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

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contents
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Cover photo by Alamy Images illustrates cover story 'Judges and terrorism after the 7/7 attacks'

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editorial
Glossing over the problems

The Legal Services Commission's (LSC's) latest annual report has crept out rather quietly (see page 4 of this issue). This is a shame, because it is an attractive document, packed with information, that makes a brave effort to lighten the gloom around legal aid with its vibrant colours and upbeat tone. As with last year's report, the lavish production includes a number of full-page photographs – and each section is colour-themed.

But on close inspection, readers will find that 2004/2005 has been quite a ticklish one for the LSC. It has undergone the upheaval of major internal structuring. The legal aid budget is still under enormous pressure. And a number of specific targets and key milestones to which the LSC committed itself in last year's *Corporate plan* have not been met – or, at least, not met in their original form.

Eyebrows may be raised by the fact that – during the past 12 months – the LSC has revised as many delivery targets as those that it has managed to achieve. In some cases, the LSC has given a satisfactory account of the changes; for example, the wise decision to defer the national roll-out of the preferred supplier pilot from April 2005 until 2006, in order to allow time for an evaluation to be completed.

But other revisions suggest that there were problems endemic in the policies that underpinned the targets. For example, the commitment to establishing a directly employed immigration office has been put firmly on the back burner. The July 2005 deadline for introducing competitive tendering for London criminal contracts has been delayed to mid-2006 because of the 'timescale for consultation and the complexity of the issues'. And, in social welfare law, there has been a move away from the plan to test 'managed competition' towards a holistic approach to service delivery along the lines set out in the Community Legal Service (CLS) strategy (see August 2005 *Legal Action* 3 and 6).

By far the most embarrassing admission in the annual report is that the LSC has failed to increase by 10 per cent the number of people who had advice from contracted suppliers in non-immigration areas of social welfare law; this goal was linked to a key Public Service Agreement (PSA) of the Department for Constitutional Affairs (DCA) under the 2002 Spending Review. Instead of going up, the number of new case starts in these areas of law has actually fallen by five per cent.

The explanations for this shortfall offered by the LSC are that there has been a reduction in problems with a legal solution, and an increase in alternative forms of service delivery. But given the continuing drop in contracts held by private practice suppliers, LAG believes the main reason is self-evident: there are declining numbers of practitioners available and willing to do publicly funded work.

So what of the future for legal aid? The commission has mapped out its direction for 2005/2006 in an equally glossy *Corporate plan* (comprising a total of 24 pages, seven of which are full colour photos). This document reflects the DCA's new PSA targets, agreed as part of the 2004 Spending Review. With the legal aid scheme on the cusp of major reforms, it is hard for the LSC to do more than set out interim objectives in the current plan. The outcome of the Carter review of legal aid procurement, the reviews of public law children cases and fraud trials, and the roll-out of the CLS strategy will all have a profound impact on the way that next year's targets are framed.

But the question is whether all these changes can be delivered without sufficient lawyers and advisers to carry out the work. Ostrich-like, the LSC makes little analytical comment about the decline in the number of contracts in 2004/05 (a loss of more than 500 contracts across all areas of law), nor does it attempt to predict future trends. The *Corporate plan* contains one short paragraph on the LSC's role in developing the next generation of legal aid lawyers – but does not translate this into a target. On the other hand, according to the plan, suppliers are certainly expected to deliver more acts of assistance, greater efficiency savings and better performance standards – as well as demonstrate a firmer commitment to legal aid.

LAG is pleased that both documents endorse the need for client-focused services – and confirm the importance of legal aid in protecting rights and supporting social and legal justice. But these principles need people to carry them out on the ground. So, we suggest that the LSC adopts an additional target: 'To stabilise the exodus of practitioners from legal aid and increase the number of young lawyers entering this work by 100 per cent each year until 2010.' Is this an unreasonable objective? We think not.

news

LSC falls short of advice target

The Legal Services Commission (LSC) has failed to meet a key target to increase new cases in areas of law that involve social exclusion, as indicated in its latest annual report. The report also shows a further drop in the number of contracts in most areas of civil law and in criminal defence work.

The report reveals the following:

- The number of new case starts in social welfare law, excluding immigration, declined by five per cent during 2004/2005. This falls short of the LSC's target to increase the number of people receiving assistance by ten per cent.

The LSC suggests that this trend could be explained by 'improved economic conditions and the success of people accessing alternative sources of help'. According to the report, the shortfall led to an underspend of £7 million against the original forecast of expenditure on this work.

- The number of suppliers holding contracts has continued to decline. During the 12 months up to March 2005, there was a reduction of five per cent in the number of family law contracts (3,118 compared with 3,273 in March 2004); and contracts for non-family work went down by seven per cent (4,183 compared with 4,505 in March 2004). During the same period, there was a fall of four per cent in the number of firms with contracts for criminal defence work.

- There was a ten per cent drop in the number of applications for legal aid certificates in non-family civil cases. The total certificates actually issued in 2004/05 stood at 25,386 – eight per cent lower than the previous year. This reflects a decline in the number of certificates for judicial review, particularly in immigration and asylum work.

The report accepts that the underspend on Legal Help work has 'fed through in part to the Licensed Work budget, as Legal Help is often the gateway to full representation'.

However, it also suggests that the decline in representation results from changes to scope brought in by the Funding Code.

The report lists the following among the LSC's achievements for 2004/2005:

- Delivery of 850,000 acts of assistance to people needing help on civil matters, and 1.5 million acts of assistance to those suspected or accused of crimes;
- Savings in key areas of work, particularly immigration and asylum and very high cost criminal cases;
- Working within the criminal justice system to influence decisions that have an impact on the LSC's costs;
- Rolling out new quality initiatives such as peer review and profiles based on outcome measurements;
- An increase in funding of £18.6 million through Community Legal Service (CLS) Partnership initiatives;
- The launch of CLS Direct; and
- The internal reorganisation of the LSC into four directorates, and the appointment of a CLS director.

The LSC's *Corporate Plan 2005/06–2007/08*, which sets a series of new targets for the commission's performance over the coming months, has also been published. The targets include savings of £102 million through implementing the 'New Focus' proposals, tailored fixed fees, reductions in the scope of criminal legal aid and greater control of very high cost cases.

Legal Services Commission annual report 2004/05 and *Corporate plan 2005/06–2007/08* are available at: www.legalservices.gov.uk. The annual report is also available from TSO, £18.50.

New arrangements for CFAs to be introduced

The existing regulations for conditional fee agreements (CFAs) will be revoked from 1 November 2005, after the Department for Constitutional Affairs (DCA) concluded that they are unnecessary and ineffective. The change, which the DCA announced in August, will affect a range of civil cases, including insolvency, environmental, human rights, defamation and injury claims. The DCA has also published a report of the responses to the 2004 consultation paper *Making simple CFAs a reality*.

The primary responsibility for client care will be focused on solicitors and the Law Society's Professional Rules of Conduct, on supporting costs guidance and on proposed new model CFAs. The society intends to introduce the amended rules and new model agreements on 1 November 2005.

New regulation for Conditional Fee Agreements (CFAs). Response to consultation, available at: www.dca.gov.uk.

New stage for legal advice project on national standards

The project to develop national standards for legal advice has entered a new phase. The National Occupational Standards for Legal Advice (NOS4Advice) is currently carrying out a telephone survey of a representative sample of advice workers, solicitors and others involved in the delivery of advice. This will provide information on, among other things, the demographic profile, skill levels and shortages, and the barriers to training and education for those delivering publicly funded legal advice.

In April and May 2005, NOS4Advice held a series of focus groups to consult practitioners in the not for profit and publicly funded sectors about generic standards. These included greeting clients, establishing their needs and referral to an appropriate service.

NOS4Advice aims to develop detailed, national standards specifications for particular areas of advice, for example, housing and money advice and debt, and for target client groups including young people and elderly people.

Information about NOS4Advice is available at: www.nos4advice.org.uk.

- The Big Lottery Fund has just announced that advice services have been allocated a budget of up to £50 million in its England and UK programmes for 2006–2009. The launch date will be June 2006.

news

Home Office 'consults' on deportation changes

The terrorist attacks, in London on 7 and 21 July 2005, have prompted the Home Secretary, Charles Clarke, to seek broader powers to deport or exclude someone from the UK on so-called 'non-conducive' grounds. The government proposes to change its policy so that people could be excluded for a wide range of 'unacceptable behaviour' directly or indirectly linked to a terrorist threat.

At present, the Home Secretary can exclude or deport non-UK citizens because they pose a threat to national security or public order, or have been involved in crimes against humanity. The revised 'non-conducive' criteria would include using any form of communication:

- to provoke, justify or glorify terrorism or encourage other serious criminal activity;
- to foster hatred which may lead to intra-community violence; or
- to advocate violence to further particular beliefs.

The proposals would also extend to those who express extreme views that are in conflict with the UK's 'culture of tolerance'.

The two and a half page consultation document was published on 5 August 2005. The consultation period closed on 19 August 2005.

Meanwhile, ten foreign nationals who face deportation on the 'non-conducive' ground relating to national security have been detained. Ministers are likely to face a showdown with the courts over expected legal challenges to the deportations, based on articles 2 and 3 of the European Convention on Human Rights. The Lord Chancellor, Lord Falconer, has warned that he could push through a new law that tells judges to strike a balance between these fundamental human rights and national security. (See also page 7 of this issue).

Exclusion or deportation from the UK on non-conducive grounds: consultation document is available at: www.homeoffice.gov.uk/docs4/deportation.pdf.

Mental health projects improve clients' wellbeing

Mental health projects that also provide advice services can improve their clients' mental health by relieving worry and stress, according to a review of agencies funded through the Legal Services Commission's (LSC's) Partnership Initiative Budget (PIB) . Such projects can also deliver positive outcomes by helping clients to obtain the right benefits, deal with debt, avoid homelessness and challenge inappropriate care.

The LSC's review of 22 projects included six that focused on the needs of people with mental health problems, which were found to be effective in reaching clients who do not normally access mainstream advice. There was also some evidence from health and social care staff that the mental health of clients appeared to improve after they had used the advice services.

However, all six projects found that working with this group of clients was time-consuming. The report raises concerns about contract compliance: agencies may be forced to deal with clients' non-advice needs at their own expense, which is 'arguably at odds with a commitment to providing access to justice for the most vulnerable'.

Innovation in the Community Legal Service – a review of 22 projects supported through the Partnership Initiative Budget, available at: www.legalservices.gov.uk.

20 years of 'Recent developments in housing law'


Nic Madge and Jan Luba QC

In the summer of 1985, in the world of housing law, most private sector tenants still enjoyed security of tenure under the Rent Act 1977, the Housing (Homeless Persons) Act 1977 was still in force, and the Housing Act 1985 had not yet received royal assent. That summer, two fresh-faced young housing lawyers walked into LAG's office and suggested a regular article on recent developments in housing law. The first 'of a regular series designed to keep advisers abreast of recent changes in housing law and practice' was printed in September 1985 in the 'grey pages' of *Legal Action*.

In the early days, they met to plan the articles in a booth in Smithy's Wine Bar. The copy was written on manual typewriters and then discussed and amended over another bottle of wine. Now, they say – with some regret – it is all done by e-mail. The first article included news of important cases on condensation (*Quick v Taff Ely BC*), on homelessness (*R v Hillingdon LBC ex p Puhlhofer* in the Court of Appeal, then unreported), and county court decisions on 'non-exclusive occupation' licence agreements following the House of Lords' decision in *Street v Mountford*.

It was far harder to track down recent cases in those early years. There were no daily e-mail alerts. Lawyers relied on *Times* law reports to keep up to date, but even they did not include many housing cases. From the early days Nic and Jan relied heavily on housing colleagues to let them know about their successes (and failures), but they also found out about cases from unlikely sources. For example, their series was first in reporting the important disrepair case of *Stent v Monmouth BC*. They only found out about it because Nic, while away for a weekend in 1987, saw the headline 'Tenant wins case against council' on the front page of the local *Abergavenny Chronicle*. (See page 15 of this issue for the latest 'Recent developments in housing law' article).

Advisers invited to give ideas for information leaflets

Advicenow, the legal information website run by the Advice Services Alliance, is inviting advisers and solicitors to contribute ideas for six new information packages to be funded by the Legal Services Commission. Frontline advisers who have identified specific advice needs for their clients, and would like to help to develop new materials are asked to contact Advicenow by 30 September 2005.[1]

Advicenow has already produced nine user-friendly in-depth guides packages: the majority are available as leaflets that can be downloaded from its website.[2]

1 For more information contact John Seargeant at: john.seargeant@advicenow.org.uk, or tel: 020 7939 0895.
2 The leaflets are available at: www.advicenow.org.uk.

CONSUMER CREDIT

Tinkering with time orders?

The Consumer Credit Bill has reappeared. Having failed to make its way through parliament in the last session due to lack of time, it was given another airing in the Queen's speech in May 2005. The bill purports to represent a major change in consumer credit law and significantly alters the provisions relating to time orders. **Frances Ratcliffe**, a barrister at 11 Old Square, writes about these provisions and discusses the impact of the changes.

Introduction

Billed as the biggest shake up of the consumer credit market in 30 years (according to the Department of Trade and Industry press notice, 16 December 2004), the Consumer Credit Bill attempts to reform the Consumer Credit Act (CCA) 1974 and provide more protection for the borrower who has fallen on hard times. With consumer credit becoming increasingly popular (the Bank of England estimates the amount of consumer credit (excluding credit cards) to be around £133,502m, with an increase of £1.3bn for June 2005) and, similarly, a substantial rise in cases of default, particularly in relation to a borrower's financial obligations under a consumer credit agreement, such reform is to be welcomed.

Time orders under CCA s129, those much under-used but potentially vast provisions, which enable the court essentially to rewrite a credit agreement on the borrower's default, have not slipped by unnoticed. The bill attempts to increase the use of such provisions as a step towards protecting and assisting the borrower, while consequently having a potentially devastating effect on the creditor who is seeking to legally enforce the credit agreement. Is it necessary to tinker with such orders, and what will the effect be if such tinkering is made law?

The current statutory provisions

The court's ability to make an instalment order in money claims is axiomatic. Take a common case of a consumer credit agreement relating to the purchase of a hatchback motor vehicle on hire purchase. The borrower contracts to make payments during the term of the agreement (say five years), and at the end of the term can elect to purchase the vehicle. During this period the borrower falls into financial difficulties and arrears accrue. On giving judgment for the creditor for the amount outstanding the court can order repayment by such instalments as it specifies (County Courts Act 1959 s99).

With hire purchase agreements, the court's power to make a suspended order on terms evident. Taking the above example, assume that the creditor requires the return of the hatchback as well as a money judgment. The court can order the return of the hatchback, suspended provided that the borrower makes specified payments. If s/he does so, the vehicle is retained (Hire Purchase Act 1938 s12) notwithstanding the creditor's prima facie legal entitlement to seizure.

On that basis it may be presumed that the provisions of the CCA 1974 did not extend the existing law. After all, s129 provided that, on a creditor's application to enforce a regulated credit agreement, or to recover possession, or if the creditor had served the borrower with a default notice, the court could make an order providing for the payment of sums owed or the remedying of a breach as the court specified. 'Sums owed' in relation to hire purchase agreements and conditional sale agreements can include future sums owed not merely arrears. The court can therefore (and frequently does) extend the period of time provided under the agreement, to enable the borrower to remedy the breach.

On an application under s129, the provisions of CCA 1974 s133 come into effect and enable the court to make a return order, or a transfer order, suspended under s135. The combination of an instalment order under s129 with a return order suspended on terms as per the time order is also possible. Such provisions are however limited to hire purchase agreements and conditional sale agreements.

The Consumer Credit Bill

Notwithstanding the court's unlimited jurisdiction relating to time orders (subject to being satisfied that such action is just) such applications are rare. The chief reason for this is presumed to be ignorance on the part of the borrower that this assistance exists. Given that the majority of defendants in such consumer credit claims appear in person, this is highly likely. The Consumer Credit Bill aims to put an end to overcome this in attempting to assist borrowers who have breached their credit agreement.

The bill extends the period of time within which the borrower can take action to remedy a breach stated in a default notice (being a precursor to taking such action, for example, to terminate a regulated agreement). Under clause 14 of the bill, the period of time required in a default notice is extended from seven to 14 days.

When serving a default notice on a borrower, a creditor must provide the borrower with an 'information sheet'. The document will have been drafted by the Office of Fair Trading to include 'information to help debtors and hirers who receive default notices' (see clause 8 of the bill), presumably covering the powers and the procedure concerning time orders.

The intention behind these provisions is clear. When served with a default notice, a borrower will also receive the information sheet detailing the assistance available. It is hoped that more borrowers will make use of the time order provisions in seeking relief. Undoubtedly, there will continue to be cases in which the borrowers bury their heads in the sand, but it is likely that, if they are made aware of the ability to seek assistance from the court, they will do so increasingly. Given that the court is generally willing to assist borrowers with a reasonable extension of time within which to remedy a breach, time orders will, doubtlessly, multiply.

The bill widens the scope of time orders by allowing a borrower to make an application before receiving a default notice. Where at least two missed payments have accrued, notice of the arrears must be served on the borrower, accompanying the information sheet. When notice of arrears has been received, the borrower can apply for a time order (see clause 16 of the bill which inserts s129A into the CCA 1974). Unlike the existing position where an application for a time order can only be made after service of a default notice, for example, the borrower will now be able to make the application after only two payments are outstanding.

The idea is to prevent arrears escalating. Currently, creditors may well be postponing the serving of a default notice until arrears have accrued to the extent that a borrower would be unlikely to obtain a time order. Such conduct will no longer be possible, and the borrower will consequently have a greater degree of control in requesting assistance from the court . This is to be welcomed where the consumer credit legislation is aimed at improving protection for vulnerable borrowers.

Conclusion

Only time will tell whether the proposed amendments to time orders will have the desired effect, namely, to protect those borrowers in financial difficulties. However, it is clear that the legislature has intended much more than a mere tinker with time orders, indeed this is a radical change in the way the law assists those borrowers who have fallen on hard times.

CONSTITUTIONAL LAW

Judges and terrorism after the 7/7 attacks

Eric Metcalfe, a barrister and director of human rights policy at JUSTICE, calls on the judiciary to uphold its constitutional responsibility to protect the UK's democratic values in the face of the government's 'well-meaning but misguided' counter-terrorism measures.

'Let no one be in any doubt', said the Prime Minister Tony Blair, 'the rules of the game are changing'.[1] Long frustrated by the approach taken by British courts to article 3 (the prohibition on torture) of the European Convention on Human Rights ('the convention') in immigration cases, Tony Blair sounded upbeat as he announced a 'new approach to deportation orders' as part of his 12-point plan of counter-terrorism measures following the events of 7 July 2005. Returning again and again to the theme of 'changed conditions in Britain', Tony Blair indicated that 'should legal obstacles arise', he was even prepared to amend the Human Rights Act (HRA) 1998 to ensure the courts adopted an interpretation of the convention that was more amenable to his plans. 'For those who are British nationals and cannot be deported', he continued, 'we will extend the use of control orders'. Other measures signalled included a proposed new offence of 'condoning or glorifying terrorism' – elsewhere referred to as 'indirect incitement' – and the possibility of a new pre-trial court procedure that would allow pre-charge detention of terrorist suspects to be 'significantly extended'.

In July, Tony Blair made clear his expectation that the courts should have regard to the 'different mood' post-7 July by making sure that 'the laws that I think the country would regard as the minimum necessary are ... upheld' (see, for example, '9/11 wake-up call ignored, Blair says in swipe at obstructive judges', Philip Webster, *Times*, 27 July 2005).[2] Although Tony Blair recognised that 'the independence of the judiciary is a principle of our democracy', he doubted whether Lord Hoffmann's dictum ('the real threat to the life of the nation ... comes not from terrorism but from laws such as these') in *A and others v Secretary of State for the Home Department* [2004] UKHL 56 ('the Belmarsh judgment') 'would be uttered now'.

However, if judges are currently silent, it would be a mistake on Tony Blair's part to confuse tact and decorum on their part with tacit acceptance of his claims. Indeed, it seems telling that, barely two hours before the Prime Minister began his 26 July press conference in London, Cherie Booth was delivering a lecture to a conference in Malaysia in which she offered a ringing defence of the role of judges in times of emergency:

At this time our understanding of the importance of judges in a human rights age should be at its clearest. And it is at this time that our support for the difficult task that judges have to perform must be at its highest. ('Now we need judges more than ever. In the face of terror, they are the guardians of democracy itself', Cherie Booth, *Guardian*, 28 July 2005)

Judges' role and responsibilities

Both the Prime Minister's comments and those of his wife highlight an important question concerning the role of judges in assessing, interpreting and applying counter-terrorism legislation: to what extent should the courts defer – if 'defer' is even the right word[3] – to the judgments of the executive and of parliament in striking a balance between the interests of national security and the need to protect fundamental rights? This is, of course, a question that the courts have grappled with many times before but – in light of Tony Blair's comments and proposals, and the events of 7 July themselves – it is likely to be asked in the coming months with ever greater urgency.

At the outset, it is important to cast doubt on what seems to be a core premise of the government's argument: that the bombings of 7 July have changed the legal climate in which the courts must consider the government's legislation. In fact, there are several versions of this claim. The first is that, since an actual attack has now taken place, the threat is clearly different than before. Therefore, any previous judgments by the courts – having been based on a different assessment of the threat – are no longer valid. This was the view put forward by the Lord Chancellor, Lord Falconer, who maintained that 'nobody would dispute a change in the facts means you need a change in the law' (see 'Falconer: no terror law dispute', 28 July 2005, BBC news online).

Government's response to the terrorist threat

But whether anything has really changed in legal terms following 7 July is open to dispute. For, far from denying the threat to the UK posed by Al-Qaeda-related terrorism following 11 September 2001, it is apparent that British courts have been very clear in accepting the government's assessment of risk: Mr Justice Collins, President of the Special Immigration Appeals Commission (SIAC), Lord Woolf, the then Lord Chief Justice (*A, X, Y, and others v Secretary of State for the Home Department* [2002] EWCA Civ 1502; [2004] QB 335, CA), and eight of the nine Law Lords in the Belmarsh judgment all accepted the government's claim that the threat posed a 'public emergency threatening the life of the nation' within the meaning of article 15 of the convention. Nor did Lord Hoffmann, the sole dissenter from this conclusion, doubt 'the existence of a threat of serious terrorist outrages' (para 94) put forward by the government. On the contrary, he accepted that: 'The events of 11 September 2001 in New York and Washington and 11 March 2004 in Madrid make it entirely likely that the threat of similar atrocities in the United Kingdom is a real one' (para 94).

Indeed, the Terrorism Act 2000 was drafted not only in response to such attacks as the Omagh bombing (which, lest anyone forget, killed 29 and injured 220 people in 1998) but also with a view to the possibility of future attacks by Al-Qaeda, among others (see, for example, *Hansard* HL Debates col 1455, 6 April 2000). Similarly, both the Anti-Terrorism Crime and Security Act (ATCSA) 2001 and the Prevention of Terrorism Act (PTA) 2005 took as their premise the likelihood that serious terrorist attacks would take place in the UK. Given that the existing law has been drafted and applied with this risk in mind, it is difficult to see what rational difference it should make to the application of these laws now that the attacks that were dreaded for so long have finally come to pass.

Public feeling, political considerations and the courts

The second version of the government's claim that 'the circumstances of our national security have self-evidently changed' (Prime Minister's press conference, 5

August 2005) is, perhaps, more challenging for the courts: it is the argument that – now that attacks have actually taken place – the judiciary is under a duty to uphold the laws that parliament considers necessary to counter further such attacks. A simplistic variation of this claim is that – since the public is strongly in favour of tougher measures against terrorists – the government has a clear mandate for action, and the courts should be slow to interfere or thwart this. It seems highly doubtful, though, whether the courts have ever interpreted legislation according to political assessments about the strength of public feeling. Indeed, this is arguably the very reason why the interpretation of law is left to unelected officials. 'The law', wrote Aristotle, 'is reason unaffected by desire',[4] and judges are insulated from direct democratic accountability precisely to protect their judgment from being swayed by political considerations and the whims and passions of the electorate.

Anti-terrorism laws and the HRA

The subtler version of this argument, though, ties in with an ongoing and more general debate about the role of the courts in reviewing the compatibility of government decisions and legislation under the HRA. On this score, there is cause for concern that British judges – ever cognisant of the impact that their decisions in counter-terrorism cases may have on operational effectiveness – may be increasingly reluctant to rule against the government on matters of counter-terrorism policy for fear of being labelled as indirectly responsible for the next terrorist outrage. In truth, while this can never be ruled out as a potential influence on a judge's mind, such an attitude would be a dereliction of the judicial duty to apply the laws of the realm 'without fear'. More problematic and far more likely is the situation where a judge declines to interfere with a governmental decision or expresses doubts about the compatibility of legislation on the ground that the court is ill-placed to second-guess the 'institutional competence' of the executive or parliament on matters of national security. Unfortunately, it is simply not possible to predict, in advance, how much weight a court will give to the specialist technical competence of the decision-maker or (in the case of parliament) the democratic competence of the legislature; so much will depend on the particulars in each case, ie, – the nature of the right involved, the nature of the interference, whether the interference is necessary and proportionate, etc. What does seem unlikely, however, is that the higher courts would resile from the specific constitutional role assigned to them under the HRA, as most recently articulated by Lord Bingham in the Belmarsh judgment:

> *It is of course true that the judges in this country are not elected and are not answerable to parliament. It is also of course true ... that parliament, the executive and the courts have different functions. But the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney-General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic.* (para 42)

As Lord Bingham makes clear, it is 'particularly inappropriate' to suggest that courts are not entitled to review the necessity and proportionality of legislation where it has been expressly directed to do so under the scheme of the HRA. On the contrary, 'the 1998 Act gives the courts a very specific, wholly democratic, mandate' (para 42). Having been charged by parliament with the task of reviewing the compatibility of government actions and legislation with fundamental rights, it would therefore be an abdication of its democratic duty for any court to refuse to ask hard questions of the balance that ministers and parliament subsequently strike in respect of counter-terrorism measures.

This includes not only those counter-terrorism measures to come, as they surely will, but also the provisions of the PTA that are already in force. While the courts have yet to rule on the compatibility of the PTA with the HRA, it is apparent that the legislation already significantly degrades the role of the courts. In particular, the PTA allows the Home Secretary to apply 'non-derogating' control orders to any person as he sees fit so long as he has 'reasonable grounds for suspecting' that that person has been involved in 'terrorism-related activity' – a standard below that of the balance of probabilities, and the same standard that applied to certification as a suspected terrorist under ATCSA Part 4 (a standard which SIAC described as 'not a demanding standard for the secretary of state to meet').[5] A court, furthermore, may only refuse permission for a non-derogating order to be made where it considers that the grounds relied on by the Home Secretary are 'obviously flawed' (PTA s3(2)(a) and (b)). Where the court grants its permission or the Home Secretary makes an order without permission, the court is required to hold a subsequent inter partes hearing within seven days at which it can quash the order where it is satisfied that the Home Secretary's grounds for seeking the order were merely 'flawed' (PTA s3(10)). In doing so, the court 'must apply the principles applicable on an application for judicial review' (PTA s3(11)).

Conclusion

Assessing the compatibility of the control order legislation is, therefore, likely to be the first real test of the integrity of the courts following the 7 July terrorist attacks. Just as the attacks can fairly be characterised as an attack on democratic values, so it becomes all the more important for the courts to hold fast to their constitutional role in safeguarding those values from well-meaning but misguided measures. Now is not the time for timidity.

1 A full transcript of the press conference, 5 August 2005, is available at: www.number-10.gov.uk.
2 See note one, 26 July 2005.
3 See, for example, Lord Hoffmann in *R v BBC ex p Prolife Alliance* [2003] UKHL 23, para 75: 'My Lords, although the word "deference" is now very popular in describing the relationship between the judicial and the other branches of government, I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening.'
4 Aristotle, *The politics*, Book 3 'The citizen, civic virtue, and the civic body', Part 16, translated by Benjamin Jowett, 1885.
5 *Ajouaou and A, B, C and D v Secretary of State for the Home Department*, [2003] UKSIAC, 1/2002, 29 October 2003, para 71. See also para 48: 'The test is ... whether reasonable grounds for suspicion and belief exist. *The standard of proof is below a balance of probabilities* because of the nature of the risk facing the United Kingdom, and the nature of the evidence which inevitably would be used to detain these appellants [emphasis added].'

LEGAL PROFESSION

Beyond the courtroom

Katie Ghose is the author of *Beyond the courtroom: a lawyer's guide to campaigning*, a new Legal Action Group title examining the practical ways in which lawyers can go beyond traditional boundaries of practice to bring about law reform. In this article she looks at some of the key issues addressed in *Beyond the courtroom* including getting involved in policy-shaping at an early stage, and the power of partnership with campaign groups, academics and others. Katie Ghose currently works for Age Concern England and will take up a new post as director of the British Institute for Human Rights at the end of September.

Introduction

The law may be the 'bedrock of a nation', but as a tool to effect major or lasting social change, it has its limits.[1] Strategic litigation can publicise injustices, mobilise support and sometimes even change the law. But it is only one way to make a difference and, as history has shown, is rarely enough on its own. The suffragettes, battling to secure women's votes in the late 19th and early 20th centuries, had to 'fight on all fronts': in the courts, in parliament, and even through direct action. It is their work during the First World War that is credited with 'tipping the balance' of public – and political – opinion in favour of reform, and eventually secured, through the Representation of the People Act 1918, the right to vote for women over 30.

More recently, the limits of a litigation route alone are shown by the experiences of Gypsies and Travellers. (See also page 18 of this issue.) After a decade or more of unsuccessful legal challenges in the UK and before the European courts, lawyers and campaigners changed tack. The Gypsy and Traveller Law Reform Coalition was formed and is now working to influence politicians from all parties of the need for law reform.

The limits of the courts

Hostile or cautious judges are not the only obstacles to securing social change via the law. There are a whole host of others including:

- The absence of a willing or able claimant (and limits on organisations' ability to take cases themselves, on behalf of a group);
- The willingness of the government to overturn a court's decision through hastily-drafted legislation; or
- A challenge may never get to court because the authorities may cave in, on a case-by-case basis, in order to avoid making a more substantive policy change.

The limits of the courts may seem an unpromising start to a book aimed at a legal audience, but my aim is to demonstrate the vital role that lawyers can play 'beyond the courtroom', especially in policy-making, campaigns and securing law reform. Lawyers are natural policy-makers and influencers. Perhaps their greatest strength is their knowledge from the 'sharp end' about the impact that laws have on people in their everyday lives. They have expertise about the workings of the legal system – as well as in their specialist areas. They are accustomed to dealing with influential people and bodies. And they can always resort to legal action (or have the threat of it up their sleeve), which makes decision-makers sit up and listen. Lawyers should not confine themselves to the courts of law. They have much to contribute to the 'court of public opinion', and in the corridors of power in Whitehall, Westminster and, increasingly, in Brussels, where policy and laws are developed that will impact on their clients, past and present.

Strategic litigation

Harlow and Rawlings, in their fascinating history of strategic litigation, write about the 'hidden dimensions' of 'pressure politics': the legal expertise that lawyers bring to policy-making and law reform which often goes unrecognised.[2] When interviewing lawyers and others for *Beyond the courtroom*, I was struck by some lawyers' lack of confidence about what they might have to contribute outside the legal arena or how to go about it. And although all were enthusiastic about the value of going beyond their individual cases, many also noted the challenges. Lawyers are often snowed under with work and are struggling under the pressures of a 'contract culture'. Balancing money-making with campaigning is a real issue for many lawyers. To combat this, Karen Ashton, who is a trainer and a partner at Public Law Solicitors in Birmingham, speaks of the need to 'incorporate campaigns into casework, to make it part and parcel of what you do'.

Lawyers can effect social change through a variety of methods. Legal challenges, if pursued strategically, can secure change especially if a case is won and is not reversed subsequently. But the indirect effects of challenges are also significant: in an early study of test cases, Tony Prosser identified these as more important than the direct effects. He highlighted that the indirect effects of challenges:

- Contribute to awareness-raising;
- Build a portfolio of cases to stimulate policy change; and
- Increase the legitimacy of the groups involved with the cases which, in turn, improves their ability to influence.[3]

Policy-making, campaigns and law reform

However, taking the wrong case at the wrong time can have a devastating impact that goes well beyond the individual and can render change impossible. Lawyers need to work with others:

- To identify the right case;
- To make good decisions about its conduct;
- To involve the right people with the right expertise (eg, as potential intervenors or expert witnesses); and
- To maximise the impact of the case by tying it in with a broader campaign.

Lawyers can work with MPs and peers to achieve the amendment of an existing law or influence a draft law as it passes through parliament; or they can work with campaign groups to win public support for a law reform which is then adopted. They can have an impact on the take-up of new legal rights by helping to train advisers, other lawyers and individuals, and make sure that important points are identified early on and tested in the courts. And at all stages lawyers can use their expertise to inform public debate, in particular, through strategic use of the media.

Lawyers are often missing from the crucial early stages of policy-making, where there is much influence to be had. Among other things, they can:

- Contribute ideas for policy and law reform to the political parties' manifesto processes;
- Work with think-tanks (which are increasingly influential);
- Engage with officials on the details of a new policy; and
- Respond to formal consultations.

Lawyers can also change policy and practice at both local and national levels. Collecting examples of bad practice (eg, from a local authority or housing benefit office) can be used to pressurise the authorities; such examples can show how a problem is widespread and needs a systematic solution. Also, they can often demonstrate the difference between the stated intention of a public policy and its effects in reality.

Lawyers have access to a wealth of knowledge about individuals, their clients

and how laws are impacting on them. People's stories, ie, the 'human interest', help bring to life the abstract or hard to grasp problem. They are invaluable to decision-makers who are often several steps removed from daily reality. Used appropriately (ie, with the client's consent), individuals' experiences can be used in letters, parliamentary briefings, responses to consultations and in media work.

The power of partnership working is a key theme of *Beyond the courtroom*. Indeed, writing the book was a highly collaborative process, drawing widely on interviews with many inside and outside the legal profession. Lawyers are enthusiastic about working with each other, in their own field, across disciplines and in different sectors, as well as with other organisations. However, outside their own practitioners' groups or trade bodies, some lawyers were unsure about how to forge partnerships or felt that their relations were ad hoc or reflected a 'referral mentality' rather than a long-term, mutually beneficial relationship.

The 'third sector' is diverse in its size, make-up and in the issues that it covers. It has changed substantially in the last 20 years. It continues to develop, as a major deliverer of services (often contentiously with some arguing this 'lets the state off the hook'), including legal services, and is becoming increasingly professional in policy-making and campaigns. While some organisations concentrate exclusively on influencing decision-makers and campaigning, others use the evidence that they gather from delivering services to give their policy and campaigns added legitimacy. The latter approach is especially valued by decision-makers, who are keen on 'evidence-based' policy-making and, increasingly, are after solutions and not only analysis of a problem. Unsurprisingly, some lawyers are unsure of the best ways of joint working or of the contributions that they can make.

Making links: some practical steps

Giving legal advice or being involved in some other way with a legal challenge is an obvious way for a lawyer to forge links with a campaigning organisation. And organisations are increasingly important as expert witnesses or intervenors (especially in human rights cases), as they are able to shed light on the 'bigger picture'.

But there is value in forging a longer term relationship, as a trustee or adviser, or by building up links with the relevant policy specialist in your field. For example:

- You can help campaigners think about what is 'legally achievable', and where a group's 'wish list' for action might lead;
- You can turn an idea into a draft bill which can be an invaluable campaign tool (and may even become law!); and
- You can pool ideas for how to find the 'right' case to test a point of law or a creative way to use existing law to secure a benefit for a wider group.

In turn, those working in information and advice are a great source of ideas about emerging issues or how the law is impacting 'on the ground'. You can share information and help them by analysing their inquiries with a 'legal eye', and identify potential challenges. Above all, non-governmental organisations (NGOs) have a wealth of expertise as policy-makers, campaigners and media specialists. Just as NGOs can benefit from your legal expertise, so you can benefit from their professional skills.

Lawyers are chronically under-involved in the awareness-raising needed to promote new legal rights. There is often a lag between a law coming into force and advisers (let alone individuals) becoming aware of it. Running training courses and seminars and helping organisations to develop materials are ways for lawyers to make a difference – before a law reaches the courtroom.

Building alliances

Surprisingly, within the legal profession, academic and practising lawyers often fail to join up. Academics have access to research budgets and can often deliver projects that can lend weight to a case for law reform. Lawyers who had been involved in legal challenges by Gypsies and Travellers worked to devise a three-year project based at Cardiff University. The result was a Traveller Law Reform Bill drafted by the Traveller Law Research Unit that involved wide consultation of the Traveller communities in the drafting process. It has stimulated a major campaign for law reform that may finally lead to lasting legal change.

Many of the most successful alliances bring together diverse partners: law firm Fisher Meredith, for example, with barristers from Hardwicke Chambers, are bringing together a forum of lawyers, NGOs and others to work on a wide range of issues regarding public services. Faced with a variety of public bodies (eg, health trusts, schools and government departments), the Choice and Access to Public Services Group is an explicit recognition of the need for lawyers and organisations working with and for vulnerable people to better co-ordinate their efforts.

The rewards that joint working reap speak for themselves. But partnership working and being abreast of wider social issues have additional 'spin-offs', including:

- Helping lawyers to be more effective in their day-to-day casework as well as in wider activities;
- Thinking about the social context in which a judge might approach a case can help lawyers to target their arguments effectively;
- A multi-disciplinary approach (eg, looking at community care challenges through a human rights prism) can help to identify new and creative approaches to a knotty problem;
- Good relations with an organisation may result in the identification of a claimant whose case will help move the law on and, therefore, benefit many others; and
- In human rights cases, the wider social context is part and parcel of the decision-making process, with individuals' rights explicitly weighed against wider societal interests.

Conclusion

When lawyers and organisations collaborate, they can be a powerful machine. In 2003, the government announced provisions dramatically to curtail immigration and asylum appeal rights and, in particular, to remove any involvement of the higher courts in scrutinising decisions. The seriousness of this proposal in constitutional terms (described by the Bar Council as '... the most draconian ouster clause ever seen in parliamentary legislative practice') brought together an unlikely alliance of lawyers and organisations who successfully worked together to amend the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 when it was going through parliament. And, in 2003/2004, a powerful lobby of lawyers and organisations worked to oppose new restrictions on support for asylum-seekers (Nationality, Immigration and Asylum Act 2002 s55), which led to hundreds becoming homeless and destitute. As we embark on a fresh parliament, with new ministers and MPs to engage with, there will be plenty more opportunities for lawyers to flex their muscles and demonstrate the power of operating 'beyond the courtroom'.

1 Helena Kennedy, *Just law. The changing face of justice – and why it matters to us all*, Chatto & Windus, 2004, p3.
2 Carol Harlow and Richard Rawlings, *Pressure through law*, Routledge, 1992, p12.
3 Tony Prosser, *Test cases for the poor – legal techniques in the politics of social welfare*, Child Poverty Action Group, 1983, p86.

Beyond the courtroom: a lawyer's guide to campaigning, LAG, September 2005, £20. See page 29 and the back page of this issue for more information and to order.

law & practice

IMMIGRATION

Recent developments in immigration law – Part 2


This series by **Jawaid Luqmani** and **Ranjiv Khubber** aims to keep practitioners up to date with developments in immigration legislation, practice and case-law. Part 1 of this article was published in August 2005 *Legal Action* 26.

POLICY AND PRACTICE

Reconsideration applications

'Recent developments in immigration law', August 2005 *Legal Action* 26 and 27, identified a number of practical problems faced by practitioners in connection with lodging applications for reconsideration at the High Court, which had previously been refused by the Asylum and Immigration Tribunal (AIT). At the Administrative Court Users Group meeting, which was held in July 2005, an attempt was made to address some of these concerns. It was reported that in 2004, 7,000 cases were lodged with the Administrative Court. In 2005, the figure is expected to be closer to 10,000, with the majority of the increase being identified as asylum and immigration cases. The figure for cases presented was approximately 50 applications for reconsideration opt-ins each day; but a further 50 or so applications were defective in relation to either the fee, the copies or for other reasons.

Mr Justice Collins, who chaired the meeting, advised that in terms of allocation of judicial time, the opt-in applications were being dealt with by Administrative Court judges at the rate of 12 per day, and each application was considered for approximately 30 minutes. The present view was that as these were cases which had reached the end of the process, for the time being at least, this work should continue to be dealt with only by sitting High Court judges and should not be referred to Deputy High Court judges. However, some consideration was being given to whether Deputy High Court judges might begin to consider applications in non-asylum cases in future. On the basis of his current workload, Mr Justice Collins estimated that reconsideration applications would involve one judge spending the equivalent of 20 working days per week to meet with the current rate of applications, and that the numbers will not decrease for some time.

One issue of grave concern was that the small backlog in decision-making which exists presently, would increase over the vacation period. During this time, only three judges will be sitting per week, and one will be undertaking paper applications consisting of reconsiderations and other applications before the Administrative Court.

In answer to questions raised by the writer, Court Manager, David Brupbacher, advised that:

- The Administrative Court will treat, as being in time, any application sent by document exchange or post which arrives at the court before the expiry of the deadline date, even though the proceedings may not be issued for some days after that.
- It was also acknowledged that applications could be faxed, where they were fees exempt, provided that the fees exemption form was completed and faxed at the same time.
- In cases where an application is not fees exempt but it is the last day for lodging it, the Administrative Court will treat the fax application as being in time only if the applicant's solicitor also undertakes to lodge the fee the next day and does so.

David Brupbacher also indicated that if applications were faxed, there was no need to send in hard copies as this may lead to a duplication of proceedings being issued. In response to whether a dedicated fax line would be provided for reconsideration applications, he suggested that, at present, this was deemed unnecessary.

- As a temporary measure to reduce the considerable backlog in issuing applications, the Administrative Court had taken on additional staff on a temporary basis.

David Brupbacher acknowledged that the fact that there is a considerable delay between the date of lodging and the date of issue would not be held against an applicant as the Administrative Court will have a separate date of receipt. The Administrative Court was invited to consider whether the issue date ought to be taken as the date of receipt, or at least that the issue date be followed by the date of receipt so as to indicate to third parties, such as the Home Office, that an application was in time. David Brupbacher indicated that as the emphasis would be on trying to reduce the backlog, such an approach would, similarly, be unnecessary. While the moves towards reducing the backlog are to be welcomed given that the new court staff have only been recruited as a temporary measure, many practitioners may feel that it will only be a matter of time before the backlog increases again.

Part of the reason for the increase in applications is the fact that a greater proportion of them are being brought by litigants without any professional legal assistance (given the costs risks associated with such cases). This is a problem that the government ought to have foreseen. With the new Immigration, Asylum and Nationality Bill – which makes further proposals about costs in reconsideration applications so as to differentiate between the costs of the reconsideration, the preparation for the hearing, and the costs of the hearing – one wonders whether the obsession with legal aid costs has meant that the government is overlooking the heart of the problem: that those persons who are fleeing persecution will always seek to pursue legal remedies – whatever obstacles are placed in their way, and whether or not they are given advice and assistance to pursue that legitimate process – given the risks that they face on return to their country of origin.

Home Office consultation document

Selective admission: making migration work for Britain

The Home Secretary has published a document on a new, single points-based system for managed migration, ie, routes to work, train or study in the UK.[1] The proposed system does not cover asylum or refugees. The consultation closes on 7 November 2005.

CASE-LAW

Unless otherwise indicated, all references to 'the Tribunal' are to the Immigration Appeal Tribunal (IAT) before 4 April 2005 and to the AIT on or after 4 April 2005.

Articles 3 and 8: suicide risk

- **J v Secretary of State for the Home Department**

[2005] EWCA Civ 629

The Court of Appeal gave detailed guidance on the application of articles 3 and 8 of the European Convention on Human Rights ('the human rights convention') in relation to cases involving protection claimants alleging a risk of committing suicide if they are removed to their country of origin.

J was a national of Sri Lanka who had suffered ill treatment at the hands of both the Liberation Tigers of Tamil Eelam and the Sri Lankan army. He fled that country and claimed protection under the 1951 Convention relating to the Status of Refugees (the 'refugee convention') and the human

rights convention in the UK. His claim was refused and he appealed. At the hearing before the adjudicator medical evidence was provided showing that the appellant suffered from post traumatic stress disorder (PTSD) and had attempted to commit suicide in the UK. The adjudicator concluded that the appellant did not have a well-founded fear of persecution. The adjudicator further concluded that the appellant would not face a breach of articles 3 and/or 8 of the human rights convention if returned to Sri Lanka. In relation to article 8, the adjudicator concluded that although he accepted that the appellant suffered from PTSD there were adequate medical facilities in Sri Lanka. Furthermore, the appellant would be able to take advantage of the palliative care and support that could be provided by his mother who still resided in Sri Lanka. In addition, the adjudicator did not accept that the appellant had attempted to commit suicide in the UK, in 2002, some weeks after the refusal of his claim. The appellant appealed to the Tribunal (IAT). The Tribunal found that the appellant had in fact attempted to commit suicide in 2002. At the hearing before it further medical evidence was provided indicating that the appellant was at significant risk of committing suicide either in the UK or in Sri Lanka or en route to Sri Lanka. The Tribunal dismissed the appeal concluding that there were adequate facilities available in the UK to prevent the appellant committing suicide while he was here and that, if he were returned to Sri Lanka, the availability of medical treatment and family support reduced the risk required to establish a breach of his human rights.

The appellant appealed to the Court of Appeal and, in particular, submitted that the Tribunal had applied the wrong test in relation to the application of article 3 to the facts of this case. The correct test was whether the removal of the appellant gave rise to a real risk of an increased risk of suicide.

The Court of Appeal stated that when considering the application of articles 3 and 8 in cases like *J* it was necessary to draw a clear distinction between 'foreign cases' and 'domestic cases' as explained by Lord Bingham in *Ullah v Secretary of State for the Home Department* [2004] UKHL 26; [2004] 2 AC 323. In addition, the risk of a violation of articles 3 and/or 8 of the human rights convention in cases such as *J*'s must be considered in relation to three stages:

1 Where the appellant is informed that a final decision has been made to remove him to Sri Lanka;
2 When he is physically removed by aeroplane to Sri Lanka; and
3 After he has arrived in Sri Lanka.

In relation to stage 1, this was plainly a domestic case. In relation to stage 3, this was plainly a foreign case. In relation to stage 2, this is better understood as a domestic case.

In relation to *foreign* cases the relevant test is whether there are strong grounds for believing that the person, if returned, faces a real risk of torture, inhuman or degrading treatment or punishment.

The court went on to state that the practical application of this test in foreign cases can be best understood by appreciating the following points, which themselves derive from the existing Strasbourg case-law:

1 The test requires an assessment to be made of the severity of the treatment which it is said that the applicant would suffer if removed. This must attain a minimum level of severity and is a fact-sensitive exercise.
2 A causal link must be shown to exist between the act or threatened act of removal or expulsion and the inhuman treatment relied on as violating the applicant's article 3 rights.
3 In the context of a foreign case, the article 3 threshold is particularly high simply because it is a foreign case. In addition, it is even higher where the alleged inhuman treatment is not the direct or indirect responsibility of the public authorities of the receiving state, but results from naturally occurring illness, whether physical or mental.
4 An article 3 claim can, in principle, succeed in a suicide case.
5 In deciding whether there is a real risk of a breach of article 3 in suicide cases, a question of importance is whether the applicant's fear of ill-treatment in the receiving state upon which the risk of suicide is said to be based is objectively well-founded. If it is not well-founded this will tend to weigh against there being a real risk that removal will be in breach of article 3.
6 A further question of considerable relevance is whether the removing and/or receiving state has effective mechanisms to reduce the risk of suicide. The existence of such mechanisms will tend to weigh against a finding of a breach of article 3.

In relation to *domestic* cases the approach is different. This is because the need to avoid or minimise the extra-territorial effect of the human rights convention (point 3 above) is absent. However, the sixth factor is of particular relevance as the signatories to the human rights convention have sophisticated mechanisms in place to protect vulnerable persons from self-harm in their jurisdictions.

Applying these principles to the appeal the court concluded that the Tribunal had applied the correct test and its decision could not be categorised as perverse or irrational.

Comment: Although the court emphasised that cases where the risk of death in the receiving state derives from lack of medical treatment are not precisely analogous to those concerning a risk of suicide, it is not difficult to see the approach of the court to the application of articles 3 and 8 of the human rights convention to suicide cases as echoing the restrictive approach previously indicated in *N v Secretary of State for the Home Department* in relation to medical treatment cases (see 'Recent developments in immigration law', August 2005 *Legal Action* 28). However, it should be noted that the court also stated that cases alleging a breach of article 3 on the basis of a risk of suicide can, in principle, succeed and any decision required a careful evaluation of the facts. On its interpretation of the facts of the instant case, the Court of Appeal was of the view that the Tribunal was not wrong in law to dismiss the appellant's appeal.

It is understood that an application for leave to petition the House of Lords is to be made in this case.

Scope of the Tribunal's jurisdiction under the Nationality, Immigration and Asylum Act 2002

■ **Mlauzi v Secretary of State for the Home Department**
[2005] EWCA Civ 128

■ **Miftari v Secretary of State for the Home Department**
[2005] EWCA Civ 481

■ **R and others v Secretary of State for the Home Department**
[2005] EWCA Civ 982

The Court of Appeal has continued to emphasise the restricted nature of the right of appeal under Nationality, Immigration and Asylum Act (NIAA) 2002 s101. In *Mlauzi*, the Court of Appeal allowed another appeal by the appellant against the Tribunal's decision to allow the Home Secretary's appeal against the adjudicator's decision to allow the appellant's appeal.

The court gave clear guidance that any attempts to appeal against decisions on the facts were now consigned to the past as a result of the restrictive scope of appeal rights under s101. The court commented that it hoped that the glut of appeals pending before it on this issue would be considered carefully, and reviewed by the Home Secretary in order to avoid a waste of the court's time and resources.

Miftari was one case that was not resolved in the way suggested by the court in *Mlauzi*. In *Miftari* the court again allowed the appellant's appeal against the Tribunal's decision because it had erred in allowing the Home Secretary's appeal against a positive determination by the adjudicator. The court gave guidance which goes considerably further than that set down previ-

ously. In essence, the court held that:

- although it was true that the adjudicator had misunderstood the jurisprudence on articles 3 and 8 of the human rights convention when he had allowed the appeal, the central problem for the Home Secretary's appeal was that the grounds drafted for the application for permission to appeal to the Tribunal from the adjudicator's decision did not disclose any point of law;
- this need for the grounds to refer to an error of law was a condition precedent for any appeal;
- because of the Court of Appeal's limited jurisdiction in relation to the Tribunal's decision but not in relation to the adjudicator's judgment, in such a situation, the latter's ruling could not be disturbed by the court;
- although a perverse decision would amount to showing an error of law, that concept (perversity) should not be given too restrictive an approach (per Lord Justice Maurice Kay); and
- the Court of Appeal's decision in *R v Secretary of State for the Home Department ex p Robinson* [1998] QB 929, still applies in the new NIAA 2002 appellate context. However, the principle set out in *ex p Robinson* (obvious points not made out by an appellant could and should be addressed by the Tribunal) does not apply if the appeal is by the Home Secretary. This may raise an issue under article 6 of the human rights convention that will have to be considered on another occasion.

In *R and others* the Court of Appeal heard a number of appeals in July 2005 and gave the most detailed judgment on the scope of appeals under the NIAA 2002 thus far. The court indicated that the appeals before it concerned the Immigration Appeal Tribunal (IAT) but the guidance given in the judgment was equally applicable to the newly created Asylum and Immigration Tribunal (AIT).

The court reminded practitioners of the points of law most frequently encountered in practice:

- Making perverse or irrational findings on a matter, or matters, that were material to the outcome ('material matters');
- Failing to give reasons, or any adequate reasons, for findings on material matters;
- Failing to take into account and/or resolve conflicts of fact or opinion on material matters;
- Giving weight to immaterial matters;
- Making a material misdirection of law on any material matter;
- Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;
- Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his/her advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made.

After considering the various issues raised by the appeals the court concluded:

- Before the IAT could set aside a decision of an adjudicator on the grounds of error of law, it had to be satisfied that the correction of the error would have made a material difference to the outcome, or to the fairness of the proceedings. This principle applied equally to decisions of adjudicators on proportionality in connection with human rights issues;
- A finding might only be set aside for error of law on the grounds of perversity if it was irrational or unreasonable in the *Wednesbury* sense, or was one that was wholly unsupported by the evidence;
- A decision should not be set aside for inadequacy of reasons unless the adjudicator failed to identify and record the matters that were critical to her/his decision on material issues, in such a way that the IAT was unable to understand why s/he reached that decision;
- A failure without good reason to apply a relevant country guidance decision might constitute an error of law;
- At the hearing of an appeal the IAT had to identify an error of law in relation to one or more of the issues raised on the notice of appeal *before* it could lawfully exercise any of its powers set out in NIAA 2002 s102(1) (other than affirming the adjudicator's decision);
- Once it had identified an error of law, such that the adjudicator's decision could not stand, the IAT might, if it saw fit, exercise its power to admit up to date evidence or it might remit the appeal to the adjudicator with such directions as it thought fit;
- If the IAT failed to consider an obvious point of convention jurisprudence (under either the refugee convention or the human rights convention), which would have benefitted an applicant, the Court of Appeal might intervene to set aside the IAT's decision on the grounds of error of law even though the point was not raised in the grounds of appeal to the IAT.
- In the court's view, the quality of the Tribunal's determinations had improved recently and because immigration law was far more 'settled' now than before the Court of Appeal would be more reluctant to intervene and grant permission against the decision of the specialist Tribunal.

Comment: In *Miftari* and *Mlauzi,* the court criticised the failure of the secretary of state to clearly articulate an error of law in his grounds of appeal in order to give the Tribunal jurisdiction to consider the appeal in the first place, and also the failure of the secretary of state to actually make out an error of law against a decision of the adjudicator allowing the claimant's appeal. These cases have been helpful in providing valuable guidance to the Tribunal to carefully evaluate applications for permission to appeal made to it and particularly unfocused challenges by the secretary of state.

In *R and others,* however, the court has taken a restrictive approach to the new jurisdiction which is likely to make it more difficult for protection claimants to appeal against adverse decisions by the adjudicator and immigration judges. The court has emphasised that challenges against a lack of reasons given in a determination, unless specific and material, will not succeed and should no longer be pursued. In addition, the court emphasised that it will be more reluctant in granting permission against a specialist Tribunal such as the IAT (or AIT). This restrictive approach to challenges against the decisions of the IAT or AIT is inevitably troubling because the complex and developing nature of immigration law, coupled with the constant legislative changes taking place, is creating a context where the decisions of the IAT or AIT should be subject to greater scrutiny not less. Finally, it should be noted that the court appreciated that where there was relevant material but this could not be used to show an error of law in the decision made, the possibility of making representations alleging a fresh claim for protection was available.

Asylum procedure: interviews

■ R (Dirshe) v Secretary of State for the Home Department
[2005] EWCA Civ 421

In April 2004, public funding was, in general, no longer available for the attendance of representatives or interpreters at interviews. The claimant sought judicial review of the Home Secretary's decision to refuse his request that an interview concerning his asylum claim be tape-recorded. Permission was refused by the High Court and the claimant appealed to the Court of Appeal.

The asylum interview was a crucial stage in the Home Secretary's consideration of an applicant's claim under the refugee convention or the human rights convention. It was, therefore, important to ensure that there was fairness in the procedure to be adopted for both the Home Secretary and the applicant. As

public funding was no longer available for the presence of a representative or interpreter for applicants, there was a real risk of unfairness and disadvantage to a person who was interviewed and wished to challenge the contents of that interview. As such there was a real risk of procedural unfairness if a tape-recording was not permitted where neither a representative nor an interpreter was able to be present at the interview. Although the decision to allow tape recordings may cause administrative and logistical difficulties for the Home Office, any such difficulties did not detract from the importance of allowing such a procedure to be now adopted. The court gave permission to appeal. It also granted the application for judicial review, quashed the Home Secretary's decision, and made the following declaration: 'The court declares that it is unlawful for the respondent to decline to permit an applicant for leave to enter or remain in the UK on grounds of asylum and/or humanitarian protection and who is not accompanied at his asylum or human rights interview by a legal representative and/or interpreter to tape record that interview.'

Comment: Subsequent to this decision, a procedure has been adopted by which the Home Office will now tape-record substantive asylum interviews on request and the tape will be given to the claimant at the end of the interview.

Asylum-seekers: age assessments/detention

■ **R (I and O) v Secretary of State for the Home Department**
[2005] EWHC 1025 (Admin)

The claimants were asylum-seekers who had asserted that they were under 18. The immigration authorities were of the view that, having regard to their appearance and demeanour, they were not the age they claimed to be and detained them. Age assessments were carried out by a consultant paediatrician (CP) who concluded that although there was a margin of error of plus or minus two years in both cases, the claimants' ages were consistent with those that they had given. Despite having received these reports, the Home Office continued to detain the claimants and to treat them as adults pending a decision by the relevant social services department. The social services department subsequently assessed the claimants. It concluded that they were under 18 and they were released from detention. The claimants sought judicial review of the Home Office's decision to continue to detain them for the period between its receipt of the reports from the CP and the age assessments carried out by the social services department. The claimants argued that the decisions to detain them were both in breach of the Home Office's own policy where age was in issue and, in any event, irrational in the light of the contents of the CP's report, which was confirmed by the subsequent social services department's reports.

Owen J granted the application for judicial review. The judge held that the Home Secretary had misapplied his own policy on cases where age was in issue. Furthermore, the decision to detain the claimants after receiving the CP's report was irrational, particularly because of the paediatrician's extensive experience and specialist expertise in age assessments.

Asylum: procedure – certification of Bangladesh

■ **R (Husan) v Secretary of State for the Home Department**
[2005] EWHC 189 (Admin)

In this case Wilson J gave a powerful and comprehensive judgment criticising the Home Secretary's approach to the certification of Bangladesh as a 'white list' country. He declared that the inclusion of Bangladesh under NIAA s94(4) was unlawful as there was significant, objective evidence available to the Home Secretary (and, indeed, mainly produced by him), which should have made any rational decision-maker realise that it was not possible to conclude that there was, in general, in Bangladesh no serious risk of persecution of persons entitled to reside there.

Subsequent to this decision Bangladesh has been removed from the list by statutory instrument (see The Asylum (Designated States) (Amendment) Order 2005 SI No 1016, in force from 22 April 2005).

Asylum: credibility

■ **Ghisari v Secretary of State for the Home Department**
[2004] EWCA Civ 1854

The Court of Appeal has given a useful reminder to the immigration appellate courts on the proper approach to findings of credibility: when the fact-finding tribunal is attempting to establish whether an appellant is being truthful, it should adopt a two-stage test in order to decide:

■ How inherently probable or improbable an account was; and

■ Whether, although inherently improbable, it was true or whether, although inherently probable, it was untrue.

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1 The consultation document is available at: www.homeoffice.gov.uk/docs4/Making_Migration_Work.pdf.

HOUSING

Recent developments in housing law


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

POLITICS AND LEGISLATION

Housing Act 2004: commencement

The Housing Act 2004 (Commencement No 4 and Transitional Provisions) (England) Order 2005 SI No 1729 brought the following provisions of the Housing Act (HA) 2004 into force in England on 4 July 2005:

- s181, which amends HA 1985 Sch 5 para 11 by providing that applications questioning the exclusion of a property from the right to buy on the ground that it is particularly suitable for elderly persons shall be determined by a residential property tribunal instead of the secretary of state; and by providing that HA 2004 s231 does not apply to any decision of a residential property tribunal in relation to such applications;
- s229, which provides that jurisdiction given under HA 2004, or any other enactment, to a residential property tribunal, shall be exercised by a rent assessment committee constituted under the Rent Act 1977;
- s230, which confers a general power on residential property tribunals to give directions by order;
- s231, which sets out the right of appeal from a decision of a residential property tribunal to the Lands Tribunal; and
- Sch 13, which confers on the secretary of state power to make regulations relating to the procedure of residential property tribunals.

The latter power has already been exercised. The Residential Property Tribunal (Right to Buy Determinations) Procedure (England) Regulations 2005 SI No 1509 contain a full procedural code for such cases. They also came into force on 4 July 2005.

The first commencement provisions for the HA 2004 have also been made in Wales. The Housing Act 2004 (Commencement No 1) (Wales) Order 2005 SI No 1814 brought into force, on 14 July 2005, the provisions relating to:

- the removal of the duty on local housing authorities under Local Government and Housing Act 1989 s167 to send annual reports to tenants (HA 2004 s227);
- new grounds on which consent to assignment of a secure tenancy may be withheld (HA 2004 s191 inserts a new Ground 2A into HA 1985 Sch 3);
- the creation of the office of Social Housing Ombudsman for Wales (HA 2004 s228 inserts new ss51A, 51B and 51C into HA 1996 and HA 2004 Sch 12 inserts a new Sch 2A into HA 1996).

Under the last of these, the details of the social housing ombudsman scheme for Wales, which came into force on 15 July 2005, are given in the Social Housing Ombudsman (Wales) Regulations 2005 SI No 1816.

Despite the fact that the tenancy deposit scheme provisions of HA 2004 Part 6 Chapter 4 are due to be implemented in England in July 2006, few landlords or letting agents have prepared for the changes. A research report released on 19 July 2005 by The Dispute Service found widespread ignorance of the impending changes: *Tenancy deposit scheme awareness survey,* July 2005.[1]

In contrast, the Office of the Deputy Prime Minister (ODPM) has been able to report good progress with arrangements for the implementation of the Home Information Pack provisions of HA 2004 Part 5 in 2007 (and the 'dry run' in 2006). The Awarding Body for the Built Environment's Diploma in Home Inspection was approved on 25 July 2005: ODPM news release 2005/0151.[2]

PUBLIC SECTOR

Secure tenants

Tolerated trespassers

■ **Lambeth LBC v O'Kane; Helena Housing Ltd v Pinder**
[2005] EWCA Civ 1010, 28 July 2005

The defendants were secure tenants. Their landlords obtained suspended possession orders based upon rent arrears. The terms of the suspended possession orders were breached and the defendants became tolerated trespassers.

In *O'Kane*, the former tenant, a Mr Kennedy, was living in a same-sex relationship with Mr O'Kane. Mr Kennedy died. Mr O'Kane sought to succeed to the tenancy. Before his death, but after breaching the terms of the suspended possession order, Lambeth sent Mr Kennedy notice of variation of tenancy conditions and four notices of revision of rent and water charges. It referred to rent and not mesne profits. Mr O'Kane argued that by its actions Lambeth had either waived the breaches of the suspended possession order or entered into a new tenancy. HHJ Welchman rejected those arguments.

In *Helena Housing Ltd*, after breach of the suspended possession orders, the landlord sent new rent cards with an increased 'rent'. Relying on this, the 'tenants' applied to the court to discharge warrants for possession on the basis that new tenancies had been created. HHJ Mackay rejected their applications.

The Court of Appeal rejected appeals by all the occupants. It concluded that it was not possible to argue that breaches had been waived in view of the decision of the Court of Appeal in *Marshall v Bradford MDC* [2002] HLR 22. The question of whether or not a new tenancy has been created is a question of fact for the trial judge. The rent increases in *O'Kane* were consistent with the former landlord's desire to increase mesne profits. There was nothing in those increases:

… to force the conclusion that the [former] landlord intended to create a new tenancy. The full context of fact must be considered, and that context includes the fact that Mr Kennedy still owed significant arrears.

The same applied in *Helena Housing Ltd*. The position is no different where the original tenancy was granted to joint tenants.

Licensees – natural justice

■ **Coleg Elidyr (Camphill Communities Wales) Limited v Koeller**
[2005] EWCA Civ 856, 12 July 2005

The claimant was a charitable company established to develop 'communities for handicapped persons' with sheltered accommodation. Mr and Mrs Koeller were members of the company. They occupied a house owned by the company as licensees. Relations deteriorated and Mr Koeller was asked to leave the community. He tendered his resignation. Mr and Mrs Koeller were then asked to vacate the house. They failed to do so. The company sought possession. HHJ Weeks QC made a possession order.

Mr and Mrs Koeller's appeal was dismissed. The company was an entirely separate entity from the community. The company's decision to seek possession of the house was a decision of the company alone. It had to be distinguished from the decision to expel Mr Koeller from the community, which was a decision taken by members of the community. The Court of Appeal did not decide the 'difficult problem' of whether the principles of natural justice applied to the company's decision. However, even if the principles of natural justice were applicable to the exercise of the company's powers of management over the house, it had acted

entirely properly and fairly towards the Koellers and the suggestion that it had acted in breach of the principles of natural justice was bordering on the fanciful. It had not acted in breach of the principles of natural justice so as to afford a defence to the claim for possession. Furthermore, the defendants were unable to rely upon any implied contractual relationship between members of the community or any defence of promissory estoppel.

For a case involving an application for summary judgment in a claim for possession of moorings, in which the court considered whether proprietary estoppel can bind a public authority and whether reasonable notice was given to terminate a licence, see *Yarmouth Harbour Commissioners v Harold Hayles Ltd* [2004] EWHC 3375 (Ch), 3 December 2004 (Park J).

Long leases

Leasehold enfranchisement

■ **Brick Farm Management Ltd v Richmond Housing Partnership Ltd**

[2005] EWHC 1650 (QB), 28 July 2005

The defendant was a charitable housing trust (see Leasehold Reform, Housing and Urban Development Act (LRHUDA) 1993 s5 and HA 1985 s6). It acquired the freehold to two blocks of flats. At least two-thirds of the flats were let on long leases. The remainder were let on assured tenancies. At least half of the tenants of both blocks with long leases wished to exercise the right to collective enfranchisement under LRHUDA s1. The defendant opposed the claim, arguing that the tenants were excluded under s5(2)(b) because their flats were '… part of the housing accommodation provided by [it]', as a charitable trust, 'in the pursuit of its charitable purposes'. It claimed that since charitable housing trusts did not, in practice, grant long leases in pursuance of their charitable function, the accommodation provided by that trust for the purposes of s5(2)(b) had to be the block of flats in which some of the tenants would otherwise be qualifying tenants in order to give practical effect to that provision. A judge rejected that contention.

Stanley Burnton J dismissed an appeal. The fact that the freehold owner was a charitable housing trust, and that some of the flats were let pursuant to its charitable objectives, did not disqualify other tenants under long leases from exercising their right to collective enfranchisement.

Adverse possession

■ **Tower Hamlets LBC v Barrett**

[2005] EWCA Civ 923, 19 July 2005

Mr and Mrs Barrett were the tenants of a public house from 1977 until 1993, when they purchased the freehold. In 1977 they started to occupy land belonging to the Greater London Council (GLC), which was next to the pub. They installed a lockable gate and kept the only key. They occupied that land without the GLC's permission until 1989 or 1990. Between 1980 and 1985 there were discussions between Mr and Mrs Barrett's landlord and the GLC about the use of the occupied land. In 1994, Mr and Mrs Barrett obtained planning permission to erect an extension to the public house on the land. Works were started but, in 1995, a representative of Tower Hamlets (the GLC's successor) pointed out to the Barretts that they were not the registered proprietors of the land, and work stopped. The Barretts then fenced the area and kept it clean and tidy. In January 2002, they applied to the Land Registry to be registered as the proprietors of the land, claiming that they had acquired title by adverse possession. Tower Hamlets sought possession. A judge ordered the Barretts to give up possession.

The Court of Appeal allowed Mr and Mrs Barrett's appeal. There was no implied licence to occupy the land as a result of negotiations that ended in 1985. Although there had been an acknowledgement of the paper owner's title in those negotiations, that acknowledgement was not by the Barretts, but by their landlord. It was not given by 'the person in possession of the land' and therefore was not an effective acknowledgement for the purposes of Limitation Act 1980 s29. The possession order was set aside.

HOMELESSNESS

Priority need

■ **Osmani v Camden LBC**

30 June 2005, House of Lords

An appeal committee (Lords Hoffmann, Walker and Lady Hale) dismissed a petition, seeking leave to appeal, in respect of the Court of Appeal's important decision on 'vulnerability' and priority need: see [2005] HLR 325 and February 2005 *Legal Action* 36.

■ **Wandsworth LBC v Brown**

[2005] EWCA Civ 907, 23 June 2005

Wandsworth decided, in April 2004, that Mr Brown was not 'vulnerable' by reason of his various physical disabilities. That decision was upheld by the council's Reviews Manager but, on an appeal to the county court (under HA 1996 s204), was quashed by consent. Eight days later, the Reviews Manager made a further decision to the same effect. On Mr Brown's further appeal to the county court, HHJ Collins found that the decision had been inadequately reasoned and was perverse. He varied the decision to one that recognised Mr Brown as having priority need by reason of his vulnerability.

Wandsworth applied for permission to bring a second appeal. It claimed that, in the light of his concerns about inadequate reasoning, the judge should have quashed and remitted the review decision and not varied it in exercise of his powers under s204(3). That power should be reserved for cases in which there was 'only one answer'.

The Court of Appeal rejected the application because it did not raise an important point of principle: CPR 52.13. While the judge had focused on the content of the review decision – which was 'repetitious', 'rambled', referred to Mr Brown as having 'depression' (when he did not) and included curious references to being 'without prejudice' – he had described the ultimate conclusion as 'astonishing' and 'plainly perverse'. In those circumstances, the use of the power to vary in order to substitute, in effect, a decision, raised no important point of principle.

Duties owed to the intentionally homeless

■ **R (Conville) v Richmond-Upon-Thames LBC [Q14]**

[2005] EWHC 1430 (Admin), 5 July 2005[4]

The claimant applied to Richmond but, in February 2005, was notified of a decision that, although she was homeless and in priority need (by reason of a dependent child), she had become homeless intentionally. In performance of its duties under HA 1996 s190(2), the council provided accommodation for 28 days and supplied details of local private lettings, which indicated that the claimant would need a deposit and a month's rent in advance. The claimant sought a review of the decision of intentional homelessness and accommodation was continued pending that review. The review decision was notified on 11 May 2005 upholding the original decision and extending continued provision of accommodation to 3 June 2005.

The claimant could not fund a deposit so applied to the council for financial help. It refused her assistance under its rent deposit guarantee scheme on the grounds that it was oversubscribed, excluded those who were intentionally homeless and that her circumstances were not exceptional.

The claimant sought judicial review contending that: (1) there had been no assessment of her housing need contrary to HA 1996 s190(4); (2) the period of temporary accommodation allowed was inadequate; and (3) the exclusion from the rent deposit guarantee scheme had been unlawful. Goldring J dismissed the claim. He held that:

■ although there had been no formal or written assessment under s190(4), by the date of its

last relevant decision the council had received and considered all the material that might have been relevant on an assessment, rendering the challenge to the failure to assess at the outset academic;

■ the start date to be used when assessing the period of temporary accommodation to be provided for the intentionally homeless was the date of the initial decision and not the date of notification of a subsequent review decision. In assessing what period would provide an applicant with a 'reasonable opportunity' for finding his/her own accommodation under s190(2)(a) the council was entitled to have regard not only to her circumstances but also to other demands on the council's housing resources and to local housing conditions.

■ although s190(2)(a) enabled a council to provide financial assistance for the intentionally homeless in finding accommodation, it was not obliged to provide it. The council had considered the exercise of its powers to provide assistance with a deposit notwithstanding the limits of its own scheme. It had decided, for adequate reasons, not to provide one.

The full housing duty

■ **R (Calgin) v Enfield LBC**
[2005] EWHC 1716 (Admin), 29 July 2005

The claimant, his wife and his baby daughter arrived in the UK from Turkey in April 2004 and were granted indefinite leave to remain. Having become homeless, they applied to Enfield which accepted a full housing duty under HA 1996 s193. It decided on review to provide accommodation in Birmingham in discharge of that duty. Mr Calgin lodged an appeal to the county court (HA 1996 s204) but that was stayed pending a judicial review of the council's policy of out-of-borough placement of homeless households. The claimant contended that a general policy of using cheaper accommodation in the Midlands ran contrary to the statutory requirement to use in-borough accommodation 'so far as reasonably practicable': HA 1996 s208(1).

Elias J dismissed the claim. He held that in determining 'reasonable practicability', the council had been entitled to take into account the pressures on accommodation locally and the availability of cheaper accommodation elsewhere. Although the 'suitability' requirement in HA 1996 s206 imposed a minimum standard which had to be achieved, irrespective of the council's available resources, if that was achieved the only inhibitor on out-of-borough placement was s208(1). The council's policy was not contrary to that provision and was not *Wednesbury* unreasonable. It had been entitled to consider resource issues in determining whether the provision of local accommodation was 'reasonably practicable'.

Reviews and appeals

■ **Cramp v Hastings LBC; Phillips v Camden LBC**
[2005] EWCA Civ 1005, 29 July 2005[5]

Hastings and Camden made decisions that Cramp and Phillips, respectively, were unintentionally homeless but had no priority need. Each asserted that they were 'vulnerable' but the council's decisions were upheld by reviewing officers. On separate appeals by each applicant, under HA 1996 s204, the reviewing officer's decisions were quashed in the county court on the ground that there had been insufficient enquiries made by the reviewing officers before reaching their decisions. Hastings was granted permission to make a second appeal to the Court of Appeal and Camden sought permission.

The Court of Appeal allowed both appeals. It held that:

■ Parliament had imposed the duty of making the necessary enquiries on a housing officer and, in the event of a review, on a senior housing officer. In each case solicitors acting for the applicant availed themselves of their right to make representations on the review. In neither case did they suggest that the council should make the enquiries, absence of which led to the reviewing officer's decision being quashed, as a matter of law. In each case the reviewing officer judged that she could make the decision without making any further enquiries along those lines.

■ It was for the councils to judge what enquiries were necessary, and they were susceptible to a successful challenge on a point of law if, and only if, a judge in the county court considered that no reasonable council could have failed to regard as necessary the further enquiries suggested by the appellants' advisers.

■ It had simply not been open to the judge in either case to hold that no reasonable council would have refrained from making particular enquiries.

■ As a matter of law a quashing could not be justified on the grounds 'that it would have been helpful' if particular enquiries had been made, or that 'there might well have been additional information' which further enquiries might have produced. Whether to make such enquiries was a matter for the reviewing officer.

■ Camden should have permission to make a second appeal because:

> *… these two cases evidence a worrying tendency in judges at [county court] level to overlook the fact that it will never be easy for a judge to say that an experienced senior housing officer on a homelessness review, who has considered all the reports readily available, and all the representations made by the applicant's solicitors, has made an error of law when she considered that it was unnecessary to put in train further detailed inquiries, not suggested by the applicant's solicitors, before she could properly make a decision on the review. The need to correct that tendency raises an important point of practice.*

The court took the opportunity to give guidance on the procedural aspects of s204 appeals in the county court and said (as to the introduction of evidence in such appeals):

> *… judges in the county court need to be astute to ensure that evidential material over and above the contents of the housing file and the reviewing officer's decision is limited to that which is necessary to illuminate the points of law that are to be relied on in the appeal, or the issue of what, if any, relief ought to be granted. An undisciplined approach to the admission of new evidence may lead to the danger that the reviewing officer is found guilty of an error of law for not taking into account evidence that was never before her, notwithstanding the applicant's opportunity to make representations about the original decision.*

■ Jan Luba QC is a barrister at Garden Court Chambers, London WC2 and a recorder. Nic Madge is a circuit judge. They are grateful to the colleagues at notes 3–5 for supplying transcripts or notes of judgments:

1 Available at: www.tds.gb.com/downloads/arla_tds_survey_jul05.pdf.
2 Available at: www.odpm.gov.uk
3 Justin Bates, Arden Chambers, London.
4 Liz Davies, barrister, and Anthony Gold solicitors, London.
5 David Watkinson, barrister, London and Holden & Co solicitors, Hastings.

GYPSIES AND TRAVELLERS

Gypsy and Traveller law update


Marc Willers and **Chris Johnson** continue this annual series. The last update appeared in August 2004 *Legal Action* 13. The authors welcome case notes and comments from readers.

INTRODUCTION

In the past year there have been a number of significant developments in the law and policy relating to the provision of accommodation for Gypsies and Travellers. The government's report on its review of Gypsy and Traveller site provision is still awaited. However, the issues that it will address have been the subject of much public debate and litigation.

In November 2004, the Office of the Deputy Prime Minister (ODPM) Housing, Planning, Local Government and the Regions Select Committee published a report on *Gypsy and Traveller sites* (13th report of session 2003–04, HC 633-I).[1] Among many recommendations, the select committee called for the return of the duty to provide, or facilitate the provision of, sites (a duty repealed by the Criminal Justice and Public Order Act (CJPOA) 1994). The government responded to the select committee in January 2005. The government stated that it did not intend to reinstate the duty because it considered that new obligations imposed on local authorities in recent legislation – to assess the need for Gypsy and Traveller sites and identify suitable locations for them (see below) – would ensure that adequate site provision is made.[2]

The Council of Europe's Human Rights Commissioner, Alvaro Gil-Robles, wrote a strong section on Gypsy and Traveller issues in his recent report on his visit to the UK.[3] He too called for a return of the duty to provide sites.

Gypsies and Travellers have been the focus of a great deal of negative media attention in recent months. The tabloid press has reported extensively on a number of high-profile planning battles and the *Sun* newspaper ran a very inflammatory campaign called 'Stamp on the camps'. Then the Conservative party raised the stakes during the general election campaign when it produced its own policy on Gypsies and Travellers, suggesting that they should be denied the right to rely on the provisions of the Human Rights Act 1998 and that the right to make retrospective planning applications should be withdrawn. The policy was roundly condemned by both the government and other political parties.

The Gypsy and Traveller Law Reform Coalition (GTLRC) continues to campaign for the provision of more sites and to fight against the discrimination that Gypsies and Travellers suffer. The GTLRC's efforts were rewarded when it won the Liberty/Justice Human Rights Award in 2004.

OFFICIAL CARAVAN SITES

'Gypsy and Traveller law update', August 2004 *Legal Action* 13, reported on the case of *Connors v UK* App no 66746/01, 27 May 2004; (2004) *Times* 10 June, where the European Court of Human Rights (ECtHR) decided that the lack of security of tenure on official sites (and the consequent eviction of Mr Connors without him being able to raise a defence in court) amounted to a breach of article 8 of the European Convention on Human Rights ('the convention').

Housing Act (HA) 2004 s209 now gives the courts the power to suspend possession orders made against Gypsies and Travellers living on official sites for up to 12 months. However, no provision has yet been introduced to enable Gypsies and Travellers to raise any defence in the possession proceedings and they continue to claim that their article 8 rights are being infringed as a consequence.

■ **Birmingham City Council v Doherty**

20 December 2004, Birmingham District Registry

HHJ McKenna considered a claim for possession brought against Mr Doherty, a resident on a local authority site. The judge granted possession and, in doing so, indicated that he had followed the judgment in *Harrow LBC v Qazi* [2003] UKHL 43; [2003] 4 All ER 461 – in which the House of Lords (by a majority of three to two) had decided that Mr Qazi, who had had his tenancy lawfully terminated, could not rely on article 8 as a defence – rather than that of the ECtHR in *Connors*.

The clear conflict between the judgments in *Qazi* and *Connors* has arisen in two other cases which are to be decided by the House of Lords in December 2005: *Kay and others v Lambeth LBC and another* [2004] EWCA Civ 926; [2004] HLR 56, involves a former tenant of a house; *Price and others v Leeds City Council* [2005] EWCA Civ 289, involves the eviction of Irish Travellers from an unauthorised encampment (see below). In both these cases the petitioners had sought to rely on article 8 as a defence to possession action, a proposition rejected by the lower courts.

Mr Doherty was given permission to use the 'leapfrog' method to petition the House of Lords. However, the House of Lords has now decided that his case should be remitted to the Court of Appeal (where it has now been lodged) and that his eviction should be stayed pending the outcome in *Kay* and *Price*.

These three cases not only raise the vital issue of the use of article 8 and the clear incompatibility between *Connors* and *Qazi*, but also the important question of the inter-relationship between a House of Lords' judgment and a ECtHR's judgment.

It seems clear that, following *Connors*, local authorities that are seeking to amend site licence agreements, or to introduce new agreements, will have to include a clause within such agreements introducing security of tenure. In July 2005, Oxfordshire County Council decided to add a clause into its new site licence agreements for its six official sites, introducing security of tenure (the clause was modelled on the security of tenure enjoyed by council tenants and is to last until such time as the government introduces security of tenure for all official sites). It can further be argued, using the logic that the ECtHR applied in *Connors*, that such agreements should include clauses dealing with: succession; repairing obligations; assignment; and the right to exchange.[4]

At the same time as Oxfordshire was considering the introduction of new licence agreements, it also proposed that the police be involved in the management of its official sites. However, after questions were raised about whether such a role was within the scope of police powers the authority withdrew this proposal.

In a memorandum to the Council of Ministers in November 2004, following the *Connors* judgment, the government stated that:

… ministers have accepted during the passage of the Housing Act 2004 that tenure on local authority Gypsy and Traveller sites is out of line with tenure in bricks and mortar social housing, and that public sites have strong similarities to social housing in terms of client profile, landlord profile and management needs … Ministers have indicated that the most suitable way to take any proposals forward would be as part of future legislation on tenure reform relating to bricks and mortar housing.

It is very disappointing to note that this issue has not yet been formally referred to the Law Commission and that there are now indications that the legislation on tenure reform may not get on to the statute book until 2007. In the meantime, Gypsies and Travellers remain in a totally unacceptable state of limbo (see *Doherty* above) and the government's inaction is threatening to clog up the courts with challenges to possession actions.

PLANNING

While the shortage of available accommodation for Gypsies and Travellers remains acute, those seeking planning permission for the use of their own land as a caravan site continue to find it very difficult to do so. The tabloid press tends to focus on the planning battles fought between the occupants of large sites, such as those in Cottenham, Cambridgeshire and Crays Hill, Basildon, with local councils and residents. However, even those trying to obtain planning permission for much smaller family sites face similar objections and are invariably refused permission by their local planning authority (LPA). As a consequence, most Gypsies and Travellers are forced to appeal to the First Secretary of State for planning permission and have to fight tooth and nail for permission to live on their land in their caravans.

Recent legislative changes

The government has recognised that Department of the Environment (DoE) Circular 1/94, *Gypsy sites and planning*, failed in its aim to provide sufficient sites for Gypsies and Travellers. While it has not bowed to the widespread calls for the reintroduction of the statutory duty to provide Gypsy sites, the government has at least imposed new duties on local authorities:

- to assess the accommodation needs of Gypsies and Travellers when undertaking their local housing needs assessments (HA 2004 s225); and
- to include policies to address the accommodation needs of Gypsies and Travellers in their local development documents (Planning and Compulsory Purchase Act (PCPA) 2004).

Gypsy status

The last 'Gypsy and Traveller law update', August 2004 *Legal Action* 14, explained that in *Wrexham CBC v National Assembly for Wales and Berry* [2003] EWCA Civ 835, the Court of Appeal had held that a person will lose his/her Gypsy status if s/he decides to retire permanently from a nomadic way of life because of age or ill health. When Mr Berry was refused permission to appeal to the House of Lords, he lodged an application with the ECtHR and complained that the Court of Appeal's decision amounted to a breach of his rights, protected by article 8 of the convention, because it ignored the fact that living in caravans is an integral part of his traditional way of life as a Gypsy. Mr Berry has since been granted planning permission to remain on his land.

Draft circular

In December 2004 the ODPM issued a consultation paper, *Planning for Gypsy and Traveller sites,* on a proposed new circular to replace DoE Circular 1/94.[5] The government stated that a new circular is necessary because evidence shows that the advice set out in DoE Circular 1/94 has failed to deliver adequate sites for Gypsies and Travellers in many areas of England.

The consultation paper defines 'Gypsies and Travellers' as meaning:

> *A person or persons who have a traditional cultural preference for living in caravans and who either pursue a nomadic habit of life or have pursued such a habit but have ceased travelling, whether permanently or temporarily, because of the education needs of their dependent children, or ill-health, old age, or caring responsibilities (whether of themselves, their dependants living with them, or the widows and widowers of such dependants), but does not include members of an organised group of travelling show people or circus people, travelling together as such.*

In doing so the government seems to be keen to move away from the rather more restrictive and unfair interpretation that was placed on the statutory definition of the word 'Gypsy' by the Court of Appeal in *Berry.*

However, concern has been expressed that the phrase 'traditional cultural preference' may be interpreted so as to exclude New Travellers, despite the fact that they can currently qualify as 'statutory Gypsies' if they lead a 'nomadic habit of life'. A number of groups have sent strong submissions to the ODPM calling for the removal of the phrase, arguing that it makes no sense to restrict the advice in the new circular to the provision of accommodation for Traditional Travellers when New Travellers have similar needs.

In addition the consultation paper includes:

- A requirement that local authorities identify suitable sites for Gypsies and Travellers in their development plan documents – advising that it will only be in exceptional circumstances that it will be acceptable to meet needs by specifying criteria for the identification of sites rather than by identifying any specific sites;
- Improved guidance on drafting criteria-based policies in development plans against which applications for sites not allocated within the plan will be judged – it is proposed that the new guidance will say that criteria should be fair, reasonable, realistic and effective in delivering sites;
- An explanation of how local housing assessments will assist local authorities to quantify the level of need and how the new planning system and the involvement of Regional Housing Boards will translate that need into allocations in the planning process;
- Advice on local authorities' responsibilities under race discrimination legislation;
- Advice on how local authorities should seek to engage with Gypsies and Travellers and build trust; and
- Advice to Gypsies and Travellers and their representatives about how they should engage with the planning system.

The National Assembly of Wales is also considering new proposals to replace its own guidance in Circular 2/94.

Green Belt – very special circumstances

Gypsy sites are considered to be 'inappropriate development' in the Green Belt. *Planning Policy Guidance 2 (PPG2): Green Belts* (1995) provides that planning permission for a Gypsy site in the Green Belt will not be granted unless the applicant shows that 'very special circumstances' exist, ie, that the harm to the Green Belt by reason of inappropriateness and any other harm is clearly outweighed by other considerations. The question of what constitutes 'very special circumstances' continues to give rise to litigation.

- **R (Basildon DC) v First Secretary of State and Temple** *[2004] EWHC 2759 (Admin), [2005] JPL 942*

The claimant local authority argued that very special circumstances are not merely factors that weigh in favour of granting planning permission and that each factor relied on must be a factor that is of a quality that can reasonably be called 'very special'. Sullivan J rejected that argument. He considered the claimant's approach to be fallacious since a number of factors, none of them 'very special' when considered in isolation may, when combined together, amount to very special circumstances. He stated that the claimant's argument did not accord with logic or common sense:

> *The short answer to the claimant's argument is that in planning, as in ordinary life, a number of ordinary factors may when combined together result in something very special. Whether any particular combination amounts to very special circumstances for the purposes of PPG2 will be a matter for the planning judgment of the decision-taker.*

It is that principle that has underpinned the judgment of the court in two other recent cases where the local authorities have

sought to quash the grant of planning permission for Gypsy sites in the Green Belt: see *R (Dartford BC) v First Secretary of State and William Lee* [2004] EWHC 2549 (Admin) and *R (Mole Valley DC) v First Secretary of State and Henry Smith* [2005] EWHC 1079 (Admin).

■ **Simmons v First Secretary of State and Sevenoaks DC**

[2005] EWHC 287 (Admin)

Newman J held that where a Gypsy seeks planning permission to develop a site in the Green Belt, the decision on whether there are very special circumstances for permitting the development will require consideration to be given to the evidence of availability of an alternative site within the planning district in which the application has been made. He also said that the best evidence likely to be available regarding alternative sites in the relevant planning district will be from statistics and information available to the LPA. The purpose of the guidance to LPAs in DoE Circular 1/94 is to secure that such evidence is available. While Newman J stated that evidence about the availability of sites outside the relevant planning district will also be relevant, he rejected an argument that Gypsies seeking planning permission should travel round extensively outside the area in which they have applied to remain, and over an area covered by their Gypsy circuit, in order to provide material about the non-availability of other sites:

Such an open-ended expression of the burden upon an applicant and, in particular, a Gypsy, in my judgment, would be capable of being oppressive and unfair because of its lack of clarity. No Gypsy would know the extent to which he was bound to carry out searches for alternative sites. It would always be open to an inspector or to the secretary of state to conclude that he had not done enough.

Article 8 and the grant of planning permission

■ **First Secretary of State, Grant Doe and others v Chichester DC**

[2004] EWCA Civ 1248

The Court of Appeal (Auld LJ dissenting) upheld a decision made by an inspector to grant planning permission in circumstances where he had concluded that the refusal of planning permission would violate the appellants' rights, protected by article 8 of the convention. When doing so Wall LJ stated that:

The inspector was bound to determine whether it was proportionate for the council to evict the Gypsies in all the circumstances of this case, in order to decide whether the council could justify its admitted interference with the Gypsies' right to respect for their homes and private life under article 8(2) of the convention. He was entitled to take account of the limited environmental harm caused by the presence of the caravan site in this location; and to balance that limited harm against the factors that weighed in the Gypsies' favour. The latter properly included the fact that the council had, on the inspector's findings, failed to fulfil its role as local planning authority for Chichester, in pursuing the national planning policy objective of seeking to meet the accommodation needs of Gypsies. That policy objective is set out in paragraphs 6 to 12 of Circular 1/94 'Gypsy sites and planning'. The fact that article 8 does not oblige the United Kingdom to accommodate every Gypsy on a site of his choice does not prevent the First Secretary of State setting out the planning objective in Circular 1/94. Nor does it prevent him (through his appointed inspector) attaching weight to the fact that this particular local planning authority has failed to meet that policy objective (with the result that the accommodation needs of Gypsies in Chichester have become more pressing) when he decides whether the council has justified its interference with these Gypsies' rights under article 8 in the circumstances of this case.

Residential amenity and fear of crime

■ **Smith v First Secretary of State and Mid-Bedfordshire DC**

[2004] EWHC 2583 (Admin), [2005] EWCA Civ 859

A planning inspector had dismissed a planning appeal brought by Mr Smith, a Gypsy, against the decision of the council to refuse him planning permission for a caravan site to accommodate his extended family. Mr Smith made an application to quash the decision on grounds that the inspector had wrongly taken account of a number of irrelevant and discriminatory considerations including: the local residents' perception that the grant of planning permission would give rise to an increase in crime in the locality; and the concern that the grant of planning permission would give rise to undue competition for work among local Gypsies and a risk of conflict between them. Sullivan J dismissed the application. The Court of Appeal allowed the appeal of Mr Smith and quashed the planning inspector's decision.

Buxton LJ said that before the local residents' fear could be taken into account as a material consideration in such a case the:

(i) fear and concern must be real, by which I would assume to be required that the fear and concern must have some reasonable basis, though falling short of requiring the feared outcome to be proved as inevitable or highly likely; and (ii) the object of that fear and concern must be the use, in planning terms, of the land … It was necessary in order to take these incidents into account to attribute them not merely to the individuals concerned but also to the use of the land. But a caravan site is not like a polluting factory or bail hostel, likely of its very nature to produce difficulties for its neighbours. Granted that the evidence of recently past events attributable to the site was sparse, or on a strict view non-existent, the fear must be that the concern as to future events was or may have been based in part on the fact that the site was to be a Gypsy site. It cannot be right to view land use for that purpose as inherently creating the real concern that attaches to an institution such as a bail hostel.

Article 8 and planning enforcement

■ **South Bucks DC v Porter**

[2003] 2 AC 558

The House of Lords laid down the approach to be adopted by a court dealing with an application for an injunction under the Town and Country Planning Act (TCPA) 1990 s187B to restrain the use of land as a Gypsy site in breach of planning control. When giving judgment Lord Scott made specific reference to the fact that a court considering an application for a TCPA s187B injunction might grant an adjournment of the proceedings – allowing those resident in caravans on a site in breach of planning control to remain in circumstances where there was a real prospect that an outstanding planning appeal might succeed. Lord Scott said:

… If the court thought that there was a real prospect that an appeal against an enforcement notice or a fresh application by the defendant for the requisite planning permission might succeed, the court could adjourn the injunction application until the planning situation had become clarified. But where the planning situation is clear and apparently final the court would, in my opinion, have no alternative but to consider the injunction application without regard to the merits of the planning decisions.

■ **Coates and others v South Bucks DC**

[2004] EWCA Civ 1378

The Court of Appeal had to consider whether a judge had erred when he considered the issue of proportionality and when he decided not to suspend the operation of a TCPA s187B injunction, which required the appellants to leave their site until their appeal

against the refusal of planning permission had been decided. Lord Phillips MR and Neuberger LJ did not fault the judge's approach to the issue of proportionality and took account of the following facts:

- It was a sensitive site in the Green Belt on which there had already been a lengthy planning battle;
- The appellants knew when they occupied the site that there was an enforcement notice prohibiting its use for residential purposes; and
- Court orders had been flouted.

They concluded that to allow the appellants to remain on the site despite such conduct was to invite further similar unlawfulness. Sedley LJ disagreed; he took the view that the judge had failed to conduct a structured consideration of the questions now well-established in Strasbourg jurisprudence regarding proportionality and stated that although the appellants' behaviour had put them in the worst possible position to ask for the court's help, they:

… at least have the excuse that for 25 years local authorities throughout England and Wales failed to carry out their statutory duty to provide proper sites in substitution for the commons they were energetically ditching and fencing against entry by caravans, and that central government failed consistently to exercise its statutory enforcement powers against these local authorities … The problem of Traveller homelessness today is largely a consequence of widespread breach of the law by the local and central state.

Sedley LJ expressed the view that it would not be the 'end of the world' if the appellants were allowed to remain in situ until the determination of their planning appeal and considered that immediate eviction was not a proportionate response, despite the conduct of the appellants.

■ **Mid-Bedfordshire DC v Brown and others**

[2004] EWCA Civ 1709

The Court of Appeal considered a case where a judge had decided to suspend the operation of a TCPA s187B injunction until a pending planning application had been determined in circumstances where the defendants had moved on to land in breach of planning control and an ex parte injunction had been granted by the court. The Court of Appeal held that the judge's decision did not take into account the role of the court in upholding the important principle that orders of the court are meant to be obeyed and should not be ignored with impunity. When doing so Mummery LJ said:

They cocked a snook at the court. They did so in order to steal a march on the council and to achieve the very state of affairs which the order was designed to prevent. No explanation or apology for the breaches of the court order was offered to the judge or to this court.

Temporary stop notices

Planning and Compulsory Purchase Act (PCPA) 2004 s52 provides LPAs with a new weapon to add to their enforcement powers' armoury when they consider that there has been a breach of planning control: temporary stop notices (TSNs). It does so by inserting s171E into the TCPA. A TSN will enable a LPA to stop an alleged breach of planning control for a limited period while it is decided whether further enforcement action is appropriate and what form it should take. It also provides a LPA with a quicker and cheaper method of enforcement than that available under TCPA s187B.

TSNs are free-standing; unlike stop notices, a TSN may be issued without the need for an enforcement notice to be in existence. A TSN must be in writing and must set out the activity that the LPA thinks is in breach of planning control. It must prohibit the carrying on of that activity and set out the LPA's reasons for issuing the TSN. It may be served on any person who appears to be carrying out the activity prohibited by the TSN, anyone who seems to be an occupier of the land to which the notice relates and anyone who appears to have an interest in the land (in cases where such persons cannot immediately be located, or refuse service of the TSN, then it will be sufficient for the LPA to display a copy of it on the site itself). In addition, the LPA must publicise the fact that it has served a TSN by displaying a copy of it on the site together with a statement that it has been served and that failure to comply with it is an offence. The site notice thereby extends the effect of the TSN to any person contravening it. It should be noted that a TSN will have no effect until the time when a copy of it is first displayed on the land and that it will cease to have effect at the end of a period of 28 days starting on the day when the copy of the notice is displayed on the land. There is no right of appeal against a TSN, but the validity of a TSN and the LPA's decision to issue it may be challenged by judicial review.

Breach of a TSN is a criminal offence and a person convicted of contravening one, after a site notice has been displayed or served on him/her, will be liable to a financial penalty. When determining the amount of the fine to be imposed, the court will have regard to any financial benefit that has accrued, or appears likely to accrue, in consequence of the offence.

TSNs cannot be used to override any permitted development which is covered by Town and Country Planning (General Permitted Development) Order 1995 SI No 418 Sch 2 Part 5 Class A (Caravan Sites and Control of Development Act 1960 Sch 1) – such as:

- The use of land by a person travelling with a caravan for one or two nights, subject to an annual limit of 28 days of such use on that land or adjoining land;
- The use of land by up to three caravans for up to 28 days a year on holdings not less than five acres;
- The use of any land for up to five touring caravans at once by members of the Caravan Club, the Camping and Caravanning Club and other recognised recreational organisations, provided the site has an exemption certificate from the Department for Environment, Food and Rural Affairs;
- The stationing of a caravan on agricultural land to accommodate a person or persons employed in farming operations 'during a particular season';
- The use of land as a caravan site for the accommodation of workers employed in carrying out building or engineering operations;
- The use of land as a caravan site by a travelling showman/woman who is a member of an organisation of travelling showmen/women, which holds a certificate, and who is travelling for the purpose of his/her business.

Like stop notices, TSNs cannot be used to prevent 'the use of a building as a dwelling house'. There is no equivalent prohibition on the application of TSNs in cases where Gypsies and Travellers reside in their caravans on land without planning permission under PCPA s52, and a number of organisations, including the GTLRC and the Joint Committee on Human Rights, have complained that the provision is therefore discriminatory and incompatible with articles 8 and 14 of the convention. The government has bowed to pressure from these organisations and has introduced the Town and Country Planning (Temporary Stop Notice) (England) Regulations 2005 SI No 206 in an attempt to ensure that PCPA s52 is not used in a discriminatory fashion.

The regulations came into force on 7 March 2005 and reg 2(2) provides that a TSN may not prohibit the continued stationing of a caravan on land where:

(a) the caravan is stationed on the land immediately before the issue of the temporary stop notice; and

(b) the caravan is at that time occupied by a person as his main residence;
unless the local planning authority consider that the risk of harm to a compelling public interest arising from the stationing of the caravan is so serious so as to outweigh any benefit, to the occupier of the caravan, in the stationing of the caravan for the period for which the temporary stop notice has effect.

Guidance on circumstances in which LPAs might decide to use TSNs to prevent the continued stationing of a caravan used by a person as his/her main residence has been published by the ODPM in Circular 02/2005.6 Paragraph 18 provides the following examples 'of locations where the unauthorised stationing of a caravan would normally be unacceptable':

- *Sites of Special Scientific Interest (SSSI) where an encampment endangers a sensitive environment or wildlife;*
- *Grounds of ancient monuments or listed buildings, battlefields or sites of potential archaeological interest;*
- *A site where pollution from vehicles, or dumping, or from poor sanitation could damage ground water or water courses;*
- *A derelict area with toxic waste or other serious ground pollution;*
- *The verge of a busy road where fast traffic is a danger to unauthorised campers;*
- *Where the site is exposed to unacceptable levels of air pollution;*
- *Where there is an immediate negative impact on the health of the occupiers of the caravans.*

Paragraph 19 of the circular also explains that:
- A TSN may be used to prohibit the stationing of any additional caravans on land on which a caravan is already stationed;
- A single TSN may apply to the whole of a site (planning unit) in circumstances where a field has been subdivided into plots, irrespective of the fact that the field may not be in single ownership;
- A TSN may be used to stop other development associated with using the site for further caravans and any further work developing the site;

but that
- LPAs should ensure that at least minimum standards of health, hygiene and public health are maintained before taking action and, for existing caravans, should allow basic temporary facilities including some form of temporary foul waste disposal which prevents nuisance or risk to anyone's health.

UNAUTHORISED ENCAMPMENTS

Article 8 defence

- **Price and others v Leeds City Council**

[2005] EWCA Civ 289
The Irish Traveller family involved in this case had been evicted over 50 times by the local authority without any authorised site (even of a transit nature) being identified. They sought to rely on article 8 as a defence to eviction action. Their argument was rejected at first instance and by the Court of Appeal. However, the Court of Appeal did give leave for the matter to proceed to final hearing in the House of Lords, where it is to be heard in December 2005 (see above).

Criminal Justice and Public Order Act 1994 s62A–E

'Gypsy and Traveller law update', August 2004 *Legal Action* 16 mentioned the introduction of these new police powers of eviction that can be used in circumstances where a suitable pitch on a relevant caravan site can be identified. On 7 March 2005, following a consultation process, the guidance on the use of these new powers was added as an update to the ODPM's *Guidance on managing unauthorised camping* (February 2004).[7] The update indicates that:

… the secretary of state considers that a suitable pitch is one that provides basic amenities including water, toilets and waste disposal facilities. Other factors includ[ing] the potential for community tension and issues of public order/anti-social behaviour need to be considered …
There should be a reasonable expectation that the pitch will be available for peaceful occupation for at least three months, except where the trespasser is expecting to move on before that time. A suitable pitch will only be available if there are currently no waiting lists for that site … efforts should be made to find suitable pitches that would enable the unauthorised campers to remain together.

Gypsy and Traveller advisers consider these new powers to be unworkable given the severe shortage of sites (the latest ODPM Gypsy Count (July 2004) recorded 4,232 caravans on unauthorised encampments in England). Their views seem to be borne out by the fact that the authors have heard of only two cases in which the new powers have actually been used: in one case a local authority rented a piece of land and placed services on it to enable the police to issue a removal direction; and in the other case the police accepted that the site identified was unsuitable and withdrew the removal direction.

Wales

In January 2005, the National Assembly for Wales and the Home Office produced *Guidance on managing unauthorised camping*. This guidance is virtually identical to the English guidance.[8] The National Assembly has also indicated that it intends to reintroduce the Gypsy Count in Wales during 2005 (last carried out there in 1997).

The National Assembly has appointed Pat Niner of the University of Birmingham to report on Gypsy and Traveller accommodation issues in Wales and her report is expected in late 2005.[9]

Non-local authority public authorities

- **R (Kanssen) v Secretary of State for the Environment, Food and Rural Affairs**

[2005] EWHC 1024 (Admin)
Owen J concluded that the Forestry Commission's (FC) practice of writing to relevant local authorities (county and district councils) to inform them of any unauthorised encampment on FC land and inviting them to undertake enquiries into welfare considerations was sufficient to comply with its obligations under common law and under government guidance. This is despite the fact that he also made clear that the FC must take account of material considerations. Mr Kanssen has now lodged an appeal with the Court of Appeal arguing that, since no material considerations may come to light if the local authorities take no action – as occurred in his case – the FC ought to carry out direct welfare enquiries before deciding whether or not to evict the occupants of such an encampment. Mr Kanssen is also challenging the decision of Owen J that the FC does not have power under the Forestry Act 1967 and the Countryside Act 1968 to provide sites for Gypsies and Travellers. He is drawing a comparison with the many campsites that exist within forests for settled people.

The authors note that the Metropolitan Police guidance on evictions makes it clear that, where necessary, the police should carry out welfare enquiries.

Anti-social Behaviour Act 2003

In June 2005, West Yorkshire Police, after consulting with Wakefield Metropolitan District Council, made orders under Anti-social Behaviour Act (ASBA) s30 (provision for removal and dispersal) covering five areas of land in Wakefield which had had unauthorised encampments on them. After a threat of judicial review proceedings,[10] arguing that these orders were: outside the powers of the ASBA; wrongly (and offensively) identified encampments as 'anti-social' per se; breached the convention rights of Gypsies and Travellers; were potentially racially discriminatory; and were irrational, the police withdrew the orders. This is a very significant decision since a number of other local authorities were

considering asking their local police to introduce similar orders.

Evictions and homelessness

When the case of *R (Price) v Cardiff County Council* came to final hearing, on 24 May 2005, Sullivan J made it clear that he felt that the council had been wrong to pursue eviction action against Mrs Price, from her unauthorised encampment on council land, when it had failed to deal with her homelessness application properly (seeking a pitch for her caravans – see below). After a short adjournment, the parties reached a settlement on the matter.[11]

HOMELESSNESS

Price and *Codona*

'Gypsy and Traveller law update', August 2004 *Legal Action* 17 reported on the case of *Codona v Mid-Bedfordshire DC* [2004] EWCA Civ 925; [2005] HLR 1, in which the Court of Appeal approved the decision of Newman J in *R (Price) v Carmarthenshire CC* [2003] EWHC 42 (Admin), March 2003 *Legal Action* 30. In *Price*, Newman J had made it clear that, where a Gypsy or Traveller had a strong degree of 'aversion to conventional housing', the local authority to whom that Gypsy or Traveller made a homelessness application under HA 1996 Part VII, should use its best endeavours to see if a pitch for the applicant's caravan could be found. Newman J also stated that local authorities were not under a duty, as such, to provide a pitch. While approving *Price*, the Court of Appeal in *Codona* decided that the rather meagre enquiries carried out by the local authority, in that case, into the possibility of a pitch (enquiries which merely involved assessing the existing authorised sites in the area) were acceptable and that the ultimate offer of temporary bricks and mortar accommodation was suitable. Ms Codona has now lodged an application with the ECtHR arguing that an offer of bricks and mortar accommodation to a Gypsy or Traveller cannot be seen as suitable.

Following the introduction of the new planning provisions (see above), especially with regard to the need to identify locations for Gypsy and Traveller sites, it can be argued that, despite the *Codona* judgment, it must now be incumbent on local authorities which receive such homelessness applications to do more than just consider what authorised provision exists (which in many districts is negligible and often entirely full). Advisers can also argue that, in the interim and with regard to the duty to provide interim accommodation under HA 1996 s188, 'tolerated sites' with temporary services provided (in line with the recommendation in DoE Circular 18/94; Welsh Office Circular 76/94) should be identified where the applicant and his/her family can remain in the meantime. No doubt the courts will soon have to adjudicate further on this vital issue.

In both *Price* and *Codona* it was made clear that *Homelessness code of guidance for local authorities* para 11.40, which deals with Gypsies and Travellers, does not properly address the correct state of the law and should be amended. In another recent judicial review challenge (which was ultimately compromised) the First Secretary of State was joined as a party due to this problem with the code and he conceded that the guidance would be amended accordingly. That amendment is still awaited.

Fresh homelessness applications and intentional homelessness

■ **Tower Hamlets LBC v Rikha Begum**

[2005] EWCA Civ 340

The (settled) homeless applicant had previously refused an offer of accommodation. She returned to the family home with her children (it had previously been accepted that it was unreasonable for her to continue to occupy the family home – HA 1996 s177). Two of her brothers later moved into the family home, one of whom was a heroin addict. Ms Begum then made a fresh homeless application. The local authority decided that this was the same as the first application and refused to accept the application. The Court of Appeal decided that, where there was a 'relevant new fact', a fresh application could be made.

This may be an important decision for certain Gypsies and Travellers who, on making a homeless application, are faced with a decision of intentional homelessness for having previously left bricks and mortar accommodation (HA 1996 s191). If a 'relevant new fact' has occurred since that previous homelessness decision (the Court of Appeal stated that the relevant date was either the date of the homelessness decision (HA 1996 s184) or the date of any review decision (HA 1996 s202)), the Gypsy or Traveller can now make a fresh homeless application and argue that the relevant date to be considered with regard to the question of potential intentional homelessness is the date of that fresh application (ie, a fresh incidence of homelessness).

CONCLUSION

If local authorities comply with their new duties to assess the accommodation needs of Gypsies and Travellers, and to identify suitable sites in their areas, then the shortage of suitable sites may be substantially reduced. However, past experience has led many to fear that some local authorities will either delay or avoid compliance with their new obligations. There are also fears that the legislation will fail to achieve its goal unless the government keeps a careful watch on its implementation and uses its enforcement powers where necessary. Whether the government has the political will to do so remains to be seen.

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1 Available at: www.parliament.uk/parliamentary_committees/odpm.cfm.
2 Available from TSO, PO Box 29, Norwich NR3 1GN or online at: www.odpm.gov.uk.
3 *Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to the United Kingdom – 4th–12th November 2004 – for the attention of the Committee of Ministers and the Parliamentary Assembly,* available at: www.coe.int.
4 The Travellers' Advice Team (TAT) at Community Law Partnership (CLP) has produced a draft model tenancy agreement for sites, which is available from: 4th floor, Ruskin Chambers, 191 Corporation Street, Birmingham B4 6RP, e-mail: office@communitylawpartnership.co.uk.
5 Available at: www.odpm.gov.uk. The period of consultation ended on 18 March 2005.
6 See note 5.
7 *Supplement to 'Managing unauthorised camping: a good practice guide'* is available at: www.odpm.gov.uk.
8 Available at: www.wlga.gov.uk/equalities/resources/camping.pdf . TAT has produced a detailed comparison of both sets of guidance which is available on request – see note 4.
9 Pat Niner previously produced two similar reports in respect of the position in England: *The provision and condition of local authority Gypsy/Traveller sites in England*. The report is available from: External Relations and Publishing, ODPM, Zone 7/H4 Eland House, London SW1E 5DU; fax: 020 7944 4527; or e-mail: h.r.summaries@odpm.gsi.gov.uk and *Local authority Gypsy/Traveller sites in England*, July 2003, which is available at: www.odpm.gov.uk.
10 By TAT and by Liberty (for two separate clients).
11 No judgment is therefore available.

PRACTICE AND PROCEDURE

ID and others and unlawful detention: the issues explained

Mark Scott and **Harriet Wistrich** consider the important decision of the Court of Appeal in *ID and others v The Home Office* [2005] EWCA Civ 38. Mark Scott examines the issue of damages for unlawful detention by the Immigration Service, and Harriet Wistrich offers advice to practitioners who might want to make a third-party intervention.

Damages for unlawful detention by the Immigration Service

Introduction

Damages for unlawful administrative detention by the Immigration Service has traditionally been a neglected area of practice. The powers of detention for the purposes of immigration control contained in Immigration Act (IA) 1971 Schs 2 and 3 (as amended) are, on the face of the legislation, very wide-ranging, and those subjected to administrative detention have been widely thought of as being without remedies.

The central issue before the Court of Appeal in *ID* was whether an immigrant was entitled to damages for an unlawful exercise by an immigration officer of a power to detain and, if so, what was the correct procedure for bringing such a claim.

The claimants were a Czech family of Roma ethnic origin; they were released on temporary admission having been detained in the UK and issued private law proceedings in the county court claiming, among other matters, that their detention amounted to false imprisonment and/or a breach of article 5 of the European Convention on Human Rights.

The defendant Home Office applied for summary judgment/to strike out the claim on both procedural and substantive grounds. Although this application was initially struck out by a district judge, the Home Office's appeal to a county court judge was successful. The claimants' appealed to the Court of Appeal to have their claims reinstated.

Procedural exclusivity: Judicial review or private law proceedings ?

The Court of Appeal gave short shrift to the Home Office's procedural argument that the claim should be struck out as it had been brought by way of private law proceedings in the county court rather than by way of public law judicial review proceedings in the Administrative Court. The court emphasised that the relevant question under the Civil Procedure Rules (CPR) was not whether 'the right procedure' had been adopted but whether the forum used deprived a party of the opportunity of having its case heard justly. The Court of Appeal held that in a damages case such as *ID*, private law proceedings were most appropriate given that the Administrative Court had no jurisdiction to hear an action for damages alone; there were no facilities in the Administrative Court for a jury (which a party had an entitlement to request, subject to limited exceptions, in an action for false imprisonment (County Courts Act 1984 s66(3)(b) and Supreme Court Act 1981 s69(1)(b)); and a contested action such as this, which required cross-examination, was more conveniently dealt with outside the Administrative Court list.

However, the Court of Appeal did indicate that, although the claim had been rightly issued in the county court as it involved a claim for racial discrimination for which the county court had exclusive jurisdiction, there were issues concerning whether the power to detain had been exercised lawfully which were of a 'public law' nature and would benefit from being tried by a judge with Administrative Court expertise. The solution that the court proposed was that the trial should be presided over by a High Court judge with Administrative Court experience, sitting as a judge in the county court.

Is there a distinction to be drawn between a case where there is a statutory power to detain and one where this power is wrongfully exercised?

In argument before the Court of Appeal, it was common ground that if there was 'no power' to detain, in the sense that the statute did not authorise the detention, then an individual so detained would be entitled to damages for false imprisonment. However, the Home Office sought to draw a distinction between this and the issue that arose in *ID*, namely, that where there was a statutory power to detain whether an improper use of this could give rise to a claim in damages against the Home Office.

The Court of Appeal concluded that there was no proper distinction to be drawn between a detention that was unlawful because there was no statutory power and a detention that was unlawful when an immigration officer wrongly exercised his/her discretion to detain, for example, by failing to take account of relevant internal policy or another relevant consideration, as in both cases the immigration officer had 'no power' to authorise the detention.

Can the Home Office be liable for the tort of false imprisonment when the detention is carried out by a private contractor?

The Home Office sought to argue that although an immigration officer (and the Home Office which has vicarious liability) had authorised the detentions of the *D* family it was not liable for false imprisonment for the detention as the physical detainer was a private contractor. The Court of Appeal again dealt with this matter quickly. It concluded that the detentions were *caused* by the immigration officers who authorised them and, although this authority protected the private contractor which detained, it did not protect the immigration officer if the giving of his/her authority was an unlawful act.

Are immigration officers immune from suit for the tort of false imprisonment?

The Home Office sought to argue that foreign nationals fell into a special category and that it had not been intended by parliament that an immigrant detained under the IA 1971 should have a remedy in damages for the tort of false imprisonment. The Court of Appeal rejected these arguments. It emphasised the particular importance that the law attached to the liberty of the person and that it was beyond doubt that the rule of law extended not simply to British nationals but also to immigrants subject to administrative detention. The Court of Appeal further concluded that there was nothing to suggest that parliament intended to create immunity from suit to an immigration officer for the tort of false imprisonment and that it would be entirely wrong that someone who had been wrongly detained by the executive should not be entitled to compensation as of right.

Conclusion

Practitioners should be aware that clients whose detention has been wrongly authorised or continued by an immigration officer may have a remedy in damages for false imprisonment.

Third-party intervention into *ID*

The Court of Appeal, when considering the case of *ID*, received evidence by way of a third-party intervention from Bail for Immigration Detainees (BID) and Immigration Law Practitioners' Association (ILPA). The rest of this article explores the reasoning, process, content and ultimate impact of having made an intervention.

Why make an intervention?

The implications of the county court judgment were clearly extremely far-reaching for immigration detainees: essentially no private law remedy would be available where an immigration detainee was unlawfully detained. In other words, a false imprisonment remedy would be unavailable to any person unlawfully detained under the IA 1971. There were real fears that should the Court of Appeal uphold the judgment, access to justice for those people who are the most marginalised and under attack in society would be even more limited.

The aim of the intervention was to show how, despite express government policy limiting and excluding immigration detention for vulnerable groups including children, torture survivors and people with serious mental and physical illnesses, there was evidence of widespread failure to adhere to this policy in practice.

The process of intervening

Initially the plan was for an intervention by the Refugee Children's Consortium, an unincorporated organisation of children's charities and other voluntary organisations set up to ensure that the rights of refugee children are respected in accordance with relevant domestic, regional and international standards.

To make a third-party intervention in the Court of Appeal, it is first necessary to make an application for permission to intervene. The application must be made in compliance with CPR Part 52 and include a fee for £100. It is helpful when preparing for the intervention to make contact with the case lawyer at the Court of Appeal who can advise about timing and factors that might influence how such an application will be received. Usually the significant factor will be whether the two parties consent to the intervention. A serious consideration for the interveners is whether there will be any risk that costs could be incurred as a result of their intervention; the key factor here is the amount of the court's time taken up by considering the evidence of the intervention.

The original idea was to get consent both for the intervention itself and to obtain a pre-emptive costs order. The appellants in the case (*ID and others*) were, of course, happy to support the intervention since its effect would be, essentially, to bolster the appeal. However, the respondent (the Home Office) was not willing to provide an indication about whether it consented until it was able to see the proposed intervention in full.

As instructions were received only about two months before the hearing, it was difficult to produce the proposed intervention in the short timescale provided.

Without a guarantee in relation to costs protection, many of the larger organisations that were members of the Refugee Children's Consortium were unable to intervene formally, as the consortium was an unincorporated association which would leave all its constituent members potentially liable for any costs order against it. In the event, only two organisations were prepared to put their name to the intervention, BID and ILPA, although both on the condition that if the application for a pre-emptive costs order was rejected when the application for permission was considered, they would have to withdraw.

The content of the intervention

The aim of the intervention was to produce evidence to show the factual repercussions arising from detention under the IA 1971. To this end, the aim was to produce evidence showing:

- the physical conditions of detention and the impact of immigration detention;
- the practical and deleterious effects of procedural exclusivity in the sense of a detained person being compelled to apply for judicial review in immigration detention cases; and
- the lack of effective redress for hypothetical legal wrongs in relation to immigration detention.

BID produced an extremely detailed witness statement highlighting the difficulty for immigration detainees in accessing effective legal representation and the ability to apply for bail, and highlighting the practical obstacles for accessing legal advice and representation, particularly for those detained in prisons. The evidence also aimed to show the impact of detention on vulnerable groups, including torture victims, those with physical and mental illnesses and children.

To illustrate the problems and show the widespread failure of protection in accordance with government policy, a series of case studies was produced showing examples of people who had been detained in contravention of government policy. Additionally, appended to the statement were a number of HM Inspectorate reports, statistics and research studies further illustrating such abuse of policy.

Evidence from ILPA was directed primarily towards the issue of the lack of access to legal representation for detainees and produced evidence of a submission to the Home Affairs Select Committee by the Association of Visitors to Immigration Detainees. Additionally, ILPA was able to produce two medical reports, one by Dr Christina Pourgourides, an expert on the impact of detention on the mental health of detainees and one by two psychotherapists working with the Medical Foundation for the Care of Victims of Torture highlighting the impact of detention on children.

Finally, a letter from the United Nations High Commissioner for Refugees (UNHCR) was also produced setting out concerns in relation to the breach of international covenants in respect of the detention of children.

Modifying the application

This proposed intervention was forwarded to the Home Office for its consideration. The Treasury Solicitor replied that it would not consent as it would not have time to investigate the factual submissions made and produce evidence, if available, to counter them.

The application for permission was considered by the presiding judge, Lord Justice Brooke, who granted permission 'because of the importance of the issues raised', but in recognition of the difficulties for the Home Office created by such a late intervention, required a more limited format. Essentially, all the case studies and medical opinion had to be removed from the intervention but the statements from BID and ILPA and the UNHCR letter, together with factual material of a more undisputed nature (for example, the HM Inspectorate reports) were allowed to remain. It was also agreed to keep any oral submissions to an absolute minimum in order to avoid any risk of costs implications for the interveners.

Third-party intervention: the cost

Aside from the risk of a costs order against the interveners, the process of making a third-party intervention, the value of the pro bono work by solicitors, counsel (Richard Hermer, Nadine Finch and Richard Gordon QC) and experts, was probably in excess of £30,000. Added to this was the work of BID and ILPA in preparing statements and gathering evidence and of the psychiatrists and psychotherapists who produced reports.

Impact of intervention

Despite the costs, in light of the judgment it was an extremely worthwhile exercise. In the words of Lord Justice Brooke:

> *I know that the Home Office is concerned with the practical implications of a decision of this kind. The evidence of the interveners showed, however, that when the Home Office determined to embark on the policy of using powers of administrative detention on a far larger scale than hitherto, the practical implementation of that policy threw up very understandable concerns in individual cases … so long as detention, which may cause significant suffering, can be directed by executive decision and an order of a court (or court-like body) is not required, the language and the philosophy of human rights law, and the common law's emphatic reassertion in recent years of the importance of constitutional rights, drive inexorably, in my judgment, to the conclusion I have reached.*

■ Mark Scott is a partner at Bhatt Murphy solicitors, London N1. Harriet Wistrich is a solicitor at Birnberg Peirce and Partners, London NW1.

PUBLIC LAW CASE NOTE

Provision of funding to voluntary and health sectors under National Health Service Act 1977

R (Keating and others) v Cardiff Local Health Board [2005] EWCA Civ 847

Facts: Riverside Advice, a voluntary sector organisation, had been running a welfare benefits project for people with mental health difficulties. The project was funded by Cardiff Local Health Board (LHB), the Welsh equivalent of both a health authority and Primary Care Trust (PCT). The project's funding was withdrawn following a review of voluntary sector funding by the LHB. Although the project had scored highly in the review assessment process and had been recommended to receive a new three-year service level agreement, the LHB said that it did not have the power to fund this work under the National Health Service Act (NHSA) 1977.

The case had been brought originally as a challenge to the fairness of the review process: the claimants being the service-users of the welfare benefits project and of another mental health service that ran a peer education project which had also been treated unfairly within the voluntary sector review. Following the issue of proceedings, the LHB conceded on the fairness issue. The board agreed to have a new process of review and decision-making for the peer education project. However, the LHB maintained its position that it would be 'ultra vires' for it to fund the Riverside Advice welfare benefits project as this was not a 'health service' within the meaning of the NHSA.

The claimants lost at first instance. Ultimately, the case turned on NHSA s3, which separated out the LHB's duties and powers into services and facilities. Section 3 allowed for medical, nursing, dental and ambulance services, and for diagnosis and treatment services. In contrast, the provision relating to prevention of illness, and to care and aftercare, was limited to 'facilities' only. Mr Justice Moses found that this did not include a welfare benefits service. He applied a strict and narrow interpretation to the word 'facilities', and did not accept that this implied services as well.

The claimants were given permission to appeal. The appeal was expedited as the project was in jeopardy following the funding cuts, and the case had widespread implications for the voluntary and health sectors: a large number of health-related projects are funded by PCTs in England and LHBs in Wales.

Before the appeal was heard, the Secretary of State for Health applied to intervene and the intervention was allowed. The secretary of state's submissions supported the claimants' arguments that NHSA s3 should be interpreted broadly. The Welsh Assembly government supported the secretary of state's intervention and submissions, although it chose not to intervene. The mental health charity MIND also made representations to the court in correspondence. It raised concerns regarding the funding of numerous mental health projects that would be held to be unlawful if the appeal were not successful.

Decision: The Court of Appeal found that Moses J had adopted too restrictive an approach to the meaning of the word 'facilities' where it appeared in NHSA s3(1)(e), in relation to the prevention of illness, and to care and aftercare. Lord Justice Brooke held that its meaning should be derived from the context in which the word is used – it means 'that which facilitates'. The judgment continued:

> *Sometimes the word refers to tools, or accommodation, or plant, which facilitate the provision of a service. Sometimes it refers to an entire service provision, like a laundry service, or the provision of a day centre, which facilitates the prevention of illness, or the care of persons suffering from illness, or the after-care of persons who have suffered from illness.*

Lady Justice Arden and Lord Justice Longmore agreed.

Comment: The decision on appeal is obviously very helpful because it clarifies what health bodies can fund. It confirms that a broad interpretation of NHSA s3 is appropriate, and that a wide range of services can be funded under this power. The judgment itself dealt with the point in a few sentences as outlined above.

By the time of the appeal hearing, the arguments had moved away from whether a welfare benefits service was a 'health' service or not. Although the LHB had, initially, raised arguments that increasing the income from, and decreasing the stress of, the benefits appeals system did not improve someone's health (or prevent his/her ill health), the debate before the Court of Appeal centred on the distinction between 'services' and 'facilities'. By that point, it was taken as read that benefits advice can be provided appropriately in a health-setting: such advice does relate to the health and well-being of the service-users. The claimants relied on research and numerous Citizens Advice projects that are set in GPs' surgeries, including a national service funded by the Welsh Department of Health.

In the lower court there had also been considerable argument about whether the availability of joint flexibilities funding (by the local authority and the LHB) meant that there was either no need or no intention on parliament's part for this type of project to be funded solely by a health body. However, these arguments had also rather faded into the background by the time the Court of Appeal considered the matter, and it focused very much on the strict statutory interpretation of the relevant section.

Although the decision itself related to a pure construction point, the case was also noteworthy because the public body conceded on the fairness question after the issue and service of proceedings. The LHB defended its actions vigorously in correspondence, but then decided not to oppose the claimants' application for permission. However, the LHB then agreed to a quashing order and to carry out a fresh review in relation to the peer education project. In relation to the welfare benefits project, once the LHB had conceded the fairness issue, the board agreed that if it was unsuccessful on the 'ultra vires' point, it would enter into the new service level agreement which the LHB's own advisory group had recommended.

In the meantime, the LHB had to adopt the rather disingenuous position that it needed the court's guidance regarding whether it had the power to fund the project. This was despite the fact that no one had challenged the LHB on this point (ie, no one had accused it of doing anything unlawful) nor had it sought any legal advice on this point before the challenge to the review process. The LHB (which was in the midst of a cost-cutting exercise) had adopted this reason but had not put it in its decision letter, nor was it minuted within the voluntary sector review. In the pre-action correspondence, the LHB said only that it might be ultra vires to fund the project, and that the claimants would have an uphill struggle to show that it was. Ultimately, the claimants were successful both on the fairness argument and the ultra vires point, although it proved to be a slow and expensive process.

Lastly, the court was also keen to emphasise the LHB's discretion in terms of what it could fund. As Lord Justice Brooke found: '… in my judgment it [the LHB] is lawfully able to provide funding for services like the Riverside project, *if it considers it appropriate as part of the health service* [emphasis added].'

■ Louise Whitfield is a project solicitor at the Public Law Project (PLP). PLP was the solicitor for the claimant. PLP offers free advice and support to practitioners via the Public Law Specialist Support Line on: 0808 808 4546. PLP's annual conference 'Judicial review – trends and forecasts' will be held on 12 October 2005. For more information, see: www.publiclawproject.org.uk/training.html.

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LEGISLATION UPDATER

CHILDREN

Children Act 2004 (Children's Services) Regulations 2005 SI No 1972

Children Act (CA) 2004 ss20–23 are concerned with the inspection of children's services. Section 23(3) defines children's services for the purposes of ss20–22.

- Reg 2(1) specifies and prescribes as children's services a list of services etc, done for, or in relation to, children (persons under the age of 18) and relevant young persons (persons of 18 or over in relation to whom arrangements may be made to promote co-operation with a view to improving their well-being, under CA 2004 s10).
- Reg 2(2) specifies and prescribes as children's services a list of services etc, done for, or in relation to, children and relevant young persons in so far as they relate to children. In force 1 September 2005.

Children Act 2004 (Joint Area Reviews) Regulations 2005 SI No 1973

Children Act (CA) 2004 s20 provides for the review of children's services in the area of a children's services authority in England (joint area reviews). 'Children's services' are defined by CA 2004 s23(3) and regulations under that provision; 'children's services authority' is defined in CA 2004 s63(1). A review involves two or more of the persons and bodies listed at s20(4); they may be requested to conduct a review by the secretary of state, or may themselves decide to conduct a review. The purpose of a review is set out in s20(3). These regs make provision for the purposes of such reviews. In force 1 September 2005.

Children and Young People's Plan (England) Regulations 2005 SI No 2149

These regulations provide for children's services authorities to prepare, consult upon, publish and review a children and young people's plan. In force 1 September 2005.

Adoption and Children Act 2002 (Commencement No 9) Order 2005 SI No 2213

This Order is the ninth commencement order made under the Adoption and Children Act 2002. In force 30 December 2005.

CRIMINAL

Serious Organised Crime and Police Act 2005 (Commencement No 2) Order 2005 SI NO 2026

This Order brings into force, on 1 August 2005, the provisions of the Serious Organised Crime and Police Act 2005, specified in article 2.

Extradition Act 2003 (Amendment to Designations) (No 2) Order 2005 SI No 2036

Italy was designated as a category 2 territory, for the purposes of the Extradition Act (EA) 2003, by the Extradition Act 2003 (Designation of Part 2 Territories) Order 2003. This Order removes that designation and re-designates Italy as a category 1 territory by adding it to the list of category 1 territories designated in the Extradition Act 2003 (Designation of Part 1 Territories) Order 2003.

Once this Order is in force Italy will be a category 1 territory for the purposes of the EA 2003 and EA 2003 Part 1 will apply to Italy. Article 1(2) of this Order is a transitional provision, which ensures that the change in designation does not apply where extradition proceedings have already begun. In force 28 July 2005.

Criminal Justice Act 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005 (Supplementary Provisions) Order 2005 SI No 2122

This Order provides, for the avoidance of doubt, that Criminal Justice Act (CJA) 2003 (Commencement No 8 and Transitional and Saving Provisions) Order 2005 Sch 2 para 23(1) ('transitional arrangements for recall after release') is to be read so that the reference to a prisoner who falls to be released under the CJA 1991 includes a prisoner who was released before 4 April 2005 and the words 'after 4 April 2005' are to be read only as indicating the date from which sub-paras (a) and (b) of that paragraph take effect. The effect of para 23(1) of Sch 2 to that Order is that a prisoner released on licence under the CJA 1991 can have his/her licence revoked and be recalled to prison by the secretary of state under CJA 2003 s254.

EDUCATION

Education (Penalty Notices) (England) (Amendment) Regulations 2005 SI No 2029

These regulations amend the Education (Penalty Notices) (England) Regulations 2004, which prescribe the necessary details for the operation of the penalty notice scheme under Education Act 1996 s444A (inserted by the Anti-social Behaviour Act 2003). The regs only apply to England. In force 1 September 2005.

Education (Assisted Places) (Amendment) (England) Regulations 2005 SI No 2030

These regulations further amend the Education (Assisted Places) Regulations (E(AP) Regs) 1997 in respect of the school year beginning on or after 1 September 2005. The reductions to be made in relevant income in respect of dependent relatives pursuant to E(AP) Regs reg 10(4) and (6) are increased from £1,540 to £1,575.

These regs amend the means test for the remission of fees: the level of income at or below which fees are to be wholly remitted is set at £12,182 instead of £11,935, with corresponding increases in the extent of remission where relevant income exceeds that sum. In force 1 September 2005.

Education Act 2005 (Commencement No 1 and Savings and Transitional Provisions) Order 2005 SI No 2034

This Order brings into force certain provisions of the Education Act 2005 on 1 August 2005, 1 September 2005, 3 October 2005 and 1 November 2005. The provisions are listed in articles 2 to 9. Article 10 and the Schedule make transitional provision and savings.

Education (Assisted Places) (Incidental Expenses) (Amendment) (England) Regulations 2005 SI No 2037

These regulations further amend the Education (Assisted Places) (Incidental Expenses) Regulations (E(AP)(IE) Regs) 1997 in respect of the school year beginning on or after 1 September 2005. E(AP)(IE) Regs provide for the payment of grants for incidental expenses, and for the remission of incidental expenses, for pupils eligible to continue to hold assisted places by virtue of the Education (Schools) Act (E(S)A) 1997 s2, notwithstanding the abolition of the assisted places scheme by E(S)A s1.

These regs amend the means test (set out in E(AP(IE) Regs reg 2) for determining eligibility to uniform grant and increase the amount of such grant payable in respect of clothing expenditure incurred in relation to the 2005/2006 and subsequent school years.

These regs also amend the means test (set out in E(AP)(IE) Regs reg 4) for determining eligibility to travel grant and increase the amount of grant payable in respect of school travel expenditure in relation to the 2005/2006 and subsequent school years. In force 1 September 2005.

Education (Pupil Referral Units) (Application of Enactments) (England) Regulations 2005 SI No 2039

The Education Act (EA) 1996 s19 requires local education authorities to make arrangements for the provision of suitable education at school or outside school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them. Any school established and maintained by a local education authority, which is specially organised to provide education for such children, is known as a pupil referral unit. EA 1996 Sch 1 provides for adaptations and modifications of the application of enactments to pupil referral units.

These regulations, which come into force on 1 September 2005:

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■ revoke and replace the Education (Pupil Referral Units) (Application of Enactments) Regulations 1994 and the Education (Pupil Referral Units) (Application of Enactments) (Amendment) Regulations 1996 in relation to England; and
■ further modify, in relation to England, the application of enactments to pupil referral units.

FAMILY

Family Proceedings (Amendment No 4) Rules 2005 SI No 1976

These rules amend the Family Proceedings Rules 1991 and deal with the communication of information relating to children cases. In force 31 October 2005.

Family Proceedings Courts (Miscellaneous Amendments) Rules 2005 SI No 1977

These rules amend the Family Proceedings Courts (Children Act 1989) Rules 1991 and the Family Proceedings Courts (Child Support Act 1991) Rules 1993. These rules deal with the communication of information relating to children cases. In force 31 October 2005.

HOUSING

Housing (Right of First Refusal) (England) Regulations 2005 SI No 1917

The landlords of secure tenants buying their homes under the Right to Buy scheme (the terms of which are contained in Housing Act (HA) 1985 Part 5), are required by HA 1985 s156A to impose a covenant in conveyances and grants of leases to the effect that, for a period of ten years after the property is transferred to the tenant under the Right to Buy scheme, there must be no relevant disposal which is not an exempted disposal (these terms are defined in HA 1985 ss159 and 160 respectively), unless the prescribed conditions have been satisfied (a 'right of first refusal covenant'). This instrument contains the prescribed conditions.

These regulations require that the owners of properties bound by the covenant who wish to make a relevant disposal which is not an exempted disposal, must first offer the property for purchase by its former landlord, its successor in title or a person nominated by it. In force 10 August 2005.

Discretionary Housing Payments (Grants) Amendment Order 2005 SI No 2052

This Order amends the Discretionary Housing Payments (Grants) Order (DHP(G) Order) 2001, which sets out the procedure by which the secretary of state will make payments to local authorities towards the cost of discretionary housing payments in accordance with Child Support, Pensions and Social Security Act 2000 s70.
■ Article 2(2) amends the DHP(G) Order to provide that a claim by any authority in England, Wales or Scotland in respect of a total amount of less than £50,000 for any year need not be audited by the authority's auditor.
■ Article 2(3) substitutes a new date by which an authority needs to submit a claim showing the amount of discretionary housing payments it has made over the relevant year. In force 1 September 2005.

LEGAL AID

Community Legal Service (Cost Protection) (Amendment) Regulations 2005 SI No 2006

These regulations amend the Community Legal Service (Cost Protection) Regulations (CLS(CP) Regs) 2000 SI No 824.

Access to Justice Act 1999 s11 provides for the extent to which a person receiving funded services may be liable personally to pay the costs of legal proceedings where a costs order is made against him/her.

CLS(CP) Regs reg 3 sets out the circumstances in which the limit under s11(1) does not apply.
■ Regs 2(1), 3(1)(d), 3(2) and 3(4) provide that the limit will not now apply in relation to certain funded family proceedings as defined in these regs.
■ Regs 2(2), 2(3), 3(1)(a) and (b), 3(3) and 5 make other minor amendments consequential upon changes to the Funding Code criteria which abolish Support Funding.
■ Reg 4 amends CLS(CP) Regs reg 4, which provides for enforcement of a costs order so that its provisions only apply where cost protection applies. In force 25 July 2005.

Community Legal Service (Scope) Regulations 2005 SI No 2008

These regulations amend Access to Justice Act (AJA) 1999 Sch 2 so as:
■ to exclude from the scope of the Community Legal Service, subject to any directions made under AJA s6(8), help in relation to any allegations of personal injury or death (before this amendment, only help in relation to allegations of negligently caused injury or death was excluded) in relation to applications for funded services made on or after 25 July 2005; and
■ to include within the scope of the Community Legal Service advocacy in the Crown Court in an application for a restraint order under Proceeds of Crime Act 2002 Part 2. In force 25 July 2005.

PRISONS

Remand in Custody (Effect of Concurrent and Consecutive Sentences of Imprisonment) Rules 2005 SI No 2054

These rules provide for the cases in which a court is not required to direct under Criminal Justice Act (CJA) 2003 s240(3) that the number of days spent by an offender remanded in custody is to count as time served by him/her as part of his/her sentence.
■ Under r2(a), no direction should be made if, while on remand, the offender was also serving another sentence of imprisonment and was not released on licence.
■ Rule 2(b) provides that no direction is to be made where a court imposes a sentence to be served consecutively on a sentence to which CJA 1967 s67 applies. In force 23 July 2005.

SOCIAL SECURITY

National Minimum Wage Regulations 1999 (Amendment) Regulations 2005 SI No 2019

These regulations amend the National Minimum Wage Regulations 1999 and come into force on 1 October 2005:
■ They increase the principal rate of the national minimum wage from £4.85 to £5.05 per hour.
■ They also increase to £4.25 per hour the rate to be paid to those workers (primarily aged between 18 and 21) who currently qualify for the national minimum wage at the rate of £4.10 per hour.
■ The hourly rate for workers aged below 18, who have ceased to be of compulsory school age, is unchanged by these regs.

Income-related Benefits (Amendment) Regulations 2005 SI No 2183

These regulations amend the Income Support (General) Regulations 1987, the Housing Benefit (General) Regulations 1987, the Council Tax Benefit (General) Regulations 1992 and the Jobseeker's Allowance Regulations 1996:
■ To make provision in each set of regs for an interim assistance grant paid by the London Bombings Relief Charitable Fund to a person who was injured, or was a partner or close relative of someone killed in, or as a result of, the terrorist attacks carried out in London on 7 July 2005, to be disregarded when calculating that person's capital for the purpose of an award of benefit where the grant is paid during the award. The disregard will last for the remainder of that award (or further awards if there is no break in-between).
■ They also amend the State Pension Credit Regulations 2002 to provide for an interim assistance grant paid by that fund to a person who was a partner or close relative of someone killed in, or as a result of, those attacks to be disregarded when calculating that person's income from capital for the purpose of an award of state pension credit where the grant is paid during the award. Again, the disregard will last for the remainder of that award (or further awards if there is no break in-between). In force 5 August 2005.

continued on page 31

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letters

LSC sets out strategy for the CLS: a response

I am astonished at the complacent tone of Crispin Passmore in his article ('LSC sets out strategy for CLS' August 2005 *Legal Action* 6). I have been dedicated to helping publicly funded clients for 30 years, and solicitors in private practice have always known that such clients have serious problem clusters. He says that: 'It does not take much analysis to conclude that clients need to be able to access services which deal with all of the problems that they face.' Yet he will not acknowledge the role of government and the then Legal Aid Board and the Legal Services Commission (LSC) in destroying the ability, and willingness, of high street firms to deliver that holistic service in the past 15 years.

When I began working in legal aid, most high street firms offered a 'full service' model to clients eligible for public funding. However, as the government refused to take responsibility for the downstream costs of constant hyperactive legal 'reforms', it began to try and control expenditure by freezing solicitors' remuneration. The government then tried to get voluntary sector suppliers to deal with so-called 'social welfare' categories of law, because the perception was that the not for profit model would be cheaper.

By the end of the 1990s it was obvious to the commercial departments of most legal aid firms that dealt with the employment, debt, housing and consumer and general contract areas of work, that there was such a disparity between market rates and legal aid, that they would need to focus their efforts on institutional and corporate clients rather than on individuals.

In the same way, family practitioners gravitated towards better paid private work. The government unilaterally imposed conditional fee agreements and removed personal injury work from legal aid, apart from a rump of cases that were remunerated at one-quarter of private client rates. Thus, it removed another layer of practitioners who supported the principle of offering a service to publicly funded clients.

Most firms are moving out of crime: mental health will be next. Then clinical negligence, community care and public law specialists will follow. That is why there are now 'very few lawyers or advisers who actually deliver services in this way'. The macho refusal of the Treasury, and successive Lord Chancellors, to increase hourly rates to keep pace even with court-imposed rates while there were still firms prepared to do the work is the direct cause of the problem. There are now very few, larger established, 'full service' firms prepared to lose money in acting for publicly funded clients. Nothing that the government and LSC do now will reverse that trend. The train has left the station.

These suppliers will not re-enter the market for Community Legal and Advice Centres or Community Legal and Advice Networks. It is pointless for Crispin Passmore to say that 'This needs to change'. There is no business case for re-entering publicly funded work. There is no competition to become a preferred supplier for poorly remunerated work.

The government's whole business model pre-supposes that there is an army of suppliers waiting for the right market conditions to re-enter a loss-making service. The government will pretend that CLS Direct is an improvement, and it will simply gloss over the fact that there are no longer any specialist advisers prepared to do face-to-face, complex publicly funded work.

Which sensible firm will change back from private client and commercial work at market rates, to service loss-making 'legal aid' cases? To imply that the prize is so attractive that firms should now reconfigure to take advantage of the 'opportunity' to provide a full range of inadequately remunerated services, with heavy bureaucracy and transaction costs, shows just how badly the government, its consultants and the LSC have misunderstood the market for litigation and dispute resolution services. It is their consistent arrogance and refusal to engage with suppliers for many years that has led to this situation. It is now 'too little, too late' for the government's supposed renewed commitment to civil legal aid.

GERRY FERGUSON,
partner at Withy King solicitors, Swindon

We welcome readers' letters and comments on *Legal Action*, which we will publish, subject to space. The editor reserves the right to shorten letters, unless it is stated that a letter should be published in full or not at all. Closing date for letters for the next issue is Monday 19 September. Send your letters to LAG at 242 Pentonville Road, London N1 9UN or e-mail: legalaction@lag.org.uk.

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continued from page 28

INQUIRIES AND CONSULTATION PAPER UPDATER

Small claims system under scrutiny

The Constitutional Affairs Select Committee is to investigate the 'small claims' system to find out if it:

- facilitates access to justice;
- is simple and informal;
- operates effectively and efficiently;
- allows cases to be allocated properly; and
- whether financial limits should be reviewed.

Submissions relating to these terms of reference are invited from relevant interested parties and should be sent to: The Clerk of the Committee, Constitutional Affairs Committee, Committee Office, House of Commons, 7 Millbank, London SW1P 3JA and an electronic version e-mailed to: conaffcom@parliament.uk by Monday 26 September 2005.

Special educational needs

The Education and Skills Select Committee is undertaking an inquiry into special educational needs (SEN) and will be looking at:

- Provision for SEN pupils in 'mainstream' schools: availability of resources and expertise; different models of provision;
- Provision for SEN pupils in special schools;
- Raising standards of achievement for SEN pupils;
- The system of statements of need for SEN pupils ('the statementing process');
- The role of parents in decisions about their children's education;
- How SEN are defined;
- Provision for different types and levels of SEN, including emotional, behavioural and social difficulties (EBSD); and
- The legislative framework for SEN provision and the effects of the Special Educational Needs and Disability Act 2001, which extended the Disability Discrimination Act 1995 to education.

Written submissions are welcomed and should be sent to: Education and Skills Select Committee, House of Commons, 7 Millbank, London SW1P 3JA and a copy e-mailed to: edskillscom@parliament.uk by Monday 3 October 2005.

Corporate environmental crime

The Environmental Audit Select Committee has published *Government response to the committee's second report of session 2004–05 on corporate environmental crime* as its *First special report of session 2005–06*, HC 434. It is available at TSO and online at: www.publications.parliament.uk/pa/cm/cmenvaud.htm.