arose before the statutory entitlement to automatic release, so the Board had no role in decision-making and detention remained authorised, in article 5 terms, by the original sentence of the court.

Comment: This case is another example of the current uncertainty about how article 5 relates to early release schemes for determinate-sentenced prisoners. Although the court managed to distinguish the HDC context from *Johnson*, it is not entirely clear why, if *Johnson* was decided correctly, the identity of the decision-maker in relation to early release would affect the applicability of article 5. Currently, judgment is awaited in the House of Lords from the Court of Appeal's decision in *R (Black) v Secretary of State for Justice* [2008] EWCA Civ 359, 15 April 2008, where the secretary of state is challenging the correctness of *Johnson*.

Sentence calculation

■ Governor of HMP Drake Hall; Secretary of State for Justice v R (Noone)

[2008] EWCA Civ 1097, 17 October 2008

The prisoner appealed against the Administrative Court's analysis of how her sentence should be calculated. The issue was how eligibility for HDC should be calculated where multiple sentences are imposed, some of which fell to be administered under the CJA 1991 and others under the CJA 2003.

Sentences of under 12 months remain administered under the CJA 1991, and those of 12 months or more (for offences committed after 4 April 2005) under the CJA 2003. The problem in this case arose as sentences administered under the different regimes cannot be treated as a 'single term'. HDC eligibility has to be calculated by reference to the last sentence imposed. So, if the sentencing court hands down a sentence of two years and a consecutive three-month sentence, the policy was that a prisoner would only be eligible for HDC by reference to the three-month term. Clearly this produced absurd and arbitrary results.

The Administrative Court ([2008] EWHC 207 (Admin), 31 January 2008) held that although it was right that the statutory framework prevented sentences under the two regimes from being single-termed, it was unlawful for the secretary of state to adopt a policy that prisons should always calculate sentences by reference to the order in which sentences were handed down. This policy prevented prisoners who are serving identical sentences in terms of length from being able to benefit from similar periods on HDC.

The Court of Appeal allowed the secretary of state's appeal. It held that sentences had to be calculated with reference to the order in which they were handed down by the sentencing court. It would not be permissible for the secretary of state to have a policy that dictated how sentences should be served. The policy of the secretary of state to calculate HDC eligibility by reference to the order of the sentences as handed down by the court, therefore, merely reflected what was the correct way of treating sentences.

Comment: Although the case, as decided by the Court of Appeal, identifies an important principle that the executive should not interfere with the sentence as imposed by the court, the outcome is unsatisfactory. Sentencing courts are notoriously oblivious to the sentence calculation implications of their decisions. As the judge in the Administrative Court stated about the statutory framework in this case: '[i]t is simply unacceptable in a society governed by the rule of law for it to be well nigh impossible to discern from statutory provisions what a sentence means in practice.' However, the only way in which the absurdity identified in this case can be addressed is for advocates to ensure that sentencing judges are aware that HDC eligibility will apply to the last sentence handed down where sentences fall to be administered under both regimes.

The use of force in secure training centres

■ R (C) v Secretary of State for Justice

[2008] EWCA Civ 882, 28 July 2008

The appellant was a young person who had

been detained in a STC. The Administrative Court found that the secretary of state had acted unlawfully by introducing changes to the Secure Training Centre (STC) Rules 1998 SI No 472, as amended by the Secure Training Centre (Amendment) Rules (STC(A) Rules) 2007 SI No 1709, to permit use of restraint and segregation to ensure 'good order and discipline' without proper consultation with the Children's Commissioner, and without properly carrying out a race relations impact assessment as required by section 71 of the Race Relations Act (RRA) 1976. The judge, however, refused to quash the STC(A) Rules.

The Court of Appeal allowed the appeal. It held that the STC(A) Rules should be quashed. The normal principle that delegated legislation declared to be unlawful should be quashed by the court was not offset by the facts that there had been limited debate on the measures in parliament or that the secretary of state had initiated a review into the use of force on children in custody. Furthermore, the failure to comply with the RRA s71 duty was not merely a technical requirement.

The Court of Appeal also went further than the Administrative Court in holding that as the secretary of state had not demonstrated that a more generalised power to restrain prisoners in STCs for reasons of 'good order and discipline' – as against the existing power that only arose where personal safety, escape or damage to property – was in issue, the STC(A) Rules were also in breach of articles 3 and 8 of the convention.

Comment: General concern about both the frequency with which force is used in STCs and the specific techniques employed was given focus by two deaths in 2004. On 19 April 2004, Gareth Myatt, a prisoner in Rainsbrook STC, died while being restrained by officers. On 8 August 2004, Adam Rickwood, a prisoner in Hassockfield STC, was found hanging in his room after he had been subjected to restraint by staff. At the inquest into the death of Adam Rickwood, it became clear that the use of force in STCs had become routine in circumstances which were not authorised by the statutory and policy framework, but were essentially to ensure compliance with staff instructions. Astonishingly, in the face of this case and other evidence that there was widespread abuse of the STC Rules, the government's response was not to ensure compliance with the law, but to seek to legalise that abuse by amending the STC Rules.

After the Court of Appeal's judgment, the Ministry of Justice (MoJ) published the review mentioned in its proceedings and the government's response.* The review was not focused on whether or not restraint was necessary for 'good order and discipline' purposes, but on the restraint techniques used on children, whether in Young Offender Institutions, STCs or Secure Children's Homes run by local authorities. The report made a large number or recommendations, most of which have been accepted by the MoJ. While it is welcome that the techniques of 'nose distraction' and the 'double basket hold' (the latter was used on Gareth Myatt) are to be removed permanently and safer alternatives brought in, it remains of great concern that the report did not recommend that the use of other types of restraint which are designed to cause pain should be prohibited from use on children.

* *Independent review of restraint in juvenile secure settings*, Peter Smallridge and Andrew Williamson available at: www.justice.gov.uk/docs/restraint-review.pdf.



Hamish Arnott, Nancy Collins and Simon Creighton are solicitors at Bhatt Murphy solicitors, London.

The investigative obligation under article 2

Saimo Chahal and **Kristina Stern** review the nature and scope of the investigative obligation which arises under article 2 of the European Convention on Human Rights ('the convention').

Introduction

In recent times numerous cases have arisen in which the nature and scope of the investigative obligation that arises under article 2 of the convention has received judicial attention. Somewhat curiously, given the frequency with which the issue has arisen, no court had definitively ruled regarding the test which has to be satisfied before the investigative obligation arises. Nor was there definitive guidance concerning the interaction between the circumstances of the particular case, and the steps that must be taken in order to satisfy the investigative obligation.

In part, this stems from the nature of the jurisprudence of the European Court of Human Rights (ECtHR), in which it is rare to see detailed analysis or exposition of the basis on which an obligation is found to exist, particularly where the later case-law recites principles established in earlier, sometimes factually distinct, cases. It partly stems from the way in which cases arise in Strasbourg, where the question is more likely to be whether or not steps actually taken were sufficient, rather than the prospective question of what must be done in the future in order that the state complies with its obligations. A further factor that makes reliance on Strasbourg case-law difficult is that the ECtHR had, in every case, been required to consider a complaint of breach of the investigative obligation in cases where a breach of the substantive obligations under article 2 was also alleged. The allegation was, therefore, always framed as ancillary to the allegation of alleged substantive breach.

The House of Lords in *R (JL) v Secretary of State for Justice (Equality and Human Rights Commission intervening)* [2008] UKHL 68, 26 November 2008 was required to determine the question, as framed by Lord Phillips, of the nature of the investigation that must be carried out by the state whenever a prisoner in custody makes an attempt to commit suicide that nearly succeeds and which leaves him/her with serious injury. The very framing of the question illustrates the breadth of the issue, namely, what obligation is owed whenever a prisoner in custody makes such an attempt. Given that, as referred to by Lord Brown, in 2007 approximately two suicides in custody occurred in the UK each week, and the number of serious attempts were clearly considerably higher, the issue for the court was one of very real social, and financial, significance.

As set out in the authors' earlier articles

(see June 2006 and July 2006 *Legal Action* 30 and 28), since the decision of the ECtHR in *McCann v UK* App No 18984/91, 27 September 1995; (1995) 21 EHRR 97, it had been recognised that the right to life in article 2 of the convention carries with it a duty to carry out an effective official investigation 'when individuals have been killed as a result of the use of force by, inter alios, agents of the state' (para 161). What was not clear, however, was whether or not that obligation was owed only when there had been an arguable breach of the substantive obligations in article 2 (as contended by the secretary of state in *JL*), or whether the obligation arose in every case in which agents of the state potentially bear responsibility for loss of life, a standard which would, in effect, be satisfied in every case of suicide, or serious attempted suicide, in the custody of the state.

The further question was about the nature of the investigation required once the article 2 investigative obligation arose. In *R (D) v Secretary of State for the Home Department (INQUEST intervening)* [2006] EWCA Civ 143, 28 February 2006; [2006] 3 All ER 946 (a case in which the secretary of state conceded that the investigative obligation arose on the facts where D was a prisoner in state custody and had made a serious suicide attempt leaving him with permanent residual brain damage) the Court of Appeal had earlier laid down minimum requirements to be met by the Prison and Probation Services Ombudsman when conducting an article 2-compliant investigation. The question in *JL* was whether or not those minimum requirements applied automatically in every case in which the investigative obligation arose in the prison context.

Background to the case

Since *McCann* was decided by the ECtHR, the court has repeatedly affirmed that article 2 of the convention carries with it a procedural element. In the custody context, the obligation has been framed as an obligation to investigate, whereas in other contexts, most particularly that of clinical negligence, the obligation is framed by the ECtHR as one to create an effective independent system for establishing the cause of death of an individual under the care and responsibility of health professionals and any liability on the part of the latter (see, eg, *Powell v UK* (2000) 30 EHRR CD362, 363–364 and in the domestic context, *R (Takoushis) v Inner North London Coroner* [2005] EWCA Civ 1440, 30 November 2005; [2006] 1 WLR 461).

Furthermore, as in the cases of *Edwards v UK* App No 46477/99, 14 March 2002; (2002) 35 EHRR 487 (death of a prisoner at the hands of a fellow prisoner) and *Menson v UK* App No 47916/99, 6 May 2003; (2003) 37 EHRR CD220 (a black man killed as a result of being set on fire by assailants during a racist attack), the investigative obligation under article 2 has been held by Strasbourg to arise in cases where the death was not in fact caused at the hand of the state actors, but was a result of the state failing to protect the individual's life, or to establish a system for the protection of life.

In the UK, in part relying on the Strasbourg cases, previously the House of Lords had considered and affirmed the investigative obligation in a number of cases, albeit not in circumstances where the victim had not in fact died. Thus, in *R (Middleton) v West Somerset Coroner* [2004] UKHL 10, 11 March 2004; [2004] 2 AC 182, the House of Lords held that article 2 required that the jury in an inquest express its conclusion on the central, factual issues in the case and in some cases that required a narrative verdict, including whether the deceased should have been recognised as a suicide risk and whether appropriate precautions should have been taken to prevent the suicide. Shortly afterwards, in *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, 16 October 2003; [2004] 1 AC 653, the House of Lords affirmed the minimum requirements of the article 2 investigative obligation as comprising independence, sufficient public scrutiny to secure accountability and an appropriate level of participation of the next of kin to safeguard their legitimate interests. While no particular procedure had to be adopted, it is indispensable that there are proper procedures for ensuring the accountability of agents of the state so as to maintain public confidence and allay the legitimate concerns that arise from the use of lethal force. *Amin*, like *Edwards*, was a case involving the killing of a young offender by his cellmate who had a history of violent and racist behaviour.

The decision of the Court of Appeal in *D* followed largely from the decision of the House of Lords in *Amin*, and incorporated the requirements set out therein into the context of an inquiry into a serious attempted suicide by a prisoner in the custody of the state. A public inquiry by the Prison and Probation Ombudsman was subsequently held in the case of *D*, and the expense of that inquiry was one factor relied on by the secretary of state in *JL*, in support of his argument that a '*D*-style inquiry' was not required in every case in which there was a serious suicide attempt by a prisoner in custody.

Competing arguments in *JL*

In *JL*, it was the secretary of state's position that the investigative obligation under article 2 was only owed by the state in circumstances in which it could be said that there was an arguable breach of the substantive obligations under that article. This followed, according to the argument, from the fundamental purpose of the investigation being to secure the accountability of state agents in respect of possible breaches of the substantive obligations imposed under article 2. The argument relied, in part, on a number of judicial comments (none arising from a direct consideration of the threshold issue before the House of Lords in *JL*) which suggested that the procedural right to an inquiry required at least an arguable case that the substantive right arose on the facts of the case (see, eg, Lord Bingham and Baroness Hale in *R (Gentle) v Prime Minister* [2008] UKHL 20, 9 April 2008; [2008] 2 WLR 879, paras 6 and 29 respectively, a case in which it was claimed that the investigative obligation arose in respect of the decision of the UK that the invasion of Iraq was lawful under international law).

By contrast, it was argued on behalf of JL that the simple fact of a death or serious injury of a person in custody gives rise to an obligation on the state to conduct an article 2-compliant investigation, albeit that there was flexibility about the nature and essential components of that investigation.

Judgment of the House of Lords in *JL*

The House of Lords dismissed the secretary of state's appeal. It characterised the obligation to have an investigation as part of the positive obligation under article 2 to have in place effective systems to protect life, in part, to ensure that lessons can be learned for the future. Thus, the near-suicide with serious injury itself triggered the obligation under article 2 without any antecedent requirement of arguable breach of the 'operational' obligation to respond to real and immediate risks to life.

While each of the law lords delivered separate speeches, there was considerable agreement between them about the essential issues raised. One common theme was a reluctance to seek to provide any definitive guidance applicable to every attempted suicide in custody. In particular, the Lords did not seek to determine when an attempt at suicide would be sufficiently serious to trigger the article 2 obligation. This is, therefore, a matter on which there remains some doubt to be resolved by future cases.

Lord Phillips, for example, confined his remarks to the situation where an attempt at

suicide came close to success, and left the prisoner with the possibility of serious, long-term injury (para 15), that being the situation which faced the Lords in *JL*.

The areas of agreement included the following. Whenever prisoners kill themselves or attempt suicide, it is at least possible that the prison authorities have either failed in their obligation to take general measures or to decrease the opportunity for risk of self-harm. Given the nature of the prison world, without an independent investigation the outside world may never know what has gone on. There needs to be an investigation to find out if something did indeed go wrong. The hallmark of an article 2-compliant inquiry is that it is 'effective', ie, it must be capable of leading to the identification and punishment of those responsible. This is described as an obligation of result, not an obligation of means (*Ramsahi v Netherlands* App No 52391/99, 15 May 2007).

The House of Lords further agreed that:

- the investigation must be prompt and carried out with reasonable expedition;
- the investigation must be initiated by the state itself;
- the investigation must be carried out by a person who is independent of those implicated in the events being investigated;
- there must be a sufficient element of public scrutiny of the investigation or its result; and
- the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his/her legitimate interests.

These principles are already well established by *Amin* and the ECtHR judgment in *Edwards*.

The Lords expressed a range of opinions about the circumstances in which the initial investigation (without a public hearing) will not be adequate to satisfy article 2 and where a *D*-type investigation requiring a public inquiry will be needed. The secretary of state had conceded from the outset that JL's case was one where article 2 required an independent investigation including a public hearing. This concession meant that the discussion at the hearing tended to focus on the form of any inquiry and when an independent investigation would be enough, and when it would need to cross the boundary into a *D*-type investigation with a public hearing. It was accepted by the Lords that if the initial investigation is independent and the evidence shows that there has not been a possible defect in the system for preventing suicide or operational shortcomings, the initial investigation may satisfy the requirements of article 2 without the need for a public hearing. The Lords were reluctant to prescribe the circumstances in which a *D*-type investigation would be necessary to satisfy the article 2 requirements, though it is perhaps most clearly spelt out in the speech of Lord Phillips. There may be circumstances where the public interest itself requires a public hearing; the need for an effective investigation may require this, for example, if witnesses refuse to give evidence; or where the initial investigation discloses serious conflicts in the evidence; or where the independent investigator identifies some area that requires further investigation; and there will be other circumstances as well.

Residual questions

The speeches of the law lords in *JL* resolve the critical theoretical issues about the threshold requirement before an obligation to establish an independent investigation arises under article 2. It also provides some freedom from the apparently restrictive 'all-or-nothing' approach which potentially flowed from one interpretation of the decision of the Court of Appeal in *D*, in which the competing positions appeared to be that once the investigative obligation arose, it required a particular form of inquiry.

However, it remains a matter of some doubt when the circumstances are such that an inquiry of the form in *Amin* and *D* is in fact required, and the basis on which a decision of the secretary of state not to conduct such an inquiry can be challenged. Furthermore, there remains considerable uncertainty about the means by which an investigation should ensure compliance with the minimum requirements established by Strasbourg and recognised in *JL*, and the way in which sufficient effective participation by the victim or next of kin and public scrutiny can be facilitated by an investigation which, by its very nature, is likely to be conducted primarily without any concurrent publicity or scrutiny by the next of kin. There is also considerable disparity in the way that investigations are conducted according to whether they are in the police, prison, immigration or mental health context, and depending on who the investigator employed, which leaves scope for inconsistency and potential unfairness. These are matters which inevitably will be resolved largely by experience, with guidance from the courts as and when issues are not capable of informal resolution.

Some of these problems have been highlighted by the judicial review in *(R) SP and Ministry of Justice* [2009] EWHC 13 (Admin), 19 January 2009. The claim raised several issues, including whether the chairperson of the investigation ordered by the secretary of state was sufficiently independent; concerning expectations about consultation on terms of reference; as well as adequate funding for SP's legal representation. The claimant succeeded on the first ground only. The court found that funding arrangements mirroring those for inquests were reasonable in the circumstances. Nonetheless, the commissioning and implementation of these investigations are likely to give rise to further litigation.

Further residual questions relate to the extent to which the principles established in JL apply outside the prison context, for example, to the establishment of circumstances of danger (as in *Öneryildiz v Turkey* App No 48939/99, 30 November 2004; (2004) 41 EHRR 20, where the ECtHR Grand Chamber held that the principles developed in the custody context applied where a dangerous rubbish facility led to loss of life), or to different circumstances of detention (such as mental health or immigration).

Saimo Chahal is a partner in the public law and human rights department of Bindmans LLP and Solicitor of the Year. Kristina Stern is a barrister at 39 Essex Street and Sixth Floor Wentworth Chambers in Sydney, Australia. They were solicitor and counsel for *JL*, with Ben Emmerson QC also in the House of Lords.

Gypsy and Traveller law update – Part 2

Chris Johnson, **Dr Angus Murdoch** and **Marc Willers** highlight the latest developments in planning law and enforcement that relate to the provision of accommodation for Gypsies and Travellers. This article is to be read in conjunction with 'Gypsy and Traveller law update – Part 1', which was published in February 2009 *Legal Action* 19 and detailed recent changes in the law and policy relating to possession proceedings, rented site provision, unauthorised encampments and homelessness.

POLICY AND PROVISION

When the government published Circular 1/2006 *Planning for Gypsy and Traveller caravan sites*. it stated that two of the main aims of the advice were to reduce the number of unauthorised encampments and developments, and to increase significantly the number of Gypsy and Traveller sites in appropriate locations with planning permission in order to address under-provision in three to five years.[1]

Three years later there has been little change in the overall picture. The Communities and Local Government (CLG) Gypsy Count for July 2008 in England showed that a total of 17,626 caravans were counted; 1,750 of those caravans were stationed on sites that were not owned by Gypsies and Travellers (unauthorised encampments); and 2,240 of those caravans were stationed on land owned by Gypsies and Travellers without planning permission (unauthorised developments).[2]

Circular 1/2006 explains how the new planning system will work in the context of the provision of Gypsy and Traveller sites. Local authorities are required by Housing Act 2004 s225 to carry out an assessment of the accommodation needs of Gypsies and Travellers, and Circular 1/2006 makes it clear that local planning authorities (LPAs) should begin the process by complying with their statutory duty to assess the accommodation needs of Gypsies and Travellers and produce Gypsy and Traveller accommodation assessments (GTAAs).

The information from GTAAs will be fed to the regional planning bodies, which will then be responsible for preparing regional spatial strategies that will identify the number of pitches required (but not their location) for each LPA and provide a strategic view of needs across the region. LPAs will then have to produce their own development plan documents which set out site-specific allocations for the number of pitches that the regional spatial strategies have specified they need to accommodate within their areas.

Progress has been made in the assessment of the need for sites around the country. However, the government has not yet confirmed the exact number of pitches that local authorities must identify in their site allocation development plan documents (DPDs). Somewhat disappointingly, in the East of England it has been suggested that some local authorities may seek to challenge the government's assessment of the number of pitches that they should identify within their areas, a course of action which could cause site provision to grind to a halt.

CASE-LAW

Temporary planning permission

The government recognised that it would take some time for the new process to be completed and for site-specific allocation DPDs to be adopted; as a consequence it included additional advice on the grant of temporary planning permission in paras 45 and 46 of Circular 1/2006.

In para 45 of Circular 1/2006, the government referred to the guidance issued by the Department of the Environment in paras 108–113 of Circular 11/1995 *The use of conditions in planning permissions* and particularly to the advice that a temporary permission may be justified where it is expected that the planning circumstances will change in a particular way at the end of the period of temporary permission. Having done so, para 45 continues as follows:[3]

Where there is unmet need and no available alternative Gypsy and Traveller site provision in an area, but there is a reasonable expectation that new sites are likely to become available at the end of that period in the area which will meet that need, local planning authorities should give consideration to granting a temporary permission.

The advice on the grant of temporary planning permission in such circumstances continued in para 46 of Circular 1/2006:

Such circumstances may arise, for example, in a case where a local planning authority is preparing its site allocations DPD. In such circumstances, local planning authorities are expected to give substantial weight to the unmet need in considering whether a temporary planning permission is justified.

■ Langton and McGill v (1) Secretary of State for Communities and Local Government (2) West Dorset DC

[2008] EWHC 3256 (Admin), 7 January 2009

The claimants applied for temporary planning permission to station two caravans on land within an area of outstanding natural beauty. The LPA refused the application and a planning inspector upheld that refusal. The claimants challenged that decision under Town and Country Planning Act 1990 s288. HHJ Gilbart QC, sitting as a deputy judge of the High Court, upheld their challenge on the ground that the inspector had failed properly to apply the government guidance in para 45 of Circular 1/2006: he had failed to ask himself whether there was a reasonable expectation that any new sites were likely to become available at the end of the period of temporary planning permission sought which would meet the need for additional sites in the area.

Significantly, the judge also gave guidance to those having to decide whether to grant temporary planning permission for Gypsy sites on the application of the advice contained in Circular 11/95. Paragraph 109 of Circular 11/95 reads as follows:

In deciding whether a temporary permission is appropriate … the material considerations to which regard must be had in granting any permission are not limited or made different by a decision to make the permission a temporary one. Thus, the reason for granting a temporary permission can never be that a time limit is necessary because of the effect of the development on the amenities of the area. Where such objections to a development arise they should, if necessary, be met instead by conditions whose requirements will safeguard the amenities. If it is not possible to devise such conditions, and if the damage to

amenity cannot be accepted, then the only course open is to refuse permission…

HHJ Gilbart QC stated (at paras 29–30, quoting in part from his judgment in the case of *McCarthy v Secretary of State for Communities and Local Government and South Cambridgeshire DC* [2006] EWHC 3287 (Admin), 20 December 2006) that he had very real concerns about the terms in which para 109 had been drafted:

… As written it appears to suggest that if a development is refused a 'permanent' permission because it would have harmful effects, that it cannot ever be right to grant permission which is limited in time by condition, and also suggests that the material considerations cannot differ as between the two cases. In my judgement that cannot be right in law, and if intended to be a guide to how authorities and inspectors should approach the reasons for a decision on the imposition of such a condition, it is far too sweeping. It does not recognise or address those cases where it might be considered that while the harm done by a permanent development would justify refusal, the balance between the reasons for grant and reasons for refusal may be altered if the development is temporary. After all, the effect of a development on its surroundings must be reduced if it [is] limited to (say) three years rather than being permanent. … Had the secretary of state actually adopted the way in which paragraph 109 is written as part of his reasoning, I would have considered that his approach had failed to use adequate or intelligible reasoning …

It appears from the terms of paragraphs 45–46 of Circular 1/2006 that the [secretary of state] has recognised that a temporary development is not to be regarded as similarly harmful to a permanent development. Thus, in that policy she has addressed what should happen where there is a requirement for more pitches, but they are not yet on stream, but accepts that the harm caused by a permission may be mitigated because the development in question will occupy its site for a short period.

See also para 24 of his judgment in *Jordan v Secretary of State for Communities and Local Government* [2008] EWHC 3307 (Admin), 2 December 2008.

Gypsy status

A Gypsy or Traveller who is seeking planning permission for a site will only be able to rely on the positive guidance contained within Circular 1/2006 if s/he is entitled to 'Gypsy status'. For planning purposes 'Gypsies and Travellers' are defined (para 15) as:

Persons of nomadic habit of life whatever their race or origin, including such persons who on grounds only of their own or their family's or dependants' educational or health needs or old age have ceased to travel temporarily or permanently …

In order to be accorded Gypsy status a person must fit within that definition.

■ Massey v (1) Secretary of State for Communities and Local Goverment (2) South Shropshire DC and Derbyshire Gypsy Liaison Group (interested party)

[2008] EWHC 3353 (Admin), 10 December 2008

The court considered whether para 15 of Circular 1/2006 had to be read literally, that is whether a person could 'only' qualify for Gypsy status if s/he had ceased travelling on grounds of ill health, old age or as a consequence of the educational needs of children; or whether a person could be entitled to Gypsy status if the cessation of travelling could be justified for some other reason. The court held that a literal approach was too restrictive and that provided there were good reasons for not travelling, a person could remain a Gypsy and Traveller for planning purposes.

The application of green belt policy

Gypsy and Traveller sites are considered to be 'inappropriate development' within the green belt and will only be permitted where 'very special circumstances' are shown to exist. *Planning policy guidance note 2 green belts* states that:[4]

Very special circumstances to justify inappropriate development will not exist unless the harm by use of inappropriateness and any other harm is clearly outweighed by other considerations … (para 3.2).

■ Wychavon DC v Secretary of State for Communities and Local Government and Butler

[2008] EWCA Civ 692, 23 June 2008

On appeal, a planning inspector granted a Gypsy family a five-year temporary planning permission for the residential use of their land, which was situated in the green belt. The LPA challenged that decision on the ground that the inspector erred in law in his treatment of the issue of 'very special circumstances'. Mitting J agreed and the inspector's decision was quashed. The judge noted that the inspector had identified three factors which he had concluded, when taken together, clearly outweighed the harm to the green belt and other harm, namely: the fact that there was to be an assessment of need for Gypsy sites which would lead the LPA to allocate sites; the undisputed need for such sites; and the lack of available alternative sites. Having done so the judge said ([2007] EWHC 3209 (Admin), 19 December 2007):

… one must step back and ask whether the three factors taken together are capable of amounting to very special circumstances. In my view, they are not. They are three commonplace factors. Although a collection of ordinary and unexceptional factors can, when taken together, amount to very special circumstances, the aggregation of three commonplace factors such as these, in my judgment, cannot (para 25).

The Gypsy family appealed against that decision to the Court of Appeal and their appeal was allowed. In an important judgment, which will be of general application in all green belt cases but particularly relevant to those involving proposals for Gypsy sites, Carnwath LJ said:

I say at once that in my view the judge was wrong, with respect, to treat the words 'very special' in the paragraph 3.2 of the guidance as simply the converse of 'commonplace'. Rarity may of course contribute to the 'special' quality of a particular factor, but it is not essential, as a matter of ordinary language or policy. The word 'special' in the guidance connotes not a quantitative test, but a qualitative judgment as to the weight to be given to the particular factor for planning purposes. Thus, for example, respect for the home is in one sense a 'commonplace', in that it reflects an aspiration shared by most of humanity. But it is at the same time sufficiently 'special' for it to be given protection as a fundamental right under the European Convention (para 21).

Carnwath LJ noted the fact that Strasbourg case-law places particular emphasis on the special position of Gypsies as a minority group and that their position as such was reflected in the guidance in Circular 1/2006. As a consequence, Carnwath LJ expressed the view that it would be impossible to hold that the loss of a Gypsy family's home, with no immediate prospect of replacement, is incapable in law of being regarded as a 'very special' factor for the purposes of the guidance in PPG2.

The significance of alternative sites

■ **South Cambridgeshire DC v Secretary of State for Communities and Local Government and Brown**

[2008] EWCA Civ 1010, 5 September 2008

The LPA challenged a planning inspector's decision to grant a Gypsy family permanent planning permission for their caravan site in open countryside. The LPA argued that the inspector should have required the Gypsy family to prove that they had carried out sufficient searches for alternative sites. The court dismissed the challenge. The LPA then appealed to the Court of Appeal.

The Court of Appeal rejected the appeal. It held that there was no burden of proof on Gypsy applicants to establish that there were no alternative sites to which they could move. The extent to which a Gypsy had searched for alternative sites was capable of being a material consideration, but the relevance of any search for alternative sites would depend on the facts of a case and be a matter for the decision-maker. In any event, there was evidence before the planning inspector that the Gypsy family had done their best to search for alternative sites.

The race equality duty

The race equality duty is set out in Race Relations Act (RRA) 1976 s71, which provides that:

(1) Every [local authority] shall, in carrying out its functions, have due regard to the need (a) to eliminate unlawful racial discrimination, and (b) to promote equality of opportunity and good relations between persons of different racial groups.

■ **R (Baker and others) v (1) Secretary of State for Communities and Local Government (2) Bromley LBC and Equality and Human Rights Commission (intervener)**

[2008] EWCA Civ 141, 28 February 2008

A Romany Gypsy and a number of Irish Travellers challenged the decision of a planning inspector to refuse them planning permission for a caravan site in the green belt. One of the grounds of challenge was that the inspector had failed to comply with the race equality duty. The Court of Appeal rejected the appeal.

However, it is significant to note that it was common ground between the parties (para 28) that:

■ the Irish Traveller appellants belonged to a racial group within the meaning of RRA s3(1); and

■ in conducting appeals, planning inspectors are subject to the race equality duty.

Giving the judgment of the court Dyson LJ said:

… it is important to emphasise that the section 71(1) duty is not a duty to achieve a result, namely to eliminate unlawful racial discrimination or to promote equality of opportunity and good relations between persons of different racial groups. It is a duty to have due regard to the need to achieve these goals. The distinction is vital. Thus the Inspector did not have a duty to promote equality of opportunity between the appellants and persons who were members of different racial groups; her duty was to have due regard to the need to promote such equality of opportunity. She had to take that need into account, and in deciding how much weight to accord to the need, she had to have due regard to it. What is due regard? In my view, it is the regard that is appropriate in all the circumstances. These include on the one hand the importance of the areas of life of the members of the disadvantaged racial group that are affected by the inequality of opportunity and the extent of the inequality, and on the other hand, such countervailing factors as are relevant to the function which the decision-maker is performing (para 31).

The Court of Appeal also rejected the suggestion that the failure of an inspector to make express reference to the race equality duty was determinative of the question whether s/he had performed his/her duty under the statute, and stated that the question in every case was whether or not the decision-maker had in substance had due regard to the relevant statutory need. That said, the Court of Appeal suggested that it would be good practice for decision-makers who are subject to the duty to make reference to the provision in all cases where it is in play.

Enforcement of planning control

Planning injunctions

Under Town and Country Planning Act (TCPA) 1990 s187B, LPAs can apply to the court for an injunction to restrain a breach of planning control when it is considered expedient to do so.

■ **South Cambridgeshire DC v Price and others**

[2008] EWHC 1234 (Admin), 5 June 2008

The LPA applied for an injunction to restrain six Gypsy families from using their land in the green belt as a caravan site. The Gypsy families' application for planning permission had been refused and their appeal against that refusal was outstanding at the time of the injunction hearing. In the event Plender J dismissed the LPA's application because he concluded that the Gypsy families' outstanding planning appeal had a reasonable prospect of success and that it would be disproportionate to force the families to leave their land before their appeal was decided. The court's assessment of the site's planning prospects proved well founded when the Gypsy families were granted permanent planning permission later in the year.

Injunctions and the race equality duty

■ **O'Brien and others v South Cambridgeshire DC**

[2008] EWCA Civ 1159, 24 October 2008

The Court of Appeal dismissed an appeal against a court's decision to grant an injunction restraining a number of Irish Travellers from the use of their land as a caravan site in breach of planning control. The appellants argued that the LPA failed to take account of its race equality duty before deciding to seek an injunction. The Court of Appeal accepted that the race equality duty was a relevant matter for the LPA to take into account when deciding whether to apply for an injunction, but, having analysed the facts of the case, concluded that the LPA had not failed in its duty to do so.

Prosecution

In circumstances where a Gypsy or Traveller stations a caravan on land in breach of a valid enforcement notice, the responsible LPA may prosecute the owner of the land and/or any person who has control of or an interest in the land, under TCPA s179. It is a defence for an owner of the land to show that s/he did everything that could be reasonably expected to secure compliance with the notice (s179(3)).

■ **Sevenoaks DC v Harber**

[2008] EWHC 708 (Admin), 3 April 2008

The LPA appealed by way of case stated against a decision of a magistrates' court to acquit a Gypsy of an offence of breaching an enforcement notice in circumstances where it had concluded that the Gypsy could have complied with the notice by ceasing to live on the land with his family in a mobile home but that such a step was unreasonable given the hardship that the family would suffer. Having regard to earlier case-law which made it clear that no defence arose unless an owner could show that compliance was not within his own unaided powers, the court allowed the LPA's appeal.

Direct action evictions

In circumstances where a Gypsy or Traveller resides in a caravan on land in breach of a

valid enforcement notice, the responsible LPA may also take direct action to secure compliance under TCPA s178; in other words, it may take action to evict the Gypsy or Traveller from the land without first seeking a court order. That said, the decision to take such drastic action will be susceptible to judicial review.

■ Basildon DC v McCarthy and others and Equality and Human Rights Commission (intervener)

[2009] EWCA Civ 13, 22 January 2009

The Court of Appeal's decision in this case is the latest in a line of recent cases in which LPAs' decisions to take direct action in order to evict Gypsies and Travellers from their own land have been challenged by way of judicial review. The Court of Appeal accepted that before reaching such a decision, LPAs had to take account of humanitarian considerations and in doing so give consideration to the personal circumstances of the Gypsies and Travellers concerned as well as to the duties imposed on them by homelessness and education legislation, the Children Act 1989, the RRA and the Disability Discrimination Act 1995.

However, on the facts of this case, the Court of Appeal was satisfied that the LPA had taken account of all relevant considerations before reaching its decision to take direct action to evict a large number of Irish Traveller families from unauthorised sites in the district, and that the decision could not otherwise be said to be unlawful. (This could be compared with *O'Brien and others v Basildon DC* [2006] EWHC 1346 (Admin), 12 April 2006; [2007] 1 P & CR 16 and the circumstances in which Ouseley J quashed the LPA's decision to take direct action to evict Irish Travellers from another site within the district.)

While Basildon's decision has been held to be lawful, the question whether or not it is morally acceptable to evict a large number of Irish Traveller families from their land at a time when there is nowhere else for them to go remains. As Sedley LJ stated in *Coates and others v South Buckinghamshire DC* [2004] EWCA Civ 1378, 22 October 2004:

Evicting families from land to which they have good title but on which they have currently no right to live is a drastic step. The children who are at local schools will very probably go back into the cycle of innumeracy and illiteracy which continues to stand between travellers and the access enjoyed by the settled community to health and jobs. If the caravan stops on roadside verges they will be guilty of obstruction and liable to be fined and moved on. If they trespass on private land they will face immediate eviction. If they buy or rent land, they will face planning controls and enforcement action (para 34).

The Irish Travellers evicted from their land in this case are likely to encounter all those difficulties identified by Sedley LJ. However, the moral question is even more relevant when one bears in mind the fact that it is likely that the government will require the LPA to identify sites for a significant number of new pitches within its district by 2011 in line with the guidance in Circular 1/2006. Those pitches may accommodate some, if not all, of the Irish Travellers who are to be evicted as a result of this case, and one has to question what purpose could possibly be served by uprooting these families and forcing them back onto the roadside where they will face considerable hardship, when they may be accommodated in the next couple of years on more suitable sites.

1 Available at: www.communities.gov.uk/documents/planningandbuilding/pdf/circulargypsytraveller.pdf.
2 Available at: www.communities.gov.uk/housing/housingmanagementcare/gypsiesandtravellers/.
3 Available at: www.communities.gov.uk/documents/planningandbuilding/pdf/324923.pdf.
4 Available at: www.communities.gov.uk/documents/planningandbuilding/pdf/155499.pdf.



Chris Johnson is a solicitor and partner of Community Law Partnership (CLP), Birmingham. He is head of the firm's Travellers' Advice Team. Dr Angus Murdoch is a Travellers Planning Adviser at CLP. Marc Willers is a barrister at Garden Court Chambers, London. Chris Johnson and Marc Willers are the editors of *Gypsy and Traveller Law*, LAG, 2nd edn, 2007, £30. Dr Angus Murdoch is one of the contributing authors of *Gypsy and Traveller Law*.

Public law, but not as we know it – Part 2

In this article, John Halford discusses how the public sector ombudsmen decide what redress is appropriate for maladministration or service failure that has led to injustice and the extent to which their decisions can be challenged and enforced. Part 1 of this article appeared in February 2009 *Legal Action* 44.

Overview

All the public sector ombudsmen have a power to make recommendations about how the injustice arising out of any maladministration they identify may be remedied. As noted in Part 1 of this article, injustice is inherently a far broader concept than 'damage' for the purposes of tort law. Ombudsman remedies are therefore not dependent on establishing foreseeability, proximity or causation (see *R v Commissioner for Local Administration ex p S* (1999) 1 LGLR 633), nor are the levels of compensation payments made in tortious claims a useful guide for redressing maladministration (see *Bernard v Enfield LBC* [2002] EWHC 2282 (Admin), 25 October 2002; [2003] HLR 27).

As with the European Convention on Human Rights concept of 'just satisfaction', the overarching principle for matching a remedy to an injustice is one with common law roots: restitutio in integrum (restoration to original condition). Thus, as far as possible, the complainant should be put back in the position s/he would have been in but for the maladministration having occurred. The ombudsmen will also occasionally make formal recommendations or 'suggestions' for the benefit of others who have suffered equivalent injustices (even where maladministration has not been shown to have caused the injustice in each of their cases). As noted in Part 1 of this article, the Local Government Ombudsman (LGO) has recently been given explicit powers to investigate to this end.

Although ombudsman reports have traditionally offered little, if any, reasoning for any recommended remedies, there is now relatively clear guidance on the principles deployed. In February 2005 the LGO issued *Guidance on good practice 6: remedies,* which is intended to promote consistency in the way financial compensation and other forms of redress for maladministration are decided by local authorities.[1] Its preamble also says '[w]e apply these guidelines both in our formal reports and in considering proposals for "local settlements"'.

In similar vein, the joint 2007 guidance from the Parliamentary Commissioner for Administration (PCA) and the Health Service Commissioner (HSC), *Principles for remedy* began:[2]

> *Remedying injustice and hardship is a key aspect of the Ombudsman's work. This document gives our views on the principles that should guide how public bodies provide remedies for injustice or hardship resulting from their maladministration or poor service. It sets out for complainants and bodies within the Ombudsman's jurisdiction how we think public bodies should put things right when they have gone wrong.* ***It also confirms our own approach to recommending remedies*** (emphasis added).

Ombudsman recommendations typically take one or more of four forms:

- Action or process-based remedies where it is recommended that a specific step is taken (because, on any reasonable view, that is what good administration requires in the circumstances) or that a new or necessary decision is taken in a proper and timely manner.
- Direct redress remedies where it is proposed that the complainant is given or awarded something tangible in recognition of the unjust consequences of the maladministration. This can be directly linked to loss or the expense to which a complainant has been put, or the value of a service that ought to have been provided.
- Indirect redress remedies, recommending a payment that acknowledges the effects on the complainant of the maladministration and injustice, such as stress and distress.
- Recommendations for systemic change for the benefit of others.

Each form of recommendation is discussed in more detail below. It should also be noted that, besides the tangible remedies of this kind, in almost all cases where maladministration is identified the Ombudsman will expect an acknowledgement of responsibility and an apology. As the PCA and HSC have observed in *Principles for remedy*:

> *In many cases, an apology and explanation may be a sufficient and appropriate response. Public bodies should not underestimate the value of this approach. A prompt acknowledgement and apology, where appropriate, will often prevent the complaint escalating. Apologising is not an invitation to litigate or a sign of organisational weakness.*

Action and process-based remedies

The aim of these is broadly similar to mandatory or quashing orders. However, they do not compel anything, nor change the legal status of any decision made.

In relation to remedies of this kind, *Guidance on good practice 6: remedies* states:

> *15 Consideration should always be given to whether there is some practical action which would provide all or part of a suitable remedy. This may be appropriate, in particular, when the injustice stems from failure to take some specific action. So, for example, the action required might be to:*
> *– issue a final statement of special educational needs where that has not yet been done;*
> *– take action to make the provision specified in a statement of special educational needs;*
> *– effect the necessary repairs to a complainant's council house;*
> *– offer a tenant a transfer of accommodation; or*
> *– assess entitlement to a benefit (for example, housing benefit) and make any requisite payment.*
>
> *16 In other cases it may be appropriate to consider some practical action which would mitigate the injustice. Examples might be:*
> *– providing screening to mitigate the effect of a development near to the complainant's property; or*
> *– providing specialist equipment or additional tuition for a child whose education had been adversely affected.*
>
> *17 Consideration should also be given to any practical action which complainants themselves might suggest. This includes any imaginative suggestions which might not be directly related to the subject of the complaint, but which complainants*

themselves would consider an acceptable remedy. One such example, following a complaint by an environmental group about the site of a school, was the suggestion of the group that the mayor should plant a tree during disability awareness week. The council was happy to arrange that (pp4–5).

Principles for remedy, explained similarly:

An appropriate range of remedies will include … remedial action, which may include reviewing or changing a decision on the service given to an individual complainant; revising published material; revising procedures to prevent the same thing happening again; training or supervising staff; or any combination of these.

Direct redress-based remedies

Guidance on good practice 6: remedies explains that:

7 The remedy needs to be appropriate and proportionate to the injustice. It should, as far as possible, put the complainant in the position he or she would have been in but for the maladministration.

8 There will be many circumstances where this cannot be achieved because of the passage of time or of events which have occurred. In such cases financial compensation may be the only available approach (p3).

The guidance continues:

24 In the absence of any other means of redress for the loss of a non-monetary benefit, financial compensation should be considered. No 'tariff' or fixed guidelines are possible, however, in view of the very wide range of injustice that may result from a failure to meet the needs of complainants in different circumstances …

25 In considering the question of how much compensation would be appropriate in any particular case, one factor which could be taken into account is what it would have cost the authority to make the provision, or provide the service or support, which should have been received. Although the cost of a benefit and the value of it may not be the same, the cost may give a useful indication. But all the circumstances should be considered and any other relevant factors should be taken into account.

26 Compensation amounts are not always large. But in cases where an individual's or a family's life has been severely affected over a period of time by an authority's maladministration, the financial compensation recommended by the Ombudsmen has sometimes been significant … (p46)

Principles for remedy stated:

5 Putting things right

Where maladministration or poor service has led to injustice or hardship, public bodies should try to offer a remedy that returns the complainant to the position they would have been in otherwise. If that is not possible, the remedy should compensate them appropriately. Remedies should also be offered, where appropriate, to others who have suffered injustice or hardship as a result of the same maladministration or poor service.

There are no automatic or routine remedies for injustice or hardship resulting from maladministration or poor service. Remedies may be financial or non-financial.

An appropriate range of remedies will include …

■ *financial compensation for direct or indirect financial loss, loss of opportunity, inconvenience, distress, or any combination of these.*

Reading this guidance together suggests that the ombudsmen will take the following approach where an action or process-based remedy will not address the injustice or all aspects of it.

First, the ombudsman asks whether a direct compensatory payment can be made to meet a quantifiable loss. The only case to consider LGO remedies in any detail, *Bernard v Enfield LBC* (see above), contains a good example. Sullivan J mentions that:

The highest recommended award (£16,350 at current values) included a significant element of pecuniary loss. The complainant had been unable to find a suitable job because of her care commitments, had sought medical treatment for depression, had exhausted her substantial savings and was reduced to living on income support, her previous standard of living having disappeared.

This refers to *Report 97/A/1305 against Kent CC* in 1998 where the LGO considered a complaint by Ms Miller, the mother of a young man with learning difficulties who was left without a residential placement from October 1996 to June 1998 as a result of maladministration. During this period his needs could not be fully met. His mother was caused a great deal of anxiety and her life was disrupted. The LGO recommended that the council should pay Ms Miller £15,000. This award may have included some element to reflect Ms Miller's assertion that she had not been able to return to full-time work during this period, although the report does not specify that.

Where the complainant has not suffered an easily quantifiable financial loss, the default approach for assessing financial compensation is to consider what the cost of acting without maladministration would have been to the authority. There is an obvious logic to this: the 'lost value' can be easily calculated and authorities should not profit from their own maladministration.

A good example of such a recommendation is that made in the report on *Complaint 05/C/11921 against Trafford MBC*, 26 July 2007. Here the LGO found that the authority should pay over £100,000 for a service failure involving a child with learning disabilities ('Daisy' for the purposes of the report) who had been living at a centre partly funded by the Learning Skills Council with the aim that this would provide a transition to her permanent adult placement. This transitional placement finished in July 2005. The council offered one permanent placement at an adult centre, which the family rejected. As no further offer was made, the family felt they had no choice but to care for their daughter in the family home (where she was still living at the date of the report).

The case therefore involved a failure properly to assess needs which the authority had a statutory duty to meet:

[t]he council has a legal duty to meet Daisy's needs as a disabled person. It is clear the council has failed to do so. This is maladministration (para 55).

The council's maladministration resulted in deterioration in the mental state of the person most directly affected: '[a] most worrying aspect of this case is the level to which Daisy's condition, behaviour and abilities may have deteriorated during the last 18 months' (para 71) and a failure to address the expressed concerns (about the suitability of the placement that had been offered).

On any view then, both the maladministration and injustice were significant. The LGO recommended that Trafford MBC should pay the complainants £1,000 per week for every week they had to care for Daisy since August 2005 (a figure based on, but slightly less than, the cost of an effective and appropriate service, which is what the council had maladministratively failed to provide). The report also recommended payment of a further £3,000 in acknowledgement of the family's distress, anxiety, and time and trouble in pursuing the complaint with the council and, looking to the future, the commissioning of an independent assessment of Daisy's and her parents' needs. This was to be followed by production of a clear plan for the identification of a long-term placement. Last, the LGO

recommended that the council report back regularly on its progress.

The lost-value approach is not always followed and there may be reductions made to the figure it would produce: *Remedies: guidance on good practice 6* emphasises that 'other relevant factors' should be taken into account such as 'the actions of the complainant and the role played by others'. This guidance emphasises that the responsibility for the injustice may not lie exclusively at the public authority's door.

On the other hand, the ombudsmen accept that complainants will often be put to expense in pursuing complaints that they would not have incurred but for the maladministration. This can include legal costs and other professional fees. *Remedies: guidance on good practice 6* comments (at pp8–9):

41 It may sometimes be appropriate to recognise that the nature of the complainant's difficulty with the authority was such that expenditure on professional fees in pursuing the dispute was justified; for example, legal fees or fees for a planning consultant.

42 In all such cases, what has to be decided is whether it was reasonable for the complainant to incur these costs in the circumstances of the case, and whether they resulted from the maladministration. Factors which could be taken into account may include:
– the complexity of the case;
– the circumstances of the complainant;
– whether the complainant is vulnerable; and
– whether the complainant could reasonably be expected to pursue the matter without professional assistance.

43 Where appropriate, the recommendation may be for a contribution to costs rather than reimbursement of the whole of the expenditure. (For example, because it was reasonable to engage a solicitor, not at the outset but at a later stage, or because the amount of professional advice commissioned was disproportionate.) In respect of legal fees it may be relevant to establish whether any of the costs were paid with assistance from the Legal Services Commission.

44 Complainants usually do not need a solicitor or other professional adviser to help them make a complaint to the Ombudsman. So we are unlikely to recommend that fees for this purpose should be reimbursed unless there are exceptional circumstances.

Complaint 03/A/15819 against Waltham Forest LBC, 9 November 2005, involved a recommendation for full reimbursement of solicitors' costs at private rates notwithstanding the case being run on a Legal Help basis: the complainant was a vulnerable refugee who could not have been expected to pursue his complaint unassisted, and it was inappropriate that the solicitors should have brought the matter to the LGO's attention at a loss.

Indirect redress remedies

Aside from direct financial loss or the value of a lost service, the ombudsmen recognise that service-failure maladministration may have other consequences that call for financial compensation. Sometimes this is recommended in addition to direct redress (as in *Complaint 05/C/11921 against Trafford MBC* and *Trusting in the pensions promise*, HC 984, TSO, 2007).[3] Sometimes only one or other type of payment is considered appropriate. The ombudsman reports consistently identify two consequences which call for particularly significant compensation: loss of childhood or proper family life, and distress.

Complaint 05/C/14043 against Birmingham City Council, 13 March 2007 is a good example of the former. The case concerned a child who was put in care subject to a court order to promote contact with members of her family living abroad. The council maladministratively failed to facilitate that contact. The ultimate redress agreed to by the council was payment of £40,000 in recognition of the four 'lost years' when she was deprived of a proper childhood, well being and family life (in the sense of that which a child in care with living relatives could properly hope to enjoy):

Given that the council had failed so completely to ensure the well-being of a child in its care, and in addition had acted in contempt of the contact order made in court, I find the council's offer of £4,000 compensation to Natasha derisory. By the council's own calculation Natasha ***was deprived of over three and a half years of her childhood*** *as a result of the council's incompetence and complete failure to act in any way which promoted her welfare.*

I think family life is worth considerably more than £4,000 to a child who has lived in turmoil from the age of two. A more appropriate sum of compensation would be ***£10,000 a year for each year that Natasha was left without a proper family life****. In recommending a total payment of £40,000, I have also taken into account the fact that the council failed to pay for any of the annual contact visits which it was supposed to fund* (emphasis added).

The council also agreed to pay a recommended £10,000 to her grandparents, as they were deprived of the opportunity to care for their granddaughter, and to reimburse the expenses they incurred in fares and telephone calls.

Distress embracing "stress, anxiety, frustration, uncertainty, worry, inconvenience or outrage" is discussed in *Remedies: guidance on good practice 6* and many published LGO reports. At p48 it suggests that payments:

… could range from £50 (for example, for a period of uncertainty about the date or outcome of an assessment) to ***thousands of pounds in cases where, for example,*** *allegations of abuse made against a complainant have not been investigated properly, or* ***action requested by a complainant to prevent children from being abused has not happened*** (emphasis added).

Similarly, *Principles for remedy* commented that it is always appropriate for public bodies to consider 'financial compensation for direct or indirect financial loss, loss of opportunity, inconvenience, distress, or any combination of these'.

There are several further useful examples of significant distress payments in the LGO reports:

The first is the case of *Complaint 05/B/10487 against Staffordshire CC*, 14 December 2006, which involved the failure to stop the bullying of a looked after child in a residential unit and the mishandling of his complaints. As a result he suffered four months of verbal and physical bullying that left him afraid and isolated. He was assaulted, abused and his possessions were taken. Compensation of £4,000 (ie, £1,000 for each month of 'lost childhood') was recommended as was the strengthening of procedures.

Then there is *Complaint 03/A/15819 against Waltham Forest LBC*. This concerned a vulnerable, epileptic refugee who was owed a housing duty which had not been discharged by the council, leaving him to sleep rough on the streets and in churches for five weeks until judicial review proceedings were threatened. A subsequent complaint about this was mishandled. Part of the redress recommended was a payment of £7,500, a payment which acknowledged both the lost value of the service that had not been provided and the consequences of non-provision.

Investigation into *Complaint 02/B/16976 against Cornwall CC*, 27 September 2005 is mentioned in the LGO's *Social services casebook*. This concerned removal of two boys from established foster carers in breach of policies and without a proper explanation. The LGO found that the brothers had suffered 'significant emotional distress' by not being able to live together as they wanted. The

Ombudsman asked the council to pay compensation to the carers and £10,000 each to the brothers in recognition of this. Significant changes to procedures were also made.

At the very highest end of the spectrum, both the HSC and LGO have recommended compensation of £25,000 for serious maladministration that has had long-term consequences for the complainants' mental health (see *Remedy in the NHS*, HC 632, TSO, 2008, p15).[4]

When a person has become mentally unwell, or an existing condition is exacerbated thanks to maladministration, counselling may also be recommended is. *Remedies: guidance on good practice 6* states that local authorities may be asked to:

… commission and pay for an independent assessment of any need for counselling or other therapy the person concerned may have, to help him or her deal with psychological damage suffered as a result of maladministration and to fund the provision as appropriate (p42).

Time and trouble in pursuing a complaint can also be compensated for. *Remedies: Guidance on good practice 6* suggests that this element need not always be included (for instance where minor failings in the complaints process have occurred) but in general complaints concerning social services complaints may be 'higher than the [normal] range of £50 to £250' (at p49) to reflect the difficulty which a complainant with physical or mental health problems, or who is vulnerable for any other reason, may have in pursuing a complaint.

Where existing maladministration is compounded by serious failures in a statutory complaints procedure, separate and significant awards can be made under this head. In this context, the LGO has stressed that the possibility of compensation should be an element in a good complaints procedure: see *Guidance on good practice 1: devising a complaints system*, Appendix 2, February 1992. He has also expressed irritation with authorities who do not, in appropriate cases, offer to pay complainants compensation (or some other appropriate recompense) as part of their settlement (see LGO, *Annual report 1996/97*, p11). Appropriate redress is particularly important when recommended by a complaint panel, most of all in service failure cases (see LGO, *Annual report 1998/99*, p11 and *Complaint 00/B/09315 against Hertfordshire CC*). C*omplaint 96/C/4315 against Liverpool City Council,* 20 August 1998 is a good example of an award at the higher end of the range specifically concerned with mishandling of a complaint. The council's actions had caused 'extreme stress' to the service user's daughter. Among the remedies recommended was a £10,000 payment to her in recognition of this.

Systemic change

Remedies: guidance on good practice 6 comments:

52. It may sometimes be clear that other people, and not just the person involved in the complaint, have been – or may have been – similarly affected. We can only formally recommend a remedy for the person who has made a complaint or a person on whose behalf a complaint has been made. But, in appropriate circumstances, we would suggest that the authority should consider the situation of other people with a view to applying a similar remedy (p10).

Remedies can now be recommended for those who have not complained but are similarly placed thanks to Local Government Act 1974 s26D.

Principles for remedy stated:

Part of a remedy may be to ensure that changes are made to policies, procedures, systems, staff training or all of these, to ensure that the maladministration or poor service is not repeated. It is important to ensure that lessons learned are put into practice.

It is a false economy and poor administrative practice to deal with complaints only as they arise and to fail to correct the cause of the problem. Learning from complaints, and offering timely and effective remedies, gives the best outcome in terms of cost effectiveness and customer service – benefiting the service provider, the complainant and the taxpayer.

The public body should ensure that the complainant receives:

- *an assurance that lessons have been learned*
- *an explanation of changes made to prevent maladministration or poor service being repeated.*

Quality of service is an important measure of the effectiveness of public bodies. Learning from complaints is a powerful way of helping to develop the public body and increasing trust among the people who use its services. So systems should exist to:

- *record, analyse and report on the outcomes of complaints and remedies*
- *apply the information to improving customer service.*

The approach of the LGO to recommendations for systemic change is best illustrated by three examples.

The first is in *Complaint 05/C/14043 against Birmingham City Council* discussed above. Here the complainant asked the LGO to make recommendations for changes in future practice. He did not do so but only because, as was noted at para 68 of the report:

I was so concerned about the council's failings in this case that I felt it necessary to meet with the current Director and Head of Service (neither of whom were in post at the time of these events) to seek assurances that action had been taken to improve systems and practice …

It is clear that extensive changes have been introduced and that management is seeking to 'embed' appropriate professional practice and active supervision. Whilst this does not provide any guarantee that such a case could not arise again, it does seem that the likelihood is significantly reduced.

In *Complaint 03/A/15819 against Waltham Forest LBC*, the LGO had received no such assurances. Besides a significant individual remedy (see above) he recommended policies be reviewed and staff be retrained by an external expert on the special needs of vulnerable refugees.

In *Trusting in the pensions promise*, the PCA was considering maladministration that may have impacted on over 125,000 people. She accepted over 200 complaints and identified four representative 'lead' cases. Her findings were made in respect of the cases actually investigated, but the recommendations were for redress for the class as a whole.

The ombudsmen and the Administrative Court

As noted throughout this article, the courts have been very respectful of the way the ombudsmen themselves have defined maladministration and injustice. They have been equally wary of interfering with the application of those concepts in individual cases whether the ombudsman's decision is to begin or abandon an investigation (see, eg, *Re Fletcher's Application* [1970] 2 All ER 527, CA and *R (Maxhuni) v Commissioner for Local Administration for England* [2002] EWCA Civ 973, 12 July 2002; [2003] LGR 113) or in reaching conclusions that no maladministration has occurred. Such decisions have always been acknowledged to be highly discretionary in nature and made by an expert body. As Simon Brown LJ observed in *R v Parliamentary Commissioner ex p Dyer* [1994] 1 WLR 621 at 626, it follows that judicial review challenges will always be inherently difficult.

Given this, the ombudsmen have generally emerged from the Administrative Court unscathed, though there are a few notable exceptions. In *R v Parliamentary Commissioner for Administration ex p Balchin (No 2)* (2000) 79 P & CR 157 para 47, Dyson J stressed that the PCA had to engage with the principal controversial issues in the complaint by giving reasons 'sufficient to enable the parties to know what he decided, and why'. In *R (Atwood) v Health Service Commissioner* [2008] EWHC 2315 (Admin), 6 October 2008, Burnett J elaborated on this, drawing an analogy with planning inspector decisions. A HSC report should be 'read as a whole in a fair way and that very fine analysis of small parts of it is likely to defeat that aim' (at para 48), however:

… the general approach to reasons in the planning context (which have been read over into other areas of administrative decision making) is appropriate in cases involving the Ombudsman. Yet it is important to bear in mind the approach is a flexible one. In each case a court of review will be looking to determine whether the reasons were adequate, whether the conclusions on the principal contentious issues have been stated, and whether the principal factual disputes have been resolved with some explanation. Whether reasons are adequate will inevitably depend upon the nature of the issue under consideration. The more serious the allegation and impact of any adverse finding the more explanation will be required of the conclusions. A process which resulted in almost bare conclusions without significant reasoning would be unfair to those criticised (para 47).

Though it has been stressed many times that the ombudsmen are permitted to develop the detail of their own procedures within the applicable statutory frameworks, a high standard of fairness is expected in the course of their investigations, so, in *R (Turpin) v Commissioner for Local Administration* [2001] EWHC 503 (Admin), 28 June 2001; [2003] LGR 133, the failure to disclose notes of a critical interview to the complainants to enable them to comment proved fatal to the report ultimately produced. This issue is, however, shortly to be considered by the Court of Appeal in an appeal arising out of *R (Kay) v Heath Services Commissioner* [2008] EWHC 2063 (Admin), 11 July 2008.

Public authorities that are dissatisfied with the LGO's findings will, like complainants, either have to accept them or bring a challenge that is unlikely to prevail. In *R v Local Commissioner ex p Eastleigh BC* [1988] QB 855, CA, Lord Donaldson concluded :

Whilst I am very far from encouraging councils to seek judicial review of an ombudsman's report … in the absence of a successful application for judicial review and the giving of relief by the court, local authorities should not dispute an ombudsman's report, and should carry out their statutory duties in relation to it (at 869G–H).

Were local authorities free to take a different view of a LGO's findings:

Such an action would wholly undermine the system of ombudsman's reports and would, in effect, provide for an appeal to the media against his findings. The Parliamentary intention was that reports by ombudsmen should be loyally accepted by the local authority concerned (at 867).

The position with PCA reports is different. In *R (Bradley) v Secretary of State for Work and Pensions* [2008] EWCA Civ 36, 7 February 2008; [2008] 3 All ER 1116, the Court of Appeal considered the legality of a ministerial decision to reject *Trusting in the pensions promise*. It held that parliamentary accountability was the primary means of enforcement. PCA findings are not 'binding' as the claimants had argued, save in the case of the LGO. If a government department does not accept a finding of maladministration, it is not obliged to bring a judicial review challenging it, but rather to provide a full and reasoned explanation to parliament through a minister. Specific parliamentary machinery, such as the Public Administration Select Committee, exists to facilitate this.

However, the court went on to say that PCA findings can only be rejected when it is rational to reject them (which is not the same thing as where it is possible to reach a different, rational view about whether a given set of facts give rise to maladministration: there must be some respect for the office of the PCA and the nature of her expert investigation). Here, as Bean J concluded at first instance, it was not rational for the secretary of state to reject the PCA's findings that the government material was misleading. Nor was it correct for Bean J to find that there was no causal link between the identified maladministration and many of the forms of injustice identified by the PCA, specifically outrage, lost opportunities to make informed choices or take remedial action, distress, anxiety, uncertainty and distortion of reality (though there might well not be a causal link between maladministration and all the financial losses of all the affected scheme members).

Recommendations – irrespective of the ombudsman involved – are by their very nature not binding. There is an implicit expectation that they will be followed and this is almost always so. The relevant ombudsman will normally write to the individual or body concerned around three months after the issue of the report to enquire about compliance. Where there is none in the local government context, provision exists to require the local authority's stance to be made public and occasionally the LGO will publish a supplementary report. The PCA/HSC may decide to lay a special report before both Houses of Parliament if, in her view, inadequate steps are taken in response to findings or recommendations.

Of course, a decision potentially amenable to judicial review is made whenever an ombudsman recommendation is rejected. To the writer's knowledge, so far, only two such cases have ever been issued and neither has reached a full hearing. It therefore remains to be seen what standard of justification and reasoning the court will require of public authorities challenged in respect of such decisions, especially if the findings of maladministration and fact are themselves unchallenged. Interesting questions also arise about the fairness of the procedure most authorities adopt when deciding whether or not to implement recommendations: generally this is done behind closed doors with officers' reports not disclosed to complainants for comment. When a complaint involves race, disability or gender issues, it is also strongly arguable that the statutory positive equality duties will be engaged.

1 Available at: www.lgo.org.uk/GetAsset.aspx?id=fAAxADIANgB8AHwARgBhAGwAcwBlAHwAfAAwAHwA0.
2 *Principles for remedy* was first published in October 2007. Readers should note that the text quoted in this article relates to the original version. The principles were reprinted with minor amendments in February 2009. The revised document is available at: www.ombudsman.org.uk/pdfs/Principles_for_Remedy.pdf.
3 Available at: www.ombudsman.org.uk/pdfs/pensions_report_06.pdf.
4 Available at: www.ombudsman.org.uk/pdfs/NHS_Remedies_200806.pdf.

John Halford is a partner in the public law and human rights department of Bindmans LLP, London. He can be contacted at: j.halford@bindmans.com.

Recent developments in practice management

Vicky Ling considers how the example of a ten-point plan and review implemented by one solicitors' firm has led to improvements in efficiency and staff morale, and increased business.

Many organisations with Legal Services Commission (LSC) contracts will need to implement radical restructuring programmes to cope with the LSC's requirement to deal with higher volumes of work across more categories of law. Recently I came across a firm that adopted a ten-point plan and achieved some impressive results. The firm was embarking on an upgrade of its IT systems and introducing new case management software. The firm felt that this was also an ideal opportunity to review the way it worked, and to introduce more efficient practices and procedures.

Identify what you need to change

No one had made a point of reviewing practices and procedures for some years, probably not since the first office manual was written. It was known that the branch office did not comply with the manual and went its own way. The secretaries and administrators felt that they could contribute more, but they did not feel that their ideas were taken into consideration.

Consult

The managing partner and the practice manager took responsibility for the project. They talked to people throughout the firm, including partners, solicitors, caseworkers, secretaries and administrators.

Explain why change is needed

Most people working in legal aid long for the merry-go-round to stop and for things to stay as they are, if only for a while. It is understandable, but it is not going to happen. The partners could see that the firm would have to deal with more cases, particularly Legal Help, without increasing its cost base. They hoped that better division of work between secretaries, support staff and fee earners would help them achieve this aim.

Involve partners and staff

Heads of department explained that the firm was committed to legal aid and would be upgrading the IT systems to help them work more effectively on clients' cases and fit in with the LSC's electronic working developments. This sounded positive and went down well. People also liked the fact that their views were being sought.

On the administrative side, lots of nagging issues which people had put up with for years were now on the agenda. There were differing views about some aspects of administration, for example, who should identify the outcome code at the end of a case. Some people thought it should be an administrator and others the caseworker. In the end it was decided that it was quicker for the caseworker to do it as s/he had the best knowledge of the case. This meant a small amendment to the office manual and the file-closing form, but it would result in better key performance indicators under the contract.

Not surprisingly, some people had strong ideas about where the workstations would be located, especially if it meant they would have to move. Others were worried that their workload would increase unmanageably and the new software would cause more problems than it solved.

Find champions

Several alternative workstations were identified, and staff could choose which they preferred. People who knew what they wanted got it first and their colleagues could see that it did make their lives easier.

Provide training

It is very tempting to cut back on training when implementing a new system, whether or not it is software-based. The cost of a day's training can seem so high that reducing the numbers of people doing training or its duration can seem attractive, but it is a false economy. Firms need everyone who will be involved to feel confident using the new system. It is also worth considering broader training needs, for example, all fee earners would use the case management software and enter their own time into the time recording, but not all of them had good typing skills. This had to be addressed to ensure that people got the most out it.

Seek and provide feedback

This was probably the masterstroke. All partners and staff were encouraged to email the practice manager so that they could log any problems and contribute ideas for making things work better. People were encouraged to provide their ideas and reassured that they would not be seen as moaners if their comments appeared negative. They were also told which ideas had been acted on and why some things would have to wait or could not be done.

Provide a role model

The managing partner was among the first to use the case management system. She was quickly aware of its strengths and limitations, so that she could emphasise the positive aspects and work with the practice manager to resolve or minimise difficulties. She made sure the partners kept their promises to provide information and review the new system.

Follow up

A series of short breakfast meetings (with pastries) involving partners and senior staff, provided the opportunity to identify how well things were being implemented and where further work was needed or things needed to be done differently. The managing partner also made sure that she visited the branch office on a regular basis and asked everyone how they felt things were going, including receptionists, trainees and support staff as well as solicitors and partners. People told her where improvements were needed, but they were overwhelmingly positive.

Acknowledge and praise achievements

The managing partner remembered which ideas people had contributed and mentioned them as she went along. However, she was also frank about issues that concerned her and where she thought there might be problems. She praised those who had come up with the solutions, and the practice manager, whose dogged attention to detail had ensured they were implemented.

In six months, administration had been reviewed, and the office manual updated. New workstations and case management had been installed throughout the practice. Staff were feeling more positive and more clients were being taken on.

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. She is co-author, with Simon Pugh, of *Making Legal Aid Work: a handbook for practitioners*, LAG, April 2009.

updater

Legislation

CHILDREN

Children and Young Persons Act 2008 (Commencement No 1 and Saving Provision) Order 2009 SI No 268

This Order is the first Commencement Order made by the Secretary of State for Children, Schools and Families under the Children and Young Persons Act (CYPA) 2008 and brings the Act into force as follows:

■ Brings into force on 1 April 2009 CYPA ss31 and 32. These sections make provision for the supply of information concerning the death of children to Local Safeguarding Children Boards and for the power of the Registrar General to supply information to national authorities. These sections extend to, and are brought into force in respect of both, England and Wales.

■ Brings into force (in relation to England) on 12 February 2009 the following provisions of the CYPA: ss6(2), 8(3) and Sch 2, 20(3), 21(2) in so far as it inserts subsection (5B) into s23C of the Children Act (CA) 1989, s33, s34(1) to (4) (partially) and s35.

– Section 6(2) of the CYPA makes provision for an order bringing s1 (power to enter into arrangements for discharge of care functions) into force to do so by reference to particular local authorities or local authorities of a particular description.

– Section 8(3) of, and Sch 2 to, the CYPA make transitory modifications of CA 1989 Sch 2.

– Section 20(3) provides for the appropriate national authority to make regulations requiring the governing body of a maintained school to ensure that the designated person (the member of staff designated by the governing body as having responsibility for promoting the educational achievement of pupils at a school who are looked after by a local authority) has the qualifications or experience, or both, prescribed by the regulations.

– Section 21(2) amends CA 1989 s23C: s23C(5B) provides for the appropriate national authority to make regulations in relation to entitlements to payment in respect of higher education.

– Section 33 of the CYPA makes provision in relation to research and returns of information under the CA 1989.

— Section 34 amends Adoption and Children Act (ACA) 2002 s12 which make provision for the independent review of determinations relating to adoption.

– Section 35 of the CYPA extends the period allowed for the making of regulations under CA 2004 ss45 or 46.

■ Brings fully into force (in relation to England) on 1 April 2009 CYPA s34 and related repeals in Sch 4. In addition, the Order makes a saving provision in respect of regulations made under ACA s12.

■ Brings into force (in relation to England) on 6 April 2009 CYPA s30 and a related repeal in Sch 4. Section 30 removes a restriction on the hearing of applications for discharge of emergency protection orders.

CRIME

Criminal Justice and Immigration Act 2008 (Commencement No 6 and Transitional Provisions) Order 2009 SI No 140

This Order brings into force the provisions of the Criminal Justice and Immigration Act 2008 set out in article 2 on 1 February 2009 as follows:

■ s48(1)(a) (the giving of youth conditional cautions);

■ s123 (review of anti-social behaviour orders etc);

■ s124 (individual support orders);

■ s148(2) (consequential etc amendments and transitional and saving provisions) in so far as it relates to Sch 27 paras 33 and 34 (see below);

■ in Sch 9 (alternatives to prosecution for offenders under 18):

– para 1;

– para 3 but only to the extent that it inserts Crime and Disorder Act 1998 ss66G and 66H;

– para 4;

■ Sch 27 paras 33 and 34 (transitory, transitional and saving provisions).

IMMIGRATION

Immigration (Passenger Transit Visa) (Amendment) Order 2009 SI No 198

This Order is made under Immigration and Asylum Act 1999 ss41 and 166(3) and amends the Immigration (Passenger Transit Visa) Order 2003 SI No 1185. The 2003 Order requires certain passengers to hold a transit visa to pass through the UK without entering while transiting to another country or territory.

This Order provides that a person who holds a passport issued by South Africa, and who has not previously entered the UK lawfully using that passport will require a transit visa. It also has the effect that nationals and citizens of Jamaica will require a transit visa. In force 3 March 2009.

LEGAL AID

Criminal Defence Service (Information Requests) (Prescribed Benefits) Regulations 2009 SI No 212

Under Access to Justice Act 1999 Sch 3 the authority responsible for granting rights to publicly funded representation for criminal cases may make an information request to the secretary of state for information about an individual who has applied for representation, to facilitate the making of decisions about financial eligibility. The information may include information about the individual's benefit status. These regulations prescribe the relevant benefits and permit the authority to seek information about the amount of any prescribed benefits being received. In force 2 March 2009.

MENTAL HEALTH

Mental Health Act 2007 (Commencement No 10 and Transitional Provisions) Order 2009 SI No 139

This Order brings into force Mental Health Act (MHA) 2007 s30 in so far as it is not already in force and the remaining provisions of s50 and its related consequential amendments and repeals.

■ Section 30 inserts provisions about independent mental health advocates into the MHA 1983. This Order commences this section in so far as it is not already in force in England. It is already fully in force in Wales.

■ Section 50 makes amendments to provisions of the Mental Capacity Act 2005 relating to deprivation of liberty safeguards.

This Order commences s50 for all purposes and Schs 7 and 9, in so far as they are not already in force and Sch 8. It also makes transitional provisions, which are set out in the Schedule:

■ para 2 extends time for completing assessments for a standard authorisation from 21 days to 42 days provided that the request is received on or before 30 April 2009;

■ para 3 extends the period of an urgent authorisation from seven to 21 days, provided it is given on or before 30 April 2009;

■ para 4 precludes requests for extensions of the duration of urgent authorisations given on or before 30 April 2009. In force 1 April 2009.

POLICE

Police Act 1997 (Criminal Records) (Electronic Communications) Order 2009 SI No 203

This Order, which comes into force on 2 March 2009, amends Police Act (PA) 1997 Part V and makes consequential amendments to the Safeguarding Vulnerable Groups Act 2006 in respect of applications made to the secretary of state for a criminal records certificate or an enhanced criminal records certificate as follows:

■ inserts new provisions into PA 1997 ss113A and 113B which have the effect that an application made under those sections need not be countersigned if the application is submitted electronically in accordance with conditions and requirements determined by the secretary of state; and

■ provides that any application submitted electronically under these new provisions is deemed to have been made in the prescribed form.

PRACTICE AND PROCEDURE

Tribunal Procedure (Amendment) Rules 2009 SI No 274

These Rules amend the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) (TP(F-tT)(SEC)) Rules 2008 SI No 2685) and the Tribunal Procedure (Upper Tribunal) (TP(UT)) Rules 2008 SI No 2698 as following:

■ In relation to the TP(F-tT)(SEC) Rules, these Rules amend the definition of 'asylum support case' in order to ensure that it is clear that proceedings brought by those persons with the same appeal rights as asylum-seekers are included within the definition.

■ In relation to the TP(UT) Rules, these Rules make amendments to make provision for the Upper Tribunal to deal with cases allocated to the Finance and Tax Chamber of the Upper Tribunal.

■ These Rules make minor amendments to correct and clarify the drafting of the TP(UT) Rules as originally made. In force 1 April 2009.

▶ Books

Actions against the police

Police Misconduct
legal remedies 4th edn
John Harrison/Stephen Cragg/
Heather Williams QC
2005 ♦ Pb 978 0 905099 91 0 ♦ 760pp ♦ £37

Community care

Community Care and the Law
4th edn
Luke Clements/Pauline Thompson
2007 ♦ Pb 978 1 903307 47 2 ♦ 1064pp ♦ £48

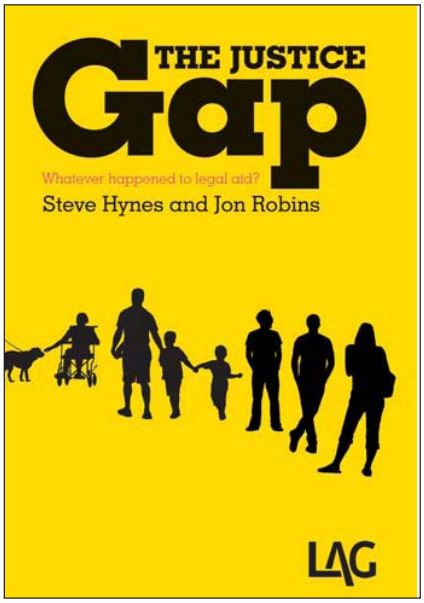
Crime

ASBOs
a practitioner's guide to defending anti-social behaviour orders
Maya Sikand
2006 ♦ Pb 978 1 903307 41 0 ♦ 496pp ♦ £45

Defending Suspects at Police Stations 5th edn
Ed Cape
2006 ♦ Pb 978 1 903307 44 1 ♦ 1008pp ♦ £52

Defending Young People
in the criminal justice system 3rd edn
Mark Ashford/Alex Chard/
Naomi Redhouse
2006 ♦ Pb 978 1 903307 34 2 ♦ 1008pp ♦ £48

Abuse of Process
a practical approach
Colin Wells
2006 ♦ Pb 978 1 903307 46 5 ♦ 384pp ♦ £45



Identification
investigation, trial and scientific evidence
Paul Bogan
2004 ♦ Pb 978 1 903307 25 0 ♦ 502pp ♦ £37

Reconcilable Rights?
analysing the tension between victims and defendants
Edited by Ed Cape
2004 ♦ Pb 978 1 903307 31 1 ♦ 148pp ♦ £15

Debt

Enforcement of Local Taxation
Alan Murdie/Ian Wise
2000 ♦ Pb 978 1 903307 01 4 ♦ 384pp HALF PRICE
** Reduced from £25 to £12.50*

Employment

Employment Law
an adviser's handbook 7th edn
Tamara Lewis
2007 ♦ Pb 978 1 903307 53 3 ♦ 864pp ♦ £30

Employment Tribunal Claims
tactics and precedents
2nd edn
Naomi Cunningham/Michael Reed
2007 ♦ Pb 978 1 903307 55 7 ♦ 472pp ♦ £30

Discrimination Law Handbook
2nd edn
Camilla Palmer/Barbara Cohen/Tess Gill/
Karon Monaghan/Gay Moon/Mary Stacey
Edited by Aileen McColgan
2007 ♦ Pb 978 1 903307 38 0 ♦ 968pp ♦ £55

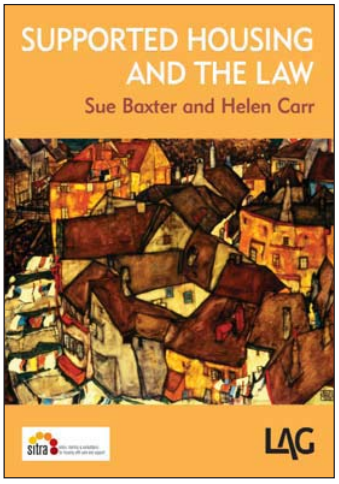
Age Discrimination Handbook
Declan O'Dempsey/Schona Jolly/
Andrew Harrop
2006 ♦ Pb 978 1 903307 48 9 ♦ 760pp ♦ £35

Maternity and Parental Rights
a guide to parents' legal rights at work
3rd edn
Camilla Palmer/Joanna Wade/
Katie Wood/Alexandra Heron
2006 ♦ Pb 978 1 903307 40 3 ♦ 880pp ♦ £35

Employment Tribunal Procedure
3rd edn
Judge Jeremy McMullen QC/
Rebecca Tuck/Betsan Criddle
2004 ♦ Pb 978 1 903307 29 8 ♦ 758pp ♦ £37

Family

Family Emergency Procedures
a guide to child protection and domestic violence 2nd edn
Nicola Wyld/Nancy Carlton
1998 ♦ Pb 978 0 905099 68 2 ♦ 448pp HALF PRICE
** Reduced from £28 to £14*



Gypsy and Traveller law

Gypsy and Traveller Law
2nd edn
Edited by Chris Johnson/Marc Willers
2007 ♦ Pb 978 1 903307 52 6 ♦ 592pp ♦ £30

Housing

Housing Law
an adviser's handbook NEW
Diane Astin
Dec 2008 ♦ Pb 978 1 903307 43 4 ♦ 968pp ♦ £35

Leasehold Disputes
a guide to Leasehold Valuation Tribunals
2nd edn
Francis Davey/Justin Bates
April 2008 ♦ Pb 978 1 903307 62 5 ♦ 376pp ♦ £30

Housing Law Casebook 4th edn
Nic Madge/Claire Sephton
Feb 2008 ♦ Pb 978 1 903307 45 8 ♦ 1192pp ♦ £55
** Includes a free CD-rom of complete contents*

Supported Housing and the Law
Sue Baxter/Helen Carr
2007 ♦ Pb 978 1 903307 51 9 ♦ 680pp ♦ £30

Homelessness and Allocations
7th edn
Andrew Arden QC/Caroline Hunter/
Lindsay Johnson
2006 ♦ Pb 978 1 903307 37 3 ♦ 880pp ♦ £45

Defending Possession Proceedings 6th edn
Nic Madge/Derek McConnell/
John Gallagher/Jan Luba QC
2006 ♦ Pb 978 1 903307 30 4 ♦ 840pp ♦ £48

Quiet Enjoyment 6th edn
Andrew Arden QC/David Carter/
Andrew Dymond
2002 ♦ Pb 978 1 903307 14 4 ♦ 320pp ♦ £29

▶ Books

Housing

Housing and Human Rights Law
Christopher Baker/David Carter/
Caroline Hunter

2001 ♦ Pb 978 1 903307 05 2 ♦ 252pp ♦ £19

Human rights

Human Rights Act Toolkit
2nd edn

Jenny Watson/Mitchell Woolf

Feb 2008 ♦ Pb 978 1 903307 61 8 ♦ 268pp ♦ £30

European Human Rights Law
Keir Starmer QC

HALF PRICE

1999 ♦ Pb 978 0 905099 77 4 ♦ 960pp
** Reduced from £35 to £17.50*

Immigration and asylum

Support for Asylum-seekers
a guide to legal and welfare rights 2nd edn

Sue Willman/Stephen Knafler/
Stephen Pierce

HALF PRICE

2004 ♦ Pb 978 1 903307 24 3 ♦ 788pp
** Reduced from £39 to £19.50*

Law reform

The Justice Gap
NEW

whatever happened to legal aid?

Steve Hynes/Jon Robins

Mar 2009 ♦ Pb 978 1 903307 63 2 ♦ 256pp ♦ £20

Beyond the Courtroom
a lawyer's guide to campaigning

Katie Ghose

2005 ♦ Pb 978 1 903307 35 9 ♦ 396pp ♦ £20

Practice and procedure

Inquests
a practitioner's guide 2nd edn

Leslie Thomas/Adam Straw/Danny Friedman

Aug 2008 ♦ Pb 978 1 903307 57 1 ♦ 736pp ♦ £48

The Adviser's Toolkit
giving legal advice

Elaine Heslop

2007 ♦ Pb 978 1 903307 49 6 ♦ 384pp ♦ £22

Parole Board Hearings
law and practice

Hamish Arnott/Simon Creighton

2006 ♦ Pb 978 1 903307 42 7 ♦ 356pp ♦ £24

Public law

Judicial Review Proceedings
a practitioner's guide 2nd edn

Jonathan Manning

2004 ♦ Pb 978 1 903307 17 5 ♦ 720pp ♦ £34

▶ Training
Spring 2009

Gypsy and Traveller Law Update
13 March

£195 + VAT 6 hours CPD Course grade: U
Trainers: Chris Johnson/Tim Jones/
Marc Willers

This course provides a comprehensive review of developments in Gypsy and Traveller law. It is designed for legal aid practitioners, Gypsy and Traveller advice and liaison workers and voluntary sector workers with a basic knowledge of Traveller issues. Local government housing, planning and education departments responsible for Gypsy and Traveller matters will also find this course particularly useful.

Employment Law Essentials
17 March

£195 + VAT 6 hours CPD Course grade: S
Trainer: Tamara Lewis

Suitable for claimant solicitors, voluntary sector and trade union advisers, this course assumes a solid basic knowledge of employment law and general familiarity with Tamara's *Employment law – an adviser's handbook*. Rather than provide an academic analysis of new case-law, this course will focus on the practical implications for advisers.

Human Rights and Discrimination Update
20 March

£195 + VAT 6 hours CPD Course grade: S
Trainers: Catherine Casserley/Declan O'Dempsey

This course will lead from an understanding of the basic use of the Human Rights Act 1998 and the European Convention on Human Rights and their use in situations of discrimination, through the case-law to a discussion of the potential applications of human rights arguments in areas such as work with children, gender and race issues, freedom of expression, privacy, religion and belief, and other areas of discrimination.

LAG

Community Care Law Reports

***Community Care Law Reports* (CCLR) is the only law reports service devoted to community care issues and the rights of vulnerable people to accommodation and services.**

'In an area of growing social and legal importance, the* Community Care Law Reports *provide a swift, comprehensive and conveniently aggregated compilation of the major decisions.'
Michael Beloff QC

Subscriptions
2009 parts service: £285

Each subscription entitles the subscriber to two free places on each CCLR practitioner seminar. Subsequent places will cost £25 + VAT per delegate.

If you register your interests at: www.lag.org.uk/getupdates, we will e-mail details of LAG's courses to you.

Training information

▶All courses take place in central London unless otherwise stated.

***▶Subscribers to Legal Action** receive a 10% discount on course fees! Discount applies to mailing address only.*

CONTINUING PROFESSIONAL DEVELOPMENT
LAG is accredited with the Law Society, the Bar Council and the Institute of Legal Executives.

COURSE GRADES Law Society-accredited courses are graded as follows:
B Basic/Introductory I Intermediate
A Advanced U Updating
S Suitable for all levels

CONCESSIONARY RATES may be available for certain individuals and organisations.

IN-HOUSE TRAINING
Do you have ten or more people in your organisation who require training on the same subject? If so, we may be able to provide an in-house course at a more cost-effective rate. For more information about in-house training, concessionary rates or for any other training enquiries, please contact the Training Department, tel: 020 7833 2931 or e-mail: lag@lag.org.uk.

noticeboard

Conferences and courses

Child Poverty Action Group
Housing benefit – the problem areas
4 March 2009
9.45 am–4.45 pm
London
£195/£140/£100/£80
5 hours CPD
This course looks at the more difficult and controversial areas of housing benefit law and concentrates on the areas where problems and local authority bad practice frequently occur. It covers the following:
■ claims and payments, including payments on account;
■ delays;
■ contrived tenancies;
■ overpayments;
■ backdating;
■ challenging decisions.
A working knowledge of housing benefit is assumed.
E-mail: training@cpag.org.uk
www.cpag.org.uk

City University Law School and Arden Chambers
Current issues in housing and land law
11 March 2009
9.30 am–5.30 pm
London
£170 including VAT (£130 for attendees of previous conferences)
6 hours CPD
This one-day conference examines recent developments in a number of important areas of housing law. It is perfectly suited for barristers, solicitors, and policy-makers working in the housing field.
Tel: 020 7040 8302
E-mail: i.d.loveland@city.ac.uk

Jordans
Employment law update seminar
19 March 2009
9.30 am–5 pm
Manchester
£195 + VAT
5.5 hours CPD
An expert panel of speakers provide the very latest case-law, an analysis of recent legislation and forthcoming changes in the field of employment law. Delegates will receive practical guidance on:
■ the Employment Act 2008: the replacement of the statutory procedures;
■ status and contractual rights: who can claim?;
■ discrimination issues;
■ redundancy handling;
■ unwanted conduct in the workplace; and
■ employment tribunals.
Tel: 0117 918 1490
www.jordan-training.co.uk

Kenworthy's Chambers and Salford Law School
Jury inquests
26 March 2009
9.30 am–5 pm
Manchester
£275 + VAT
5.5 hours CPD
This is a course for practitioners to be brought up to date with the latest case-law and new statutes, particularly the new Coroners and Justice Bill 2009 and the Health and Safety (Offences) Act 2008. Areas considered include:
■ deaths in custody;
■ article 2 duties;
■ inquests and medical negligence; and
■ health and safety fatalities.
Tel: 0161 295 4670
E-mail: l.redford@salford.ac.uk

Lectures, seminars and meetings

Environmental Law Foundation
Environmental liability: the new regime. A guide to the workings of the Environmental Liability Directive in the UK
4 March 2009
2 pm–5 pm
London
£150 including VAT
3 hours CPD
The Environmental Law Foundation is hosting the essential conference on the latest developments on the Environmental Liability Directive from the UK's perspective. The conference will focus in particular on future environmental litigation and the greater role non-governmental organisations can play in ensuring the protection of habitats and water courses.
Tel: 020 7404 1030
www.elflaw.org/

Doughty Street Chambers
EC law update
30 March 2009
6.30 pm–8 pm
London
£20 including VAT
1.5 hours CPD
Charlotte Kilroy and John Walsh lead this seminar that examines developments in EC law in the following areas:
■ the Citizens Directive, the Qualification Directive and the Ankara Agreement;
■ developments following Case C-127/08 *Metock*, Case C-45/08 *Elgafaji and FS (Turkey)* [2008] UKAIT 00060; and
■ domestic and European Court of Justice case-law. Particular attention will be given to the lacunae that are emerging in the EEA Regulations 2006.
Tel: 020 7404 1313
E-mail: enquiries@doughtystreet.co.uk
www.doughtystreet.co.uk

Volunteers required

Norfolk Community Law Service
Norfolk Community Law Service (NCLS) is a charity delivering free legal advice to the residents of Norfolk. We need volunteer solicitors to support our housing repossession arrears advice and advocacy service for about one day per month.
Contact: Judi Lincoln, housing repossession co-ordinator
Tel: 01603 496623
E-mail: info@ncls.co.uk

Disability Advice Service
Disability Advice Service (DAS) is a charity delivering free legal help and support to disabled people throughout the UK with the intention of empowering them. We need volunteers to undertake legal research. Volunteers can be final year undergraduates, LPC or BVC students, trainee or qualified solicitors, trainee or qualified barristers or any other legal professional (judges, law lecturers). Volunteers will be required to research the law and provide a written 'opinion/advice' to various enquiries that come into the service.
Contact: Dr R S Rawal
Fax: 020 8572 0044
E-mail: disabilityadviceservice@hotmail.co.uk

Advertise your events in noticeboard for FREE!

If you have an event you would like to advertise in *Legal Action*'s noticeboard, please e-mail a short description, including contact details, cost and any CPD accreditation to: nmoorthy@lag.org.uk. We will endeavour to include as many entries as space allows. ***Advertise your events.***

Trainee solicitor and pupil barrister vacancies
If you have a pupillage, training contract or vacation scheme vacancy, you can also advertise it for FREE in *Legal Action*'s noticeboard. Please contact Nim Moorthy for details, e-mail: nmoorthy@lag.org.uk or tel: 020 7833 7430.

Copy deadlines for entries to appear in:

April: 13 March
May: 9 April
June: 15 May
July: 19 June

Advertise your event on this page, contact: Nim Moorthy
tel: 020 7833 7430, fax: 020 7837 6094, e-mail: nmoorthy@lag.org.uk

Early Bird offers on LAG's 2009 training courses

Get a 15 per cent discount* on the following courses by booking and paying for places by the date indicated.

Civil justice

Actions Against the Police (Advanced)

28 April 2009
■ London ■ 6 hours CPD
■ 9.15 am–5.15 pm
Fiona Murphy, Heather Williams QC and Phillippa Kaufmann
Level – Advanced

Usual price – £195 + VAT
Early Bird price – £165.75 + VAT
Book and pay before 20 March 2009
Please note this course is open to claimants' lawyers only

Inquest Law and Practice

10 November 2009
■ London ■ 6 hours CPD
■ 9.15 am–5.15 pm
Adam Straw, Leslie Thomas and Fiona Borrill
Level – Introductory/ Intermediate

Usual price – £195 + VAT
Early Bird price – £165.75 + VAT
Book and pay before 31 July 2009

Community care

Community Care Update

8 May 2009 and
1 December 2009
■ London ■ 6 hours CPD
■ 9.15 am–5.15 pm
Karen Ashton, Luke Clements, Stephen Cragg, Phil Fennell, Stephen Lodge and Pauline Thompson
Level – Updating

Usual price – £195 + VAT
8 May course:
Early Bird price – £165.75 + VAT
Book and pay before 20 March 2009
1 December course
Early Bird price – £165.75 + VAT
Book and pay before 31 July 2009

*Please note that the Early Bird discount is not cumulative with any other discounts and does not apply to all courses in the training programme.
For the latest information on all our courses and to book online visit: **www.lag.org.uk/training.**

Crime

Police Station Update

21 May 2009 and
21 October 2009
■ London ■ 3 hours CPD
■ 2 pm–5.15 pm
Ed Cape
Level – Updating

Usual price – £100 + VAT
21 May course:
Early Bird price – £85 + VAT
Book and pay before 20 March 2009
21 October course
Early Bird price – £85 + VAT
Book and pay before 31 July 2009

Employment

Employment Law Update

3 July 2009
■ London ■ 6 hours CPD
■ 9.15 am–5.15 pm
Catherine Rayner
Level – Updating

Usual price – £195 + VAT
Early Bird price – £165.75 + VAT
Book and pay before 20 March 2009

Employment Law Essentials

30 November 2009
■ London ■ 6 hours CPD
■ 9.15 am–5.15 pm
Tamara Lewis
Level – Suitable for all levels

Usual price – £195 + VAT
Early Bird price – £165.75 + VAT
Book and pay before 31 July 2009

Housing

Defending Possession Proceedings

30 March 2009
■ London ■ 6 hours CPD
■ 9.15 am–5.15 pm
John Gallagher and Derek McConnell
Level – Introductory

Usual price – £195 + VAT
Early Bird price – £165.75 + VAT
Book and pay before 20 March 2009

Introduction to Housing Law

10 July 2009
■ London ■ 6 hours CPD
■ 9.15 am–5.15 pm
Diane Astin and John Gallagher
Level – Introductory

Usual price – £195 + VAT
Early Bird price – £165.75 + VAT
Book and pay before 20 March 2009

Recent Developments in Housing Law

7 September 2009
■ London ■ 6 hours CPD
■ 9.15 am–5.15 pm
Caroline Hunter and Jane Petrie
Level – Updating

Usual price – £195 + VAT
Early Bird price – £165.75 + VAT
Book and pay before 31 July 2009

Housing and Support for Migrants

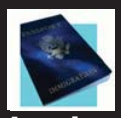
9 October 2009
■ London ■ 6 hours CPD
■ 9.15 am–5.15 pm
Anne McMurdie and Solange Valdez
Level – Intermediate

Usual price – £195 + VAT
Early Bird price – £165.75 + VAT
Book and pay before 31 July 2009

Housing Disrepair

16 December 2009
■ London ■ 6 hours CPD
■ 9.15 am–5.15 pm
Deirdre Forster and Beatrice Prevatt
Level – Suitable for all levels

Usual price – £195 + VAT
Early Bird price – £165.75 + VAT
Book and pay before 31 July 2009
Please note that this course is aimed specifically at tenants' advisers.



Immigration

Immigration Law Update

22 October 2009
■ London ■ 6 hours CPD
■ 9.15 am–5.15 pm
Ranjiv Khubber and Jo Swaney
Level – Updating

Usual price – £195 + VAT
Early Bird price – £165.75 + VAT
Book and pay before 31 July 2009

Prison law

Foreign National Prisoners

4 June 2009
■ London ■ 6 hours CPD
■ 9.15 am–5.15 pm
Laura Dubinsky and Judith Farbey
Level – Suitable for all levels

Usual price – £195 + VAT
Early Bird price – £165.75 + VAT
Book and pay before 20 March 2009

Prison Law Basics and Disciplinary Hearings

1 July 2009
■ London ■ 6 hours CPD
■ 9.15 am–5.15 pm
Hamish Arnott and Simon Creighton
Level – Suitable for all levels

Usual price - £195 + VAT
Early Bird price - £165.75 + VAT
Book and pay before 20 March 2009

Introduction to Parole Hearings and Early Release for Prisoners

25 November 2009
■ London ■ 6 hours CPD
■ 9.15 am–5.15 pm
Hamish Arnott and Simon Creighton
Level – Suitable for all levels

Usual price – £195 + VAT
Early Bird price – £165.75 + VAT
Book and pay before 31 July 2009

Public law

Advanced Judicial Review

11 September 2009
■ London ■ 6 hours CPD
■ 9.15 am–5.15 pm
Jonathan Manning
Level – Intermediate/Advanced

Usual price – £195 + VAT
Early Bird price – £165.75 + VAT
Book and pay before 31 July 2009

lag.org.uk

Credit card hotline: 020 7833 2931
Fax: 020 7837 6094 E-mail: lag@lag.org.uk

LAG