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NHS CONTINUING CARE AND INDEPENDENT LIVING: THE LAW REVIEWED

LAG

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The purpose of the Legal Action Group is to promote equal access to justice for all members of society who are socially, economically or otherwise disadvantaged. To this end, it seeks to improve law and practice, the administration of justice and legal services.

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End game for legal aid?

The language used by the House of Commons Constitutional Affairs Committee in its report *Implementation of the Carter Review of legal aid*, which was published in May 2007, could hardly be stronger. In their reality check of the progress so far, the MPs conclude that ' … the government has introduced these plans too quickly, in too rigid a way and with insufficient evidence'.

The report lists 80 printed sources of written evidence, with a larger number of additional papers also received but not printed. Oral evidence was taken from 31 witnesses (including the then Secretary of State for Constitutional Affairs, Lord Falconer, head of the Legal Services Commission (LSC), Carolyn Regan, senior judges and a range of practitioners and not for profit organisations, including LAG's then director, Alison Hannah). The weight of evidence underpins the committee's conclusion that the current proposals – for fixed fees and the model proposed for competitive tendering – are deeply flawed and present a high risk of undermining an already fragile supplier base. Phrases such as 'shaky evidence base', 'potentially short-sighted transitional arrangements', 'great risk', 'disproportionate impact on BME [black and minority ethnic] clients' and 'catastrophic deterioration in the relationship between suppliers, their representative organisations and the LSC' pepper its conclusions.

In identifying the two significant sources of increased legal aid spending – high cost criminal cases in the Crown Court and public law child care cases – the committee rightly questions the need for drastic upheaval in unrelated areas of legal aid expenditure. It also asks specifically why there is a need to introduce a highly contentious fixed-fee scheme as a short transitional step towards competitive tendering. The committee suggests instead that competitive tendering be implemented directly, after adequate piloting, without this intermediate stage.

But the chances of the report being accepted, let alone adopted, by the new Ministry of Justice and the LSC, seem remote in the extreme (see page 4 of this issue). All the indications are that both bodies are intent on pushing through these reforms, come what may. The heavy hand of the Treasury is openly acknowledged to be the driving force, and Prime Minister-in-waiting Gordon Brown is even less likely to step back from the so-called marketisation of legal aid.

There is something shocking in this refusal to listen to the voices of reason. It is true that there is an increasing breakdown in the relationship between practitioners and the LSC. But this does not mean that the practitioners' objections and concerns should be peremptorily dismissed in the way they are. A barrage of statistics about the increase in numbers helped, the percentage of legal aid providers that might (or might not) benefit from the change, depending on where they are, or measurement of the miles between local legal aid suppliers, goes no way to deal with their anxieties. The LSC cannot show that the benefits of meeting its conditions are worth the cost, financially or in terms of job satisfaction and security, for providers.

But even more shocking is the undermining of legal aid's role in protecting human rights and redressing the imbalance of power between the state and citizen, the powerful and the powerless. By prioritising quantity over quality, the government and the LSC, in turn, are indeed dumbing down the legal aid system. LAG welcomes the expansion of telephone advice services but these must be backed up by face to face legal help and representation. Many people just do not have the confidence to act on advice given without more support than a telephone conversation, a leaflet, or a letter. Those with disabilities or from BME groups will be particularly disadvantaged by the changes, as the committee recognised. LAG cannot understand why the government is so determined to push through these proposals at such a pace, without piloting, and in the teeth of opposition from the very people who will have to implement them.

The system of legal aid in this country is probably the best in the world: it provides advice and representation on a wide range of legal problems, from community care and welfare benefits, to actions for clinical negligence as well as criminal prosecution. Other countries look with envy at this model. This is something to be proud of: a recognition that access to justice is a fundamental democratic right.

The amount of money spent on the legal aid system is a tiny proportion of government spending overall and pay rates for legal aid lawyers have remained static for years. There are ways in which savings can be made, but all the evidence so far is that the current proposals for fixed fees and competitive tendering are more likely to damage services than develop them. With a new Ministry of Justice, and a new Prime Minister in the offing, is it too much to ask that a new and more positive approach be adopted for legal aid reform?

news feature

Update on the new Justice Ministry

Following the creation of the Ministry of Justice (MoJ) in May (see May 2007 *Legal Action* 4), the Lord Chancellor and Secretary of State for Justice, Lord Falconer, has just given details of ministers' responsibilities:

Lord Falconer:

- Overall strategy;
- The resourcing of his departments;
- Major constitutional issues;
- Appointments, including all judicial appointments;
- Royal, church and hereditary issues and lord lieutenants;
- Privy counsellors; and
- Correspondence with cabinet ministers and the higher judiciary.

David Hanson MP, minister of state:

- Penal and sentencing policy;
- Oversight of prisons, probation, prisoner conditions and criminal law; and
- Northern Ireland Court Service.

Harriet Harman QC, MP, minister of state:

- Criminal justice;
- HM Courts Service;
- Implementation of the Constitutional Reform Act 2005, the concordat and the Supreme Court Judicial Appointments Commission;
- Judicial diversity;
- Family justice;
- Coroner reform; and
- Crown dependencies

Baroness Ashton, parliamentary under secretary of state:

- Human rights, including the Commission for Equality and Human Rights;
- European Union and international policy;
- International legal trade;
- Freedom of Information Act 2000;
- The National Archives;
- Data sharing and data protection; and
- Associated offices: the Statutory Publications Office, the Public Guardianship Office, including the mental capacity implementation programme, and the Official Solicitor's Office.

Vera Baird, QC, MP, parliamentary under secretary of state:

- Civil law policy;
- Civil and family legal aid;
- Criminal legal aid;
- Women's penal policy;
- Law Commission;
- Legal Services Commission;
- Social exclusion;
- Land Registry;
- Equalities; and
- Better regulation.

Bridget Prentice MP, parliamentary under secretary of state:

- Youth justice;
- Reform of electoral administration;
- Legal services;
- Legal Services Complaints Commissioner/Legal Services Ombudsman;
- Asylum and immigration;
- Compensation culture; and
- Devolution and regional policy.

Gerry Sutcliffe MP, parliamentary under secretary of state:

- Prisons;
- Probation;
- Industrial relations;
- Criminal law, including the Corporate Manslaughter Bill; and
- Administrative justice, including the creation of the Tribunals Service.

The MoJ has published, *Justice – a new approach*, a paper that sets out the ministry's objectives and how it aims to achieve these.[1] The MoJ's objectives are to reduce reoffending and protect the public; to promote justice; to provide access to justice for all; to increase confidence in the justice system; to uphold people's human, information and democratic rights; and to safeguard and reform the constitution.

Meanwhile, the constitutional dispute that began before the MoJ even opened its doors continues. Just after the government announced that the MoJ was to be established, Lord Falconer claimed that the MoJ will 'strengthen further the already strong judicial-executive relationship set out in the concordat ..., which sets out the roles and responsibilities of the Lord Chancellor and the judiciary'. However, this seems to be at odds with the Lord Chief Justice, Lord Phillips' opinion on the subject. He responded to the announcement with a statement detailing the important issues of principle that the creation of the MoJ raised: 'structures are required which will prevent the additional responsibilities [of the new ministry] interfering with or damaging the independent administration and proper funding of the court service [; and] the continuing problems of prison overcrowding and the availability of resources to provide the sentences imposed by the courts necessitate public debate'.

The subsequent creation of the MoJ has not resolved the important issues of principle between the executive and the judiciary. Judges are concerned that they will come under pressure to adjust their sentencing practice to accommodate the prison overcrowding crisis. Magistrates have also backed the judges' calls for constitutional safeguards to protect their independence. With no new money being made available to the new MoJ, despite its expanded remit, there is a further fear that the Court Service's and the legal aid budgets will be squeezed to deal with the ever-growing prison population.

Lord Falconer acknowledged the need to reduce the prison population and outlined new measures to deal with it in *Penal policy – a background paper*.[2] These include a call for more community sentences and reform of the rules so that ex-prisoners who are not assessed as dangerous, and who breach their licences, may now be returned to prison for 28 days rather than the remainder of their sentences. Lord Falconer will ask the Sentencing Guidelines Council (chaired by Lord Phillips) to review the impact of the Criminal Justice Act 2003. He has already asked Lord Carter to carry out a review of the prison building programme to see if the 8,000 extra places planned can be provided more quickly.

A working group composed of senior judges and senior government officials has been meeting since March 2007 to discuss the issues identified by the Lord Phillips with the aim of putting in place constitutional safeguards to protect the independence of the judiciary and issues related to the administration of justice. At the time of writing, Lord Phillips had just issued a statement that the present state of the working group's discussions was that 'much progress has been made, but no agreement has been reached and difficult issues remain'. The statement also reported that Lord Phillips was due to appear before the House of Commons Constitutional Affairs Select Committee at the end of May and to present a full report on the current position to parliament.

1 Available at: www.justice.gov.uk/docs/Justice-a-new-approach.pdf.
2 Available at: www.justice.gov.uk/docs/Penal-Policy-Final.pdf.

Alliance holds 'Justice – access denied' week of action

Campaigning activities that were co-ordinated by the Access to Justice Alliance (AJA) during its week of action, from 14 May to 18 May, have highlighted the damaging impact that the government's civil legal aid changes will have on the most vulnerable people in society. The eventful week started with a well-attended meeting in parliament, which included Henry Bellingham MP, the Shadow Minister for Constitutional Affairs. Speakers included Alan Beith MP, chairperson of the Constitutional Affairs Select Committee, Karen Buck MP, a stalwart supporter of the AJA and Lucy Anderson from the Mayor of London's office. They spoke of their concerns that the introduction of a fixed fee system of payment, followed by competitive tendering, will badly affect the quality and supply of legal help and that those people who are unable to find a legal aid lawyer to take on their case will be denied any meaningful access to justice. Wilma Morrison from Central London Law Centre emphasised the need to localise the campaign to defend legal and advice services, 'We need to draw what is happening to the attention of our local communities. It is their legal aid, not ours.'

Law Centres® were at the forefront of the week's activities, which took place throughout the country. The events included lawyers, advisers and clients demonstrating outside county courts across London as well as in Sunderland, Sheffield and Stafford, and a march in Manchester that ended with a protest outside the Immigration Tribunal.

Alison Hannah, chairperson of the AJA, commented: 'The excellent service that legal aid provides is rarely recognised. The week of action raised awareness of the important role that it plays to help people obtain access to justice. For example, lawyers and housing advisers throughout London demonstrated outside county courts to support representation for people at risk of losing their homes. The AJA calls on the government to rethink its proposals to ensure that services for such vulnerable people are not damaged by them.'

■ For more information, visit: www.accesstojusticealliance.org.uk.

The first ever Community Legal Advice Centre (CLAC) has just opened in Gateshead. Paul Hillier, the new CLAC's manager, said: 'For the people of Gateshead, the centre is a great step forward in improving access to legal advice. From debt to divorce, people can come to the centre knowing that help and advice is available on a wide range of everyday issues. As centre manager my job is to make this idea work to improve the lives of the people of Gateshead.'

DCA publishes final annual report

In a departmental swan song, the Department for Constitutional Affairs (DCA) gave an upbeat self-assessment of its performance in its final annual report. Despite indicating that the DCA is on course to meet the majority of its goals, the report pointed to slippage in its target 'to achieve earlier and more proportionate resolution of legal problems and disputes by ... increasing advice and assistance to help people resolve their disputes earlier and more effectively'.

Statements in the report that the level of actual acts of advice had increased were backed by figures released by the Legal Services Commission showing that nearly 800,000 cases of civil legal help were funded by legal aid over the last year, including a 51 per cent increase in telephone advice from Community Legal Service Direct. But despite this increase in advice provision, the target had not been met, which was explained by a rise in people seeking help.

Details of the DCA's settlement in the 2007 Comprehensive Spending Review revealed that its core funding, including provision for legal aid, will be reduced by 3.5 per cent annually until 2011. The report promotes the official government line that there will be a need to deliver better services 'for the same amount or less money'.

Commenting on the report, Michael MacNeil, LAG's policy director, questioned the 'self-congratulatory' tone of the report: 'Not surprisingly, the figures suggest that demand for advice is outstripping supply. It is important that people receive suitable advice and assistance. While focusing services on the users' needs to achieve this should be encouraged, the financial backdrop, coupled with an ever-increasing emphasis on volume work, is ominous: it could lead to the completely inappropriate targeting of resources.'

■ *Departmental report 2006/07* is available at: www.dca.gov.uk/dept/report2007/dp2007-full-report.pdf.

IN BRIEF

■ Public Law Project is to hold a conference on trends and forecasts in the area of judicial review, and aims to bring together a mix of both claimant and defendant lawyers. The conference will take place in Manchester on 25 June 2007.

■ More information, visit: www.publiclawproject.org.uk.

Representation is not funded in many tribunal hearings. In this article, Paul Draycott, a barrister at Garden Court North, and Steve Hynes, director of the Law Centres Federation, discuss the limited avenues open for state funding, and the arguments for extending legal aid to tribunals in some cases.

Extending legal aid to tribunals

Introduction

Currently, legal aid is available for representation before the Asylum and Immigration Tribunal, Mental Health Review Tribunals, the Lands Tribunal and the Employment Appeal Tribunal (EAT) (see Access to Justice Act (AJA) 1999 Sch 2). The issue of extending legal aid to the Social Security and Child Support Appeals Tribunals and Employment Tribunals (ETs) was raised in the debate on the Tribunals, Courts and Enforcement Bill in March 2007. In response to a question on this issue, Vera Baird QC, MP hinted that if cost savings were made from introducing fixed fees, legal aid might be extended to some tribunals, though she would not elaborate on which tribunal would be the likely recipient.

In *The treatment of asylum seekers. Tenth report of session 2006–07*, the parliamentary Joint Committee on Human Rights stated, regarding the issue of representation in the asylum support appeal process, that: 'The absence of provision for representation before the Asylum Support Adjudicators may lead to a breach of an asylum seeker's right to a fair hearing, particularly where an appellant speaks no English, has recently arrived in the UK, lives far from [the tribunal in] Croydon and/or has physical or mental health needs.'[1]

In the reported case of *R(H)* 3/05, 9 September 2004, a Tribunal of Social Security Commissioners emphasised the need for exceptional funding to be granted to claimants in complicated proceedings, stating that:

*It would have been unfortunate had none of the claimants been represented in these difficult and important cases. As Baroness Hale recently pointed out … 'The general public cannot be expected to understand these complexities' (*Kerr v Department for Social Development *[2004] UKHL 23, [2003] 1 WLR 1372, R 1/04) … It would have been difficult if not impossible for the claimants adequately to represent themselves on the issues these cases raise … Whilst nothing we say can or should be taken as a judgment on the merits of any application for funding, had there been no legal representative to put the claimants' case, the resulting inequality of arms would have been a real concern.*

In *Tribunal users' experiences, perceptions and expectations: a literature review*, the authors conclude on the value of representation before tribunals:

Most of the research concludes that appellants find it difficult to represent themselves. When people have the opportunity to be represented … they tend to make use of it. Although some appellants choose to represent themselves, they often find that the process is more complex and legalistic than they had imagined and regret their decision afterwards.[2]

The report goes on to say that there is little support for the assertion in the Leggatt Report (see page 18 of this issue) that through 'a combination of good quality information and advice, effective procedures and well-conducted hearings, and competent and well-trained tribunal members', the majority of applicants can represent themselves at hearings.

Excluded work

Before discussing the arguments under article 6 of the European Convention on Human Rights ('the convention') for extending legal aid to representation at tribunals, it is useful to look at the funding currently available:

- Chapter 3 of the Legal Services Commission's (LSC) *The funding code: decision making guidance* (The LSC manual, volume 3, Part C) provides guidelines on excluded services, which: ' … can nevertheless be funded because they are within the Lord Chancellor's directions on scope'.
- Part 2 of the Lord Chancellor's direction, which is included in chapter 3, concerns 'legal representation' and authorises the LSC:

… to fund legal representation, including excluded services, in any of the following types of case: …

(b) … (Proceedings against public authorities concerning serious wrongdoing, abuse of position or power, or significant breach of human rights) …

(h) Proceedings arising out of allegations of the abuse of a child or vulnerable adult;

(i) Proceedings arising out of allegations of sexual assault; …

If the merits and means tests are met, applications for funding should be made in tribunal proceedings involving allegations of sexual assault, the abuse of disabled claimants or those employed by a public authority who have been subjected to 'serious wrongdoing', 'abuse of power' or 'significant breach of [their] human rights', such as a sustained campaign of harassment.

Special cases exception

AJA s6(8)(b) allows the Lord Chancellor to authorise the funding of exempt tribunal proceedings ' … in specified

circumstances or, if the [LSC] request him to do so, in an individual case'.

Chapter 27 of the LSC's funding code guidance concerns 'exceptional funding' and provides that the Lord Chancellor will consider funding where the LSC is satisfied that the client meets the means and merits tests, that evidence has been provided that there are no alternative means of funding available, and that the matter is of:

- *significant wider public interest; or*
- *overwhelming importance to the client; or*
- *… [where] it would be practically impossible for the client to bring or defend the proceedings, or the lack of public funding would lead to obvious unfairness in the proceedings (Jarrett complexity).*[3]

Applications are made to the LSC's Special Cases Unit, which makes an initial assessment of the case before passing it on to a minister for a final decision. In 2005/06, 350 applications were made for exceptional funding, of which 147 were granted, the bulk of which (59 per cent) were in connection with inquests (see *LSC annual report 2005/06*, p21).

In so far as the successful applications concerned tribunal proceedings, the majority are likely to have been deemed of 'significant wider public interest'. 'Wider public interest' means the potential of the proceedings to produce real benefits for individuals other than the client. Such benefits will usually fall within the following categories: protection of life or other basic human rights; direct financial benefits, for example, that the proceedings will lead to the government making higher payments to an entire category of claimant; potential financial benefits, in that the proceedings may establish a principle which will assist other claimants making similar claims; and cases concerning intangible benefits such as health, safety and quality of life.

In order to gain exceptional funding, this 'wider public interest' must be 'significant', which will usually be the case if the proceedings raise a specific point of law that the tribunal will have to resolve.

Cases will be deemed to be of 'overwhelming importance' if they are of exceptional importance to the client beyond the monetary value (if any) of the claim, because they concern the life, liberty or physical safety of the client or his/her family, or the roof over their heads.

Successful applications based on the '*Jarrett* complexity' (see above) of ET proceedings will usually concern discrimination claims brought by claimants suffering from either a learning disability, a chronic physical condition or a significant clinically recognised mental illness (or, for example, those who have little understanding of English) and whose employer or former employer is legally represented. Any such application will need to be accompanied by expert medical evidence confirming the nature of the claimant's condition.

Factors that will generally assist applications for funding are the number of days the claimant's hearing will last; the number of allegations of discrimination to be decided; the size of the tribunal bundle; the number of the respondent's witnesses to be cross-examined; whether expert evidence will be called and the experts cross-examined; the amount the claim is worth; the level of resources and experience of the respondent's legal team; whether allegations of harassment are involved or other distressing matters of a personal nature; and the complexity of the relevant issues of law.

The funding code guidance states that: ' … most tribunals have been excluded from legal aid on the grounds that their procedures are intended to be simple enough to allow people to represent themselves'. Unfortunately, this bears no relation to the increasing legal and procedural complexity of ET proceedings, especially following the commencement of the statutory dispute procedures. The LSC should be reminded in the course of an application that there is no duty on an ET, of its own motion, to ensure that every allegation in an originating application is dealt with, unless it has been expressly abandoned (see the Court of Appeal's decision in *Mensah v East Hertfordshire NHS Trust* (1998) IRLR 531).

Article 6 challenge likely?

Article 6 of the convention safeguards an individual's right to a fair hearing. While article 6 does not in any way confer an absolute right to legal aid, the convention requires: ' … that a litigant is not denied the opportunity to present his or her case effectively before the court … and that he or she is able to enjoy equality of arms with the opposing side … ' (see *Steel and Morris v UK* App No 68416/01, 15 May 2005; (2005) 41 EHRR 22, among others).

The question of whether the provision of legal aid is necessary under article 6: ' … must be determined on the basis of the particular facts and circumstances of each case and will depend, inter alia, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively' (*Steel and Morris* see above).[4]

Although, thus far, attempts to argue article 6 in relation to discrimination proceedings have met with fairly mixed results (for example, see *Fry v Ministry of Defence* EAT/0146/02, 1 April 2003), if cases are sufficiently complex and meet the European Court of Human Rights' criteria, the legal representation of the client will be a prerequisite for a fair hearing, and the state should provide this through the grant of legal aid.

The Scottish Executive has taken a more general view of its obligations under article 6. Since 1 December 2002, legal aid has been provided for appeals to the Social Security Commissioners which meet the necessary means and merits tests while, in 2000, the Scottish Executive introduced legal aid for representation in complex cases before ETs.

The future

If it is conceded that there will not be a general loosening of the purse strings to fund representation in every tribunal, the above criteria would seem a useful starting point to establish which cases are funded. Such a move would also pre-empt a gradual creep towards funding of such cases through the special cases exception. Moreover, with the new strands of discrimination law (age, sexuality and religion or belief) on the statute book, as well as the establishment of the Commission for Equality and Human Rights (CEHR), due to swing into operation in October this year, might an extension to tribunal cases involving human rights and equality issues be warranted? From the public policy point of view, this would complement the services that the CEHR can provide and, most importantly, ensure that many of the most disadvantaged claimants get a fair hearing in complex cases.

1 Available at: www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/81/81i.pdf.
2 Michael Adler and Jackie Gulland, Council on Tribunals, 2003, available at: www.council-on-tribunals. gov.uk/docs/other_adler(2).pdf.
3 See *R (Jarrett) v Legal Services Commission and others* [2001] EWHC Admin 389, 22 May 2001.
4 See *Airey v Ireland* App No 6289/73, 6 February 1981; (1979–1980) 2 EHRR 305 and *P, C and S v UK* App No 56547/00, 16 October 2002; (2002) 35 EHRR 31.



Here, Chris Callender, assistant director (legal), Laura Janes, solicitor and legal officer for children, and Anna Prasad, solicitor and legal officer for young adults, at the Howard League for Penal Reform, review some of the key case-law concerning children in custody.

Children in custody, children in need and the Children Act 1989

Application of the CA 1989 to children in custody

Since 2002, the legal team at the Howard League has provided the only dedicated legal service for children in custody. The legal team has recently expanded and now represents young people under 21. Since its inception, the legal team has focused on a range of social welfare issues concerning children in custody and has contributed significantly to a developing body of case-law with a strong focus on the Children Act (CA) 1989 and community care issues that has helped to change dramatically the landscape concerning the welfare of children in and leaving custody.

The legal team was launched following the judgment in *R (The Howard League for Penal Reform) v Secretary of State for the Home Department and Department of Health (interested party)* [2002] EWHC 2497 (Admin), 29 November 2002; [2003] 1 FLR 484 in which Munby J paints a damning picture of the state of youth offender institutions in England and Wales and recognises formally the vulnerabilities of children in custody:

[Children in custody] are, on any view, vulnerable and needy children. Disproportionately they come from chaotic backgrounds. Many have suffered abuse or neglect … Over half of the children in YOIs have been in care. Significant percentages report having suffered or experienced abuse of a violent, sexual or emotional nature ... Very significant percentages were … either homeless or living in insecure accommodation. Over half were not attending school, either because they had been permanently excluded or because of long-term non-attendance … Many reported problems relating to drug or alcohol use. Many had a history of treatment for mental health problems. Disturbingly high percentages had considered or even attempted suicide (paras 10 and 11).

The judgment also clarified the law. It confirmed that the CA does not cease to apply when a child is in prison but operates subject to the requirements of incarceration. Therefore, children in custody can be assessed under CA s17 to decide whether they are children 'in need', and s47 'child protection' referrals can also be made under the Act.

As a result of this case, the duties towards children in custody under the CA have been recognised and incorporated into Prison Service Order (PSO) 4950, *Regimes for juveniles* (10 September 2004). Although the PSO already contained detailed child protection procedures, crucially, the judgment confirms that local authorities continue to owe duties to children while they are in prison.

Local authority circular LAC (2004)26, *Safeguarding and promoting the welfare of children and young people in custody* (July 2004) provides detailed guidance about who should be responsible for carrying out functions under the CA and creates a rather complex referral mechanism whereby social services local to the secure establishment have a duty to make referrals to the home social services where appropriate.

Duty to assess

Despite the judgment and the circular, many young people leaving custody face terrible problems securing appropriate accommodation and support in the community – even where they are clearly entitled to assistance under the CA. The Howard League has now represented many child clients who are entitled to assistance on release from custody, under the CA, but who are, instead, dumped in bed and breakfast accommodation. A report, *Chaos, neglect and abuse: the duties of local authorities to provide children with suitable accommodation and support services*, published by the Howard League in 2006, provides a detailed summary of this practice and a summary of the relevant legal framework.*

The legal framework for almost all of these cases hangs on the legal requirement to assess children who might be in need under CA s17. Lord Nicholls in *R v Barnet LBC ex p G; R v Lambeth LBC ex p W; R v Lambeth LBC ex p A* [2003] UKHL 57, 23 October 2003 recognised that '[t]he first step towards safeguarding and promoting the welfare of a child in need by providing services for him and his family is to identify the child's need for those services' (para 32).

In addition, the duty to assess the needs of 16 and 17-year-olds, where appropriate under the CA, was confirmed

in a case brought by the Howard League: *R (M) v Hammersmith and Fulham LBC* [2006] EWCA Civ 917, 5 July 2006. The judgment considered the interface between the Housing Act (HA) 1996 and the CA. It confirmed that officers of the housing department should require social services to complete an assessment in circumstances where

' … facts that the housing office staff know, or come to know in the course of their enquiries under … the 1996 [Housing] Act, about a 16 or 17-year old child put them on notice that duties under the 1989 [Children] Act may be owed to that child…' (para 91). It is clear from both the Homelessness (Priority Need for Accommodation) (England) Order 2002 SI No 2051 and the Homelessness Code of Guidance, that those children who should be dealt with under the CA 1989 are specifically excluded from making 'priority need' applications under the HA 1996.

A lawful assessment

Ensuring that a young person in custody is assessed appropriately is simply the thin end of the wedge. It is essential that the assessment is conducted in a sufficiently meaningful way in order to translate into real assistance for the young person. The case of *R (J (by his litigation friend MW)) v Caerphilly CBC* [2005] EWHC 586 (Admin), 12 April 2005; [2005] 2 FLR 860, brought by the Howard League, provides detailed guidance about the criteria that a lawful assessment will need to meet. Although this case concerned the lawfulness of a pathway plan (an assessment tool used to continuously assess care leavers under the CA), it has been argued that the same criteria apply to any assessment of children in need:

A care plan is – or ought to be – a detailed operational plan … Sometimes a very high level of detail will be essential … any care plan worth its name ought to set out the operational objectives with sufficient detail – including detail of the 'how, who, what and when' – to enable the care plan itself to be used as a means of checking whether or not those objectives are being met. Nothing less is called for in a pathway plan (para 46).

In addition, the assessment of a child's needs should be in accordance with the extremely detailed guidance issued by the Department of Health in *Framework for the assessment of children in need and their families* (March 2000).

Unfortunately, despite this (growing) body of case-law, local authorities have argued frequently that the duty to assess a young person relates to his/her immediate needs and, therefore, need not deal with the imminent needs of a child about to leave custody, such as support and accommodation in the community.

The case of *R (K) v Manchester City Council* [2006] EWHC 3164 (Admin), 10 November 2006 has clarified the position by confirming that '[a] lawful assessment under section 17 of the Children Act must necessarily examine not only the immediate, current circumstances of the child concerned but must also look to imminent changes in those circumstances' (para 39).

In addition, the judgment confirmed that the assessment should be carried out by social services and not the youth offending team (YOT) and that: '[t]he defendant authority is required itself to carry out an assessment. It is not entitled to delegate that function' (para 45). This is important as the Howard League's legal team has found that the assessment functions that should be carried out by social services are, in fact, passed routinely to YOT workers who are seen to assume responsibility for young people in the criminal justice system. YOT workers are unable to decide that a child is 'in need' or should be accommodated under the CA. Furthermore, there are social and political issues surrounding the provision of welfare assistance to children in the criminal justice system. While for many young people in custody 'offending behaviour' is often seen as the least of their problems compared with homelessness, substance misuse or mental health issues, professionals in social care may have a tendency to see young people who commit offences as offenders first and children second. The Howard League legal team often deals with assertions from local authorities that a young person has 'made his/her own bed' and will not engage. Helpfully, the courts have considered and commented on this particular scenario.

The problem of the unco-operative child

Hammersmith and Fulham (soon to be heard in the House of Lords) cites *Caerphilly* on the classic problem of the 'unco-operative child', in which Munby J commented that:

[t]he fact that a child is unco-operative and unwilling to engage, or even refuses to engage, is no reason for the local authority not to carry out its obligations under the Act and the regulations. After all, a disturbed child's unwillingness to engage with those who are trying to help is often merely a part of the overall problems which justified the local authority's statutory intervention in the first place. The local authority must do its best (para 76).

The work of the Howard League has revealed that local authorities are failing routinely to do their best. However, although it is frustrating as a lawyer to monitor statutory compliance, the case-law set out above has clearly confirmed that failures by local authorities are amenable to judicial challenge.

Amenable to challenge

Hammersmith and Fulham confirms (at para 78) that '[i]f a local authority fails inappropriately to identify a child in need within CA 1989, section 17(10), that failure is amenable to judicial review'. In addition to the case-law set out here and the statutory framework, there exists a range of guidance and policy such as the Youth Justice Board's *National Standards for Youth Justice Services* (2004) and the Department of Health's *Children (Leaving Care) Act 2000: regulations and guidance* (October 2001) to assist practitioners in ensuring that their young clients' social welfare needs are being met. The national standards state firmly that planning for release should commence from the beginning of a child's custodial sentence.

Access to justice and unmet legal need

One of the classic problems faced by children in custody is a profound lack of access to justice. Not only are children unaware of their legal rights and remedies but they often do not have the means or the confidence to approach solicitors for help. In an effort to stop the 'revolving door' syndrome faced by many young people in the criminal justice system, a broad approach to their needs is required. Criminal solicitors and independent advocates are ideally placed to identify children in, or leaving, custody who may be entitled to assistance under the CA 1989. Behind many criminal youth justice matters lies a raft of social welfare problems and unmet legal need.

* Available to order from www.howardleague.org, £15.

Recent developments in immigration law

This series of articles by **Jawaid Luqmani** and **Ranjiv Khubber** aims to keep practitioners up to date with developments in immigration legislation, practice and case-law.

POLICY AND LEGISLATION

Accession (Immigration and Worker Authorisation) Regulations 2006 SI No 3317

These regulations came into force from 1 January 2007 to set out in detail the provisions about the limited rights that would be afforded to the newest members of the European Community (EC). As with the previous accession countries, where limits were placed on the rights of some of the accession states which joined the European Union (EU) as from May 2004, even greater limits have been placed on citizens of Bulgaria and Romania. In essence:

- In order to work within the UK, an individual who is an 'accession state national subject to worker authorisation' will need prior approval before entering the UK to take up employment (reg 9).
- Certain persons will have an unrestricted right of access to the labour market, namely if they can show that they are highly skilled (reg 7).
- A highly skilled person will, for these purposes, mean a person who can meet the Highly Skilled Migrant Programme (HSMP) criteria (although proficiency in English is not required), or a person with a Higher National Diploma or degree or above from an educational institution in Scotland, or a second class honours degree or above from an educational institution in England, Wales or Northern Ireland which would enable a person to participate in the Science and Engineering Graduate Scheme, or a master's degree or doctorate from any such institution (reg 4).
- Persons who are not accession state nationals subject to worker authorisation will be the following:

– those who already have leave to remain in some other capacity as at 31 December 2006 which does not prevent them from taking up employment; or
– those who are lawfully working in the UK for a 12-month period or more as at 31 December 2006; or
– those who are married to a person with British citizenship or indefinite leave to remain; or
– those who are a family member of an EU national (not themselves being an accession state national subject to worker authorisation (reg 2).

- Any employer that employs an accession state national who is subject to worker authorisation and either has no, or has the incorrect, authorisation commits an offence (reg 12).
- Any accession state national subject to worker authorisation commits an offence either by taking up employment where s/he does not hold an authorisation document, or where the work is in breach of any authorisation document (reg 13).
- Obtaining or seeking to obtain an authorisation document by means which include deception is also an offence (reg 14).

These restrictions apply only to those who are workers; they do not apply to those who are self employed and would, therefore, be subject to the same rules as other EU nationals.

Social Security (Bulgaria and Romania) Amendment Regulations 2006 SI No 3341

In a similar vein, these regulations, which also came into force on 1 January 2007, ensure that citizens of those countries are not regarded as being habitually resident for the purposes of access to the benefits regime if the individuals are accession state nationals subject to worker authorisation.

Immigration (Leave to Remain) (Prescribed Forms and Procedures) Regulations 2007 SI No 882

These regulations prescribe a new set of forms for use as from the date the provision came into force, namely 2 April 2007. Many of the changes were to reflect the fact that the rebranded name for the Immigration and Nationality Directorate is the Border and Immigration Agency (BIA). However, the new forms also include a new requirement for those seeking settled status to be able to demonstrate their ability to communicate in English and have knowledge about the way of life in the UK.

Immigration and Nationality (Fees) Regulations 2007 SI No 1158

These regulations, which took effect from 2 April 2007, have amended and increased the fees payable in connection with immigration and nationality applications sent to the Home Office. In the case of increases for those seeking indefinite leave, the rise is the greatest with the previous fee of £335 being more than doubled to £750. Importantly however, persons seeking indefinite leave on the basis that they are the victims of domestic violence remain exempt from any fees where, at the time of making the application, they are able to show that they are destitute (reg 8).

Given the possibility that, as a result of the fee increases, the Home Office may have to return a large number of application forms on the basis of the payment of the incorrect amount, the department accepted that during a transitional period, ie, for applications posted between 2 April 2007 and 20 May 2007, the applicant (or his/her representative) will be notified of the need for the correct fee and, if the balance is paid within 28 days, the application would be processed in the usual way. This transitional period was imperative for applicants whose leave was due to expire shortly after the fees increase and whose applications would not have been received before the date on which the increased rates applied on 2 April; without it, if the applications were returned, the individual applying may have lost any appeal rights as his/her subsequent application would ordinarily be treated as being out of time.

As the requirements for those seeking indefinite leave now include the need to have passed the English language and the British way of life tests, a transitional note on the BIA's website that deals with the revised fees states that any application received between 2 April 2007 and 31 January 2008, which is not accompanied by evidence that the tests have been taken and completed, will be treated as an application for further leave to remain and any difference in fee refunded.[1]

There are some categories of persons who will be able to avoid taking the tests about both the language and the way of life in connection with their applications for citizenship, namely:

- persons under 18 or over 65;
- persons applying as victims of domestic violence;
- persons with significant mental/physical health conditions that would prevent them from studying or taking the test;
- foreign and commonwealth citizens after their tour of duty in the armed forces has ended;

■ spouses of those members of the armed forces;
■ spouses/partners of Diplomatic Service, Department for International Development or British Council on a tour of duty abroad;
■ bereaved spouses/civil or unmarried partners;
■ retired persons of independent means;
■ parents/grandparents or other dependent relatives; and
■ EU nationals and Turkish EC Association Agreement (ECAA) nationals.

Revised Practice Direction on judicial review in immigration removal cases

The Civil Procedure Rules (CPR) were amended with effect from 1 March 2007. Practice Direction (PD) 54 has been supplemented to include a new section II for dealing with cases of judicial review challenges involving immigration removals.[2]

The PD provides that where a person is served with removal and the Home Secretary specifies that the PD will apply, in issuing any proceedings in court before removal, a claimant must specify that the PD applies. Furthermore, the application must be accompanied by a copy of the removal directions and a statement of the factual summary of the case (provided by the Home Secretary). In addition, holding grounds will no longer suffice as the application and the claim form must be accompanied by detailed grounds which are also to be forwarded to the designated immigration officer whose name appears on the factual summary form.

If the documents specified are not included or if the claim form is not accompanied by detailed grounds, the claimant (or his/her representative) is required to indicate why. The matter must then be referred to a judge for consideration. The PD also enables a judge to indicate if s/he believes that an application is without merit.

Although the PD was said by the then Department for Constitutional Affairs to come into effect from 1 March 2007, the revision of the *Operation enforcement manual* (OEM) by the Home Office states that the new procedures took effect from 12 March 2007. Further guidance is also set out in detail in a revised chapter 44 of the OEM on judicial review.[3]

Under the new procedures, removal directions must be served not less than 72 hours before the actual date of travel planned and give not less than two working days' notice of removal; the last 24 hours of this period must be during a working day so as to enable proceedings to be brought if this was thought appropriate. The change to the OEM states that the immigration officer should provide a short, factual summary at the time of the setting of the removal directions, and that this should include details of the individual to whom notice of any proceedings should be given in the event of an injunction being obtained. Paragraph 44.2 suggests that the decision, removal directions and factual summary should also be sent to legal representatives actively involved in the case post-appeal. The experience of many practitioners, however, is that this provision is not, in general, complied with.

The note proceeds to explain that removal will only be deferred if the claim for judicial review has been issued and a copy of the claim form and detailed grounds are received by the Treasury Solicitor. In cases where the PD has not been complied with, removal will be deferred on the following grounds only:
■ if the court directs that it should be deferred after it has had sight of the claimant's reasons for non-compliance; or
■ if permission is granted; or
■ if the court has been advised of the non-compliance but has not yet made a decision on whether or not the non-compliance was justifiable.

In other words, there is a probability that removal will take place if there has been non-compliance without good reason. In some cases, the non-compliance may be the failure to serve detailed grounds at the time that the claim form was issued. In other cases, it may be the failure, on the part of the Immigration Service, to provide the written material required under the PD. In the former situation, the prospects of persuading a judge that there are good reasons may depend on a variety of factors, not least of which may include details of when notice of the removal was received by the claimant's representatives since, despite the provision within para 44.2 (see above), it does not yet appear to be the consistent practice of the Immigration Service to notify advisers when removal directions are set. In the latter situation, there can be little reason for the Home Secretary not to comply with the requirement to provide documents, in which case the reason for non-compliance is likely to be more acceptable as it is a matter which is beyond either the claimant's (or the representative's) control.

On a practical note however, one can envisage a number of potential problems with the new procedures:
■ If the claimant is not able to get access to his/her representative, the actual time available for attempting to comply within the 72 hours may be much reduced.
■ Although the Immigration Service is required to provide the factual summary, at the request of either the claimant or his/her representative, there is no time period imposed on the Immigration Service regarding when it will respond to any request.
In many cases, the claimant will contact a new adviser either:
■ because his/her previous adviser is not authorised to conduct the case; or
■ his/her previous adviser cannot be contacted; or possibly where
■ s/he has not had an adviser or at least not one who has acted recently.
Again, in such a situation, the actual time available for attempting to comply with the new procedures will be potentially far less than 72 hours.
■ Even if there is compliance with the new procedures and proceedings are issued, the removal direction will still need to be cancelled formally. The policy appears to be that any decision to defer is now being processed not by the named individual on the factual summary, but by the Operational Support and Certification Unit (OSCU). In a recent case in which the author was involved, it took more than three hours for the removal to be deferred by the Immigration Service, notwithstanding the facts that removal had been set for that evening and the claimant had already been collected for transportation to the airport. Even then, it was necessary to put the Immigration Service on notice of the intention to apply for injunctive relief, despite the terms of chapter 44 which state that removal must be deferred where a claim form has been issued and detailed grounds sent to the IND (now renamed the BIA) (para 44.4).

The Home Secretary has also made it plain that if permission to apply for judicial review is refused, removal will certainly not be deferred pending the request for an oral hearing in any case in which the judge refusing permission has indicated the case to be without merit. What is more troubling is that where there has been non-compliance, the position of the Immigration Service is not to defer removal until the very last moment if a judge has not yet decided whether the reasons for non-compliance are acceptable. In practical terms, this may lead to removals taking place, given that the chain of communication between the enforcement unit, the port dealing with removal (which may be different), the OSCU and any escort agency involved may easily break down, even in cases where a judge might later conclude that the case has merit and that the reasons for non-compliance were acceptable.

Comment: Practitioners will need to be both able to respond far faster to emergencies and in a position to lodge completed claim forms with grounds within a far shorter period of time than is current practice.

This has enormous ramifications for publicly funded clients since, invariably, given the shorter notice period, it may be difficult to access a client for the purposes of completing applications for legal aid funding, especially if s/he has been detained some distance from his/her adviser's office. Furthermore, for organisations without devolved powers, the time factor involved in the Legal Services Commission's (LSC's) decision-making on funding will also impact considerably on an already tight time limit.

All in all, the measures give greater than ever power to the Home Secretary with only limited safeguards to ensure that a claimant has a realistic prospect of being able to challenge the decision before removal. As if in anticipation of the assertion of a lack of proper access to the court process, PD 54 para 18.1(2) reminds readers that nothing within the section prevents a judicial review from being pursued after removal has taken place.

Statement of changes to Immigration Rules

Statement of change in Immigration Rules HC 1702

■ Paragraphs 1, 3, 4, 5, 6, 7 and 8 include significant alterations to the HSMP. Practitioners who advise in this area will be aware that, without notice, the previous scheme for HSMP applications was frozen in November 2006. The scheme was put on hold until the beginning of December 2006 by withdrawing the relevant Immigration Rules from 8 November (para 1); these were not replaced until 5 December (paras 3–8), during which time applications were not being processed at all while the new procedures were set up.

The changes shift the focus away from the need for an individual to demonstrate his/her particular talent with reference to achievements, and place a far greater emphasis on monies earned over a period of time. In addition, and consistent with the general desire on the Home Office's part to ensure that more individuals are fluent in English, there is a requirement for an individual to show objective evidence to the effect that s/he has a high level of English language skills. The rules also refer to the need for an individual to provide evidence to support his/her claim to be highly skilled with reference to documents listed in appendix 5 to the rules, which sets out specific documents which will have to be produced.

■ Paragraph 2 defines the term 'UK Bachelors degree', specifying that it must be a degree from an authorised or designated institution.

Comment: The effect of these changes appears to be to reduce the scope for discretion to be exercised with regard to an individual's potential and only allows those with a proven track record of considerable earnings to be able to show that they would qualify under this category. The change also means that the rules are far more prescriptive about which documents would be required to be produced in order that an applicant can succeed with an application to remain in this category.

Statement of changes in Immigration Rules HC 130

HC 130 deals with the amendments to the rules consequent on Romania and Bulgaria acceding to the EU. The change came into effect on 1 January 2007.

■ Paragraph 1 deletes the reference to Bulgaria and Romania from the nationals of territories who could enter as au pairs.

■ Paragraph 2 deletes the reference to the ECAA applications.

■ Paragraph 3 provides that persons previously in the UK on the basis of an ECAA would still be permitted to apply for indefinite leave, provided that the business was commenced before January 2007, and:

– the person was able to show that s/he had been economically self-sufficient from the business for five years; and

– had been actively involved in the business.

■ Paragraph 4 confirms that the provisions of the Immigration Rules apply in these circumstances notwithstanding the fact that the individual may be in the UK under the Immigraton (European Economic Area) Regulations (I(EEA) Regs) 2006 SI No 1003.

■ Paragraph 5 deletes the reference to Bulgaria and Romania from the list of visa national countries.

Statement of changes in Immigration Rules HC 398

HC 398 came into effect on 2 April 2007.

■ Paragraph 1 inserts a requirement that those persons seeking indefinite leave to enter or remain in the UK have sufficient knowledge of the English language and life in the UK. It also sets out in some detail the specific criteria that are required to be met in order to demonstrate an ability to comply with the requirement.

The rule as amended also retains a discretion for the Home Secretary to waive the requirement in particular cases of mental or physical ill health on the part of a specific applicant. The rule change also provides that if a person otherwise meets the requirements of the rules, save as to the language/way of life requirements, the application will be regarded as one for an extension of time. This amendment reflects the approach set out in the transitional note above (and, consequently, that provision may only remain in force until 31 January 2008 although the rule does not specifically state this).

■ Paragraphs 2–24 insert the requirements about language/way of life specifically for the following categories of persons seeking permanent residence, namely: work permit holders, representatives of overseas newspapers or other international media, sole representatives, private servants in diplomatic or private households, overseas government employees, highly skilled migrants, persons who were granted leave as members of a religious order or ministers of religion, persons with UK ancestry, business persons, innovators, writers and artists, those seeking to remain under the ECAA (although presumably such persons may be eligible under the I(EEA) Regs which impose no such requirement: see HC 130 para 4 above), investors and spouses or civil partners of the above, persons seeking leave to remain to enjoy contact with a child resident in the UK, spouses or civil partners of those who are retired persons of independent means (although curiously not the retired person him/herself though, by definition, to qualify s/he would need to be at least 65 by the time s/he sought indefinite leave to remain), persons seeking to remain on the ground of long residence, and spouses or civil partners, or unmarried or same-sex partners, of persons settled in the UK. In any such application, the requirement is not imposed if, at the time of seeking indefinite leave, the applicant is either under 18 or over 65. See also page 17 of this issue.

Statement of changes in Immigration Rules CM 7074

CM 7074 introduces a number of changes, some of which came into force on 19 April 2007, with others that are due to take effect on 1 September 2007.

April 2007 changes

■ Paragraph 1 provides for a definition of 'bona fide private education institution' which, among other matters, is required to provide records of enrolment and attendance to the BIA. It also introduces a new definition for 'external students' as a person undertaking a degree course without actually attending the academic institution.

■ Paragraphs 5, 7, 8, and 12–15 amend the provisions for students and require individuals to be enrolled at an organisation that is on an approved list of the Department for Education and Skills' Register of Education and Training Providers and which provides information about enrolment and attendance, when requested, to the BIA.

■ Paragraph 19 imposes a requirement that

person seeking entry as a minister of religion provide evidence of an ability to speak and write to level 6 of the International English Language Testing System certificate which is not more than two years old at the time that the application is submitted.

September 2007 changes

■ Paragraphs 2, 4, 6, 9–11 and 16–18 make further changes in relation to students and introduce the concept of student visitors enabling persons over 18, who are enrolled on an approved list, to obtain entry for up to six months. At the same time, the rules specifically prevent those seeking entry as visitors (who are not student visitors) from studying in the UK.

CASE-LAW

Article 8; proportionality; jurisdiction; role of the Immigration Appellate Authority

■ Huang v Secretary of State for the Home Department and Kashmiri v Secretary of State for the Home Department

[2007] UKHL 11,
21 March 2007

As readers will be aware, these cases concerned appeals from the decision of the Court of Appeal ([2005] EWCA Civ 105, 1 March 2005; [2006] QB 1) in which important guidance had been given to the proper approach of the Immigration Appellate Authority (IAA) (adjudicators, immigration judges and the Tribunal) to cases raising claims under article 8 of the European Convention on Human Rights ('the human rights convention') (qualified right to private and family life). In essence, the Court of Appeal ruled that, first, the IAA was not confined to considering, by way of a review, whether the Home Secretary's decision in refusing a claim under article 8 was irrational or unreasonable, but the IAA was, rather, required to make its own ruling regarding whether the decision to remove an applicant breached his/her rights. However, second, the Court of Appeal held that when reaching such a decision, the IAA could only allow a case under article 8 where the relevant Immigration Rules were not satisfied if, and only if, the circumstances of the case were 'truly exceptional'.

In both *Huang* and *Kashmiri*, the Court of Appeal held that the approach by the Tribunal was legally defective. In *Huang*, the court allowed the appeal to the extent that the matter should be reheard by the Tribunal. In *Kashmiri*, the court concluded that, despite the legal error, in its view no difference in outcome would occur if the matter were reheard by the Tribunal and, therefore, dismissed his appeal.

The Home Secretary appealed against the Court of Appeal's decision in *Huang* to allow her appeal (to the extent outlined above). In *Kashmiri*, the appellant appealed against the Court of Appeal's decision to dismiss his appeal.

In a single judgment, the House of Lords (Lords Bingham and Hoffmann, Baroness Hale, and Lords Carswell and Brown) dismissed the Home Secretary's appeal. The Lords allowed the appeal in *Kashmiri* to the extent that, like *Huang*, his case should be considered further by the Tribunal. The House of Lords concluded:

■ The Court of Appeal was correct to conclude that the task of the IAA on an appeal was not a secondary, reviewing function dependent on establishing that the primary decision-maker had misdirected him/herself, or acted irrationally, or was guilty of procedural impropriety. Rather, the IAA must decide for itself whether the impugned decision was lawful and if not, but not only if not, reverse it (para 11).

■ Per *R v Secretary of State for the Home Department ex p Daly* [2001] UKHL 26, 23 May 2001; 2 AC 532 although the court's approach in a judicial review where human rights were in issue required a more exacting standard of review than the usual *Wednesbury* test or even a heightened test, it was important to note that the position was different with matters arising on a statutory appeal. In such a context, by contrast the court (or Tribunal) was required to make a judgment on whether the decision infringed an applicant's human rights (para 13). The intervention of the court in such a context was therefore appropriately greater (para 13).

■ When addressing the question of the approach to article 8(2), there had been a number of sub-issues in which both the court below and the parties had immersed themselves. However, in reality, it was not necessary to complicate or mystify what is not 'in principle, a hard task to define, however difficult the task is, in practice, to perform' (para 14).

■ The first task of the IAA was to establish, with care, the facts as these will inevitably be important and often decisive (para 15).

■ The IAA will need to consider and weigh all relevant factors in favour of the refusal of leave which is challenged with particular reference to justification under article 8(2). There will be general policy considerations that will be borne in mind (for example, administrative efficiency and consistency). In certain situations, more particular reasons will be relied on to justify removal, for example criminal deportations. The giving of weight to policy considerations in such cases cannot aptly be described as deference. 'It is performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice.' However, it was particularly important to note that in cases such as *Samaroo v Secretary of State for the Home Department* [2001] EWCA Civ 1139, 17 July 2001; [2002] INLR 55, there was no statutory right of appeal but rather the more limited intervention by way of judicial review (para 16).

■ The Home Secretary's contention that the position in the immigration context was analogous to the housing context – where the legislation itself had inherently considered and articulated the balance between the competing interests of landlord and tenant – was to be rejected. The position in the immigration context was significantly different: the terms of the Immigration Rules had not been the subject of active scrutiny by parliament (para 17).

■ The IAA was required to follow the clear and constant jurisprudence from Strasbourg (ie, the European Court of Human Rights (ECtHR)) per the observations made in the current UK case-law on its relevance, for example *R (Ullah) v Special Adjudicator* [2004] UKHL 26, 17 June 2004; [2004] 2 AC 323. The cases from Strasbourg were of value in showing where, in many different factual situations, the ECtHR, as the ultimate guardian of rights under the human rights convention, has drawn the line, thus guiding national authorities in making their own decisions. Furthermore, the importance of this case-law lies in the way that it illuminates the core value which article 8 seeks to protect:

> *Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant* (para 18).

■ When consideration of article 8(2) is reached, the ultimate question concerns the

proportionality of any decision made. The well-known formulation of the questions to be asked when deciding whether a measure is proportionate (per *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69) '"whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective"', needed to be coupled with the requirement for any decision to balance the competing interests of society with those of individuals and groups. This was recognised by the House of Lords in *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27, 17 June 2004; [2004] 2 AC 368 (para 19).

■ Where the proportionality question is reached in an article 8 case, the ultimate question for the IAA is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, and taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. On this aspect, it was not necessary to ask, in addition, whether the case meets a test of exceptionality. The exceptionality referred to by Lord Bingham in *Razgar* was an expectation: it was not a legal test required to be satisfied under article 8(2) (para 20).

■ In the light of the above reasoning, the Home Secretary's appeal in *Huang* would be dismissed and the appeal in *Kashmiri* would be allowed to the extent that it would be heard by the Tribunal in the light of the guidance given by the House of Lords. Costs were ordered to be paid by the Home Secretary in both cases.

Comment: As readers will be aware, the question of the correct approach to consideration of article 8 of the human rights convention in a statutory appeal has been the subject of serious controversy and difficulty for the Tribunal and the senior courts ever since the advent of the Human Rights Act 1998. The judgment by the House of Lords in these appeals is, therefore, particularly welcome in providing clear and concise guidance to the key matters raised and avoiding the myriad of issues and sub-issues that this complex area inevitably brings into play.

The House of Lords has emphasised that:

■ the role of the IAA is not limited simply to review (upholding that part of the Court of Appeal's decision below);

■ the critical issue under article 8(2) is to appreciate that the decision must strike a fair balance between the competing interests of the appellant and the state;

■ in order to be assisted on that question, the IAA (and the courts) must consider carefully the evidence in any given case as well as the important guidance provided by the case-law developed by Strasbourg; and

■ exceptionality is not a relevant legal test when reaching a decision on the article 8(2) question.

The result of this guidance is that although appellants who rely on article 8 rights will undoubtedly have to show a serious breach as a consequence of their potential removal, the Tribunal's jurisdiction in allowing such cases is no longer restricted to those containing an elusive, subjective and inconsistent set of 'truly exceptional circumstances'. It will be interesting to see how the Tribunal interprets and applies this guidance in the coming months, and especially in relation to the large number of deportation appeals currently before the Asylum and Immigration Tribunal (AIT) as well as the remaining (few) cases which will be before it as a reconsideration after a negative decision against claimants based on the Court of Appeal's exceptionality threshold. In addition, the previously harsh impact of the restrictive threshold for success given by the Court of Appeal in the past may be able to be reconsidered by fresh claims under the *Immigration Rules HC 395* para 353. Such claims may surface now where the difference in the approach between the tests set out by the Court of Appeal previously and by the House of Lords now will have had a material impact on the particular case. See also page 18 of this issue.

Darfur; persecution; internal relocation

■ AH (Sudan) and others v Secretary of State for the Home Department

[2007] EWCA Civ 297,
4 April 2007

As is well known by immigration advisers, these appeals concerned the claims of three black Africans, who lived formerly in Darfur in western Sudan, for protection under the 1951 UN Convention relating to the Status of Refugees ('the refugee convention'). The Court of Appeal heard their appeals as a result of the Tribunal's decision, which itself had been the result of the House of Lords' decision in these cases ordering them to be considered further: *Januzi and others v Secretary of State for the Home Department* [2006] UKHL 5, 15 February 2006; [2006] 2 AC 426; June 2006 *Legal Action* 14.

Before the court, the appellants argued, first, that the Tribunal had erred in concluding that they would not be in danger of refugee convention persecution in whatever part of Sudan they were to be returned to and, second, that the Tribunal had erred in law in concluding that even if the appellants were not in danger of persecution if returned to Khartoum, it would not be unduly harsh under the rules applying internal relocation to require them to return there.

In a detailed judgment, the court dismissed the appeals on the first issue but allowed them on the second issue (internal relocation) on the basis that, when considering this question, the AIT materially misstated the law and reached a conclusion not open to it. The court then proceeded to apply the law correctly to the facts found by the AIT. The court quashed the Home Secretary's refusals of asylum in all three cases before it.

On the question of the correct legal approach to the issue of internal relocation, the court provided useful guidance relevant to the appeals before it and, more generally, in the light of the reasoning given by the AIT for refusing the instant appeals.

In particular, the court noted that when considering the question of whether it would be unduly harsh to expect a claimant to move to another part of the receiving country, it was not correct to consider the test of undue harshness as requiring nothing less than breaches of the human rights convention and articles 2 and 3 in particular (paras 30 and 31). In addition, when appreciating the existing jurisprudence on this issue, the correct approach for its application to any given case was the following:

■ The starting point must be conditions prevailing in the place of habitual residence.

■ Those conditions must be compared with the conditions prevailing in the safe haven.

■ The latter conditions must be assessed according to the impact that they will have on a person with the characteristics of the asylum-seeker.

■ If, under those conditions, the asylum-seeker cannot live a relatively normal life, according to the standards of his/her country, it will be unduly harsh to expect him/her to go to the safe haven.

■ Traumatic changes of lifestyle, for instance from a city to a desert or into slum conditions, should not be forced on the asylum-seeker.

The Tribunal had failed to apply this approach when reaching its conclusions. The court proceeded to apply the correct approach to the instant appeals. The court concluded that it would be unduly harsh to require the appellants to seek internal relocation to Khartoum, particularly if, for example, an asylum-seeker who was a

subsistence farmer in Darfur ended up in a camp in Khartoum, s/he would not be living a relatively normal life compared with either the life from which s/he had been expelled or to the general standards of his/her country. In addition, the relocation in these appeals (in contrast to almost all of the other case-law on this question) required a radical change in the structure of life, completely different from that from which the appellants had come, and this had not been appreciated properly by the Tribunal when considering this question (paras 45–46).

Finally, the court commented that in appeals which are regarded as 'country guidance' cases by the specialist tribunal, it may be of assistance in future for the Home Secretary to make a direct contribution (through suitable evidence and data) of the situation prevailing in the particular country. In addition, as country guidance cases can now contribute to decisions on issues of law as well as simply fact, it was more, rather than less, necessary, for care in their compilation.

Comment: The Court of Appeal's decision in these appeals provides helpful guidance to the Tribunal and to practitioners not only on the issue of internal relocation and the unduly harsh test as it relates to Darfur, but more generally in terms of the application of that test to other asylum cases. In particular, the rejection of the need to satisfy the requirements of the human rights convention and the need for careful evaluation of the impact of relocation to the particular circumstances of a claimant, as between the place of habitual residence and the proposed safe haven, should lead to a less restrictive enquiry from the decision-maker, the Tribunal and the courts.

OTHER CASE-LAW IN BRIEF

Practitioners' attention is drawn also to the following cases:

Access to the court; procedural fairness; jurisdiction

There have been a number of important cases where the Court of Appeal has recently emphasised the importance of both access to the court and anxious scrutiny in the context of asylum and human rights claims.

■ FP (Iran) v Secretary of State for the Home Department; MB (Libya) v Secretary of State for the Home Department

[2007] EWCA Civ 13, 23 January 2007

These joined appeals concerned situations where the appellants had failed to attend their appeal hearings through no fault of their own, but rather through the fault of their legal representatives. The appellants had moved address but their legal representatives had failed to notify the relevant authorities (in *FP*, the AIT was informed, and in *MB* neither the AIT nor the Home Office was informed).

■ The appeal hearings that were due to be heard were, in fact, second-stage reconsideration hearings; errors of law had been appreciated previously by the AIT at the first-stage hearing. In both cases, and under Asylum and Immigration Tribunal (Procedure) (AIT(P) Rules) Rules 2005 SI No 230 rr19(1) and 56, the reconsideration hearing proceeded in the appellants' absence as notice of the hearings had been served on the last known addresses and no explanation had been provided for their absence. The decision of the Home Office to refuse their cases was upheld. In each case, the appellant's absence was used particularly as a basis for making adverse credibility findings.

The appellants appealed to the Court of Appeal. In a powerful and unanimous judgment, the Court of Appeal concluded that the relevant rules, although properly applied by the AIT when the cases were considered, were unlawful because they interfered with the fundamental right to be heard on an issue of great importance (ie, the right to refugee status determination). In addition, the court concluded that the appellants could not be fixed with the fault of their representatives, and distinguished the situation of asylum claimants from those of other immigrant claims (for example, students as in *R v Secretary of State for the Home Department ex p Al Mehdawi* [1990] 1 AC 876).

■ AM (Serbia); MA (Pakistan); MA (Sudan) v Secretary of State for the Home Department

[2007] EWCA Civ 16, 25 January 2007

These joined cases concerned the restriction on considering grounds of challenge in transitional reconsideration cases. The appellants' appeals against adverse decisions by the Home Secretary had been dismissed by adjudicators. The appellants sought, under the previous appellate regime, leave to appeal to the Immigration Appeal Tribunal (IAT). Leave was granted by the IAT.

After the IAT granted permission in these cases and until 4 April 2005, it would have been possible for each appellant to vary his grounds of appeal under Immigration and Asylum Appeals (Procedure) Rules 2003 SI No 652. However, AIT(P) Rules r62(7) provided that for transitional cases such as these 'the reconsideration shall be limited to the grounds upon which the [IAT] granted permission to appeal'.

The Court of Appeal concluded that although the relevant rule under consideration was intra vires under the enabling provision of Nationality, Immigration and Asylum Act (NIAA) 2002 s106, it was, nonetheless, *Wednesbury* unreasonable in that it prevented an individual from arguing a meritorious point by way of amendment which related to a potential breach of fundamental rights concerning the refugee or the human rights convention. In addition, the court observed the *Robinson* principle (*R v Secretary of State for the Home Department ex p Robinson* [1998] QB 929) of the Tribunal considering obvious points of refugee convention law, even if these were not raised by an appellant, applied with equal force to cases concerning the human rights convention and, particularly, where points in favour of a claimant had not been omitted but actually advanced before the Tribunal albeit by way of amendment.

■ BR (Iran) v Secretary of State for the Home Department; MD (Iran) v Secretary of State for the Home Department

[2007] EWCA Civ 198, 13 March 2007

These joined cases concerned the issue of the Court of Appeal exercising its discretion to consider appeals where a notice of appeal under the CPR had been filed substantially later than was required by the rules. After their reconsideration hearings had been dismissed by the AIT, the appellants sought permission to appeal to the Court of Appeal against those decisions. Permission to appeal was granted by the senior immigration judges in both cases. Under CPR PD 52, the appellants had to, within 14 days of being served with the notice of decision, file an appellant's notice with the Court of Appeal. However, long delays occurred in both cases before the notice of appeal was lodged with the court. On the preliminary question of whether time should be extended the Court of Appeal concluded that:

■ First, there should be a presumption that, where the AIT has granted permission to appeal to the Court of Appeal, the appeal ought to be heard.

■ Second, that presumption may be displaced if it can be shown that the decision of the senior immigration judge was plainly wrong. The court will have to make that assessment without actually hearing the appeal, but the enquiry is likely to come close to being in substance an appeal, rather than just an application.

■ Third, the length of the delay, when caused by legal representatives, should not be relevant.

■ Fourth, where the delay has been caused by the applicant, that may affect his/her credibility but does not disentitle him/her to international protection if risk is established, whatever the court's disapproval of his/her conduct.

In these cases, the court therefore granted an extension of time. It also gave the following guidance in order to try to avoid future repetition of the situation that had arisen in these cases:

■ The covering letter which goes out with the grant of permission to appeal to the Court of Appeal should make it clear that the appellant's notice must be filed within 14 days. In the case of a litigant in person, s/he might, in addition, be advised to consult a solicitor or citizens advice bureau immediately, and further, special steps might need to be taken where s/he is shown by the preceding process not to be able to read the English language.

■ Although this would not be done in the instant cases, in any future cases of delay, the court would not hesitate to make references to the Law Society and the LSC.

■ An applicant whose case is prolonged because of unnecessary delay should not assume that any delay will improve his/her chances of success under article 8 of the human rights convention.

■ Where the AIT has granted leave to appeal (as opposed to where the tribunal has refused leave or has no jurisdiction) it will be easier to list the application for an extension of time with the substantive appeal to follow.

■ R (AM) (Cameroon) v Asylum and Immigration Tribunal

[2007] EWCA Civ 131,
21 February 2007

This case concerned the important question of whether an application for judicial review of the decision of an immigration judge could succeed even though a High Court judge had, under NIAA s103A, dismissed an application for reconsideration of a tribunal's decision on an appeal against a decision of the Home Secretary to refuse an asylum and human rights claim. The applicant appealed to the Court of Appeal against the decision of the High Court that refused her permission to apply for judicial review.

The Court of Appeal held that, in exceptional circumstances, a court could grant permission to apply for judicial review of interlocutory decisions of an immigration judge even though a High Court judge had rejected a reconsideration application under NIAA s103A. In the instant case, the court noted, among other matters, that it was strongly arguable that the high standards of fairness required when considering an asylum/human rights case had not been provided. It granted permission to appeal and permission to apply for judicial review.

■ JM v Secretary of State for the Home Department

[2006] EWCA Civ 1402,
4 October 2006

In this case, the Court of Appeal considered the correct interpretation to be given to NIAA s84(1)(g), in particular. It overturned the previous decision of the Tribunal and concluded that on a 'variation of leave' appeal, there is no jurisdiction to consider the potential breach of an appellant's human rights if his/her removal is not imminent.

When reaching its conclusion, the court noted that the approach previously taken by it to the consideration of asylum appeals where there was also a hypothetical as opposed to actual possibility of removal (for example, *Saad, Diriye and Osario* [2002] INLR 34) applied with equal if not greater force to cases concerning the human rights convention.

In addition, Lord Justice Laws noted the submission of the Home Secretary that although both NIAA s84(1)(c) and (1)(g) allowed an immigration decision to be challenged on human rights grounds, these two provisions could be distinguished in that the former was intended to cover a decision giving rise to an imminent risk of removal whereas the latter was intended to cover a broader or remote situation.

■ AA (Zimbabwe) v Secretary of State for the Home Department

[2007] EWCA Civ 149,
6 March 2007

This is the latest decision by the Court of Appeal in the ongoing litigation concerning claims for protection in relation to removals to Zimbabwe. The Court of Appeal remitted the matter back to the Tribunal for further consideration. The court concluded that the Tribunal had failed to consider important aspects of the evidence provided and, in particular, concerning the consequences for involuntary returnees at Harare airport. It is understood that the AIT has decided that a different case, *HS (Zimbabwe)*, will be heard as the new country guidance case on Zimbabwe instead of *AA(3)*. This hearing has been listed for July 2007.

1 Available at: www.ind.homeoffice.gov.uk/aboutus/newsarchive/citizenknowledge.
2 *Practice Direction - Judicial review* is available at: www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part54.htm.
3 *Chapter 44 – Judicial review and injunctions* is available at: www.ind.homeoffice.gov.uk/documents/oemsectiond/chapter44judicialreview?view=Binary.

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Support for asylum-seekers and other migrants update

Sue Willman continues her series of updates on welfare provision for asylum-seekers and other migrants, supplementing the second edition of LAG's handbook, *Support for asylum-seekers*. The previous update appeared in January 2007 *Legal Action* 13.

POLICY AND LEGISLATION

New Home Office strategy

In March 2007, Home Secretary John Reid announced the latest Home Office strategy, *Enforcing the rules: A strategy to ensure and enforce compliance with our immigration laws*.[1] One of the strategy's main themes is refusing access to services and benefits to 'illegal migrants' (see para 34) who are 'harming' UK society. *Enforcing the rules* contains a lot of rhetoric but little detail, stating that the Home Office will develop detailed plans for implementing the strategy by April 2008. One worrying objective is to review access to primary healthcare and then work with NHS staff and GPs and trusts to introduce the rules, apparently a reference to limiting access to GP treatment for refused asylum-seekers and other migrants. The strategy refers to pilots in three NHS trusts designed to test how Home Office data can help ensure overseas visitors are not entitled to free access to secondary healthcare.

Joint Committee on Human Rights' inquiry into the treatment of asylum-seekers

The Joint Committee on Human Rights (JCHR) has published its report on the treatment of asylum-seekers with chapters on asylum support, children, healthcare, detention and the media.[2] The report identifies a number of human rights violations and potential violations in these areas and demands changes. For example, it calls for a right to free hospital treatment for refused asylum-seekers, especially for pregnant and nursing mothers and people with HIV/AIDS, who are presently denied treatment. The JCHR concludes that by refusing permission to work and offering a system of support which led to widespread destitution, the government was violating the human rights of asylum-seekers and former asylum-seekers.

ASAP report on flawed Home Office decision-making

A report by the Asylum Support Appeals Project (ASAP) highlights the extent of poor decision-making by National Asylum Support Service (NASS) staff where refused asylum-seekers' rights to food and shelter are at stake (see February 2007 *Legal Action* 5).[3] The report's findings include the following:

- 83 per cent of the decisions considered applied an incorrect test to destitution; and
- 43 per cent of the decisions were flawed in the approach to the criteria for support.

The report also demonstrates the effect of the lack of public funding for representation before the Asylum Support Adjudicators (ASA):

- 99 per cent of appellants were unrepresented in 2004–5; and
- 60 per cent of those appellants represented by ASAP during this period had their appeals allowed or remitted, compared with only 20 per cent of unrepresented appellants.

NASS/Immigration and Nationality Directorate developments

Rebranding the Immigration and Nationality Directorate

In April 2007, the Home Office announced that a new 'shadow agency', the Border and Immigration Agency (BIA), had replaced the Immigration and Nationality Directorate (IND). The BIA remains part of the Home Office, and is responsible for managing immigration control in the UK. BIA's chief executive Lin Homer said that its new identity would be rolled out over the next 12 months as part of the transition to full agency status. She said there would be 'increased accountability' and 'a tough new regulator'. Information about asylum support can be found on the BIA's website via 'Applying' and 'asylum support'.[4] It is more difficult to find asylum support guidance such as NASS policy bulletins on the website, but these still appear on it under documents now referred to as Asylum Support policy bulletins.

New Asylum Model and NASS

In July 2006, it was announced to the National Asylum Support Forum stakeholder forum meeting that NASS no longer existed as an organisation. The Home Office is gradually introducing 'end-to-end case management of asylum claims' on a regional basis across the UK. This means that a single 'case owner' deals with an asylum application from initial interview until a favourable decision and integration, or a negative decision and voluntary return or removal. There are five 'segments' under which cases are to be processed: third country, minors, potential non-suspensive appeal, late and opportunistic, and general casework. It appears that New Asylum Model (NAM) case owners will also deal with support decisions for cases in the new model system, including s4 cases.

The immigration minister, Liam Byrne, has also announced that a special legacy team would process the 400,000 or so older cases by June 2011. At the time of writing, the organisation previously known as NASS continues to administer asylum support decisions from its IND offices in Croydon, and it appears this may prevail for 'legacy' cases as well as s55 cases.

Unaccompanied minors

The Home Office has introduced various changes to law and policy affecting unaccompanied asylum-seeking children. The Asylum Policy Instructions were amended from 1 April 2007 so that a child who comes to the UK and claims asylum will now only be granted discretionary leave until s/he is 17.5 years rather than until the age of 18. The BIA will not seek to enforce removal before the child turns 18 unless satisfied that adequate reception and accommodation arrangements are in place in the proposed country of return.

There are 'case owners' in NAM who specialise in dealing with applications by minors after attending a five-day 'minors training programme'. The changes do not affect support entitlement under the Children Act (CA) 1989, except that there are proposals to 'disperse' unaccompanied minors around the UK so that the responsibility is shared among local authorities.

Language and life in the UK tests

The requirement to pass an English language or 'knowledge of life in the UK' test for those who are applying for British citizenship has been extended to those who are applying for indefinite leave to remain from 2 April 2007 (see also page 12 of this issue). It is possible to apply for an exemption due to age or a

medical condition, or to apply for further leave to remain for more time to pass the test.[5]

Iraq and support under Immigration and Asylum Act 1999 s4

The largest proportion of refused asylum-seekers accommodated by the Home Office under Immigration and Asylum Act (IAA) 1999 s4 (ie, 2,600) are from Iraq.[6] Most qualify for support on the basis that the provision of accommodation is necessary to avoid a breach of their rights under the European Convention on Human Rights ('the convention') (see Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations (IA(PAFAS) Regs) 2005 SI No 930 reg 3(2)(e)). This is usually because they have outstanding further representations or a fresh claim under article 3 of the convention. It has been argued that Iraqi refused asylum-seekers should also qualify for support on the basis that they are taking reasonable steps to return, or there is no viable route of return to Iraq given the dangers of travel there (IA(PAFAS) Regs reg 3(2)(a) and (c) respectively and see January 2006 *Legal Action* 14).

In response to these arguments, the Home Office issued guidance on 27 February 2007 about issues arising on route and method of return.[7] This guidance concludes 'There are a number of routes available for people wishing to travel to or from Iraq … it is considered that travel from the UK to Iraq is both possible and reasonable'. However, the guidance notes that the United Nations High Commissioner for Refugees (UNHCR), in its position paper of December 2006, *UNHCR return advisory and position on international protection needs of Iraqis outside Iraq*, advised against the possibility of internal relocation in all parts of Southern and central Iraq.[8] The Home Office rejects the UNHCR's conclusion that it is unsafe for all persons in Central and Southern Iraq to relocate, but the guidance goes on to state that 'each case must be considered on its individual merits'. It appears that the Home Office's current approach to applications for IAA s4 support to avoid a breach of the convention is to consider whether there are safety issues that go beyond the mechanics of return.

Asylum Support Tribunal

The Asylum Support Adjudicators (ASA) was renamed the Asylum Support Tribunal (AST) and its funding and administration were transferred from the Home Office to the Lord Chancellor from 2 April 2007 (see Transfer of Functions (Asylum Support Adjudicators) Order 2007 SI No 275). This change is a belated response to the report of the review of tribunals by Sir Andrew Leggatt entitled *Tribunals for users – one system, one service*, which was published in 2001. Following publication of the Leggatt report, the government published the white paper *Transforming public services: complaints, redress and tribunals* in 2004. This paper recommended the establishment of a unified new Tribunals Service under the remit of the Lord Chancellor.

Benefits

Integration Loans for Refugees and Others Regulations 2007

Draft regulations and an explanatory note have been published setting out the basis for the proposed new integration loans for asylum-seekers who have been granted leave to remain, either as a refugee or after being granted humanitarian protection, or as a dependant (see June 2006 *Legal Action* 26). There is no time limit for making an application, although the length of time since the applicant was granted leave to remain is a relevant factor in deciding whether or not to provide a loan. At the time of writing, there is no date for implementation. Until the loan scheme is introduced, asylum-seekers who are granted refugee status still have the right to claim backdated social security benefits.

Habitual residence test and advance claims

The Department for Work and Pensions has issued the Social Security, Housing Benefit and Council Tax Benefit (Miscellaneous Amendments) Regulations 2007 SI No 1331 governing claims where income support, jobseeker's allowance, housing benefit or council tax benefit has been refused because the claimant is not habitually resident in the UK. This follows the Court of Appeal's decision that the decision-maker had discretion to make an 'advance award' of benefit where a claimant would become habitually resident in future (*Secretary of State for Work and Pensions v Bhakta* [2006] EWCA Civ 65, 15 February 2006; June 2006 *Legal Action* 28). The amended regulations, in force from 23 May 2007, reverse the position so that people from abroad, ie, those who are not habitually resident, are excluded from advance awards of benefit. This is explained in *Housing Benefit and Council Tax Benefit Circular* HB/CTB A6/2007.[9]

CASE-LAW

Benefits

Forthcoming appeals on residence

■ Abdirahman and Ullusow v Secretary of State for Work and Pensions

These test cases on the meaning of right to reside are appeals against the Social Security Commissioners' decisions (*CH/2484/2005*; *CIS/3573/2005*; and *CPC/2920/2005*, 12 May 2006) in the context of non-economically active EU nationals and are due to be heard by the Court of Appeal on 18 and 19 June 2007.

■ R (Couronne and others) v (1) Crawley BC (2) Secretary of State for Work and Pensions (3) First Secretary of State; R (Bontemps and others) v Secretary of State for Work and Pensions and (1) West Sussex CC (2) Reigate & Banstead BC (interested parties)

[2006] EWHC 1514 (Admin), 30 June 2006[10]

The commissioners' decision to reject the Chagossian islanders' appeal was reported in January 2007 *Legal Action* 15. The Court of Appeal has granted leave to appeal (*C1/2006/1793* and *1795*) and the case is listed for 9 July 2007.

Immigration

Article 8 of the convention

■ Huang v Secretary of State for the Home Department and Kashmiri v Secretary of State for the Home Department

[2007] UKHL 11, 21 March 2007

The facts and judgment of this case are set out in more detail on page 13 of this issue.

In this key decision, the House of Lords reviewed the approach to applications for leave to remain in the UK based on the convention's article 8 right to respect for family life and the effect of proportionality. The test is set out at para 20 of the judgment:

> *… whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide.*

Asylum and Immigration (Treatment of Claimants, etc) Act 2004 s35 and 'reasonable excuse'

■ R v Tabnak

[2007] EWCA Crim 380, 19 February 2007

The appellant, T, an asylum-seeker whose claim had been refused, had pleaded guilty to the offence of refusing to co-operate with his removal under Asylum and Immigration

(Treatment of Claimants, etc.) Act 2004 s35 and been sentenced to 12 months' imprisonment. T had refused to comply with the Home Secretary's request that he assist in obtaining a travel document because he feared that if he were returned to Iran his life would be at risk.

The main issue considered by the Court of Appeal was whether such fears were capable of constituting 'a reasonable excuse' for failing to comply with a requirement of the Home Secretary. The court drew a distinction between unwillingness, and an inability, to comply. Although the court rejected T's appeal, it envisaged circumstances in which a defendant would, because of apprehension for the consequences of deportation, suffer some psychiatric illness that could constitute a reasonable excuse for non-compliance.

Asylum support under IAA s95

Jurisdiction of the AST

■ R (Secretary of State for the Home Department) v Chief Asylum Support Adjudicator and Malaj (interested party)

[2006] EWHC 3059 (Admin), 30 November 2006

The Home Secretary brought a judicial review to challenge the Chief Asylum Support Adjudicator's (CASA's) decision and general approach to cases where NASS considers that there is no right of appeal because the appellant is not an asylum-seeker. M, the interested party, who was not represented in the judicial review, appealed to the ASA against the refusal of asylum support by NASS. After M appealed, NASS wrote to the CASA contending that she had no jurisdiction to hear the appeal because M was a failed asylum-seeker and so had no right of appeal under IAA s103(1). The Administrative Court dismissed the application. It decided that the ASA can hear an appeal which relates to the existence or otherwise of the factual circumstances that lead to support being granted under IAA s95, such as whether or not the appellant is an asylum-seeker.

Asylum support under IAA s4

Voucher only support

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

[2006] EWHC 3147 (Admin), 29 November 2006

The claimant, AW, a refused asylum-seeker, applied for judicial review of the Home Secretary's decision not to provide clothes for her or her baby. She received support from the Home Office, in the form of accommodation and supermarket vouchers only, under IAA s4. AW argued that the phrase in the legislation 'facilities for accommodation' should be read so as to include other essential items such as clothing and was not limited to food and basic toiletries. Sir Michael Harrison found that the Home Secretary's power under IAA s4 to provide 'facilities for accommodation' did not extend to clothing, since the facilities had to be linked to accommodation.

Comment: The 6,000–7,000 households accommodated under the IAA s4 regime continue to have no access to the essentials of daily life such as clothing, baby things and travel expenses.[11] In May 2006, the Home Secretary issued draft regulations which would have enabled a limited number of items to be provided in kind. On 21 February 2007, the Home Office advised the JCHR that there would be further consultation following the above case. To date no further regulations have been issued.

Community care

Adults and National Assistance Act 1948 s21

■ Croydon LBC; Hackney LBC v R (AW, A and Y) and Secretary of State for the Home Department (interested party)

[2007] EWCA Civ 266, 4 April 2007

Is the local authority or NASS responsible for supporting a refused asylum-seeker with care needs who has an outstanding fresh asylum or human rights claim? The local authorities appealed to the Court of Appeal following the preliminary ruling in *R (AW) v Croydon LBC* [2005] EWHC 2950 (Admin), 16 December 2005; June 2006 *Legal Action* 29. The effect of that decision was, first, that a failed asylum-seeker who claimed at port and who continues to have temporary admission is lawfully in the UK for the purposes of Nationality, Immigration and Asylum Act (NIAA) 2002 s54 and Sch 3, and so may be entitled to accommodation under National Assistance Act (NAA) 1948 s21. Those who entered the UK unlawfully, and made an asylum or convention claim 'in-country', and do not have temporary admission are treated as unlawfully in the UK and so are ineligible. This issue was upheld in *R (M) v Slough BC* [2006] EWCA Civ 655, 25 May 2006 below and so was not appealed against. Second, Mr Justice Lloyd Jones decided that a local authority was responsible for providing NAA s21 accommodation to avoid a breach of convention rights if the refused asylum-seeker had an outstanding fresh claim. A local authority could not refuse on the basis that IAA s4 support was available.

The Court of Appeal agreed and dismissed the appeal. It found that when the Home Secretary considers whether a failed asylum-seeker is destitute under IAA s4, he must take into consideration the availability or otherwise of NAA s21 accommodation by reference to the Asylum Support Regulations 2000 SI No 704. It followed that the s21 accommodation duty preceded any duty under s4. Lord Justice Laws concluded: 'There is in the end nothing to show that the legislature intended to distribute responsibility for the support of failed asylum-seekers between central and local government in a radically different manner from the arrangements which their Lordships' decision in *Westminster* [*v NASS*] shows were made in relation to asylum-seekers.' See also page 38 of this issue.

■ R (N) v Lambeth LBC

[2006] EWHC 3427 (Admin), 20 December 2006[12]

N had applied for a judicial review of Lambeth's decision that she was not entitled to accommodation under NAA s21. N was a refused asylum-seeker who had become chronically ill with AIDS-related conditions. After her asylum claim was refused, N claimed unsuccessfully that it would be a breach of article 3 of the convention to return her to Uganda where she would probably die because she could not afford anti-retroviral drugs and other necessary treatment. The House of Lords rejected N's appeal in *N v Secretary of State for the Home Department* [2005] UKHL 31, 5 May 2005; [2005] 2 AC 296.

N petitioned the European Court of Human Rights (ECtHR). Initially, the ECtHR wrote to the UK government asking that she should not be removed at that stage. Subsequently, the Home Secretary had not sought to remove her, pending consideration of that claim. After the House of Lords' decision, Lambeth reviewed N's needs; it found that her HIV illness was stable and non-symptomatic and she was responding well to medication. The council applied its eligibility criteria for community care services based on the *Fair access to care services* guidance. Services were only provided to those who fell into the top two bands, 'critical' or 'substantial'. The council concluded that N did not fall within either band. Defending the claim, the council argued that N was not 'in need of care and attention' both because it could take its eligibility criteria into account when considering that question and because she did not need 'care and attention'. The council also argued that the council had no power to provide support to N because this was not needed to avoid a breach of her convention rights: she was excluded by NIAA Sch 3 and could obtain support from the Home Secretary under IAA s4. Mr Justice Walker reviewed the case-law in some detail and rejected these arguments.

The council had misdirected itself by

assessing the need for 'care and attention' by reference to the eligibility criteria, rather than by reference to the need for 'looking after' as set out in the case-law from *R v Westminster City Council and others ex p M, P, A and X* CA, 17 February 1997; (1997) 1 CCLR 85 onwards. The judge then followed the approach of Mr Justice Lloyd Jones in *R (AW, A and Y)* above in finding that the council could not take into account the availability of IAA s4 support from the Home Office when assessing its NAA s21 duty. There was a duty to provide s21 accommodation to avoid a convention breach where the fresh human rights claim was not manifestly unfounded. An application to the ECtHR was analogous to a fresh claim. The Court of Appeal granted permission to appeal and expedition, although this was before the decision in *R (AW, A and Y)* above.

Comment: The House of Lords has granted leave to appeal in *R (M)* above in relation to the meaning of 'in need of care and attention' and on the application of NAA s54 and Sch 3 to a failed asylum-seeker.

Children

■ R (Blackburn-Smith) v Lambeth LBC

[2007] EWHC 767, 4 April 2007

The claimant, B, applied for judicial review of the council's decision to withdraw accommodation and financial support, provided under CA s17. B was a Jamaican overstayer who came to the UK on a visitor's visa, had married and had children, and had divorced. Her children were British nationals. She advised the local authority that she had an outstanding application under article 8 of the convention, but it appears that this was not produced to the council or to the court.

The council concluded that B had other means of support because she had refused both the £35 a week financial support offered and to provide information about how she was supporting her household. The council's enquiries suggested that she could work in Jamaica: there was no evidence that she could not support herself there. The council offered B travel expenses back to Jamaica or to accommodate the children without her under CA s20. The court found there was no absolute duty to accommodate B or her children under s17. The council had carried out adequate assessments and had considered the article 8 rights of B, her husband and their children.

■ R (Hillingdon LBC) v Secretary of State for Education and Skills

[2007] EWHC 514 (Admin), 15 March 2007

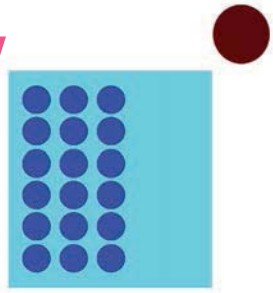
Hillingdon applied unsuccessfully for a judicial review of the secretary of state's decision to reduce the grant paid to it to offset the costs of supporting former unaccompanied minors. Local authorities have a duty to provide services under CA s23 to former 'looked after' children. In *R (Berhe) v Hillingdon LBC* [2003] EWHC 2075 (Admin), 29 August 2003; 1 FLR 439 (known as the *Hillingdon* judgment), the High Court confirmed that this duty applied to former unaccompanied minors. Following this decision, local authorities that supported a higher number of unaccompanied minors, such as Hillingdon, secured a central government leaving care grant of £140 per person for each person in their area but councils were expected to fund up to the first 44 young people. Hillingdon argued that the secretary of state's decision to reduce this grant from April 2005 was unlawful.

Mr Justice Forbes dismissed the application. He found there was no legitimate expectation that the grant would be paid at a particular rate. Nor did the change in the formula for the grant thwart the secretary of state's stated policy of directing assistance to those most affected by the *Hillingdon* judgment.

1 Available at: www.ind.homeoffice.gov.uk/6353/aboutus/enforcementstrategy.pdf.
2 *The treatment of asylum seekers*, tenth report of session 2006-07, HL 81–I/HC 60–1, March 2007, available at: www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/81/81i.pdf.
3 *Failing the failed? How NASS decision making is letting down destitute rejected asylum seekers*, Asylum Support Appeals Project, February 2007, available at: www.asaproject.org.uk/news/ASAP_Feb07_FailingtheFailed.pdf.
4 Visit the BIA's website at: www.bia.homeoffice.gov.uk.
5 Further details are available at: www.bia.homeoffice.gov.uk/applying/nationality/knowledgeoflifeintheuk.
6 *Asylum statistics: 4th Quarter 2006 United Kingdom*, Home Office, is available at: www.homeoffice.gov.uk/rds/pdfs07/asylumq406.pdf.
7 *Country policy bulletin 1/2007: Iraq* is available at: www.ind.homeoffice.gov.uk/documents/countryspecificpolicybulletins.
8 Available at: www.unhcr.org/home/RSDLEGAL/458baf6f4.pdf.
9 Available at: www.dwp.gov.uk/hbctb/circulars/2007/a6–2007.pdf.
10 Simon Cox, barrister, London.
11 See note 6.
12 Amanda Weston, barrister, Manchester.

Sue Willman is a partner at Pierce Glynn solicitors. Readers are welcome to forward relevant cases to: swillman@pierceglynn.co.uk for inclusion in the next 'Support for asylum-seekers and other migrants update', which will be published in January 2008 *Legal Action*. The author would like to thank colleagues at notes 10 and 12 for their contributions.

Discrimination law update – Part 1



The aim of this twice-yearly update is to highlight proposed legislative changes and key case-law developments, and to offer some practical guidance to advisers and practitioners on the implications of any such changes to everyday practice. Catherine Rayner also gives practical guidance on how judgments may impact on casework and representation. Part 1 of this article reviews recent developments in policy and legislation and in case-law relating to a first challenge under the Employment Equality (Age) Regulations (EE(A) Regs) 2006 (see below), sex discrimination and sexual harassment and the burden of proof. Part 2 will be published in July 2007 *Legal Action*.

POLICY AND LEGISLATION

Disability equality duty

The Disability Discrimination Act (DDA) 2005 makes significant changes to the DDA 1995. Most of the DDA 2005 provisions came into force on 10 October 2006, with the public sector duty coming into force on 4 December 2006.

The introduction of the disability equality duty is a key step in the implementation of anti-discrimination measures. The duty requires public authorities to promote positive attitudes to disabled people; encourage the participation of disabled people in public life and promote equality of opportunity between disabled and other people. The purpose is to ensure that local authorities mainstream disability equality into the way that they carry out their functions and that systematic and institutionalised discrimination is tackled effectively.

DDA 1995 s49A as inserted by DDA 2005 s3 sets out the general duty on public authorities to promote disability equality. DDA 1995 s49B defines a public authority as including 'any person certain of whose functions are functions of a public nature'. This is a wide-reaching duty, and advisers should note that it is likely to cover a very broad range of organisations, from health authorities and primary care trusts, to schools, colleges and the police.

In addition to the general duties, there are also specific duties which the public bodies covered must comply with. The Disability Discrimination (Public Authorities) (Statutory Duties) Regulations 2005 SI No 2966 require that listed public bodies must draw up and publish a Disability Equality Scheme, showing how they intend to fulfil their obligations under the Act. Guidance on the process for doing this, and the matters to be taken into account by authorities, can be found in the Disability Rights Commission's code of practice on the DDA 2005.[1] Full details of the duty and its implications are set out in December 2006 *Legal Action* 33 and are not repeated here.

Gender equality duty

The gender equality duty came into force on 6 April 2007. The duty requires all public bodies to demonstrate that they are promoting gender equality and eliminating sexual discrimination and harassment. Guidance on the duty and its application and the various codes of guidance are available from the Equal Opportunities Commission.[2]

Employment Equality (Age) Regulations 2006 SI No 1031

The EE(A) Regs came into force on 1 October 2006. They represent the final stage of the domestic implementation of the EU Equality Directive (2000/78/EC) (see also October 2006 *Legal Action* 20). The EE(A) Regs provide that discrimination on the ground of age will be unlawful in the context of employment and vocational training, and follow much the same scheme as the existing provisions for race, gender, sexuality and religion, and much of disability. So, for example, the types of unlawful discrimination are the same, namely direct and indirect discrimination (reg 3); victimisation (reg 4); harassment (reg 6); and post-employment discrimination (reg 24). The claimant must prove discrimination by reference to an actual or hypothetical comparator (reg 3(1)(a)) or prove that a provision, criterion or practice has been applied to them (reg 3(1)(b)). The burden of proof operates in the same way, which applies only in sherriff and county courts, operates as for other discrimination strands (reg 40). The scope of the EE(A) Regs, in terms of which individuals can rely on them (Part 2 regs 7–23), and the steps for enforcement, are identical to other discrimination strands. However, there are a number of key differences between the EE(A) Regs and other areas of discrimination with which advisers need to be fully familiar when advising on age discrimination. These are set out below.

Retirement age

No unlawful discrimination will take place where a person who has reached the age of 65 is dismissed by reason of retirement (reg 30). Whether or not the dismissal is by reason of retirement depends on whether the steps and definitions set out in Employment Rights Act 1996 s98ZA–F have been complied with.

Advisers should note that this provision is currently subject to challenge by the National Council on Ageing (which operates under the names Age Concern and Heyday) on behalf of Heyday, the membership organisation, in the case of *R (The Incorporated Trustees of the National Council on Ageing) v Secretary of State for Trade and Industry*, QBD, 6 December 2006. The parties have agreed that the question of whether the EE(A) Regs comply with the Equality Directive, by effectively introducing a mandatory retirement age of 65, will be referred to the European Court of Justice (ECJ) for determination. Cases raising issues of age discrimination or unfair dismissal where this is relevant will be stayed pending the outcome. Currently, the ECJ is considering a similar point in lititation from Spain. This will be reported in future articles.

Apparent age of the claimant

Age discrimination may occur if less favourable treatment takes place because of a person's actual age or his/her apparent age (reg 3(3)(b)). This might apply if a person is denied work or promotion because s/he looks too young for the responsibility, or is considered too old to appeal to the youth market, for example.

Only the claimant's *age*

Direct discrimination can only be unlawful if it is due to the age or perceived age of the claimant and not because of the age or perceived age of an associate. A person is

not discriminated against if s/he is treated less favourably because of the age of his/her children, partner or friends, for example. This is different to race, sexuality and religious discrimination.

Justification of direct discrimination

Direct discrimination on the ground of age is unique in that the employer can defend its otherwise discriminatory action by showing that the treatment is a 'proportionate means of achieving a legitimate aim' (reg 3(1)). This is the same justification which applies to indirect discrimination.

It is important to note the difference between the UK legislation and the Equality Directive, which refers to objective justification. The European wording requires that the treatment must be 'appropriate and necessary' (article 2(2)), which is arguably a higher standard than the wording of the UK test.

What is a legitimate aim?

During the consultation stage of the legislation, the Department of Trade and Industry suggested that legitimate aims may include considerations of health and safety; the facilitation of employment planning; the encouragement and reward of loyalty; the setting of age requirements to protect a particular age group, or to ensure protection of a particular group; and the fixing of a minimum age of qualification for some employment advantages, in order to encourage the recruitment or retention of workers of a certain age, or the fixing of a maximum age for recruitment or promotion based on the need to train for the post in question. The last three aims appear to suggest positive discrimination which is not itself lawful, and therefore unlikely to be capable of constituting a legitimate aim.

Other considerations may include costs. An employer may argue that older workers are more expensive to employ, perhaps because of the costs of either insurance or of potential retirement, or health concerns generally. While costs may form part of a legitimate aim for a private company, cost alone is not likely to be a legitimate aim (see, for example, *Cross and others v British Airways plc* UKEAT/0572/04/TM, 23 March 2005; [2005] IRLR 423). This is because it is recognised that there are costs associated with different groups of workers which are specific to them (the costs of pregnant women or disabled staff, for example) and it would be contrary to the public policy aim of eliminating discrimination for employers simply to be able to say: 'It is too expensive.'

Any legitimate aim pursued must be proportionate, meaning that the extent of the disadvantage of the discriminatory effect is outweighed by the advantages of the aim being achieved. For example, the employer is more likely to be able to justify discrimination if protection of employees' health and safety is the aim rather than the aim being to attract more customers.

Potential comparator and comparator group

The EE(A) Regs do not give any guidance on how to decide the appropriate age of the comparator for the purposes of direct discrimination. Certainly nothing suggests that there has to be a significant difference between the age of the person who is complaining of discrimination and the age of the comparator. The ages must simply be different.

However, in most cases, the greater the difference in age between complainant and comparator, the greater the likelihood that age has been a factor. So, the recruitment of a woman who is a couple of years younger than one of the unsuccessful candidates may not be significant; while a ten-year age gap between the successful candidate and all other candidates may well be. A smaller age difference may be far more significant in the earlier and later stages of working life, or if assumptions have been made about whether a woman is still likely to have children, or when a man might be hoping to retire, or the health risks of certain groups of people.

Similarly, when considering a claim of indirect discrimination, the legislation gives no guidance about how a pool for comparison should be drawn. The EE(A) Regs refer to a disadvantage to persons of the same 'age group' as the claimant, and define age group as meaning persons defined by reference to age, whether by reference to a particular age or a range of ages (reg 3(3)(a)). Advisers should take account of the guidance from the House of Lords in *Rutherford* and the Court of Appeal in *Cheshire & Wirral* below.

Exceptions relating to benefits based on length of service

Regulation 32(1) provides that discrimination in the award of a benefit based on length of service will not be unlawful, provided that it reasonably appears to the employer or another that the use of length of service as a criterion fulfils a business need, for example, by encouraging loyalty (reg 32(2)). This means that accrued service can be a factor in enhanced pay and benefits, provided it fulfils a business need.

Advisers should note that the standard is subjective, depending on the reasonable belief of the employer. Furthermore, the effect of regulation 32(2) is that an employer can lawfully decline to provide certain benefits to employees with less than five years' service.

Exception for national minimum wage

Regulation 31 exempts the national minimum wage provisions, allowing for lower pay for younger workers, from the scope of the EE(A) Regs.

Exception for payment of redundancy pay

Regulation 33 provides that enhanced redundancy payments calculated in accordance with the relevant statutory provisions will be lawful. An employer will not discriminate if it pays actual weeks' pay, or uses a greater multiplier in the calculations.

Instructions to discriminate

The provisions in the EE(A) Regs regarding instructions to discriminate are unique, although provisions dealing with instructions to discriminate exist in the Race Relations Act 1976 in a different form. Regulation 5 provides that a person shall discriminate against another if s/he treats that person less favourably because:

- that person has not carried out an instruction to do an act which would be unlawful under the EE(A) Regs; or
- having been given an instruction to do an unlawful act, that person complains to another person about that instruction.

The instruction to discriminate can be given by any person.

Advisers should be aware that a person can only benefit from the protection of these provisions if the instruction to discriminate is in fact and law unlawful. It will not be enough that the person complaining believes that the instruction given is unlawful. This means that a complainant must ensure that the various elements of age discrimination are present, and that there is no justification by the employer.

Provided that the instruction is unlawful, the person instructed will be protected if s/he complains to any other person. This appears to mean that the complaint can be made to any manager, or indeed any external person, including perhaps the press. In this respect the protection appears to be far wider that the whistle-blowing legislation, for example.

CASE-LAW

EE(A) Regs challenge

R (Unison) v First Secretary of State [2006] EWHC 2373 (Admin), 27 September 2006; [2006] IRLR 926; May 2007 *Legal Action* 13 and 23 involves a first challenge under the

EE(A) Regs. Advisers should note that the proceedings were brought for judicial review of the government's decision to change the pension rules in the light of the EE(A) Regs, and were not discrimination law proceedings. Thus, the question asked was not whether there was discrimination, but whether the decision to change the rules was one which a reasonable decision-maker could make.

The action was brought by Unison on behalf of its members when, following the introduction of the EE(A) Regs, the government announced the abolition of the 85 year rule from its pension schemes, on the grounds that it was age discriminatory and of cost. The rule allowed members of the scheme to retire early with full benefits if the sum of their age and the number of years' service was 85 or more. Clearly, this was a benefit which tended to favour older workers with long service.

If a younger worker had challenged the provisions on the ground of discrimination, it would be open to the employer, or pension scheme in this case, to argue that the service and benefits exemption applied, and that there was a reasonable belief that there was a business reason for the provisions. This would be a fairly low threshold (see above). Here, the government decided that, in order to comply with the new regulations, the provision
must be removed. Unison challenged the reasonableness of this decision, arguing that this step was unnecessary to ensure compliance with the Equality Directive. Furthermore, it argued that the provisions fell within the derogation concerning pensions and benefits.

The High Court dismissed the application by Unison, partly because the government would have removed the rule on a policy basis in any event, because of considerations of cost. However, the court further held that the government had concluded correctly that the rule produced different outcomes where the distinguishing characteristic was age and it was, therefore, potentially discriminatory.

Sex discrimination and sexual harassment

It is a well-recognised principle of European law that national laws implementing EU Directives must be put into effect to ensure that there is no reduction in existing national rights. Furthermore, if the national laws do not properly implement the EU Directive, the national courts must interpret national legislation so as to comply with EU law and, if this is not possible, should disapply the national law in so far as it is non-compliant. In the case of *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007] EWHC 483 (Admin), 12 March 2007, the Equal Opportunities Commission (EOC) challenged by way of judicial review the wording and effect of the statutory provisions contained in the Employment Equality (Sex Discrimination) Regulations (EE(SD) Regs) 2005 SI No 2467. These regulations implement into UK legislation the EU Equal Treatment Amendment Directive (2002/73/EC).

The EOC argued, and the High Court agreed, that the legislative provisions as drafted have a number of flaws, which mean that they are not compliant with the Equal Treatment Amendment Directive. It is understood that the government will not be appealing the ruling, but will be entering into discussions with the EOC with a view to redrafting the law.

Advisers should be aware of the defects of the legislative provisions now identified, since these will have an immediate impact on any cases currently being pursued. The case can, of course, be relied on as authority in any case before the courts, but it is also important to remember that the doctrine of direct effect will mean that the Equal Treatment Amendment Directive can itself be relied on, where it is sufficiently precise, against emanations of the state. These will include government; local government; and the health service and fire services, for example. Claimants working for wholly private sector organisations who cannot rely directly on the Equal Treatment Amendment Directive, and who have particular difficulty with claims of harassment or in specific maternity claims, may need to either seek an adjournment pending the redrafting of the provisions or, in some cases, consider taking a *Francovich* action (see *Francovich* and *Bonifaci v Italy* Case C-6/90 and Case C-9/90 respectively; [1991] ECR I-5357; [1995] ICR 722). In any cases where there is doubt, expert advice should be sought.

The legislative failures identified are as follows:

- The definition of harassment in the freestanding provisions relating to sexual harassment is too narrowly drafted. The legislation, as drafted, provides that a woman is subject to harassment if she receives unwanted conduct 'on the ground of her sex' which has the prohibited purpose or effect (Sex Discrimination Act (SDA) 1975 s4A, as inserted by EE(SD) Regs reg 5). The wording of the Equal Treatment Amendment Directive at article 2(2) is unwanted conduct 'related to the sex of a person' which has the prohibited purpose or effect. The UK drafting wrongly imports a causative link between the treatment of the claimant and her gender, rather than a mere connection or association with sex. The current wording could not be interpreted in line with the Equal Treatment Amendment Directive, and thus will have to be recast.
- On the proper reading of article 2(2) of the Equal Treatment Amendment Directive, harassment of a woman can take place where denigratory conduct is directed towards another person than the claimant, if the conduct creates a humiliating or other environment for her.
- As drafted, the insertion of SDA s3A by EE(SD) Regs reg 4, regarding discrimination against pregnant women, introduces a requirement for a comparator who is a non-pregnant female. The High Court confirmed that it is unlawful to require a comparator in pregnancy discrimination cases, and since the section could not be read otherwise, it must be recast. Advisers will note that the government had always maintained that s3A did not introduce any new rights, but merely codified the existing law. Therefore, any case on this point alone may simply be dealt with under pre-existing case-law, rather than the statutory provisions.
- SDA s6A, inserted by EE(SD) Regs reg 8, sets out a series of exceptions to the right not to be discriminated against in the field of benefits. SDA s6A(1), as drafted, restricts the right of pregnant women to receive certain non-contractual benefits during the period of compulsory maternity leave, contrary to the findings of the ECJ in *Lewen v Denda* [2000] ICR 648; 33/97 [1999] ECRI–7243 and must be recast. The rights will apply to any discretionary bonus payments, accrued while a woman was still in work, and during the two-week compulsory leave period.
- SDA s6A(4), as drafted, appears to restrict the rights of women to claim certain forms of discrimination connected with their contract, such as complaints about lack of consultation during the additional leave period. This section will also require recasting.

Burden of proof

The question of how to make a statutory comparison in indirect discrimination cases remains a complex area of law. The new drafting of the EE(A) Regs raises some specific questions, and therefore guidance from the courts is welcomed. In *Cheshire & Wirral Partnership NHS v Abbott and others* [2006] EWCA Civ 523, 4 April 2006; [2006] IRLR 546, the Court of Appeal considered who decides the valid pool for comparison in an indirect discrimination case. The claimants' equal pay case concerned the non-payment of a bonus to a group of women domestic workers. The service that the women worked for had been contracted out and the bonus, paid originally to all domestic

workers, was removed from contracted out staff but retained and frozen for porters and catering staff, who remained in-house.

When, in October 2001, the domestic staff transferred back to local health authority employment, the bonus was not reinstated and the claimants brought equal pay claims comparing themselves with the wholly male porters, who did receive the bonus, but not with the mixed female and male group of catering staff, most of whom received the bonus.

For the purposes of the hearing, it was assumed that the work was of equal value and that the employer, therefore, had to defend any potential indirect discrimination under Equal Pay Act 1970 s1(3). The employers argued that the claimants had identified an incorrect comparator group and that the correct comparator group was a combination of both porters and catering staff. The employment tribunal (ET) disagreed. It found that the women claimants had the right to choose the comparator group. The Employment Appeal Tribunal (EAT) agreed but the Court of Appeal did not. While it is for the claimant to choose the comparator, s/he cannot construct an artificial or arbitrary group. The statistics have to be valid and stringent and not merely fictitious or a short-term phenomenon (see, for example, *Enderby v Frenchay Health Authority* Case C-127/92; [1993] IRLR 591, ECJ). The Court of Appeal said that here the pool should include caterers and porters as a matter of logic.

In the event it made no difference because there was still a clear disparate impact and thus a prima facie case of sex discrimination which required justification by the employer.

The Court of Appeal went on to consider whether the size of the group in this case rendered the statistics meaningless in any event, and found that it did not. While the pool for comparison was small where the issue is an identified benefit, such as a bonus, the size of the pool was of less importance. Furthermore, if the group of 37 was considered too small for the purposes of comparison the effect would be to deny the claimants a remedy.

Advisers should also note that the finding by a tribunal about the correct comparator group is not just a question of fact. It is a question which must be arrived at within a legal framework.

Additional guidance on the selection of the pool for comparison has now been given by the House of Lords in the long-running case of *Rutherford and another v Secretary of State for Trade and Industry (No 2)* [2006] UKHL 19, 3 May 2006; [2006] IRLR 551. Advisers will recall that in this case Mr Rutherford sought to challenge the upper age limit of 65 for claiming unfair dismissal as indirectly discriminating against men. This followed Mr Rutherford's dismissal by way of redundancy when he was 67. His claim of unfair dismissal was excluded because of the upper age limit.

The question for the House of Lords was where to draw the correct pool for comparison. The ET focused on an age band of 55 to 64, considering that this was the group for whom retirement had some real meaning. It established that within this group, looking at the advantaged and disadvantaged groups, there was a disparate impact on men. Both the EAT and the Court of Appeal disagreed with the approach and considered various other formulations, including looking at the entire workforce. Their conclusion was that there was neither disparate impact nor unlawful discrimination.

The House of Lords agreed that there was no unlawful discrimination, but did not agree on the pool for comparison. The correct approach was simply to recognise that the purpose of the analysis in sex discrimination cases was ' … to look for disproportionate impact on men as such and on women as such, as anonymous, characterless materials for statisticians'. Since the statutory bar applied to everyone, male or female, over the age of 65 and no one, male or female, under the
age of 65, the impact on men and women was the same. The rule applied to the same proportion of men and women. That is, all of them over 65 and none of them under 65. Even looking at the advantaged and disadvantaged groups, there was no significant disparate impact.

In many cases of indirect discrimination, the provision, criterion or policy will not be so clear, and there is often a lack of clarity about the way the comparison should be made. Lord Walker strongly favoured the 'advantage-led' approach. That is, that the group of workers who benefit from the criterion, policy or provision should be analysed to see whether there is a disparate impact in terms of gender, race or other, as the case may be. In most cases, this will be the correct approach although it is recognised that there will be some cases where the circumstances of the disadvantaged group will produce such stark statistics that notice must be taken of them.

Where there is a clear disparate impact, employers are required to objectively justify discrimination. Service-related pay schemes reward longer continuous service, and therefore tend to have a disparate impact on women. The question of what an employer would need to do to justify such a scheme was considered by the ECJ in *Cadman v Health & Safety Executive* Case C-17/05, 3 October 2006; [2006] IRLR 969. The ECJ decided that the reward of long service is a legitimate aim and objective of a pay policy, since it is accepted that length of service and experience tend to go hand in hand. Thus, most employers are likely to be able to justify such a pay policy. The effect of this is that an employer will not have to demonstrate that long-serving employees are more experienced, or more valuable; it will be assumed that they are.

Guidance on the application of the burden of proof in discrimination cases was given by the Court of Appeal in *Igen Ltd (formerly Leeds Careers Guidance), Parsons, Green and McNiven v Wong* [2005] EWCA Civ 142, 18 February 2005; [2005] ICR 931, and this guidance remains good law. There, the Court of Appeal proposed a two-stage test, with the respondent providing explanations at the second stage. This raises a question of how far the respondent's explanation can be considered at the first stage? In *Laing v Manchester City Council* UKEAT/0128/06, 4 July 2006; [2006] IRLR 748; May 2007 *Legal Action* 14, the EAT considered whether or not it would be an error of law to take the explanation into account when assessing whether the claimant had proved the necessary facts for the burden of proof to shift. It decided that it is not. Here the claimant, a black West Indian man, argued that he was subject to harassment on racial grounds. The ET accepted the evidence of the employer that, while Mr Laing had been treated badly, the supervisor treated all employees in the same inappropriate and abrupt manner. While the bad employer defence may be relied on by a respondent at stage two, as an explanation which explains completely potentially discriminatory treatment, the ET did not err in law by taking it into account when considering the first stage, that is, whether or not Mr Laing had proved facts from which a conclusion of discrimination could be drawn.

The ET should have regard to all the facts at the first stage in order to see what inferences it is proper to draw. If there is evidence that the treatment is not, as a matter of fact, different treatment to others who are of a different race, it cannot be less favourable treatment and the claim can go no further. It was entirely appropriate in this case and on these facts for the ET to take account of the finding of facts at the first stage.

One of the most difficult issues facing any claimant in a discrimination claim is how to prove that poor treatment is on the ground of gender, race or other as may be. The key difficulty that ETs have wrestled with is what findings of fact will be sufficient for a prima facie case to be made out so that the burden

moves to the respondent to explain its treatment. The importance, of course, is that if the employer is unable to offer a full and non-discriminatory explanation, the ET must find that unlawful discrimination has taken place.

Guidance on when the burden of proof will shift to the respondent has now been given by the Court of Appeal in the joined cases of *Madarassy v Nomura International plc* [2007] EWCA Civ 33, 26 January 2007; May 2007 *Legal Action* 14; *Brown v Croydon LBC and another* [2007] EWCA Civ 32, 26 January 2007 and *Appiah and another v Governing Body of Bishop Douglass Roman Catholic High School* [2007] EWCA Civ 10, 26 January 2007; May 2007 *Legal Action* 11. The Court of Appeal reviewed the case-law dealing with the burden of proof and approved the guidance from *Igen Ltd and others v Wong*. It then gave further guidance which is of key importance to any adviser litigating a discrimination case and bears reading in full. Mummery LJ, giving judgment for the court in *Madarassy*, rejected the argument that the burden of proof shifts to a respondent once the claimant has established the facts of a difference in status and a difference in treatment:

The court in Igen v *Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*

'Could conclude' in section 63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.

The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim (paras 55–57).

Whether this guidance will make the process any clearer to advisers, claimants or the ET remains to be seen, but what is clear is that more than a difference in treatment and a difference in race or gender will be required to win a discrimination case. Some evidence which assists the ET in making the link between the less favourable treatment and the reason for the treatment will be required. Since most discrimination is unlikely to be admitted, and much will be unconscious, claimants continue to face an uphill struggle in the majority of cases.

1 The code of practice can be obtained from the Disability Rights Commission and is available at: www.drc.org.uk/employers_and_service_provider/disability_equality_duty/explaining_the_duty/codes_of_practice.aspx.
2 Visit: www.eoc.org.uk.Docs/GED_CoP_Draft.doc.

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Recent developments in education law – Part 2

Angela Jackman, **Pat Wilkins** and **Eleanor Wright** continue their twice-yearly series considering changes and developments in the law relating to education. Part 2 of this article reviews recent developments in case-law relating to school admissions, negligence, special educational needs (SEN) and transport. Part 1 was published in May 2007 *Legal Action* 9 and reviewed recent developments in policy and legislation, looking at the Education and Inspections Act 2006 and the new School Admissions Code, and case-law relating to school exclusions. Readers are invited to send in unreported cases of interest and information relating to current events in this area.

CASE-LAW

School admissions

■ R (O) v Hackney LBC and The Learning Trust

[2006] EWHC 3405 (Admin), 4 December 2006

This was a claim against a local authority and education trust on behalf of a boy with serious speech and language problems. Hackney operated a co-ordinated admissions system through The Learning Trust in association with other London boroughs. The claimant's guardian had only named one oversubscribed school on the common application form; apparently due to a misunderstanding. The claimant's guardian stated that she had not received a list sent out to disappointed parents detailing schools with vacancies, or later updates of the list. She made no other attempt to contact the local education authority (LEA) although she did appeal unsuccessfully for a place in the preferred school. Subsequently, the guardian requested statutory assessment of the child's SEN; that request was refused but he was placed on School Action Plus. When the guardian eventually applied to other schools, her two first preferences were full. She was provided with details of other schools with vacancies but did not accept a place at any: one was a school in special measures.

It was contended that the admission scheme was flawed because all schools that would have been able to provide suitable educational provision had no places available, and those which did have places could not provide an appropriate level of education. It was therefore suggested that this was in breach of Education Act (EA) 1996 ss13 and 14, which deal with the requirement for local authorities to secure that there is efficient secondary education available to meet the needs of the population in their areas, including schools sufficient in number and character to provide for all pupils. There were also claims under EA 1996 s19, and for breach of article 2 of Protocol 1 of the European Convention on Human Rights ('the convention').

The claim was dismissed. A choice of school places had always been available and a suggestion that the schools would not meet the claimant's SEN was not upheld; the needs of children at School Action Plus can be met within the resources normally available to any mainstream school. The duty of councils in relation to ss13 and 14 was clarified, in that it was held that they do not require councils to guarantee a particular standard of school. The human rights claim was also dismissed on the basis that article 2 of Protocol 1 of the convention requires a quality of education only to a minimum standard. The s19 duty did not arise because no authority is required to make alternative provision where it has offered a place at a suitable school which is reasonably practicable for the pupil to attend.

Negligence

■ Smith v Hampshire CC

[2007] EWCA Civ 246, 22 March 2007

This was an education negligence claim arising out of the alleged failure of the local authority to diagnose and provide for the claimant's dyslexia. The claimant left school at the age of 15 with serious literacy difficulties. He later consulted his GP who referred him to a clinical psychologist who suggested that he was dyslexic; the claim was brought when the claimant was 23, within three years of receiving the psychologist's report. At first instance, the court held the claim was statute-barred because the claimant had knowledge relevant to his cause of action by the time he consulted his GP, or that his dyslexia was ascertainable at that time and he had not taken reasonable steps to obtain the necessary expert advice. The claimant appealed.

The Court of Appeal held that the judge was entitled to find that a reasonable person in the claimant's position would have taken action to find out about his/her dyslexia and sought help at an earlier stage when s/he heard that this was a possibility. The normal expectation is that a person suffering from a significant injury would be curious about its origins, and this should also apply to dyslexics. The claimant's untreated dyslexia was not something which in itself had inhibited him from seeking expert advice, as was demonstrated by the fact that he did ultimately do so. Limitation Act (LA) 1980 s14(3) provides that a person's knowledge includes knowledge that s/he might reasonably have been expected to acquire from facts observable by him/her, if necessary with the help of appropriate expert evidence.

In this case, the claimant knew that he had literacy difficulties that were attributable to his schooling, and these were observable facts which gave rise to a cause of action. The claimant did not, for the purposes of the LA, need to know that he was formally diagnosed as dyslexic. The judge had also correctly exercised his discretion not to disapply the limitation period, given strong evidence of prejudice to the local authority because of the absence of relevant documents.

Statutory appeals to the Special Educational Needs and Disability Tribunal

■ The Reverend and Mrs Jones v Norfolk CC and SENDIST

[2006] EWHC 1545 (Admin), 10 July 2006

This appeal concerned the failure of the Special Educational Needs and Disability Tribunal (SENDIST) to record and take into account professional witnesses and to consider the need to be specific about the provision that it was ordering in a statement

of SEN. The appellants to the tribunal relied on written reports of four professional witnesses: a paediatric psychiatrist; a speech and language therapist; and two educational psychologists. In its decision, the SENDIST did not record that it had admitted two of the professional reports. The decision referred to the four professional witnesses.

On appeal to the Administrative Court, the court held that the failure of the SENDIST to record that it had admitted the reports of two witnesses was not significant. However, the SENDIST had wholly failed to refer to the opinions and reasoning of three of the witnesses on the issue about whether a specialist school was required by the appellant. It was difficult to tell from the SENDIST's decision that those three expert witnesses had given any evidence on that issue. The failure to address the evidence of the professional witnesses meant that the order of the tribunal must be quashed.

The appeal to the Administrative Court against the SENDIST's decision was also challenged on the grounds that the order was not specific in the educational provision to be made for the appellant and that it provided for the LEA to undertake further assessment and therefore deprived the parents of a right of appeal if the provision was changed. At the appeal to the Administrative Court, it was decided that, in this particular case, an additional assessment before preparation of the statement of SEN would have been beneficial, but that the appellant had not been in school for some time and therefore flexibility was needed. A minimum level of flexibility had been laid down by the SENDIST and the parents had not been deprived of a right of appeal. Reference was made to EA 1996 s326, which provides for the tribunal's powers and does not give it a power to order further assessment. However, reference was also made to the decision in *E v Newham LBC* [2003] ELR 286, where the Court of Appeal judged that, in some cases, a degree of flexibility in a tribunal order may be appropriate. See also *R (IPSEA Ltd) v Secretary of State for Education and Schools* [2003] ELR 393 and *E v Rotherham MBC* [2001] EWHC Admin 432, 5 June 2001 regarding change in level of support, and *J v Staffordshire CC and SENDIST* [2005] EWHC 1664 (Admin), 30 June 2005 regarding adequacy of reasons.

■ Hammersmith & Fulham LBC v (1) Pivcevic and Goh (2) SENDIST

[2006] EWHC 1709 (Admin), 10 July 2006

This was an appeal by Hammersmith & Fulham against a SENDIST's decision on 21 November 2005 and a decision on review on 17 March 2006. The SENDIST's decision, upheld on review, was that the child in question should leave Queensmill school, a specialist autistic school maintained by Hammersmith & Fulham, and attend Rainbow school, a private autistic school, and that his statement of SEN should be amended. The cost of education at Rainbow School was, at the time, over £42,000 a year. The potential cost to Hammersmith & Fulham of the SENDIST's decision could have amounted to £2 million. The SENDIST's decision was based on the conclusion that education which did not involve applied behavioural analysis (ABA) was unsuitable for the child. The child had been admitted to Queensmill school in January 2004. He had moved to London from Moscow and, between July and December 2003, had received intensive training from an ABA-trained clinical psychologist in Moscow. From June or July 2005, he received ABA training at home on three afternoons a week and was permitted not to attend Queensmill school on those afternoons. Hammersmith & Fulham applied for a review of the SENDIST's decision that the child should be placed at Rainbow school under Special Educational Needs Tribunal Regulations 2001 SI No 600 reg 37 on the grounds that there were obvious errors in the original SENDIST decision and that the comments and conclusions of the decision in relation to the standards and appropriateness of provision for pupils with autism at Queensmill school were unjust and, in the interests of justice, therefore required a review. When the original decision was upheld on review, Hammersmith & Fulham appealed to the court on the following grounds:

- There is no evidence to support the SENDIST's key findings.
- The SENDIST's decision was irrational.
- The SENDIST applied an incorrect test: although the wording of its first decision suggests that it decided that the child would not receive an adequate education at Queensmill school but would do so at Rainbow school, in substance, the conclusion that it reached was that the child would receive a better education at Rainbow school than at Queensmill school.
- The SENDIST failed to give adequate reasons for its decision.

Evidence: Hammersmith & Fulham requested disclosure of the chairman's notes of evidence alleging that the SENDIST's decisions did not accurately record the evidence that had been given, and asserting that there was a disagreement between the parties about what had occurred at the hearing. Disclosure of the notes of evidence was refused by the Treasury solicitor who asserted that the relevant sections of the chairman's notes had been set out in the SENDIST's second decision on review. Hammersmith & Fulham did not apply to the court for an order for disclosure of the notes.

Burnton J considered when the court would exercise its power to order the SENDIST to produce signed notes of evidence. He decided that the court would not exercise its power because it would be useful or beneficial for the parties to see them. It must be shown that the notes of evidence are required fairly to determine grounds of appeal or of review which appear to have a reasonable prospect of success. Where there is a substantial allegation that there was no evidence to support a significant finding made by the SENDIST, the notes should be produced, and, in such circumstances, the court will normally, if necessary, make an order for their disclosure.

In a case such as this, where notes are not disclosed voluntarily and no application is made for an order for their production, unless it is clear from the SENDIST's decision that its finding was not based on the oral evidence, the court may have no means of knowing whether the finding in question was reasonably based on that evidence; and so the court may be unable to establish whether this ground of appeal is well-founded. There may also be cases where procedure, impropriety or unfairness is alleged, which the court cannot properly determine without the chairperson's notes of evidence.

Did SENDIST apply the correct test? The test for the SENDIST was whether Queensmill school was suitable for the child's ability or aptitude or his SEN and, therefore, appropriate for the child (see EA 1996 s324 and Sch 27 para 8(2)(a)). The question for the SENDIST was not where the child would be best educated; it was required to decide the adequacy or suitability of education and not whether Rainbow school would provide the child with education that was better for him than that at Queensmill school.

Burnton J considered the SENDIST's first decision, where it indicated that the child had made remarkable progress using ABA and that education with ABA would be preferable, but this did not necessarily mean that other forms of teaching were unsuitable. The SENDIST had accepted that education at Queensmill school was less effective than an intensive ABA programme, and that it could flatten or decrease the rate of developmental progress. The SENDIST did not find that it would do so. Burnton J did not accept that the flattening or decrease in the rate of progress necessarily meant that educational provision would be unsuitable or inappropriate. It does not mean that progress ceases.

Burnton J then considered the decision on review under regulation 37. He accepted that

the court should have regard to the reasons given on review under regulation 37 when deciding whether adequate or lawful reasons were given for the first decision. He also accepted that the court should approach the reasons given by the SENDIST on review with caution, having regard to the requirements of the regulations and the risk of subsequent justification of the earlier decision. The decision on review concluded that the child's progress at Queensmill school had not matched his abilities, at least until he had the benefit of an ABA and verbal behaviour programme. His education at Queensmill school had not been suitable for him. Adequate reasons were given for the conclusion on the review. Burnton J therefore concluded that the review decision showed that, in reaching its original decision, the SENDIST had applied, or at least was applying, the correct test.

Burnton J made an observation on the cost of placements. Hammersmith & Fulham had submitted that the very considerable financial consequences to it of the SENDIST's decision required the tribunal to approach its task with proportionately greater care than might be expected or required in cases where much smaller amounts are at stake. Burnton J did not accept that the financial consequences of a SENDIST's decision were the sole or major criterion for the care required in taking a decision. A dispute about the nature of the education required by a child is important even if the costs implications of themselves are minor.

Disability discrimination and exclusion

■ Governing Body of Olchfa Comprehensive School v (1) IE and EE (2) Rimington (Chair of the SENDIST)

[2006] EWHC 1468 (Admin), 22 June 2006

This is an appeal by a governing body from a SENDIST's decision that there had been unlawful discrimination when the child, JE, was excluded for three days. The SENDIST ordered that the school should apologise in writing to JE and that all staff should undergo disability equality training. Before this SENDIST decision, there had been two decisions by the tribunal that JE was not disabled. Both decisions had been quashed on consent following appeal to the Administrative Court from the SENDIST's decisions.

The knowledge issue: Issues raised before the SENDIST at appeal included whether JE was disabled at the material time and whether the school knew or could reasonably be expected to know that JE was disabled. At the time of the exclusion, a diagnosis had been sought about whether JE was suffering from Attention Deficit Hyperactivity Disorder (ADHD). By the time of the hearing before the SENDIST, a diagnosis of ADHD had been made. However, it is clear that the SENDIST did not rely on such a diagnosis. Although the school realised that JE had social and emotional difficulties, he exhibited behaviours consistent with other children who did not have ADHD. He was not underachieving in terms of his learning in class. The school said that it had no formal knowledge of a diagnosis of ADHD. The SENDIST accepted that a lack of a formal diagnosis could not preclude the finding of disability. The SENDIST itself did not make a finding of ADHD although it concluded that there was sufficient information regarding JE's symptoms and behaviour to lead to a conclusion that he was disabled.

The court accepted that there was sufficient evidence before the SENDIST to conclude that JE was, at the material time, disabled within the meaning of Disability Discrimination Act (DDA) 1995 s1 and Sch 1. The court then considered the knowledge issue from the school's perspective. Reference was made to DDA 1995 s28B(3) and s28B(4) and the code of practice at paragraph 7.4. It was submitted that both subsections and the code of practice provide avenues for a lack of knowledge defence.

In considering s28B(3) and s28B(4), Crane J rejected the argument that the defence of lack of knowledge only applies if the responsible body establishes that it would not have taken the step if it had known of the disability. This would ignore the differences between s28B(3) and subsection (b) specifically making the effect of the lack of knowledge relevant: … that its failure to take the step was attributable to that lack of knowledge. There is no equivalent in s28B(4). The school submitted to the SENDIST that it was not only disputing that JE was disabled at the material time but was also putting forward a case that it did not know and could not reasonably have been expected to know that he was disabled. The SENDIST erred in law by not making a finding on whether the school had failed to prove what it needed to provide under s28B (4) in relation to the exclusion.

Unlawful discrimination, justification and DDA 1995 s28C: Crane J considered the definition of discrimination under s28C and, in particular, whether treatment could be shown to be justified under s28B(1)(b). It was the view of Crane J that s28B(1)(b) required a balancing exercise whereby the responsible body must show that the unfavourable treatment (the exclusion) was justified in all the circumstances, including the interests of the school and of the disabled pupil. It was the view of Crane J that the SENDIST had not carried out that exercise.

Crane J also considered s28B(7), which referred to less favourable treatment, or the failure to comply with s28C (reasonable steps), which could only be justified if the reason was both material to the circumstances of a particular case and substantial. In the case of JE, Crane J found that the SENDIST had not made a finding that the reason was material or substantial. Crane J found that the SENDIST had gone on to consider the duty under s28C to take reasonable steps and found that the school had failed to do so. By implication, the school had only failed to justify the unfavourable treatment by exclusion by reason of s28B(8) when it was read with s28C. Crane J also considered the relationship between DDA 1995 s28A and s28C. Section 28A at (4) refers specifically to discrimination by way of exclusion from school. Section 28C, requiring the taking of reasonable steps, refers to the making of arrangements for determining admission and in relation to education and associated services. There is no specific reference, as under s28A, to exclusion. Crane J concurred with the conclusion reached in the *Governing Body of PPC v DS and others* [2005] EWHC 1036 (Admin), 5 May 2005 that the taking of steps in relation to education is sufficiently widely phrased to embrace steps in relation to arrangements for exclusion. Section 28C focuses on ensuring that discrimination will not take place, rather than on decisions that amount to discrimination.

Taking of reasonable steps: The SENDIST found that the school had failed to take reasonable steps including the training of staff in relation to ADHD. It also found that the school had failed to take reasonable steps which may have rendered the need for disciplinary action less likely. Having found that the school had failed to take reasonable steps for the purposes of s28B(8)(a) and, by implication, that the failure was without justification for the purposes of s28B(8)(b), the SENDIST then failed to consider the final words of s28B(8), namely would the unfavourable treatment by way of exclusion have been justified even if the school had complied with a duty under s28C to take reasonable steps? Section 28B(8) does not require proof that the taking of reasonable steps would have prevented unfavourable treatment by way, in this case, of exclusion. However, s28B(8) makes it necessary, if there has been a failure to take reasonable steps, to establish that otherwise justified treatment remains justified despite the failure. For the reasons of the failure to consider s28B(8), Crane J quashed the SENDIST's decision.

■ Ms 'K' v The School and SENDIST

[2007] EWCA Civ 165,
6 March 2007

This was an appeal to the Court of Appeal from a decision in the Administrative Court confirming the SENDIST's decision that the refusal by the school to clean and change a pupil, who was incontinent following a bowel accident, did not amount to discrimination and was not in breach of DDA 1995 s28A(2), s28B(2) and s28C(1)(b). Mitting J, in the Administrative Court, dismissed the appeal against the SENDIST's decision.

The pupil, A, was a paraplegic following a road traffic accident. His intellectual ability was unimpaired but he was unable to change or clean himself after bowel movements. He had a statement of SEN and was placed in mainstream education.

Mitting J, sitting in the Administrative Court, had considered whether the provision of education or associated services in DDA 1995 s28A(2), read with the code of practice in relation to schools and considered in the light of the definition of 'special educational provision' in EA 1996 s312(4), could include the cleaning and changing of a child after a bowel accident. He concluded that the cleaning and changing of a pupil after a bowel accident was clearly not education and was not an associated service as it did not advance A's understanding of topics taught at school or his ability to learn or to enjoy the other facilities of the school, such as sporting activities. It amounted to personal care, not education or services associated with education. Mitting J then considered whether the cleaning and changing of a pupil was an auxiliary service within DDA 1995 s28C(2)(b). Auxiliary aids and services are things or persons which help a pupil to access education and associated services. Reference was made to the code of practice at paragraph 6.20. There is not a duty on a school to provide an auxiliary aid or service. Cleaning and changing A was a service and, if it was related to his education, it must be an auxiliary service. Auxiliary aids and services are ordinarily provided by a LEA under EA 1996 Part IV. It would be unreasonable to impose a collateral and supplemental burden on the school. Mitting J also upheld the conclusion of the SENDIST that the school was justified in not cleaning A because of health and safety issues.

On appeal to the Court of Appeal, the court considered the relationship between the duties owed by the school under the DDA 1995 and the SEN provisions of the EA 1996 Part IV. The court found that there was no barrier between these two sets of duties. The school's duty towards A under EA 1996 Part IV was to provide A with the special educational provision set out in Part III of his statement of SEN. If additional provision for A was required, it could only be obtained through amendment of the statement of SEN. In so far as the school was required to take any reasonable step(s) to cater for A's disability, that step was to approach the LEA and, if assistance was not forthcoming voluntarily, to require the LEA to reconsider the statement of SEN. The Court of Appeal dismissed the appeal on the grounds that the responsibility for providing the additional facilities required to change and clean A lay with the LEA under the statement of SEN and that the school was justified in refusing to continue to change and clean A on health and safety grounds.

School transport

■ R (S) v EduAction (Waltham Forest) and Waltham Forest LBC

[2006] EWHC 3144 (Admin),
22 November 2006

The claimant was a severely autistic child of 16 who had been provided with transport to school in a minibus with two escorts due to his disruptive behaviour. After he was removed from school and reinstated, the local authority suggested that it would offer shared transport, which the parents queried. The local authority took this as a rejection of the transport, following which it offered only to reimburse his parents for taking him to school, without consulting them on the practicalities of this. The parents submitted the decision was *Wednesbury* unreasonable and procedurally unfair. The options of walking to school or taking public transport were not available, and it was wrong in principle to require his parents to take him.

The court pointed out that under EA 1996 s509AA and s509AB (which relate to children of sixth-form age) there was no absolute obligation on the local authority to provide actual transport. A local authority's transport policy should have regard to a range of discretionary factors in deciding what transport to offer. Parents also have an obligation to help to get their child to school.

However, the local authority's decision was seriously flawed because of its misunderstanding about the parents' reaction to the offer of shared transport, and it should have consulted the parents before offering any alternative. The local authority's internal appeals procedure was also flawed since the parents were not allowed to see all the evidence relied on by the appeal panel. The local authority gave an assurance that it would accept a fresh application and, therefore, no final ruling was given.

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Recent developments in European Convention law – Part 2

Philip Leach continues his series on cases at the European Court of Human Rights (ECtHR) which have particular relevance to the UK. This article examines ECtHR case-law concerning articles 8, 12 and 14 of the European Convention on Human Rights ('the convention'). Part 1 was published in May 2007 *Legal Action* 41 and reviewed ECtHR practice and procedure, and case-law relating to articles 3, 5 and 6 of the convention. Parts 1 and 2 cover the period from July to December 2006.

CASE-LAW

Right to respect for private and family life (article 8)

Strip-searching of visitors to prison

■ **Wainwright v UK**

App No 12350/04, 26 September 2006

The applicants were mother (M) and son (A). A had cerebral palsy and severe arrested social and intellectual development. In August 1996, P (M's son and A's half brother) was arrested on suspicion of murder and detained on remand at HMP Armley. As P was suspected of being involved in the supply and use of drugs within the prison, the governor ordered that all his visitors be strip-searched before visits.

In January 1997, the applicants went to visit P. M and A were informed that they would be strip-searched, as there was reason to believe that they were carrying drugs. M and A were told that, if they refused, they would not be allowed to visit P.

M was taken by two female officers into a small room overlooking offices. There were roller blinds on the windows, but they were not pulled down. While M was being searched she explained that, because of his learning difficulties, her son would not be able to sign any consent form without someone explaining to him what was about to happen. By that time M was standing in her underwear. She was permitted to put her vest back on and was then told to pull down her underwear and bend forward. Her sexual organs and anus were examined visually. She was then asked to pull her vest up above her breasts. By the end of the search, M was shaking and visibly distressed. After she had been told to put her clothes back on, one of the officers asked her to sign a consent form, attached to which was a summary of the procedure to be carried out. She signed the form without reading it.

A was taken to a separate room by two male officers. Once in the room, one of the officers put on a pair of rubber gloves, which frightened A. A removed the clothes from the upper half of his body and they were searched. He was subjected to a finger search, which included poking a finger into his armpits. The prison officers then told A to remove the clothes from the lower half of his body. He was, by that stage, crying and shaking. A removed his boxer shorts and was told to spread his legs. Because of his physical disability, he had to balance with one hand on the wall to do so. One of the prison officers looked all around his naked body, lifted up his penis and pulled back the foreskin. A was then given a consent form to sign. He explained that he could not read and that he wanted his mother to read it to him. The officers ignored the request and said that if he did not sign the form he would not be allowed in to visit his brother. He signed the form.

In October 1998, M was examined by a psychiatrist who concluded that the severe upset that she had experienced in the prison had made her existing depression worse. The same doctor also found that A was suffering from post-traumatic stress disorder (PTSD) and had a depressive illness. He found the strip search to be the main cause of both illnesses.

The applicants brought proceedings against the Home Office. The Court of Appeal found that trespass to the person could not be extended to fit the applicants' circumstances. It found that no wrongful act had been committed, except battery against A who was awarded damages. This decision was confirmed by the House of Lords (see *Wainwright and another v Home Office* [2001] EWCA Civ 2081, 20 December 2001; [2003] UKHL 53, 16 October 2003).

Decision: There was a violation of articles 8 and 13, but no violation of article 3. The applicants were awarded €3,000 each as non-pecuniary damages. Given the endemic drugs problem in the prison and the prison authorities' suspicion that P had been taking drugs, the searching of visitors might be considered a legitimate preventive measure. However, the application of such a highly invasive and potentially debasing procedure to people who were not convicted prisoners or under reasonable suspicion of having committed a criminal offence had to be conducted with rigorous adherence to procedures and all due respect to their human dignity.

The prison officers had failed to comply with their own regulations. They had also failed to give the applicants copies of the consent forms before the searches were carried out. It appeared that M was visible through a window in breach of the relevant procedures. There was no verbal abuse by the prison officers and there was no touching of the applicants, except in the case of A who had received damages for battery. Therefore, the treatment undoubtedly caused the applicants distress, but did not reach the minimum level of severity prohibited by article 3.

As to article 8, the searches pursued the legitimate aim of fighting the drugs problem in the prison, but they were not proportionate to that aim in the manner in which they were carried out. Where procedures were laid down for the proper conduct of searches on outsiders to the prison, who might very well be innocent of any wrongdoing, the prison authorities were required to comply strictly with those safeguards and by rigorous precautions protect the dignity of those being searched as far as possible.

Article 13 was violated as the applicants' domestic proceedings had been unsuccessful, except for the instance of battery on A. The House of Lords had found that the negligence of the prison officers did not give grounds for any civil liability, as there was no general tort of invasion of privacy. The applicants had not had available to them a means of obtaining redress for the interference with their rights under article 8.

Comment: This is a decision in which the ECtHR has shown a willingness to exact rather more demanding standards than the domestic courts. The House of Lords found that the Human Rights Act (HRA) 1998 was not applicable, because the events in question occurred before its entry into force. Nevertheless, Lord Hoffmann went on to consider the application of article 8, coming

down against there being a violation, on the basis of the act in question being 'merely negligent', rather than intentional.

Environmental pollution

■ Giacomelli v Italy

App No 59909/00,
2 November 2006

The applicant had lived since 1950 in a house on the outskirts of Brescia, 30 metres away from a plant for the storage and treatment of 'special waste', which had begun operating in 1982. The Lombardy Regional Council granted the company Ecoservizi a licence to operate the plant in 1982. It subsequently renewed the operating licence for successive five-year periods. In 1989, the company was authorised for the first time to treat harmful and toxic waste by means of 'detoxification', a process involving the use of chemicals.

The applicant brought three sets of proceedings for judicial review of the decisions to grant the operating licences. Her applications in the first set of proceedings were dismissed; the second set resulted in a decision ordering the suspension of the plant's operation, which was not implemented; and the third set was still pending.

In 1996, the Regional Council ordered Ecoservizi to initiate an environmental impact assessment (EIA). Between 2000 and 2004, the Ministry of the Environment issued three EIA decrees, concluding that the operation of the plant was incompatible with environmental regulations. Reports by the local health authority and the regional environmental protection agency concluded that the continuation of the plant's operation could cause health problems for those living nearby, and that Ecoservizi had failed to ensure that the waste to be detoxified was compatible with the facility's specifications.

In December 2002, the District Council temporarily rehoused the applicant's family pending the outcome of the judicial proceedings. The applicant complained that the persistent noise and harmful emissions from the plant entailed severe disturbance to her environment and a permanent risk to her health and home, in breach of article 8 of the convention.

Decision: There was a violation of article 8. The applicant was awarded €12,000 as non-pecuniary damages.

Neither the decision to grant Ecoservizi an operating licence, nor the decision to authorise it to treat industrial waste by means of detoxification, had been preceded by an appropriate investigation or study. In breach of domestic law, Ecoservizi had not been asked to undertake an EIA until 1996, seven years after commencing its activities involving the detoxification of industrial waste. The court noted that the Ministry of the Environment had found on two occasions that the plant's operation was incompatible with environmental regulations because of its unsuitable geographical location and the specific risk to the health of local residents. In spite of the findings of the administrative courts, the administrative authorities had failed to order the closure of the facility.

For several years the applicant's right to respect for her home had been seriously impaired by the dangerous activities carried out at the plant situated 30 metres away from her house. There had, therefore, been a failure to strike a fair balance between the interests of the community in having a plant for the treatment of toxic industrial waste and the applicant's effective enjoyment of her right to respect for her home and her private and family life.

Comment: This is the latest in a relatively recent spate of interesting environmental cases before the ECtHR,[1] and a further example of the application of its twofold article 8 test, which involves an assessment of both the substantive merits of the relevant decision and of the decision-making process. Emphasis is once again placed on the importance of public access to information in this field.

Inadequate police checks before implementation of warrant to search premises

■ Keegan v UK

App No 28867/03,
18 July 2006

The applicants' family moved to 19 New Henderson Street, a property owned by Liverpool City Council, in April 1999. The property had been vacant for six months. Before that, the tenant had been the mother of D, who had been arrested in connection with a series of armed robberies between January 1997 and August 1999, but who had been released without charge. D often gave 19 New Henderson Street as his address, and his mother was still on the voters' register as living at that address.

On 18 October 1999, a detective constable applied successfully for a warrant to search the house. He swore on oath that he had reasonable cause to believe that cash stolen during the robberies was in the possession of the occupants. On 21 October 1999, at 7 am, the police raided the property using a metal ram to make a hole in the front door. When it became clear that only the applicants were present, the police apologised, arranged for repairs to be made and left at about 7.15 am.

The applicants brought proceedings against the chief constable for the tort of maliciously procuring a search warrant. Medical reports indicated that they were suffering varying degrees of PTSD. The county court judge made a finding of fact that the police had made prior enquiries with utility companies and the housing department to establish the occupancy of the property, but had mislaid their notes. The judge inferred that the checks revealed that D's mother was no longer living at the property, but that the applicants were living there. He found that the police had not acted with reckless indifference, an element necessary to prove the tort of maliciously procuring a search warrant. The Court of Appeal upheld the decision on the basis that malice could not be proved. On counsel's advice, no application for leave to appeal to the House of Lords was made. The applicants complained to the ECtHR of violations of articles 8 and 13 of the convention.

Decision: There was a violation of both articles 8 and 13. Three of the applicants were awarded €3,000 damages each and the other three applicants were awarded €2,000 damages each.

An appropriate balance had not been struck between the need to investigate crime and the applicants' right to respect for their home. The applicants had been living at the address for six months and had no connection with the suspect or the offence. The loss of the police notes made it impossible to deduce whether the mistake arose because of a failure to make the proper enquiries, or a failure to transmit or record the information. Where basic steps to verify the connection between the address and the offence under investigation were not carried out effectively, the resulting police action, which caused the applicants considerable fear and alarm, could not be regarded as proportionate. Not every unsuccessful search by police would fail the proportionality test, but a failure to take reasonable and available precautions might do so. It was not necessary to restrict actions for damages to cases of malice in order to protect the police in their vital functions of investigating crime. The applicants had also not had an effective remedy, because the requirement to prove malice was too onerous. The domestic courts were unable to examine issues of proportionality or reasonableness and the balance was set in favour of protection of the police.

Comment: This decision hinged on an assessment of the proportionality of the interference with the applicants' article 8 rights. The fact that the police did not act maliciously was not considered decisive, as

the convention 'is geared to protecting against abuse of power, however motivated or caused'. This principle casts doubt on Lord Hoffmann's reliance on the 'merely negligent' actions of the Prison Service, in arguing against a violation of article 8 in *Wainwright* (see above).

Right to marry (article 12)

Gender recognition certificates

■ R and F v UK

App No 35748/05,
28 November 2006

The applicants, who lived in Scotland, had met and begun a relationship in October 1997. They were married in October 1998 and had since then lived as a married couple. They owned their home jointly and had a joint mortgage. F was born male but in 2003 underwent gender reassignment surgery. R was involved throughout the entire process, providing emotional and practical support. The applicants did not consider F's treatment to have affected their physical and emotional relationship and they had left open the possibility of having children in the future.

F wished to have her new gender recognised, including in her birth certificate. One of the conditions for obtaining a full gender recognition certificate (GRC), under the Gender Recognition Act (GRA) 2004, was that the recipient must not be married. As F was married, she was only entitled to apply for an interim GRC, unless and until F and R divorced, something to which they were both deeply opposed. The applicants were entitled to enter into a civil partnership (with effect from 5 December 2005 under the Civil Partnership Act (CPA) 2004), but they considered that such a partnership was not a substitute for marriage because of the different social standing attached to civil partnerships and the different legal protection afforded to couples that were married.

Decision: The application was declared inadmissible. The applicants had not failed to exhaust domestic remedies, as a declaration of incompatibility under the HRA could not be regarded as an effective remedy because it was not binding on the parties to the proceedings and was dependent on the discretion of the executive.

The ECtHR recognised that F faced a dilemma of either sacrificing her gender or her marriage, which had a direct and invasive effect on F's enjoyment of her article 8 rights. The requirements of the notion of 'respect' varied, depending on the case and the margin of appreciation to be accorded to the authorities. Whether a positive obligation exists depended on the balance struck between the general interests of the community and the interests of the individual. Same-sex marriages were not permitted in Scotland. However, the applicants could continue their relationship in all its current essentials and could give it a legal status akin, if not identical, to marriage through a civil partnership. There were costs involved, but they were not sufficient to be prohibitive.

As to article 12, the regulation of the effects of a change of gender in the context of marriage fell within a state's margin of appreciation. It was relevant to the consideration of the proportionality of the effects of the gender recognition regime that the civil partnership provisions allowed couples to achieve many of the protections of married status.

The applicants' complaints under articles 13 and 17, article 1 of Protocol No 1 and article 14 (together with articles 8, 12, 17 and article 1 of Protocol No 1) were also rejected.

Comment: The GRA, introduced as a result of the ECtHR's judgment in *Goodwin v UK* (2002) 35 EHRR 18, established a mechanism for transsexuals to have their new genders recognised. The GRA requires that a Gender Recognition Panel must grant an application (s2) if it is satisfied that the applicant:

- has, or has had, gender dysphoria;
- has lived in the acquired gender throughout the preceding two years; and
- intends to continue to live in the acquired gender until death.

Although the ECtHR acknowledged that the applicants were placed in an 'invidious' position because of their marriage, this was not enough to trump the state's margin of appreciation in this area.

The decision on admissibility, that the applicants need not have applied for a declaration of incompatibility under the HRA, reflects the ECtHR's consistent line on this question, since the case of *Hobbs v UK* App No 63684/00, 18 June 2002. However, as here, the ECtHR is now signaling (see *Burden and Burden v UK* below) that this position could change: 'It is possible that at some future date evidence of a long-standing and established practice of ministers giving effect to the courts' declarations of incompatibility might be sufficient to persuade the court of the effectiveness of the procedure.'

However, it is suggested that this is highly questionable, given that, regardless of any such 'practice', the process would remain a matter of executive discretion. See also *Parry v UK* App No 42971/05, 28 November 2006, a similar case concerning a couple from south Wales.

Prohibition of discrimination (article 14)

Liability of cohabiting sisters to inheritance tax

■ Burden and Burden v UK

App No 13378/05,
12 December 2006

The applicants were unmarried sisters, born in 1918 and 1925, who had lived together all their lives. For the past 30 years they had lived together in a house built on land inherited from their parents in Wiltshire. The house was owned by the applicants in their joint names (and was, together with other land they owned, currently valued at about £875,000). Each of the applicants had made a will leaving all her property, including her share of the house, to the other.

The applicants applied to the ECtHR, arguing that the value of their house had increased to the point that each sister's share was worth more than the current exemption for inheritance tax. As the current rate of inheritance tax on amounts over the exemption was 40 per cent, the survivor might therefore have to sell the house in order to pay the tax. The applicants argued that they were therefore at a disadvantage compared with the survivor of a married couple, or a homosexual relationship registered under the CPA, who would be exempt from paying inheritance tax in those circumstances. They invoked article 1 of Protocol No 1 taken together with article 14 of the convention.

Decision: There was no violation of article 14 taken together with article 1 of Protocol No 1 (by four votes to three). The applicants' complaint was declared admissible. The government's argument that the applicants could not claim to be victims was rejected. In light of the applicants' advanced age and the virtual certainty that one would be liable to pay inheritance tax on the death of the other, they could claim to be directly affected. Furthermore, the applicants were not obliged to have taken proceedings under the HRA and sought a declaration of incompatibility, which was dependent on the discretion of the executive.

The duty to pay tax on existing property fell within the scope of article 1 of Protocol No 1, and therefore article 14 was applicable. The ECtHR accepted that the inheritance tax exemption for married and civil partnership couples pursued the legitimate aim of promoting stable and committed heterosexual and homosexual relationships. In the field of taxation, governments had a wide margin of appreciation, and a workable system of taxation had to use broad categorisations to distinguish between different groups of taxpayers. The implementation of such a

scheme would inevitably create marginal situations and individual cases of apparent hardship or injustice. It was primarily for the state to decide how best to strike the balance between raising revenue and pursuing social objectives.

Comment: This case raises the issue of the exclusion of sibling (and other family) relationships from the CPA. During the passage of the bill through parliament, the House of Lords accepted, by a narrow majority, an amendment which would have had the effect of extending the availability of civil partnership (and the associated inheritance tax concession) to family members within the 'prohibited degrees of relationship', if:

- they were over 30 years of age;
- they had cohabited for at least 12 years; and
- they were not already married or in a civil partnership with some other person.

However, the amendment did not survive scrutiny in the House of Commons. The ECtHR was split on the merits of this decision, with the three dissenting judges disputing the application of the 'margin of appreciation' doctrine to this case.

1 See, for example, *Taşkin and others v Turkey* App No 46117/99, 10 November 2004; *Moreno Gomez v Spain* App No 4143/02, 16 November 2004; *Öneryildiz v Turkey* App No 48939/99, 30 November 2004 and *Fadeyeva v Russia* App No 55723/00, 9 June 2005.

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Recent developments in housing law

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

POLITICS AND LEGISLATION

Discrimination in housing

On 30 April 2007, it became unlawful to discriminate on grounds of religion or belief, or sexual orientation in the provision of housing, access to housing or by subjecting a person to eviction or other detriment. The provisions are contained in Equality Act (Sexual Orientation) Regulations 2007 SI No 1263 reg 5 and in Equality Act 2006 Part 2: Equality Act 2006 (Commencement No 2) Order 2007 SI No 1092. Communities and Local Government (CLG) has issued two guidance notes outlining the new provisions: *Guidance on new measures to outlaw discrimination on grounds of religion or belief in the provision of goods, facilities and services (Part 2, Equality Act 2006)* and *Guidance on new measures to outlaw discrimination on grounds of sexual orientation in the provision of goods, facilities and services: Equality Act (Sexual Orientation) Regulations 2007*.[1]

Northern Ireland

The law relating to private rented accommodation in Northern Ireland has undergone its most radical change in 30 years following the commencement of the Private Tenancies (Northern Ireland) Order 2006 SI No 1459 on 1 April 2007. A handy *Guide to the Private Tenancies (NI) Order 2006* has been published by the Housing Rights Service.[2]

Court fees in housing cases

The Department for Constitutional Affairs (DCA) has launched a consultation exercise on a wide-ranging revision of the civil court fee structure governing housing cases and other civil litigation. The consultation paper, *Civil court fees* (April 2007), considers not only fee increases and a redistribution of the burden of fees but changes to the system for remission. The consultation ends on 25 June 2007.[3]

Tenancy deposits

On 6 April 2007, the new regime for the taking of deposits from assured shorthold tenants came into force and applies to private sector tenancies granted on or after that date: Housing Act 2004 (Commencement No 7) (England) Order 2007 SI No 1068. The new schemes are outlined at April 2007 *Legal Action* 31, [2007] 714 *Estates Gazette* 100 and [2007] 151 *Solicitors Journal* 451. Introducing the new arrangements, the secretary of state said that the 'new rules will inject greater fairness into the rental market … ': CLG news release 2007/0077, 5 April 2007. The government has published free guidance booklets for distribution to both landlords and tenants.[4]

When examining notices given under Housing Act (HA) 1988 s21, in respect of tenancies granted on or after 6 April 2007, advisers will need to consider whether non-compliance with the tenancy deposit arrangements has invalidated such a notice: HA 2004 s215.

Housing-related support

The arrangements for housing-related support under the Supporting People Programme for the current financial year (2007/2008) have recently been published. A helpful summary is available in a letter sent by CLG to all local authority chief executives in March 2007 introducing new statutory guidance and conditions: *Supporting people 2007/08 grant conditions, directions and guidance*, 29 March 2007.[5]

Specialist support with housing cases

The Legal Services Commission has announced that the present contracts for specialist support with housing work awarded to Shelter, Garden Court Chambers and other specialist housing advisers have been extended to 31 March 2008. A consultation paper on the position after 2007/2008 is imminent.

Disrepair and the small claims track

The question of whether the small claims limit for housing disrepair cases should be changed is posed by the DCA's consultation

paper *Case track limits and the claims process for personal injury claims* issued on 20 April 2007 (paras 34–35).[6] The paper examines the arguments for and against raising the limit for housing disrepair claims and suggests that the housing disrepair limit should remain at the level it is now. It invites on how the process of dealing with housing disrepair claims could be improved. Responses are sought by 13 July 2007.

Housing law reform

The Law Commission's *Newsletter: Spring 2007* updates progress on its housing law reform agenda.[7] It is hoped that the 'Ensuring responsible renting' project will produce a consultation paper soon. On 'Housing dispute resolution', the commission is still exploring '… the best way to take the project forward …'.

Accommodation for care leavers

A research report prepared by the Rainer Foundation concludes that almost one in six young people leaving care are being placed in unsuitable accommodation: *Home alone: housing and support for young people leaving care* (April 2007).[8] The report recommends that every local authority develops a list of approved properties and landlords and a system for inspecting properties rigorously before vulnerable young people are placed in them.

Home Information Packs

Home Information Packs were due became mandatory for house and flat sales on 1 June 2007 with the commencement of the provisions of HA 2004 Part 5. The detail is contained in the Home Information Pack Regulations 2007 SI No 992. Just four weeks before commencement, the House of Lords Merits of Statutory Instruments Committee reported that the regulations ' … may imperfectly achieve their policy objective': *18th report of session 2006–07*, HL Paper 92.[9] On 18 April 2007, the housing minister Yvette Cooper MP gave a more upbeat assessment in a speech to the Association of Housing Information Providers spring conference.[10]

Possession proceedings

The statistics for county court possession proceedings in the first quarter of 2007 show an increase in the numbers of mortgage claims made, possession orders granted and a reduction in the proportion being 'suspended' compared with the first quarter of 2006. Falls in the number of landlord possession proceedings are explained, in part, by difficulties with the new Possession Claim Online system and by the implementation of the rent arrears protocol: *Statistics on mortgage and landlord possession actions in the county courts – first quarter 2007*, DCA statistical bulletin, May 2007.[11]

EUROPEAN CONVENTION ON HUMAN RIGHTS

Article 1 of Protocol No 1

■ Veselinski v Former Yugoslav Republic of Macedonia

App No 45658/99,
24 February 2005

Mr Veselinski was an officer in the Yugoslav Army until he retired in 1985. As a soldier, he paid monthly contributions from his salary to the Yugoslav Army for the construction of army apartments.

In 1990, the Yugoslav Federal Assembly enacted a Law on Housing of the Army Servicemen which allowed army servicemen, current and retired, to purchase their apartments with a price adjustment for the amount of the monthly contributions that they had paid. In 1992, the Macedonian Ministry of Defence took over all the obligations of the Yugoslav Army for army apartments, including the obligation to sell those apartments with a price reduction.

In 1993, a new Macedonian law provided that tenants were entitled to purchase socially owned apartments on credit and at a beneficial price, but, unlike the earlier law, it did not provide for a price adjustment for the amount of the monthly contributions previously paid. In 1992, Mr Veselinski asked the Macedonian Ministry of Defence to allow him to purchase his current apartment at a reduced price or to give him another apartment which used to be owned by the former Yugoslav Army. A dispute arose about the terms of his purchase and, in 1997, the Supreme Court held that Mr Veselinski had no right to buy at the reduced price. As a result of that decision, he became liable to pay further sums of money.

The European Court of Human Rights (ECtHR) stated that the concept of 'possessions' in article 1 of Protocol No 1 of the European Convention on Human Rights ('the convention') has an autonomous meaning. In substance it guarantees the right of property. A 'possession' may be either an 'existing possession' or a claim, in respect of which the applicant can argue that he has at least a 'legitimate expectation' of obtaining effective enjoyment of a property right. The 'legitimate expectation' may also encompass the conditions attaching to the acquisition or enjoyment of property rights. Taking into account Mr Veselinski's previous contributions and the agreements in force at the time, he had a 'legitimate expectation' that the purchase of his apartment would be at a reduced price. The Supreme Court's decision was an unjustified interference with his peaceful enjoyment of his possessions and, therefore, a violation of article 1 of Protocol No 1.

■ Kletsova v Russia

App No 24842/04,
12 April 2007

Ms Kletsova, a tenant of a flat, took court proceedings against the Kamyshin municipal housing maintenance enterprise. She obtained orders that the enterprise carry out maintenance works (repairing and white-washing the ceiling and painting the floor) and for payment of non-pecuniary damages of 200 roubles. The judgment became enforceable in September 2003, but the damages were only paid in April 2005, after insolvency proceedings had been initiated. In finding a breach of article 6 and article 1 of Protocol No 1, the ECtHR stated that: ' … a person who has obtained an enforceable judgment against the state as a result of successful litigation cannot be required to resort to enforcement proceedings in order to have it executed'.

SECURE TENANCIES

Tolerated trespassers and HA 1985 s85

■ London & Quadrant Housing Trust v Ansell

[2007] EWCA Civ 326,
19 April 2007,
(2007) Times 25 April

Ms Ansell was a secure tenant. In 2000, her landlord began possession proceedings based on rent arrears of just under £1,050.

A judge made a suspended possession order in 2001. The order provided that: 'When you have paid the total amount mentioned the claimant will not be able to take any steps to evict you as a result of this order.' Ms Ansell failed to comply with its terms and so became a tolerated trespasser. In October 2004, she paid all the arrears and her rent account went into credit. Five years after the original order, and after allegations of anti-social behaviour, her landlord took the view that it was no longer possible to enforce the earlier possession order and issued a new possession claim on the basis that Ms Ansell was a trespasser.

HHJ Birtles held that, in accordance with its terms, the first possession order could no longer be enforced once the arrears and costs had been paid. Accordingly, the landlord was entitled to bring a new possession claim. Ms Ansell had no good defence.

The Court of Appeal dismissed Ms Ansell's appeal. If it had been open to the landlord to issue and execute a warrant of possession under the earlier order, the present proceedings would be misconceived. It would be wrong to allow the protection afforded by HA 1985 s85(2) to be circumvented by proceeding otherwise than under that order. However, all sums due under the suspended possession order had been paid. That meant that the original order for possession was not enforceable and the court's powers under s85 were no longer exercisable in relation to enforcement under that order (see *Swindon BC v Aston* [2002] EWCA Civ 1850, 19 December 2002; [2003] HLR 42).

The judge was entitled to conclude that Ms Ansell had become a trespasser, that the landlord was required to bring a new claim for possession, and that that was a valid and lawful claim for possession which succeeded. He did not fall into the error of allowing a possession order to be enforced in a manner which circumvented the provisions of s85(2). The extended discretion conferred on the court by those provisions had ceased to be exercisable.

Occupation as only or principal home

■ Johnson v Dundee City Council

2006 Hous LR 68

Mr Johnson sought a finding that he was entitled to exercise the right to buy under the Housing (Scotland) Act (H(S)A) 1987. He was a secure tenant who suffered from a psychotic illness. He was cared for by a friend who lived in the next street. In May 2004, he married her. In 2005, he applied to buy his property but the council refused to entertain the application, contending that he had not been living in the property continuously for two years before the application.

The Scottish Lands Tribunal refused his application. The marriage was enough to give rise to a presumption that he and his wife were living together in her home. The onus was on Mr Johnson to show that this was not the case. He had failed to do this. He clearly found giving evidence very stressful and it was not possible to make an accurate assessment of his credibility. His wife was a hesitant and unforthcoming witness who appeared to choose answers which she felt would assist Mr Johnson's case and which were often inconsistent or contradictory. The housing officer was a reliable witness who said that Mr Johnson's property was largely unfurnished and appeared unoccupied when she had visited. The evidence of the neighbours, though largely circumstantial, pointed to the couple living together at Mr Johnson's wife's property.

Comment: Although this is a decision under the H(S)A, it is likely that an English or Welsh court, which made the same findings of fact, would have reached the same conclusion.

Anti-social behaviour

■ Places for People Homes Ltd v Maddocks

[2007] EWCA Civ 252,
7 February 2007

The defendant was a secure tenant. The claimant brought a possession claim relying on HA 1985 Sch 2 Grounds 1 and 2. It pleaded 60 allegations of nuisance including racist and other abuse and noise nuisance by playing loud music and banging. A recorder found that most of the allegations were not established. Although some allegations relating to music were proved or admitted, he decided that it was not reasonable to make a possession order and dismissed the claim. The landlords sought permission to appeal.

The Court of Appeal refused a renewed application. The landlord's attempt to dress up criticisms of the detail of findings of fact as points of law was not persuasive. The recorder's decision was one of fact and, in part, discretion which was 'unassailable'. The recorder had to make an evaluative judgment of what was reasonable on the evidence and did so properly. The fact that numerous other allegations were unproved or trivial was not irrelevant in dealing with the admitted noise allegations.

■ Mansfield DC v Langridge

[2007] EWCA Civ 303,
31 January 2007

Mr Langridge was a secure tenant. He suffered from learning disability, had Tourette Syndrome, reactive changes in his mood and anxiety and personality disorder. He was 'in a highly unstable state of mind'. The council sought possession, claiming that he had breached terms of his tenancy relating to payment of charges, anti-social behaviour, repairs, bad hygiene, the keeping of animals and/or that he was guilty of conduct causing, or likely to cause, a nuisance or annoyance to his neighbours. HHJ Mithani made a forthwith order for possession.

Auld LJ refused an oral renewal of Mr Langridge's application for permission to appeal. Although it was argued that there had only been findings of acts of nuisance and annoyance on 17 out of nearly 700 days and that this was not enough to justify a possession order, Auld LJ could not say that the trial judge's reasoning was so wrong as to give Mr Langridge a real prospect of success if the matter were to go forward to appeal. Although another judge might have taken a different view, the proposed grounds for appeal were simply an attempt to re-argue the case on the facts.

■ Lambeth LBC v Assing

Lambeth County Court,
2 March 2007[12]

Mr Assing was the secure tenant of a flat. He had lived on the estate for 30 years and been a tenant for nine years. There was a dispute about the water supply to the bin chamber. In July 2005, Mr Assing broke the padlock to the bin chamber. In September 2005, he assaulted the concierge and subjected him to verbal abuse. He was charged with assault and, in February 2006, he pleaded guilty and was sentenced to a community order with requirements that he perform 100 hours' unpaid work and attend an anger management course. The council issued proceedings, seeking a demotion order or a postponed possession order for a period of two years. The defendant conceded that the grounds for possession were made out, but that reasonableness was in issue. District Judge Wakem (see February 2007 *Legal Action* 28) noted that although the assault was serious, the defendant had been punished by the magistrates' court and had behaved well for the year since. She was satisfied that neither the other tenants nor the council staff needed the protection of a postponed possession order. She considered that no further action in relation to the tenancy was appropriate and so made no order. Lambeth appealed.

HHJ Gibson dismissed the appeal. He rejected a submission that consideration of what was reasonable should vary as between the two remedies sought and that in relation to claims for demotion, it was inappropriate to take into account how the defendant was likely to behave in future. There was nothing to suggest that reasonableness in relation to demotion orders is to be considered otherwise than in the broad way suggested by Lord Greene MR in *Cumming v Danson* [1942] 2 All ER 653, at p655.

HHJ Gibson rejected a number of complaints about the way in which the district judge had exercised her discretion as to reasonableness. She was not wrong to give the lack of subsequent misbehaviour some weight. The suggestion that her decision was perverse was unsustainable. There was no significant error in her treatment of the facts nor in her appreciation of what was required before a demotion order or a postponed possession order can be made. Lambeth has applied to the Court of Appeal for permission to bring a second appeal on the basis that the appeal raises an important point of principle and practice.

ASSURED TENANCIES

Breach of suspended possession orders

■ Knowsley Housing Trust v White

[2007] EWCA Civ 404,
2 May 2007

Mrs White was initially a secure tenant of Knowsley MBC but, as a result of a large-scale stock transfer, she became an assured tenant of the claimant. She fell into rent arrears. A 'suspended possession order' was made on 8 June 2004 in Form N28, which provided:

The defendant gives the claimant possession of [the property] on or before 06 July 2004 … This order is not to be enforced so long as [the] defendant pays the claimant the rent arrears and the amount for use, occupation and costs, totalling £2,262.52 by the payments set out below in addition to the current rent.

Largely due to housing benefit difficulties, Mrs White breached the terms of the order. Later, she sought to exercise her preserved right to buy, but Knowsley Housing Trust informed her that she was not entitled to exercise that right because her tenancy had come to an end on the breach of the 'suspended possession order'. It asserted that she occupied the property as a tolerated trespasser. She sought a declaration that she was still an assured tenant and entitled to exercise the right to buy. HHJ Mackay dismissed her claim.

The Court of Appeal dismissed her appeal. After referring to the 'formidable complexity' of housing legislation, Buxton LJ rejected Mrs White's contention that an assured tenancy can only terminate when possession is given up. The HA 1988 does 'not mandate any particular solution' to the question of when an assured tenancy comes to an end. '[T]he answer must be found in the construction of the order made by the county court.' That is particularly so when the court exercises its powers under HA 1988 s9(2)-(4) to suspend execution or postpone the date of possession.

Following *Harlow DC v Hall* [2006] EWCA Civ 156, 28 February 2006; [2006] 1 WLR 2116, the effect of the order made was that Mrs White's assured tenancy expired on the last date for giving possession, ie, 6 July 2004. Longmore LJ stated that the absence of an equivalent in HA 1988 to HA 1985 s82(2) made no difference to the proper construction of an order for possession made against an assured tenant. He continued:

If a tenant wishes to retain her tenancy until she is evicted, she can always ask the court not to insert in the order any date on which she is to give up possession. It would then be in the discretion of the court whether to make an order in that form.

Rent increases

■ Riverside Housing Association Ltd v White

[2007] UKHL 20,
25 April 2007,
(2007) Times 7 May

An assured tenancy agreement contained clauses providing that:

(6) Riverside may increase the rent by giving the tenant four (4) weeks notice in writing as set out in accordance with the provisions of this agreement …

(7) The rent payable will be increased annually with effect from the first Monday of June each year. (This is known as the 'rent variation date').

Another clause provided that: 'In this agreement the term "rent variation date" refers to the annual increase in rent which will occur each year on the first Monday in June with four (4) weeks prior notice.' Tenants challenged the validity of a number of notices served which purported to increase the rent. One, served in February 2001, provided for a rent increase from 2 April 2001.

In subsequent years, Riverside gave similar notices in February, purporting to increase the rent from a date in April. The tenants claimed that Riverside only had the right to increase the rent if it served a notice which took effect on the first Monday of June (ie, on the rent variation date) with 28 days' prior notice. HHJ Stewart QC found that the notices were valid. The Court of Appeal held that they were not valid.

The House of Lords found that the notices were valid. Lord Neuberger stated that these rent review provisions, like any other contractual term, had to be interpreted by reference to the particular words used in their particular context. Although Riverside's argument that time was not of the essence when considering them was misconceived, the notion of a moveable rent review date, whereby Riverside could increase the rent once at any time during a year from the first Monday in June, provided that it, first, gives 28 days' notice, appeared sensible and fair. The House of Lords construed the relevant clauses in the tenancy agreement as meaning that Riverside was entitled to increase the rent once a year on 28 days' notice and that the notice could take effect any time on or after the first Monday in June.

Creation of tenancies

■ Levy v Vesely

[2007] EWCA Civ 367,
27 April 2007

Ms Vesely's landlords were trustees of a protective trust set up for a Ms Miller who had mental health problems. Ms Vesely claimed to be an assured tenant. The trustees claimed that she was an assured shorthold tenant. The dispute centred on the date on which Ms Vesely became a tenant of premises owned by the same landlords before moving to her present flat, and whether it was before or after 28 February 1997 when the provisions of HA 1996 s96 came into force. In early 1996, Ms Miller, who was in hospital, gave the keys to the flat to Ms Vesely. She moved in, but did not pay any rent. Towards the end of 1996, after being discharged from hospital, Ms Miller began to spend more time in the flat, sharing it with Ms Vesely. In December 1996, the trustees agreed with Ms Vesely that she would make a weekly contribution of £65 to the joint household expenses of the two women. The payments were not intended to be rent. Ms Vesely had exclusive occupation of two rooms and shared the kitchen and bathroom facilities with Ms Miller. In September 1997, the trustees made an agreement with Ms Vesely, regularising her position, whereby she paid a rent. HHJ Faber found that this agreement created an assured shorthold tenancy. Ms Vesely appealed.

The Court of Appeal dismissed her appeal. The evidence showed that during 1996 there was some continuing uncertainty about the future occupation of the flat. There was ample evidence from which HHJ Faber was entitled to conclude that Ms Vesely's exclusive occupation of two rooms at the rear of the flat before 28 February 1997 was not as a result of a tenancy granted to her by the trustees, and that the arrangement for Ms Vesely to make a weekly contribution to the two women's joint expenditure was not intended by either party to be rent. A rent-free arrangement for the exclusive use and occupation of premises does not create a tenancy, if the correct inference from the purpose of the arrangement and the surrounding circumstances is that there is no intention to create the landlord and tenant relationship between the parties. The judge's finding that the arrangement was for the continued sharing of the expenses of a joint household by two friends made it very difficult, applying an objective test, to infer that there was an intention to grant a tenancy to one of them, the only other occupant neither having, nor being in need of, a tenancy, as she was a beneficiary under the trusts on which the entire flat was held.

Damages for unlawful eviction and harassment

■ Daramy v Streeks

Lambeth County Court, 15 November 2006[13]

The claimant was an assured shorthold tenant. He lost his employment and fell into two months' rent arrears. His landlord then began harassing him for the rent and assaulted his wife. The landlord then obtained a possession order, but evicted the tenant without obtaining a warrant. He also took his belongings to sell in order to recover the rent that was due to him. The claimant brought a claim for damages.

HHJ Crawford Lindsay awarded damages of £1,500 for the harassment leading up to the eviction; £2,500 for the actual eviction and for the time spent out of the property and £1,250 in aggravated damages, to reflect the landlord's conduct.

Enforcement of possession orders

■ The Trustee in Bankruptcy of Canty v Canty

[2007] EWCA Civ 241, 5 March 2007

The trustee in bankruptcy obtained a possession order in respect of a property owned by the defendant and his mother. They appealed unsuccessfully. After the defendant's mother died, the trustee in bankruptcy sought to enforce the order. The defendant refused to comply. He left the property, but occupied the roof. The possession order was amended to include a penal notice, and when the defendant remained on the roof, he was committed for contempt of court and sentenced to an immediate term of six months' imprisonment. He appealed.

The appeal was dismissed. It was clear that the defendant was in breach of the possession order, as well as various obligations arising under the Insolvency Act 1986, including ss312, 333 and 363. It was a wilful and deliberate breach, motivated by a belief that the possession and bankruptcy orders should not have been made, and that he should not have to comply with them. There was no point in any order other than an immediate custodial sentence. In the circumstances, a sentence of six months' imprisonment was not manifestly excessive. The defendant's appeal was totally without merit.

Landlord and Tenant Act 1987 s48

■ Glen International Ltd v Triplerose Ltd

[2007] EWCA Civ 388, 23 March 2007

A tenant sought to exercise its right to a new lease under Leasehold Reform, Housing and Urban Development Act (LRHUDA) 1993 s42. Under LRHUDA s99(3)(i), such a notice should be sent to the address last furnished to the tenant as the landlord's address for service, in accordance with a notice under Landlord and Tenant Act 1987 s48. The landlord disputed service of the requisite notice, claiming that it had been sent to the wrong address and that its agents had furnished the claimant with an address for service under s48, but that the tenant had sent the notice to a different address. The landlord relied on one specific letter in which its agents had indicated an address for correspondence. The tenant argued that the solicitors to whom that letter had been written had been acting for it only in relation to dilapidations and insurance, and that the letter had been understood as giving an address for correspondence between the landlord's agents and the solicitors on those discrete issues, not for the service of notices on the landlord. A county court judge found for the tenant, holding that the letter had not been a valid s48 notice.

The Court of Appeal dismissed the landlord's appeal. The correspondence, although referable to the lease and the relationship of landlord and tenant, was specifically focused initially on matters of dilapidations and, subsequently, on questions of insurance, and dealt with nothing else. There was nothing in the correspondence which either explicitly or implicitly indicated that the solicitors had any more general retainer in relation to either the property or the landlord and tenant relationship. Neither the terms of the specific letter relied on nor that letter read in the context of the correspondence as a whole could reasonably have been regarded by the recipient agents of the tenant as conveying that message. It followed that, for the purposes of s48, the letter did not constitute notice of an address for service on the landlord.

HOUSING ALLOCATION

Local Government Ombudsman

■ Nottingham City Council

Complaint 05/C/02965, 19 April 2007

A young single parent made a homelessness application and was given priority for an urgent allocation of council accommodation. She was made a single offer of a house from which the previous tenant had been evicted for failing to maintain the premises and his garden.

At the date of letting, the floors were soaked in urine, the walls were smeared with human faeces and the garden was completely overgrown. A ward councillor who visited the property described the condition of the house as 'stomach turning'. The complainant felt she had had no option but to take it. Subsequently, the council's contractor estimated that over £11,500 of remedial works were needed. The Ombudsman was 'appalled' that anyone should be invited to view a house in this 'dreadful condition'. Compensation of £2,450 was recommended.

Public Sector Ombudsman for Wales

■ Vale of Glamorgan Council

Complaint 2005/01724, 26 February 2007

The complainants were elderly owner-occupiers of a holiday chalet. They were required to vacate for two months each year. From 2003, their health deteriorated significantly. One developed a substantial visual impairment and the other had severely reduced mobility. In 2004, they applied to join the council's housing register and were placed in the bronze category (the lowest priority group) as the council considered them adequately housed. They unsuccessfully sought 'medical priority' which would have significantly improved their prospects of being rehoused.

The Public Sector Ombudsman for Wales found maladministration in the council's handling of the housing application and, in particular, the applications for medical priority. Contrary to the statutory code of guidance, there had been a failure to carry out any form of enquiries, which meant that the council was not in a position to undertake a proper and considered assessment. There was also a failure to give sufficient consideration to whether homelessness was an issue.

A proper assessment would have led to the complainants being deemed to be statutorily homeless no later than the end of September 2005, leading to their application for permanent housing being given greater priority. Compensation of £2,500 was recommended for the 15 months unfairly and avoidably spent in 'unacceptable housing conditions'.

HOMELESSNESS

Intentional homelessness

■ Rowley v Rugby BC

B5/06/1972, 25 April 2007

Ms Rowley and her partner moved out of their privately rented flat and applied to the council as 'homeless' persons. They told the council that their landlord had said he was selling the

property with vacant possession. After enquiries of the landlord, the homelessness officer invited the couple to sign and return a tear-off slip on a letter which set out that they: had given up the tenancy; had given the landlord a month's notice; and had moved to be nearer to their family. After they had returned that slip, a decision was made that they had become homeless intentionally: HA 1996 s190. That decision was upheld on review and an appeal against it was dismissed by HHJ Pearce-Higgins QC.

The Court of Appeal dismissed a further appeal. The couple had unequivocally agreed the facts put to them in the letter. The initial decision contained no 'irregularity' or 'deficiency' triggering Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 SI No 71 reg 8(2), even though those terms were to be construed broadly.

■ **Eren v Haringey LBC**

[2007] EWCA Civ 409,
24 April 2007

Having separated from her husband, the claimant left the matrimonial home (a private rented flat). Two applications made to Enfield LBC for homelessness assistance resulted respectively in findings that she was not homeless and later, when the tenancy had been surrendered, that she had become homeless intentionally. Subsequently, the claimant applied to Haringey. She did not disclose the former matrimonial home, her applications to Enfield or the accommodation that Enfield had secured temporarily. Haringey obtained the Enfield file.

The claimant alleged that she had been in fear of her husband and that another woman had impersonated her in giving up the keys. Haringey decided that her account was inconsistent with that earlier given to Enfield and lacked credibility. It decided that she had become homeless intentionally.

HHJ Pearce allowed an appeal but the Court of Appeal reversed the judge and upheld the council's decision. The Haringey reviewing officer had given the application a full and fair assessment and had not simply rubber-stamped the Enfield decision. There had been no error of law.

HOUSING AND COMMUNITY CARE

■ **Croydon LBC and Hackney LBC v AW, A and Y**

[2007] EWCA Civ 266,
4 April 2007

The claimants were failed asylum-seekers who were destitute and likely to suffer infringement of their convention rights if not provided with accommodation and other assistance by the state. The issue on their claims for judicial review was whether the necessary assistance fell to be provided by local authorities (under National Assistance Act 1948 s21) or the Home Office (under Immigration and Asylum Act 1999 s4). The High Court held that their support was a matter for the councils. An appeal by the local authorities was dismissed. On a true construction of the various statutory provisions, responsibility lay with the local authorities. See also page 19 of this issue.

1 Available at: www.communities.gov.uk/index.asp?id=1510068 and www.communities.gov.uk/index.asp?id=1510066 respectively.
2 To order visit: www.housingrights.org.uk/downloads/PTOleaflet.pdf, £5 for members, £9.95 for non-members.
3 Available at: www.dca.gov.uk/consult/civilcourt-fees/cp0507.pdf.
4 Available at: www.direct.gov.uk/en/TenancyDeposit/DG_066385.
5 Available at: www.spkweb.org.uk/NR/rdonlyres/E8D7BD39-E0F2-47B0-B25E-3403FB38C0CA/12092/CE__letter.pdf.
6 Available at: www.dca.gov.uk/consult/case-track-limits/cp0807.pdf.
7 Available at: www.lawcom.gov.uk/docs/newsletter_spring_2007.pdf.
8 Available at: www.crin.org/docs/Rainer_home_alone.pdf.
9 Available at: www.publications.parliament.uk/pa/ld200607/ldselect/ldmerit/92/92.pdf or from TSO, £8.50.
10 See: www.communities.gov.uk/index.asp?id=1509883.
11 See: www.dca.gov.uk/statistics/mpstats/2007/nat-q1.pdf.
12 Dawn McPherson, Fisher Meredith, solicitors, London and Beatrice Prevatt, barrister, London.
13 Charlotte Collins, Anthony Gold, solicitors, London and Desmond Rutledge, barrister, London.

Nic Madge is a circuit judge. Jan Luba QC is a barrister at Garden Court Chambers, London, and a recorder. They are grateful to the colleagues at notes 12 and 13 above for transcripts or notes of judgments.

NHS continuing care and independent living: the law reviewed

Although, in general, state provision of social care services for disabled, elderly and ill people living in the community is the responsibility of social services authorities, in certain situations the duty to arrange such assistance passes to the NHS. This situation occurs when a person's needs for nursing and other care support are deemed to be above a level that can be provided by social services. Such persons are described as qualifying for 'NHS continuing care' support.[1] Luke Clements and Paul Bowen discuss issues relating to individuals' entitlement to such support.

Introduction

Qualifying for NHS continuing care support brings with it many benefits – most importantly, that the care is provided without charge, unlike the support provided by social services authorities which is, in general, means tested. Entitlement to NHS continuing care support is not, however, without its potential drawbacks. This article considers these difficulties and asks whether they are more perceived than real.

Potential drawbacks of entitlement to NHS continuing care

■ The different nature of the public law duty under the National Health Service Act (NHSA) 2006 and the National Health Service (Wales) Act (NHS(W)A) 2006 (the NHS Acts 2006) on the one hand, and the community care legislation (for example, the National Assistance Act (NAA) 1948 and the Chronically Sick and Disabled Persons Act (CSDPA) 1970) on the other, means that the care package a person receives from the NHS may be materially inferior to that which would be provided by social services. The NHS's obligation is, in general terms, a target duty (see *R v Cambridgeshire HA ex p B* [1998] 1 WLR 898) whereas the duty under the community care legislation is, in general terms, specifically enforceable.

This important difference was at the heart of the proceedings in *R ((1) T (2) D (3) B) v Haringey LBC and R (D) v Haringey Teaching Primary Care Trust* [2005] EWHC 2235 (Admin), 21 October 2005; (2006) 9 CCLR 58. The claimant (D), a three-year-old girl, was born with a subglottic haemangioma which obstructed her airways, and required a tracheostomy (a tube in her throat) to be fitted. The tracheostomy had to be cleared frequently and a trained individual present at all times to deal with any emergency, although a carer (such as D's mother) could be trained to provide the necessary care. The local authority assessed D's needs under the Children Act 1989. It concluded that she required four nights a week nursing care to enable her mother to rest, but maintained that this was a healthcare service to be provided by the primary care trust (PCT). The PCT agreed that such support was a healthcare service for which it was responsible, but disagreed with the local authority about the level of support required and, in any event, relied on the fact that the NHSA 1977 (which has subsequently been consolidated with the relevant provisions to be found in the NHS Acts 2006) gave rise to only a target duty so the trust could not be compelled to provide any support, let alone at the level sought by the claimant.

The judge accepted both the local authority's argument that nursing care could not be provided as part of its community care functions, and the PCT's submission that, in any event, it could not be compelled in judicial review proceedings to provide a healthcare service under the NHSA 1977 (now 2006). D and her mother were left to cope with the reduced service that the PCT was prepared to provide.

■ Entitlement to NHS continuing care support may disentitle the disabled person to the following:

– a community care assessment and the social care expertise and care planning support that may flow from this;
– direct payments; and
– other associated benefits, including, for instance, the right to a disabled facilities grant (DFG).

■ Entitlement to NHS continuing care support may disentitle the disabled person's carer to an assessment/services under the carers' legislation, most importantly the Carers (Recognition and Services) Act (C(RS)A) 1995 and the Carers and Disabled Children Act (CDCA) 2000.

A re-examination of the relevant case-law and statutory regime suggests that these perceived drawbacks may not exist or, alternatively, may not be as significant as previously considered. If the analysis in this article is correct, the question arises about how such misunderstandings have occurred and persisted. Two compelling reasons appear to be, first, the fact that the key cases (most notably in *R v North and East Devon Health Authority ex p Coughlan v Secretary of State for Health (intervenor) and Royal College of Nursing (intervenor)* CA, 16 July 1999; [2000] 2 WLR 622; (1999) 2 CCLR 285; [2000] QB 213; *R (Grogan) v Bexley NHS Care Trust and (1) South East London Strategic Health Authority (2) Secretary of State for Health (interested parties)* [2006] EWHC 44 (Admin), 25 January 2006; (2006) 9 CCLR 188, and *R ((1) T (2) D (3) B)* (see above) have not concerned the rights of adults living in non-institutional settings and, second, the extraordinary complexity of the statutory regime.

The statutory regime

There is a considerable overlap between the services that can be provided:

■ by a local authority under its community care functions as defined by National Health Service and Community Care Act (NHSCCA) 1990 s46(3), namely NAA Part III s21(1) (residential accommodation) and s21(5) ('other services … provided in connection with the accommodation'), NAA s29 and CSDPA s2 (other welfare services), and NHSA 2006 s254 and Sch 20 and NHS(W)A s192 and Sch 15); and

■ by the NHS under the NHS Acts 2006.

Some method is, therefore, needed to decide an individual's eligibility for NHS services, which fell for consideration in *Coughlan*. The method adopted is a combination of government policy contained in circulars and guidance from central government and eligibility criteria developed by health authorities, reinforced by three statutory bars on the provision of services by local authorities, namely NAA s21(8) as amended by the National Health Service (Consequential Provisions) Act (NHS(CP)A) 2006 Sch 1 para 6, NAA s29(6) and Health and Social Care Act (HSCA) 2001 s49.

The statutory prohibition in NAA s21(8) applies to residential accommodation provided under s21(1) and 'other services …

provided in connection with the accommodation' under NAA s21(5) (which can include nursing services (see *Coughlan* at para 27(c)). Where those services are 'authorised or required to be provided' under, materially, the NHS Acts 2006, the local authority cannot lawfully provide them.

Whether those services are 'authorised or required to be provided' under the NHSA 2006 is primarily a question of government policy. In setting policy, the secretary of state is entitled to take into account what services can lawfully be provided by local authorities as care provision, but there remains a legal boundary between the two (see *Coughlan* above at para 39).

In deciding where the line is to be drawn in an individual case, as a general guideline, where nursing services are 'merely incidental or ancillary' to the provision of residential accommodation (a quantitative question) and 'of a nature which it can be expected that an authority whose primary responsibility is to provide social services can be expected to provide' (a qualitative question), the accommodation and other services in connection with it may be provided under NAA s21(1) and 21(5) (see *Coughlan* at para 30(e)).[2] This boundary has been identified as the point at which the individual's 'primary need is a health need'.[3] If the individual crosses that boundary, all services that could otherwise have been provided by the local authority under s21(1) and 21(5) must be provided by the NHS and, as a result of s21(8), they cannot be provided by the local authority.

But does this mean that social services authorities, thereafter, have no residual responsibility to those who are eligible for NHS continuing care, in terms of either the assessment or provision of community care services? *Coughlan* has, perhaps, been understood as leading to the conclusion that no such duties exist (as has been suggested by the High Court in *R ((1) T (2) D (3) B)* above). What is sometimes overlooked, however, is that – strictly speaking – the exclusionary effect of s21(8) is limited to people in residential accommodation and to services provided 'in connection with' such accommodation. It does not exclude the following:

- Services provided by local authorities, under NHS Acts 2006 s254 and Sch 20, and s192 and Sch 15 respectively, including non-accommodation services to prevent people becoming ill. Such services are deemed to be 'community care services' under NHSCCA s46(3). The Court of Appeal in *Coughlan* does not appear to have heard argument concerning the community care duties of social services authorities under the NHS Acts 2006 because these duties are limited to the provision of non-residential care services (NHS Acts 2006 Sch 20 para 2(11) and Sch 15 para 2(11) respectively) and Ms Coughlan was not seeking such support.
- Services provided under NAA s29 and CSDPA s2. These might be provided either:
  – to individuals living at home, in respect of whom NAA s21(8) has no application; or
  – to those living in residential accommodation, where the services cannot properly be described as provided 'in connection with' the residential accommodation within the meaning of s21(5) (for example, educational opportunities provided on another site).

Where services are more properly considered as falling within NAA s29 (which includes services under CSDPA s2) the corresponding provision to NAA s21(8) is NAA s29(6)(b). However, this provision only prohibits social services from providing services 'required' to be provided under the NHS Acts 2006, as opposed to those that are 'authorised or required' to be so provided in s21(8). This excludes only those services which must be, as a matter of law, provided under the NHS Acts 2006 (ie, 'required').[4] It does not exclude those services that could, as a matter of law, be provided by either the NHS or a local authority but which, as a matter of policy, the secretary of state has decided should be provided by the NHS as NHS continuing care (ie, 'authorised'). Thus, for example, any adaptations necessary to enable a person to live at home could be provided by either the NHS under the NHS Acts 2006 or a local authority under NAA s29 and CSDPA s2. The fact that the individual qualifies for NHS continuing care would not displace the local authority's duty to provide such services if they are not met by the NHS.

It follows, therefore, that social services can provide all manner of community care services for the support of a person living in the community, who is entitled to NHS continuing care support, apart from those services which, as a matter of law, can only be provided by the NHS.[5] It would appear that all such persons are potentially entitled to community care services (notwithstanding the NHS support) and so eligible for a community care assessment under NHSCCA s47(1) (see, for instance, *R v Bristol City Council ex p Penfold* QBD, 23 January 1998; (1998) 1 CCLR 315, where the court held that the duty was triggered merely by the 'appearance of need'). It would also appear that if such a person's needs are not being met fully by the NHS package (ie, there is a shortfall in terms of the nature or quantity of the services), the social services authority may be under a duty to address this deficit.

Clearly, it is the policy of the Department of Health (DoH) and the National Assembly in Wales that if an individual is eligible for NHS continuing care, the NHS is responsible for all the services required to meet his/her assessed care needs (see *NHS continuing health care: action following the* Grogan *judgment* para 16 and *NHS responsibilities for meeting continuing NHS health care needs: guidance 2004*).[6] This, however, is a policy decision and cannot displace social services authorities' powers and duties: such councils may be required to meet disabled people's needs for community care services notwithstanding that, as a matter of policy, the NHS is obliged to provide them. This may occur in a number of situations, including the following:

- An NHS body might refuse to provide the service because of a lack of resources and, thereby, rely on the 'target' nature of the public law duty under the NHS Acts 2006. In such a situation, the social services authority could be compelled to make good the shortfall – as a result of the (in general) specifically enforceable nature of the public law duty under the community care legislation.
- An NHS body might lack the appropriate physical and human resources to provide the required service. In such a situation, there is nothing to stop the NHS body from commissioning (ie, paying) the local authority to provide continuing care services that fall more readily within a local authority's expertise and resources. However, if the NHS body does not do this, the local authority must still provide the service: it cannot rely on the government guidance to avoid its own duty. If the authority is, as a result, 'out of pocket', it must seek suitable redress from the NHS body.
- An NHS body might differ in its assessment of a person's community care needs. For example, a social services authority might assess a person as having a need for a certain level of care support at home (for example, five days a week) whereas the NHS body might consider that the needs are less extensive (for example, three days a week). This was the situation that arose in *R ((1) T (2) D (3) B)*. In those circumstances, on the authors' analysis, the social services authority would be obliged to make up the difference.

The above analysis addresses the first perceived 'drawback' identified at the beginning of this article, namely the different nature of the public law duty under the NHS Acts 2006 and the community care legislation. If the analysis put forward in this article is correct, an individual should not be any worse off if s/he is entitled to NHS continuing care support because the local authority would be obliged to make good any

shortfall in provision. Indeed, and contrary to the conclusion of Charles J at para 39 in *Grogan*, there is no 'gap' (or, at the very least, there is a narrower gap) between what the secretary of state is under a duty to provide as part of the NHS, and 'health services' that could lawfully be supplied by local authorities.

In the light of the above analysis, the other 'drawbacks' now fall to be considered:

■ Disentitlement to community care assessment and the social care expertise and care planning support

As has been noted above, the mere fact that it is the policy of both the DoH and the National Assembly that individuals who are eligible for NHS continuing care should have all their care needs met by the NHS, cannot, in itself, displace the statutory duties owed to disabled persons under the community care legislation. Such people may (for the reasons given above) still appear to be 'in need' of such services and, as a consequence, the duty to assess under the NHSCCA is triggered (see *Penfold* above). Indeed, to put this question beyond doubt, the DoH, in a letter dated 2 November 2006 from its Director General for Social Care to all social services authorities, written as a result of the revelations of the findings of abuse of people with learning disabilities in accommodation provided by the Cornwall Partnership NHS Trust (all of whom were receiving NHS continuing care support) stated:[7]

One of the key contributing factors identified in Cornwall was a clear absence of person-centred planning together with a failure to provide comprehensive, local authority-led assessments for people living in NHS accommodation. Assessments and person-centred planning – a fundamental tenet of Valuing People *– are essential in ensuring that services meet an individual's needs and are in their best interests.*

It is a matter of significant concern that this was allowed to happen and I am writing to remind you of your duty to ensure that such assessments are provided under section 47(1) of the NHS and Community Care Act (1990).

■ Disentitlement to direct payments

Sections 57 and 58 of the HSCA entitle disabled people, in certain situations, to receive a cash payment from social services in lieu of a care package to meet their community care needs. The HSCA makes no provision for such payments to be made in relation to NHS responsibilities – a point emphasised by the DoH in an advice note of February 2005:[8]

Whilst the Department of Health is unable to comment on individual cases, direct payments made under the Health and Social Care Act 2001 relate only to certain local authority social services. This means that where an individual has an identified health need which falls to the NHS, that part of any 'care' package cannot be delivered as a direct payment within the meaning of the legislation... This statement is not, nor is it intended to be, a comprehensive description of the legal position concerning direct payments, and councils are advised to take their own legal advice on this issue.

There is an important preliminary point to note in relation to this advice, namely that it merely states that direct payments cannot be made under the HSCA; the advice does not state that such payments cannot be made at all in these circumstances. This point was partially addressed in *Gunter (by her litigation friend and father Edwin Gunter) v South Western Staffordshire Primary Care Trust* [2005] EWHC 1894 (Admin), 26 August 2005, where Collins J held that there was nothing, in principle, in the wording of (what is now) NHSA 2006 s12 and Sch 3 para 15 to preclude a PCT from making direct payments (in that case to an independent user trust). He stated: 'It seems to me that parliament has deliberately given very wide powers to primary care trusts to enable them to do what in any given circumstances seem to them to achieve the necessary provision of services' (para 26).

Once it is accepted, however, that a determination of entitlement to NHS continuing care does not disentitle a person (as a matter of law) to support under the community care regime, a number of options arise which could (potentially) enable a direct payment arrangement to be maintained: for a person who has now been reclassified as entitled to NHS continuing care funding. Most obviously, there would seem no insurmountable objection to the NHS body making a payment to the social services authority using its powers under NHSA 2006 s256, since (contrary to what had previously been thought to be the case) there are subsisting social services' responsibilities, and s256 payments can be used to fund such health-related local authority functions.

■ Disentitlement to benefits such as disabled facilities grant support

Local authorities are responsible, through their housing authorities, for the administration and payment of grants, formerly known as 'disabled facilities grants', towards the cost of building works which are necessary in order to meet the needs of a disabled occupant (Housing Grants,

Construction and Regeneration Act 1996 s23(1) as amended by the Regulatory Reform (Housing Assistance) (England and Wales) Order 2002 SI No 1860), up to a maximum of £25,000 (£30,000 in Wales). Such grants neither fall within the meaning of 'community care services' in NHSA s46(3) nor have to be assessed when a community care assessment is conducted under NHSCCA s47. The triggering event for consideration of a grant is an application.

It has been argued by some local authorities that they have no responsibility to make a DFG to a person who is eligible for NHS continuing care. This argument, which was recently taken by the local authority defendant in *R (B) v Harrow LBC and others* CO/2891/2006 but then conceded before trial, is misconceived. There is no statutory bar on the provision of DFGs by local authorities where the services can or should be provided by the NHS corresponding to NAA ss21(8) or 29(6) or to HSCA s49. Government policy does not specifically require such adaptations to be the responsibility of the NHS: an individual who is living at home and entitled to NHS continuing care is, in the authors' view, eligible for a DFG if s/he otherwise satisfies the criteria for a grant.

■ Disentitlement of associated carers to an assessment/services under the carers' legislation[9]

Section 1 of the CDCA entitles a carer (ie, one who provides, or intends to provide, a substantial amount of care on a regular basis) to an assessment if the authority is satisfied that the disabled person 'is someone for whom it may provide or arrange for the provision of community care services'. It follows, from the above analysis, that since such authorities are empowered to provide community care services for people who are entitled to NHS continuing care support, their carers are entitled to assessments under the C(RS)A and the CDCA.

Conclusion

In summary, the authors consider that entitlement to NHS continuing care does not bring an end to the responsibilities of the relevant social services authority: it retains a duty to assess an individual's wider community care needs (and those of his/her carer) and to meet any needs that are not met by the NHS, for whatever reason. Moreover, there is no reason, in principle, why entitlement to NHS continuing care should prevent an individual from receiving direct payments or a DFG, if s/he is otherwise eligible.

However, if this article establishes nothing else, it is that the current statutory regime concerning community care and its interface with adjoining legislation is overly complex. The courts have repeatedly shown exasperation with the situation. For example, in *Crofton (a patient suing by his father and litigation friend John Crofton) v National Health Service Litigation Authority* [2007] EWCA Civ 71, 8 February 2007 at para 111; (2007) 10 CCLR 123 at 148, the Court of Appeal expressed its despair in the following terms: 'We cannot conclude this judgment without expressing our dismay at the complexity and labyrinthine nature of the relevant legislation and guidance, as well as (in some respects) its obscurity.'

While this level of complexity might be acceptable in the law regulating commercial interests or international relations, it is deeply damaging when it relates to the rights of disabled people. On any measure, the law in this context is acting as a profoundly disabling barrier to disabled people's ability to access fundamental rights; in this case, the possibility of independent living.

1 For a detailed review of this area of law see *Community care and the law*, Luke Clements, 3rd edn, LAG, 2004, chapter 10.
2 This judgment must now be read subject to HSCA s49, which was passed since *Coughlan* and prohibits local authorities from providing nursing care by a registered nurse.
3 See *Coughlan* at para 31, *Grogan* at para 14, HSC 2003/006: LAC(2003)7 *Guidance on NHS funded nursing care*, paras 19 and 28 and *NHS continuing health care: action following the* Grogan *judgment*, paras 10(b) and (c), 13, 14, 16 and 18. The NHS papers are available at: www.dh.gov.uk.
4 This question will turn on the nature, scale and type of the service being provided (see *R (1) T (2) D (3) B)* at paras 61 and 62).
5 In this respect, it should be noted that NHSA 2006 Sch 20 para 3 and NHS(W)A Sch 15 para 3 oblige social services authorities (and not the NHS) to provide a home help service for households where such assistance is required owing to the presence of a person who (among other things) is suffering from illness, and under the current Department of Health directions concerning what is 'required' to be provided under NHSA 2006 Sch 20 para 2 and NHS(W)A Sch 15 para 2, it is a social services authority's duty to make domiciliary care arrangements for the purpose of preventing mental disorder, as well as for persons who are, or who have been, suffering from mental disorder (see LAC(93)10 *Approvals and directions for arrangements from 1 April 1993 made under Schedule 8 to the National Health Service Act 1977 and sections 21 and 29 of the National Assistance Act 1948* Appendix 3, available at: www.dh.gov.uk (which, as a result of NHS(CP)A s4 and Sch 2 para 1(2), continue to apply with equal effect to the consequent provisions in the NHS Acts 2006)).
6 Available at: www.dh.gov.uk and at: www.wales.nhs.uk/documents/ACF3BF4.pdf respectively.
7 The letter is available at: www.dh.gov.uk and see, in particular, *Joint investigation into the provision of services for people with learning disabilities at Cornwall Partnership NHS Trust*, Commission for Social Care Inspection and the Healthcare Commission, July 2006, available at: www.healthcarecommission.org.uk/_db/_documents/cornwall_investigation_report.pdf.
8 *Direct payments and health* is available at: www.dh.gov.uk/en/Policyandguidance/Organisationpolicy/Financeandplanning/Directpayments/DH_4104420. Similar advice has been issued in Wales: see *Direct payments guidance: community care, services for carers and children's services (direct payments) guidance Wales 2004* para 11 available at: www.wales.nhs.uk/documents/direct-payment-policy-e-merge.pdf.
9 Most importantly, the C(RS)A and the CDCA.

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Legislation

CHILDREN

Local Authority Targets (Well-Being of Young Children) Regulations 2007 SI No 1415

Childcare Act (CA) 2006 s1(1) places a duty on an English local authority to improve the well-being of, and reduce inequalities between, young children in the authority's area. These regulations set out the process to be followed by the secretary of state in setting targets under CA s1(3) with regard to that duty. In force 5 June 2007.

EDUCATION

Education (School Information) (England) (Amendment) Regulations 2007 SI No 1365

These regulations amend the Education (School Information) (England) Regulations (E(SI)(E) Regs) 2002 SI No 2897 and come into force on 1 June 2007. They are made under Education Act (EA) 1996 s508A and 508D, which were inserted by the Education and Inspections Act 2006.

The E(SI)(E) Regs require local education authorities (LEAs) to publish certain information (detailed in Sch 1), and a composite prospectus of admission information for schools in their area (detailed in Sch 2) for each school year.

The amendments made by these regulations require each authority, in addition, to publish certain information about school travel.

School Travel (Piloting of Schemes) (England) Regulations 2007 SI No 1366

These regulations are made under Education and Inspections Act (EIA) 2006 ss79 and 181(2)(c) and come into force on 1 June 2007. They make provision for the piloting of the school travel scheme provisions in Education Act 1996 s508E and Sch 35C (inserted by EIA).

- Reg 2 defines the pilot period as running from 1 September 2009 to 1 August 2012.
- Reg 3 provides that every application by a local education authority (LEA) to the secretary of state for approval to run a school travel scheme in its area (a 'pilot scheme') must contain detailed information about the proposed pilot scheme as specified in the Schedule.
- Reg 4 requires LEAs running pilot schemes to provide annual reports to the secretary of state by no later than 1 September following the academic year to which they relate.
- Reg 5 provides, for the purposes of EIA s79(2), for there to be a maximum of 20 pilot schemes in force during the pilot period.
- Reg 6 provides that pilot schemes will expire at the end of the pilot period unless a later date is agreed by the LEA and the secretary of state, or they are revoked earlier by the LEA.

School Travel (Pupils with Dual Registration) (England) Regulations 2007 SI No 1367

These regulations modify the application of Education Act (EA) 1996 s508B(1) and (2) and Sch 35C para 3(1) and (2), which provisions were inserted by the Education and Inspections Act 2006.

Section 508B requires local education authorities (LEAs) in England to ensure that suitable home to school travel arrangements are made for eligible children in their area. Section 508E and Sch 35C enable LEAs to run school travel schemes, and Sch 35C para 3 requires such schemes to ensure that suitable home to school travel arrangements are made for eligible children in their area.

These regulations modify the application of s508B and Sch 35C para 3 regarding children who are registered pupils at more than one school. They provide that where a child is registered at two qualifying schools, then the relevant school for the purposes of home to school travel arrangements is whichever of the schools the child is attending on the day in question.

They also extend the meaning of 'home to school travel arrangements' in relation to children who are registered at two or more qualifying schools and are of no fixed abode, to ensure that, so far as is reasonably practicable, the LEA secures travel between temporary residences and the nearest qualifying school at which the child is registered. In force 1 June 2007 (in relation to the modification of the application of Sch 35C para 3(1) and (2)) and 1 September 2007 (in relation to the modification of the application of s508B(1) and (2)).

LEGAL AID

Community Legal Service (Asylum and Immigration Appeals) (Amendment) Regulations 2007 SI No 1317

These regulations amend the Community Legal Service (Asylum and Immigration Appeals) Regulations (CLS(A&IA) Regs) 2005 SI No 966.

Immigration, Asylum and Nationality Act 2006 s8 makes amendments to Nationality, Immigration and Asylum Act 2002 s103D, under which the CLS(A&IA) Regs were made. Those amendments extend the power of the Asylum and Immigration Tribunal to make an order under s103D(3) for the payment of an appellant's costs out of the Community Legal Service fund. Section 103D(3) no longer limits that power to cases where the tribunal has completed the reconsideration of an appeal.

- Reg 2 removes provisions of the CLS(A&IA) Regs which are no longer required as a result of the amendments to s103D.
- Reg 3 amends the CLS(A&IA) Regs to specify the circumstances in which the tribunal may make an order under s103D(3) without having completed the reconsideration of an appeal.
- Reg 4 clarifies the scope of the review procedure under the CLS(A&IA) Regs in light of the amended powers of the tribunal.
- Reg 5 makes provision for the situation where a s103D order is made and the appellant has changed representative during immigration review proceedings, and requires the tribunal to give reasons where it makes an order excluding either counsel's or solicitor's fees.

These regulations have effect only in relation to appeals decided in England and Wales. In force 30 April 2007.

Legal Aid (Asylum and Immigration Appeals) (Northern Ireland) Regulations 2007 SI No 1318

These regulations make provision about the exercise in Northern Ireland of the powers in Nationality, Immigration and Asylum Act (NIAA) 2002 s103D(1) and (3), as inserted by Asylum and Immigration (Treatment of Claimants, etc) Act 2004 s26(6) and amended by Immigration, Asylum and Nationality Act 2006 s8.

Section 103D and these regulations give effect to a special legal aid scheme for:

- applications to the High Court under NIAA s103A by an appellant for a review of the Asylum and Immigration Tribunal's decision on an asylum or immigration appeal; and
- proceedings for the reconsideration by the tribunal of its decision following an order made on such an application.

When it determines these forms of onward appeal, the High Court or tribunal can order payment of an appellant's costs out of the legal aid fund. These powers supersede the general power vested in the Northern Ireland Legal Services Commission to grant legal aid funding in civil cases. In force 30 April 2007.

POLICE

Serious Organised Crime and Police Act 2005 (Amendment of Section 76(3)) Order 2007 SI No 1392

If a person is convicted of an offence that is mentioned in Serious Organised Crime and Police Act 2005 s76(3) the court, when sentencing or otherwise dealing with the person, may also make a financial reporting order in respect of him/her. This Order amends s76(3) to add offences to it. In force 4 May 2007.

SOCIAL SECURITY

Social Security, Housing Benefit and Council Tax Benefit (Miscellaneous Amendments) Regulations 2007 SI No 1331

These regulations amend the Social Security (Claims and Payments) Regulations (SS(C&P) Regs) 1987 SI No 1968, the Council Tax Benefit Regulations 2006 SI No 215, the Council Tax Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006 SI No 216, the Housing Benefit Regulations 2006 SI No 213 and the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006 SI No 214. In force 23 May 2007.

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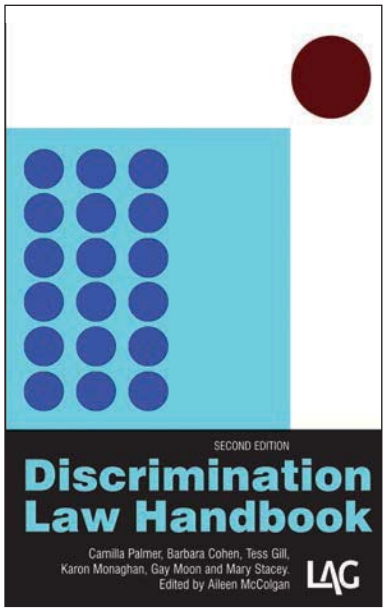

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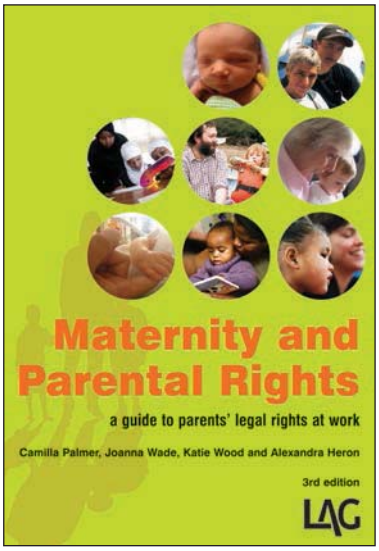

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▶ Training
Spring/Summer 2007

EU Law for Social Welfare Lawyers and Advisers
7 June
£185 + VAT 6 hours CPD Course grade: I
Trainers: Sue Willman/Adrian Berry
A basic understanding of EU law has become essential for anyone working in the areas of housing, benefits and community care, whether as advisers or service providers. This new course has been devised to fill the gap. The trainers will provide an overview of EU law, explaining common EU concepts and language, and then proceed to examine the effect of EU law on access to housing, community care and social security law.

Introduction to Mental Health Review Tribunals
12 and 13 June
£425 + VAT 12 hours CPD Course grade: I
Trainers: William Armstrong/Phil Fennell/ Rob Ferris/Simon Foster/Bill Jackson/ Robert Robinson/ Lucy Scott-Moncrieff
This comprehensive two-day course, held jointly with Mind, has been approved by the Law Society as suitable for solicitors seeking to attain membership of the Mental Health Review Tribunal (MHRT) panel. The course is designed for practitioners with a good grounding in mental health law and the issues affecting mentally disordered clients.

Employment Discrimination Law Update
26 June
£185 + VAT 6 hours CPD Course grade: U
Trainers: Elaine Heslop/Catherine Rayner
This course will ensure that delegates are aware of the key strands currently developing in discrimination protection and case-law which impact on those protected by employment discrimination laws.

Forthcoming

Parole and Oral Hearings
5 July
£185 + VAT 6 hours CPD Course grade: A
Trainers: Hamish Arnott/Simon Creighton

Recent Developments in Housing Law
11 July
£185 + VAT 6 hours CPD Course grade: S
Trainers: Caroline Hunter/Jane Petrie

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

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noticeboard

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Law NEC 2007
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Free Entrance
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Legal Action Group will be attending this conference and exhibiting at Stand A75. Please call in for a chance to browse our publications, find out more about us or just to say hello!

Garden Court North Chambers
Homelessness seminar
15 June 2007
Manchester
9.30 am–5 pm
£50 + VAT (discount for voluntary organisations)
5 hours CPD
This seminar will be at an intermediate level aimed at practitioners with at least a basic knowledge of homelessness law but not necessarily having substantial practical experience. Topics include:
- Priority need, intentionality, local connection – Rory O'Ryan and Laura Cawsey
- Discharge of duty generally – James Stark
- Interrelationship with community care – Adam Fullwood
- Interim duties including housing pending review and appeal – Ben McCormack
- How to prepare appeals and reviews – Alex Durance

The seminar will also provide an update on recent activity in the field of homelessness law. Delegates will have the opportunity to consider the implications of new developments and how they may impact on their own clients.
Contact: Helen Ray
Tel: 0161 236 1840
E-mail: hray@gcnchambers.co.uk for more details and booking form.
www.gcnchambers.co.uk

Child Poverty Action Group
Housing benefit – the problem areas
2 July 2007
London
5 hours CPD
This one-day course looks at the more difficult and controversial areas of housing benefit law. The course concentrates on the areas where problems and local authority bad practice frequently occur. It aims to cover the following areas:
- 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 for more details
www.cpag.org.uk

Lectures, seminars and meetings

The Institute of Employment Rights (IER)
Grievance and disciplinary procedures & employment tribunal rules: fairness or fudge?
13 June 2007
1.30 pm–4.15 pm
London
£45 IER subscribers and members
£60 trade union members
£120 commercial
2 hours CPD
This seminar will be of great interest to trade unionists, employment lawyers, personnel specialists, academics, students and those concerned with the development of public policy.
Speakers: Iain Birrell (Thompsons Solicitors), Carolyn Jones (IER), Roger Seifert (Centre for Industrial Relations) and Ron Woods (ACAS)
Tel: 0151 702 6925
Fax: 0151 702 6935
E-mail: office@ier.org.uk
www.ier.org.uk

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North London Action for the Homeless is a well-established homelessness charity based in Stoke Newington. We provide crucial support to homeless and vulnerable people in Hackney. We are looking for a new treasurer. Our financial affairs are very simple (annual budget £40–50k pa); responsibilities include cash book, budgeting, organising fundraising, and attendance at management committee meetings every six weeks.
More information from Jon Clarke,
Tel: 0796 898 5320
E-mail: admin@nlah.org.uk
www.nlah.org.uk.

Books

The Institute of Employment Rights
The right to strike: from the Trade Disputes Act 1906 to a Trade Union Freedom Bill 2006
Edited by K D Ewing
ISBN 978 0 9551795 4 9
328pp
December 2006
£15 each (one to nine copies: reductions for bulk orders)
This book tells the story of the Trade Disputes Act 1906, in celebration of its centenary. That Act was one of the most important pieces of labour legislation ever passed by a British parliament. It provided very simple legal protection for the right to strike for 65 years, and left a legacy which is found on the statute book to this day. The substance of today's law, however, is far removed and much weaker than the position established in 1906. For that reason, the Trade Union Freedom Bill is designed to soften some of the harder edges of the Thatcher bequest. The 15 authors contributing to this report – all involved in the Institute's unique network of academics, lawyers and trade unionists – examine the twists and turns in the judicial and statutory developments surrounding the right to strike over the last 100 years.
www.ier.org.uk

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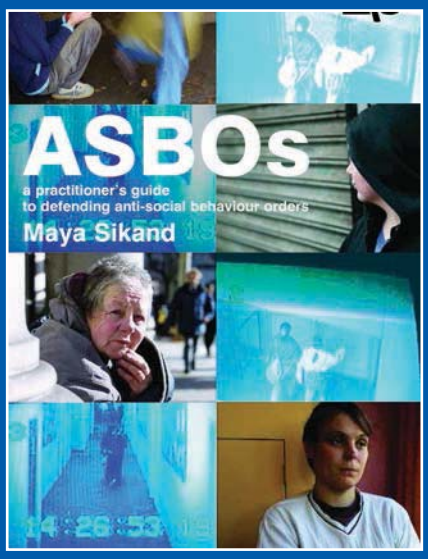

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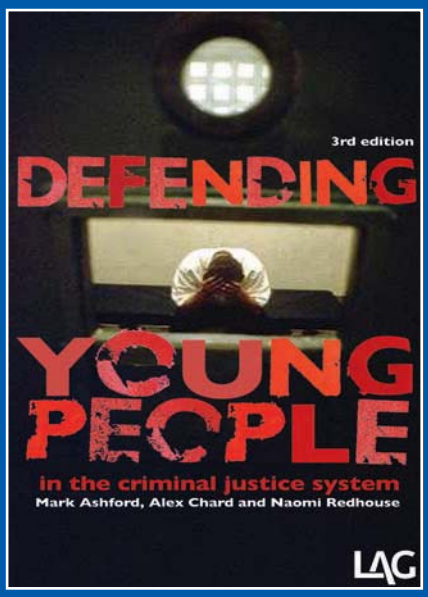

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