LAG

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.

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

Cover photograph: Joanne O'Brien

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

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

Equal justice under law

With the Equality Act 2006 in place, the appointment of Trevor Phillips as chair of the new Commission for Equality and Human Rights (CEHR) and recruitment for its commissioners and chief executive officer underway, the CEHR (which will become operational in October 2007) is beginning to take shape. But there are still many loose ends to be secured.

In February 2005, the government set up the Equalities Review to investigate the various factors that prevent people from making the best of their abilities; to make recommendations on key policy priorities; and to inform modernisation of equality legislation and the development of the new CEHR. At the same time, and in parallel, the Department of Trade and Industry (DTI) undertook – through the Discrimination Law Review – a review of anti-discrimination legislation, in order to develop a 'simpler, fairer legal framework' to 'fit the needs of Britain in the 21st Century'.

In March 2006, the Equalities Review produced an interim report, with a final one expected in early 2007. The interim report showed a consensus among respondents that legislation was the biggest driver of progress towards a more equal society. They agreed on the need for consistency of legislation and better enforcement of anti-discrimination laws, and that a Single Equality Act was the most desirable outcome to achieve after three years. The responses suggested the new CEHR should prioritise tackling inconsistent legislation, increasing partnership working among relevant agencies, spreading good practice and holding the government to account in tackling inequalities.

However, so far, nothing has been heard from the Discrimination Law Review. When, finally, the Discrimination Law Review reports its conclusions, LAG hopes that it will lead to the unification and simplification of the law in this field – levelling it up rather than down – and extend the positive duties currently imposed on the public sector.

There is an urgent need for change. The anti-discrimination laws are about the most complex there are. Even tracking down the relevant provisions is complicated, scattered as they are in a variety of Acts, statutory instruments, codes of practice and EC directives. There are inconsistencies between the different strands of anti-discrimination law, and their language is confusing. The law must be simplified, consistent, easily accessible and understandable.

But while LAG hopes that both the reviews and use of the CEHR's powers will be a step change, there is still something missing. The existing equality commissions have not provided much support for individual cases of a non-strategic nature.

In the absence of legal aid for representation at employment tribunals, this is a real problem for those trying to enforce or defend their rights. In employment cases, there is usually an imbalance of power between the parties, and people are rightly worried about the consequences of accusing their employers of discrimination. It is plainly wrong for the government to suggest that tribunal procedures are so simple and straightforward that representation is not necessary. The truth is that both the law and procedure in this area are fiendishly complicated. It is very difficult for someone to navigate the rocks and reefs of a discrimination case single-handed. The research shows clearly that being represented makes a huge difference to the chance of success at the tribunal. In disability discrimination cases, research found that the chance of winning was much better for a person who is represented: over 11 per cent of cases were successful if the claimant was represented by a friend or relative; and this rose to over 27 per cent when s/he was represented by a Law Centre® specialist adviser. It is also harder for pro bono lawyers to fill this gap in the legal aid system, not least because discrimination cases take longer to prepare and they usually find it difficult to take time out to do the work needed.

If legal aid is not to be extended for tribunals – and quite the reverse is indicated – then the CEHR is one of the few organisations that could play a vital role through its power to provide assistance in individual cases. However, while the signs are against this happening, the CEHR will also have grant-giving powers, and perhaps this is a more realistic hope for progress. The grant currently given to Law Centres for anti-discrimination work by the Disability Rights Commission is an example of best practice that the CEHR could – and should – promote. If the CEHR offers grant funding for specialist support in discrimination and human rights cases, this will really make a difference. LAG hopes that the CEHR's commitment – and budget – will be equal to the task.

news feature

Law Centres challenge Carter review

Peter Hay, of the Law Centres Federation (LCF), writes:

Serious concern about the Carter review has prompted the LCF to survey its members about its potential impact. A sample of urban and rural Law Centres® revealed a unified view that the proposals are flawed and could threaten access to civil law services by vulnerable and disadvantaged clients.

The following Law Centres took part in the survey: Brent, Chesterfield, Newcastle, Kirklees, Greenwich, Wiltshire, Battersea South West London, Southwark, Hammersmith and Fulham and Avon and Bristol. Their responses confirm that Law Centres remain under considerable pressure and have more potential clients than can be helped. Some services, such as immigration, are reported as particular pressure points, but housing, employment, welfare law and debt all feature in the survey as becoming more difficult for clients to access.

This finding corresponds with observations made in the survey responses that a number of high street solicitors providing legal aid are closing or reducing these services. Such is the degree of concern among Law Centres about the implications of the Carter review that the LCF's membership voted, at its annual conference in November, to boycott the review's implementation unless significant changes are made. See 'LCF votes to reject new legal aid contracts' opposite.

Demand for civil law services

There is widespread concern from many Law Centres that they have to turn potential clients away. One Law Centre regrets that it cannot take on around 15 per cent of the immigration cases that clients present to it. Another Law Centre reports that immigration enquiries made at its reception desk have increased by 20 per cent: from 1,747 in 2001 to 2,103 in 2006.

Law Centres also comment on increases in enquiries from outside their normal catchment area. Chesterfield is seeing a rise in the number of people from elsewhere who are seeking help in housing and employment cases. Hammersmith and Fulham refers to increasing numbers of asylum-seekers and failed asylum applicants from other parts of the country who are seeking advice. Newcastle reports that it is 'working to capacity' on housing and immigration cases, and is turning away clients.

The survey also demonstrates that local firms of solicitors are ceasing to provide certain services or making changes which are likely to reduce the volume of clients they are able to help. Hammersmith and Fulham comments that many large immigration firms have moved out of this market completely. Greenwich states that one local practice has closed its welfare rights and immigration departments, and that other local firms have reduced their intake. Battersea South West London notes that high street housing firms are closing down as, under the legal aid framework, they find it difficult to make a profit.

Access to legal aid

Most Law Centres in the survey confirmed that they believe the situation is getting worse for clients who wish to access civil legal aid. The picture presented by the survey responses is one of continuing pressure to meet existing demand. One Law Centre says that due to the difficulty of administering LSC contracts, no additional cases are being seen and more people are being turned away at its reception desk regarding certain areas of law.

Concerns include Greenwich's view that current trends will mean that solicitors will inevitably concentrate on the volume of cases and will not be well placed to prioritise quality. Battersea South West London comments that there is decreasing support overall for the most needy and those on low incomes. Hammersmith and Fulham believes that immigration and housing are the worst affected categories of service.

Specific gaps in provision

The survey indicates that gaps in provision occur across all civil law services, but with the balance varying from area to area. Specific gaps relate to unmet demand described above.

A particular question was included in the survey on the availability of legal advice for domestic violence cases, for example when an emergency injunction might be required. The Law Centres in the sample report that they do not have the capacity to provide this service directly and, moreover, have experienced difficulty in securing onward referrals to solicitors.

Security, crime and immigration at heart of Queen's speech

A legislative programme focusing on security, crime and immigration was outlined in the Queen's speech on 15 November 2006, with mention of 29 bills affecting England and Wales.

These include:

Asylum and Immigration Bill to increase the power of immigration officers; give new powers of arrest and allow biometric details to be taken; make it explicit that there will be a presumption of deportation for those committing serious crimes; and simplify the appeals system to make deportation easier.

Criminal Justice Bill to create, among other things, new powers to tackle anti-social and violent behaviour.

Fraud (Trials without a Jury) Bill to enable trials without a jury in 'serious' fraud cases.

Legal Services Bill to deal with the regulation of the legal profession in England and Wales.

Local Government Bill to give parish councillors the freedom to create bylaws and impose instant fines on people for litter and dog-fouling offences.

Mental Health Bill to allow people with untreatable personality disorders to be detained.

Offender Management Bill to allow the use of private firms and others to deal with tackling re-offending.

Organised Crime Bill to strengthen powers to recover criminal assets and introduce a new offence of assisting a criminal act believing that an offence may be committed.

Tribunals, Courts and Enforcement Bill to reform the tribunal system; enable a more diverse range of people to apply for judicial office; and change bailiff powers.

Commenting on the Queen's speech, Michael MacNeil, LAG's policy director, said: 'The government's programme sounds very similar to last year's "law, order and security" agenda. Many of the proposals will worry those who campaign for equal access to justice and fair treatment by the justice system.'

■ The transcript of the Queen's speech is available at: www.parliament.uk/faq/lords_stateopening.cfm. The full text of the bills published to date is available at: www.publications.parliament.uk/pa/pabills.htm.

Time for review of ASBOs?

Media reports following the publication in November of the Youth Justice Board's (YJB's) report, *Anti-social behaviour orders*, that some young people consider anti-social behaviour orders (ASBOs) as a 'badge of honour' diverted attention from other findings which raised important issues about the processes, perceptions and experiences associated with such orders.[1] For example, the research's finding that nearly half of the ASBOs imposed on young people were breached and, as a result, they were entering the criminal justice system for the sole offence of breaching an order, received little attention.

Also in November, the Runnymede Trust launched *Equal respect – ASBOs and race equality*, its study into the potential for ASBOs to be used to deal with racist behaviour, and the impact of such orders when served on members of black and minority ethnic (BME) communities.[2] This important report found a paucity of data monitoring on ASBOs, which means that there is no way to investigate the impact of such orders on BME communities.

Sarah Isal, senior research and policy analyst for the trust, said, 'As things stand, there is no certainty that the levels of institutional racism found in other parts of the criminal justice system, and acknowledged in the Stephen Lawrence inquiry, are not having an effect on how to tackle anti-social behaviour generally and the use of ASBOs in particular.'

1 A summary of the research is available free at: www.yjb.gov.uk. The full report is available to order at: www.yjb.gov.uk, £8.
2 Available at: www.runnymedetrust.org.

LAG welcomes *Law in the real world* report

One of the challenges presented at the launch of *Law in the real world: improving our understanding of how law works*, a report from the Nuffield Foundation inquiry on empirical legal research, was that bold and imaginative leadership is required to address the currently fragile base for such research.*

Professor Dame Hazel Genn QC, who introduced the report on behalf of her co-authors, Professors Martin Partington and Sally Wheeler, noted that while the law is an increasingly important feature of modern life, there seems to be a decreasing capacity to keep it under empirical examination.

The report outlines a range of proposals for an integrated strategy that will support and develop research capacity in empirical legal research. It is suggested that success will be measured by the creation of a younger generation of researchers with the necessary interest, enthusiasm and skills to undertake empirical legal research. Professor Genn pointed to a list of factors to explain why this mattered, including that law should be seen as a 'vehicle for social justice' and that there was a need for society 'to have evidence about how the law really works'.

LAG has written to the Nuffield Foundation and the authors welcoming the report. LAG's policy director, Michael MacNeil, said: ' LAG hopes that the report will stimulate a debate about the need to build empirical evidence to assess how the law works in the real world and how various policy initiatives and legislation impact on people's ability to access justice.'

** Law in the real world: improving our understanding of how law works. Final report and recommendations*, available at: www.ucl.ac.uk/laws/socio-legal/empirical/docs/inquiry_report.pdf.

Carter reforms: an update

Excited reports of the Lord Chancellor, Lord Falconer's retreat from the Carter proposals have turned out to be inaccurate. But in a speech to the Legal Aid Forum in November, Lord Falconer clarified that although he would look again at aspects of the family law proposals, he was not backtracking on the reforms. He said that he stood by the principles of fixed and graduated fees and that there would be no extra money for legal aid.

The strength of feeling provoked by the market-based proposals has resulted in unusually high numbers of submissions during the consultative process on the Carter reforms. The Department for Constitutional Affairs and the Legal Services Commission (LSC) have received over 2,600 responses to their joint consultation paper, and over 200 submissions have been made to the Constitutional Affairs Committee's (CAC's) inquiry. This may explain why the CAC is not expected to consider the evidence until 2007.

Meanwhile, the push against the proposals continues with the launch of the Law Society's latest campaign, *What price justice?* The campaign's objective is: 'To persuade the government to guarantee an adequately funded legal aid system ensuring quality representation and access to justice for all.' The LSC has rejected the claim that there is poor access to legal aid services and stated that provision has to move to be based around the needs of clients, not lawyers.

LCF votes to reject new legal aid contracts

Delegates at the Law Centres Federation's annual conference voted to boycott the new legal aid contracts due from April 2007 'unless there are substantial changes'. The conference, which took place in Manchester in November, was dominated by concerns over the Carter proposals.

Vera Baird MP, QC, minister for legal aid, spoke about the proposed changes at the conference. She reiterated the government's commitment to fixed fees as the right way forward and that there will be no increase in the legal aid budget. While recognising the important work that Law Centres® do, she did not accept that fixed fees would prevent them from taking on complex cases or acting for vulnerable clients. She commented that, 'We are absolutely committed to fixed and graduated fees, and will not shrink from this, but we want to get these right.' The minister proposed setting up a stakeholder body for the not for profit (NFP) sector to assist the transition. However, while expressing support for Law Centres in making the process as 'gentle and supportive as possible', she had little practical comfort to offer.

Delegates expressed concern not only in relation to the proposed level of fixed fees and the development of Community Legal Advice Centres, but also about the terms of the draft unified contract, which is currently out for consultation. This will require members of the management bodies for NFP organisations to be personally liable for any losses from legal aid work – a term which directly conflicts with current charity practice and is therefore likely to be rejected by all such bodies.

Adam Griffith, policy officer at the Advice Services Alliance (ASA), summarises a new ASA report that questions whether *Causes of action: civil law and social justice* provides a justification for the Legal Services Commission's (LSC's) five-year strategy for the Community Legal Service (CLS).[1]

Causes of action and the CLS strategy: is this really evidence-based policy making?

Introduction

Ole Hansen's article, 'CLACs and CLANs – a new reality?', August 2006 *Legal Action* 8, highlighted the lack of explicit support in *Causes of action* for the CLS strategy, and for Community Legal Advice Centres (CLACs) and Community Legal Advice Networks (CLANs) in particular. ASA's report, *Causes of action and the CLS strategy – is this really evidence based policy making?*, examines the extent to which *Causes of action* supports four arguments that appear to be central to the CLS strategy's proposals for massive changes in the structure of advice services, namely that:

- the need for legal advice is broadly the same everywhere;
- too many people fail to get advice;
- people do not experience single problems as much as clusters of problems; and
- referrals do not work.

Need is broadly the same everywhere

The CLS strategy claims that need is broadly the same everywhere, with the implication that the LSC can have one commissioning policy, including CLACs and CLANs, that can be applied across England and Wales. 'Broadly the same' can mean different things to different people. *Causes of action*, however, found that in 2004:

- respondents in Wales (28 per cent) reported significantly fewer problems than their counterparts in England (34 per cent);
- there were differences in the incidence rate of problems between the different regions of England, with the highest rates in London (40 per cent); and
- outside London, however, there was no discernable pattern.

Too many people fail to get advice

Causes of action analyses people's responses to problems in five categories. The percentage of people's responses, in each category, is set out in Table 1 below.

Causes of action also found that:

- people's responses depended largely on the type of problem experienced;

Table 1

Response (%)	2001	2004
Did nothing	19	10.5
Handled alone	30.4	31
Obtained advice	43.1	51.6
Tried to obtain advice and failed	2.3	2
Tried to obtain advice, failed and handled alone	5.2	5
Total	100	100

- whether people seek advice reflects how serious they think a problem is;
- there was a strong link between people's awareness of local advice services and whether or not they took action;
- success in obtaining advice varies considerably depending on the type of problem and the type of adviser consulted;
- unsuccessful attempts to obtain advice were particularly high in relation to problems concerning neighbours, rented housing and unfair police treatment; and
- people in temporary accommodation contained much higher proportions of those who either took no action or tried to obtain advice and failed.

It is difficult to comment on the overall percentage of people with problems who seek advice. The fact that someone has a justiciable problem does not mean that s/he 'should' seek advice. Many handle their problems alone and do so successfully.

The variations in success in obtaining advice appear to reflect the availability of legal advice, and people's knowledge of it. Neighbour disputes are not a priority within the CLS; problems concerning rented housing and unfair police treatment are priorities. *Causes of action* suggests to the ASA that the priority should be to increase the availability and profile of advice in these areas. It also suggests that services should be targeted at people in temporary accommodation.

People experience clusters of problems

The proportions of people reporting problems (in England and Wales) are summarised in Table 2 below:

Table 2

Number of problems reported (%)	2001	2004
One problem	20	21
Two problems	9	7
Three or more problems	8	5

Most problems were experienced by people who faced more than one problem within three-and-a-half years. Nevertheless, the low proportion of people reporting multiple problems raises two questions:

- whether it is right to base a national legal aid policy on the assumed access difficulties of such proportions of the population; and
- whether the CLS strategy will be able to overcome such difficulties.

Causes of action identifies three distinct clusters: a family cluster, a homelessness cluster, and an economic cluster, which comes in three different sizes. The findings about clusters are very important. The question, however, is whether they are strong enough to justify a wholesale restructuring of legal advice services.

- The family cluster affects relatively few people and should not represent a problem in terms of access to legal services, since such problems are typically taken to solicitors who should be able to deal with all of them.
- The homelessness cluster, although more problematic, is equally small in terms of the proportion of people affected.
- The economic clusters contain at their core a four-problem cluster, which includes consumer and neighbour problems, neither of which are a priority within the CLS.
- *Causes of action* does not demonstrate a direct link between cluster problems, nor does it tell us whether cluster problems occurred together or separately over the three-and-a-half year reference period covered by the surveys.

More persuasive evidence about 'clusters' is to be found in a research report recently published by the Department for Constitutional Affairs (DCA), which focused on housing, benefits and debt problems presented to a small sample of solicitors' firms and advice agencies.[2] The report found, not surprisingly, that clusters were common among clients who approached advisers with housing, debt and benefit problems, and highlights a number of issues concerning the identification of and response to cluster problems. It suggests that:

> *... most problem clusters would benefit from, but not require, co-ordinated management, and for a minority of very complex clusters, with particularly vulnerable clients, the need for co-ordinated management is strong* (p35).

Referrals do not work

Causes of action identifies the problem of 'referral fatigue', finding that the likelihood of respondents obtaining advice declines the more often they are referred. Between 2001 and 2004, it appears that:

- fewer referrals were actually made;
- the success rates of initial referrals fell; and
- the success rates of subsequent referrals rose.

Causes of action found that the success rates of referrals varied considerably between different types of advisers. In particular, 'in both 2001 and 2004, more than two-thirds of those referred on by citizens advice bureaux successfully obtained advice elsewhere, compared to only around one-third of those referred on by 'other' advisers'.[3]

Causes of action does not distinguish between different types of problems in its discussion of unsuccessful referrals. However, where advice is easy to obtain, for example in relation to family and personal injury problems, one would expect people to experience fewer referral problems. Conversely, one would expect more referral problems in relation to disputes concerning neighbours, rented housing and unfair police treatment.

Causes of action does not explain why referrals failed. This makes it difficult to assess whether the CLS strategy is likely to make a real difference. CLACs and CLANs will still be making referrals and giving people appointments, which may or may not be kept. It is not possible to know what a normal 'drop-out' rate would be.

The variation in success rates between different advisers suggests that a major part of the problem arises because people seek help from inappropriate sources. It does not suggest that referrals within the legal advice sector do not work.

Conclusion

In ASA's opinion, *Causes of action* provides only limited support for the CLS strategy. Need varies between different geographical areas for reasons that remain unclear. Whether people seek and obtain advice would seem to depend largely on the nature of the problem, the availability of advice, and the identity of the first adviser consulted. Relatively few people experience 'clusters' of problems. *Causes of action* does not provide convincing evidence of the need to restructure legal advice services to meet the 'clusters' identified. The recent research published by the DCA is probably a more reliable pointer in this regard.

There are several different ways in which these issues can be approached. *Causes of action* suggests improving public education and the training of advisers so as to make referrals more effective. There is much of merit in the CLS strategy, but *Causes of action* does not, on its own, justify such a radical restructuring of legal advice services.

1 *Causes of action and the CLS strategy – is this really evidence based policy making?* (For availability telephone: 020 7378 6428.) It contains references to all the findings from *Causes of action* referred to in this article. The ASA is grateful to Pascoe Pleasence for clarifying some of the findings in *Causes of action* and for the figures in Table 1.

Causes of action: civil law and social justice, Pascoe Pleasence, 2nd edn, is available from TSO, £24.95 or tel: 020 7759 1193. A summary of the main findings is available at: www.legalservices.gov.uk/docs/news/Summary-Main-Findings-revised-Mar05.pdf.

Making legal rights a reality. The Legal Services Commission's strategy for the Community Legal Service 2006-2011 is available at: www.legalservices.gov.uk/docs/civil_contracting/CLS-Strategy-final-15032006cover.pdf. See also May 2006 *Legal Action* 8 and 9.

2 *A trouble shared – legal problems clusters in solicitors' and advice agencies*, Richard Moorhead and Margaret Robinson and Matrix Research and Consultancy, DCA research Series 8/06, November 2006, available at: www.dca.gov.uk/ research/2006/08_2006.pdf.

3 See *Causes of action*, 2nd edn, p118.

In early 2007, the Public Legal Education and Support (PLES) Task Force will produce its final report making specific proposals to develop a national strategy on public legal education. Here, Tom Dunn, pro bono co-ordinator at the College of Law, discusses Clapham Park Streetlaw Plus, a public legal education project that, from October 2003 to March 2006, aimed to help residents of a south London housing estate find out more about the law as it affected them in their daily lives.

Streetlaw: one way to deliver public legal education

Public legal education defined

Public legal education: a proposal for development (incorporating a summary of responses to the discussion paper *Towards a national strategy for public legal education,* September 2004) published by LAG, the Advice Services Alliance and the Citizenship Foundation in June 2005, offered the following definition of public legal education (PLE), based on the National Consumer Council's definition of consumer education: 'Public legal education combines the supply of appropriate information with the process of developing the attitudes, knowledge, understanding and skills necessary to make informed personal decisions in circumstances which are affected by our individual and collective legal rights and responsibilities.'[1] See also October 2004 and July 2005 *Legal Action* 9 and 8.

This definition captures the nature of the public legal education that the College of Law has delivered since 1999 with student volunteers in its pioneering Streetlaw programmes in schools, prisons and community organisations and, particularly, in its Streetlaw Plus project in Clapham Park. Most of this work has involved delivering participative workshops about the law to the public.

Streetlaw on Clapham Park Estate

The Clapham Park Streetlaw Plus project was funded by the Clapham Park Project (part of the government's New Deal community regeneration programme) and the College of Law. The project was managed by a full-time, six-years' qualified supervising solicitor and administered by a full-time co-ordinator. The work of the project was delivered by 250 Graduate Diploma in Law and Legal Practice Course students. The co-ordinator spent two days a week in an office on the estate and the rest of her time at the College of Law providing administrative support to the students.

During the first three months of the project, the supervising solicitor and co-ordinator consulted with residents to find out which areas of law they wanted to know more about. An initial schedule of workshops was drawn up. The project soon developed various supplementary services including:

- a follow-up e-mail service to individual residents to answer questions about the law that had arisen in workshops, but which students had been unable to answer;
- a follow-up referral service to specialist legal advisers of residents with live legal problems identified in workshops, for example identification of eligibility for public funding; and
- running workshops and mock trials in local secondary schools and providing advice and assistance to local community organisations on capacity building and governance issues.

The students usually worked in teams of four and each student put in about 30 hours of work. Each student spent three weeks researching his/her area of law. The supervising solicitor then checked their research findings before the students spent two more weeks devising an interactive workshop and drafting a resource pack stating the law. The sixth week was spent running through the workshop before delivering to residents on the estate. The supervising solicitor attended each workshop with the students and supervised and checked every stage of their preparation.

Key achievements

Clapham Park Estate has around 9,000 residents. Streetlaw Plus delivered 247 workshops, which were attended by 1,282 Clapham Park residents. Four hundred and eighty-four resource packs were distributed to residents. Feedback surveys completed by attendees at each workshop showed that:

- 87.2 per cent of residents described the information they received as clear or very clear;
- 81.2 per cent of residents described the information they received as relevant or very relevant;
- 88.7 per cent of residents said they would use the service again; and
- 89.3 per cent of residents said they would recommend the service to another resident.

An evaluation of the students' involvement showed that they found the experience rewarding and interesting and developed authentic legal skills and career ambitions. In many cases, students had developed a commitment to pro bono

work as a result of their involvement in the project.

Lessons learned

The biggest challenge that the project faced was in establishing the service's profile and purpose. Residents sometimes came to Streetlaw's events hoping to get legal advice, which the service is not designed to provide. Residents took time to understand what Streetlaw was offering them and to recognise the ways in which it might be useful. This experience suggests that any national strategic body will face a real challenge in getting across the message about what PLE can do for people.

However, once residents engaged with the service, they wanted to find out about an enormous range of areas of law, including police powers, anti-social behaviour, drugs laws, the civil and criminal justice systems, immigration and asylum, planning, employment, homelessness, welfare benefits, business leases, charitable status and community interest companies and other forms of incorporation. A national strategic body will also have to think carefully about what areas of law are most appropriate to be delivered by a PLE programme.

PLE for young people

The project found that PLE has great potential for engaging young people with what might be called the rights and responsibilities agenda, although not in the areas of law that might have been anticipated. The project was frequently asked to run workshops on police powers, drugs laws and anti-social behaviour. These workshops often encountered antagonistic responses from those attending, usually it seemed, because these areas of law were perceived as being strong on responsibilities and state power and weak on individuals' rights.

For those who regard PLE as a means of encouraging law-abiding behaviour, the project found more positive responses in workshops on areas of law which young people felt empowered them. Workshops on, for example, how to deal with a discriminatory job interview, or how to oppose a planning application were met with great enthusiasm.

This experience echoes the view of John Clarke, deputy director of children's services for Hampshire County Council, in his evidence to the House of Commons Select Committee on Education and Skills in October 2005.[2] Talking about the value of teaching children about their rights under the UN Convention on the Rights of the Child, John Clarke said:

The principal change is that children are aware of themselves and the rights they have, that raises their self-esteem. The second thing that happens is they begin to understand that others have rights too, so when there are issues … we tend to see them quite quickly … adopting rights respecting language …

The project's experience was that residents appeared to become more likely to recognise and respect other people's rights once they understood that they too had rights. Indeed, at times, young residents seemed delighted to discover the law might actually help them in some way.

The importance of interactivity

The interactive element of the workshops proved itself to be effective at, in the words of the PLES Task Force's definition of PLE, providing 'the confidence and skills they need to deal with disputes and gain access to justice'. A workshop on how a job applicant could deal with having a criminal record staged a mock interview in which the applicant was given the chance to explain why his record should not preclude him from being considered for the post. Residents commented regularly that the interactivity in the workshops left them much more likely to both remember – and have the confidence to use – what they had been told.

The Streetlaw method also demonstrated potential for improving knowledge of the law in ways that could enable people to access public services effectively and to deal with institutions and the professions appropriately and confidently. In one workshop on housing benefit appeals, residents acted out a model claim from start to finish and formulated, for themselves, ways of dealing with obstructive council staff.

PLE and justiciable problems

The PLES Task Force's scoping report of January 2006 drew a distinction between PLE directed at preventing or resolving justiciable problems that arise between individuals and PLE directed at community organisations.[3] The project's experience suggests that the distinction is unhelpful. The project accessed individuals facing potentially justiciable problems through workshops in community organisations that such individuals attended.

A role for law schools and universities

There is real potential for Streetlaw-style delivery of PLE through law schools and universities. The project demonstrated that the Streetlaw model, delivered by graduate volunteers under the rigorous supervision of qualified lawyers, can provide good quality, responsive and sensitive PLE. As one resident commented:

We got more from you than we would have got from a solicitor. You all seem very patient and open and explain things clearly. This makes us feel relaxed.

Lessons can be learned from the US where Street Law Inc programmes are delivered out of around 70 law schools, working in partnership with community leaders, judges, police officers and qualified lawyers.

Conclusion

The Clapham Park Streetlaw Plus project was met with great enthusiasm and interest. The residents came to understand the particular and innovative nature of what they were being offered and to use and appreciate it. As one resident said:

I expected it [the workshop on welfare benefits] to be irrelevant and too complicated but I have learnt about my rights, especially in terms of welfare benefits while working. Ninety-nine per cent of points have been clearly explained and were easy to understand.

This comment describes the type of impact that most PLE proponents would wish for. The College of Law's experience in Clapham Park suggests that Streetlaw has the potential to reproduce this kind of outcome and level of satisfaction on a large scale.

1 Available at: www.lag.org.uk.

2 *Citizenship education: oral evidence, Monday 24 October 2005 given by Professor Sir Bernard Crick, Ms Miriam Rosen and Mr Scott Harrison; Mr Keith Ajegbo, and Mr John Clarke*, HC papers 581–i, 2005–06 available at: www.publications.parliament.uk/pa/cm200506/cmselect/cmeduski/581/5102407.htm and from TSO, £5.50.

3 *Second meeting of the PLES Task Force 30 January 2006 Paper 2/03a. Public Legal Education Strategy (PLES) Task Force scoping report*, available at: www.pleas.org.uk/news_1045-10106-1929.html.

Recent developments in immigration law

This series 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

Refugee or Person in Need of International Protection (Qualification) Regulations 2006 SI No 2525

Refugee or Person in Need of International Protection (Qualification) Regulations (RPNIP(Q) Regs) 2006 came into effect on 9 October 2006. The regulations were designed to give effect in part to EU Directive 2004/83/EC in relation to the minimum standards for the qualification and status of third-country nationals, stateless persons as refugees, or other persons in need of international protection.

The regulations apply to any pending asylum claim or pending appeal as at 9 October 2006 and consequently have an immediate impact on any case that is 'live' for any asylum practitioner.

■ Regulation 4 specifies that in determining whether a person is a refugee or otherwise eligible for humanitarian protection, it is to be assumed that protection is provided if either the state or any party or organisation, including any international organisation, controlling the state or a substantial part of the territory of the state, take reasonable steps to prevent the persecution or suffering by operating an effective legal system for the detection, prosecution and punishment of the acts complained of and where the individual can access such protection. Many practitioners may fear that, as a consequence, establishing an inability to access effective protection for a claimant will be far tougher.

■ Regulation 7, which deals with exclusions, determines that in considering whether an individual should be excluded under article 1F(b) of the Geneva Convention, serious non-political crimes will also include those with an allegedly political motive if they include 'a particularly cruel action'. One can anticipate that there may be considerable scope for litigation in assessing what is meant by actions which are 'particularly cruel' in the context of seeking to effect regime change. There may be scope for arguing that acts, while cruel, are not particularly cruel when compared with the actions of the regime. It increases the potential scope for evaluating actions in a more subjective way which may lead to anomalous decision-making.

Statements of changes to Immigration Rules

Refugees and humanitarian protection

Statement of changes in Immigration Rules, Cm 6918, took effect on 9 October 2006. It is also designed to ensure compliance with EU Directive 2004/83/EC when coupled with the new regulations (see above) and existing provisions.

Practitioners will need to familiarise themselves speedily with the new rules as it is likely that future decisions and appeals will be dealt with in terms of how these rules have, or have not, been fulfilled.

■ Paragraph 1 extends the grounds on which leave to enter or remain may be curtailed to include those following revocation of asylum or humanitarian protection.

■ Paragraph 2 defines an asylum applicant as a person requesting recognition as a refugee under the Geneva Convention on the basis that requiring his/her removal from the UK would breach the Geneva Convention.

■ Paragraph 3 replaces the phrase 'United Nations Convention and Protocol relating to the Status of Refugees' with reference merely to the 'Geneva Convention'.

■ Paragraph 4 replaces the previous r334 and specifies that an asylum applicant will be granted asylum if the secretary of state is satisfied that the person is in the UK or at a port of entry; is a refugee as defined in RPNIP(Q) Regs reg 2; that there are no reasonable grounds for believing him/her to be a danger to the security of the UK; that s/he does not constitute a danger to the community having been convicted of a particularly serious crime; and that refusing the application would be a breach of the Geneva Convention. To succeed with the claim for asylum, each of these components must be met.

■ Paragraph 5 is merely a typographical change.

■ Paragraph 6 inserts several new rules dealing with asylum and the loss of protection:

– **Rule 339A** provides for the revocation or refusal to renew a grant of asylum in circumstances where the individual has voluntarily reavailed him/herself of the protection of the country of nationality; or, having lost his/her nationality, s/he has re-acquired it; or s/he has acquired and enjoys the protection of a new nationality; or s/he has re-established him/herself in the country of former claimed persecution; or where the circumstances leading to the granting of asylum have ceased to exist so that the individual cannot reasonably refuse to avail him/herself of the protection of the country of nationality; or, where the person is stateless, s/he cannot reasonably refuse to return to the country of former habitual residence because the circumstances in connection with the claim for asylum have ceased to exist; or where s/he should have been excluded under RPNIP(Q) Regs reg 7 (see above in respect of exclusions); or any misrepresentation or omission of facts or use of false documents were decisive in the grant of asylum; or s/he is regarded as being a danger to the security of the UK; or, having been convicted of a particularly serious crime, s/he constitutes a danger to the community.

In assessing whether it would be reasonable for an individual to have his/her asylum status revoked, or an extension refused, on account of the changed circumstances making it unreasonable for the individual to refuse to avail protection from the former state, the secretary of state is obliged to consider whether the change of circumstances is both significant and long term. The provisions on revocation or refusal to renew a grant of asylum will apply only to claims made on or after 21 October 2004.

– **Rule 339B** provides that where a person's asylum is revoked or not renewed any other limited leave may be curtailed at the same time.

– **Rule 339C** makes specific provisions for the grant of humanitarian protection within the rules themselves. A person would qualify for such protection if s/he is in the UK or at a port of entry; s/he does not qualify as a refugee as defined in RPNIP(Q) Regs reg 2; where there are substantial grounds for showing that if returned to the home country, s/he would face a real risk of suffering serious harm; and s/he is not excluded from the grant of humanitarian protection.

Serious harm is further defined as the death penalty or execution, unlawful killing, torture or inhuman or degrading treatment or

punishment, or serious and individual threat to life by reason of indiscriminate violence in situations of international or internal armed conflict. In other words, humanitarian protection will be restricted to cases which would otherwise meet the criteria under articles 2 or 3 of the European Convention on Human Rights ('the human rights convention'). It is important to note both the introduction of humanitarian protection within the rules for the first time and the strict interpretation that this is likely to entail.

– **Rule 339D** identifies the cases in which a person is to be excluded from humanitarian protection as those where there are: serious reasons for believing that s/he has committed war crimes, crimes against peace or humanity or any other serious crimes or instigated or participated in such crimes; or where s/he has committed acts contrary to the purposes and principles of the UN or has encouraged or instigated others to commit such acts; or where there are serious reasons to believe that s/he constitutes a danger to the community or the security of the UK; or before arriving in the UK s/he committed an offence which would have been punishable by imprisonment if committed in the UK and s/he left the home country to avoid penalties on account of that crime. Given the absolute nature of article 3, the fact that a person may have fled his/her home country to avoid penalties on account of crimes committed there would not be a sufficient reason to prevent that individual being able to claim that his/her removal would breach article 3, but presumably s/he would then continue to receive leave to remain outside of the rules and the humanitarian protection category.

– **Rule 339E** provides that if the secretary of state grants humanitarian protection to persons without leave to enter, they will be given limited leave to enter and, if they already have leave, then such leave will be varied.

– **Rule 339F** provides for the refusal of humanitarian protection for a person unable to meet the requirements of r339C.

– **Rule 339G** provides for the revocation of humanitarian protection or refusal to renew humanitarian protection (mirroring to a large extent the provisions for revocation or refusal to renew for persons granted asylum under r339A (see above)) where the circumstances have changed such that protection is no longer required, having regard to the change being significant and sufficiently permanent; where the individual should be excluded on account of serious reasons for believing him/her to be culpable of acts contrary to the purposes and principles of the UN or encouraging others in such acts; due to his/her involvement in crimes against peace or humanity, war crimes or any other serious crime; where s/he is considered a danger to the community or the security of the UK; where s/he has used deception which was material to the grant of humanitarian protection; or where s/he has committed a crime abroad before arrival and his/her purpose in fleeing was to avoid penalties on account of that crime.

As observed above, this last exception sits uneasily with the general understanding in relation to human rights convention claims, where the motivation for the person fleeing is generally not taken into account and it is only the question of the risk that s/he faces that should be evaluated, regardless of his/her conduct. One assumes that in such a case, the refusal to grant further humanitarian protection or to revoke it would not mean that removal would not still engage the UK's obligations under the human rights convention.

– **Rule 339H** permits any leave granted to be curtailed where humanitarian protection is neither granted nor renewed.

– **Rule 339I** imposes a requirement on any person claiming asylum or humanitarian protection to provide all material factors to substantiate the claim as soon as possible. Those factors are said to include a statement on the claim, any documentation about age, background, identity, nationality, country and place of previous residence, previous applications and travel routes as well as any travel documents.

For many asylum claimants who have faced expensive and arduous journeys and been told by their agents that they should not reveal their routes to the UK, the specific requirement on them to do so to assist with the assessment of their claims may prove problematic.

– **Rule 339J** provides that the assessment of an asylum claim or eligibility for humanitarian protection will be on an individual basis and will take into account: all relevant facts as they relate to the country from which asylum/protection is claimed including laws and regulations in that country and the way in which they are applied; relevant statements and documents presented by the individual; background factors such as age and gender to assess whether the acts to which the individual might be exposed would amount to persecution or serious harm having regard to the individual characteristics of the applicant; whether the actions of the individual since leaving the country of origin were engaged in solely or mainly to create an asylum claim in order to assess whether there would be any risk to the individual; and whether the individual could have availed him/herself of the protection of another country where an entitlement to citizenship could be asserted.

– **Rule 339K** creates a presumption that where a person is able to show that s/he has already been subject to persecution or serious harm, or direct threats of the same, this should be taken as a serious indication of the existence of a real risk unless there are good reasons to believe that such treatment will not be repeated.

In theory, this rule would be very welcome to most applicants but, as ever, it is the question of whether the account given is believed in the first place which is critical in being able to rely on this rule.

– **Rule 339L** imposes a duty on the applicant to substantiate the claim but where aspects of the claim are not supported by documentary evidence, confirmation will not be needed provided that: the individual has made a genuine effort to substantiate the claim; all material factors available have been submitted and a satisfactory explanation about missing material has been given; the statements are found to be coherent and plausible and are not inconsistent with information generally available and relevant to the case; the claim has been made at the earliest opportunity unless the individual can show good reason for not having done so; and the person's credibility is generally established.

Practitioners will again no doubt have concerns about the fact that, while accepting that corroboration is not generally required in asylum claims, the introduction of a default position, which suggests that confirmation is required except in cases where every effort has been made to provide it, without success, is likely to lead to additional reasons for doubting the veracity of a claim to be raised.

– **Rule 339M** permits a failure, without reasonable explanation, to make a prompt and full disclosure of facts or to otherwise assist in establishing the facts, including failure to attend an interview, to report for fingerprinting, to complete a questionnaire or to report to an immigration officer, to be a basis for concluding that the person has not substantiated his/her claim.

– **Rule 339N** permits the secretary of state to have regard to the provisions of Asylum and Immigration (Treatment of Claimants, etc) Act (AI(TC)A) 2004 s8 in assessing the general credibility of an applicant.

– **Rule 339O** provides that asylum or humanitarian protection will not be granted if the individual can reasonably be expected to stay in a part of the country where there would be no risk of harm or persecution regardless of whether or not there are technical obstacles in returning to the country from which protection is being sought.

– **Rule 339P** permits sur place claims being

made where events have taken place since departure from the country of origin, or where the activities of the individual since departure give rise to such a claim, particularly where the activities are a continuation of a previously held conviction or orientation.

– **Rule 339Q** provides that a person granted asylum is to be issued with a renewable five-year residence permit unless there are compelling reasons of national security or public order, or where the individual is regarded as a danger to the security of the UK or a danger to the community having been convicted of a particularly serious crime.

Similarly, a person granted humanitarian protection will also be entitled to a residence permit for five years, which is renewable, in the absence of such circumstances detailed above for those given asylum. Family members of those granted asylum or humanitarian protection who do not qualify in their own right are also to be given renewable residence permits on the same basis. Curiously, the term 'family members' is not defined either in this part of the rules or within the RPNIP(Q) Regs although there is reference to spouses, civil partners, unmarried partners and children under 18 in other parts of the new rules (see r349 below).

■ Paragraphs 7–10 delete rr340, 341, 343 and 344 respectively.

■ Paragraph 11 inserts further new rules:

– **Rule 344A** provides that a person granted asylum who applies for a travel document will be issued such a document for him/herself and his/her family members enabling travel outside the UK unless there are compelling reasons of national security or public order. The rule also enables those with humanitarian protection to apply for a travel document, but only where the individual can show that s/he has made reasonable efforts to obtain a document from his/her own national authorities, which have been refused, and where there are serious humanitarian reasons for travel. By limiting travel solely for humanitarian reasons, this would appear to be an even tighter restriction on the issuing of travel documents for those with humanitarian protection.

– **Rule 344B** indicates that a person granted asylum or humanitarian protection will not be subject to any conditions restricting employment or occupation.

– **Rule 344C** provides for the successful individual to be given information about his/her rights in a language s/he can reasonably be expected to understand as soon as possible after the claim has been determined.

■ Paragraph 12 replaces the previous rule 349 and provides that the spouse, civil partner, unmarried or same-sex partner, or minor child, accompanying a principal applicant, can be included in the application for asylum and that, if successful, the dependant will be granted leave to enter or remain for the same period of time.

It also provides that such family members may make an application independently but, if they do so, such a claim should be made at the earliest opportunity and a failure to do so without reasonable explanation will impact on credibility.

■ Paragraphs 13–15 insert new rr352AA, 352BA and 352CA respectively, which specify the need for prior entry clearance for those seeking leave to enter as the unmarried or same-sex partner of a refugee and also that the person has been granted asylum on or after 9 October 2006; the relationship must have involved the parties living together for at least two years; the relationship existed before the person granted asylum had left the previous country in order to seek asylum; and the applicant would not be excluded as a danger to the security of the UK or under article 1F of the Geneva Convention.

Limited leave to remain is to be given to those already in the UK provided that all the other conditions are met and that they would not otherwise be excluded. In the event that valid entry clearance is not produced or the other conditions are not met, then leave to enter or remain as appropriate will be refused.

■ Paragraph 16 inserts a new interpretation provision through r352G confirming that, for the purposes of Part 11 of the rules, the 'Geneva Convention' is to be taken as being the 'United Nations Convention and Protocol relating to the Status of Refugees'; 'country of return' is to mean one of the territories listed in Immigration Act (IA) 1971 Sch 2 para 8(c) (ie, country of nationality, embarkation or that issued a passport); and 'country of origin' means the country of nationality or former habitual residence where the individual is stateless.

Foreign national prisoners

Statement of changes in Immigration Rules, HC 1337, took effect on 20 July 2006. It was part of the secretary of state's response to the fierce criticisms over the foreign national prisoners fiasco, when it was suggested that over 1,000 foreign nationals who had committed serious offences had not been considered for deportation before release.

The changes replaced the old r364, and instead introduced a rebuttable presumption indicating that the public interest would generally mean that deportation would be appropriate in such cases and that where removal would not involve a breach of either the Geneva Convention or the human rights convention, it would be only in exceptional cases that deportation would not be justified.

It is important to appreciate that although the rule took effect from 20 July 2006, it is not retrospectively applied. Therefore, the rule only applies to those cases in which decisions to deport were made on or before 19 July. Consequently any appeals where the original decision was made before the coming into force of this rule should continue to be litigated on the basis of the old rules and without this presumption.

Tribunal procedure changes

Asylum and Immigration Tribunal (Procedure) (Amendment) Rules 2006 SI No 2788 came into effect (except for rr10 and 11) on 13 November 2006.

■ Rules 2, 3, 12 and 13 remove the strict definition of prescribed appeal forms and instead contemplate forms of a type approved by the president of the Tribunal.

■ Rule 4 replaces the heading to Asylum and Immigration Tribunal (Procedure) Rules 2005 SI No 230 r9 clarifying that it relates to cases where there is no relevant decision.

■ Rule 5 permits the Tribunal, when making a decision on timeliness, to provide reasons in summary form.

■ Rule 6 specifies that an appeal is to be treated as withdrawn if, before determination, the appellant dies, but enables the personal representatives to continue with the appeal where the Tribunal considers it necessary.

■ Rule 7 requires a person wishing to pursue an appeal on asylum grounds, where s/he has been granted more than 12 months' leave to enter or remain, to file a notice within 28 days of receiving the notice of leave to enter or remain, or on race relations grounds similarly within a 28-day period, and to serve the same on the respondent. If the time limits are not complied with, then the appeal will be treated as abandoned. The notice of appeal in either case is to include the appellant's name and date of birth, the Tribunal's reference number, the Home Office reference number (if applicable), the Foreign and Commonwealth Office reference number (if applicable), the date on which leave was granted and confirmation that the appeal is being brought on asylum or race relations grounds, as relevant. The new rule also requires the Tribunal to acknowledge receipt of the notice of appeal and send a copy to the respondent.

■ Rule 8 extends the time for the fixing of a hearing from 28 days to 35 days after receipt of the notice of appeal or decision on timeliness and extends, from 28 days to 35 days, the time for determining an appeal where there is to be no hearing.

■ Rule 9 envisages that an application for

reconsideration could be made to the Tribunal, even if out of time, where the Tribunal concludes that it could not practicably have been made in time.

■ Rules 10 and 11 are introduced to enable decisions on whether or not to make an order for costs to distinguish between costs for the making of the request for reconsideration, for preparing for the reconsideration and for presenting the reconsideration. As observed above, these provisions did not come into effect on 13 November 2006 and will only come into effect when Immigration, Asylum and Nationality Act 2006 s8 comes into force.

■ Rule 14 confirms that signing an appeal notice or bail form on behalf of a client is tantamount to serving the Tribunal and the other party with notice of acting, but if the form is not signed by the representative then a separate notice of acting must be served unless the individual is appointed to act on the day of the hearing. Furthermore, where a representative ceases to act the rule now requires notification to be given to the Tribunal and the other party of that fact in writing.

■ Rule 15 enables the president of the Tribunal, either of his/her own motion or on application, to review any order, decision or determination and set the same aside where the decision was made as a result of an administrative error on the part of the Tribunal. Any application for such a review must be made within ten days if the party is within the UK (28 days otherwise) with a copy being served on the other party. The power is exercisable either by the president, a deputy president or a senior immigration judge.

■ Rule 16 deletes the Schedule of prescribed forms.

Immigration and Nationality Directorate change of policy on deferrals

In a letter from Lin Homer, the director general at the Immigration and Nationality Directorate, to the Immigration Law Practitioners' Association, dated 6 November 2006, a change of policy was announced with effect from that date. Previously, a policy had operated, albeit loosely, whereby removal would be deferred for a few working days to enable an application for judicial review to be lodged even though the failure to follow the protocol on a number of occasions caused some considerable consternation among members of the judiciary. The change of policy announced is that, henceforth, removals will not be deferred unless proceedings are actually issued, although curiously the letter then proceeds to indicate that third country removal challenges (where another EU territory has accepted responsibility for the resolution of a claim for asylum) and those where the claims are certified as being clearly unfounded are to be excluded from this policy change. The policy change was said to be a consequence of practitioners threatening judicial review proceedings, which led to the interruption of removals, where proceedings were not then pursued. Oddly, the letter gave no details of how regular an occurrence this has been, nor did it name organisations or individuals said to have engaged in such practice, although one imagines it would certainly be of interest to the regulatory or complaints body of any organisation within this field.

Many practitioners will no doubt be left surprised that there has been a need for the policy change announcement, since it has for some time been common practice on the part of the immigration authorities not only not to agree to defer unless proceedings are issued but, in some cases, to also insist on the obtaining of an injunction even where proceedings have been lodged.

CASE-LAW

Women and membership of a particular social group

■ K v Secretary of State for the Home Department; Fornah v Secretary of State for the Home Department

[2006] UKHL 46,
18 October 2006,
[2006] 3 WLR 733

Both appellants in these cases (K and F) appealed against adverse decisions by the Court of Appeal on the critical question of whether their accepted well-founded fear of persecution was 'for reasons of … membership of a particular social group'.

In *K*, the appellant was an Iranian who was married to B, with whom she had a child. While in Iran her husband was arrested and detained by the authorities for reasons not known. K visited him briefly while he was detained and he appeared to show her signs of ill treatment. A few weeks after B's disappearance, the Revolutionary Guards searched K's house and insulted and raped her. Subsequently, the Revolutionary Guards attended her son's school to make enquiries about him and, as the adjudicator found, for the purposes of making her fearful. K was frightened about what would happen to her and fled to the UK with her son and claimed asylum. The Home Office rejected her application for protection under both the 1951 Convention relating to the Status of Refugees ('the refugee convention') and the human rights convention. She appealed to the then immigration adjudicator.

The adjudicator allowed the appeal under both article 3 of the human rights convention and the refugee convention. As to the latter, he concluded that she had a well-founded fear of persecution for reasons of her membership of a particular social group (PSG), namely her husband's family. The Home Office successfully appealed the refugee convention aspect of his decision before the then Immigration Appeal Tribunal (IAT). The IAT concluded that although the family was a quintessential social group, because the 'primary' member of the family (her husband) was not persecuted for a refugee convention reason the secondary members could not subsequently be said to be persecuted for being members of the primary person's family. For this reasoning the IAT had relied on the decision of the Court of Appeal in *Quijano v Secretary of State for the Home Department* [1997] IAR 227. On appeal, the Court of Appeal followed the decision in *Quijano* and on the basis of that reasoning dismissed the appeal.

In the second case, F was a national of Sierra Leone. The basis for her claim was that if returned to Sierra Leone she would be at risk of subjection to female genital mutilation (FGM). The Home Office had granted her limited leave to remain but rejected her asylum claim because, among other matters, it did not consider that girls who were at risk of being subjected to FGM formed a PSG within the terms of the refugee convention. F appealed to a then adjudicator.

The adjudicator allowed the appeal and found that her fear was for a refugee convention reason, because of her membership of a PSG, that of young, single Sierra Leonean women, who are clearly at considerable risk of enforced FGM. The secretary of state appealed and the Tribunal overturned the adjudicator's decision. It was not satisfied that the PSG identified by the adjudicator could properly be regarded as a PSG within the meaning of the refugee convention. F appealed to the Court of Appeal which upheld the Tribunal's decision.

The House of Lords allowed the appeals in both cases (see case note on page 32 of this issue).

Comment: The House of Lords' decisions in these cases are to be welcomed as providing practical and constructive guidance on an issue of continuing controversy. Particularly helpful are the powerful observations of Baroness Hale in relation to the need not to underestimate the importance of gender-based persecution under the refugee convention and the rejection of the restrictive approach to the application of the PSG question in the context of family situations as previously decided by the Court of Appeal in *Quijano*.

Asylum and Immigration Tribunal

Deportation appeals; EU nationals; EU regulations

■ MG and VC (EEA Regs 2006 – 'Conducive' deportation)

[2006] UKAIT 00053,
3 July 2006 (reported)

In this case, the Asylum and Immigration Tribunal (AIT) provided detailed guidance on the approach to appeals concerning the deportation of EU nationals under IA 1971 s3(5)(a) (deportation conducive to the public good) in the context of the new Immigration (European Economic Area) Regulations (I(EEA) Regs) 2006 SI No 1003 and EU Directive 2004/38/EC.

In the first case, MG had been convicted of robbery and had been sentenced to four and a half years' imprisonment. On the basis of this conviction, the secretary of state had made a decision under s3(5)(a) and MG appealed. The immigration judge noted that the appellant had behaved well in prison and had appreciated that the cause of his offending had been his alcohol abuse. He further concluded that the appellant was motivated to lead an industrious and crime-free life on his return from prison and was particularly motivated to avoid the alcohol abuse that had led to his offending. The immigration judge therefore allowed the appeal, applying the material regulations at the time of his hearing of the appeal: the I(EEA) Regs 2000 SI No 2326.

In the second case, the appellant, VC, had come to the UK to live with her mother in 1993, when she was nine years old. She had been resident in the UK ever since. In April 2002 she was convicted of an offence of importation of Class A drugs and received a sentence of eight and a half years' imprisonment. The secretary of state made a decision to deport on conducive grounds and in particular stated: 'Although there is no clear evidence that you will re-offend, the offence for which you have been convicted is considered to constitute a threat to the requirements of public policy on the basis of conduct alone.'

VC appealed and the immigration judge concluded that after having considered all the evidence she was satisfied that the appellant would not commit any further offences and allowed the appeal. In both cases the secretary of state applied for reconsideration of the immigration judges' decisions.

The Tribunal considered the relationship between a deportation decision under the IA 1971 and applicable EU law. It noted that the new regulations derived from EU Directive 2004/38/EC, whose purpose was to promote the notion of citizenship of the EU as set out in Part 2 of the consolidated version of the EC Treaty, with the consequence that for many purposes a citizen of an EU country is to be regarded as in his/her own country when s/he is exercising an EC Treaty right within another EU country.

The Tribunal next noted the key provisions of the I(EEA) Regs 2006 for the purpose of the appeals before it: reg 15 (permanent right of residence), reg 21 (the criteria for decisions taken on public policy, public security and public health grounds) and the transitional provisions set out in Schedule 4.

The first important effect of the I(EEA) Regs 2006 as noted by the Tribunal was that these new regulations came into force immediately on 30 April 2006 and the previous law was no longer in effect as of that date. The Tribunal observed that the remarkable effect of this was that existing decisions and appeals are to be treated as decisions and appeals under the new regulations. As such, a decision which was lawful when made under the old regulations, followed by a Tribunal determination that was not in error of law when it was made, may 'now' disclose an error of law as a result of the 'retrospective change of the decision and its authority'.

The Tribunal next observed that the inter-relationship between the provisions of the immigration Acts and the I(EEA) Regs was not entirely straightforward. Although a detailed exploration was not necessary for the purposes of the appeals before it, it was accepted that where the immigration Acts empower the secretary of state to make a decision against a person who is not a national of the UK, such decisions can (unless the contrary appears) be made against a person who is an EEA national or who is, or would be, a qualified person under the I(EEA) Regs. In this situation the decision generally will not be a finding under the I(EEA) Regs but rather a decision under the relevant immigration Act. However, a person who appeals under an immigration Act (for example, the Nationality, Immigration and Asylum Act (NIAA) 2002) against an immigration decision may invoke the Directive as implemented by the I(EEA) Regs indirectly under NIAA s84(1)(d), which permits the appellant to appeal on the ground 'that the appellant is an EEA national or a member of the family of an EEA national and the decision breaches the appellant's rights under the community treaties in respect of entry to or residence in the United Kingdom'.

The Tribunal next considered that given that the decisions in these appeals were made under the IA 1971 rather than the I(EEA) Regs, it may be asked whether these decisions were in truth 'EEA decision[s]' defined in I(EEA) Regs 2006 reg 2 as 'a decision under these regulations'. The Tribunal was confident that they were indeed EEA decisions for a number of reasons.

- First, the Directive and the I(EEA) Regs give substantive rights to EEA nationals and this includes the right not to be removed except in circumstances permitted by the Directive and the regulations.
- Second, I(EEA) Regs 2006 reg 24 (person subject to removal) applies to all decisions to remove that are made 'in accordance with regulation 19(3)' (exclusion and removal from the UK).
- Third, any decision to remove an EEA national with a right of residence that was not in accordance with reg 19(3) would be unlawful.
- Fourth, given that reg 24 applies, the decision is one under (not merely in accordance with) the regulations even if it is worded as if the IA 1971, with no intrusion of EU law, were the empowering provision.
- Finally, the Tribunal noted that, in any event, the Directive would have direct effect on these cases and the terms of articles 27 and 28 (which are for all practical purposes the same as those of I(EEA) Regs 2006 regs 19 and 21) would apply and achieve the same result as if the decisions were an 'EEA decision' governed by the regulations.

The Tribunal then went on to state that the appeals before it would need to be considered within the 'calculus of removals' under the I(EEA) Regs 2006. Under the new regulations an EEA national who has a permanent right of residence in the UK can be removed only on 'serious grounds of public policy or public security'. If the EEA national is under 18 or has resided in the UK for more than ten years s/he can be removed only on 'imperative grounds of public security'. The Tribunal noted that the ground for removing an EEA national with a right of residence is more strongly expressed than it was under the previous regulations as a result of the addition of the word 'serious' before 'grounds'. As to the applicability of the 'imperative grounds of public security', in any given case the Tribunal was informed by the Home Office that this phrase was a reference to terrorist-based offences. The Tribunal indicated that it was a phrase inappropriate to cover the ordinary risk to society arising from the commission of further offences by a convicted criminal.

As a result of the changes in the wording of the new regulations, the Tribunal concluded that where reg 21(3) applies to an individual (for example, because s/he is an EEA national with a right of residence, but not a minor or a long-term resident) s/he may be removed as previously on the ground that there is a risk of him/her committing further

offences, but with the provision that the risk of harm must now constitute 'serious grounds of public policy' for his/her removal. Where reg 21(4) applies (where the individual is a minor or a long-term resident) the ground must now be both qualitatively and quantitatively more serious.

In the light of the above analysis the Tribunal concluded that there was no material error of law in the determinations of the immigration judges in the cases before them.

Comment: The Tribunal's decision in these cases provides important and useful guidance on the approach that needs to be taken by the Home Office in relation to deportation decisions, and by the Tribunal in relation to deportation appeals, which concern the potential removal of EEA nationals (and/or their dependants). Two particular points can be noted. First, the retrospective effect of the I(EEA) Regs 2006 means that decisions previously considered to be lawful may now be unlawful because of the significant change in the wording of the regulations. This may lead to the possibility of fresh claims on EEA or article 8 of the human rights convention grounds. Second, and perhaps paradoxically, it is questionable whether the change in the regulations leads to the different approach to the consideration of deportation of EEA nationals in terms of EU law: although the I(EEA) Regs 2006 differ from the previous ones in imposing a more clearly defined and stringent test on the state in deporting EEA nationals, such an approach does not differ radically from the well-established EU case-law which has always applied to such cases (despite the wording of the previous UK interpretation under the previous regulations), for example, *Nazli v Staadt Nurnburg* [2000] ECR I-957 and *Ministre de L v Olazabal* [2002] ECR I-10981. In any event it is hoped that the greater clarity given by the new regulations will not lead to the somewhat inconsistent decisions by the UK courts with the prevailing EU jurisprudence (for example, *R (Schmelz) v Immigration Appeal Tribunal* [2004] EWCA Civ 29, 15 January 2004).

Delay in decision-making; article 8; exceptional circumstances

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

[2006] EWHC 1489 (Admin), 16 May 2006

This is a useful judgment on the impact of Home Office delay in relation to decision-making rendering any removal disproportionate. The claimant challenged the decision of the secretary of state to refuse to accede to an application made by her to be allowed to remain in the UK on the basis of her marriage to a UK national.

The claimant was a Jamaican national. She came to the UK in February 1999 on a six-month visitor visa. In April, she met her husband to be and in June she applied for and was offered a place at college. She applied for a student visa which was granted for one year. It was extended in October 2000 for a further year. In the meantime, her daughter joined her in July 2000 and her two sons followed in December 2000. At this time she was still married but that marriage had effectively broken down.

As a result of her childcare responsibilities she did not continue with her studies and, instead, made a claim for asylum. She subsequently appreciated that this was a false claim. This claim was refused by the Home Office and an appeal was lodged. In the meantime she had begun a serious relationship with her husband to be (Mr Ajoh). She obtained a divorce in relation to her existing marriage to her husband in Jamaica. She married her new husband in the UK on 11 April 2003. Following the marriage she applied to remain as a spouse of Mr Ajoh and withdrew the asylum appeal.

On 14 May 2003, the Home Office wrote a standard letter in relation to her application indicating, inter alia, that it expected a caseworker in the Initial Consideration Unit to screen the application in the next five weeks. However, the Home Office did nothing until it reached a decision on 22 March 2005, some 22 months later. In the meantime, the family life reflected by the marriage was strengthened by her husband's stepchildren commencing schooling in the UK and the birth of three children in the UK.

Collins J noted that, in the light of the prevailing case-law, generally speaking in cases of this nature the interests of immigration control would trump any interference with family life under article 8 of the human rights convention. However, on the facts of this case there was excessive delay by the Home Office in making any decision and there would be a real detriment to the continuation of family life established as a result of that delay by removal. The judge rejected as without merit an argument that the delay had not led to any change in the situation of the claimant. It was obvious that the delay had led to the claimant and her family having established firmer roots in the UK.

The judge applied the guidance given by the Court of Appeal in *Secretary of State for the Home Department v Akaeke* [2005] EWCA Civ 947, 27 July 2005 and concluded that, in the particular circumstances of this case, the delay was inordinate and inexcusable and did lead to prejudice to the claimant. The decision to remove would therefore have to be set aside.

Comment: Readers may feel that the delay which occurred in this case is not uncommon in relation to many pending applications and appeals. It will be interesting to see to what extent this decision will influence other cases before the Tribunal and the higher courts or whether it will be simply confined to its own facts.

Fast-track procedures; medical examinations

■ R (D and K) v Secretary of State for the Home Department and others

[2006] EWHC 980 (Admin), 22 May 2006

D and K were asylum-seekers who claimed to have been tortured in their respective countries of origin. They arrived separately in the UK, were interviewed and then sent to Oakington Detention Centre with a view to their respective claims being dealt with under the fast-track procedure.

D was transferred to Oakington on 12 May 2005 and released on 18 May 2005, having been granted temporary admission. K was transferred to Oakington on 5 May 2005 and released on 11 May 2005, having also been granted temporary admission. At the time of the judicial review hearing, their claims for asylum had not been the subject of an initial decision by the Home Office. By way of application for judicial review, the claimants made a number of challenges. They both claimed that their transfer to Oakington was unlawful or, in the alternative, that their continued detention while at Oakington was unlawful. They also claimed that the defendants (the secretary of state (first defendant), GSL UK Limited (previously known as Group 4 Total Security, second defendant) and PCFM (a company specialising in the provision of medical services, third defendant)) had variously acted in breach of the Detention Centre Rules (DC Rules) 2001, and contrary to the government's promulgated policy and to published standards relating to the handling of asylum cases. In particular, the claimants contended that the defendants had failed to comply with DC Rules r34 as no medical examination had been carried out within 24 hours of their arrival at the detention centre and that the policy of the third defendant, which stated that medical personnel should not, when filling out an allegation of torture form, express any opinion about the possible causes of injuries on a detainee or whether the injuries were consistent with an allegation of torture, was contrary to the purpose of DC Rules r35(3). Damages were also sought for

asserted breaches of the rights of D and K under articles 3, 5 and 8 of the human rights convention.

Davis J held that, first, in both cases the DC Rules were breached because the claimants were not provided with a medical examination within 24 hours of being brought to the detention centre. Second, the policy in relation to the allegation of torture forms breached the requirements of the rules as a medical practitioner should not be prevented from indicating that injuries on a detainee's body are consistent with an allegation of torture. Third, the decisions to transfer the claimants to a detention centre and allocate their cases to the fast track was not unlawful and the making of torture allegations did not automatically mean a claim was not able to go into the fast-track procedure. Fourth, the claimants had been wrongfully detained for a period that was longer than necessary and there had therefore been a breach of article 5 of the human rights convention.

CASES IN BRIEF

Abuse of power; refusal to grant status in accordance with Immigration Appellate Authority's decision

■ **(S and others) v Secretary of State for the Home Department**
[2006] EWCA Civ 1157, 4 August 2006

■ **R (S and others) v Secretary of State for the Home Department**
[2006] EWHC 1111 (Admin), 10 May 2006

The claimants arrived in the UK having hijacked a plane while it was on a flight in Afghanistan in order to flee from the Taliban regime. They claimed asylum. They were convicted of hijacking in the criminal courts. These convictions were quashed by the Court of Appeal. Subsequently, the Home Office refused their applications for leave to enter the UK. The claimants appealed to the Immigration Appellate Authority (IAA). The IAT (sitting as a panel of three immigration adjudicators) dismissed their asylum claims but held that returning them to Afghanistan would lead to a breach of their human rights under article 3 of the human rights convention. The Home Office sought permission to appeal against this decision but that was refused by the IAT.

Subsequent to this decision, the Home Office published the Humanitarian Protection and Discretionary Leave Policies and on the basis of those policies refused to grant any leave on the ground that it was inappropriate to do so. Instead, the claimants were kept on temporary admission until a decision was made on whether to grant or refuse them leave to enter the UK.

The claimants argued, inter alia, that the refusal to grant them discretionary leave to enter the UK was unlawful because it was contrary to the decision of the IAA and unfair, and amounted to an abuse of power.

In a powerful and detailed judgment Sullivan J granted the application for judicial review and gave strong criticisms of the Home Office's attempt to defend the current proceedings. In particular the judge held that the decision to refuse to grant the claimants some form of discretionary leave was not only contrary to the decision of the IAA but also amounted to a clear abuse of power by a public authority. The Home Office's attempts to justify its position were particularly weak and an order for costs on an indemnity basis would be made as there had been a complete failure on the part of the secretary of state to comply with the Civil Procedure Rules and make full and frank disclosure under judicial review proceedings. The Court of Appeal dismissed the Home Office's limited appeal to this decision.

Marriage regulations; discrimination; human rights convention

■ **R (Baiai and others) v Secretary of State for the Home Department and Joint Council for the Welfare of Immigrants (intervener)**
(No 1) [2006] EWHC 823 (Admin), 10 April 2006;
(No 2) [2006] EWHC 1035 (Admin), 10 May 2006;
(No 3) [2006] EWHC 1454 (Admin), 16 June 2006

These cases all concerned the legality of the marriage regulations introduced by AI(TC)A s19 and the Immigration (Procedure for Marriage) Regulations 2005 SI No 15. As the first and third judgments are to be considered by the Court of Appeal shortly a detailed examination is not set out here. However, the conclusions in the judgments can be summarised as follows:

■ In the first judgment, Silber J ruled that the practice and policy introduced by the secretary of state limiting the rights of persons subject to immigration control to enter into a civil marriage breached the claimants' rights under articles 12 and 14 of the human rights convention.

■ In the second judgment, Silber J concluded that the orders made in the first judgment constituted 'just satisfaction' for each of the claimants and none were therefore entitled to any damages.

■ In the third judgment, Silber J held that the secretary of state had not unlawfully refused the application of an illegal immigrant for a certificate of approval to marry an EEA national and had not breached his rights under the human rights convention and, in particular, articles 12 and 14.

Seven-year policy for children and their parents (DP 5/96 (DP 069/99))

■ **R (Suleiman) v Secretary of State for the Home Department**
[2006] EWHC 2431 (Admin), 21 July 2006

The claimant in this case was a failed asylum-seeker with young children who had resided in the UK continuously for over seven years. She made an application to the Home Office to allow her family to be granted the benefit of policy DP 5/96 (also known as DP 069/99) in the light of, among other matters, the length of the family's residence in the UK, the adverse impact on the children's welfare of removal (her youngest child had serious problems with his educational development while in the UK) and on the basis that her and her family's immigration history was not particularly poor. After permission had been granted and previous decisions refusing the benefit of the policy had been abandoned, the Home Office decided to maintain the decision to refuse the claimant and her family the benefit of the policy on the basis that, in its view, her immigration history was particularly poor, that history impacted on the whole family (including the children) and, as the case concerned matters of policy, the Home Office was entitled to a greater degree of deference, particularly because of its special knowledge and understanding of the matters raised.

Charles J concluded that the decision to refuse the claimant and her family the benefit of the policy was unlawful. This was particularly because, despite the deference that could be given to the Home Office in such matters, any decision made still required a careful judgmental and balancing exercise of all the relevant matters in issue. Bearing in mind the more demanding approach to scrutiny of decisions such as those under consideration in this case (following the guidance given in cases such as *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, 23 May 2001; [2001] 2 AC 532) the decision was flawed. A further decision would have to be made by the Home Office in the light of the guidance given in the judgment. This matter was listed for a further judicial review hearing in November 2006 if the further decision of the Home Office was negative.

Comment: This judgment is useful in reflecting how the significant change in approach to public law challenges raising

fundamental rights can lead to a more interventionist approach by the court: the learned judge noted that if the test was the traditional *Wednesbury* unreasonable head of challenge, the decision would have been likely to survive scrutiny.

Domestic violence; HC 395, para 289

■ JL (Domestic Violence: evidence and procedure)

[2006] UKAIT 00058,
12 July 2006

In this case, the Tribunal considered two important aspects of the application of the requirements of the domestic violence rule for separated spouses (HC 395, para 289): first, when an application can be considered to be validly made and, second, what evidence is required for the Tribunal to be satisfied that a spouse has suffered domestic violence such that the relationship has broken down as a result of that violence.

As to the latter question, the central point in issue was whether the appellant's failure to provide evidence required by the Home Office to establish that the relationship had broken down as a result of domestic violence meant that her appeal could not be allowed (under the rules). The Home Office argued that unless evidence was provided that had been set out in the Immigration Directorate's Instructions (IDIs), the Tribunal could not allow the appeal. The immigration judge did not accept this contention. He allowed the appeal under both the rules and article 8 of the human rights convention as a result of his acceptance of evidence other than that set out in the IDIs as showing that the relationship had indeed broken down as a result of domestic violence.

The Home Office appealed and an order for reconsideration was made. The Tribunal dismissed the appeal giving four powerful reasons:

■ First, as the Tribunal was an independent judicial body it was contrary to its purpose to allow one party (here the Home Office) to dictate which evidence could be considered for the purpose of reaching a decision on a material issue. To do so would render an appellant's right to access to an independent, fact-finding appellate body ineffective.

■ Second, the requirements of the Immigration Rules were directed to those who made immigration decisions and not to a subsequent appellate body which would consider all the evidence available to it after the decision had been made.

■ Third, although para 289A(iv) of the Immigration Rules was valid in relation to the impact of complying with the requirements of completion of the relevant forms and procedural regulations, it did not follow that its requirements also determined either the consideration of the merits of the application or appeal.

■ Fourth, the Tribunal stated that it was important to appreciate the scope of jurisdiction on an appeal by looking at NIAA s85(4). That section allowed the Tribunal to consider any evidence about any matter which it thinks is relevant to the substance of the decision.

The decision of the immigration judge was affirmed and a direction made that the appellant be granted indefinite leave to remain.

Comment: This aspect of the Tribunal's decision is welcome and a sensible rejection of the previously restrictive approach to the same issue found in *RH (Para 289A/HC 395 – No Discretion)* [2006] UKAIT 00043, 18 April 2006.

Zimbabwe: return of failed asylum-seekers

■ AA (Risk for involuntary returnees)

[2006] UKAIT 00061,
2 August 2006

This Tribunal decision is the latest round in the ongoing debate about the implications on return to Zimbabwe for failed asylum-seekers. This decision was the result of the Court of Appeal's decision to remit the matter back to the AIT after it had previously allowed the appeal of AA.

The Tribunal dismissed the appellant's appeals on the basis that, on its interpretation of the latest evidence on the material questions raised, the appellant would not face a risk of a well-founded fear for a refugee convention reason(s) and/or a breach of his rights under the human rights convention. It is understood that an appeal has been lodged for the matter to be considered further by the Court of Appeal.

Fresh claims for asylum; human rights convention protection

■ WM (DRC) v Secretary of State for the Home Department; Secretary of State for the Home Department v AR (Afghanistan)

[2006] EWCA Civ 1495,
9 November 2006

Readers will be familiar with the judgment of Collins J in the Administrative Court in *R (Rahimi) v Secretary of State for the Home Department* [2005] EWHC 2838 (Admin), 21 November 2005. The secretary of state was given permission to appeal by the Court of Appeal. That court heard the appeal along with another case *WM* (an appeal from a decision of David Lloyd Jones QC refusing permission to apply for judicial review).

The Court of Appeal analysed the proper approach to the consideration of a fresh claim under para 353. It allowed the appeal and application for judicial review in *WM* and dismissed the secretary of state's appeal in *AR*. A more detailed examination of the judgment will appear in a future 'Recent developments in immigration law' article.

Jawaid Luqmani is a partner at Luqmani, Thompson & Partners, London. Ranjiv Khubber is a barrister at 6 King's Bench Walk, London, specialising in immigration, human rights and asylum support.

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

Dispersing failed asylum-seekers

On 23 October 2006, the Home Office instituted a new dispersal policy for those failed asylum-seekers granted 'hard cases' support in the London area under Immigration and Asylum Act 1999 s4.[1] Since that date, new London applicants have been provided with support in the area of their former National Asylum Support Service (NASS) accommodation, and those who did not have NASS accommodation previously have been sent to the West Midlands region. Around 1,350 people already receiving s4 support in London in October 2006 are being subjected to a phased dispersal programme. Only those with 'exceptional circumstances' will be supported in London.

Law reform

The Law Commission has issued *Remedies against public bodies. A scoping report* (October 2006), outlining a proposed substantive law reform exercise on the subject and setting out a summary of the current law.[2] The paper invites readers to indicate whether they would wish to receive a detailed consultation paper on the topic (to be issued in 2007). Meanwhile, the commission's autumn 2006 newsletter gives an update of progress on its other housing-related law reform projects.[3]

Anti-social behaviour and housing

■ On 8 November 2006, the Police and Justice Act 2006 received royal assent. Part 3 contains new housing provisions enabling public and social landlords:
– to enter into parenting contracts with tenants;
– to seek parenting orders from the courts; and
– to obtain anti-social behaviour injunctions in a wider range of circumstances (under a replacement for Housing Act (HA) 1996 s153A).

■ The pilot scheme enabling a number of county courts to grant anti-social behaviour orders (ASBOs) against minors ended on 30 September 2006. The scheme is now being evaluated (see the Anti-social Behaviour Act 2003 (Commencement No 4) Order 2004 SI No 2168 and the Anti-social Behaviour Act 2003 (Commencement No 4) (Amendment) Order 2006 SI No 835).

In its place, a new pilot scheme for 'anti-social behaviour co-ordinators' is being rolled out in 11 county courts (Birmingham, Bradford, Bristol, Bow, Central London, Hull, Lambeth, Leeds, Liverpool, Manchester and Nottingham): see Department for Constitutional Affairs news release, 2 October 2006.

■ The Department for Communities and Local Government (DCLG) has published a summary of the most recent research on the effectiveness of Intensive Family Support Projects in dealing with anti-social behaviour, *Anti-social behaviour Intensive Family Support Projects* (Housing research summary 230, October 2006).[4] It concludes that the success of such projects had led to a reduction in the risk of homelessness for the families using them.

Choice-based lettings

Research published by the DCLG has taken an in-depth look at the operation of local authority choice-based lettings schemes.[5] It considers 11 English schemes and two operating in Scotland. A summary of the research is available in *Monitoring the longer term impact of choice based lettings* (Housing research summary 231, October 2006).

Gypsies and Travellers

The DCLG has published *The Social Landlords Order 2006 (permissible additional purposes – England) relating to the provision of Gypsy and Traveller sites* (October 2006).[6] This contains a regulatory impact assessment and a race equality impact assessment in relation to new arrangements for funding housing associations to run or manage Gypsy and Traveller sites in England.

Uniform treatment of housing benefit claims made by residents on all Gypsy and Traveller sites has been recommended in *A single housing benefit control for Gypsy and Traveller sites* (Department for Work and Pensions, Research report No 379, October 2006).[7]

Housing tenure in England

Housing in England 2004/05. A report principally from the 2004/05 survey of English housing (DCLG, October 2006) reports the latest data on housing tenure, housing conditions, overcrowding and household occupancy in England.[8] The predominance of 'owner-occupation' has been given a further boost by the government's launch of a new HomeBuy mortgage scheme to assist low-income purchasers: see DCLG news release 2006/0112, 2 October 2006.

Disability discrimination by landlords

Ahead of the substantial changes to be made on 4 December 2006 to the duties owed by landlords to disabled tenants and their families, the Disability Rights Commission has issued *Housing and the disability equality duty. A guide to the disability equality duty and Disability Discrimination Act 2005 for the social housing sector* (November 2006). The report contains a helpful overview of the new duties and the other new statutory provisions.[9]

Housing cases and the Ombudsmen

The *Digest of cases 2005/2006* published by the Local Government Ombudsmen (September 2006) summarises recent investigations covering housing allocations, homelessness, neighbour nuisance and transfer of tenancy cases.[10]

Housing ex-prisoners

The London Resettlement Board is consulting (until 5 January 2007) on its resettlement strategy – *Reducing re-offending in London. Phase two of the London Resettlement Strategy* (September 2006) – which is designed to cut the number of homeless discharged prisoners in London.[11]

ASSURED TENANCIES

Breach of 'suspended possession orders'

■ **Knowsley Housing Trust v White**
Liverpool County Court, 14 September 2006

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.

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'. The trust 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.

Dismissing Mrs White's application for a declaration, HHJ Mackay held that 'the defendant was, unfortunately, not a tenant at the time that she put in her application for "right to buy"'. He rejected her argument that the tenancy did not determine until the possession order was executed. In view of HA 1988 s9, assured tenancies may come to an end before possession is given up. Furthermore, even though s5 is silent about when assured tenancies end, if parliament had intended the tenancy to subsist until the execution of the possession order it would have said so. HHJ Mackay granted permission to appeal to the Court of Appeal. An expedited hearing has been sought in which the DCLG has applied to intervene.

Demoted tenancies

■ Manchester City Council v Pinnock

Manchester County Court, 20 January 2005[12]

The defendant became a secure tenant in 1978. As a result of anti-social behaviour, the claimant sought an ASBO against three of the defendant's children and an injunction against his partner. In 2004, Manchester served a notice seeking a demotion order under HA 1985 s83(1). The notice set out allegations of anti-social behaviour concerning the actions of members of the defendant's family. A claim was issued on the same day. The defendant asserted that the notice was defective because the claimant had not given the required 28 days' notice. At a preliminary hearing, the claimant conceded that the notice was defective but made an application to dispense with the requirement of notice under s83(1)(b). The claimant asserted that the move towards a demotion order was motivated by a wish to preclude the defendant's application to exercise the right to buy from proceeding. Only such action could enable the claimant and the Greater Manchester Police to protect neighbours from further anti-social behaviour.

District Judge Gosnell rejected the argument that it would be just and equitable to dispense with the notice. If the local authority was seeking to use proceedings to preclude a tenant's statutory right to buy, it was only fair that the procedure was followed correctly. The local authority could use powers under HA 1996 s153A to tackle anti-social behaviour around a property – it was immaterial whether the property was owned or not. Furthermore, the last incident of alleged anti-social behaviour relied on occurred in October 2003. On consideration of all the circumstances (see *Kelsey Housing Association v King* [1996] 28 HLR 270) the application was dismissed and the proceedings struck out.

Setting aside warrants

■ Mersa v Waltham Forest LBC

Bow County Court, 6 October 2006[13]

Ms Mersa was housed under the council's duties under HA 1996 Part VII in property temporarily leased from a private landlord. The agreement was expressly stated to be a non-secure tenancy. Subsequently, the council served a notice to quit and brought possession proceedings on the basis that the tenant was a trespasser. A possession order and a money judgment for arrears and a fixed sum for use and occupation after the date for possession were granted. The council then sought to execute the warrant. Ms Mersa applied for the warrant to be set aside, before execution, on the ground of oppression. She claimed that there had either been an agreement not to enforce the possession order while payments of the current rent and £60 per week off the arrears were made, or because a new tenancy had arisen by reason of an increase in the weekly charge. A district judge refused to hear the application on the basis that, as this was a non-secure tenancy, she had no jurisdiction. She distinguished the case of *Jephson Homes Housing Association v Moisejevs* (2001) 33 HLR 54, CA, on the ground that it only applied to post-execution cases.

Recorder White allowed Ms Mersa's appeal against the district judge's refusal to hear the application. Following *Jephson Homes* and the cases cited therein, the county court, although a creature of statute when dealing with non-secure tenancies, had jurisdiction to set aside a warrant pre-execution in cases of oppression. This included intervention to control potential abuse of the court process such as applying for a warrant of execution where there may have been a binding agreement not to enforce or where a new tenancy of the same property had arisen.

Setting aside judgments

■ Nelson v Clearsprings (Management) Ltd

[2006] EWCA Civ 1252, 22 September 2006, (2006) Times 5 October

The defendant was the tenant of a residential property and accrued arrears of rent. The landlord filed a Civil Procedure Rule (CPR) Part 55 claim form for possession, arrears of rent and mesne profits. The claim form was issued and posted to 28 Brook Road. The defendant did not respond and a possession order was made. Its case was that it was unaware of the proceedings until it learned of the judgment. Its address was 26 not 28 Brook Road. The landlord knew that. The address on the claim form was a mistake. The defendant applied to set aside the order. A district judge held that judgment should be set aside in accordance with CPR 39.3(5) only if the defendant had a reasonable prospect of success at trial. A circuit judge allowed its appeal.

The Court of Appeal dismissed the landlord's appeal. Where a claimant obtained judgment against a defendant who had not been served with the claim form in accordance with the CPRs and had no knowledge of the proceedings, the defendant would normally be entitled, as of right, to an order setting aside the judgment and for the costs of the application. The draftsmen of the CPRs could not have intended to introduce the stringent requirements of CPR 39.3(5) into applications to set aside judgments irregularly obtained, in the sense of being obtained without service of the claim form in line with the rules. *Akram v Adam* [2004] EWCA Civ 1601, 30 November 2004; [2005] 1 WLR 1762 was distinguishable because in that case there was service within the rules whereas in this case there was not. The court hoped that the Rules Committee would provide expressly for cases where judgment had been entered even though the defendant had never been served with the claim form. Until then:

i) If the defendant can show [that] he has not been served (or is not deemed to have been served) with the claim form at all, then he would normally be entitled to an order setting the judgment aside and to his costs in making the application.

ii) If, when the claimant is served with an application to set aside such a judgment, he believes that he can show that the defendant

has no real prospect of successfully defending the claim, then he may apply to the court for orders dispending with service of the claim form, permission (under CPR 24.4(1)) to apply forthwith for summary judgment, and for summary judgment on his claim.

iii) If such an application and cross-application are made, the court should make such order as it considers just.

iv) If the claimant can show that the defendant has been guilty of inexcusable delay since learning that the judgment has been entered against him, the court would be entitled to make no order on the defendant's application for that reason. The judgment would then stand (subject to any direction made by the court, whether in relation to statutory interest accruing due on the judgment or otherwise).

■ Radley v Bruno

IHC 213/06,
10 October 2006[14]

Mrs Radley was an elderly woman. After the death of Mrs Radley's husband, her nephew, Mr Bruno, and his wife lived with her. In December 2003, Mrs Radley executed a lease to herself and Mr and Mrs Bruno for a term of 99 years, initially at a peppercorn rent. Before granting the lease, Mrs Radley sought legal advice. Her solicitor also insisted that she obtain a certificate from a general medical practitioner stating that she had the requisite capacity to enter into the transaction. Later, Mrs Radley sought to have the lease set aside on the grounds of lack of capacity, non est factum, presumed undue influence and unconscionable bargain. Particulars of claim were served on both defendants, but they did not acknowledge service or file a defence within the requisite time period. Accordingly, Mrs Radley sought default judgment on the claim. Despite proper service, Mr and Mrs Bruno neither responded nor attended the subsequent hearing. However, the defendants' newly instructed solicitors sent a fax to the court on the day of the hearing requesting an adjournment on the basis that they had only just been instructed due to public funding difficulties. That request was rejected, and default judgment was entered on 31 January 2006. The defendants sought to have that judgment set aside under CPR 13.3 on the ground that they had a reasonable prospect of defending the claim successfully. They claimed that the evidence relied on by Mrs Radley was far from conclusive, and that their failure to deal with the claim earlier had been the result of public funding difficulties.

Lawrence Collins J granted the application. Although, prima facie, Mrs Radley had a very strong case, on the documents before the court, the defendants had shown that they had a real prospect of defending the claim successfully. In relation to the lack of promptness, while it was true that there had been a delay of some seven weeks before the defendants had issued their application, and that once issued they had failed to prosecute their application expeditiously, the case was not one where that delay should deprive them of their defence. In those circumstances, the discretion under CPR 13.3 would be exercised and the default judgment set aside.

ALLOCATION

Local Government Ombudsmen investigation

■ Croydon LBC

05/B/00679,
17 October 2006

A Croydon tenant applied for a transfer on medical grounds. The council's officers decided that there should be a visit and assessment by an occupational therapist (OT). No such visit was scheduled for seven months and only then undertaken in response to the Ombudsman's request. That delay – which was compounded by a failure to tell the tenant what was (not) going on – amounted to maladministration. When the OT's report was received, it was not considered properly by the council in assessing the tenant's needs and the council took two months to correct that mistake. The Ombudsman recommended £500 compensation and a review of the council's procedures.

HOMELESSNESS

Intentional homelessness

■ R (Conville) v Richmond upon Thames LBC

House of Lords,
10 October 2006

The House of Lords has refused Richmond leave to appeal in relation to this important case on the duties owed to the intentionally homeless (see the Court of Appeal's decision [2006] EWCA Civ 718, 8 June 2006; [2006] 1 WLR 2808; July 2006 *Legal Action* 30).

■ Bennett v Croydon LBC

[2006] EWCA Civ 1292,
7 September 2006

The claimant was a Lambeth council tenant. In March 2003, she left her family in that flat and went to act as live-in carer to her mother who was the tenant of a Croydon council house. Before her mother died in February 2004, the claimant's family also moved into the house. The claimant gave notice to quit the Lambeth flat but was unsuccessful in her attempt to remain in the Croydon house and was evicted by the council. On her subsequent application, the council found her to have become homeless intentionally. HHJ Ellis dismissed an appeal brought under HA 1996 s204. Ms Bennett sought permission to bring a second appeal asserting that although the initial decision had addressed the question of whether her mother's house was 'settled accommodation', the reviewing officer had not done so.

The Court of Appeal dismissed a renewed application for permission. The question of 'settled accommodation' did not arise on the facts. It might have done if the claimant had given up the flat when she moved to the house to care for her mother. Then a question would have arisen about whether that deliberate act had been 'spent' by the acquisition of a settled home with her mother. But: 'It can hardly be claimed that the applicant obtained settled accommodation after she gave up her flat in the very short time before it was made clear to her that she had no right to remain in the house' (para 6).

Local connection referrals

■ Kensington & Chelsea RLBC v Danesh

[2006] EWCA Civ 1404,
5 October 2006

Mr Danesh was accommodated as an asylum-seeker by NASS in Swansea but, after being granted leave to remain, travelled to London and applied to Kensington & Chelsea RLBC as a 'homeless' person. The council accepted that he was owed the main housing duty (HA 1996 s193) but referred that duty back to Swansea using the local connection provisions. Swansea accepted that referral.

Mr Danesh sought a review on the basis that, if he had to go back to Swansea, he would experience 'violence' in the form of racially motivated aggression and harassment putting him in fear of violence. A reviewing officer confirmed the original decision, but HHJ Cotran allowed an appeal brought under HA 1996 s204.

The Court of Appeal allowed the council's further appeal. It held that 'violence' in HA 1996 s198 referred to actual physical violence only and did not cover acts or gestures short of that. The reviewing officer's decision that, on the particular facts, Mr Danesh would not face actual or even threatened physical violence in Swansea was a conclusion 'eminently open' to him. The judge had been wrong to interfere with that decision.

Accommodation pending review

■ R (Emeka Omatoyo) v City of Westminster

[2006] EWHC 2572 (Admin), 21 September 2006[15]

The claimant was a young single man with a history of repeated homelessness, drug and substance abuse, offending and prison. On his application to Westminster for assistance as a homeless person, it was noted that he had mental health problems and a risk of self harm and suicide. The council decided that he was not 'vulnerable' and had no priority need. He applied for a review.

He asked for accommodation pending review under HA 1996 s188(3). The council's policy was to provide such accommodation where the request for a review exhibited 'any merit' in contending that the original decision may have been made unfairly, incorrectly or in ignorance of relevant and material facts. The council refused to provide the claimant with such accommodation and he sought judicial review of that decision.

Following an inter-partes hearing, Deputy Judge Andrew Nicol QC granted permission to apply for judicial review and continued an interim injunction that the council accommodate until the review decision was notified. The council's 'any merit' policy provided a low threshold. The claimant had a strong prima facie case that:

■ the original decision had wrongly failed to take account of the claimant's actual history; and

■ the council had failed to take into account its own homelessness strategy contrary to the requirement in Homelessness Act 2002 s1(5).

As the case was one of accommodation pending review (as distinct from accommodation pending appeal) the judge followed and applied *R v Newham LBC ex p Lumley* (2001) 33 HLR 11 rather than *R v Brighton & Hove Council ex p Nacion* (1999) 31 HLR 1095.

HOUSING AND COMMUNITY CARE

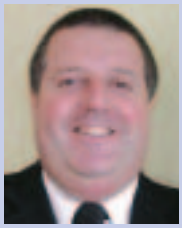
■ R (B) v Lambeth LBC

[2006] EWHC 2362 (Admin), 20 September 2006[16]

The claimant, a Lambeth council tenant, suffered from significant schizophrenia, used crack cocaine and was receiving anti-psychotic medication. She had been 'sectioned' under the Mental Health Act (MHA) 1983 and been an in-patient on a number of occasions. One of the effects of her illness was that she had incorporated her neighbours in her delusional belief system and caused nuisance to them. In the course of a community care assessment, the council noted that the situation regarding the neighbours was 'insoluble' and acknowledged that the claimant needed to be rehoused. It was common ground that she was owed a duty under MHA s117 and plain that that included a duty to provide accommodation (*R v Manchester City Council ex p Stennett* [2002] UKHL 34, 25 July 2002; [2002] AC 1127). The council decided that it would pursue the possession proceedings it had initiated on nuisance grounds and, on eviction, would provide alternative suitable accommodation. The claimant sought judicial review of that decision.

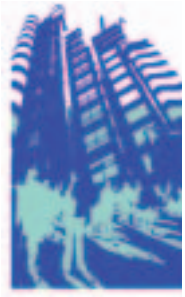
HHJ Gilbart QC (sitting as a Deputy High Court judge) held that the council was in breach of its statutory duty. It was 'simply seeking to put off to another day an important decision. That decision is the making of an offer of accommodation which their own evidence accepts is inevitable' (para 9). Although the judge granted a declaration, he declined a mandatory order. He instead adjourned the judicial review claim to be restored two months later, and indicated that unless accommodation was offered 'very shortly' there would be an insuperable argument for the adjournment of the possession claim.

1 Available at: www.ind.homeoffice.gov.uk/6353/12358/nasfsection4andLondon.pdf.
2 Available at: www.lawcom.gov.uk/docs/remedies_scoping_report.pdf.
3 Available at: www.lawcom.gov.uk/docs/newsletter_autumn_2006.pdf.
4 Available at: www.communities.gov.uk/pub/795/230AntisocialBehaviourIntensiveFamilySupportProjectsAnevaluationofsixpioneerings_id1503795.pdf.
5 *Monitoring the longer term impact of choice based lettings* is available at: www.communities.gov.uk/pub/599/MonitoringtheLongerTermImpactofChoicebasedLettings_id1503599.pdf.
6 Available at: www.communities.gov.uk/pub/773/TheSocialLandlordsOrder2006PermissibleAdditionalPurposesEnglandrelatingtothepros_id1503773.pdf.
7 Available at: www.dwp.gov.uk/asd/asd5/rports2005-2006/rrep379.pdf.
8 Available at: www.communities.gov.uk/pub/870/HousinginEngland200405Areportprincipallyfromthe200405SurveyofEnglishHousing_id1503870.pdf.
9 Available at: www.drc.org.uk/pdf/DED%20Housing%20Guidance.pdf.
10 Available at: www.lgo.org.uk/pdf/digest05-06/Sec-D-Housing.pdf.
11 Available at: www.gos.gov.uk/gol/docs/247610/resettlemenstratphase2.pdf.
12 Robert Lizar solicitors, Manchester, and John Hobson, barrister, Manchester.
13 Gilbert Turner Coomber solicitors, London, and Daniel Dovar, barrister, London.
14 Baker and Co solicitors, London, and William Geldart, barrister, London.
15 Gareth Mitchell, Pierce Glynn solicitors, London, and Stephen Knafler, barrister, London.
16 Pierce Glynn solicitors, London, and Stephen Reeder, 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 12–16 for supplying transcripts or notes of judgments.

Housing repairs update 2006



Beatrice Prevatt and **Marina Sergides** detail the latest policy, legislation and case-law concerning housing disrepair in this annual review.

POLICY AND LEGISLATION

Housing Act 2004

The Housing Health and Safety Rating System (England) Regulations 2005 SI No 3208 made under Housing Act (HA) 2004 s2(3) were laid before parliament on 28 November 2005 and came into force on 6 April 2006.

From 6 April 2006, landlords must apply for a licence to operate a house in multiple occupation (HMO). From 6 July 2006, councils will have the power to prosecute anyone who operates an HMO without the necessary licence or who has given false information on their licence application form: see Housing Act 2004 (Commencement No 5 and Transitional Provisions and Savings) (England) Order 2006 SI No 1060.

Small claims

On 6 December 2005, the House of Commons Constitutional Affairs Committee published its report on changes to the scope of the small claims track.[1] It concluded that the small claims limits for personal injury and housing disrepair cases were in need of reconsideration. It recommended that the limit for housing disrepair cases be raised to £2,500 (in order to be consistent with a proposed rise in the limit for personal injury claims) but indicated that it would be essential to ensure that vulnerable tenants are not unduly disadvantaged by any change.

In February 2006, in its response to this report, the government undertook to consider all the case track limits.[2] This work is still in progress and is being informed by representations from a range of different sources. The government intends to consult on the proposals which emerge by the end of the year. On 13 October 2006, the Law Society published *Fast and fair*, its proposals for lower value personal injury claims, which will avoid the need to increase the small claims limit. The proposals have been sent to government ministers, MPs and policy makers.[3]

Decent homes target

On 7 June 2006, Ruth Kelly, Secretary of State for Communities and Local Government, announced the final decent homes bidding round and the publication of:

- new supplements to the Arms Length Management Organisation (ALMO) bidding guidance and transfer bidding guidance: *Supplement to the guidance on arms length management* and *Supplement to the housing transfer manual – 2006 programme*;
- revised decent homes implementation guidance: *A decent home: definition and guidance for implementation*;
- *Review of Arms Length Housing Management Organisations*; and
- *From decent homes to sustainable communities: a discussion paper* (the consultation closed on 15 September 2006).[4]

A decent home: definition and guidance for implementation indicates that the Department for Communities and Local Government expects 95 per cent of all social housing to be decent by 2010 and the remainder to be improved as fast as possible after this date. The definition of a decent home has been updated to reflect the Housing Health and Safety Rating System (HHSRS), which replaced the Housing Fitness Standard on 6 April 2006. A decent home must now meet the following four criteria:

- it must meet the current statutory minimum standard for housing, namely it must not contain any hazards assessed as serious (category 1) under the HHSRS;
- it must be in a reasonable state of repair;
- it must have reasonably modern facilities and services; and
- it must provide a reasonable degree of thermal comfort.

The guidance states that the decent homes standard is a minimum standard that all social housing should meet by 2010, or other renegotiated deadline, and which can be measured consistently across all housing stock.

CASE-LAW

Disrepair and the Civil Procedure Rules

■ Southwark LBC v Fleming

Lambeth County Court, 30 June 2006[5]

In a possession claim for rent arrears, the tenant counterclaimed for disrepair and nuisance due to a mouse infestation. In May 2006, the tenant applied to debar the council from defending the Part 20 claim under Civil Procedure Rule (CPR) 3.4(2)(c) for its wholesale failure to comply with the directions order made in December 2005, which gave a trial window of June/July 2006. The council served its disclosure list two days before the hearing of the application on 30 June 2006, and served a reply and defence to the Part 20 claim on the afternoon before the hearing.

DJ Wakem debarred the council from defending the Part 20 claim and ordered it to pay the costs of the application. The judge found that the council had shown a complete disregard for the December 2005 order and that the court had to ensure that the default did not go unmarked. She considered that none of the alternative penalties in the form of costs sanctions were appropriate. The claim for possession was unaffected by the ruling.

■ Sowerby v Charlton

[2005] EWCA Civ 1610, 21 December 2005

The tenant claimed damages for paraplegia sustained when she fell over the wall leading up to the front door of premises and down an eight foot drop to a basement area. The property was owned by the landlord of the friends she had been visiting. After an initial exchange of correspondence, the landlord admitted liability in an open letter but subsequently withdrew the admission after the issue of proceedings. The tenant successfully applied to strike out parts of the landlord's defence relying on the admission of liability.

On the landlord's appeal, the Court of Appeal held that the judge had been wrong to hold that CPR 14 applied to pre-litigation admissions. Despite provision under the CPR regime for pre-action activity in the form of pre-action protocols and disclosure, the CPRs were principally concerned with the regulation of cases after an action has been started. However, given that there was no real prospect of the landlord resisting a finding of primary liability, although contributory negligence would be an issue, summary judgment was appropriate.

Liability

Who is liable?; change of landlord

■ Edlington Properties Ltd v Fenner & Co Ltd

[2006] EWCA Civ 403, 22 March 2006

In a claim for rent arrears and insurance premiums by the assignee of a tenant's original landlord, the tenant sought to set off its damages claim against its original landlord for breach of building obligations in an agreement to build a factory that was seriously defective.

After a thorough review of principle, authorities and textbooks, the Court of Appeal unanimously held that a tenant's right to claim damages against a predecessor in title of the present landlord by way of equitable set off was a personal right, not a right which ran with the land, so as to entitle the tenant to claim against arrears that had accrued to the present landlord (which were not arrears that had been assigned to the current landlord by its predecessor in title).

Comment: In the light of this judgment a tenant will be unable to bring a claim for damages for disrepair against a new landlord for an earlier landlord's breach of its repairing obligation, but can only set off such a claim against any assigned arrears.

Contractual liability

■ Marlborough Park Services Ltd v Rowe and another

[2006] EWCA Civ 436, 7 March 2006

The tenant, a long leaseholder, was liable to keep his two-storey maisonette in good repair. His landlord was liable to repair the main structure of the property. The tenant's property suffered from cracking due to deflection of intermediate timber floor joists. The judge held that the works fell within the landlord's repairing obligation and the costs should be shared equally among all the tenants of the building.

On appeal, it was held that the judge's construction of the lease had been correct. A landlord's obligation under a lease to repair the main structure of a property included an obligation to repair floor joists in a tenant's property as the joists played a significant part in keeping the structure sound. The main structure was not limited to items in the ownership and control of the landlord or items which served more than one unit. Such qualification of the landlord's obligation was neither obvious nor necessary.

■ Janet Reger International Ltd v Tiree Ltd

[2006] EWHC 1743 (Ch), 17 July 2006

A tenant of commercial premises brought an action for disrepair in relation to the basement of the premises, which had become damp due to a defective damp proof course. The tenant claimed that its landlord was obliged to prevent damp from entering the basement because of its obligation to exercise reasonable endeavours under its covenant to maintain, repair and renew the structure or, alternatively, under an implied term that it would use reasonable endeavours to remedy any defective part of the structure that was causing, or threatened to cause, immediate damage to any part of the demise that the tenant was obliged to maintain.

It was held that the landlord was not obliged to carry out any works under its repairing obligation and was not in breach of it. There was no evidence of damage to the structure and there had been no deterioration in the bricks as a result of the damp. The purpose of the works required was not to remedy damage to the structure. The works fell within the tenant's repairing obligation as they were necessary to put and keep the whole of the premises in good and substantial repair and condition. The purported implied term was wholly inappropriate and did not meet any of the conditions for the implication of such a term.

■ The Incorporated Trustees of the Dulwich Estate v Kaye and others

[2006] EWLands LRX/137/2005, 11 September 2006

The landlord rebuilt a retaining wall on its premises that had partially collapsed due to pressure from the retained soil. The landlord then sought to recover the costs from the tenants, as service charges for 'repairs'. A Leasehold Valuation Tribunal (LVT) held that the rebuilding work went beyond repair and the landlord was not entitled to recover the cost. The Lands Tribunal allowed an appeal. The wall had been in 'substantial disrepair' and, on the expert evidence, the only way to 'properly repair' it was by pursuing the method adopted.[6]

Notice

■ Charalambous v Earle

[2006] EWCA Civ 1090, 12 October 2006

In this addendum judgment, the tenant, a long leaseholder, brought a claim for damages for disrepair due to defects to the roof above his top-floor flat. On an appeal in respect of damages (see below), the Court of Appeal reduced the damages awarded partly on the basis that the judge had failed to make any allowance for the time needed for the landlord to carry out repairs. Having heard further submissions on this point, the Court of Appeal upheld its reduction in the level of damages. It accepted that the defects were principally within the roof and therefore arguably within the general rule in *British Telecommunications plc v Sun Life Assurance Society plc* [1996] Ch 69, namely, that in respect of disrepair in parts of the building within the landlord's control, the landlord was in breach immediately a defect occurred. However, it held that as it had been common ground before the trial judge that for the purposes of assessing damages, the date of the notice of the defects should be taken as the starting point, it was therefore illogical not to allow the landlord a reasonable time to respond.

LJ Carnwath raised the possibility of a further amendment to the notice rule as he held that: 'In a future case, it may have to be considered whether the "general rule" as laid down by BT requires some modification to take account of the practicalities of the modern relationship of residential lessors and lessees.' It should be borne in mind that this was said in the context of long leases where there is a reciprocal obligation on lessees to contribute to the costs of the works.

Service charges

■ Continental Property Ventures Inc v White and another

[2006] EWLands LRX 60/2005, 15 February 2006

A landlord appealed against the LVT's decision that it was not entitled to recover, by way of service charge, sums in respect of damp proofing and redecoration of two flats and a common hallway on the basis that the sums had not been reasonably incurred. The LVT held, as a matter of fact, that the damp proofing works could have been carried out under a guarantee and to do them at cost was unreasonable. The tribunal also disallowed works to the second flat as these were only necessary because the landlord had neglected to repair a leaking pipe within time. It decided that the test of reasonableness under Landlord and Tenant Act (LTA) 1985 s19(1)(a) was wide enough to encompass both the costs actually incurred and the circumstances in which they were incurred, including past disrepair.

The landlord's appeal was dismissed. Although the tribunal's reasoning was mistaken, its decision was correct. The relevant costs under s19(1)(a), which had to be reasonably incurred, were defined by LTA s18(2) as the costs incurred by a landlord in connection with matters for which the service charge was payable. This included the cost of repairs but this cost did not depend on whether the repairs ought to have been allowed to accrue. The reasonableness of incurring costs for the repair could not, as a matter of natural meaning, depend on how the need to repair had arisen. However, given that the tenant would have an equitable set

off to any claim for the service charge, the costs incurred by the landlord were not reasonably incurred and the tenant had a defence to the recovery of the service charge. The tribunal could only have been wrong in relation to the guarantee works if there was evidence that the works could not or would not have been carried out under the guarantee. This was a matter of fact which the landlord had chosen not to dispute before the tribunal.

Damages

■ Earle v Charalambous

[2006] EWCA Civ 1090, 28 July 2006

The tenant, a long leaseholder, brought a claim for damages for disrepair due to defects to the roof above his top-floor flat. It was accepted that the landlord was on notice of the problem from January 2000 and the tenant complained of dampness and water penetration from this date until major works were commenced in May 2004. The kitchen ceiling partially collapsed in December 2002, at which point the tenant moved out and stayed with his parents until the works were completed in September 2004.

Liability was agreed and the judge awarded £20,000 general damages for the period January 2000 to December 2002, when the tenant was in occupation, and £10,000 for the 21 months from December 2002 to September 2004, when he lived with his parents. The judge cross-checked his awards against a notional rental value of £1,000 per month.

The landlord appealed on two grounds: first, that the judge was wrong to assess damages by reference to a notional reduction in rental value, where the flat was the tenant's home and not an investment property, and should have restricted himself by reference to a tariff based on previous disrepair awards; and, second, that the award was excessive.

The Court of Appeal held that where a landlord's breach of covenant had the effect of depriving a tenant of the enjoyment of his/her home and valuable property asset for a significant period, a notional judgment of the resulting reduction in rental value was likely to be the most appropriate starting point for assessment of damages. That reduction would not be capable of precise estimate but was a matter for the court rather than for expert valuation evidence. The award in respect of the first period was not supported by adequate reasoning and was excessive when viewed against the tenant's own claim. This award was reduced to £13,500. The award of £10,000 in respect of the second period was upheld. The award was just under half the rental value for that period and was not open to criticism in principle.

In the addendum judgment (see above), given after consideration of further submissions in relation to notice, the Court of Appeal decided that the landlord should pay 50 per cent of the tenant's appeal costs given that the tenant had succeeded on all the major issues but the landlord had achieved a significant reduction in the damages awarded for the first period.

■ Sachs v Brentfield Trust

Willesden County Court, 9 October 2006[7]

The claimant lived in a two-bedroom ground floor flat held under a long lease at a nominal rent. For many years water, had leaked into the kitchen and, to a lesser extent, the bathroom due to defective rainwater goods on the outside of the block. The claimant had to put out jugs and buckets to catch the water. Latterly, when things were at their worst, he was collecting half a bucket of water every two days. The defendant acquired the reversion in November 2000 but carried out no repairs and played no part in the ensuing litigation except to attend at the assessment of damages hearing to apply unsuccessfully for an adjournment. Deputy District Judge Ashworth, applying *Earle v Charalambous*, awarded 25 per cent of the rack rent of £850 per month for six years giving an award of £15,300 general damages, together with £2,850 special damages.

■ Rushton and others v Southwark LBC

Lambeth County Court, 20 October 2006[8]

(Infant settlement approved by DJ Zimmels)

C1 was the secure tenant of a three-bedroom lower ground floor flat between December 1996 and September 2003. In 2004, C1 issued a claim for damages, specifically for rising and penetrating dampness. C1 also claimed damages for mice infestation. The claim settled for a global sum of £17,500, representing five years' loss and including a claim of £4,000 for special damages.

C1 also claimed, as litigation friend, damages for personal injuries suffered by her children. C2 (born in 1994) developed breathing problems and pneumonia eight weeks after moving into the property and was admitted to hospital for two weeks. A diagnosis of asthma was made. He continued to suffer breathing difficulties and was treated with inhalers, consisting of both preventers and rescuers. C2's condition improved considerably after the move from the premises. The expert evidence was that the pneumonia was brought about as a result of the damp environment, which led to him being symptomatic for many months, but that the damp conditions had exacerbated, but not caused, the asthma. The prognosis for C2 was good and the court approved damages of £5,500.

C3's symptoms were worse. C3 (born in 1998) was admitted to hospital with pneumonia when aged six months, followed by further asthma attacks, sometimes requiring inpatient treatment. Her sleep was disturbed by coughing and she missed several days of school. C3 was particularly prone to respiratory infections. Repeated antibiotic treatment resulted in the removal of enamel from one of her front teeth. The expert evidence was that the episode of pneumonia was brought about as a result of the damp conditions within the property and caused C3 to be symptomatic for several months. The asthma had been exacerbated, and the number of infections increased, due to the damp. The prognosis was that there was some risk of future illness caused by the conditions, but C3's condition had improved since leaving the property. The court approved damages of £10,000.

■ Lewis v Courtney

Barnet County Court, 19 January 2006[9]

In a possession claim for rent arrears, the tenant counterclaimed damages for disrepair because of water penetration due to a defective roof for an 18-week period.

HHJ Viljoen found that on the facts (namely, that there had been severe damp in the bathroom but that it had remained usable and some dampness in the kitchen, living room and bedroom) this was not a particularly serious case of disrepair. He awarded damages of 20 per cent of the rent of £1,300 per month. The claim for special damages was dismissed as the tenant failed to persuade the judge that he had suffered any damage to his possessions.

■ Shefford v Nofax Enterprises (Acton) Ltd

Central London County Court, Case number 5CL15986[10]

Three joint tenants rented a split-level basement/ground floor flat which was advertised as a three-bedroom property. Within a short time of moving in, all three bedrooms became damp and the whole flat started to smell. Three months later the landlord asked the tenants to sign a document confirming that the property was let as a one-bedroom flat but they refused to do so. They subsequently learnt from an environmental health officer (EHO) that notices had been served before the tenancy prohibiting the landlord from letting the flat as other than a one-bedroom flat. They were advised that the other bedrooms lacked adequate ventilation and natural light and it was the EHO's view that it was inevitable that dampness would occur. After four months the tenants moved out and sought damages from the landlord.

District Judge Gilchrist found the landlord liable in nuisance, misrepresentation, and for breaches of LTA 1985 s11 and the covenant implied in *Smith v Marrable* [1843] 11 M&W 5, namely, that a furnished dwelling should be fit for human habitation at the start of the tenancy. He awarded general damages of £2,750 based on the fact that the tenants had bargained for a three-bedroom flat, but had only received a one-bedroom flat and even that bedroom was in disrepair. The damages awarded equate to approximately 50 per cent of the rent of £1,300 per month.

Local Government Ombudsman report

■ Complaint against Stonebridge Housing Action Trust

05/A/7668,
13 September 2006

The tenant complained that the Housing Action Trust (HAT) had failed to identify the source of a roof leak which caused water penetration into her premises for a period of 18 months from August 2004 until January 2006, although ineffective remedial works were carried out in April and November 2005. The Ombudsman found that it should have taken no longer than six months to rectify the problem and the HAT's delay amounted to maladministration.

The Ombudsman approved an offer of compensation of £1,250, of which £750 was to remedy the injustice to the tenant and £500 was to go towards her legal costs, which she had incurred by using solicitors to make her complaint to the Ombudsman. The Ombudsman questioned whether it was essential for the tenant's solicitors to have embarked on the statutory charge procedure (by applying for public funding to instruct an environmental health consultant) once they had referred the complaint to him in August 2005, but considered it appropriate in the circumstances of this case to ask the HAT to make a contribution towards the solicitors' costs. The award amounted to half of the solicitors' costs with the tenant being obliged to pay the rest from the compensation awarded to her.

Comment: This report highlights the dangers for tenants in pursuing alternative dispute resolution at the same time as having a public funding certificate.

Environmental Protection Act 1990

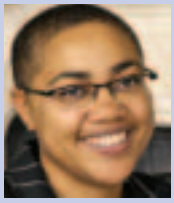
■ R (Vella) v Lambeth LBC and London & Quadrant Housing Trust (interested party)

[2005] EWHC 2473 (Admin),
14 November 2005,
January 2006 Legal Action *32*

A tenant of a housing association complained to the council and asked it to take action under the Environmental Protection Act 1990 on the basis that the state of his home was prejudicial to health as noise transference from the flat above and communal hallway contributed to his depressive illness. The tenant sought judicial review of the council's failure to serve an abatement notice.

The claim was dismissed on the basis that the simple lack of sound insulation could not cause premises to be in such a state as to be prejudicial to health. The earlier decision in *Southwark LBC v Ince* [1989] 21 HLR 504, which had suggested the contrary, should no longer be followed.

1 *The courts: small claims*, First report of session 2005–06, HC 519, available at: www.publications.parliament.uk/pa/cm200506/cmselect/cmconst/519/519.pdf.
2 *The courts: small claims. Government response to the Constitutional Affairs Select Committee's report*, Cm 6754, available at: www.dca.gov.uk/majrep/smallclaim/casc_smallclaim.pdf.
3 Available at: www.lawsociety.org.uk/documents/downloads/dynamic/fastandfairsmallclaims.pdf.
4 All of these publications are available at: www.communities.gov.uk/index.asp?id=1152136.
5 Patricia Carr, solicitor, Anthony Gold solicitors, London and Desmond Rutledge, barrister, London.
6 The transcript can be found at: www.bailii.org.
7 Ian Greenidge, solicitor, Hodge Jones & Allen solicitors, London, and William Geldart, barrister, London.
8 Tony Ross, barrister, London.
9 Justin Bates, barrister, London.
10 Robert Millar, University of London Housing Services, and Deirdre Forster, solicitor, Powell Forster solicitors, London.




Beatrice Prevatt and Marina Sergides are barristers at Garden Court Chambers, London WC2. They are grateful to the colleagues at notes 5 and 7–10 for supplying transcripts or notes of judgments.

The use of statutory demands against council tax payers

The past 18 months have seen an increasing use of statutory demands under the Insolvency Act (IA) 1986 by local authorities as a method of debt recovery. In this article, Alan Murdie provides a short outline of this highly technical area and a number of relevant points.

Introduction

A number of metropolitan authorities and London boroughs have been increasingly turning to the use of statutory demands under the IA 1986 for arrears in council tax;[1] even cases of rent arrears have been reported, suggesting that local authorities may not understand fully the nature of insolvency proceedings.[2] The only advantage of bankruptcy proceedings for a debtor is that any other enforcement measure is effectively prevented from being used thereafter, including imprisonment (see *Re Smith (A Bankrupt)* [1990] 2 AC 215) but unless the debtor is living in rented accommodation, bankruptcy is likely to result in loss of home and severe financial hardship. Anecdotal reports suggest that some authorities, such as Manchester, have been actively targeting home-owners who have council tax arrears with the procedure.[3] The complex nature of insolvency proceedings may mean that the taxpayer feels s/he has become ensnared in a bizarre game of snakes and ladders. The greatest problem facing a taxpayer is that in insolvency proceedings the courts are disinclined to look behind the judgment or order which gives rise to the indebtedness. At the same time, the bankruptcy courts do not appear to appreciate the way in which the rights of a taxpayer to challenge liability orders are severely constrained.

Procedure

Council Tax (Administration and Enforcement) Regulations (CT(A&E) Regs) 1992 SI No 613 reg 49 provides that where a liability order has been made, the sum owing may be deemed a debt under the IA 1986. This means that the local authority must first have obtained a liability order for the sum of at least £750 or such an amount is outstanding; the liability order is a prerequisite of reg 49.

The local authority must begin by serving the taxpayer a demand in the prescribed form under the Insolvency Rules 1986 SI No 1925. The demand must:

- be dated and signed by the proper officer of the local authority;
- state the amount of the debt and how it arises;
- specify whether it is a debt payable immediately or not;
- give details of the liability order and when it was granted by a magistrates' court;
- state details of any other charge or costs.

(Insolvency Rules, as amended by Insolvency (Amendment) Rules 1987 SI No 1919 r6.1.)

The demand must also give details about the rights of the debtor, possible methods of compliance and the purpose of the demand. There must be an explanation that bankruptcy proceedings will be commenced if the demand is not complied with, and details of how to contact the local authority. Finally, the demand must inform the taxpayer that s/he has a right to apply to the county court or High Court to have the demand set aside, which must be done within 18 days of service (Insolvency Rules r6.2(1)(d); Insolvency Rules 1986 r6.4(1); Practice Direction (Insolvency Proceedings) (1999) para 12.1). A failure to comply with the rules, such as the local authority beginning proceedings on the wrong form, will not invalidate the demand (see *Cartwright v Staffordshire and Moorlands DC* [1998] BPIR 328). The test is whether prejudice is caused to the debtor (see *Re a Debtor* (No 1 of 1987) [1989] 1 WLR 271, CA).

Response by the debtor

On receipt of the demand, a debtor may pay the debt, or secure or compound it to the satisfaction of the creditor. If the debtor reduces the amount owed to below £750, a bankruptcy petition cannot be presented. Alternatively, the debtor may seek to set aside the local authority demand through the county court or High Court. The appropriate court for London is the High Court; in other cases, it is the county court where the debtor would present his/her own bankruptcy petition (Insolvency Rules r6.4(2)).

Setting aside

An application to set aside a statutory demand may be made by a taxpayer on Form 6(4), which is available from the county court. The application to set aside must be supported by a copy of the demand, and an affidavit or statement of truth (Form 6(5)). A letter to the council requesting that a demand is set aside is not sufficient for compliance with the rules (see *Ariyo v Sovereign Leasing plc* [1998] BPIR 177, where a letter to Rhyl County Council was held to be insufficient for compliance with the rules). The statement should specify the date of service of the demand and the grounds on which it is to be set aside. Compliance with time limits is strict.

The application to set aside the statutory demand may be granted if, under Insolvency Rules r6.5(4):

(a) the debtor appears to have a counter-claim, set-off or cross demand which equals or exceeds the amount of the statutory demand; or
(b) the debt is disputed on grounds which appear to the court to be substantial; or
(c) it appears that the creditor holds some security in respect of the debt … and the court is satisfied that the value of the security equals or exceeds the full amount of the debt; or
(d) the court is satisfied on other grounds that the demand ought to be set aside.

Of these grounds, the debtor may be able to make a case if the local authority has failed to award council tax benefit or other benefits; has miscalculated the year's liability to tax; has failed to award a discount or grant an exemption; or has failed to repay money owed from an earlier year. In such cases it may be best for a taxpayer to rely on Insolvency Rules r6.5(4)(b) grounds 'which appear to be substantial' to avoid a technical argument over the meaning of 'equals or exceeds the amount of the statutory demand'. This may be particularly important where there are questions of fact to be decided relating to sole or main residence. To succeed it may be necessary to show that the disputed part of the debt would reduce the overall level of council tax debt to below £750 – this will avoid an argument from the local authority that the taxpayer has to pay the full demand. However, there may be problems even if what is termed a triable issue can be shown. Where part of the debt is disputed but a part exceeding £750 is not, the court will not set aside the order.

Triable issue

Both the old and the current Practice Directions for insolvency proceedings indicate that the statutory demand may be set aside wherever a triable issue may be shown. However, equally, the court may refuse to set aside a liability order if it is founded on a judgment or order, which the court refuses to go behind (see *Morley v IRC (Re A Debtor* (No *657-SD-1991)*) [1996] BPIR 452).

This may cause particular difficulties for a taxpayer who has a bona fide case which should go before a valuation tribunal, because the court may not appreciate that this is where disputes between a taxpayer and the local authority are to be settled. Similarly, the court may not realise that the CT(A&E) Regs themselves seek to prevent these arguments being raised at the liability order hearing where the order is made (reg 57(1)) (In *Mohammed v Southwark LBC* [2006] EWHC 305 (Ch), 7 March 2006; [2006] RVR 124 (see below) it was not until the hearing of the bankruptcy petition that the court was prepared to look at arguments suitable for a valuation tribunal.)

'Other grounds'

Insolvency Rules r6.5(4)(d) provides the court with a broad residual discretion to set aside a statutory demand if satisfied that it ought to do so. The courts consider the list of potential grounds to be an open one (see *Budge v AF Budge (Contractors)* [1997] BPIR 366) and it may include maladministration or harassment by the creditor. This may bring into play wider principles of justice, where the court might consider it unjust for the debtor's inability to pay to be established for the purpose of allowing a bankruptcy petition to be presented.

Possible grounds on which a demand might be challenged include where the local authority has failed to award a discount, benefit or other reduction to which the taxpayer is entitled. Other grounds might include arguments for overturning the liability order on which the statutory demand purports to be based.

It is conceivable that human rights principles regarding the disproportionate nature of bankruptcy where debt is small might be untested here, perhaps as part of a wider point that liability order hearings themselves may be in breach of article 6 (right to a fair and public hearing) of the European Convention on Human Rights if the taxpayer has been effectively precluded from putting his/her case through the operation of procedural rules which effectively prevent the overturning of the liability orders (See 'Local taxation update' April 2005 and April 2006 *Legal Action* 11 and 15 and the judgment in *R (Mathialagan) v (1) Southwark LBC (2) Camberwell Green Magistrates' Court* [2004] EWCA Civ 1689, 13 December 2004; [2005] RA 43).

Suspension of time

Once documents are filed the court will review their content. The effect of filing is to suspend

the time limit for compliance (Insolvency Rules r6.5(6)), giving the taxpayer time to negotiate or otherwise settle the debt.

If the application to set aside the statutory demand is dismissed at this stage, the three-week period for compliance with the demand begins to run again (Insolvency Rules r6.5(1)). If on reviewing the document the court is satisfied that the application to set aside should be heard, a hearing date will be set with at least seven days' notice to the debtor and the local authority. Otherwise, a liability order will be treated as valid and the court will be unwilling to reopen the question of whether it should have been granted.

Can the local authority prove it has obtained a liability order for the purposes of the IA 1986?

Where the debtor has been unable to take any of the above steps, the only other option will be to attend the bankruptcy hearing and put the local authority to proof as to the existence of the liability order.

Indications that this may be a problem arise from the fact that the liability order may have been obtained months or even years before, with recent Divisional Court authority holding that the limitation period does not begin to run until the date that a demand notice is served (see *Regentford Ltd v Thanet DC* [2004] EWHC 246 (Admin), 18 February 2004). Furthermore, the computerised bulk summonsing procedures used by local authorities may not actually result in a hard copy of an individual formal order against the debtor signed or endorsed by a court. The most likely physical form of a document appears to be a summons list of names of debtors presented at a liability order hearing and signed by the magistrate and, in some cases, an electronic signature of stamp from the local authority is the only endorsement. This was an issue touched on by the Court of Appeal in *Mathialagan* in which Waller LJ found: '… it very surprising that the only document with a court stamp … [after a hearing] is not produced by the court, but is created automatically by the local authority's software, even though the local authority is a party to the proceedings'.

That such issues have arisen in at least one case before the High Court was confirmed in a report by the Zacchaeus 2000 Trust, which provided McKenzie Friend support to a pensioner with disabilities who was subject to bankruptcy proceedings by the London Borough of Camden through the High Court in September 2005. The debtor represented himself before the Bankruptcy Division of the High Court where proceedings were dismissed after three adjourned hearings where the local authority had either failed to produce relevant paperwork or establish that a liability order had been obtained as it had claimed.[4]

In cases where a taxpayer has had no notice of liability order proceedings, s/he may seek to put the local authority to strict proof to show it has complied with billing procedures and a liability order has been issued. If no liability order can be produced, which is endorsed by the signature of a justice of the peace or other court stamp, the application may fail for proof that an order has been obtained.

There may also be a further argument about whether the proper officer of the council, empowered to sign statutory demands, has signed the demand correctly. The proving of appropriate authority can be a complex matter.

The bankruptcy petition

If no action is taken, the local authority may then present a bankruptcy petition against the debtor. By the time the bankruptcy petition reaches court, it will generally be too late for the debtor to challenge the liability order. Should a debtor then seek to go back to the magistrates' court to set aside the liability order, s/he will then encounter the problems arising from the Court of Appeal judgment in *Mathialagan* and other authorities limiting judicial review to within three months of the liability order being issued (see *Mathialagan*). Once again, the High Court or county court will normally accept the liability order as validly issued and may refuse to examine the grounds on which it was granted. However, the judgment in *Mohammed* does offer a potential, if last minute, opportunity to challenge issues concerning liability or calculations by the local authority.

Mohammed v Southwark LBC

One hopeful sign in an exceedingly technical area is the decision in *Mohammed*. The court indicated that there are circumstances where it will look at issues regarding liability. In this case, the taxpayer had applied belatedly to the valuation tribunal to challenge a liability order on the ground of student status, having failed previously to set aside a liability order. The court considered itself entitled to deal with the argument which was to be the subject of a valuation tribunal appeal.

Two points of importance arise from this case. First, at the hearing of the bankruptcy petition the taxpayer is not precluded from deploying an argument previously raised at a hearing seeking to set aside a statutory demand (para 9). The bankruptcy court may examine and decide any matter that may be determined by the valuation tribunal (para 14).

With respect to the latter point, the court held:

The courts strive to avoid having different tribunals being seised of the same issues because of the potential of conflict that that might occasion. The bankruptcy proceedings are in train for the purposes of determining (amongst other things) the validity of Mr Mohammed's contentions as summarised in his skeleton argument and oral submissions. If it decides those in his favour the petition will be dismissed and the respondent will be bound to give effect to that determination and adjust his council tax liability accordingly.

Second, the court also considered, conversely, that if the taxpayer failed in his/her argument, then s/he would be precluded from raising the matter before a valuation tribunal in the future. With matters subject to appeals to the valuation tribunal, the court considered that 'it would be quite wrong for the bankruptcy court in an appeal to the level of the High Court Chancery Division [that it] should defer a decision which affects its processes to that of a valuation tribunal' (para 15).

With respect, this may not always be the case, given that tribunals are essentially conceived as fact-finding bodies. It is submitted that the bankruptcy court could encounter difficulty in the future in a case which involved a large number of factual matters, such as sole or main residence or evidence of blighting where a valuation tribunal is considering banding.

1 Royal Courts of Justice Advice Bureau.
2 Nadine Clarkson, Ole Hansen & Co.
3 Jane Phipps.
4 Reverend Paul Nicolson, Zacchaeus 2000 Trust.

Alan Murdie is a barrister, who co-founded the Poll Tax Legal Group in 1990. He is co-author, together with Ian Wise, of *Enforcement of local taxation: an advisers' guide to non-payment of council tax and the poll tax*, LAG, 2000, £15. He is grateful to the colleagues at notes 1–4 for supplying information for this article.

Compensation for wrongful house searches by police post-*Keegan*

Here, Stephen Simblet discusses the European Court of Human Rights' (ECtHR) decision in *Keegan v UK* App No 28867/03, 18 July 2006 and possible remedies for the significant number of people who suffer the intrusion and disruption of a wrongful police raid on their home.

Introduction

In *Keegan and others v Chief Constable of Merseyside* [2003] EWCA Civ 936, 3 July 2003; [2003] 1 WLR 2187 at para 35, Ward LJ stated:

That an Englishman's home is said to be his castle reveals an important public interest, but there is another important public interest in the detection of crime and the bringing to justice of those who commit it. These interests are in conflict in a case like this and on the law as it stood when these events occurred, which is before the coming into force of the Human Rights Act [HRA] 1998, which may be said to have elevated the right to respect for one's home, a finding of malice on the part of police is the proper balancing safeguard.

Fortunately for any 'Englishman' (and in the instant case an Irishman) lacking the physical security of a castle, some greater measure of legal security against police officers forcing their way into their home through carelessness has been provided by the ECtHR in its recent decision in *Keegan*. Its view of the position is this:

The exercise of powers to interfere with home and private life must be confined within reasonable bounds to minimise the impact of such measures on the personal sphere of the individual guaranteed under article 8 [of the European Convention on Human Rights ('the convention')] which is pertinent to security and well-being (see, eg, Buckley v the United Kingdom*, judgment of 25 September 1996,* Reports *1996-IV, [s]76). In a case where basic steps to verify the connection between the address and the offence under investigation were not effectively carried out, the resulting police action, which caused the applicants considerable fear and alarm, cannot be regarded as proportionate* (para 34).

The courts' judgments in *Keegan*

The Court of Appeal, in *Keegan*, considered claims arising out of police officers' forcible entry and search of a house lived in by a family wholly unconnected with the object of the search. The incident had occurred in 1999, before the entry into force of the HRA. A warrant had been obtained by the police from a magistrate and passed to other police officers to force entry by smashing the door open with a battering ram. The claimants had brought claims for false imprisonment, trespass and, when the police sought to rely on a warrant, malicious procurement of a search warrant. The claimants' claim was dismissed in the county court.

The Court of Appeal considered the police officers' purpose in obtaining the warrant and also their alternative case alleging a power of entry under Police and Criminal Evidence (PACE) Act 1984 s17. The principal issue on the appeal related to the basis on which the police had obtained the warrant. Kennedy LJ said, 'In my judgment it is obvious that if the proper enquiries had been made and the results of those enquiries had been properly reported, the conclusion would have been reached that in mid-October 1999 there was no reasonable and probable cause to apply for a search warrant ...' However, the claimants were unable to prove malice, so with some reluctance, particularly on the part of Ward LJ (see above), the appeal failed.

The claimants pursued their claim to Strasbourg. They claimed breaches of articles 8 and 13 of the convention. The ECtHR declared the application admissible and referred to what Ward LJ said in his judgment in its formulation of the admissibility issue. The ECtHR decided that there had been breaches of articles 8 and 13. It awarded compensation of €15,000 damages to the six applicants, plus their legal costs.

The judgment is important and helpful in many respects. First, the court roundly rejected the government's argument that where the police were acting in good faith, it would be wrong to find a violation of article 8:

The fact that the police did not act maliciously is not decisive under the convention which is geared to protecting against abuse of power, however motivated or caused (see, mutatis mutandis, McLeod*, cited above, where the police suspected a breach of the peace might occur). The court cannot agree that a limitation of actions for damages to cases of malice is necessary to protect the police in their vital functions of investigating crime ...* (see above for remainder of para 34).

As argued by the applicants, this finding does not imply that any search, which turns out to be unsuccessful, would fail the proportionality test, only that a failure to take reasonable and available precautions may do so (paras 34–35).

Since the basis of the Keegans' claim arose out of the failure of their proceedings, it was not a big leap from the ECtHR's finding of breach of article 8 to its decision that there had been a breach of article 13, which was duly found. The court stated:

While it is true that the applicants took domestic proceedings seeking damages for the forcible entry and its effect on them, they were unsuccessful. The court observes that the courts held that it was in effect irrelevant that there were no reasonable grounds for the police action as damages only lay where malice could be proved, and negligence of this kind did not qualify. The courts were unable to examine issues of proportionality or reasonableness and, as various judges in the domestic proceedings noted, the balance was set in favour of protection of the police in such cases. In these circumstances, the court finds that the applicants did not have available to them a means of obtaining redress for the interference with their rights under article 8 of the convention.

There has therefore been a violation of article 13 of the convention (paras 42–43).

This is obviously a significant step forward in providing a remedy to the significant number of people who suffer the intrusion and disruption of a police raid, often with many officers and with a forcible entry to the home, founded on faulty intelligence. Quite how such a remedy should be framed is still to be considered, as is the extent of police shortcomings. Quite clearly, not every raid in which nothing is found will entitle the disturbed householders to compensation but, on the other hand, there may be cases in which police shortcomings that are less than the 'shoddy detective work' of the Merseyside

police will still create liability.

In *Keegan*, the entry was under warrant. This article will consider the means by which a domestic remedy for entry when the warrant should not have been obtained may be fashioned. But before turning to that issue, it would be appropriate to observe that this judgment will have some ramifications for the exercise of powers of entry without warrant. One of those consequences was considered obliquely in *Keegan*, that is the power of entry to arrest someone whom the police officer has reasonable belief will be on the premises under PACE s17. In *O'Loughlin v Chief Constable of Essex* (1997) 3 December, CA; [1998] 1 WLR 374, the Court of Appeal considered the propriety of the exercise of this power. It emphasised the need for the police officer, where practicable, to communicate his/her purpose in entering to the occupier before resorting to force. The police also have a power, under PACE s18, to enter the premises 'occupied or controlled' by someone who has been arrested for an indictable offence for the purposes of looking for evidence. Although PACE reasonably closely confines those powers, such that a search of entirely the wrong house would give rise to liability in trespass anyway, *Keegan* may require the court to consider the proportionality of any search.

Potential remedies for wrongful police house searches

Breach of human rights

I shall now consider the remedies in domestic law for those whose homes were searched by the police under authority of a warrant, but where it is contended that there was insufficient link between the house searched and the police investigation. One, and perhaps the most obvious, way is to bring a claim for breach of human rights, relying on HRA ss6, 7 and 8 and a pleading of breach of article 8 of the convention. It would seem clear that the HRA ought to permit the claimant, whose peace is disturbed by police conduct of this kind, to have the court evaluate the article 8 issue in a tort similar to that of malicious procurement of a search warrant, only without the need to prove malice.

In other words, it is time to try and frame a cause of action based on obtaining a warrant without reasonable and probable cause. Quite what the standard would be for 'cause' would be subject to some debate. It would be wrong to reduce the test to one of reasonable suspicion, in particular since other police powers of entry into the home require reasonable belief, which imposes a higher standard. In *Johnson v Whitehouse* (1984) RTR 38, Nolan J said: 'Suspicion and belief cannot exist together. Suspicion is much more than belief; belief includes and absorbs suspicion.' In the tort of malicious prosecution, reasonable and probable cause has been equated with the taking of reasonable steps.

Breach of duty of care in negligence

This leads on to the next way in which such a remedy might be fashioned, which is through the tort of negligence. Negligence would seem to focus the inquiry not on simply what was done, but on what was not – and might reasonably have been – done. The argument would be that a police officer, who applies for a warrant and/or prepares the information on which it will be obtained, would come under a duty of care in negligence to have taken sufficient steps to justify the application for the warrant. It is noteworthy that the ECtHR's judgment in *Keegan* described a situation amounting to 'negligence' (para 42).

There ought to be little difficulty in identifying a standard of care, which is referable to the inquiries that could reasonably be carried out and, therefore, little difficulty in identifying breach and causation of damage. The problem that the courts will need to grapple with is the propriety of imposing a duty of care on a police officer who is taking a step towards taking judicial proceedings. While there ought to be no difficulty in identifying foreseeable damage to someone for whose house a search warrant is obtained, in modern times, the courts have shied away from imposing liability on police officers and others who investigate and prosecute crime. In *Elgozouli-Daf v Crown Prosecution Service* [1995] QB 335, the Court of Appeal refused to impose a duty of care on the Crown Prosecution Service arising out of its conduct of a prosecution. In *Brooks v Commissioner of Police for the Metropolis and others* [2005] UKHL 24, 21 April 2005; [2005] 1 WLR 1495; July 2005 *Legal Action* 32, the House of Lords held that there was no duty to take reasonable steps to investigate crime or to protect the interests of someone caught up in that crime. The argument that it was not in the public interest in these circumstances for liability to be imposed on the police prevailed. There are cases, including *Welsh v Chief Constable of the Merseyside Police* [1993] 1 All ER 692 and *L and P v Reading BC and Chief Constable of Thames Valley* [2001] 1 WLR 1575 in which an assumption of responsibility has given rise to liability.

Furthermore, the courts have recognised, in a number of cases, that the actions of people involved in the administration of justice and the preparation of witness statements and so on will attract immunity from liability in negligence. Thus, in *Taylor and others v Director of the Serious Fraud Office and others* (1998) 29 October, HL; [1999] 2 AC 177, the House of Lords protected an immunity, which ' ... is designed to encourage freedom of speech and communication in judicial proceedings by relieving persons who take part in the judicial process from the fear of being sued for something they say', to the extent that communications between potential witnesses in a fraud investigation were not to be disclosed for the purpose of a defamation claim. While, in *Darker v Chief Constable of the West Midlands Police* (2000) 27 July, HL; [2001] 1 AC 435, the House of Lords was prepared to hold that the immunity did not extend to fabricating evidence, it remains to be seen whether any sort of immunity argument could be advanced in domestic courts.

There are several ways in which a duty of care in negligence may exist. It may be possible to argue that in deciding to seek a judicial authority to enter someone's home, the police assume responsibility and are susceptible to a duty of care. After all, the timetable and method of the operation remain in the control of the police: the householder, for obvious reasons, has no knowledge of, or right to participate in, the proceedings relating to the issue of a warrant. Indeed, in *R (Cronin) v Sheffield Magistrates' Court* [2002] EWHC 2568 (Admin), 20 November 2002, it was held that there was no duty in the magistrates' court to keep a record of the proceedings in which the warrant had been granted.

More fundamentally, it is important not to be too cautious about this: the Strasbourg court has held that it is in breach of article 13 for there to be no domestic remedy for what happened in *Keegan*, and if the domestic courts allow themselves to be gulled into artificial restrictions on the tort of negligence, the absence of an effective remedy would still persist.

Trespass

The other, more radical, method of redress is the relevance of the tort of trespass. It is quite clear from the case-law on article 8 of the convention that where this article is engaged, any reliance on article 8(2) in purported justification of the entry needs to be established by the state. As the court analysed it in *Keegan*:

It is not disputed that the forcible entry by the police into the applicants' home interfered with their right to respect for their home under article 8 paragraph 1 of the convention and that it was 'in accordance with the law' on a domestic level and pursued a legitimate aim,

the prevention of disorder and crime, as required by the second paragraph of article 8. What remains to be determined is whether the interference was justified under the remaining requirement of paragraph 2, namely whether it was 'necessary in a democratic society' to achieve that aim.

According to the court's settled case-law, the notion of necessity implies that the interference corresponds to a 'pressing social need' and, in particular that it is proportionate to the legitimate aim pursued (see, eg, Olsson v Sweden, *judgment of 24 March 1988, Series A no 130, [s]67). The court must accordingly ascertain whether, in the circumstances of the case, the entry of the applicants' home struck a fair balance between the relevant interests, namely their right to respect for their home balance, on the one hand, and the prevention of disorder and crime on the other (see* McLeod v the United Kingdom, *judgment of 23 September 1998,* Reports of judgments and decisions *1998–VIII, [s]53).*

While a certain margin of appreciation is left to the contracting states, the exceptions provided for in paragraph 2 of article 8 are to be interpreted narrowly and the need for measures in a given case must be convincingly established (see Funke v France, *judgment of 25 February 1993, Series A no 256-A, [s]55). The court will assess in particular whether the reasons adduced to justify such measures were relevant and sufficient and whether there were adequate and effective safeguards against abuse (see, eg,* Buck v Germany, *judgment of 28 April 2005, [ss]44–45)* (paras 29–31).

In *Keegan*, the officers carrying out the search relied on the existence of the warrant to justify their entry, which, but for the warrant and the defence provided by Constables Protection Act 1750 s6, would have been a trespass. In all cases of trespass, it is for the person entering to prove the necessary legal authority; that is consistent with the approach in article 8 of the convention.

One issue that may need to be considered is whether the existence of a warrant provides an absolute immunity? Are there not circumstances in which the immunity should be qualified? That issue remains untouched by either the Court of Appeal's or the Strasbourg decision in *Keegan*. There are much more complicated policy decisions about immunity than those that arose in *Keegan*, and it may be that those are not going to be litigated. If the remedy focuses on the circumstances in which the warrant was obtained, the court's ability to evaluate whether reasonable care was taken is clearer. It will only be, for example, if information comes to light between obtaining the warrant and its execution that the point would need to be decided.

More prosaically, it would appear that a claimant in the post-*Keegan* position should not be the one who has to prove absence of reasonable and probable cause, whether it is under the statutory tort contemplated by a claim under HRA ss6, 7 and 8 or in negligence. In circumstances where the police enter a home that is unconnected with their investigation, under authority of a warrant for that home, there is no reason why they should not be required to prove that all reasonable steps were taken. There is an analogy to be drawn here with the tort of conversion, where the bailee of lost or damaged goods is required to prove that s/he exercised reasonable care, rather than vice versa.

One other analogy to be drawn with the tort of trespass is in relation to damages. The tort of trespass provides not merely for damages on a narrow compensatory basis (or 'basic damages' as they are described in *Thompson and Hsu v Commissioner of Police of the Metropolis* (1997) 19 February; [1998] QB 498) but also for both aggravated and exemplary damages. In *Fisher and another v Chief Constable of the Cumbria Constabulary* (1997) 29 July, CA, a post-*Thompson* case, the Court of Appeal considered damages for a trespassory search of a fish and chip shop that had occurred when the occupier was absent. Notwithstanding that the court had found that there was a proper and appropriate search, the failure of the police to supply information about the search entitled the aggrieved occupier to damages. The Court of Appeal held that in every such case, there should be a bracket of between £500 to £1,500 for general damages as a minimum, and then that it was necessary to consider, in appropriate cases, an award of aggravated and/or exemplary damages. It made an award of aggravated damages in *Fisher*. Trespass may therefore be the most valuable remedy for a claimant.

Conclusion

When fashioning a domestic remedy, therefore, it would appear that for that remedy to fit into the scheme of other torts, the domestic court should have available to it both aggravated and exemplary damages. The ECtHR in *Keegan* did not take the opportunity to expand the categories of damage available to the victims of breaches of article 8 of the convention, it not being usual for the Strasbourg court to award exemplary damages. Furthermore, it has to be said that it is unlikely that exemplary damages would be awarded in domestic law for a mistake rather than for bad faith. *Keegan* is an important decision. How it will be applied in domestic law is yet to be seen.

Stephen Simblet is a barrister at Garden Court Chambers, London, specialising in claims against the police, inquests and mental health work. He was counsel for the Keegan family in the county court, Court of Appeal and (with Maya Sikand, barrister, Garden Court Chambers, London) in the ECtHR's application.

The author is grateful to Chris Topping, Jackson and Canter solicitors, Liverpool, solicitor for the Keegan family for his comments and improvements to this article.

Qualification Directive becomes part of English law

Judith Farbey describes the Home Office's introduction of new measures aimed at transposing the Qualification Directive ('the Directive') into English law.[1] Changes to the Immigration Rules apply to all asylum applications recorded by the Home Office on or after 9 October 2006.[2] The Refugee or Person in Need of International Protection (Qualification) Regulations (RPNIP(Q) Regs) 2006 SI No 2525 apply to all asylum applications and appeals pending on that date. See also page 10 of this issue.

Introduction

The new measures deal with both asylum claims and claims for humanitarian protection. They are designed to give partial effect to the Directive. Many elements of the Directive 'do not require implementation as equivalent provision is already made'.[3] The 1951 refugee convention remains the fundamental source of refugee law,[4] although the new measures raise interesting points of interpretation.

Well-founded fear

A refugee is a person demonstrating 'well-founded fear of being persecuted' (article 1A(2) of the refugee convention). The Immigration Rules establish a duty of co-operation between an asylum claimant and the Home Office in the assessment of well-founded fear. The duty, deriving from article 4(1) of the Directive, may go towards satisfying the shared fact-finding duty which the United Nations High Commissioner for Refugees (UNHCR) handbook exhorts.[5]

Persecution

In *Sandralingham and Ravichandran v Secretary of State for the Home Department*; *Rajendrakumar v Immigration Appeal Tribunal and Secretary of State for the Home Department* [1996] Imm AR 97, the Court of Appeal essentially glossed persecution as implying a violation of human rights. The link between persecution and human rights violations has grown more forceful in subsequent case-law. In accordance with article 9 of the Directive, the RPNIP(Q) Regs give statutory force to this trend. An act of persecution must be 'sufficiently serious by its nature or repetition as to constitute a severe violation of a basic human right' or be an 'accumulation of various measures' of this sort (reg 5(1)).

The RPNIP(Q) Regs also give examples of acts of persecution (reg 5(2)). These very much mirror the examples given in the Directive (article 9(2)), including physical, mental and sexual violence; legal and administrative measures which are discriminatory or implemented in a discriminatory way; and prosecution or punishment which is disproportionate or discriminatory. The RPNIP(Q) Regs fail to transpose the Directive's reference to 'acts of a gender-specific or child-specific nature'. These forms of serious harm, such as gender violence and child conscription, may thus form the subject of future litigation.

Refugee convention reasons

A refugee's fear of persecution must be 'for reasons of race, religion, nationality, membership of a particular social group or political opinion' (article 1A(2) of the refugee convention). As commentators and courts have highlighted, the words 'for reasons of' imply only a broad linkage between a refugee convention reason and feared persecution.[6] The Directive reflects the breadth of this linkage: there must be a 'connection between' a refugee convention reason and the acts of persecution (article 9(3)). Under the RPNIP(Q) Regs, an act of persecution must be committed 'for at least one of the [refugee convention] reasons' (reg 5(3)). Hence the RPNIP(Q) Regs import the breadth of the refugee convention and the Directive.

The RPNIP(Q) Regs give examples of what is included within the scope of each refugee convention reason (reg 6(1)). On the whole, the examples reflect existing English case-law but bring welcome clarity. Thus, it is now clear that religion as a refugee convention reason includes abstention from religious acts. Even the concept of 'particular social group' is not exhaustively defined, but uses the Directive's definition (article 10(1)(d)) as an 'example' (reg 6(1)(d)). This should enable decision-makers to apply existing principles set down in *Islam v Secretary of State for the Home Department*; *R v Immigration Appeal Tribunal and another ex p Shah* [1999] 2 AC 629.

Exclusion

The RPNIP(Q) Regs deal with exclusion from refugee status under articles 1D to 1F of the refugee convention, which apply to persons undeserving of protection on account of criminality or atrocious acts. Most familiarly, article 1F excludes a person from refugee status if s/he has 'committed a serious non-political crime outside the country of refuge prior to … admission to that country as a refugee'. Under the RPNIP(Q) Regs, a 'serious non-political' crime includes 'a particularly cruel action, even if it is committed with an allegedly political objective' (reg 7(2)(b)). While this reflects the Directive (article 12(2)(b)), the notion of a 'particularly cruel action' is new to English law and does not derive from the refugee convention. It ought to be interpreted in line with existing English case-law, under which a crime will cease to count as political if the means are disproportionately violent to the political end (see *T v Secretary of State for the Home Department* [1996] Imm AR 443).

Family reunion

Practitioners should note that the family reunion provisions now extend to unmarried and same-sex partners (HC 395, para 352AA).

1 See Council Directive 2004/83/EC.
2 See *Statement of changes in Immigration Rules*, Cm 6918, available at: www.ind.homeoffice.gov.uk. Cm 6918 amends *Statement of changes in Immigration Rules*, HC 395.
3 Transposition note prepared by the Home Office as an annex to the *Explanatory memorandum* to the RPNIP(Q) Regs, available at: www.opsi.gov.uk.
4 See *The Convention relating to the Status of Refugees done at Geneva on 28 July 1951* and *The Protocol relating to the Status of Refugees done at New York on 31 January 1967*.
5 UNHCR, *Handbook on procedures and criteria for determining refugee status under the 1951 convention and the 1967 protocol relating to the status of refugees*. 1992, para 196.
6 See, for example, James Hathaway, *The law of refugee status*, Butterworths, 1991, p140.

Judith Farbey is a barrister at Tooks Chambers, London.

Women and membership of a particular social group

■ ***Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department* [2006] UKHL 46, 18 October 2006**

Facts: In both cases it was common ground that the appellant had a well-founded fear of being persecuted if she were returned to her respective home country, Iran (K) and Sierra Leone (Fornah). The only issue in each case was whether the appellant's well-founded fear was 'for reasons of … membership of a particular social group [PSG]'.

The adjudicator accepted that K's husband was arrested and detained by the Iranian authorities and that she and her son were targeted. The adjudicator found this to be consistent with the way that the Iranian authorities acted so as to menace the families of prisoners, and concluded that if K was returned to Iran she would be detained for reasons of her membership of her husband's family. The Immigration Appeal Tribunal (IAT) allowed the secretary of state's appeal. It indicated that the adjudicator had erred in law in not following *Quijano v Secretary of State for the Home Department* [1997] Imm AR 227. The Court of Appeal upheld that decision.

In *Fornah*, the adjudicator also allowed her appeal on the ground that she had a well-founded fear of enforced genital mutilation for reasons of her membership of a PSG, namely Sierra Leonean women. The IAT allowed the secretary of state's appeal. The Court of Appeal, Arden LJ dissenting, upheld that decision.

Decision: The judgments provide a clear answer to the problem that has been thought to arise where a family member attracts the adverse attention of the authorities, whether for reasons not covered by the 1951 Convention relating to the Status of Refugees ('the refugee convention') or reasons unknown, and persecutory treatment is then directed to other family members; and overrule *Quijano*. In deciding a family is a PSG, the judgments rely on and approve *The UNHCR [United Nations High Commissioner for Refugees] position on claims for refugee status under the 1951 Convention relating to the Status of Refugees based on a fear of persecution due to an individual's membership of a family or clan engaged in a blood feud*, 17 March 2006, p5. Lord Hope stated:

> *Persecution of a person simply because he is a member of the same family as someone else is as arbitrary and capricious, and just as pernicious, as persecution for reasons of race or religion. As a social group the family falls naturally into the category of cases to which the refugee convention extends its protection.*

The Lords saw no difficulty in identifying females in Sierra Leone as a PSG in light of the strong element of sexual discrimination in Sierra Leone where patriarchy is deeply entrenched. They were not concerned that once females in Sierra Leone have undergone enforced genital mutilation they are no longer at risk of being persecuted in that way as there is no requirement that all members of the group need to be at risk. While Lord Bingham and Baroness Hale preferred this wider approach, Lords Hope, Rodger and Brown appear to favour the narrower group of uninitiated females in Sierra Leone on the basis that this is the despised and distinct group within the society of Sierra Leone. However, the Lords made it clear that a PSG should not be defined so narrowly as to only include those persons likely to be persecuted, given the acceptance that the convention reason for the persecution need not be the sole reason, provided it is an effective reason.

Comment: Aside from the clarification of the law in the above respects, the decision is likely to be of practical assistance to practitioners in the following ways:

■ There is a reaffirmation of well-known principles such as:

– those relevant to a PSG as set out in *R v Immigration Appeal Tribunal ex p Shah* and Islam [1999] 2 AC 629 using more up-to-date materials; and

– the meaning of 'for reasons of' in establishing causation.

■ The UNHCR's *Guidelines on international protection*: *'membership of a particular social group' within the context of article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 7 May 2002, are cited as a 'very accurate and helpful distillation' of the effect of international authority on the PSG convention reason. These guidelines were issued following an expert meeting at San Remo in September 2001 convened by the UNHCR. Baroness Hale applauded the approach taken at San Remo in concluding that: 'The text, object and purpose of the refugee convention require a gender-inclusive and gender-sensitive interpretation.' She referred to the UNHCR's *Guidelines on international protection: gender-related persecution within the context of article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 7 May 2002, and said: 'Thus, while the guidelines stop short of saying directly that women are always a particular social group, they do make it clear that if a woman is persecuted because she is a woman and women generally are assigned an inferior status in the society, she should qualify for recognition as a refugee.'

She also described the adjudicator's credibility findings in relation to K as an 'admirable example of a gender-sensitive approach' in that he gave K the benefit of the doubt in failing to disclose the fact that she had been raped by the Revolutionary Guards until after her interview and in accepting that the final trigger for her flight from Iran might not be the risk to herself, but the risk to her child. Notwithstanding the gender guidelines, such a gender-sensitive approach on the part of immigration judges is still all too rare.

■ There is a clarification of the effect of the EU Directive 2004/83/EC on interpreting a PSG. The Directive states that:

> *A group shall be considered to form a particular social group where in particular: [(i)] members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and [(ii)] that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society* (article 10(1)(d)).

The secretary of state argued that a PSG for the purposes of the refugee convention would need to satisfy both (i) and (ii). The Lords preferred the view of the UNHCR that the criteria in (i) and (ii) should be treated as alternatives, providing for recognition of a PSG where either criterion is met, and not requiring that both be met. In the premises the Lords concluded that the Directive and the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 SI No 2525 bringing it into force would have to be interpreted consistently with this definition.

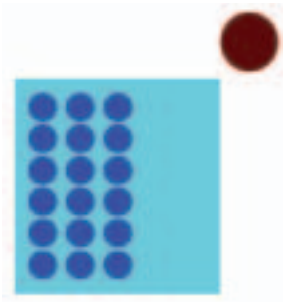
■ The Directive has been implemented by *Statement of changes in Immigration Rules*, Cm 6918, which took effect on 9 October

2006. The secretary of state will now issue a person granted asylum or humanitarian protection a UK residence permit that is valid for five years and renewable (para 339Q).

Practitioners may be met with reluctance on the part of the secretary of state or judges to engage in arguments relating to a convention reason when the grant of leave will be the same when there is no convention reason. The importance of refugee status to asylum claimants has been recognised in the Lords' judgments. If such claimants are recognised as refugees, all the benefits of the refugee convention are available to them and they will be accorded the status that the contracting states have undertaken to accord to a refugee and all the rights that attach to it. In addition, not all contracting states are parties to the European Convention on Human Rights and rights provided by EU Directives may be subject to change in the future. Lord Hope describes the benefit of being recognised as a refugee as a 'very substantial additional benefit which is well worth arguing for'. (See also pages 10 and 31 of this issue.)

Melanie Plimmer represented K and is a barrister at Garden Court North Chambers, Manchester, specialising in public law with particular experience of representing individuals against the state in human rights, immigration and asylum, prison and discrimination cases.

New statutory duty to promote disability equality



Potentially the most significant recent legislative development in relation to discrimination and equality is the imposition of enforceable positive duties on public authorities. In Great Britain,[1] the first such duty came in the Race Relations (Amendment) Act 2000 after the Stephen Lawrence inquiry had exposed institutional racism within the police service and other public authorities.[2] Barbara Cohen explains how, from 4 December 2006, public authorities will have a legal duty to promote disability equality under Disability Discrimination Act (DDA) 1995 Part 5A (inserted by DDA 2005 s3).

The 'general duty'

DDA 1995 s49A makes it a duty of every public authority in carrying out its functions to have due regard to:

- the need to eliminate unlawful disability discrimination;
- the need to eliminate harassment of disabled people that is related to their disabilities;
- the need to promote equality of opportunity between disabled people and others;
- the need to take steps to take account of disabled people's disabilities even where that involves treating disabled people more favourably;
- the need to promote positive attitudes towards disabled people; and
- the need to encourage participation by disabled people in public life.

'Due regard' means that 'in all their decisions and functions authorities should give due weight to the need to promote disability equality in proportion to its relevance'.[3]

Unlike the Race Relations Act (RRA) 1976 general duty, which applies to public authorities listed in RRA Schedule 1A, the general disability equality duty applies to 'every public authority' (DDA 1995 s49A(1)), including any person '… certain of whose functions are functions of a public nature' (DDA 1995 s49B(1)(a)). By adopting the Human Rights Act 1998 definition of a public authority (s6(3)(b)), the DDA 1995 brings within the ambit of the disability equality duty private and voluntary sector bodies which, under contract or other arrangements, '[exercise] a function which would otherwise be exercised by the state - and where individuals have to rely upon that person for the exercise of the governmental function'.[4] It also introduces some degree of uncertainty since the meaning of 'functions of a public nature' remains unclear, and whether a private or voluntary sector organisation is subject to the disability equality duty will be, ultimately, for the courts to decide. There is no uncertainty, however, that the general disability equality duty is fully binding on 'pure' public authorities, including ministers, government departments and executive agencies, local authorities, NHS trusts and boards, governing bodies of maintained educational establishments, chief constables, police authorities and inspection and audit agencies.

Specific disability equality duties

Regulations made under the DDA 1995 prescribe specific disability equality duties that apply to public authorities listed in Schedules to these regulations: the Disability Discrimination (Public Authorities) (Statutory Duties) Regulations (DD(PA)(SD) Regs) 2005 SI No 2966 and the Disability Discrimination (Public Authorities) (Statutory Duties) (Scotland) Regulations (DD(PA)(SD)(S) Regs) 2005 SSI No 565.

Public authorities listed in Schedule 1 to these regulations, including the main bodies within central and local government, the NHS, the police, other national bodies such as the Housing Corporation, the Legal Services Commission, and regulatory bodies including the Law Society and the General Medical Council, are each required to publish a disability equality scheme.[5] An authority's disability equality scheme must state:

(a) how disabled people have been involved in the development of the scheme;

(b) the authority's methods for assessing the impact, or likely impact, of its policies and practices on equality for disabled people;

(c) the steps the authority will take to fulfil its general duty (its action plan);

(d) the authority's arrangements for gathering information about the effect of its policies and practices on disabled people and, in particular, information on their effect on:

(i) the recruitment, development and retention of disabled employees;

(ii) educational opportunities and achievements of disabled pupils and students; and

(iii) the extent to which services and other functions take account of the needs of disabled people; and

(e) the authority's arrangements for making use of such information in complying with the general duty (DD(PA)(SD) Regs and DD(PA)(SD)(S) Regs reg 2(3)).

Within three years of publishing its scheme, an authority must take the steps in (c) above and carry out the arrangements in (d) and (e) above (DD(PA)(SD) Regs reg 3 and DD(PA)(SD)(S) Regs reg 4). It must report annually on the steps it has taken, the results of its information-gathering and the use it has made of the information gathered (DD(PA)(SD) Regs reg 4 and DD(PA)(SD)(S) Regs reg 5). An authority must review its scheme and publish a revised scheme at least every three years (DD(PA)(SD) Regs reg 2(4) and DD(PA)(SD)(S) Regs reg 2(4)).

DD(PA)(SD) Regs reg 5 also requires the secretaries of state listed in Schedule 2, including all those with domestic responsibilities, and the National Assembly for Wales (and the Scottish ministers: DD(PA)(SD)(S) Regs reg 6) to publish a report every three years:

- giving an overview of progress towards equality of opportunity between disabled people and others in the sector covered by their departments, or in Wales (or Scotland); and
- setting out proposals for co-ordination of action by public authorities within that sector, or nation, to bring about further progress towards disability equality.

Codes of practice

The Disability Rights Commission (DRC) has issued statutory codes of practice for England and Wales, and for Scotland, giving practical guidance to public authorities on compliance with the general and specific duties.[6] Like other DRC statutory codes of practice, these codes are admissible as evidence in legal proceedings, and courts or tribunals are required to take into account any part of a code that appears to them to be relevant (DDA 1995 s53A(8A)).

Enforcement of the equality duties

Judicial review to enforce compliance with the general equality duty

The DRC and any legal or natural person or group of persons with a sufficient interest may apply for judicial review to challenge a public authority's breach of its general equality duty under the DDA 1995. Judicial review could be sought by one or more employees or their trade union, one or more actual, former or potential service users or an organisation that represents the interests of disabled people who are affected, or who are likely to be affected, by an authority's breach of its disability equality duty. *R (Elias) v Secretary of State for Defence and Commission for Racial Equality (intervenor)* [2005] EWHC 1435 (Admin), 7 July 2005; [2005] IRLR 788, the first application for judicial review to challenge breach of the general race equality duty, may serve as a useful precedent.[7]

Statutory enforcement powers of the Disability Rights Commission

The DDA 1995 gives the DRC powers to enforce compliance with the specific duties in the DD(PA)(SD) and DD(PA)(SD)(S) Regs (DDA 1995 ss49E and 49F). Where the DRC is satisfied that a public authority has failed, or is failing, to comply with a specific duty it may serve a compliance notice requiring the authority to comply and to provide written information about the steps it has taken. If the authority fails to comply with the requirements of the compliance notice the DRC may apply to the county court/sheriff for an order requiring the authority to comply.

From October 2007, the Commission for Equality and Human Rights will have comparable powers to enforce specific disability equality duties and a new power and new procedures to give notice requiring compliance with the general disability equality duty (see Equality Act 2006 s32 and Sch 2).

Significance of the disability equality duty

The disability equality duty shifts the burden from individual victims to public bodies and expands the target beyond eradicating discrimination to promoting and securing real equality for disabled people. Compliance should lead to greater transparency in the ways that public authorities make decisions and carry out their functions. One result will be an easier task for those who wish to challenge a policy or practice as discriminatory, as they will now have far better access to relevant information, including the results of disability equality impact assessments, to support their claims.

1 Northern Ireland Act 1998 s75 imposed equality duties on nine different grounds on specified Northern Ireland public authorities.
2 *The Stephen Lawrence inquiry. Report of an inquiry by Sir William Macpherson of Cluny*, Cm 4262-I, February 1999.
3 Disability Rights Commission, *The duty to promote disability equality. Statutory code of practice. England and Wales*, 2005, para 2.34, available at: www.drc.org.uk/pdf/4008_477_DED_Code_Dec05_pdf.pdf.
4 See note 3, para 5.4.
5 DD(PA)(SD) Regs reg 2(6) requires national and local public authorities and most educational establishments to publish their disability equality schemes by 4 December 2006; governing bodies of primary schools and maintained special schools in England must do so by 3 December 2007; and governing bodies of schools in Wales must do so by 1 April 2007. DD(PA)(SD)(S) Regs reg 2(6) requires all listed public authorities to publish their schemes by 4 December 2006.
6 DDA 1995 s53A(1C); and see note 3 and *The duty to promote disability equality. Statutory code of practice. Scotland*, 2006, available at: www.drc-gb.org/pdf/4008_376_SCOTCON3.pdf.
7 See also *Secretary of State for Defence v Elias* [2006] EWCA Civ 1293, 10 October 2006. While the finding that the secretary of state had failed to comply with the RRA duty was not appealed, the Court of Appeal referred to the importance of the duty in upholding the High Court's finding of indirect discrimination.

Barbara Cohen is a discrimination law consultant.

updater

Legislation

EDUCATION

Education Act 2002 (Commencement No 9 and Savings) Order 2006 SI No 2895

This Order brings into force certain provisions of the Education Act 2002, except in relation to Wales, on 6 November 2006.

IMMIGRATION

Asylum and Immigration Tribunal (Fast Track Procedure) (Amendment) Rules 2006 SI No 2789

These rules amend the Asylum and Immigration Tribunal (Fast Track Procedure) Rules 2005 SI No 560, to bring them into line with the Asylum and Immigration Tribunal (Procedure) Rules 2005 SI No 230, as amended by the Asylum and Immigration Tribunal (Procedure) (Amendment) Rules 2006 SI No 2788. In force 13 November 2006.

Immigration, Asylum and Nationality Act 2006 (Commencement No 3) Order 2006 SI No 2838

Article 3 of this Order brings into force, on 13 November 2006, Immigration, Asylum and Nationality Act (IANA) 2006 s9 (abandonment of appeal). Article 4 brings into force IANA s58 (acquisition of British nationality, etc) on 4 December 2006. The provisions commenced by article 4 will not have effect in relation to an application for registration made before 4 December 2006.

MENTAL HEALTH

Mental Capacity Act 2005 (Appropriate Body) (England) Regulations 2006 SI No 2810

These regulations are made under Mental Capacity Act (MCA) 2005 s30(4) and define 'appropriate body' for the purposes of MCA ss30–32. MCA s30(1) provides that certain research carried out on, or in relation to, a person without capacity is unlawful unless it is carried out as part of a project which is approved by an appropriate body and satisfies further requirements specified in the Act.

■ Reg 1 provides that these regulations apply in relation to research carried out in England. It further provides for the regulations to come into force on 1 February 2007 for the purposes of enabling applications for ethical approval of research to be made and decided under the Act and on 1 April 2007 for all other purposes.

■ Reg 2 defines an appropriate body as a committee which is established to advise on the ethics of intrusive research in relation to people who lack capacity to consent to it and which is recognised for that purpose by the secretary of state.

Mental Capacity Act 2005 (Commencement No 1) Order 2006 SI No 2814

This Order is the first commencement order under the Mental Capacity Act (MCA) 2005.

■ Article 2 brings MCA ss30 (research), 31 (requirements for approval), 32 (consulting carers), 33 (additional safeguards) and 34 (loss of capacity during research project) into force on 1 April 2007 regarding any research carried out as part of a project begun on or after 1 April 2007.

■ Article 3 brings ss30 to 34 into force on 1 February 2007 for the purpose of enabling research applications to be made to, decided by, an appropriate body.

■ Article 4 provides that where a research project has begun before 1 April 2007 and was approved before that date then ss30–34 do not come into force until 1 April 2008.

■ Section 30 provides that intrusive research on, or in relation to, people without capacity is unlawful unless certain conditions, set out in that section and in ss31–34, are complied with.

■ Article 5 brings ss35–41 into force on 1 November 2006 for two purposes. First, to enable the health secretary to make arrangements under s35 (appointment of independent mental capacity advocates (IMCAs) to enable IMCAs to be available. Second, to enable local authorities to appoint IMCAs in accordance with the Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (General) Regulations 2006 SI No 1832.

■ Article 5 brings ss35–41 fully into force on 1 April 2007.

Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Expansion of Role) Regulations 2006 SI No 2883

These regulations adjust the obligation to make arrangements about the availability of independent mental capacity advocates (IMCAs), which is imposed by Mental Capacity Act 2005 s35. Under the regulations, the secretary of state may also make arrangements to enable IMCAs to be available to represent a person who lacks capacity to agree to the outcome of an accommodation review or to protective measures taken in adult protection cases. In force for the purpose of enabling the secretary of state to make arrangements as a result of reg 2 on 1 November 2006 and, for all other purposes, on 1 April 2007.

PRACTICE AND PROCEDURE

Youth Justice and Criminal Evidence Act 1999 (Commencement No 12) Order 2006 SI No 2885

This Order commences, for remaining purposes, Youth Justice and Criminal Evidence Act (YJCEA) 1999 s61(2), which provides that YJCEA Part 2 Chapter 4 shall have effect for the purposes of proceedings before a service court subject to any modifications which the secretary of state may, by order, specify. Chapter 4 contains provisions allowing reporting restrictions to be imposed in certain proceedings involving vulnerable persons. In force 6 December 2006.

Youth Justice and Criminal Evidence Act 1999 (Application to Standing Civilian Courts) Order 2006 SI No 2888

This Order applies, with modifications, Youth Justice and Criminal Evidence Act 1999 Part 2 Chapters 1–3 and 5 to standing civilian courts. These chapters contain a range of measures designed to help young, disabled, vulnerable or intimidated witnesses give evidence in criminal proceedings. The Order also contains modifications to certain provisions of chapter 4 dealing with reporting restrictions. In force 6 December 2006.

Criminal Justice Act 1988 (Application to Service Courts) (Evidence) Order 2006 SI No 2890

This Order revokes Criminal Justice Act 1988 (Application to Service Courts) (Evidence) Order 1996 SI No 2592, which applied the provisions of Criminal Justice Act 1988 ss32(1)–(3), 32A and 34A, with modifications, to proceedings before service courts. The provisions related to the giving of evidence by witnesses other than the accused through a live television link and by video recording of an interview with a child witness, and prohibited the cross-examination of a child witness by the accused in person. In force 6 December 2006.

Standing Civilian Courts (Evidence) Rules 2006 SI No 2891

These rules make provision for a range of measures designed to help young, disabled, vulnerable or intimidated witnesses give evidence in proceedings in the standing civilian court. These measures are contained in Youth Justice and Criminal Evidence Act 1999 Part 2, certain provisions of which are applied, with modifications, to proceedings in the standing civilian court by the Youth Justice and Criminal Evidence Act 1999 (Application to Standing Civilian Courts) Order 2006 SI No 2888 (see above). In force 6 December 2006.

SOCIAL SECURITY

Housing Benefit and Council Tax Benefit (Amendment) Regulations 2006 SI No 2813

These regulations amend the Housing Benefit Regulations 2006 SI No 213, the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006 SI No 214, the Council Tax Benefit Regulations 2006 SI No 215 and the Council Tax Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006 SI No 216 to grant authorities the power to modify those regulations to provide that certain payments made under the Armed Forces and Reserve Forces (Compensation Scheme) Order 2005 SI No 439 may be disregarded from the calculation of income for housing benefit or council tax benefit purposes. In force 20 November 2006.

▶ Books

Actions against the police

Police Misconduct
legal remedies 4th edn
John Harrison/Stephen Cragg/
Heather Williams QC
April 2005 ♦ Pb 0 905099 91 5 ♦ 760pp ♦ £37

Community care

Community Care and the Law
3rd edn
Luke Clements
2004 ♦ Pb 1 903307 19 8 ♦ 758pp ♦ £37

Crime

ASBOs
a practitioner's guide to defending anti-social behaviour orders
Maya Sikand
Sept 2006 ♦ Pb 1 903307 41 4 ♦ 496pp ♦ £45

Defending Suspects at Police Stations 5th edn
Ed Cape
Sept 2006 ♦ Pb 1 903307 44 9 ♦ 1008pp ♦ £52

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

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

Identification
investigation, trial and scientific evidence
Paul Bogan
2004 ♦ Pb 1 903307 25 2 ♦ 502pp ♦ £37

Employment

Discrimination Law Handbook
2nd edn
COMING SOON
Camilla Palmer/Barbara Cohen/
Tess Gill/Karon Monaghan/
Gay Moon/Mary Stacey
Edited by Aileen McColgan
Dec 2006 ♦Pb 978 1 903307 38 0 ♦c900pp ♦£55

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

Maternity and Parental Rights
a guide to parents' legal rights at work
3rd edn
Camilla Palmer/Joanna Wade/
Katie Wood/Alexandra Heron
Sept 2006 ♦ Pb 1 903307 40 6 ♦ 880pp ♦ £35

Employment Law
an adviser's handbook 6th edn
Tamara Lewis
Oct 2005 ♦ Pb 1 903307 36 8 ♦ 804pp ♦ £28

Employment Tribunal Claims
tactics and precedents
Revised 1st edn
Naomi Cunningham
March 2005 ♦ Pb 1 903307 50 3 ♦ 440pp ♦ £25

Employment Tribunal Procedure
3rd edn
Judge Jeremy McMullen QC/
Rebecca Tuck/Betsan Criddle
2004 ♦ Pb 1 903307 29 5 ♦ 758pp ♦ £37

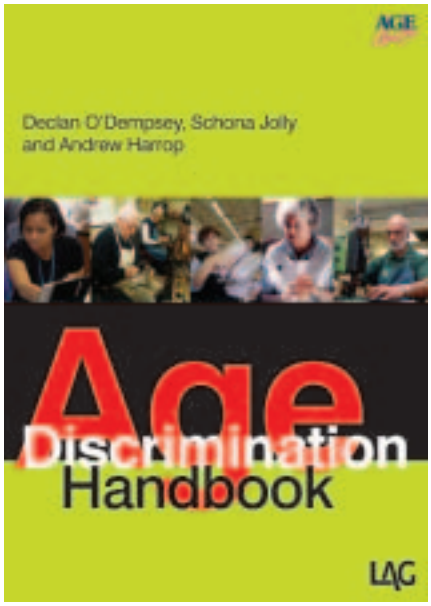
Gypsy and Traveller law

Gypsy and Traveller Law
Edited by Marc Willers/Chris Johnson
2004 ♦ Pb 1 903307 26 0 ♦ 488pp ♦ £29

Housing

Homelessness and Allocations
7th edn
Andrew Arden QC/Caroline Hunter/
Lindsay Johnson
Sept 2006 ♦ Pb 1 903307 37 6 ♦ 880pp ♦ £45

Defending Possession Proceedings 6th edn
Nic Madge/Derek McConnell/
John Gallagher/Jan Luba QC
August 2006 ♦ Pb 1 903307 30 9 ♦ 840pp ♦ £48



Leasehold Disputes
a guide to Leasehold Valuation Tribunals
Francis Davey/Justin Bates
2004 ♦ Pb 1 903307 27 9 ♦ 256pp ♦ £20

Housing Law Casebook 3rd edn
Nic Madge
2003 ♦ Pb 1 903307 10 4 ♦ 1264pp
** Reduced from £39 to £19.50*

Quiet Enjoyment 6th edn
Andrew Arden QC/David Carter/
Andrew Dymond
2002 ♦ Pb 1 903307 14 7 ♦ 320pp ♦ £29

Housing and Human Rights Law
Christopher Baker/David Carter/
Caroline Hunter
2001 ♦ Pb 1 903307 05 8 ♦ 252pp ♦ £19

Repairs
tenants' rights 3rd edn
Jan Luba QC/Stephen Knafler
1999 ♦ Pb 0 905099 49 4 ♦ 420pp ♦ £29

Human rights

Human Rights Act Toolkit
Jenny Watson/Mitchell Woolf
2003 ♦ Pb 1 903307 15 5 ♦ 256pp ♦ £22

European Human Rights Law
Keir Starmer QC
1999 ♦ Pb 0 905099 77 X ♦ 960pp
** Reduced from £35 to £25*

Immigration and asylum

Support for Asylum-seekers
a guide to legal and welfare rights 2nd edn
Sue Willman/Stephen Knafler/
Stephen Pierce
2004 ♦ Pb 1 903307 24 4 ♦ 788pp ♦ £39

noticeboard

Conferences and courses

Child Poverty Action Group
Human rights and social security: possible challenges
5 December 2006
10 am–4.30 pm
London
£195 lawyers (other rates available)
5 hours CPD
This one-day course explores some of the areas where the principles of human rights law may have an impact on the social security and tax credits systems and includes:
■ an explanation of the different interpretative approach required by human rights law;
■ an overview of the critical provisions of the Human Rights Act 1998;
■ the articles of the European Convention on Human Rights most applicable to social security and tax credits and analysis of their key aspects;
■ where and how human rights challenges may be brought; and
■ identification of possible areas of challenge within the social security and tax credits systems, and consideration of those challenges which have already been brought.
E-mail: training@cpag.org.uk
www.cpag.org.uk

JUSTICE/Sweet & Maxwell
Custody and detention: obligations, rights and remedies
6 December 2006
9 am–5.10 pm
London
£325 + VAT standard fee, 10% discount for JUSTICE members
6 hours CPD
This conference will bring you the latest analysis of the obligations of public authorities and private actors responsible for detention towards prisoners and detainees, the legal rights of those detained and the remedies available to them.
Keynote speaker: Anne Owers CBE, HM Chief Inspector of Prisons
Tel: 020 7393 7859
E-mail: conferences@sweetandmaxwell.co.uk
www.justice.org.uk

Social Housing Law Association (SHLA)
First annual conference
8 December 2006
9 am–5 pm
London
£175 SHLA members, £225 non-members
5.5 hours CPD
Key issues: possession claims; choice-based lettings; anti-social behaviour; tolerated trespassers; the Respect Action Plan; and future challenges facing social housing.
Keynote speech: Lord Justice Chadwick.
Tel: 020 7253 9992
E-mail: info@shla.org.uk
www.shla.org.uk

Centre for Law, Gender and Sexuality/Liberty/LAG
Encountering human rights: gender/sexuality, activism and the promise of law
5/6 January 2007
London
£165 full rate
£27 student or low/unwaged
6 hours CPD
This two-day conference will bring together activists, academics and practitioners to assess how human rights law and practice in the UK interacts with issues concerning gender and sexuality.
Confirmed plenary speakers: Justice Yvonne Mokgoro (Constitutional Court of South Africa), Zillah Eisenstein (Ithaca College and anti-racist feminist activist), Pragna Patel (Southall Black Sisters and Women against Fundamentalism), and Gwen Brodsky and Shelagh Day (Poverty and Human Rights Centre, Canada).
www.kent.ac.uk/clgs/events/genderHR/index.htm

Lectures, seminars and meetings

Centre for the Study of Human Rights
Human rights: some old truths and necessary new directions
7 December 2006
6.30 pm–8 pm
London
Free
In this public lecture, marking International Human Rights Day, Manfred Nowak subjects the state of contemporary human rights and its future prospects to critical scrutiny.
Speaker: Professor Manfred Nowak, UN Special Rapporteur on Torture
Chair: Dr Margot Salomon
www.lse.ac.uk/Depts/human-rights

University College London (UCL) Faculty of Laws
Current legal problems 2006–2007: Lecture series
Terror, torture and the new constitutionalism
7 December 2006
6 pm–7 pm
London
Free
1 hour CPD
Speaker: Rodney Austin (UCL)
E-mail: d.fourniol@ucl.ac.uk
www.ucl.ac.uk/laws

The legal as a current problem
14 December 2006
Speaker: Dr Oren Ben-Dor (University of Southampton)
See above for further details

The rights and responsibilities of age
18 January 2007
Speaker: Jonathan Herring (Exeter College, Oxford)
See above for further details

Other

Asylum Support Appeals Project (ASAP)
Destitution Awareness Week
4–8 December 2006
Croydon
ASAP is a legal charity offering advice and representation to asylum-seekers in their asylum support appeals at the Asylum Support Adjudicators (ASA) in Croydon. It currently runs a duty scheme at the ASA two days a week where asylum-seekers can access free representation but wants to run the scheme every day for one week to highlight the difficulties that destitute asylum-seekers face.
Tel: 020 8684 5875 for more information or, if you are a barrister, solicitor or legal practitioner, to volunteer for the ASAP duty scheme.
www.asaproject.org.uk

Advertise your events in noticeboard for FREE!

If you have an event you would like to advertise in *Legal Action*'s noticeboard, please e-mail a short description, including contact details, cost and any CPD accreditation to: hjones@lag.org.uk.

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

Copy deadlines for entries to appear in:

January: 27 November
February: 8 January
March: 5 February
April: 5 March
May: 9 April
June: 7 May
July: 11 June

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

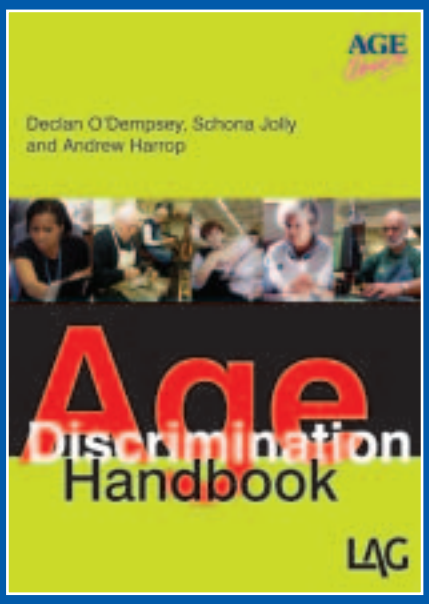
NEW AND FORTHCOMING TITLES FROM LAG BOOKS

Age Discrimination Handbook

Declan O'Dempsey, Schona Jolly and Andrew Harrop

The Employment Equality (Age) Regulations in force from October 2006 implement the EU Framework Directive on Equal Treatment in Employment and Occupation, making discrimination on the ground of age unlawful in employment and education. *Age Discrimination Handbook* is a comprehensive, yet practical, guide to these changes.

Pb 1 903307 48 1 760pp October 2006 £35

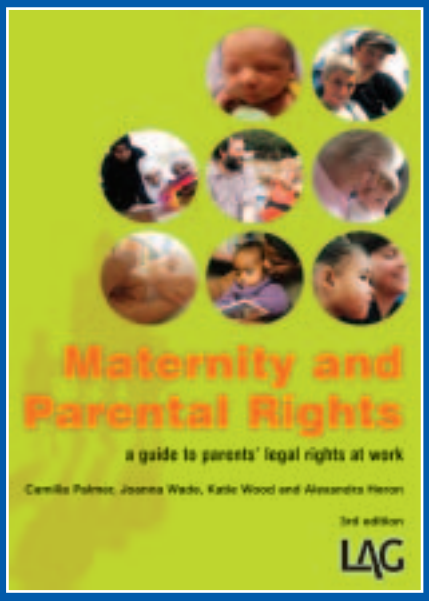


Maternity and Parental Rights

Camilla Palmer, Joanna Wade, Katie Wood and Alexandra Heron

Often called 'the bible of working parents' rights', *Maternity and Parental Rights* is a complete guide to the statutory framework relating to parents' rights at work – a patchwork of UK and European employment, discrimination and social security law.

Pb 1 903307 40 6 880pp September 2006 3rd edition £35

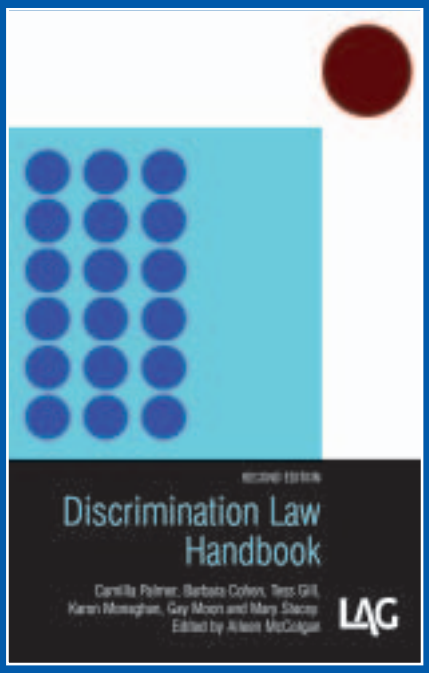


Discrimination Law Handbook

Camilla Palmer, Barbara Cohen, Tess Gill, Karon Monaghan, Gay Moon and Mary Stacey. Edited by Aileen McColgan

Second edition of the practical, accessible guide to all aspects of discrimination law covering employment, goods and services. This edition has been updated to include all the provisions that came into force in October 2006.

Pb 978 1 903307 38 0 c900pp December 2006 2nd edition £55



www.lag.org.uk

Tel: 020 7833 2931 or E-mail: books@lag.org.uk

LAG books