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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editorial
The coal miner's canary

On 1 May, the Legal Services Commission fully implemented the much-criticised, five-hour threshold on initial advice for asylum cases. Extensions of time will be allowed only in 'genuine and complex cases'. In April, regulations came into force to remove legal representatives' attendance at most asylum interviews from the scope of Community Legal Service (CLS) funding.

Even the Department for Constitutional Affairs (DCA) concedes that 'the majority' of the 260 respondents to its consultation on these proposals was opposed to the cuts. The Coalition Against Legal Aid Cuts emerged in response to them; its public statement was supported by 130 organisations representing asylum-seekers or working in the field of human rights or social justice. At a public meeting, the coalition called to account Lord Falconer, the Secretary of State for Constitutional Affairs. It briefed members of the House of Lords before they debated the new CLS regulations, explaining how legal representatives ensured fair play at the interview as well as taking an independent record of it, and provided reassurance to clients.

But all these entreaties and protests have fallen on deaf ears. Practitioners trying to work within the confines of the new regime – supposedly designed to improve quality – now find themselves forced to deliver a service of a lower standard. Ole Hanson, a former director of Legal Action Group, announced that his south London firm would take no more asylum or immigration cases after experiencing 'outrageous' refusals of Legal Help extensions. His firm's departure from this area follows that of another London firm, Wesley Gryk, acknowledged as a leader in this specialised and complex field of law.

More changes are on the cards. The DCA admits that it is now considering whether it could dispense with legal aid altogether for the initial stage of asylum claims. Meanwhile, the Asylum and Immigration Bill travels relentlessly towards the statute book. Following pressure from fellow peers, Lord Falconer promised to amend the controversial clause on asylum and immigration appeals that was set to oust judicial review of tribunal decisions. At the time of writing, the shape of the revised clause has yet to be revealed, but many fear that the government will make as few changes as it can get away with.

Other aspects of the bill give rise to equally serious concerns. It will become a criminal offence to arrive in the UK without a valid passport or identification document. Specified behaviour – for example, passing through a safe third country without claiming asylum, or destroying a passport without good excuse – must be treated, automatically, by both the Home Office and the appellate body as damaging an asylum-seeker's credibility. The fact that this clause contradicts the UN's policy on refugees has been ignored. That it fetters judicial discretion to assess an appellant's truthfulness at the appeal hearing has also been glossed over.

The latest raft of changes must be seen alongside the other measures already in place to 'manage' those seeking asylum. The fast tracking of cases and the denial of proper appeals to asylum-seekers from 'safe' countries sit alongside the use of biometric identity cards, dispersal and detention – together with the enforced destitution of those who make late asylum claims. The marginalisation of those who are already excluded is the name of the game.

LAG believes that, as a matter of principle, the quality of justice should not be affected by the social or personal status of those receiving it. But the standards of justice and procedural fairness meted out to asylum-seekers are being progressively downgraded. The latest measures not only restrict asylum-seekers to a second-rate legal aid scheme – they will soon face an inferior system of tribunal justice, complete with special rules for the assessment of their credibility.

Government policies towards asylum-seekers aim both to control them and engineer their physical and institutional separation from the rest of society. Denying asylum-seekers equality of arms, and excluding them from the mainstream legal system also seem to be part of the plan. LAG believes that these policies are bad news for all of us. Like the caged canary that warns coal miners of poisonous gas, asylum-seekers' current experiences signal the treatment that other marginal groups could soon expect to receive in the name of 'justice'.

The DCA's response to the consultatation on legal aid for asylum is available at: www.dca.gov.uk/consult/leg-aid/asylumresp.htm. (See also 'EU expansion leaves asylum-seekers destitute once more' on page 4 of this issue).

news

EU expansion leaves asylum-seekers destitute once more

The government has issued last-minute regulations, which restrict work and benefit rights for European Economic Area (EEA) nationals. Advisers believe that this move is in response to tabloid newspapers' hysteria about East European citizens 'flooding' into the UK after their countries' accession to the EU on 1 May.

A new habitual residence test reduces access to benefits for all EEA nationals, who are in the UK as workers or work-seekers. The test requires them to show that they have a 'right to reside' in the UK.

Regulations in force from 1 May establish a new worker registration scheme for nationals from the so-called 'A8' countries - ie, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovenia and Slovakia.* These workers will need to register with the Home Office to obtain the right to reside in the UK, and gain access to work-related benefits. Unfortunately, the work registration forms were not available before 1 May, and delays are expected in the processing of applications.

In addition, at the beginning of April, the National Asylum Support Service (NASS) wrote to all asylum-seekers from A8 countries to advise them that its support would end on 30 April. NASS also instructed local authorities to end their support on that date. Many of the 2,571 asylum-seeker households affected by these changes are awaiting decisions from the Home Office regarding whether to grant them indefinite leave to remain in the UK under the latest amnesty policy, or have outstanding human rights appeals.

Sue Willman, solicitor at Pierce Glynn, commented: 'Instead of being welcomed into Europe, hundreds of Roma asylum-seekers who are settled here have been facing street homelessness since 1 May. Even asylum-seekers with children and disabilities have had support cut off, in complete violation of the European Convention on Human Rights.'

* The Accession (Immigration and Worker Registration Regulations) were available in draft form only at the time of writing.

'Advice helps build communities', LAG tells Home Office

The Home Office is in danger of overlooking the contribution of legal and advice services in supporting civil renewal, according to LAG. The group made the observation in its response to the government's consultation, *Building civil renewal.** LAG expressed surprise that the paper made no reference to the role of Law Centres® and advice agencies in building the capacity of both communities and individuals. In addition, LAG made a number of points, including:

- Legal and advice services can give important guidance to community organisations on their legal rights and obligations, for example, in relation to employment, constitutions and contracts.
- Agencies such as Law Centres® work with communities to achieve social justice, for example, by working with groups of residents to fight for better housing conditions or environmental justice.
- An understanding of individual responsibilities and rights is important in building social cohesion.

* Available at: www.homeoffice.gov.uk/docs2/ccbrconsult.pdf. LAG's response to the paper is available on request from: nardill@lag.org.uk

PACE codes revised . . . yet again

Ed Cape, Professor of Criminal Law and Practice at the University of the West of England, writes:

Using new powers under the Criminal Justice Act (CJA) 2003, the Home Office has issued draft revised Police and Criminal Evidence Act 1984 Codes of Practice for consultation, with a deadline for comments of only three weeks. The current revisions came into force on 1 May 2004, and the Home Office has indicated that, in future, the codes will be revised annually.

Most of the changes reflect provisions introduced by the CJA:

- Code A is amended in line with new police powers to stop and search a person without arrest, on suspicion that s/he is in possession of articles, which may be used for causing criminal damage.
- Code C is amended to take account of the new 'street bail' provisions that enable the police, following arrest, to bail a suspect to attend a police station at a later date. Other changes to Code C include the removal of custody officers' obligation to record property found in suspects' possession when they are booked in at a police station, and, as a matter of routine, allowing reviews of detention to be conducted by telephone.
- The major change to Code D takes account of new powers to take, as a matter of routine, fingerprints and non-intimate samples from persons who are detained in respect of recordable offences.

However, other changes do not result from the CJA, for example:

- Code A is amended, in line with a recommendation of the *Stephen Lawrence inquiry: Report of an inquiry by Sir William Macpherson of Cluny*. Consequently, all 'stops' of members of the public must be recorded in writing, and a copy of the record offered to the person stopped.
- A new paragraph 17 is added to Code C, which deals with the power to conduct a mandatory drugs test following charge for certain offences.
- Changes are also made to the threshold for deciding when an interview must cease and a suspect be taken before a custody officer with a view to charge.
- In addition, the definition of 'solicitor' is changed so that the police are, in effect, given new powers to exclude accredited representatives from the police station.

In a separate development, the Home Office has indicated that it intends to introduce an Organised Crime and Police Powers Bill in the next session of parliament. One part of the bill will deal with powers of arrest, and the current proposal is that the present structure be revised completely, with the police given a power of arrest for any offence.

news

CLS and CDS: financial eligibility from April 2004

The Legal Services Commission writes:
Traditionally, the eligibility levels for civil and criminal legal aid have been increased from each April to take account of the increases in state benefits, for example, Income Support. State benefits increased, generally, from 12 April 2004.

No decision has yet been taken by ministers on the eligibility uprating for legal aid for April 2004. As a result, there will be no increase, at the present time, in either Community Legal Service or Criminal Defence Service financial eligibility rates, other than those that apply automatically when state benefits are uprated.

This means that current gross income, disposable income and capital limits will continue to apply for all new applications for funding after 12 April. The Legal Services Commission (LSC) will also apply these rates when it reassesses certificates under the Community Legal Service (Financial) Regulations 2000 SI No 516 reg 15. The current 'passporting' arrangements will, of course, continue.

Following the uprating of 1.8 per cent to the Income Support (General) Regulations 1987 SI No 1967, the following increases to the allowances for dependants will apply automatically to applications for funding and reassessments on, or after, 12 April 2004 for all levels of service.

Partner
Increased from £135.14 to £137.53 per month
Child aged 15 or under
Increased from £167.29 to £183.67 per month
Child aged 16 or over
Increased from £167.29 to £183.67 per month

The updated Keycards (Nos 40 and 40a) provide a step-by-step guide to assessment (see *Focus 44* for details). The updated suppliers' calculator and accompanying guidance (LSC Manual II part 2C) are available at: www.legalservices.gov.uk. Copies of all means assessment forms, including Keycards, are also available at the website.

The LSC will provide a further update on eligibility limits once a decision has been reached by ministers, which is expected in the near future. For further information contact: Grace Nicholls, Means Assessment Policy Adviser, 29–37 Red Lion Street, London WC1R 4PP, tel: 020 7759 1776.

IN BRIEF

■ The complaints handling arm of the Law Society has been renamed the Law Society Consumer Complaints Service. The new service will be the point of contact, for the public, for all concerns regarding solicitors' conduct and quality of service. It will deal with all complaints about service, but matters concerning solicitors' conduct will continue to be handled by the compliance arm of the society's Regulation Directorate.

The address and phone numbers for use by the public will continue to be: Victoria Court, 8 Dormer Place, Leamington Spa CV32 5AE, tel: 0845 608 6565.

■ Advice UK has published its research on the cost, in both time and resources, for advice organisations of achieving the Community Legal Service Quality Mark at General Help level. Copies of the *Cost of quality* report are available on request from: general@adviceuk.org.uk or tel: 020 7407 4070.

CLARIFICATION

In April 2004 *Legal Action* 8, under 'Transitional arrangements', the first sentence should read '. . .only complaints about police received after 1 April 2004. . .'

Lewisham Law Centre down, but not out

Paul Heron of Lewisham Law Centre® writes:
In March, and with little notice, the local council cut Lewisham Law Centre's® budget by £41,000. This was a big blow and a massive disappointment as we have improved and expanded the services offered by the Law Centre during 2003 and into this year, including:

■ The introduction of 'drop-in' sessions to provide clients and the general public with easier access to legal advice and representation services.
■ The expansion of our outreach service through the SureStart scheme.
■ The securing of a grant from the NHS to organise a year-long, borough-wide take-up campaign for Disability Living Allowance for children.
■ The running of a new pro bono session every Thursday, staffed by solicitors and barristers from local legal firms.

We hope that, during 2004, the Law Centre will be able to bounce back from the short-term problem of the cut imposed on it, and build and expand the services that it provides to Lewisham's residents.

Alison hannah

Jeffrey Gordon, LAG's London marathon man, is pictured at the end of the run with Martin Fisher, chair of LAG's board. Jeffrey finished the run in just 3 hours 58 minutes. LAG received donations of £1,500 before the event, and hopes to double this amount from contributions not yet received.

LEGAL SERVICES

Advice services in Leicester – a cautionary tale

Less than ten years ago, Leicester had a thriving and busy independent advice sector. This oasis may now succumb to the sands of the advice desert if Leicester City Council carries out proposals to reduce dramatically spending on legal advice services, writes **Glenda Terry**, manager at Leicester Law Centre®.

The situation in Leicester

Leicester has all the indicators of social deprivation and the demographic factors which point to high levels of need for advice in social welfare law: it is the largest city in the East Midlands; it has communities of both settled and newly-arrived migrants who will shortly constitute the majority of the city's population; it is a National Asylum Support Service (NASS) dispersal area; one third of its households recieve means-tested benefits; unemployment is high; and wages are low.

Proposed funding cuts

Leicester's independent advice sector has until now comprised several specialist agencies, including the Law Centre and the citizens advice bureau (CAB) and a few community-based groups whose advice work is targeted at specific communities or city wards. Historically, all have received core funding from the local authority, Leicester City Council. In 2001, the council decided to merge the city's CAB with the Law Centre, at a saving of £100,000 a year. The council now proposes draconian reductions in funding in its bid to reduce its spending on legal advice services by a third of the current budget. Under these proposals, several smaller advice agencies, one of which has a contract with the Legal Services Commission (LSC) and all of which conduct their work to the relevant Community Legal Service (CLS) quality mark standard, will lose their funding. Support for the Law Centre will be reduced to the minimum necessary for it to remain viable in order to retain its LSC contract.

Corporate aims

This downsizing arises not simply from general budgetary constraints, but as the result of a restructure of advice services on the part of the local authority, following its 'best value' review. Only advice services that are deemed to contribute to the achievement of corporate aims are to be funded in the future. Services at the General Help level are to be supported at the expense of casework and specialist help on the ground that they are more cost-effective. This is because General Help services allegedly raise more money (through the submission of claims for welfare benefits, for example) for city residents than casework services. They can also be delivered in partnership with the Department for Work and Pensions (DWP) and Jobcentre Plus. The monetary gain factor and the potential for partnerships with other governmental bodies have been cited by the council to justify the proposal to deliver most welfare benefits and all employment advice services through its own in-house services.

The remit of the new service will be tailored to ensure compliance with corporate aims: housing and debt advice services will be designed to maximise the authority's rent revenue; welfare benefits provision will target people with disabilities to increase the revenue available to the councils for home care services and to encourage clients to take up paid employment. Casework and representation in housing and immigration appear not to fulfil any identifiable corporate aim. Therefore, clients must take their chance with the diminishing number of private practice firms that continue to undertake legal aid work in these categories of law.

Implications for advice sector

The message delivered by these developments and the rationale on which they are based will have repercussions throughout the advice sector. The local authority has always been a capricious ally: it has no general statutory duty to fund advice services and, in this respect, Leicester's experience of drastic cuts to the funding of advice services is by no means unique. However, our situation does raise concerns of wider impact, and the principle at issue here seems to be the crucial one of access to justice.

If the justification for supporting advice services through local authority funding relates entirely to their potential to meet corporate objectives, then there is an inherent compromise to the principal aim of legal advice – the pursuit of justice for the individual. The concepts of independence and impartiality are fatally compromised once this principle is conceded. The proposals to deliver advice services via the Leicester model unleash an irreconcilable conflict of interest within the exercise of the various roles of those governmental organisations that now seem poised to replace the independent advice sector as service providers. What recourse will a client have when his/her interests do not coincide with those of the local authority? The dilemma is compounded if the advice available is also to be delivered through a dangerously intimate partnership with agencies such as the DWP and Jobcentre Plus whose aims are not uncommonly at variance with the interests of their clients.

Such a radical shift in the ethos and aim of publicly-funded legal advice services, allied to the steady erosion of civil legal aid, raises disturbing questions about access to justice for clients who cannot afford to pay for legal help. Where, in these proposals, is the Human Rights Act 1998's 'equality of arms' between the individual and the state when the state assumes the roles of both advocate and arbiter, and effectively denies to its poorest citizens the means and power to challenge its decisions?

Role of the Community Legal Services Partnership

The role of the Community Legal Services Partnership (CLSP) within the demise of Leicester's independent advice services is also of wider significance. Despite the opportunity that it appears to present for funders and providers to contribute, on equal terms, to the planning and co-ordination of advice services, and to the realisation of the 'seamless service', in Leicester at least the CLSP has served largely to enhance the influence of its most powerful members – the local authority and the LSC. The CLSP has, in effect, been presented with a fait accompli by the local authority and has been asked to comment on a radical restructure of advice services only at the point where the deal is all but done. In Leicester, as no doubt in other places, the CLS watchdog has become a toothless hound, which can only growl at its captors.

The CLSPs have created their own bureaucracy and have absorbed the time and energy that the not for profit (NFP) sector previously gave to its own liaison and campaign groups. In Leicester, the NFP providers' representatives now question whether they can continue to participate within a forum which has been powerless to uphold the principle of access to justice – ironically, the foundation on which the entire CLS edifice rests.

CRIMINAL JUSTICE SYSTEM

Restorative justice: the way ahead

Roger Smith, director of Justice, the human rights and law reform organisation, reviews the restorative justice movement, both in the UK and abroad, and makes suggestions for how this initiative should be advanced in this country.

The case of David Collins

David Collins made legal history. In March 2003, the Court of Appeal reduced his sentence from a total of seven to five years because he attended a 'restorative justice programme', which the court found was 'by no means a soft option'. Mr Collins had participated in a conference with one of his victims, members of her family and his own. He had apologised. He had undertaken a Narcotics Anonymous course, and successfully applied to change his prison to do so. He had reported to a prison liaison officer on his progress at regular intervals, something the court found 'a powerful feature' of his experience.

An international movement

Mr Collins's case may have been a first for the Court of Appeal in giving such recognition to restorative justice techniques. However, it would not, as Justice's research indicates,[1] have been unusual in a number of other jurisdictions. Restorative practices are institutionally integrated into the criminal justice systems of fellow European states like Austria and Norway. In the United States, restorative justice flourishes in both traditionally liberal states such as Minnesota, and southern states like Texas, which are generally considered much more conservative. In fact, one of the characteristics of the restorative justice movement is its internationalism. Originally developed in New Zealand and then Australia, its ideas have spread around the world. A quick search of the internet will reveal just how much activity there is. A good starting place is the avowedly international site whose 'leading edge' section amounts to a hall of fame for restorative justice practitioners from 18 countries around the world – including those as diverse as Belgium, Brazil and Bulgaria.[2]

The youth justice system and referral orders

Domestically, restorative justice concepts have been integrated within the youth justice system and its practice of referral orders. The current chair of the Youth Justice Board is Sir Charles Pollard, a restorative justice pioneer who developed the idea of 'restorative cautioning' while Chief Constable of Thames Valley Police Authority. Around a third of all young offenders are now dealt with by way of referral orders, which require a panel – including volunteer members of the local community – to put together a package of suitable conduct for an offender who accepts his/her guilt. Justice's research found variable practice but, on the whole, a successfully introduced system.

Expanding prison population

The difficulty in the UK has been more in relation to adult prisoners than to young offenders. The UK now has the highest rate of imprisonment in the European Union, with numbers at around 74,000. A decade ago, the prison population was around 45,000. The cost of prisons has become a major driver of government policy. In the words of no less than Lord Woolf, the Lord Chief Justice, 'the rapidly rising population of our prisons . . . [is] an explanation as to why a by no means "soft" Home Secretary described prisons as an expensive way of making bad people worse'. Unsure of the way forward, the government commissioned Lord Justice Auld to review the criminal courts. In his 2001 report, *A review of the criminal courts of England and Wales*, he advocated, among a range of other measures, a major extension in the use of restorative justice. The government responded in 2003 with a strategy document, which argued for 'building in high quality restorative justice at all stages of the criminal justice system'.

Searching for a definition

It is interesting, with such high level commitment to restorative justice, how elusive a definition is. Indeed, Lord Woolf has argued that 'no one has produced a satisfactory definition and that is probably a good thing', because it does not restrict experiment. Tony Marshall, an early advocate, has defined restorative justice as 'a process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of an offence and its implications for the future'. The government strategy paper offers a description:

> *Restorative justice brings victims and offenders into contact, so that victims can get answers to questions, tell offenders what the real impact of their offending was and receive an apology. Restorative justice gives offenders the chance to make amends for their crime, either to victims themselves or the community. But restorative justice is about more than material reparation – it can repair relationships and trust that have been broken by crime.*

Restorative justice in practice

Thus, the experiences of David Collins are pretty typical of restorative justice practice. He attended a conference with his victim and both his and her supporters; sought to make amends by apology; and showed a willingness to change his life by dealing with his addiction. These are common to practice around the world where great weight is put on conferencing of this kind or, sometimes, direct mediation between an offender and his/her victim (or representative). In some cultures and countries, there is acceptance of a collective approach to sentencing through 'circles' of community representatives who either directly impose a sentence or, more usually, recommend one to the judge.

Thus, restorative justice is inherently consensual. It only works if an offender agrees to participate seriously. This raises interesting human rights issues that have attracted attention by various transnational institutions. Sentencing, on the one hand, needs to be proportionate to the offence and, on the other hand, needs to be individually tailored to an offender. This requires a sensitive balance which, to be fair, the current juvenile system generally seems to display. There needs, however, to be continuing vigilance on both balance and the genuine involvement of offenders. They must be offered 'effective participation' in the process of sentencing. Any consent must be real and not assumed. It was on the ground of lack of effective participation that the European Court of Human Rights found the court procedures adopted in *Venables and Thompson* to be unfair.

International treaties

The practice of restorative justice in relation to juveniles in the UK must be carried out in the shadow of the European Convention on Human Rights, as well as a number of international covenants that cover the treatment of juveniles. These

include the UN Standard Minimum Rules for the Administration of Juvenile Justice 1985 (usually referred to as 'The Beijing Rules'), the Convention on the Rights of the Child 1989 and the UN Guidelines for the Prevention of Juvenile Delinquency 1990 ('The Riyadh Guidelines'). Considerable encouragement is given by these international covenants to the diversion of juveniles from the court process. The UN has also been involved in the setting of standards for restorative justice practice, and a set of basic principles was agreed in 2002. The European Union published a framework decision on restorative justice in 2001.

Role of police

Most of these international agreements relate to juveniles but, increasingly, projects for adults, such as David Collins, are being developed. In the lead was the use of restorative justice in diversion from the courts in combination with cautioning, developed by Thames Valley Police Authority. This raises the interesting issue, on which opinion is divided, about the desirability of police-led restorative work. Undoubtedly, in both this country and others, notably Australia, the commitment of police authorities and individual police officers has allowed restorative justice to get off the ground. The police have had the resources, the incentive and the access to make it work. The presence of police officers can give victims some security and encourage participation – the low level of which is a significant brake on its satisfactory expansion. In the short term, police-led restorative work probably should take the lead so that activity can be developed. In the longer term, it may be that, ideally, the police would continue to participate, but some new, independent agency would take over the lead.

Both the Lord Chief Justice and the government have called for continuing exploration of the possibilities of restorative justice. Victim-offender mediation now takes place from West Kent's Independent Mediation Service to South Yorkshire's Remedi project. Both the probation and prison services are involved. The West Midlands Victim Offender Unit is based in, and staffed by, the Probation Service. Within prisons, programmes have expanded beyond institutions like the therapeutically-oriented Grendon Underwood, where they might be expected, to a range of others such as Hull, Aylesbury and Bristol. The Home Office is supporting major experiments with restorative justice in Northumbria's magistrates' courts and London's Crown Courts.

Saving money

For Home Office policy-makers, the key issue is cost-effectiveness. A prison place costs a little under £30,000 a year. Can the state save money and get a better result by using restorative justice? Research in other jurisdictions suggests that it can. Large 'meta-studies' of experience, such as those conducted by Dr Mark Umbreit of the University of Minnesota, suggest a positive response. Dr Umbreit is head of the Center for Restorative Justice and Peacemaking at the University of Minnesota, and his website is worth consulting by those interested in the subject.[3] Dr Umbreit compared results from 63 empirical studies in five countries. He highlighted subjective gains from restorative justice: 'Conferencing strategies do contribute to increased victim involvement and reparation, to offenders taking responsibility for their behaviours, and to community members participating in shaping a just response to law violation.' And, hearteningly: 'Offenders going through conferencing approaches often have lower levels of reoffending than they did before or when compared with a similar group of offenders who did not go through conferencing.' There is, however, a note of caution here and, no doubt, the precise calculation of benefits and cost will depend on the precise situation in any particular jurisdiction. We must await research sponsored by the Home Office for a definitive result on possible savings of cost.

Effect on victims

We do know, however, that restorative justice practice can transform the experience of victims. Mr Collins was, indeed, fortunate in his choice of victim. She was a teacher, who was willing to participate in the conference with her offender and even to write to him, in acknowledgement of his apology, that she hoped things would go well for him. Many victims have experienced enormous relief in recognising that chance or other factors played a part in the crime committed against them rather than thinking that they were targeted personally by the offender. Thus, we need to develop a model for restorative justice that will encourage victims to participate in conferencing and reparation, but does not penalise either them or their offenders if they do not wish to do so.

Conclusions

Justice's research identified ten conclusions that should be reflected in how restorative justice is advanced in this country:

- Restorative justice should not be narrowly defined. It should be seen as a set of values rather than one particular model of provision.
- Restorative justice provides a framework within which the criminal justice system can move away from over-reliance on punitive imprisonment.
- Restorative justice must be realistic and responsive. Justice felt that there is room to explore restorative justice with more serious cases, including domestic violence, subject to satisfactory protection for victims.
- Restorative justice must be resourced adequately, both in terms of cost and the length of time in which funding is provided.
- Restorative justice must be designed to avoid 'net-widening'. There is a danger that restorative justice might be undone by its claims for success, and that offenders will be diverted into schemes who, otherwise, would have simply had no action taken against them and still moved away from offending.
- Restorative justice practice must be consistent with human rights principles.
- Restorative justice must be supported by the development of standards for practice and the accountability of practitioners.
- Restorative justice should, ideally, be led by independent practitioners.
- Restorative justice should be led by a single body which oversees its development.
- Restorative justice should be championed by government.

The most contentious of Justice's recommendations is probably that restorative justice should be extended cautiously into domestic violence cases. This is now done in Austria, and early opposition by the women's movement has evaporated. Justice thinks that there are tremendous opportunities for restorative justice to transform the landscape of the UK's criminal justice system. Let us hope that the government continues to agree.

Restorative Justice

1 The results of Justice's work, funded as part of the Esmée Fairbairn Foundation's *Rethinking Crime and Punishment* project, are published as *Restorative justice: the way ahead*, Shari Tickell and Kate Akester. Further details from admin@justice.org.uk.

2 www.restorativejustice.org.

3 http://ssw.che.umn.edu/rjp.

LEGAL AID

The future of CLS Partnerships

The future of Community Legal Service Partnerships (CLSPs) is a central concern of the review of the Community Legal Service (CLS), which has been conducted by consultants appointed by the Department of Constitutional Affairs for several months. **Adam Griffith**, a policy officer at the Advice Services Alliance (ASA), reports on research carried out by ASA, *What are they good for? – Advice agencies' experience of Community Legal Service Partnerships*, which has been submitted to the review team.[1]

Introduction

Between July and September 2003, ASA interviewed representatives from 20 advice agencies of various kinds from different parts of England and Wales, to investigate agencies' experiences and perceptions of CLSPs. The sample was not meant to be representative. It was skewed in favour of those who had been involved in CLSPs, and felt that their partnership had achieved something.

Key findings

Involvement in CLSPs

The membership of CLSPs was not as originally envisaged. In particular:

- The research found a very strong pattern of only one or two solicitors from private practice 'staying the course' and remaining involved;
- Concern was expressed at the lack of involvement of other voluntary and statutory organisations, community groups and black and minority ethnic groups;
- Several respondents commented on the lack of involvement of funders, other than local authorities and the Legal Services Commission (LSC);
- Some CLSPs were reported to have limited their membership deliberately, and/or excluded organisations that were seen as 'dabblers' in advice;
- Agencies which served particular client groups felt less involved than more mainstream advice agencies; and
- Smaller organisations felt marginalised or that their involvement was tokenistic.

Needs assessments and strategic plans

Almost all of the CLSPs had used LSC guidance, needs models and/or other proxy measures to complete a needs assessment. Some had used additional methods, or had engaged independent researchers.

Many respondents were generally happy with the needs assessment. Several thought that it had simply 'told us what we knew already'. Concerns were expressed about:

- the lack of impartiality and independence;
- the tendency for needs assessments to reflect the views of agencies with the resources and motivation to be involved; and
- the tendency for some agencies to seek to influence needs assessments with a view to obtaining support for their own future funding applications.

The CLSPs concerned had worked on preparing a strategic plan, although not all had completed this work. A number of respondents commented on the time and effort involved, variously describing the process as being, for example, 'long and painful', seeming 'to go on for ever', and involving 'loads and loads of paperwork'.

Referral protocols

- Most of the CLSPs concerned had spent time devising a referrals procedure;
- Most respondents stated that the procedure had not worked; and
- Some respondents thought that referrals had improved, nevertheless, mainly as a result of the networking opportunities provided by CLSPs.

The impact of CLSPs

Respondents' assessment of the impact of their local CLSPs varied considerably. In addition to successful Partnership Initiative Budget (PIB) bids,[2] some positive impacts were reported:

- There were some reports of new LSC contracts;
- There were instances of funding being obtained from other sources as a direct or indirect effect of the CLSP;
- Most respondents reported improvements in relationships, generally described in terms of better networking or working arrangements; and
- The link between CLSPs and the Quality Mark was generally seen as positive.

However:

- There was little evidence of any new local authority funding;
- No evidence was found of co-ordinated funding, or of any significant steps being taken in this direction;
- Most respondents thought that their CLSPs had done nothing to meet the needs identified, and had failed to 'make a difference'; and
- There were suggestions of CLSPs being sidelined or marginalised as a result of decisions being made elsewhere, particularly by the LSC, local authorities and other funders.

How active are CLSPs?

There was considerable variation in the level of activity reported. Broadly speaking, the CLSPs under discussion seem to fall into three categories:

- CLSPs which are seen as active, where there was significant involvement and things were happening;
- CLSPs where the respondents expressed concerns about the future; and
- CLSPs which were dormant or dying on their feet.

The watershed/crossroads

Many of the CLSPs we looked at appear to be at a crossroads. Active involvement was declining and there was a general sense that, having completed the main tasks set for CLSPs in the early years, people were not sure what they ought to be doing next. Respondents quite frequently spoke of their CLSP degenerating into a talking shop, and of meetings at which nothing seemed to get decided.

Lack of resources

Several respondents saw the lack of any significant money or other resources to support CLSPs, or enable them to implement the recommendations contained in strategic plans, as the key factor in determining the effectiveness of CLSPs.

The key players

It is clear that advice agencies have played an important, and in many cases a leading, role in CLSPs. Some respondents had clearly acted as 'driving forces' in their local CLSPs. Others, however, had tried their best, but felt that they had achieved very little.

Local authorities appear to play a key role in determining the relative success or failure of CLSPs. However, there was considerable variance in the nature and extent of local authorities' involvement, with officers coming from a variety of council departments.

The research suggests that:

- CLSPs are likely to flounder or even fail completely in the absence of local authorities' involvement;
- local authorities can play a significant role in either encouraging or limiting the development of CLSPs;
- although the LSC was seen as the dominant force in half of the CLSPs looked at, it appears ultimately to be less determinative of the effectiveness or success of CLSPs.

However, there is some evidence that the LSC's role is changing. Several respondents reported clear indications that

the LSC would be playing a less active role in future: it would be likely to concentrate its activities on the more 'active' CLSPs; it favoured amalgamating some small CLSPs into larger ones; and it was prepared to contemplate the disbandment of 'failing' CLSPs.

What have CLSPs achieved?

In many ways, CLSPs have achieved the modest aims set out in the consultation paper on the CLS, *The Community Legal Service: a consultation paper* (Lord Chancellor's Department, 1999) rather than the more ambitious agenda set out in the LSC's guidance, *Guidance and information for CLSPs* (LSC, 2000). There have been improvements in networking, and in referrals, notwithstanding the problems with the relevant protocols. The 'network of local advisers' does exist, in many areas, to a greater extent than before CLSPs were introduced. There is evidence that some agencies have had their funding protected as a result of intervention by CLSPs and the LSC. By contrast, referral protocols, as suggested by the guidance, have not generally got off the ground. There is little evidence either of any movement towards co-ordinated funding.

Where do we go from here?

Many things could be done to improve CLSPs, but the fundamental flaw remains the lack of resources to satisfy unmet needs. Although some funding has been made available through the PIB, this is generally for three years only, and the future of such projects is unclear. Similarly, the impact of CLSPs on LSC funding may have been of limited duration. It is not clear whether such impact will continue in future, given the introduction of the new bidding rules, the narrow recommendations recently made by most of the Regional Legal Services Committees (RLSCs), and the partial success achieved to date in implementing those proposals.

One suggestion currently being mooted is a revised role for the PIB as a pump-priming investment fund, aimed at getting new or additional services started, to meet needs which have been identified as regional priorities.[3] The amounts suggested to date have, however, been modest.

In the absence of significant new resources, what is to be done?

It might be thought that the obvious conclusion is that CLSPs ought to be abolished, but the research does not suggest that. Most respondents remained optimistic that CLSPs have a worthwhile role to play within the CLS. The challenge is to identify that role.

There was little enthusiasm for larger CLSPs among respondents. The geographical size of CLSPs was generally felt to be correct. There may be dangers in localism, such as a risk of parochialism, or the continuance of domination by one partner, but there are equally wide dangers in forcing functioning CLSPs into larger groupings. On the other hand, where there is a lack of local impetus there may be a case for amalgamating some CLSPs into larger ones.

We asked respondents whether there should be some devolution of funding decisions to CLSPs. While there was some enthusiasm, in principle, many identified practical problems, due to the perceived lack of strength, independence and impartiality of CLSP steering groups. Several respondents did not see how they could properly be involved in decisions affecting their own funding, and doubted that they could trust their partners to make the right choices either.

If the present model is flawed, we may need to think of a revised role for CLSPs. Much of the work that is valued is a result of networking among providers. Respondents differed about whether such networking would continue in the absence of CLSPs. In any event, if CLSPs are to continue they need to have purposes beyond networking. Respondents suggested a number of possible roles for CLSPs, which can perhaps be considered as two main functions: co-ordinating local service delivery and social policy.

A future role for CLSPs?

The first function could include:

- monitoring need, supply and capacity issues, and possibly commissioning local research;
- identifying priorities for service development and the deployment of resources;
- identifying training needs;
- developing and supporting good practice, for example, in referral/signposting between agencies;
- placing a greater emphasis on securing the core provision of existing services; and
- publicising the services which are available.

The second function could include:

- identifying social policy issues, usually on a local level, and responding to them;
- initiating campaigns or projects that would raise awareness of what needs are on the ground;
- attempting to influence policies on local issues such as debt collection;
- campaigning for new services; and
- promoting and developing advice and legal services through representation on the Local Strategic Partnership.

This could all be done by networks of providers only, or possibly involve other willing partners. Issues of ownership would have to be clarified. It might be possible to have an inner membership consisting of providers only and an outer membership, which would include other interested parties. If local authorities did not wish to be involved, efforts would have to be made to establish links with them.

Clarity of role is essential, and is more important than a name, but it may be best not to call them 'partnerships' unless that really means something to the participants. It needs to be very clear that they are local groups doing what they want, rather than a part of an official apparatus.

Consideration should also be given about the need for resources to support CLSPs in their new role, especially if LSC resources are withdrawn. A revamped Partnership Support Budget could be a possibility, with CLSPs able to apply for small grants to support their work.

There would inevitably be 'CLSP deserts'. In such areas, and/or more generally, there could be a review of needs and provision every, say, three years. This could be under the aegis of the RLSCs.

If CLSPs' role is to be redefined, this is likely to also involve a redefinition of the role of RLSCs. They would, presumably, take primary responsibility for needs analysis, albeit with a duty to consult local stakeholders, including CLSPs. They could have a duty to engage with local community groups and others forming part of the 'wider CLS'. One way of doing this may be to organise conferences on particular topics or targeted at specific client groups. RLSCs would, presumably, have primary responsibility for defining the regional priorities for contracting and in considering bids received under the PIB. An expanded role for RLSCs may require additional staff to support them. However, there would, presumably, be countervailing savings in the LSC's Planning and Partnership budget, if CLSPs' role is redefined as suggested above.

1 The full report of this research is available at: www.asauk.org.uk, or ASA, 12th Floor, New London Bridge House, 25 London Bridge Street, London, SE1 9ST, £7.50.

2 Originally named the Partnership Innovation Budget.

3 An overview article in *Focus 43*, LSC, p2, talks about 'a more flexible funding regime', which is 'focused more directly in support of our regional priorities for contracting; opening up start-up or expansion funding packages for solicitors and not-for-profit organisations, who are willing to fill gaps in service which have been identified as priorities.'

law & practice

COMMUNITY CARE

Community care law update

Jean Gould and **David Wolfe** continue their twice-yearly series of updates in community care law. The authors welcome details of cases and contributions from readers.

Since our last update in September 2003 *Legal Action* 29, there has been relatively little community care case-law development. Surprisingly, the introduction of the *Fair access to care services* guidance (see September 2002 *Legal Action* 11) has led to few decided cases on the assessment duty under it.[1] Our experience is that many more disputes are settling pre-action or following the grant of permission for judicial review.

However, the law is evolving in related fields that impact directly on the community care world relating to the extent of the duty owed to children in need; continuing NHS health care; damages awarded under the Human Rights Act (HRA) 1998; inquests and article 2 of the European Convention on Human Rights ('the convention'); and the dividing line between social services departments' and the National Asylum Support Service's (NASS) duties in relation to asylum-seekers and their families.

This article summarises the recent developments in the following areas:

- Social services departments' duty to provide accommodation to children in need;
- Damages under the HRA in the community care context;
- A patient's right to insist on NHS funded treatment abroad;
- Community care assessments;
- Funding continuing NHS health care; and
- The need for an inquest following a death in a hospital or care home.

This article does not deal with the latest developments regarding cases involving social services departments and the NASS because this and other issues are covered in regular 'Support for asylum-seekers update' articles in *Legal Action*. The next update will be published in the June issue.

Social services departments' duty to provide accommodation to children in need

■ **R v Barnet LBC ex p G; R v Lambeth LBC ex p W; R v Lambeth ex p A**

[2003] UKHL 57

The House of Lords has attempted to resolve the confusion which arose from various Court of Appeal decisions in relation to Children Act (CA) 1989 s17(1). However, in doing so, the House of Lords has still left some uncertainty. The three cases under consideration raised the questions of whether s17(1) imposes a duty on local social services authorities in relation to individual children (as opposed to being simply a 'target duty') and, if so, what that responsibility required. In each case, the child argued that the particular local authority (LA) was required by s17(1) to assess his/her needs, and provide him/her and his/her family with appropriate accommodation (in a situation where suitable housing was unavailable).

Lords Nicholls and Steyn considered that s17(1) required a LA to assess the needs of a child who was defined by the CA as 'in need'. However, the section did not require a LA to meet those assessed needs. Furthermore, in deciding what provision, if any, to make to a child, a LA could take into account its own resources and the cost to it of meeting the assessed needs. The Lords rejected the suggestion that, if a LA decides to provide accommodation for a child, it must necessarily provide for his/her parents too. A LA's function under the CA is to provide accommodation for homeless children not homeless families (ie, the s17 route could not provide a mechanism for families to jump the ordinary housing queue).

Lambeth had adopted a policy of offering accommodation to children but not their parents. Lords Nicholls and Steyn were critical of the blanket nature of this policy, and contended that each case must be judged on its merits. Furthermore, they considered that where a child was 'not old enough to understand what was going on' or 'would be likely to be significantly upset at being separated from his parent', s/he would need to be housed with his/her parents (which the LA would thus have to provide). However, it could be permissible for the LA to offer an older child housing separate from his/her parents. Moreover, where a family had unsuitable accommodation, a LA could discharge its obligations by asking the local housing authority to help with rehousing the family.

However, Lord Hope considered that s17(1) did not give rise to a duty to assess or make provision for any particular child, but provided broad aims which a LA needed to bear in mind when performing its duties under the CA. He agreed that if a child were being accommodated by a local social services authority, this would not lead invariably to a duty on the LA to accommodate him/her with his/her parents. In addition, he agreed that a LA could take into account its resources in deciding whether and how to exercise its power to make any provision.

Lord Scott agreed that a local social services authority was under a duty to assess the needs of a child in need. However, he and Lord Millett held that the obligation came from CA Sch 2 para 3 and not s17(1). Lord Scott agreed that s17(1) did not impose a duty to make any provision and, in deciding whether and how to exercise this power, a LA could take into account its resources. He considered that Lambeth's policy of offering children housing separate from their parents was lawful. He did not accept that the proposed distinction between younger children who would be significantly upset by separation from their parents and older children who would not was a tenable one. There would be few children who would not be significantly upset and so it would, unjustifiably in his view, outlaw Islington's policy.

So, it appears from these various judgments:

- that a local social services authority is obliged to assess the accommodation needs of a child in need;
- but even if a LA concludes that a child needs accommodation, it is not under a duty to provide it;
- in deciding whether and, if so, how to provide accommodation, a LA can have regard to its own resources and the cost of the provision;
- where a LA provides accommodation to a child, there is no general duty also to provide it to his/her parents;
- there may be an obligation to provide accommodation if a child is not old enough to know what is going on or would be particularly upset by separation from his/her parents; and
- although the target duty does not 'crystallise' into an enforceable individual duty following assessment, decisions are, nonetheless, amenable to judicial review on the usual public law principles.

Damages under the HRA in the community care context

■ **Anufrijeva and another v Southwark LBC; R (N) v Secretary of State for the Home Department; R (M) v Secretary of State for the Home Department**

[2003] EWCA Civ 1406

These three linked appeals concerning human rights damages claims gave the Court of Appeal its first opportunity to rule on compensation under the HRA. The cases concerned article 8 of the convention (right to respect

for private and family life) in the social welfare context. Although arising from damages claims, the judgment is also relevant (particularly in relation to the applicability and effect of article 8) in the context of judicial review proceedings which seek to secure additional community care support.

Anufrijeva was a claim based on Southwark's alleged failure to provide suitable accommodation for a disabled person. N and M were both refugees who claimed that aspects of their treatment by the Home Office had led to violations of their article 8 rights. N claimed that this breach had, for him, resulted in destitution, debt and psychiatric illness. M maintained that this breach had led to considerable delay in reunion with his two children and his mother. N succeeded at first instance.

The Court of Appeal dealt with the following questions:

When does a duty arise under article 8 to take positive action? The court upheld the decision in *Bernard v Enfield LBC* [2002] EWHC 2282 (Admin); (2002) 5 CCLR 577; March 2003 *Legal Action* 17, that article 8 could impose a positive duty to provide social welfare support, but limited the principle to cases where an individual's predicament is 'sufficiently serious to engage article 3'. Article 8 is more likely to be engaged when a family unit is involved. Where the welfare of children is at stake, article 8 'may require the provision of welfare support in a manner which enables family life to continue'. This judgment leaves open possible arguments in any future judicial review claim that levels of community care which do not enable family life to continue are unlawful.

In what circumstances does maladministration constitute breach of article 8? Each case asserted a breach of a public law duty because of a failure to provide a particular benefit. The Court of Appeal decided that contravention of a positive obligation to give a particular welfare service, for instance, by undue delay, could amount to a breach of article 8 'provided that the impact on private or family life is sufficiently serious and was foreseeable'.

In addition, resources were held to be relevant in deciding the extent of obligations imposed by article 8. As the financial burden on public bodies would be increased significantly by the imposition of liability in damages for administrative delay, the court decided that maladministration of this kind would only infringe article 8 if the consequence is 'serious'. Relevant factors would include the extent of the culpability of a public body for the failure to act, and the foreseeable consequences.

When should damages be awarded? Damages, in this context, are generally not the only or most significant remedy sought. Cases are usually brought in order to prevent the infringement of a particular human right. In deciding whether to award damages for non-pecuniary losses, for example, for psychiatric illness, courts should take a broadbrush approach. They should only award damages where it would be 'just and appropriate' and 'necessary' to afford reasonable satisfaction. The consequences of delay must be more serious than distress and frustration for article 8 damages to be awarded.

How should damages be assessed? In those exceptional cases where awards would be made, the level of damages is likely to be based on the Judicial Studies Board's and Criminal Injuries Compensation Authority's guidelines if there is a relevant comparison, for example, a physical injury or psychiatric condition caused by a breach of human rights, and/or in cases of maladministration, on the local government ombudsman's recommendations for compensation. Awards for maladministration should be 'modest'.

The judgment takes a pragmatic, even populist, view of where to strike the balance between an individual and wider society:

... The cost of supporting those in need falls on society as a whole. Resources are limited and payments of substantial damages will deplete the resources available for other needs of the public including primary care. If the impression is created that asylum-seekers whether genuine or not are profiting from their status, this could bring the Human Rights Act into disrepute.

What procedures should be followed to ensure that the costs of obtaining relief are not disproportionate? Practitioners need to be aware of the cautionary nature of this judgment. Any HRA claim involving maladministration should be brought in the Administrative Court, whether or not the claim is under judicial review proceedings. This ruling echoes *R (Cowl) v Plymouth CC* [2001] EWCA Civ 1935; (2002) 5 CCLR 42, in requiring justification for the use of litigation rather than alternative dispute resolution (ADR), before permission is granted in relation to judicial review.

Where there is a claim for other relief, permission should be limited to that, and:

... consideration given to deferring permission for the damages claim, adjourning or staying that claim until use has been made of ADR ... or remitting that claim to a district judge or master if it cannot be dismissed summarily on grounds that in any event an award of damages is not required to achieve just satisfaction.

The court did not deal with any of the potential difficulties in using the ombudsman's system as a method of investigating claims for damages under the HRA. For example, the ombudsman's jurisdiction does not extend to the investigation of disputes which turn on a point of law or statutory interpretation. Furthermore, the ombudsman will not investigate 'any action in respect of which the person aggrieved has had a remedy by way of proceedings in any court of law under Local Government Act 1974 s26(6)' (see *R v Commissioner for Local Administration ex p H* SLJ 1999/5104/4). Presumably, in these cases, the ombudsman will decide that it is not reasonable to expect an aggrieved person to pursue proceedings in light of *Anufrijeva*. Even in pure damages cases, unless a LA admits unequivocally to a breach of human rights, it is probably safest for practitioners to commence a claim in the Administrative Court, and then apply for a stay pending the ombudsman's investigation.

A patient's right to insist on NHS funded treatment abroad

■ **Secretary of State for Health v R (Watts)**

[2004] EWCA Civ 166

When she was 72 years old, Mrs Watts was diagnosed as needing a hip replacement. She asked her local Primary Care Trust (PCT) to provide her medical treatment in France, where the operation could be done more quickly than in the UK. The PCT refused. It relied on draft NHS guidelines which provided that overseas treatment could only be supported if medical care could not be provided in the UK within the time usually necessary for obtaining it. Furthermore, a request for medical treatment abroad could be refused if equally effective medical care could be provided in the UK without 'undue delay' (which the PCT took to mean within the NHS's target time of 12 months). In the event, Mrs Watts obtained the operation privately. She then challenged the legality of the PCT's refusal and sought, as damages, the cost of the operation.

In the Administrative Court, Munby J held that Mrs Watts was not entitled to a refund of the cost of the operation. In addition, he reached a number of findings including:

■ Under EC Treaty article 49, prior authorisation of treatment for an NHS patient in another member state at the NHS's expense could be refused on the ground of lack of medical necessity only if the same or equally effective treatment could be ob-

tained without undue delay at an NHS establishment. 'Undue delay' was to be assessed with regard to all the circumstances.

- Although national waiting times were relevant matters, they were not determinative.
- However, a waiting time of significantly over three months and certainly one of 12 months would be too long.
- On the facts of the case, the three to four months' wait faced by Mrs Watts was not too long.
- Where appropriate, reimbursement to a patient for medical care aboard would be by reference to the provisions in the UK, ie, 100 per cent refund – and not by reference to the 75 per cent refund which would have applied if, for example, Mrs Watts had been resident in France when receiving the treatment in question.

The secretary of state appealed against the findings and Mrs Watts cross-appealed. However, without reaching any conclusions on the points made, the Court of Appeal has expressed its tentative view that national waiting times (and thus the economic concerns which lead to these times) should not have been taken into account in deciding whether there was undue delay. The Court of Appeal has referred various issues arising from the case to the European Court of Justice (ECJ) for its view. It was, in part, the profound implications of Munby J's conclusions which led to the reference to the ECJ. Plainly, this case has the potential for a significant effect depending on the ECJ's ruling.

Community care assessments

The Administrative Court has recently examined aspects of the approach to be adopted to community care assessments, albeit without considering the detail of the FACS (or related) guidance involved.

- **HP (2) and R (KP) v Islington LBC**

[2004] EWHC 7 (Admin)

Mr P had significant mental health needs. Islington applied its Care Programme Approach (CPA) eligibility criteria to Mr P and concluded that, because he did not (within those criteria) have a 'severe and enduring mental illness', it would not offer him community care provision. Munby J held that decision to be an unlawful approach. Specifically, he held that the council's decision (under National Health Services and Community Care Act 1990 s47) about individuals' eligibility for generic community care services could not lawfully be collapsed into consideration of the CPA eligibility criteria, as Islington had done.

- **R (S) v Leicester CC**

[2004] EWHC 533 (Admin)

S was a 35-year-old woman with autism, who was ordinarily resident in Leicester. She had been assessed, in 1999, as needing residential accommodation. S's place in a residential home in Sunderland (where she had initially been situated in conjunction with a local educational placement) was maintained on that basis. However, Leicester decided to move her to a local placement because it considered that the difficulties that it had observed with monitoring S in the residential home had now rendered that placement 'unsuitable' within the Choice of Accommodation Directions 1992. S challenged the legality of the decision. She argued, among other things, that a fresh view on the placement's suitability for the purposes of the directions could only be effective if it arose from a formal reassessment of her needs. Accordingly, the judge agreed with S. He held as unlawful the council's conclusion that the Sunderland placement was unsuitable because S's needs would be better met, ie, she could be more easily monitored in Leicester.

Funding continuing NHS health care

The last few months have seen the effects of the recommendations made by the Health Service Ombudsman's report, *NHS funding for long term care of older and disabled people – 2nd report session 2002/2003* (see April and September 2003 *Legal Action* 30).[2] The retrospective reviews of cases where it is asserted that individuals are entitled to financial recompense because they previously ought to have been assessed as eligible for fully funded NHS health, rather than social, care are now underway.

The advice given by the Department of Health (DoH) to Strategic Health Authorities (SHAs) on the conduct of the review process has not been published. However, SHAs are apparently advised to assess cases against their current eligibility criteria rather than that in place at the relevant time. The retrospective review system appears to operate in a similar way to the scheme for current cases, which is set out below.

Continuing care directions

Following the ombudsman's criticisms, the DoH published the Continuing Care (National Health Service Responsibilities) Directions 2004 (Continuing Care Directions).[3] The directions require SHAs to:

- establish a single set of eligibility criteria for the provision of continuing care by PCTs and NHS Trusts for which it is the appropriate authority; and
- make arrangements, in accordance with directions, for the review of decisions made in relation to continuing care.

Each SHA must appoint an independent 'standing chairman', who must be 'notified' of written requests for reviews where a complaint has not been resolved informally. There is no right to a review, but the SHA 'may' refer the matter to a review panel. However, the discretionary power should be exercised with regard to the older, but still current, guidance on continuing care reviews as set out in Continuing Care: NHS and Local Councils' Responsibilities (HSC 2001/015; LAC (2001) 18) Annex E. The circular says that: 'It is expected that such decisions [not to convene a review panel] will be confined to those cases where the patient falls well outside the eligibility criteria or where the case is very clearly not appropriate for the panel to consider.'[4]

The procedure for reviews is left to the discretion of the standing chair, but the guidance recommends that the panel takes independent clinical advice, and has access to the views of the patient, family and carers. However, it is not envisaged that they will address the panel or attend its deliberations. The directions require the standing chair to sit with two other panel members drawn from another LA within their area and another PCT.

Is there a duty on the NHS to assess patients' needs for continuing health care?

The Continuing Care Directions require PCTs to:

- act in accordance with the eligibility criteria established by the SHA;
- take reasonable steps to ensure that an appropriate assessment is carried out in all cases where it appears to the Trust that there may be a need for such care; and
- where an assessment is carried out, to inform the patient of the decision and make a record of it.

Interestingly, the Delayed Discharges (Continuing Care) Directions 2004 firm up the requirements in delayed discharge cases.[5] They place a duty on an NHS body, before it issues a notice under Community Care (Delayed Discharges etc) Act (CC(DD)A) 2003 s2 (see below), to:

- carry out an appropriate assessment of the need for continuing care, in consultation with a social services authority if the NHS body considers it appropriate;
- consult with the patient and, where appropriate, carer when carrying out the assessment;
- decide (having regard to the assessment and the eligibility criteria) whether the patient's needs call for the provision, by an NHS body, of continuing care;
- notify the patient of the decision and record it in the notes; and

■ inform the patient of the review procedure.

This duty is expressed in language reminiscent of the assessment duty under National Health Service and Community Care Act (NHSCCA) 1990 s47(1). Although the duty is in directions rather than primary legislation, it seems likely that it will be enforceable through judicial review, if necessary. The duty represents a significant procedural development for those patients awaiting discharge and trying to access continuing care from the NHS. Unfortunately, these gains may be offset by eligibility criteria that are vague and difficult to apply, and the continuing reluctance of health bodies to fund the care of older people in particular, beyond the hospital bed.

Delayed discharge

Since January 2004, CC(DD)A Part I has been fully implemented in England. However, the Welsh Assembly has decided not to implement it. The Delayed Discharges (England) Regulations 2003 SI No 2277 set out the mechanics of the CC(DD)A.

The CC(DD)A applies to 'qualifying hospital patients'. These patients receive prescribed care, defined in the regulations as 'acute care paid for by the NHS'. The DoH has indicated that, once the system is established, the secretary of state may widen the scope of prescribed care. Additionally, s14 enables the scope of such care to be extended to 'qualifying care home patients', ie, those in NHS-funded care homes who receive care of a description specified in regulations. This power has not yet been exercised. The relevant NHS body (PCT or NHS Trust) must give notice to the relevant LA if it appears to it that someone who is, or may become, a qualifying patient will need community care services in order to be discharged safely (s2). The relevant LA is where the patient is ordinarily resident or, if s/he has no such residence, where the hospital is situated (s 2(2)).

The regulations set out the requirements of a s2 notice, ie, it must be in writing and contain certain information, including:

■ an indication of the likely date of discharge (if known); and

■ a statement that the NHS body has consulted with the patient and, where reasonably practicable, carer. The statement must also set out whether the patient or carer has objected to the notice; that consideration has been given to providing the patient with continuing NHS care; and the results of the evaluation.

When a LA receives a s2 notice, it must assess the patient with a view to identifying those community care services that are needed to ensure his/her safe discharge from hospital (s4(1)). The LA must then decide, having consulted with the relevant NHS body, what services, if any, it will make available (s 4(2)). The LA must also assess the carer on request or where s/he has asked for an assessment within the last 12 months. The purpose is to determine, after consultation with the NHS body, any services which need to be made available under the Carers and Disabled Children Act (CDCA) 2000 to ensure the patient's safe discharge (ss4(3) and 4(4)).

These assessments will meet the LA's obligations to assess under NHSCCA s47 or CDCA s1, but only in respect of services necessary to enable a safe discharge (s 4(9) and (10)). If there may be a need for other community care or carers' services, the LA will have to ensure that it performs its full assessment obligations. These obligations apply even if there have been previous assessments by the LA (s4(5)).

The NHS body must give a second notice specifying the date of discharge, which will stay in force unless withdrawn (s5(3) and 5(4)). The regulations specify that the notice must be given at least one day in advance of the proposed discharge date. The LA must then have in place the service provision necessary to ensure the patient's safe discharge either by the date of release from hospital or within two working days of service of the notice.

At the end of the period, if the patient is not discharged, either because the LA has failed in its assessment duty, or has not provided the service which it decided should be made available, the LA will be liable to make penalty payments to the NHS body (s6). The regulations specify the daily rate of payments, which is £120 for higher rate authorities (for example, those in London and the South East) and £100 for lower rate authorities.

Delayed discharge and choice

In March 2003 *Legal Action* 20, we discussed the likely implications of the CC(DD)A including its impact on the choice of future care for service users moving from acute care. New guidance on the National Assistance Act 1948 (Choice of Accommodation) Directions 1992, which is currently in draft form, seems to bear out our earlier concerns.[6] The guidance advises that when the preferred home is not available (because it is full) councils should meet assessed care needs by a suitable interim measure. This could be intermediate care, a temporary care home placement or a package of home-based care. Furthermore, the following extract from the draft guidance indicates the sort of pressure that patients may face:

> *Councils should take all reasonable steps to gain an individual's agreement to an interim care package . . . Councils should make reasonable efforts to take account of the individual's desires and preferences. In doing this, councils should ascertain all relevant facts and take into account all the circumstances relevant to the person, and ensure that the individual (and their family or carers) understands the consequences of failing to come to an agreement. Where patients have been assessed as no longer requiring NHS continuing inpatient care, they do not have the right to occupy indefinitely an NHS bed. If an individual continues to unreasonably refuse the interim care home or care package, the council is entitled to consider that it has fulfilled its statutory duty to assess and offer services, and may then inform the individual, in writing, they will need to make their own arrangements.*

Similarly, non-statutory guidance, the Community Care (Delayed Discharges etc) Act 2003: guidance for implementation (HSC 2003/009: LAC (2003) 21 Annex A,[7] sets out the DoH's view on determining the circumstances in which the LA can regard its duty as discharged having made 'all reasonable efforts'. It cites *R v Kensington and Chelsea ex p Kujtim* [1999] 4 All ER 161, and highlights the test for the LA to be entitled to treat its duty as discharged, namely, 'manifestation of persistent and unequivocal refusal, rather than a single transgression'.

The need for an inquest following a death in a hospital or care home

A number of recent high profile cases have focused on the circumstances in which, following a death in custody or hospital, a public inquiry or inquest is needed, and where public funding must be available to assist relatives in such a process.[8] The most directly relevant case to community care practitioners is *Khan.* At the same time, reviews of the coroners system by the government are underway.

■ **R (Khan) v Secretary of State for Health**

[2003] EWCA Civ 1129, [2003] 4 All ER 123

Mr Khan's daughter died of potassium poisoning in hospital as a result of gross negligence. The Crown Prosecution Service decided not to bring any prosecutions following a police investigation, but eventually negligence was admitted by the NHS. The coroner's inquest was adjourned so that the applicant could try to obtain funding to be legally represented. The judicial review was of the Secretary of State for Health's rejection of Mr Khan's request for such funding or, alternatively, a separate public inquiry.

The Court of Appeal decided

that, to satisfy article 2 of the convention, the state should provide a procedural mechanism for investigating the cause of death and ascertaining responsibility for it through an effective judicial investigation that was held in public. The manner of the investigation needed would depend on the seriousness of the events leading to the death. The family of the deceased should be involved in the procedure to the extent necessary to safeguard their interests. That had not happened in this case. The police investigation – in which the family had played no part – could not be a substitute for an effective judicial enquiry; nor could the private investigations carried out by the NHS Trust – these lacked sufficient independence – and again did not involve the family. The court said that the family should not have to initiate a civil claim for damages to find out what had happened to their relative. The state was responsible for initiating the inquiry. Even the coroner's inquest could not satisfy article 2 unless Mr Khan could play an effective part, and he could not do so without legal representation because of the complexity of the case and the suspicion of an NHS 'cover up'.

Coroners law review

The government's *Death certification and investigation in England, Wales and Northern Ireland – The report of a fundamental review 2003* reported in June 2003 (see September *2003 Legal Action* 24).[9] The report recommends major changes to the current system, which if implemented would result in a professional judicial structure for the coroners service; a legally effective Family Charter; more flexibility over the scope of an inquest; and fuller conclusions as well as fairer and more consistent rules on disclosure of evidence. It also proposes structures to create effective links between the coroner's office and public health and other public safety networks.

Chapter 11 deals with special cases including hospital deaths and deaths in care homes. The report recommends that categories of death for reporting to the coroner include 'Any death in which lack of care, defective treatment, or adverse reaction to prescribed medicine may have played a part, or unexpected deaths during or after surgical treatment.' The proposals for care homes deal with ensuring speedy and independent certification of death, but also with links to regulatory bodies. They are summarised as follows:

... the National Care Standards Commission followed by the Commission for Social Care and Inspection should be able to raise any anxieties about an individual death with the coroner ... the commission should be given on a confidential basis any information from individual death investigations that would be relevant to its inspectorial and regulatory functions ... the commission should have reciprocal arrangements with the coroner and the Statutory Medical Assessor, and for its part should make available to them relevant material from its inspections and regulatory work.

Home Office position paper on the Coroners Service

Following the review above and the Shipman Inquiry, the Home Office has now published, *Reforming the coroner and death certification service – a position paper*, which contemplates changes to the Coroners Service.[10] It proposes that:

Where a death occurs that is not due to a naturally occurring disease or degenerative process, or where the medical cause of death is not known, we believe that there is a real value in holding a judicial inquest. This allows the death to be publicly investigated by a local coroner in a court setting. Two types of death might be referred to a coroner (for example, deaths in custody or deaths following occupational health treatment. See sample list at Annex 2) and, as at present, where the treating doctor is unable to certify the cause of death.

The sample list at Annex 2 includes:

- Any death where lack of care, defective treatment, or adverse reaction to prescribed medicines may have played a part, or unexpected deaths during or after medical or surgical treatment.
- Any death which is the subject of significant unresolved concern or suspicion about its cause or circumstances on the part of any family member, or any member of the public, any health care, funeral service or other professional with knowledge of the death.

Further consideration is to be given to the regime for funding representation for families at inquests.

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As part of the LSC Specialist Support initiative, Public Law Solicitors offer a free telephone advice and supported casework service on health and community care law matters to all organisations with a general civil contract, Specialist or General Help with the casework quality mark, telephone: 0121 256 0334 (Tuesdays and Thursdays between 2.00 pm and 4.30 pm).

1 Available at: www.dh.gov.uk/assetRoot/04/01/96/41/04019641.pdf.
2 Available at: www.ombudsman.org.uk/hsc/document/care03/care03.pdf.
3 Available at: www.dh.gov.uk/assetRoot/04/07/46/90/04074690.PDF.
4 Available at: www.dh.gov.uk/assetRoot/04/01/37/84/04013784.pdf.
5 Available at: www.dh.gov.uk/assetRoot/04/07/46/91/04074691.PDF.
6 Available at: www.dh.gov.uk/assetRoot/04/07/14/51/04071451.PDF.
7 Available at: www.dh.gov.uk/assetRoot/04/06/50/65/04065065.PDF. The DoH publications referred to above are also available from Department of Health, PO Box 777, London SE1 6XH, tel: 08701 555455, fax: 01623 724524.
8 *Amin v Home Secretary* [2003] UKHL 51, [2003] 3 WLR 1169; *Khan v Secretary of State for Health* [2003] EWCA Civ 1129; [2003] 4 All ER 1239; *Middleton v Coroner for the Western District of Somerset* [2004] UKHL 10.
9 Available at: www.official-documents.co.uk/document/cm58/5831/5831.htm or TSO, PO Box 29, Norwich, NR3 1GN, £26.50. Volume 2: background papers, 4 July 2003 is available at: www.homeoffice.gov.uk/docs2/cofundrev.html.
10 Available at: www.official-documents.co.uk/document/cm61/6159/6159.htm or from TSO, PO Box 29, Norwich, NR3 1GN, £7.50.

PUBLIC LAW

Recent developments in public law


Kate Markus and **Martin Westgate** continue their six-monthly series surveying recent developments in public law which may be of more general interest to Legal Action readers. They welcome short reports from practitioners about unreported cases, including those where permission has been granted or which have been settled.

Public authority and amenability to judicial review

The Joint Committee on Human Rights' report *The meaning of public authority under the Human Rights Act*, was published on 3 March 2004.[1] Its conclusions were:

- The current application of the functional public authority provision in Human Rights Act (HRA) 1998 s6(3)(b) leaves real gaps and inadequacies in human rights protection in the UK. This deficit in protection may leave the UK in breach of its obligations under articles 1 and 13 of the European Convention on Human Rights ('the convention'). It is also inconsistent with the intention of parliament, which foresaw a wider application of rights under the HRA.
- The fundamental problem is not with the design of the HRA, but with its inconsistent and restrictive application by the courts.
- As the case-law currently stands, whether human rights breaches by private and voluntary sector providers of public services will give rise to accountability under the HRA is likely to depend on a number of relatively arbitrary criteria.
- Most of the (lower) courts are applying an institutional rather than a functional focus on the application of the provision. There is too much focus on the relatively arbitrary (in human rights terms) criterion of the body's administrative links with institutions of the state. This is inconsistent with the House of Lord's approach in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2003] UKHL 37*.[2]
- Lord Hope's broad, functional approach to public authority in *Aston Cantlow* is to be preferred to that in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595 and *Callin, Heather and Ward v Leonard Cheshire Foundation [2002] EWCA Civ 366*[3] (even though the House of Lords (HL) in *Aston Cantlow* did not expressly overrule these decisions). Under this approach, a narrow category of 'pure' public authorities should be complemented by a wide category of 'functional' public authorities identified on the basis of public function.
- As a matter of broad principle, a function is a public one when government has taken responsibility for it in the public interest.
- For a body to discharge a public function, it does not need to do so under direct statutory authority. Institutional links with a public body are not necessary to identify a public function.
- The attribution of public authority responsibilities to private sector bodies is justified on the basis that the private body operating to discharge a government programme is likely to exercise a degree of power and control (which in the absence of delegation would be state power and control) over the realisation of the individual's convention rights.
- The report urges the following steps to assist in resolving the problem:

– Government intervention in the public interest as a third party in cases where it can press the case for a broad, functional interpretation of the meaning of public authority; and

– Guidance by relevant government departments, in particular the Department for Constitutional Affairs (DCA) and the Office of the Deputy Prime Minister (ODPM), on the protection of human rights through contract (and draft standard contractual terms).

- In relation to 'pure' public authorities, the report casts doubt on the House of Lords' view in *Aston Cantlow* that it is relevant that, in Strasbourg, public authorities could not enforce their own convention rights under article 34, since only individuals and non-governmental organisations (NGOs) could bring a claim for breach of their rights. The report doubts whether this is right and states that it hopes that Strasbourg jurisprudence will come to recognise that there are circumstances in which public authorities have convention rights.[4]

- **R (Agnello and others) v Hounslow LBC and others** *[2003] EWHC 3112 (Admin)*

The claimants were market traders who had not been allocated units at a new market. Against them it was alleged that the decision was a commercial one, which was not amenable to judicial review.

Following *R (Beer) v Hampshire Farmers Market Ltd* [2003] EWCA Civ 1056, Silber J rejected the submission. He found that there were a number of features which indicated that the decision had the necessary public character: (i) the statutory power in relation to the market; (ii) the market was held on publicly owned land; (iii) the council's power to regulate the activities of the market and the conduct of the tenants derived not solely from the lease, but also from its power to pass byelaws; (iv) the public had access to the market. As for the last factor, Silber J said that he would have found that the decision was amenable to judicial review even if the general public had not had access to the market: it was not a private market because retailers and traders had access to it.

Procedural fairness and bias

- **R (Agnello) v Hounslow LBC** *(see above)*

The claimants challenged decisions to allocate market units in the new market to other traders and not to themselves. This challenge was, in part, on the ground that the decision was tainted by bias because of the role the 'Relocation Committee'. This committee consisted of a small group of individuals belonging to the Tenants Association (which represented many market traders including some, but not all, of the claimants). The committee was intimately involved in, and was party to, the decisions, notwithstanding that its members were direct competitors of some of the claimants. They also had a pecuniary and personal interest in securing tenancies for themselves in the new market.

The case of the claimants was based on apparent, rather than actual, bias. It was said that the Relocation Committee was not only consulted by the council, but also made detrimental allegations about some of the claimants. Furthermore, the claimants were not given an opportunity to comment on these allegations. Some of these allegations were significant and may have been decisive in the decision-making process.

Applying recent authorities as to the proper approach of the court to allegations of apparent bias, Silber J concluded that a fair-minded and informed observer, who is neither complacent nor unduly sensitive or suspicious, would have concluded that there was a real possibility that the council was biased. His reasons included: (i) The Relocation Committee was an important source of information to the council, and its members were trade competitors of the claimants and competitors for units at the new market; (ii) The claimants' substantial business might impact adversely on the businesses of members of the Relocation Committee. Therefore, it was not in the best interests of those traders to have the claimants competing with them; (iii) The claimants did not have a chance to disabuse the council of information given to it; (iv) There was no justification put forward for the council's failure to obtain the claimants' comments.

Silber J also rejected the suggestion that the claimants had waived or surrendered a claim for bias because they knew that the

council's decisions would be made in consultation with the Tenants' Association. He found that the claimants did not know that their competitors could or would make statements of substantial or crucial importance without the right to comment on them.

The ability to comment on material before the council in the comparative evaluation exercise between bids for units was also a feature of the council's duty of fairness. The right to make such comments arose from the following: (i) the potential potency of allegations made; (ii) the significance of the decision to an applicant's ability to earn a living; and (iii) the fact that the source of the information had an interest which was adverse to the applicant's. Silber J recognised that the administrative inconvenience of giving information to an applicant might 'trump' the right to comment, but such difficulties would have to be very substantial.

Comment: It seems that Silber J did not consider that the council was biased in itself. However, it had acted unlawfully in 'listening to people with personal interests in the outcome of all the applications, but not then asking those who had been the subject of comment by trading members for their own comments on this information'. This might be considered to be more a case of unfairness (a factor also considered by Silber J as summarised above), rather than bias.

■ **Richardson and Orme v North Yorkshire CC and another**

[2003] EWCA Civ 1860

This case does not involve bias as such, but deals with the disqualifying interests of councillors. Mr Richardson was a member of the defendant authority. His home was close to, and likely to be affected by, a quarry that was the subject of a planning permission application. However, he was not a member of the committee that was dealing with the planning application. Could he attend the meeting? He had withdrawn under protest and claimed that his exclusion rendered the planning decision void.

Local authorities are obliged, under the Local Government Act 2000, to adopt a model code of conduct. Among other things, that code (at para 12) requires that a member of an authority with a 'prejudicial interest' in any matter must withdraw from a meeting where that matter is being discussed. A prejudicial interest for these purposes means 'one which a member of the public with knowledge of the relevant facts would reasonably regard as so significant that it is likely to prejudice the member's judgment of the public interest'. Mr Richardson's interest was found to be prejudicial, and the Court of Appeal held that he was indeed bound to withdraw. It held that the meaning of 'member' is not limited to members of the committee which actually considers the matter in question. It extends to any member of the authority. Moreover, a member cannot circumvent this by remaining in a personal capacity only. The only way that s/he can lose his/her status as a member is by resigning.

■ **R (Mahfouz) v Professional Conduct Committee of the General Medical Council**

[2004] EWCA Civ 233,
[2004] EWCA Civ 431

M was a doctor appearing before the Professional Conduct Committee (PCC) of the General Medical Council (GMC). After the first day of the hearing, stories appeared in a number of newspapers referring to a previous incident in respect of which M had been struck off the register. It was common ground that evidence on this matter would not have been admissible in the present hearing. The PCC refused M's application that the members who had read the articles should discharge themselves. It also refused to adjourn pending an application for judicial review of that decision.

The Court of Appeal held that there was no ground to doubt the ability of the committee to deal with the case fairly, but that the decision not to adjourn pending the judicial review was wrong. Carnwath LJ noted that the approach of the court, where it is alleged that a lower tribunal has acted in breach of the rules of fairness or natural justice, is not confined to reviewing the reasons for the tribunal on *Wednesbury* principles. The court must make its own independent judgment, and the question is one of law, not of fact.

Regarding the substantive complaint, the court noted that there is no absolute rule that knowledge of prejudicial publicity is fatal to the fairness of the proceedings. The question is the effect of the publicity on the minds of the tribunal's members. In the present case, the PCC's members included two professional and three lay members, selected from a panel of people chosen as having experience in public life. They could be assumed to understand the proper approach to issues of law, and be aware of the need to disregard irrelevant material. It was also relevant to consider the GMC's procedures; the length of time since the previous finding of misconduct; the different nature of the previous case; and the impact of seeing and hearing the witnesses in relation to the present charges. There were no grounds to question the committee's ability to decide the case fairly.

Carnwath LJ noted the risk of over-complicating a simple issue: namely, that proceedings should be, and seen to be, fair. The issue must be looked at objectively and subjectively, and the possibility of subconscious bias must be taken into account. However, in many cases where the impartiality of the tribunal is not in doubt there is no practical distinction between the different ways of looking at the matter. In a case such as the present, the issue is not bias in the usual sense, but the prejudicial effect of inadmissible material on an otherwise impartial tribunal. Bias or apparent bias on the part of a tribunal cannot be corrected, but knowledge of prejudicial material need not be fatal.

On the other hand, the refusal to adjourn pending the application for judicial review gave insufficient weight to the practicalities. The need to make the claim quickly meant that, in practice, it would have to be prepared by the same counsel that appeared for M before the PCC. Although M's decision to take no further part in the PCC's proceedings was not justified, the refusal of the adjournment put his counsel in the invidious position of having to choose in which forum she could best represent his interests. Fairness, and the appearance of it, required a limited adjournment. There is no inflexible rule: in general, it is preferable for proceedings to be allowed to take their course, and a challenge to be taken to their validity by way of appeal. But in the present case, it was relevant to take into account that the need for speed in such proceedings is relative; a finding against M would be highly prejudicial to him; and M was funding the proceedings himself without any prospect of recovering costs. At a later hearing, despite having approved the PCC's approach save for the adjournment question, the Court of Appeal ordered a hearing before a fresh tribunal for 'pragmatic' reasons: [2004] EWCA Civ 431.

■ **R (PD) v West Midlands & North West Mental Health Review Tribunal**

[2004] EWCA Civ 311

The claimant applied unsuccessfully to the Mental Health Review Tribunal (MHRT) to be discharged. He complained that the medical member of the tribunal was a consultant psychiatrist employed by the Trust that ran the hospital where he was detained. The Court of Appeal rejected the argument. The relevant test was whether a 'fair minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased' (*Porter v Magill* [2002] 2 AC 357, p494). There was no absolute rule that an employee of a party before a tribunal could not sit on it. The Trust was a party to the proceedings only in the sense

that it was interested in the hearing. It had no interest in the outcome. The managers of the hospital might also have an interest in detaining the patient. However, a reasonable and informed member of the public would not suspect that a consultant employed at a different hospital would be so concerned at the reaction of the managers of the Trust, and the implications for his/her own position, that this would consciously or not affect his/her position.

Fairness and reconsideration of decisions

■ **Banks v Secretary of State for Environment, Food and Rural Affairs**

[2004] EWHC 416 (Admin)

When faced with a challenge, a decision-maker may conduct a review of the original decision. Unsurprisingly, this often results in the decision being confirmed. This case gives useful guidance about reviews of this kind although the facts were extreme.

The claimants were beef farmers. Their entire herd had been served with a Movement Restriction Notice (MRN) on the ground that they had been exposed to feed containing mammalian protein. The relevant regulations, which were intended to control Bovine Spongiform Encephalopathy (BSE), allowed an inspector to serve a notice if s/he had reasonable grounds for supposing that an animal had been fed or exposed to such protein. The effect of the notice was to prevent the herd from entering the human food chain, so making it valueless.

Although the regulations did not require prior notice or reasons and there was no right of appeal, the defendant accepted that fairness required the inspector to give sufficient information to allow the person affected to make proper representations. The defendant had failed to do so, and there were serious failings of elementary principles of fairness. In particular, the defendant had not given a frank statement of the basis for the notice. It believed that the claimants had fed protein to the herd deliberately, but did not say this – the department's letter suggested accidental access. The defendant also failed deliberately to supply the claimants with a relevant report.

However, the defendant claimed that it had now reconsidered, in the light of all the material, and confirmed the original decision. Therefore, the defendant said, whatever the original failings, the claim must fail.

This argument was rejected. There was no evidence that 'a properly authorised inspector had carried out, in a fair, open-minded and comprehensive manner, a genuine review of the case' in the light of the new evidence. There was a 'world of difference between carrying out a genuinely open-minded review, and striving to defend an earlier decision in the context of adversarial litigation'. This was an example of the latter.

Giving guidance for the future, Sullivan J said (at para 113) that one of the functions of a review procedure must be to 'give some degree of assurance' to the person aggrieved that there will be a genuine reconsideration. He accepted that there will always be a suspicion that the department will simply close ranks and uphold an earlier decision, but the review should 'seek to dispel such suspicions as far as possible'. To this end, it should consider adopting review procedures similar to local authorities and other government departments which 'commonly involve review by another (and preferably more senior) official who has not been connected (at least not directly) with the decision under review. To ensure transparency, the person seeking review must be told what material will be considered by the reviewing official and given an opportunity to comment upon it'. In this case, it was essential that a fresh mind be brought to bear on it. Fairness was not possible if a review was conducted by an official who had entertained the grave suspicions about the claimants that had led to the notice. In other cases, a more informal process may be appropriate, for example, where there is no dispute about the relevant facts.

Consultation

■ **R (Beale and Carty) v Camden LBC**

[2004] EWHC 6 (Admin)

The claimants were two of a number of council tenants opposed to a proposal by Camden to transfer management of its housing stock to an arms length management organisation (ALMO). Section 27 of the Housing Act (HA) 1985 requires consent by the Office of the Deputy Prime Minister (ODPM) to such a transfer. The ODPM issued guidance requiring that tenants and leaseholders affected by the proposal be consulted about it, so that they 'fully appreciate the implications' of it and can make 'an informed choice'. The guidance provided that, in giving consent, the ODPM would need to be satisfied that the proposal had the support of a majority of tenants.

Camden had chosen to ascertain tenants' support by a ballot. The claimants challenged the legality of the ballot on the grounds that the consultation process prior to it was unlawful because it neither put the case against the ALMO nor enabled those opposed to it to do so effectively. Furthermore, it was submitted that the ballot question was tendentious in that its wording tended to invite support for the proposal.

Munby J dismissed the application. He rejected Camden's first justification for ignoring the case against the ALMO, that there were no credible arguments against it. Moreover, it was not for the court to determine which arguments are credible: that is for the electorate. However, he held that the council's duty to consult extended no further than that contained in HA 1985 s105. The Court of Appeal held, in *R v LB Brent ex p Morris* (1997) 30 HLR 324, that a council's duty was to make arrangements which permit tenants to inform themselves of the proposal. There is no obligation to inform tenants of objections to the proposal or any opposing view, or to send anything to those affected. The ODPM's guidelines did not create any greater duty on the authority: while failure to comply with them might imperil an authority's application for s27 approval, this alone cannot make the consultation process unlawful. It is for the ODPM to decide whether or not the guidelines have been complied with.

Nor did *The code of recommended practice on local authority publicity* (Department of the Environment (DoE) Circular 20/88 revised by Department of the Environment, Transport and the Regions (DETR) Circular 06/2001) help the claimants.[5] Although the code did not have the force of law, Munby J recognised that it is of great assistance in deciding how a reasonable authority would act. However, it does not require authorities to include in their publicity the opposing arguments of those with whom they disagree, nor are they prevented from publicising their policies or the reasons for them. However, neither must they engage in publicity campaigns whose primary purpose is to persuade.

Furthermore, Munby J held that Camden did, in fact, engage with and address the case against the ALMO, and that in any event its materials had to be placed in the context of the wider debate which included both sides of the argument.

Munby J was prepared to assume that whether or not the ballot question was fair is to be decided by the court, and the authority's view is not determinative. However, the words used in the ballot question were an accurate description of the ALMO, and were not biased.

Legitimate expectation

■ **R (Nurse Prescribers Ltd) v Secretary of State for Health**

[2004] EWHC 403 (Admin)

The claimants wished to supply saline solution for use in the NHS. They intended to supply it as a generic rather than a branded product. Generic products are generally cheaper. The relevant

regulations provided that nurses were required to prescribe a generic product where one was available in the categories set out in the 'drug list'. There was, at the time, no category for generic saline products, and so nurses supplied branded products by default. The claimants entered into negotiations with the Department of Health (DoH). The proposal was that a generic category should be created. Nurses would then have to prescribe that product and the claimants would be able to supply to meet that demand. The DoH wrote to the claimants in November 2000, saying that it was amenable to making a generic category available, and that, in line with current policy, this would then have to be used by nurses instead of the branded version. However, the letter noted that a final decision would have to depend on consultation, which was then in progress. In January 2002, the DoH asked for, and was given, an undertaking by the claimants that they could meet any demand for a generic solution. In fact, by the time of that undertaking, the DoH had already decided, in May 2001, that nurses would not be limited to generic prescribing. That decision was reflected in regulations made in May 2002. In the meantime, the claimants had incurred loss by entering into a contract with a third party for the supply of saline solution.

The claimants failed in their claim that there was a substantive legitimate expectation that only generic products would be prescribed by nurses. The DoH had never made this promise, and there were, in any event, sound policy reasons to give nurses a wider choice. However, the claimants did have a qualified legitimate expectation that the DoH would notify them of any change of policy. That obligation was 'not freestanding', and did not arise until the defendant asked the claimants for a commitment that was likely to involve expense. The defendant had disappointed that expectation by failing to notify the claimants of its change of mind in May 2001 when asking for the undertaking.

Despite this, the claimants were not granted any relief. In particular, the judge refused to order the defendant to reimburse the claimants for expenditure incurred after it gave the undertaking in January 2002: 'There was an obligation on the claimant to tell the department of its intended commitments, if it was to have any claim upon the department's resources for its intended expenditure.'

Comment: Although Mitting J held that it was not possible to bring a claim for compensation 'in judicial review proceedings arising out of a claim for disappointment of a legitimate expectation directly', the decision does assume that the claimants could have had a right to claim wasted expectation if they had notified the defendant of their intention to incur expense. Presumably, the argument would then be that it would be an abuse of power for the defendant to effect the change in policy without making proper recompense. It is hard to see why notification of expenditure should be necessary since the obligation to disclose a change of mind only arose when the defendant asked the claimants to give a commitment that would very likely involve expense, in any event.

■ **R (White) v Justices of Barking Magistrates' Court**

[2004] EWHC 417 (Admin)

On separate occasions, in 1998 and 1999, the claimant was found to be renting premises used as a 'cannabis factory'. Police had seized 286 and 253 plants respectively and, on the second occasion, the plants were estimated to have a projected yield of 11.9–22.9kg. On each occasion, the plants were lit using abstracted electricity.

The claimant was not arrested until 2003. When the matter came before the magistrates, in August 2003, they accepted jurisdiction and did not leave open the option of committing to the Crown Court for sentence. They adjourned for reports. When the matter came back, in September 2003, a different bench committed for sentence. The claimant complained that this was in breach of a legitimate expectation, created by the August hearing, that the claimant would not be committed.

Stanley Burnton J accepted that the impression given at the first hearing had been that the matter would not be committed and that this created an expectation. Usually, the Administrative Court will enforce that expectation. However, he did not do so in this case. The decision not to commit was, given the seriousness of the offences, so unreasonable as to be perverse. It was, accordingly, unreasonable and would have been open to judicial review by the prosecution. The court would not grant judicial review at the behest of the claimant because to do so would be to implement an unlawful decision.

There was also an allegation that the magistrates, in August 2003, had been misled, albeit unwittingly, by the claimant's advocate, into believing that the plants had no commercial value. This was not the case. The judge did not resolve the factual issue, but considered that if that were the case then it would also be a reason for refusing judicial review. It would not be an answer that the claimant had not intended to mislead.

Reasons

■ **R (Agnello) v Hounslow LBC**

(see above)

In this comprehensive decision, Silber J also considered complaints that inadequate reasons had been given for the decision not to grant units to the claimants. It was said that the duty to give reasons arose from the very serious economic loss that the claimants would suffer if they could not obtain spaces in the new market. In many cases, this would result in the loss of their livelihoods.

Silber J applied the decision of the Court of Appeal in *R (Asha Foundation) v Millennium Commission* [2003] EWCA Civ 88, in rejecting this complaint. He held that, as the decision was not that the claimants were not eligible for allocation of space, but that other candidates complied with the criteria for grant of space to a greater degree, there were real difficulties in requiring reasons, as set out in *Asha.* The decision involved the assessment of different applications, and the preference for a particular one may not be the same in the case of each individual involved in the process. In addition, it is not possible to explain why the claimants have not been preferred without also explaining the assessments on other applications. This would create an impossible burden.

■ **R (Sandeep Luthra) v General Dental Council**

[2004] EWHC 458 (Admin)

The claimant was suspended for six months for serious professional misconduct. He faced three charges, in essence, that he had claimed for work that was not necessary or had not been done. The reasons given by the General Dental Council (GDC) were that he had not 'in the face of overwhelming evidence from the credible witnesses called on behalf of the council, either acknowledged your wrongdoing or expressed any regret for it'. The claimant pursued a statutory appeal under Dentists Act 1984 s29. The issue was whether this was a sufficient statement of reasons. The claimant submitted that this kind of broadbrush approach was not adequate. The council ought to have given a basic explanation about what conclusions it had reached on each of the charges. This was rejected. In a case turning on basic credibility, the decision-maker does not have to identify why, in reaching its findings of fact, it had accepted some, but rejected other, evidence. In this respect, article 6 of the European Convention on Human Rights ('the convention') added nothing to fairness.

■ **Lough and Others v First Secretary of State**

[2004] EWHC 23 Admin

This was a planning appeal where the appellant objectors argued that the inspector had failed to address proportionality properly. The development was a 20-storey block, and the appellants claimed that it would interfere with their rights under article 8 and article 1 of Protocol 1 of the convention by causing a loss of privacy, light and view and interference with television reception. Collins J held that it was not necessary to refer expressly to proportionality, provided it was clear that all relevant factors had, indeed, been considered, and the result would not be any different.

■ **Richardson and Orme v North Yorkshire CC**

(see above)

The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 SI No 293 govern certain types of development. They require (reg 21(1)) that an authority granting planning permission shall make available to the public a statement setting out the reasons for its decision. The authority in this case had failed to do so, and the question was the effect that had on the underlying decision. The Court of Appeal upheld the decision of Richards J that the effect of a failure to give reasons depends on the statutory context. The courts are now readier to quash a decision for failure to give reasons. However, in this case, the statute required the authority to make available to the public information about what had been decided, rather than laying down requirements for the decision-making process itself. Since the defect could be cured, the proper order was to require the information to be given rather than to quash the decision.

Delay

■ **Crichton v Wellingborough BC**

[2004] Env LR 11, p 215,

[2002] EWHC 2998 (Admin)

Practitioners often work on the basis that the date of the decision is left out of account in deciding when the three-month limit for judicial review proceedings expires. This case challenges that assumption. The decision was made on 10 June and proceedings were issued on 10 September. Gibbs J thought that the proceedings were probably one day out of time. The interpretation provisions in Civil Procedure Rules (CPR) Part 2 do not apply. They relate to clear days and not a period of months. However, he accepted that the contrary was arguable and did not have to decide the point finally, as he would have extended time anyway.

■ **R (Agnello) v Hounslow LBC**

(see above)

The applications for judicial review were lodged on the last day of the prescribed three-month period. The council contended that permission should not be granted as the claimants had failed to bring their judicial review claims promptly, in accordance with the requirements of CPR 54.5.

Silber J reviewed the controversy about the status of the requirement to bring a claim 'promptly', following the decision of the House of Lords in *R (Burkett) v LB Hammersmith* [2002] 1 WLR 1593; November 2002 *Legal Action* 10 and 16. He concluded, as a result of the European Court's decision in *Lam v UK* (App 41671/98) and of the Court of Appeal's in *R (Young) v Oxford CC* [2002] 3 PR 86, that the requirement to issue proceedings 'promptly' remains. The starting point is that, when proceedings are brought within the prescribed three-month period, there is a rebuttable presumption that they have been brought promptly. In the present case, the council contended that the presumption was rebutted because third parties were, or would probably be, affected by the delay.

On the facts of the present case, Silber J did not consider that the presumption was rebutted for the following main reasons: (i) Any intervention by the court would not adversely affect market dealings undertaken in good faith, as there was no evidence that there were such dealings; (ii) There was no evidence that third parties would be prejudiced. Although those traders who had been allocated units had been joined as interested parties, none of them had taken part in the proceedings; (iii) Any delay had to be considered in the light of the long period before the units could be used in 2006. Prospective tenants were not expected to relocate for at least two years, and so were unlikely to be adversely affected if the decision was quashed; (iv) There was no evidence that the council would be, or had been, prejudiced by delay. The council had entered into an agreement with a property development company which was conditional on it securing a minimum take-up of lettings before 1 January 2004. However, it was agreed that this would not be achievable if the judicial review application was successful. The council had adduced no evidence that the development company would, in fact, exercise its rights under that agreement. On the evidence, Silber J considered it highly unlikely that the company would terminate the agreement; (v) The claimants had made it clear to the council that they are aggrieved by the decisions since they first heard of them; (vi) The council had shown little urgency about the project, suggesting that delay in initiating the proceedings was not of great importance to it; and (vii) If the proceedings had been brought six weeks earlier, it would have made little difference as the 1 January deadline could probably not have been met.

■ **Watkins v Rhondda Cynon Taff BC**

[2003] EWCA Civ 129

In 1964, the council made a Compulsory Purchase Order in respect of land owned by the defendant. This was for the purpose of providing an open space. The provisions, at the time, allowed for the council (subject to certain conditions) to transfer title to itself by executing a deed poll. The council did this in 1988, but did not bring proceedings for possession against the defendant until 2000.

The defendant claimed (among other defences) that the deed poll was invalid because the council did not intend to use the land as open space any longer. The council argued that this defence raised a public law issue, and ought to have been challenged by judicial review in 1988. Applying *Wandsworth LBC v Winder* [1985] AC 461, the Court of Appeal held that there was no discretion to refuse to allow a public law defence to be taken on the ground of delay. The council relied on *Clark v University of Lincolnshire & Humberside* [2000] 3 All ER 752, where the Court of Appeal had held that a claim raising public law issues would usually be an abuse of process if it was brought more than three months from the date of the decision. The court in this case considered that that did not help the council as it applied only to claims and not defences.

New evidence

■ **E v Secretary of State for the Home Department; R v Secretary of State for the Home Department**

[2004] EWCA Civ 49

E and R each appealed against the dismissal of their appeals against the rejection of asylum claims. After their tribunal hearings, but before the decisions were promulgated, they obtained new evidence which they claimed showed a risk of persecution. The Immigration Appeal Tribunal (IAT) refused permission to appeal on the ground that it could only decide the appeal on the objective evidence before it at the time of the hearing.

The Court of Appeal held that a mistake of fact giving rise to unfairness was a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties shared interest in co-operating to achieve the correct result, such as asylum law. In order to succeed on such a ground, the following criteria apply: (i) It would have to be established that there was a mistake about an existing fact, including a mistake regarding the availability of evidence on a particular matter; (ii) The fact or

evidence must be 'established', ie, uncontentious and objectively verifiable; and (iii) The appellant must not have been responsible for the mistake and it must have played a material part in the tribunal's reasoning. The admission of new evidence on such an appeal was subject to *Ladd v Marshall* principles of previous unavailability, significance and crdibility (see *Ladd v Marshall* [1954] 1 WLR 1489).

Comment: Although this case involved an appeal on a point of law, the Court of Appeal expressly stated that for these purposes the same principles applied to judicial review. The case appears finally to have resolved the uncertainty regarding whether material error of fact can ever be a ground for judicial review. It should, however, be noted that the ground is a relatively narrow one, within the criteria set out by the Court of Appeal above, which adopt those identified much earlier in *R v CICB ex p A* [1999] 2 AC 330. Where the claim is one for judicial review, as opposed to an appeal, it is unclear how far *Ladd v Marshall* principles will apply. *Lynch* (see below) must now be read in the light of this case. See also the review of the case-law on this issue, by David Blundell [2004] JR 36.

■ **R (Lynch) v General Dental Council**

[2003] EWHC 2987 (Admin), [2004] 1 All ER 1159

The general rule is that fresh evidence, which was not before the decision-maker, will not be admitted in judicial review proceedings. The exceptions to this were set out by the Court of Appeal in *R v Secretary of State for the Environment ex p Powis* [1981] 1 WLR 584: to show what material was before the decision-maker; determine jurisdictional fact or procedural error; and prove alleged misconduct, such as bias or fraud.

In this case, L was a dental practitioner who challenged the defendant's refusal to register him as an orthodontic specialist. He wished to admit expert evidence to show that the defendant's decision was irrational. Collins J held that fresh evidence involving expert evidence should not, in general, be admitted unless it fell within the *Powis* guidelines. However, in very rare cases, as here, the court may admit expert evidence. The court will do this if it is necessary to enable it to understand the material put before it, for instance, if the decision subject to judicial review is made by an expert or a body dealing within a field involving consideration of technical terms that would not be fully understood by a layman. The evidence may explain technical terms or, where the significance of a particular process is in issue, the evidence can be admitted to explain the process and its significance. The court must be careful to distinguish between expert evidence which explains what is involved in a particular process, and such evidence that goes on to opine that it was irrational for the body to have reached its conclusion. Furthermore, where the decision-making body is composed of experts or has been advised by them, it will be virtually impossible to justify the submission of expert evidence which goes beyond explanation of technical terms. This is because such evidence will almost inevitably involve an attempt to challenge the factual conclusions and judgment of an expert.

Challenge by a 'successful' party

■ **R (Redditch BC) v First Secretary of State**

[2003] EWHC 650 (Admin), [2003] 2 P & CR 25 p 328

The claimant authority refused planning permission to a developer. The developer appealed, but the inspector dismissed the appeal. However, the inspector did not uphold the authority's main ground, that of highway safety. Fearing that this might set a precedent, the authority applied for judicial review, even though it had succeeded on the appeal. Wilson J refused permission to apply. There was no real risk of prejudice since neither the authority nor an inspector on appeal would be bound to follow the inspector's decision in this case. He distinguished *GLC v Secretary of State for the Environment* July 19 1985 JPL 868. In that case, a 'successful' authority had been able to bring a claim for judicial review. The inspector had refused permission only on the basis that the developer had not entered into an appropriate agreement to fund necessary consequential works. However, the developer could do so at any time, at which point the authority would have been bound to grant permission.

Public funding

■ **R (G) v Legal Services Commission**

[2004] EWHC 276 (Admin)

This case clarifies the circumstances in which public funding can be granted for an action in negligence against a public body. The claimant had been remanded to the care of his local authority. It failed to place him in secure accommodation. He was later injured when driving a stolen car.

Although actions for negligently caused injury are generally excluded, funding is authorised in the case of proceedings against public authorities concerning serious wrongdoing, abuse of position or power, or significant breach of human rights (para 7(b) of the Directions given under Access to Justice Act 1999 s6(8), and Funding Code s8).

Pitchford J held that the LSC had erred in taking too narrow a view of serious wrongdoing and had equated it with deliberate, dishonest or malicious conduct. The correct test was to consider a range of criteria including:

(1) The nature of the duty owed; (2) The purpose of that duty, this will involve a consideration to whom and to what class of person was the duty owed, and the protection the duty was designed to afford; (3) The quality of the acts and omissions which are alleged to constitute the serious wrongdoing, and the circumstances in which those acts or omissions occur; (4) The harm or risk of harm which the breach occasioned; and (5) The public dimension of the duty and the breach which informs the priority for funding legal representation.

On this basis, he considered that claims that might qualify would include a dereliction of duty owed by a public authority endowed with powers and fixed with responsibilities in a field of activity essential to the health and safety of the public.

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1 This report, the seventh report from session 2003–2004, is available at: www.parliament.uk/commons/selcom/hrhome.htm and at: www.tso.co.uk, tel: 0870 600 5522, £16.50.
2 This is the only case in which the House of Lords has considered HRA s6(3)(b).
3 The report criticises *Leonard Cheshire* at para 146.
4 Thanks to Kate Beattie of Doughty Street Chambers' Human Rights Unit for this summary.
5 Available at: www.odpm.gov.uk.

LEGAL PROFESSION

Proceeds of Crime Act 2002 – to disclose or not?

Lawyers are faced with the real possibility of having to breach client confidentiality and act as government narks if some commentators, including the Law Society and prominent members of the Solicitors Family Law Association (SFLA), are to be believed. **David Burrows** outlines when lawyers must, under the Proceeds of Crime Act (PoCA) 2002, disclose their clients' financial activities concerning suspected or actual money laundering to the National Criminal Intelligence Service (NCIS).

Offences and defences

It is said that PoCA Part 7 and s342, which came into operation on 24 February 2003, require solicitors to override legal professional privilege (LPP) between themselves and their clients. Where, in the course of acting for a client in court proceedings, information about his/her possible criminal activity comes to a lawyer's attention this must be reported to the NCIS.

The PoCA deals with newly defined 'money laundering' offences in relation to 'criminal property'. Such property is defined by s340(2)–(3) as a person's benefit from 'criminal conduct' (ie, an offence – for example, tax evasion or benefits fraud – committed in any part of the UK).

A solicitor may commit offences under the PoCA as follows:

- The primary money laundering offences are under ss327–329: ie, being 'concerned in an arrangement which [a person] knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property…' (s 328(1)). Acting in matrimonial ancillary relief proceedings may be regarded as being 'concerned' in such an arrangement.
- Where a person knows or suspects that a disclosure has been made to the NCIS under s338 (see below) and s/he 'makes a disclosure' which is likely to prejudice any investigation that might be conducted, ie, tips off a client or others.'Tipping off' is defined as where a person reveals that a disclosure has been made to the NCIS.
- Failure to disclose in the regulated sector under s330 (and see Money Laundering Regulations 2003 SI No 3075) will not be considered further in this article since the Law Society has been told by the Treasury that 'participation in litigation' and 'publicly funded work' are outside the regulations.[1] A defence to money laundering offences is provided for a person with information (or, under s328(1), a suspicion) about possible criminal activity. S/he must disclose information to the NCIS under s338, and then stop acting for the particular client until 'appropriate consent' is obtained or certain time limits have passed (s335).

Questions and interpretations

A spectrum of questions is raised for a practitioner about whether an offence may have been committed under the PoCA as follows:

- Do any of the PoCA's provisions override a client's absolute right to LPP, ie, prevent a lawyer from being able to provide legal advice to him/her throughout the relevant proceedings?
- If so, is a client's right to a fair trial (of which LPP is a part) or his/her right to privacy under articles 6 (right to fair trial) and 8 (right to respect for private and family life) of the European Convention on Human Rights ('the convention') engaged? Is the PoCA thus compatible with the convention?
- Finally, for matrimonial ancillary relief proceedings in particular, does the difficulty of reconciling the duty of full and frank disclosure with the privilege against self-incrimination render the PoCA inherently inconsistent? (See *Livesey (formerly Jenkins) v Jenkins* [1985] AC 424).

Can the PoCA override LPP?

At common law, if a fundamental right (such as LPP) is to be overridden by statute, this must be done in express terms or by necessary implication: see *R v Special Commissioner and another ex p Morgan Grenfell & Co Ltd* [2002] UKHL 21, [2002] 2 WLR 1299). While the wording in ss337 and 338(4) may be an attempt to override LPP: 'an authorised disclosure [for example, under s328(2)] is not to be taken to breach any restriction on the disclosure of information (however imposed)'. This provision does not even mention LPP, and surely does not come up to the *Morgan Grenfell* criterion of being express words. In this author's opinion, it is most doubtful that the PoCA has overridden LPP.

Is the PoCA compatible with the convention?

LPP is an absolute right. It is essential to the administration of justice:

> *…a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. … [N]o exception should be allowed to the absolute nature of [LPP], once established.*

See, for example, *R v Derby Magistrates' Court ex p B* [1996] 1 AC 487 at 508, a case relied on heavily in *Morgan Grenfell*.

The society, in its money laundering guidance, and the SFLA fail to distinguish between the duty of confidentiality and LPP (a concept re-examined recently in *Three Rivers DC v the Governor and Company of the Bank of England (No 7)* [2004] EWCA Civ 218). LPP is part of the confidentiality duty, but all confidential matters are not necessarily privileged. The duty of confidentiality engages article 8, but not necessarily article 6, of the convention, while LPP will always engage article 6.

Self-incrimination privilege

For a matrimonial ancillary relief lawyer, the privilege against self-incrimination drives the PoCA into the evidential buffers, both at common law and under statute. In Civil Evidence Act 1968 s14(1), the privilege, in civil proceedings, is defined as the right 'to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty.' How can this definition sit with a jurisdiction which, simultaneously, requires a person to provide the court and the other party with full and frank disclosure? In the author's view, it does not.

Conclusion

The PoCA is a poorly drafted piece of legislation. It is capable of a variety of interpretations. The Act's consequences are by no means a foregone conclusion, ie, lawyers must act as unpaid government informers. Each practitioner faces a dilemma and must decide:

- if LPP is overridden by PoCA Part 7; and, if so,
- is the fact that the LPP is superseded compliant with the convention; and
- whether s/he is entitled to expect clients to incriminate themselves in circumstances where full and frank disclosure is required.

It would appear to follow that a solicitor may breach client confidentiality by making an 'authorised disclosure' to the NCIS under PoCA s338 only if s/he is satisfied is that the answer to each of the points above is 'yes'.

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1 See *Money laundering: guidance for solicitors* para 3.12, available at: www.lawsociety.org.uk.

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

EU accession and eligibility

In line with the Home Secretary's announcement on 23 February 2004, regarding conditions to be imposed on migrant nationals of the ten additional countries which join the EU on 1 May 2004, the Office of the Deputy Prime Minister (ODPM) is tightening the eligibility rules on access to homelessness assistance and allocation of social housing. A letter sent to all local housing authorities on 14 April 2004 explains the changes and is available at: www.odpm.gov.uk. The necessary statutory modifications are made by the Allocation of Housing and Homelessness (Amendment) (England) Regulations 2004 which came into force on 1 May 2004. The regulations were, at the time of writing, available in draft form only.

Housing Acts appeals

Numerous statutory appeals lie to the county court under the Housing Acts (HA) 1985–1996, not least homelessness appeals under HA 1996 ss204–204A. In February 2004, the Department for Constitutional Affairs published a consultation paper entitled *Statutory appeals and statutory review: proposals for rationalising procedures*. It proposes the introduction of a 'permission' requirement in all such cases, and a common statutory time limit (of 28 days). The consultation period ends on 14 May 2004. The paper is available at: www.dca.gov.uk/consult/statutory/statappeals.htm.

Choice-based lettings

The evaluation of the pilot schemes to test choice-based lettings (CBLs) of social housing has been completed. The report, *Piloting choice-based lettings: an evaluation* (Housing research summary 208), and a summary of consumers' experiences, *Applicants' perspectives on choice-based lettings* (Housing research summary 207), were published by the ODPM in February 2004. Both reports are available at: www.odpm.gov.uk. Housing minister Keith Hill MP, in his commentary on the reports, expressed the hope that all local housing authorities and registered social landlords would use the material to develop their own approach to CBLs by 2010 ('Choosing for the future' *Inside Housing* 27 February 2004, p26).

Advisers are already considering the new allocation scheme adopted by Lambeth, in March 2004, to replace the procedure which was declared unlawful by the Court of Appeal in July 2002 (see *R (A) v Lambeth LBC* [2002] EWCA Civ 1624, [2002] 34 HLR 13). Other recent developments on choice in allocation are reviewed at: www.choicemoves.org.uk.

End of bed and breakfast for homeless families?

Statistics published by the ODPM's Homelessness and Housing Support Directorate on 15 March 2004, indicate that in England at the end of December 2003:

- over 95,000 homeless households were living in temporary accommodation provided under HA 1996 Part 7 (Homelessness); and
- of those households, 1,689 were families with children living in bed and breakfast (B&B) hotels; and
- of those families, 930 had been in B&B for more than six weeks.

By 1 April 2004, due to the Homelessness (Suitability of Accommodation) (England) Order 2003 SI No 3326, those 930 families had to be moved from B&B (see February 2004 *Legal Action* 30). The Order prohibits the use of B&B for families, but exceptionally allows a family to spend no more than six weeks in B&B. A local authority that continues to use B&B for families faces individual legal challenge, but its B&B expenditure may also be ultra vires the council's powers.

PUBLIC SECTOR

Assured tenancies – anti-social behaviour

■ **New Charter Housing (North) Ltd v Ashcroft**
[2004] EWCA Civ 310, 8 March 2004

Ms Ashcroft was an assured tenant. After a long history of harassment towards their neighbours, her 17-year-old son was the subject of an interim anti-social behaviour order. He breached that order and was sentenced to a six-month detention and training order. As a direct result of the conduct of Ms Ashcroft (threats) and her son (for example, smashing windows and slashing car tyres), four neighbours who had made complaints about their behaviour moved away from the area. Ms Ashcroft's landlord claimed possession under HA 1988 Sch 2 Ground 14. It relied on 28 incidents of nuisance. HHJ Armitage QC found that there was 'the clearest possible case made out under Ground 14'. However, he decided that Ms Ashcroft should have the opportunity to demonstrate that she was able to curb her son's conduct on his release, and that therefore it was reasonable to suspend the possession order. The landlord appealed.

The Court of Appeal allowed the appeal. There was no reason to suppose that Ms Ashcroft would take the opportunity to curb her son's conduct. She had herself uttered threats to neighbours about what would happen if she were evicted. She failed to show any regret for her son's conduct or any basis on which she sought to put it right. The judge had failed properly to consider the position and rights of the neighbours. It was appropriate to interfere with the judge's exercise of discretion and set aside the order suspending the order for possession.

Mesne profits

■ **Braintree DC v Vincent**
[2004] EWCA Civ 415, 9 March 2004

Mrs Vincent, the first defendant, was an elderly lady. She was a secure tenant and lived in a bungalow. In April 2002, Mrs Vincent suffered an accident and was admitted to hospital. Subsequently, she was placed in a nursing home.

The second and third defendants were her sons. From April 2003, the third defendant lived in the bungalow. A possession order was made on the ground of rent arrears. The judge also ordered the third defendant to pay a sum equivalent to 22 weeks' rent for his use and occupation of the property. He appealed.

The Court of Appeal allowed the appeal. Until the order for possession was made, the third defendant had been Mrs Vincent's licensee. He had not become liable to the claimant until his mother's tenancy came to an end. The money judgment against the third defendant was set aside.

Eviction – damages

■ **Smith v Southwark LBC**
25 February 2004, Lambeth County Court[1]

Ms Smith was a secure tenant of a flat owned by Southwark. Due to harassment, she left her home and applied to be rehoused in another borough. In the meantime, she lived with her mother. Southwark was fully aware of the situation. It persuaded her to sign notice of termination of the tenancy in June 2000. In July 2000, a housing officer wrote that she had seven days to remove all her possessions from the premises. Ms Smith telephoned the housing office and left a message for the

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housing officer requesting an extra seven days. She rang again, two days later, and was told the message had been passed on. On 21 July 2000, Southwark entered the premises and removed and destroyed all her possessions. Ms Smith had only a few items that she had taken with her. Not only were furniture, clothing and electrical goods destroyed, but all her photographs and personal mementos. These included pictures of her parents and sister. She was devastated by the loss of her possessions.

Ms Smith was rehoused. She received a loan of just over £800 from the Social Fund and was given a further £1,000 through a council scheme. She used these monies to buy basic goods. Ms Smith prepared a detailed schedule of loss amounting to £18,424. Southwark's insurers admitted liability for trespass to goods. Judgment was entered in default.

At the disposal hearing, HHJ Cox ordered that Southwark pay the special damages in full. He awarded general damages at £500 per annum for three and a half years and aggravated damages of £1,750. The final sum awarded was £21,885, which included nominal interest.

PRIVATE SECTOR

Fair rents

■ **Western Hereditable Investment Co v Hunter**

23 March 2004,
Court of Session (Inner House)[2]

In deciding a fair rent under Rent (Scotland) Act 1984 s48, a Rent Assessment Committee (RAC) rejected the landlord's suggestion of taking a market rent and then making an allowance for scarcity. (See *Curtis v London RAC* [1999] QB 92, CA, and *Spath Holme Limited v Greater Manchester and Lancashire RAC* [1995] 28 HLR 107, CA, where the comparable provisions of the English and Welsh Rent Act 1977 were considered). Instead, 'relying on its skill and judgment, . . . [the committee preferred] the method of reaching a fair rent by comparison with comparable regulated tenancies'.

On appeal, the Court of Session remitted the case because the RAC had not given adequate reasons for rejecting the market rent approach. The court found that 'the use of registered fair rent comparables [as] the 'primary' method for determination of a fair rent . . . is misconceived'. However, unanimously, the judges expressed a measure of disagreement with the approach adopted by the English Court of Appeal. The Lord President stated that he disagreed with the view expressed by Auld LJ, in *Curtis v London RAC*, that 'the exercise [of determining a fair rent] must in some way identify a market rent en route to assessing a fair rent'. Lord Hamilton doubted, 'at least for the purposes of Scottish cases, the appropriateness of laying down, apparently as a matter of law, certain approaches which, in various evidential situations, can or cannot be followed by rent assessment committees in the determination of a fair rent'. Lord Marnoch stated that 'it is important not to be over-prescriptive as to the manner in which fair rents should be assessed'.

Comment: Practitioners should note that English and Welsh courts, up to and including the Court of Appeal, are bound by the decisions in *Curtis v London RAC* and *Spath Holme Limited v Greater Manchester and Lancashire RAC*. However, the judges' comments in *Western Hereditable Investment Co v Hunter* may be of significance if these issues ever reach the House of Lords.

Eviction – damages

■ **Cooper v Sharma**

23 February 2004,
Brentford County Court[3]

Ms Cooper was the assured shorthold tenant of a one-bedroom flat. The defendant, her landlord, interfered with her mail from the beginning of the tenancy. On 28 April 2003, after she had applied for housing benefit, he disconnected the electricity supply to her lights. On 2 May, he disconnected the gas, electricity and hot water supplies. On 5 May, he cut off the cold water supply, and on that day the claimant obtained an injunction ordering him to reconnect the utilities. He did not comply until 19 May. On 16 July, the defendant changed the locks and threw Ms Cooper's belongings, and those of her son, on to the pavement. On 22 July, Ms Cooper obtained an injunction that the defendant readmit her, but he refused to comply. He was committed for contempt on 29 August. Ms Cooper and her son slept on a friend's floor until 5 August when they were given B&B accommodation. On 13 October, the local authority granted her a non-secure tenancy of a flat. In a claim for damages, the landlord was debarred from defending for non-compliance with directions.

DJ Plashkow awarded general damages of £23,350, aggravated damages of £4,000 and exemplary damages of £2,500. The general damages were assessed on the following basis:

- £4,600 for the disconnection of the utilities (23 days at £200) and £400 for interference with post;
- £4,750 for the period sleeping on the friend's floor (19 days at £250);
- £10,500 for the period in B&B accommodation (70 days at £150); and
- £3,100 for the period after moving into non-secure accommodation (31 days at £100. (The 31 days represented the balance of the time that it would have taken the defendant to repossess the flat using the HA 1988 s21 procedure).

LONG LEASES

Long lessees – service charges

■ **Veena SA v Cheong**

[2003] 1 EGLR 175, Lands Tribunal

Veena was the landlord of a Mayfair property containing seven flats. Service charges included the cost of a full-time porter. The Leasehold Valuation Tribunal (LVT) found that a full-time porter was not necessary and limited the amount of service charges accordingly.

The Lands Tribunal dismissed the landlord's appeal. The word 'reasonableness' in Landlord and Tenant Act (LTA) 1985 s19 should be read in the general sense. A twofold test should be applied. It is necessary to show that the costs themselves were reasonable and that it was reasonable to incur them. It was not unreasonable to expect a porter to be employed in flats of this calibre, but Veena had not shown that there was a need for a full-time porter. The fact that porterage was contemplated in the lease did not mean that the costs of such a service were reasonable automatically.

Long lessees – appointment of manager

■ **Orchard Court Residents Association v St Anthony's Homes Ltd**

[2003] EWCA Civ 1049,
[2003] 33 EG 64

A LVT appointed a manager of three blocks of flats. Subsequently, it made a variation order extending the manager's term of appointment. The landlord argued that the LVT had erred by failing to consider whether any of the requirements of LTA 1987 s24(2) were met when making the variation order.

The Court of Appeal refused permission to appeal. When deciding an application under s24(9), a court is not required to satisfy itself that one of the thresholds in s24(2) has been met. Section 24(2) is concerned with creating new orders when none exists. Section 24(9) is concerned with orders which already exist and that satisfy s24(2).

■ **Morshead Mansions Ltd v LVT for the London Rent Assessment Panel**

[2003] EWCA Civ 1698,
13 November 2003

Tenants of a block of flats were in divided camps over issues of management. The LVT appointed a manager under LTA 1987 s24, but then suspended the appointment and allowed a Mr Wismayer, who was the moving force in one of the factions, to resume control. However, there were complaints that Mr Wismayer was paying himself too much. The LVT

agreed, finding his proposed fees 'inordinately high and disproportionate'. It imposed, as a condition of suspension of the order appointing a manager, a ceiling on the fees that Mr Wismayer might charge. He said that such a decision was outside the LVT's powers because the money to pay the fees had nothing to do with the leases but had been raised through powers in the company's Articles of Association. He sought permission to appeal.

The Court of Appeal refused a renewed application for permission to appeal. Section 24(6) provides that the appointment of a manager may be 'subject to such conditions as [the LVT] thinks fit'. Section 24(9) provides that the LVT may 'vary or discharge (whether conditionally or unconditionally) an order' made under s24. Jacob LJ described these as 'wide words'. The LVT can, 'in exercising its powers over whether to appoint a manager or keep a manager in place, impose conditions irrespective of whether the money which is referred to in the conditions has come from payment under the lease by way of service charges or any other source'.

Right to first refusal

■ **M25 Group Ltd v Tudor**

[2003] EWCA Civ 1760, (2004) Times 17 February

Purchasers of the freehold reversion of a building gave notice to the tenants under LTA 1985 ss3 and 3A, which contained details of the change of ownership. The tenants gave notice, apparently under LTA 1987 s11A, requiring information about the disposal. The new landlord's solicitors challenged the validity of the notice. Although it identified the tenants correctly, and there was no doubt that they were 'qualifying tenants' under LTA 1987, the notice failed to state 'the addresses of the flats of which they are qualifying tenants' as required by LTA 1987 s54(2). The tenants then gave notice under LTA 1987 s19 seeking to enforce the right to first refusal, but the statutory 14 days elapsed without a response. In subsequent enforcement proceedings, the landlord applied to strike out the claim on the ground that the notice was invalid. The judge held that the notice was valid, and the landlord appealed.

The appeal was dismissed. It is necessary to consider whether the statutory provisions are either substantive or secondary ('machinery'). In relation to machinery provisions, it is necessary to consider whether they are 'essential parts of the mechanics or merely supportive of the other provisions'. The substantive provisions are those that confer the right to acquire the freehold. The secondary (machinery) provisions include requirements relating to s11A notice and those prescribed under s54, including the obligation to state the relevant addresses. While the requirement for a notice is essential machinery, the obligation to state an address is 'merely supportive'. A failure to include addresses does not invalidate the notice. Both the tenants and the purchasing landlord could readily and indisputably ascertain the relevant information. (See, too, *Belvedere Court Management Ltd v Frogmore Developments Ltd* [1997] QB 858, CA.)

Leasehold enfranchisement

■ **Castlegroom Ltd v Enoch (No 2)**

[2003] 48 EG 128, LVT

A nominee purchaser served initial notices seeking the enfranchisement of a block of flats. An application was made to the LVT but, on 16 October 2000, the parties agreed terms of acquisition. A dispute arose, but HHJ Hallon made a vesting order: [2003] 31 EG 69. The freeholder and intermediate lessees then applied to the LVT for orders that the prices for their respective interests should be increased under Leasehold Reform, Housing and Urban Development Act (LRHUDA) 1993 s24(4)(b)(i), because increased property prices amounted to a change of circumstances.

The LVT decided that it did not have jurisdiction to determine the application. Increased property prices do not constitute a change of circumstances within the meaning of s24(4)(b)(i).

Right to a new lease

■ **Lay v Ackerman**

[2004] EWCA Civ 184, (2004) Times 24 March

The tenant of premises served a notice under LRHUDA s42 proposing a new lease. The premises were part of the Portman Estate and the freeholders were the trustees of the Portman Family Settled Estates. The solicitors to the estate prepared and served a s45 counternotice which identified wrongly the freehold owners as the Portman Family Collateral Settlements. That was a subsidiary trust. A judge held that the counternotice was invalid.

The Court of Appeal allowed the landlord's appeal. Following *Mannai Investment Co Ltd v Eagle Star Assurance* [1997] AC 749, HL, the court had to consider how, in the light of the mistake, a reasonable person in the position of the recipient would have understood the notice in the circumstances of the particular case, and whether it would have been understood as conveying the information required by the relevant statutory provisions. There was no express statutory requirement for the landlord to be named in the counternotice. Under s45, it was clear that the landlord had to serve the counternotice. That meant that it had to be served with the landlord's authority. That was the position in this case; a reasonable person in the tenant's situation could not have been in any doubt that the counternotice had been sent by, and with the authority of, the actual landlord. A s45 counternotice was not invalid simply because it left the tenant in doubt about the landlord's identity.

RIGHT TO BUY

■ **R (Kelly) v Hammersmith & Fulham LBC**

[2004] EWHC 435 (Admin), 26 January 2004

Mrs Herbert had been a long-standing council tenant. In 2000, she claimed the right to buy with her daughter, Mrs Kelly, who lived with her. The market price was £120,000, but Mrs Herbert qualified for a statutory discount (HA 1985 s129), which reduced the cost to £70,000. Mrs Kelly borrowed that sum and a mortgage was executed in joint names. Mrs Kelly paid the purchase expenses and the transfer was into joint names. Mrs Kelly paid all the mortgage payments. The part of the transfer form on which the parties were to record their respective interests in the property was not completed. In August 2002, Mrs Herbert died. She had lived in a council care home for 18 months. The council registered a caution against the freehold property for £46,000 in respect of the cost of the care that it had provided. Mrs Kelly claimed that Mrs Herbert had had no beneficial interest in the property, and that the joint legal interest was held, in trust, solely for her. She sought judicial review of the council's refusal to remove the caution.

Wilson J dismissed the claim. The proper procedure for disputes over cautions was an application to the Land Registrar followed by an appeal (if necessary) under Land Registration Act 1925 s56. In any event, in the light of *Springette v Defoe* [1992] 2 FLR 388 and *Evans v Hayward* [1995] 2 FLR 511, it was plain that the effect of the discount on a 'prima facie and on a resulting trust basis' had given Mrs Herbert a five-twelfth equitable interest in the property. No material before the court indicated a common intention that the interest held should be other than in those proportions. Mrs Herbert had, accordingly, a legal and beneficial interest in the freehold property against which the council had lawfully registered a caution.

■ **Kyriakides v Pippas**
[2004] EWHC 646 (Ch), 18 March 2004
In 1983, Mr Kyriakides, then a pensioner, bought his council house, which was the matrimonial home, under the right to buy. He took out a 100 per cent mortgage with his daughter. Mr Kyriakides and his daughter were registered as joint legal owners. The transfer was silent regarding their respective beneficial interests. He paid the mortgage instalments, in full, by direct debit from his bank account. On his death, in 1996, the daughter secured the transfer of the property into her sole name. Mrs Kyriakides, the widow, who remained in occupation, claimed that her husband had been the sole legal and beneficial owner, and that the property should have passed into his estate.

Deputy Judge Gabriel Moss QC upheld that claim after considering *Kelly* (above). Mr Kyriakides had made the financial contribution to the purchase. It was his entitlement that had produced the discount and he had paid the mortgage. The role of his daughter had simply been as joint applicant for, or quasi-surety of, the mortgage, and as a nominee purchaser. The true purchaser had been the tenant alone and the sole legal and beneficial interests were properly his. There was no substance to the daughter's claim of a gift or dowry to her.

■ **Popowski v Popowski**
[2004] EWHC 668 (Ch), 26 March 2004
In 1985, Mr and Mrs Popowski exercised their right to buy their council home with a 60 per cent discount. It was transferred into their joint names. They entered into a trust deed with their son under which he acquired the whole beneficial interest in the property. He agreed to pay the mortgage and house insurance on the basis that his mother and father could live in the property rent-free, for as long as they wished, under a licence. After he had paid over £20,000 in mortgage instalments, Mrs Popowski applied to set aside the transaction with her son on the basis that it had been obtained by undue influence. She asserted that her beneficial interest in the property was at least 60 per cent and relied on *Springette v Defoe* (above).

Deputy Judge Richard Sheldon QC dismissed her claim. The transaction did not constitute a disadvantage to Mrs Popowski sufficiently serious to give rise to a presumption of undue influence. Even if that was wrong, sufficient evidence had been given by the son – about the circumstances in which the trust deed had been made – to rebut any such presumption.

HOMELESSNESS

Interim accommodation

■ **R (Flash) v Southwark LBC**
[2004] EWHC 717 (Admin), 15 March 2004
The claimant applied as a 'homeless' person under HA 1996 Part 7 for accommodation for herself and her grandson. The council accepted that it owed an interim duty to accommodate them as the claimant was potentially eligible, homeless and in priority need: HA 1996 s188. In judicial review proceedings, the council was ordered to secure accommodation in compliance with that duty. It made two offers, which the claimant refused. The first property had entrance steps that the claimant could ascend but not descend without assistance. The second property was a one-bedroom flat where the council said the grandson could sleep in the living room. The claimant applied for committal of the council for breach of the order.

Owen J dismissed the application. The drawbacks of each unit of accommodation were not serious enough to render them 'unsuitable' for performance of the interim duty. It could not be said that the offers were unlawful. In the circumstances, the court's order had not been breached, but had been complied with and would be discharged.

Intentional homelessness

■ **O'Connor and another v Kensington & Chelsea RLBC**
[2004] EWCA Civ 394, 30 March 2004
Mr and Mrs O'Connor left their housing association property in London to travel to Ireland to visit Mr O'Connor's father who was very ill. He died shortly after their arrival in November 2000. Mr O'Connor, who already suffered from depression, was particularly affected by his father's death. The family stayed on in Ireland temporarily, and arranged for a family friend to occupy their home and pay the rent. In May 2002, Mrs O'Connor returned to the London property to find that:

- the rent had not been paid;
- the friend had not forwarded the post which contained details of proceedings for possession;
- a suspended possession order had been made; and
- the friend would not move out.

When she excluded the friend and changed the locks, he broke in. She reduced the arrears from almost £2,000 to £83, but her application to stay a warrant was refused and the possession order executed.

On a HA 1996 Part 7 application, the council decided, on review, that Mr and Mrs O'Connor had become intentionally homeless. They appealed, but by the date of the hearing had taken an assured shorthold tenancy elsewhere in London. HHJ Behar dismissed the appeal, but held that even if the review decision had been defective he would have refused any remedy, as the couple was not homeless.

The Court of Appeal allowed a second appeal. It held that:

- although an erroneous decision would ordinarily be quashed or varied, in a rare case it would be open to the court to refuse relief on the basis that it was an abuse of process for a pointless appeal to be pursued;
- the application for the review (and the solicitors' representations in support of it) had asserted that no act or omission by the couple had caused their homelessness. Unsurprisingly, the thrust of the review concentrated on that submission. The 'omission' relied on by the reviewer was the couple's failure, during their 16-month absence, to protect their tenancy;
- even though it had not been raised, the reviewer was obliged to consider whether the couple's failure was 'deliberate' or could not be treated as such because they had, in good faith, been ignorant of a relevant fact: HA 1996 s191(2). On the facts, the couple had not known of their friend's default, the mounting arrears or the possession proceedings. The action that they took in mid-2002, demonstrated what the couple would have done if they had known about it.

Local connection

■ **R (Enfield LBC) v Broxbourne BC**
15 March 2004
In 2002–2003, a homeless person and other members of her family made a series of Part 7 applications for accommodation to both Enfield and Broxbourne councils. The information given in the applications, about which relative was caring for the dependent child of the family, was contradictory and confusing. In June 2003, Broxbourne accepted that it owed the full housing duty, but decided to exercise its discretion to refer the applicant to Enfield where she had a local connection. Enfield refused to accept the referral. It sought judicial review on the basis that Broxbourne had failed to make the necessary enquiries or take account of relevant material, and had wrongly exercised the discretion to refer.

Moses J dismissed the claim. Broxbourne had investigated the application made to it properly, and reached a proper and lawful decision on both the extent of the duty owed and the exercise of the discretion to refer.

Suitability of offers

■ **R (McCammon-Mackenzie) v Southwark LBC**
[2004] EWHC 612 (Admin), 9 March 2004
The claimant was a homeless

single parent. She was disabled and unable to work due to ME and depression. Her son, aged 15, had learning difficulties and needed a separate bedroom. The claimant made a Part 7 application in November 2001, and the council accepted that it owed the full housing duty: HA 1996 s193(2). It provided the claimant with a series of four units of B&B accommodation in single rooms. As a result, the son had been cared for by social services since January 2002. The latest offer, a two-bedroom unit, was not self-contained.

In judicial review proceedings, Keith J granted a final mandatory order requiring the council to comply with its s193 duty within two months. The family had needed two-bedroom accommodation throughout, and the council had been in breach of its statutory duty in not providing it. The latest offer could not fulfil that duty as the time had come to stop placing the claimant in hostel-style accommodation that was not self-contained.

Accommodation pending appeal

■ **Onyaebor v Newham LBC**

15 December 2003,
Bow County Court[4]

The appellant applied to the council for housing assistance after he lost his employment and tied accommodation in London. He told the council that his wife and children lived in Nigeria, and he had visited them periodically since coming to the UK in 1963. He gave the council an address where he said his family stayed in Lagos. The council instructed enquiry agents who visited the property in Lagos. They found the appellant's wife. She told them that the appellant owned that property.

The council decided that the appellant was not homeless as he had accommodation in Nigeria. The council did not disclose the information that it relied on, either at the initial decision stage or on review, except to indicate that it had an enquiry agent's report. The appellant lodged a HA 1996 s204 appeal, and asked the council to accommodate him pending the hearing. On its refusal to do so, the appellant appealed that decision under s204A. Shortly before that hearing, the enquiry agent's report was disclosed to the appellant.

HHJ Roberts allowed the s204A appeal. There had been unfairness in reaching decisions against the appellant, most particularly in deciding not to accommodate pending appeal. Relevant material had been taken into account about which he had not had the opportunity to comment. Although the council claimed to have had regard to the principles in *R v Camden LBC ex p Mohammed* (1998) 30 HLR 315 on the manner required to reach a proper s204A decision (see *Francis v Kensington & Chelsea RLBC* [2003] HLR 50), it had not observed them. The council had drawn adverse inferences from material that it had not allowed the appellant to deal with, before it reached the decision not to accommodate him pending the appeal. That decision was quashed and the council was ordered to accommodate pending the main appeal.

The review decision was later withdrawn, concluding the main s204 appeal. On the onus of disclosure on an authority in homelessness cases, see *R v Poole BC ex p Cooper (1995)* 27 HLR 605.

Appeals

■ **E v Secretary of State for the Home Office**

[2004] EWCA Civ 49,
2 February 2004

Homelessness appeals in the county court can only be brought on a point of law: HA 1996 s204. Questions often arise about whether the county court can consider factual matters which were not known to the decision-maker at the time of the decision under appeal, and that can only be proved by the admission of 'fresh evidence' on the appeal.

The proper approach for a county court judge to take in such circumstances will be informed by consideration of this immigration case in which the Court of Appeal considered precisely that issue. The court held that:

- an appeal on a point of law may be made on the basis of unfairness resulting from 'misunderstanding or ignorance of an established and relevant fact';
- fresh evidence may be admitted on such an appeal in order to establish the true facts; and
- the discretion to admit such evidence is subject to *Ladd v Marshall* principles, but they may be departed from, in exceptional circumstances, where the interests of justice require.

HOUSING AND COMMUNITY CARE

■ **R (Khan) v Oxfordshire CC**

[2004] EWCA Civ 309,
17 March 2004

The claimant was a victim of domestic violence and fled to a refuge. She was not entitled to benefits or eligible for housing assistance under HA 1996 Parts 6 or 7, as she was a sponsored immigrant. She applied to social services for help with accommodation. The council decided that she did not have any significant mental or physical needs requiring support (other than those that may result from her destitution) and that, therefore, she did not need care and attention under National Assistance Act (NAA) 1948 s21.

In judicial review proceedings, Moses J quashed that decision and the council appealed. The claimant cross-appealed against the judge's declaration that, if she did not meet the s21 threshold, she could not be assisted under Local Government Act (LGA) 2000 s2.

The council's appeal was allowed. The council's officer had recognised that domestic violence could give rise to a need for 'care and attention' within s21, but decided that it had not done so in this case. Adequate reasons for that decision had been given. In relation to the cross-appeal, the effect of NAA s21(1A) was to bar the claimant from assistance with accommodation because of her immigration status. That provision was also a statutory prohibition which prevented her from being provided with accommodation (or help with the costs of it) under LGA s2. However, the NAA did not prohibit assistance to her with non-accommodation costs and the provision of other services under LGA s2.

■ Jan Luba QC is a barrister at Two Garden Court Chambers, London EC4. Nic Madge is a district judge. Both are recorders. They are grateful to the following colleagues for supplying transcripts or notes of judgments:

1 Tracey Bloom, barrister, London.
2 Scott Martin, solicitor, Scotland.
3 Law for All, solicitors, London, and Victoria Osler, barrister, London.
4 Kevin Gannon, barrister, London.

EMPLOYMENT

Employment Tribunal costs – some comfort for applicants?

Philip Plowden argues that the changes to the costs regime in the Employment Tribunal are leading to abuse by employers' representatives. He suggests that where employers make unwarranted costs threats, applicants and their advisers should be prompt in reporting the matter to the Employment Tribunal (ET), and should consider whether the threat amounts to a breach of any relevant rules of professional conduct.

Changes to the costs regime

All those practising in the ET will be aware of the changes to the costs regime which were introduced in July 2001. Among other changes, The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 SI 2001 No 1171 and The Employment Tribunals (Constitution and Rules of Procedure) (Scotland) Regulations 2001 SI 2001 No 1170 provide for the award of costs where: 'In the opinion of the tribunal, a party has in bringing the proceedings, or a party or a party's representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, *or the bringing or conducting of the proceedings by a party has been misconceived* . . .'[1] (author's emphasis).

The test of what is or is not misconceived is far from clear, and this lack of clarity is compounded by the fact that the amount the ET can award in costs was increased, very substantially, from £500 to £10,000.

It is entirely unsurprising to find that employers' advisers are taking full advantage of this change in the costs regime – and that threats of costs applications now seem to be made almost routinely in letters between the parties. These threats are often followed by costs applications at the ET itself after the hearing. In discussions with employers' representatives, it is not uncommon to hear the assertion that this (mis)use of the new costs jurisdiction is no more than a legitimate litigation tactic, or that they are simply following their client's instructions in seeking costs. Fortunately guidance from the Court of Appeal in two recent cases suggests that such applications are likely to be inappropriate, and may indeed be improper.

The decision in *Gee v Shell*

■ **Gee v Shell UK Ltd**
[2002] EWCA Civ 1479, [2003] IRLR 82

This is a case that concerned the previous costs regime. Mrs Gee and her husband were bringing claims against Shell which argued, among other things, that some of the contracts were with Mr Gee, rather than Mrs Gee, so that she lacked the requisite period of service. The ET warned Mrs Gee that there was considerable doubt on this point, and so she was at risk of a substantial costs award if she persisted with her case and lost on this basis. Worried that a costs order might mean that she was risking her house, Mrs Gee withdrew her claim. The Employment Appeal Tribunal (EAT) held that the costs warning from the ET had been unfair and oppressive. The Court of Appeal agreed, and went on to make a number of points about the costs regime.

The leading decision is that of Lord Justice Scott Baker, who agreed with the EAT that:

. . . [T]his is a jurisdiction where an order for costs is very much the exception rather than the rule. Parliament had set a high threshold for a costs order to be made . . .

He acknowledged that the subsequent changes to the rules had '. . . lowered the threshold by the addition of the criterion of the misconceived bringing or conducting of proceedings', and said that this made it even less likely that costs could have been awarded under the old regime.

But where does this leave applicants who are faced with costs threats under the new 'lower threshold' regime? This issue is addressed in the speech of Lord Justice Sedley. First, Sedley LJ dealt with the issue of whether unrepresented claimants should be dealt with more leniently than those who have the benefit of representation. He suggested that the role of the ET is to look at the relative equality of arms of the parties in each case:

The tribunal's job, precisely because it cannot guarantee equality of arms, is to ensure equality of access to its processes for sometimes disparately powerful parties. This involves making a careful appraisal, case by case, of the parties and their respective capabilities.

There is no single rule, therefore, which says that a represented or unrepresented party is more or less at risk of costs. The test is one of equality of treatment: 'It must also, however, involve ultimate equality of treatment, so that whoever presses on with a doomed case after due warning faces the same risk on costs.'

Sedley LJ then turned to the particular nature of the employment jurisdiction as being intended to be accessible to people 'without the need of lawyers' so that 'in sharp distinction from ordinary litigation' it should ordinarily be a no costs jurisdiction. He continued by considering the change in the costs regime:

This case does not concern the ambit of the recent amendment to include 'misconceived' proceedings – again, not an easy concept even for lawyers. <u>But the governing structure remains that of a cost-free user-friendly jurisdiction in which the power to award costs is not so much an exception to as a means of protecting its essential character</u>. (author's emphasis)

Finally, he addressed the responsibility of lawyers to the tribunal and those appearing before it, stating that '. . . lawyers, none more so than Queen's Counsel who rightly command great respect, have an obligation not to let their weight become overbearing, whether on the tribunal or on the opposing party.' In Mrs Gee's case, he stated, it was far from the case that there could be only one outcome to the litigation – and tribunals must not too readily accept the assertions of lawyers unless they are satisfied, after full argument, that they are meritorious.

Applying *Gee* to the new regime

■ **Lodwick v Southwark LBC**
[2004] EWCA Civ 306

The judgment in *Lodwick* was handed down on 18 March 2004. It is a case in which the new 'misconceived' test applies. The majority of the judgment of the Court of Appeal concerns the failure of the lower tribunals to apply the test of bias, now best summarised in the House of Lords decision of *Porter v Magill* [2002] 2 AC 357, in the correct way. However, the ET, in dismissing the applicant's unfair dismissal claim had awarded £4,000 costs against him. The Court of Appeal took the opportunity to revisit *Gee*, and to apply its principles to the new regime.

In his judgment, with which the other judges concurred, Pill LJ stated that he would allow the appeal against the costs order. The ET had awarded costs on the basis that there had been limitations in Lodwick's witness statement; he had raised numerous matters apparently only to 'obfuscate the issues and cause delay'; his complaints had been weak and only one had had 'merit, in the sense that it needed to be tested'; and he had apparently made a remark at the earlier disciplinary hearing which had suggested that he would take his employers to a tribunal which would cause them expense even if he did not win. Costs were awarded on the basis that the length of the hearing had been 'considerably extended', but the period by which it was lengthened was not quantified.

Pill LJ started by applying *Gee*:

Costs are rarely awarded in proceedings before an Employment Tribunal . . . Costs remain exceptional (Gee v Shell UK Ltd [2002] EWCA Civ 1479) . . . (para 23)

The ET had found that the claims had been weak, but the statutory test was 'misconceived', and tribunals needed to be careful not to apply this test with the benefit of hindsight:

. . . [A]s Sir Hugh Griffiths stated in E T Marler Limited v Robertson [1974] ICR 72: 'Ordinary experience of life frequently teaches us that that which is plain for all to see once the dust of battle has subsided was far from clear to the contestants when they took up arms.' To order costs in the Employment Tribunal is an exceptional course of action and the reason for, and the basis of, an order should be specified clearly, especially when a sum as substantial as £4,000 is involved. (para 26)

Even allowing for the wide discretion of the ET in such matters, Pill LJ was of the view that the correct test had not been applied. Interestingly, however, he went on to say that although he was not deciding the matter, he was 'of the view' that lack of an earlier costs warning would not itself prevent costs from being awarded. Moreover, he rounded off his judgment with the warning that: 'Nothing in this judgment may be taken as encouraging, or permitting a toleration of, the slack or unbusinesslike conduct of cases before Employment Tribunals.' (para 27)

What is the effect of these cases?

First, the cases confirm that the ET remains, essentially, a 'cost-free, user-friendly jurisdiction' (see *Gee*). A claim may be unsuccessful for any number of reasons without being 'misconceived'. And if ETs award costs too readily they are in danger of simply equating an unsuccessful case with a misconceived one. The dicta of Sedley LJ in *Gee* and Pill LJ in *Lodwick* send out a powerful message that this must not be allowed to occur.

The second important implication of the cases is that lawyers are put on notice about their particular obligation to the ET and the opposing party. In relation to solicitors, this should be read in conjunction with the professional conduct rules, *The guide to the professional conduct of solicitors*, and in particular para 17.01.[2] This provides that:

Solicitors must not act, whether in their professional capacity or otherwise, towards anyone in a way which is fraudulent, deceitful or otherwise contrary to their position as solicitors. Nor must solicitors use their position as solicitors to take unfair advantage either for themselves or another person.[3]

This is clearly not a principle confined merely to those representing employers: there will be cases where the employee may have the advantage of representation by a lawyer or experienced adviser, and the employer may be unrepresented. In either situation, *Gee* speaks of the 'obligation' on lawyers not to throw their weight around. Since it is now clear that costs awards in the ET will remain exceptional, a representative who seeks to suggest that because an application has been unsuccessful the tribunal should make a costs award may risk misleading the tribunal about the law. Similarly, a legal representative who makes a costs threat in a letter to the other party, without reasonable grounds for believing that an application for costs could properly be made, may potentially be in breach of the professional conduct rules. Finally, it should be noted that, in those cases where aggravated damages are available to the ET, inappropriate costs threats by the employer may well result in damages in recognition of the additional stress and anxiety caused to a successful applicant.

Summary

Gee and *Lodwick* are important reminders of the continuing nature of the ET as a no costs jurisdiction in the majority of cases. There will be cases which are misconceived, and where costs are appropriate. But these judgments provide a clear indication that for a claim to be misconceived requires far more than it being merely unsuccessful. Most importantly, *Gee* and *Lodwick* should act as a warning that costs threats should not be used by lawyers routinely in an attempt to dissuade applicants from pursuing a remedy. In those, hopefully exceptional, cases where legal representatives fail to heed that warning, and continue to threaten costs without good cause, representatives should be prepared to report the matter to the ET. If inappropriate costs threats continue to be made, representatives should consider whether this may amount to professional misconduct, and as such should be reported to the Law Society or Bar Council.

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1 These regulations were laid on 27 March 2001 and came into effect on 16 July 2001.
2 *The guide to the professional conduct of solicitors*, 8th edn, is available at: www.lawsoc.org.uk.
3 Similar principles apply to barristers – see, for example, *Written standards for the conduct of professional work*, para 5.2, available at: www.barcouncil.org.uk.

EMPLOYMENT

Employment law update

Tamara Lewis and **Philip Tsamados** continue their six-monthly update on employment and discrimination law, designed to keep practitioners informed of all the latest developments. Readers are invited to send in innovative unreported cases, information on significant cases in which appeals have been lodged and examples of the use of new legislation.

LEGISLATION

Regulations

Employment Act 2002 (Dispute Resolution) Regulations 2004 SI No 752

These come into force on 1 October 2004 and, in conjunction with Employment Act 2002 Part III, require employers to follow statutory procedures with regard to dismissal and disciplinary action and grievance procedures. The regulations are complicated and should be read carefully. Essentially, they establish mandatory standard and modified procedures to be followed in cases of disciplinary action and grievances. Failure to comply with the procedures will render a dismissal of an employee with one year's continuous employment unfair automatically. The amount of compensation is enhanced by a minimum of 10 per cent and, at the Employment Tribunal's (ET's) discretion, by up to 50 per cent. If the employee fails to comply with the requisite procedure, his/her compensation will be reduced by the same amounts. In addition, the time limits to apply to an ET are, in certain circumstances, extended to allow time for the use of the requisite procedure.

Employment Rights (Increase in Limits) Order 2003 SI No 3038

From 1 February 2004, the limits on awards which can be made by ETs were increased. These include the compensatory award for unfair dismissal, which was increased from £53,500 to £55,000, and the maximum figure of a week's pay for the purposes of, among others, the basic award and redundancy payments, which was increased from £260 to £270.

Disability Discrimination Act 1995 (Amendment) Regulations 2003 SI No 1673

These come into force on 1 October 2004.[1] The 'small employer' exclusion of firms with fewer than 15 employees will be removed. The main changes are to bring the definitions of disability discrimination more into line with those for other areas of discrimination. Disability Discrimination Act (DDA) 1995 s5(1) (less favourable treatment for a 'reason which relates to' a disabled person's disability) is renumbered s3A(1). A new s3A(5) is introduced, ie, less favourable treatment 'on the ground of a disabled person's disability'.

This is analogous to direct discrimination under the Sex Discrimination Act (SDA) and cannot be justified by an employer. A specific definition of harassment is introduced under DDA s3B to match that in the Race Relations Act (RRA) 1976, the SDA, Employment Equality (Religion or Belief) Regulations 2003 SI No 1660 and Employment Equality (Sexual Orientation) Regulations 2003 SI No 1661. The duty to make reasonable adjustments will come under DDA s4A, and its wording will be widened to include any provision, criterion or practice which places the disabled person at a substantial disadvantage. It will no longer be possible to justify a failure to make reasonable adjustments. The questionnaire procedure under DDA s56(3) is modified so that an inference may be drawn if the respondent fails to answer within eight weeks.

Codes of practice

The Equal Opportunity Commission's revised *Code of practice on equal pay* came into force on 1 December 2003. It replaces the previous code, which was issued in 1997.[2]

Pending legislation

The Department for Work and Pensions (DWP) published a draft Disability Discrimination Bill in December 2003.[3] It will extend the meaning of 'disability' so that those with cancer, multiple sclerosis or HIV infection are usually covered on diagnosis. It will also introduce a new duty on public bodies to promote equality of opportunity for disabled people, analogous to the duty under RRA s71.

DISCRIMINATION

Illegal contracts

Employees may be working on illegal contracts for a number of reasons, for example, they colluded knowingly in a fraud on the Inland Revenue or do not have a work permit when necessary. In general, employees who have participated in the illegality actively cannot bring a claim founded on the illegal contract, such as unfair dismissal. There is more flexibility with discrimination cases, since these are based on a statutory tort as opposed to the employment contract. The Court of Appeal (CA), in *Hall v Woolston Hall Leisure Ltd* [2000] IRLR 578, CA, said that the test in discrimination cases is whether the applicant's claim is linked inextricably to the illegal contract so that, by allowing it to proceed, the courts would appear to be condoning the illegality. In *Hall*, the employee was allowed to bring her sex discrimination claim even though she knew that her employer had been defrauding the Inland Revenue.

■ **Vakante v Addey and Stanhope School and others**
(2004) 751 IDS Brief 11, EAT

Mr Vakante, a Croatian national, applied successfully for a post as a trainee teacher with the respondent school. Mr Vakante stated falsely that he did not need a work permit, despite receiving a Home Office letter confirming that he did. He was dismissed after eight months. Mr Vakante claimed race discrimination in a number of respects including lack of training; insulting remarks; less favourable terms of engagement; failure to investigate his complaints of discrimination; and dismissal.

The case went to the Employment Appeal Tribunal (EAT) twice. The first EAT remarked that claims under RRA s4(2)(b), ie, relating to access to promotion, transfer, training or other benefits are likely to be bound up inextricably with illegality, while complaints under s4(2)(c), ie, relating to dismissal or any other detriment, might not be. However, the ET had found that all the complaints were so closely connected with the deliberate illegality that to allow Mr Vakante's case to proceed would be to endorse his illegal actions. Mr Vakante appealed.

The second EAT endorsed the ET's decision. This case was different on its facts from *Hall*. This was the first reported case where the employee was responsible entirely for the illegality. The ET was, therefore, entitled to find that the illegality tainted the entire contract. In such cases, it would be unlikely that a complaint could arise from the operation or termination of that contract in a discriminatory manner. One possible exception would be where the conduct complained of was extrinsic to the operation of the contract, for example, gratuitous racial abuse by a fellow employee.

Direct sex discrimination

Literally applying the definition of direct discrimination in SDA s1(1)(a), suggests that men and women should be allowed to wear identical clothes, and be subject to the same restrictions. This concept has always been too radical for the courts, which have looked for legal ways around the problem. In the key case of *Smith v Safeway plc* [1996] IRLR 456, CA, the CA decided that the provisions of a dress code need not be exactly the same for men and women, if they were equivalent. The issue has come up again in the following case.

■ **Department for Work and Pensions v Thompson**
(2004) 127 EOR 28,
730 IRLB 11,
751 IDS Brief 8, EAT

Jobcentre Plus introduced a dress code, in 2002, which required staff to dress in a 'professional and business-like way'. Men were required specifically to wear a collar and tie, while women had only to 'dress appropriately and

to a similar standard'. The code gave some examples of inappropriate clothing, which included some gender-specific items that applied to women only. Mr Thompson was disciplined for refusing to wear a collar and tie. In the ET, his direct sex discrimination claim was successful. The DWP appealed to the EAT.

The EAT allowed the appeal, following the guidance in *Smith v Safeway plc.* It said that the ET should have looked at the overall context of the dress code in deciding whether men were treated less favourably than women. It should not have looked simply at whether men were required to wear one specific item of dress which women were not. The overarching requirement was for staff to dress in a 'professional and business-like way'. The question was whether men could achieve the necessary level of smartness (applying contemporary dress standards) only by wearing a collar and tie. The EAT remitted the case to a differently constituted ET for a decision.

Indirect sex discrimination

Under sex discrimination law, indirect discrimination is not unlawful if it can be objectively justified. However, the state is not permitted to justify a measure purely by budgetary considerations.

■ **Steinicke v Bundesanstalt für Arbeit**

[2003] IRLR 892,
724 IRLB 6, ECJ

Ms Steinicke worked for the Federal Employment Office (FEO). German national law allows public servants to work part-time once they reach 55 years of age. However, they must have worked full-time for at least three, of the preceding five, years. Ms Steinicke's application was rejected because she could not satisfy this condition. She had worked part-time for much of that period. She claimed indirect sex discrimination under the Equal Treatment Directive 76/207. The German court referred the case to the European Court of Justice (ECJ) for guidance.

The FEO said that the purpose of the scheme was to free posts in the employment market by encouraging full-time workers to accept reduced hours. The ECJ accepted that the encouragement of recruitment constituted a legitimate social policy aim in which member states had a wide margin of discretion. However, that discretion must not frustrate the implementation of a fundamental principle of EC law such as equal treatment. Also, a mere generalisation about the capacity of specific measures to encourage recruitment was not enough. (See *Kutz-Bauer v Freie und Hansestadt Hamburg* [2003] IRLR 368, ECJ.) In this case, it was not a suitable justification as it excluded from access to the scheme those people, ie, part-time workers, who made a considerable contribution to the unblocking of the labour market.

With regard to the FEO's other justification, ie, cost-neutrality and the burden of planning and allocating posts in the public sector, the ECJ said that budgetary considerations may underlie a member state's choice of social policy and influence the nature and scope of social protection measures, but cannot justify discrimination.

Pregnancy and maternity

Under Employment Rights Act (ERA) 1996 s99, it is unfair automatically to dismiss a woman for a pregnancy- or maternity- related reason. In addition, it is an unlawful detriment, contrary to s47C, to subject a woman to a disadvantage short of dismissal for those reasons. Both actions will also be unlawful sex discrimination under the SDA. When women are on maternity leave, it is frequently a case of 'out of sight, out of mind'. The following case shows that it is important for employers to keep those women informed of all major developments at work.

■ **Visa International Services Association v Paul**

[2004] IRLR 42,
125 EOR 27,
731 IRLB 13,
752 IDS Brief 6, EAT

During Ms Paul's maternity leave, her employer decided to reorganise the department in which she worked. Two new posts were created, one of which Ms Paul was interested in and believed she was qualified to apply for. Ms Paul was told about the post only after it had been filled. Her grievance was rejected on the ground that she did not have the necessary experience for the job. The company also thought a friend and fellow employee had told her about the post, which was not, in fact, true. Ms Paul resigned and brought a tribunal claim for sex discrimination, constructive unfair dismissal and pregnancy-related detriment. The company counterclaimed for £3,623 enhanced maternity pay that it had paid to her. Under her contract, payments in excess of statutory maternity pay could be reclaimed if a woman decided not to return to work after maternity leave. As a result of the counterclaim, Ms Paul added a further claim of victimisation.

The ET upheld Ms Paul's claims. The failure to inform Ms Paul, during her maternity leave, of job opportunities in her department was a detriment related to pregnancy or maternity contrary to ERA s47C. It also amounted to a fundamental breach of the implied term of trust and confidence. Ms Paul was entitled to resign and claim constructive dismissal. The reason for the dismissal was related to pregnancy or childbirth, and was unfair automatically. Ms Paul had also been victimised under SDA s4. Two other women had left the company's employment following maternity leave, but it had not reclaimed their enhanced maternity pay. Unlike Ms Paul, those women had not brought a tribunal claim for sex discrimination. The company appealed.

The EAT upheld the ET's decision. It was irrelevant that Ms Paul was not, in fact, qualified for the new post. Her trust and confidence had been undermined because, after 12 years' service, Ms Paul had not been informed of a job opportunity for which she believed she was suitable.

DISABILITY

Under DDA s6, an employer must make reasonable adjustments where any arrangements made by it or physical feature of the premises places a disabled person at a substantial disadvantage compared with those who are not disabled. In the following case, the Scottish Court of Session came up with a particularly narrow interpretation of this section, which restricts the scope of the employer's duty severely.

■ **Archibald v Fife Council**

[2004] IRLR 197,
753 IDS Brief 17, CS

Ms Archibald could no longer work as a road sweeper for the council after a surgical complication made it impossible for her to walk without the assistance of sticks. Ms Archibald was dismissed eventually as she was unable to do her old job for the foreseeable future. Her applications for over 100 alternative posts were unsuccessful. Ms Archibald brought a discrimination case, complaining that she should not have been made to compete for alternative employment if she could show that she was able to perform the duties and responsibilities of the post in question. Ms Archibald lost her case in the ET, EAT and Court of Session. The Court of Session said that the duty of reasonable adjustment did not extend to giving a disabled person a quite different job.

Comment: This appalling decision cannot be right and will hopefully be appealed to the House of Lords. Section 6(3)(c) of the DDA actually lists transferring someone to fill an existing vacancy as a possible adjustment. Paragraph 4.20 of the code of practice says that this means that suitable alternative posts, and possibly reasonable retraining, should be considered.

■ **Mid Staffordshire General Hospitals NHS Trust v Cambridge**

(2004) 743 IDS Brief 7, EAT

In this case, the EAT confirmed that an employer which fails to make a full and proper assessment to enable it to decide what steps would be reasonable to prevent a disabled worker from being at a disadvantage, is in breach of the duty to make reasonable adjustments. It is unlawful under DDA s5(1) to treat a disabled worker less favourably for a reason related to his/her disability, unless an employer can justify the treatment. As long as an employer carries out a proper risk assessment, and makes a rational judgment based on the properly informed opinion of suitably qualified doctors, the decision cannot be challenged (*Post Office v Jones* [2001] IRLR 384; [2001] EWCA Civ 588; 97 EOR 37; LA 11/01). However, there is often scope for bringing a case where an employer has not gone to the correct doctors or failed to carry out a proper assessment.

■ **Paul v National Probation Service**

[2004] IRLR 190,
730 IRLB 13,
753 IDS Brief 10, EAT

Mr Paul was under the care of a consultant psychiatrist for chronic depression and it was accepted that he had a disability. He applied for a job as a supervisor with the National Probation Service for one day a week, and as a 'handyman' for three hours a week. He was offered both jobs subject to a satisfactory occupational health report. The service's occupational health adviser sought a medical report from Mr Paul's GP (who hardly knew him), but not from his treating consultant. The report said Mr Paul's condition was unlikely to improve for the foreseeable future. The service decided that the supervisor job would be too stressful for Mr Paul and withdrew the offer.

Mr Paul claimed less favourable treatment related to his disability and failure to make reasonable adjustment. The ET rejected his claim. It said that there was no failure to make reasonable adjustments because there was no alternative way to assess the medical fitness of a candidate. Also, the discrimination was justified because the occupational health assessment of Mr Paul's medical suitability for the supervisor's post was not unreasonable.

The EAT upheld Mr Paul's appeal. Regarding the failure to make reasonable adjustment, the ET had focused wrongly on the requirement to pass an occupational health assessment as the problematic 'arrangement'. In fact, what caused the difficulty was the requirement for Mr Paul to be able to cope with a stressful job. The service should have considered ways of alleviating the stress, for example, by easing Mr Paul into the job gradually, and extending his induction/supervision period. Paragraph 5.24 of the code of practice states that 'advice from an occupational health expert simply that an employee was "unfit for work" would not mean that the employer's duty to make a reasonable adjustment was waived.'

Even if the service had not failed in its duty to make reasonable adjustments, the discrimination would not have been justified. The service should have scrutinised the occupational health assessment more carefully. It should have asked Mr Paul's views on his GP's report, and should have obtained an opinion from a more appropriate medical source.

COMPENSATION FOR DISCRIMINATION

In some cases, a worker who has been discriminated against suffers injury to feelings or health of a kind which the employer could not have anticipated. The question is whether the employer should only be liable to compensate for foreseeable damage, or for all loss caused by the discrimination. In general negligence law, compensation is usually only awarded for reasonably foreseeable loss arising from the neglect. In the following case, the CA said that it is not necessary to prove reasonably foreseeable loss as the tort of racial discrimination is unique, and the RRA was implemented to remedy this great evil.

■ **Essa v Laing Ltd**

[2004] IRLR 313
(2004) 733 IRLB 11, CA

Mr Essa was affected badly by a racist remark made by a foreman at work. He suffered from depression and underwent a dramatic personality change. The ET upheld his claim for race discrimination regarding the remark, but said that the employer could not have reasonably foreseen the extent of Mr Essa's reaction to the discrimination. The ET, therefore, awarded only £5,000 for injury to feelings. Mr Essa appealed.

The EAT said the ET was wrong to limit compensation for psychiatric injury to reasonably foreseeable loss. A worker who has been subjected to discrimination is entitled to compensation where s/he can show a direct causal link between the discriminatory act and his/her loss. Laing Ltd appealed.

The CA upheld the EAT's decision. The majority of the CA said that it was not necessary for the applicant to prove that the loss was foreseeable. Compensation should be awarded where there is a real causal link between the act of discrimination and the injury alleged. No such compensation will be payable where there has been a break in the chain of causation (ie, an intervening act), or where the worker has failed to take reasonable steps to mitigate his/her loss.

In *Chief Constable of West Yorkshire Police (No 2) v Vento* [2003] IRLR 102, CA, the Court of Appeal gave guidance for the size of awards for injury to feelings, setting out three broad bands of award. Within each band, tribunals still have much discretion to take account of the facts in each case. Aggravated damages can be awarded where the respondent has behaved in a 'high-handed, malicious, insulting or oppressive manner'. (See *Alexander v Home Office* [1988] IRLR 190, CA.) One aspect of the following case is that the alleged discriminator was promoted before the grievance against him had been completed. Surprisingly, this is not unusual during harassment grievances.

■ **British Telecommunications plc v Reid**

[2004] IRLR 327
(2004) 126 EOR 28,
751 IDS Brief 7, CA

Mr Reid, a BT employee, who was of African-Caribbean descent, was subjected to a racist comment during an argument, in November 2000, with a colleague, Mr Edwards. Mr Edwards prodded Mr Reid, saying he knew people with baseball bats, and that Mr Reid had better watch out. He added, 'I will get someone to put you back in your cage'. Mr Reid was upset and left work before the end of his shift. He was then disciplined for abandoning his duties.

Mr Reid raised a grievance about Mr Edwards' conduct, but after an investigation BT found that Mr Edwards had not been racist. Mr Reid asked for a review of the decision. The review was finally completed in February 2002. It confirmed Mr Edwards had not been guilty of racial harassment. During this period, Mr Reid had time off work with stress and was relocated on health grounds, initially to Bletchley, which was too far to travel, and then to central London. Meanwhile, Mr Edwards was promoted. Mr Reid brought a race discrimination case in the tribunal.

The ET found that Mr Edwards' 'cage' remark was direct race discrimination. In awarding £6,000 to Mr Reid for injury to feelings, it took account of his stress and considerable sick leave; the stress of an, initially, unsuitable relocation; the fact that he had been subjected to a totally unjustified disciplinary investigation; and that he had had to wait 14 months for his grievance to be completed. It awarded a further £2,000 aggravated damages because Mr Edwards had remained in post unpunished, and had even been promoted. BT appealed to EAT, which upheld the awards. BT appealed again to the Court of Appeal.

BT argued that the ET had made only one finding of race discrimination, ie, the racist remark. It was therefore wrong, in awarding injury to feelings, to take account of events which occurred after the racist remark, ie, the disciplinary investigation, the handling of the grievance, and stress associated with the initial unsuitable relocation. The CA disagreed. These matters arose out of the discrimination and were a consequence of it. Therefore, they were relevant in assessing injury to feelings. Indeed, the time taken to resolve a grievance can prolong the injury. The award of £6,000 was in line with the bands set out in *Vento (No 2)* (see above).

The CA also confirmed that the ET was entitled to take account of the fact that Mr Edwards remained in post and unpunished, and the timing of his promotion, in awarding aggravated damages. This is not to say that an employee should never be promoted while disciplinary proceedings are outstanding. However, in particular cases, a promotion could demonstrate an employer's high-handedness. A big factor in this case was that the promotion took place before an investigation into a serious allegation of racial harassment had been completed.

■ **Barresi v P Garnett & Son Ltd**
(2004) 127 EOR 31, ET
In this case, an ET decided that an Italian machine assistant, who had experienced racial discrimination and abuse throughout most of his seven years' employment, suffered injury to feelings at the top end of the highest band in *Vento (No 2)*. The ET awarded Mr Barresi £25,000 for injury to feelings including £5,000 aggravated damages. In addition, he was awarded £5,000 damages for personal injury.

EQUAL PAY

Under the Equal Pay Act 1970 (EqPA 1970), a woman can compare her pay with that of a man, who is employed by the same or an associated employer. This provision goes further under EU law (Treaty of Rome, article 141, as amended), where she can compare her pay with that of a man, who is employed in the same establishment or service (*Scullard v Knowles and Southern Regional Council for Education and Training* [1996] IRLR 344, 67 EOR 44, EAT). However, it is essential that the pay differences can be attributed to a single source, otherwise there is no particular body that is responsible for the inequality, and which can restore equal treatment (*Lawrence and others v Regent Office Care Ltd and others* [2002] IRLR 822, 110 EOR 27, ECJ). There have been several test cases applying this principle.

■ **Allonby v Accrington & Rossendale College and others**
C-256/01,
[2004] IRLR 224,
732 IRLB 11, ECJ
The college originally employed Ms Allonby. In 1996, her employment was terminated. Like other lecturers, Ms Allonby was told that if she wanted to continue to work for the college, she must register with ELS – an agency which supplied available lecturers to various educational institutions, and with which the college had an arrangement. Ms Allonby's pay fell as a result of the new circumstances, and she made various claims, including one for equal pay with that of a male lecturer, who was still employed by the college. Unfortunately, the ECJ said she could not compare her pay with that of her ex-colleagues, who were still employed directly by the college, because there was no longer a single source in control of pay.

■ **Department for Environment, Food and Rural Affairs v Robertson and others**
(2004) 730 IRLB 3, EAT
Six male civil servants, who worked for the Department for Environment, Food and Rural Affairs, wanted to compare their pay with female civil servants employed in the Department of Transport and the Regions (Central). Applying *Lawrence*, the EAT said that the comparison could not be made. Although the Treasury retained overall control, individual departments negotiated budgetary control, terms and conditions.

Equal pay claims – a defence

Under EqPA s1(3), an employer has a defence to an equal pay claim if s/he can show that the pay differential is due to a genuine material factor other than sex. Where there is indirect sex discrimination (for example, part-time workers being paid less than full-time ones), the employer must provide objective justification for the pay difference. The position is unclear where there is no indirect discrimination. In *Glasgow CC and others v Marshall and others* [2000] IRLR 272, HL, the House of Lords said that, in non-indirect discrimination cases, there is a valid defence if the difference can be explained by genuine factors, which are not tainted by sex discrimination. However, the ECJ, in *Brunnhofer v Bank der Österreichischen Postparkasse* [2001] IRLR 571, ECJ, required objectively justified reasons in a non-indirect discrimination case. In the following case, the majority of the EAT seems to misread *Brunnhofer* and prefer the *Marshall* test. Advisers are urged to continue to press for the application of the *Brunnhofer* test.

■ **Parliamentary Commissioner for Administration and another v Fernandez**
[2004] IRLR 22,
730 IRLB 5, EAT
Mr Fernandez, a barrister, who was employed as a caseworker by the Parliamentary Ombudsman, brought an equal pay case. Mr Fernandez compared his pay with that of Ms Moulder, who was a caseworker with the Health Service Ombudsman. The ET decided that Mr Fernandez's equal pay claim should succeed because the employer had not objectively justified the pay differential. The employer appealed.

The majority of the EAT decided that the *Brunnhofer* case did not suggest that objective justification was necessary, except in an indirect discrimination case. In other cases, such as this one, it was only necessary for the employer to provide a gender-neutral explanation. The case was, therefore, remitted to a fresh ET for rehearing. The dissenting minority member of the EAT analysed *Brunnhofer* more fully, and said that the ECJ required objective justification in all equal pay cases.

Despite years of equal pay law, the pay gap between men and women continues to exist. One problem area is service-related pay. The practice of paying increments for length of service is widespread, but can indirectly discriminate against women because they tend to have shorter service as a result of taking career breaks for childcare. In *Handelsog Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening (acting for Danfoss)* [1989] IRLR 532, ECJ, the ECJ said that an employer need not justify the use of length of service as a criterion 'since length of service goes hand in hand with experience, and since experience generally enables the employee to perform his duties better'. But in the next major case, *Nimz v Freie und Hansestadt Hamburg* [1991] IRLR 222, ECJ, the ECJ changed its mind. It ruled that any decision depended on the circumstances of the case and, in particular, 'the relationship between the nature of the duties performed and the experience afforded by the performance of those duties'.

■ **Health and Safety Executive v Cadman**
[2004] IRLR 29,
125 EOR 25,
732 IRLB 13,
747 IDS Brief 3, EAT
Ms Cadman, a principal inspector employed by the Health and Safety Executive (HSE), was paid less than male employees with longer service. The reason was that, historically, pay progression was based exclusively on length of service. The HSE accepted

RECOMMENDED READING

IDS Brief

- Dress codes – what not to wear 742
- Redundancy selection criteria 744
- Unfair dismissal – health and safety dismissals 745
- Employment law review 2003 748
- Work dos – and don'ts 746
- Compensation limits 2004 749
- Employment status 751–752

Industrial Relations Law Bulletin (IRLB)

- The Working Time Regulations 1998–1 733

Equal Opportunities Review (EOR)

- New discrimination regulations, disability: an EOR guide 122
- Trade Unions and equality 122
- Lord Lester's Stonewall lecture: 'New Labour's Equality Laws' 123
- Compensation awards 2002 124
- Key discrimination cases 2004 126

Other

- ACAS Guidance for Employees: Bullying and Harassment at Work. Available at: www.acas.org.uk
- ACAS Code sexual orientation 124 EOR 20
- ACAS Code religion and belief 124 EOR 20
- Compensation for Loss of Pension Rights – Employment Tribunal Guidelines edn 3. Available from: TSO bookshops and at: www.tso.co.uk/bookshop
- RRA Questionnaires: how to use the questionnaire procedure in cases of race discrimination in employment, 2nd edn, Tamara Lewis
- Discrimination Questionnaires: how to use the questionnaire procedure in all cases of discrimination in employment (featuring new areas of sexual orientation and religion), Tamara Lewis. Both questionnaires are available from Central London Law Centre, tel: 0207 839 2998

that the pay system had adverse impact on female employees because they tended to have shorter service than men in Ms Cadman's pay band. However, the HSE argued that following the *Danfoss* decision, using length of service as a pay criterion was objectively justified and did not need specific justification in any particular case.

The ET upheld Ms Cadman's claim. It held that *Danfoss* had been overtaken by subsequent ECJ decisions. As the HSE had failed to provide a specific justification, the defence failed. The HSE appealed. The EAT overturned the ET's decision. It said *Danfoss* was still good law and no specific justification was needed for service-related pay.

Comment: Rather surprisingly, the EAT thought *Nimz* could be distinguished from *Danfoss* on certain factual grounds, ie, in *Nimz*, different hours had been worked by the two groups of employees. Fortunately, this highly doubtful decision is being appealed, and is likely to be referred to the ECJ.

CONTRACT AND EMPLOYMENT RIGHTS

Change of position

Where an employer has overpaid wages or some other entitlement and seeks restitution, it is possible, in certain circumstances, for the employee to use the defence of 'change of position' to avoid repayment of all, or part, of the money. This is on the basis that the worker is unaware of the overpayment and has changed his/her position in reliance on the overpayment. In *Lipkin Gorman v Karpnale Ltd* (1991) 2 AC 548; [1992] All ER 512, HL, Lord Goff stated 'where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him to so repay outweighs the injustice of denying the plaintiff restitution'. The CA considered the defence again in the following case.

- **Commerzbank AG v Price**

21 November 2003, CA, 729 IRLB 5

Mr Price was overpaid a bonus of £250,000 by his employer bank. The overpayment was clearly a mistake, and Mr Price's employer was entitled to restitution of the amount unless he could establish the defence of change of position. The CA held that the test was 'had the employee's position so changed that it would be unjust in all the circumstances to require him or her to make full restitution of the overpayment?'

The CA found that Mr Price's change of position was based on his mistake about his entitlement to the bonus and was not the bank's fault. Therefore, there was no causal link between the change of position and the payment under a mistake. Furthermore, he still had the money and had not spent it. Finally, although Mr Price argued that he would have left the bank's employment if he had not believed that he was entitled to the bonus, this was not a sufficient casual link to establish a change of position.

Breach of contract

Loss of opportunity

In 'Employment law update' November 2003 *Legal Action* 22, we reported the case of *Virgin Net Ltd v Harper* EAT/0111/02, 9 July 2003, 741 IDS Brief 9, with regard to whether damages for wrongful dismissal could include compensation for the loss of opportunity to bring an unfair dismissal claim, in circumstances where an employee was dismissed without contractual notice, and the addition of the period of notice would bring his/her continuous employment to at least one year. The CA has now heard this case.

- **Virgin Net Ltd v Harper**

10 March 2004, CA

The CA upheld the decision that Ms Harper could not obtain damages for loss of opportunity to claim unfair dismissal. The right not to be unfairly dismissed carried with it a requirement of one year's continuous service at the effective date of termination (EDT). In a case where an employee was dismissed without notice, parliament had decided that, under ERA s97(2), the statutory minimum notice period under s86 would be added artificially to move the EDT in order to avoid premature dismissal. The CA also agreed with the EAT that *Addis v Gramophone Company Ltd* [1909] AC 488, HL, and *Johnson v UNISYS Ltd* [2001] IRLR 279, HL, precluded the award of damages for the manner of dismissal.

Comment: This case focused on the issue of loss of opportunity for the employer's failure to dismiss the employee with the requisite period of notice. However, a lost opportunity claim might still be arguable where dismissal is in breach of a contractual disciplinary period under *Raspin v United News Shops Ltd* [1999] IRLR 9, EAT.

Part-time workers

The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 SI No 1551 ('Prevention of less favourable treatment Regs'), prohibits less favourable treatment of part-time workers unless it is objectively justified. The following test case was brought by 12,000 retained firefighters, and is the first important case to interpret the regulations.

- **Matthews and others v Kent & Medway Towns Fire Authority and others**

[2003] IRLR 732, EAT

The retained firefighters claimed that they had been less favourably treated than their whole-time colleagues, in particular with regard to their exclusion from the Fireman's Pension Scheme.

- Prevention of less favourable treatment Regs reg 5(1), states that a part-time worker has the right not to be treated less favourably than a comparable full-time employee.
- Reg 5(2) states that the less favourable treatment has to be

on the ground that the worker is employed on a part-time basis and cannot be justified on objective grounds.

■ Reg 2(4) states that a part-time worker has to compare him/herself with a comparable full-time colleague if they are both employed by the same employer under equivalent types of contracts, and are engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience.

■ Reg 2(3) lists the different types of contract, including employees who are employed under a contract which is neither for a fixed term nor a contract of apprenticeship (reg (3)(a)), and any other description of worker that it is reasonable for the employer to treat differently from others on the ground that workers of that particular description have a different type of contract (reg 2(3)(f), now reg 2(3)(d)). The ET made a number of findings together with alternative conclusions.

The EAT held that:

■ Whole-time and retained firefighters were both employed under contracts falling within reg 2(3)(a), ie, not fixed-term or apprenticeship contracts. However, the EAT also found that retained firefighters fell within reg 2(3)(f). Therefore, they had a different type of contract from the whole-time firefighters. The EAT found that reg 2(3)(f) contains no limitation on the criteria by which types of contracts can be differentiated, and only makes sense if, among other things, the demarcation can be made by reference to the workers' contractual working pattern. If this was not the case, reg 2(3)(f) would not contain reasonableness criteria. Consequently, the purpose of the provision is to remove a group of workers from the other sub-paragraphs of reg 2, where it is reasonable for the employer to treat them differently from other workers.

■ Even if both groups were employed under the same type of contract, under reg 2(4), given the factual differences between the work, they did not do the same or broadly similar work.

■ In the alternative, the retained firefighters were treated less favourably than their whole-time colleagues within reg 5(1), regarding matters such as pension benefit, sick pay and pay for additional duties. The EAT found that the ET had applied the correct legal test when assessing less favourable treatment. It had compared each term of the contracts with those of the comparators, rather than evaluating, overall, how favourable were each of the two groups' pay packages.

■ In the alternative, the less favourable treatment fell within reg 5(2), and the ET was right to apply the 'but for' test of causation (as in discrimination cases) to find that the difference between the workers was on the ground that one group of firefighters is retained and the other whole-time.

■ In the alternative, the employer would not have been able to show that the less favourable treatment was justified on objective grounds under reg 5(2).

UNFAIR DISMISSAL

Compensation

In 'Employment law update', November 2003 *Legal Action* 23, we reported the EAT's decision in *Dunnachie v Kingston Upon Hull CC* [2003] IRLR 384, and in two other cases about whether compensation for injury to feelings was available as part of an award of compensation in unfair dismissal cases. The CA has now heard the cases.

■ **Dunnachie v Kingston Upon Hull CC**

[2004] IRLR 287, [2004] EWCA 84

In a case where an employee had resigned following a long campaign of being bullied and undermined by a colleague, the Court of Appeal found that an ET was right to award compensation of £10,000 for the manner of an unfair dismissal in respect of the damage to his health and self-esteem. The CA held that this case fell within ERA s123(1), which provides that, 'the amount of the compensatory award shall be such amount as [an ET] considers just and equitable in the circumstances, having regard to the loss sustained by the [applicant] in consequence of the dismissal in so far as that loss is attributable to [the] action taken by the employer'.

The CA found that the long-standing decision in *Norton Tool Co Ltd v Tewson* [1972] ICR 501 was wrong, and that an award of compensation for unfair dismissal could reflect non-economic loss. However, the CA stressed that most unfair dismissal cases would not give rise to such an award. Sedley LJ, in particular, said that such awards should not be made for every upset caused by unfair dismissal, but only cases where there is 'a real injury to self respect'. Principally, this would be in constructive dismissal cases where an employee had been driven from his/her job. In most cases, assuming there was no reinstatement, the basic award would be adequate to compensate for the unfairness. Evans-Lombe J said that losses flowing from an unfair dismissal could include psychiatric illness resulting from the circumstances of the dismissal.

The CA also judged the appropriateness of the amount of compensation against the guidelines for injury to feelings awards in discrimination cases set by *Vento v Chief Constable of West Yorkshire Police (No 2)* [2003] IRLR 102, CA; May 2003 *Legal Action* 21 and above).

Territorial jurisdiction

There has been uncertainty about what is now the exact nature of the ETs' territorial jurisdiction following the repeal of ERA s196, which stated that certain statutory rights, including unfair dismissal, were excluded from the jurisdiction of ETs where, under an employee's contract of employment, s/he ordinarily works outside GB. The CA has now considered the issue.

■ **Lawson v Serco Ltd**

[2004] IRLR 206, CA

Mr Lawson worked as a security supervisor at a RAF base on Ascension Island. The respondent company is registered, and has its head office, in England. Mr Lawson is a British national and domiciled in England. Mr Lawson's wages were paid in sterling into his bank account in England, but he did not pay UK income tax because he was working abroad.

The CA held that the right not to be unfairly dismissed applies to dismissal from employment in GB. In most cases, this would not be difficult to determine. But in borderline cases, this was to be established by an assessment of all the circumstances of the employment in the particular case. This could include the employee's base of work and the residence of the parties, but the emphasis must be on the employment itself. In applying the test, there needed to be a degree of flexibility. A dismissal during a single short absence from GB, for example, would not usually exclude protection from unfair dismissal. The CA found that Mr Lawson was not employed in GB, and the ET had no jurisdiction to consider his claim of unfair dismissal.

■ Tamara Lewis is a solicitor in the employment unit at Central London Law Centre. Philip Tsamados is solicitor with Hodge, Jones & Allen, solicitors, London, and a volunteer adviser at Central London Law Centre. Contributions for the next update in November 2004 may be sent to Tamara Lewis at Central London Law Centre, 19 Whitcomb Street, London WC2H 7HA or to Philip Tsamados at Hodge, Jones & Allen, 31–39 Camden Road, London NW1 9LR.

1 See 122 EOR 19 for commentary.
2 The code is available at: www.eoc.org.uk/cseng/legislation/law_code_of_practice.pdf.
3 See 127 EOR 21 for commentary. The draft bill is available at: www.parliament.uk/bills/draftbills.cfm.

INQUESTS

Inquests and the right to protection of life

In this article **Stephen Cragg** explores the implications of two recent House of Lords cases, which may transform inquests into deaths in custody. He was counsel for the family in *Sacker*.

Background

■ **R (Middleton) v West Somerset Coroner**
[2004] 2 WLR 800, [2004] UKHL 10
■ **R (Sacker) v West Yorkshire Coroner**
[2004] 1 WLR 796, [2004] UKHL 11

These two cases were heard together by the House of Lords and judgment was given on 11 March 2004. Both cases concerned prisoners who had hanged themselves in jail, in circumstances where prison officers and healthcare staff might have done more to prevent these deaths.

The obvious role of the jury in such cases is to pass comment not just on the immediate cause of death, but also on the surrounding circumstances. One main reason for this is to identify what went wrong, and to seek to prevent recurrences.

However, standing in the way of such a sensible approach in both cases was the case of *R v Coroner for North Humberside ex p Jamieson* [1995] QB 1. In that case, the Court of Appeal took a restrictive view of the roles of the inquest and jury in investigating such deaths. Rule 36 of the Coroners Rules 1984 states that one of the questions to be answered by a jury is 'how' a person came by his/her death. The Court of Appeal in *Jamieson* ruled that this meant 'by what means' rather than the more expansive 'in what circumstances'.

The only opportunity for a jury to pass comment on such a death was if the coroner could be persuaded to leave, as a contributing factor, a verdict of 'neglect'. But this verdict was so tightly circumscribed that unless a prison officer or police constable, for example, exercised gross negligence in not preventing a person harming his/herself, then a coroner could not leave the option to the jury. The upshot was that, in many cases, members of a jury sat for days listening to a catalogue of errors and failings closely linked to the death. However, they were then denied the opportunity to draw any conclusions from the evidence that they had heard.

Middleton and *Sacker*

However, the advent of the Human Rights Act (HRA) 1998 offered an opportunity to reopen the argument, which has now been accepted by the House of Lords. In *Middleton*, the Lords affirmed that article 2 of the European Convention on Human Rights ('the convention'), right to protection of life, required that there be an effective, official investigation into a death involving the state. The Lords accepted that a coroner and jury at an inquest would often discharge this requirement. They also found that not only was there a duty to investigate a death, but that this extended to drawing conclusions from the investigation about the accountability of the state for the death.

To this end, the Lords found that there must be some mechanism for a jury to express its findings on the state's involvement at the end of the hearing. The Lords found that: 'The conclusion is inescapable that there are some cases in which the current regime for conducting inquests in England and Wales, as hitherto understood and followed, does not meet the requirements of the convention.' (para 32)

Noting that the convention had not been referred to in *Jamieson*, the Lords held that r36 should now be reinterpreted in cases where article 2 was engaged to require an investigation into 'by what means and in what circumstances' a person came by his/her death. The result of this small change, the Lords decided, was to give a jury the opportunity to comment on the facts surrounding a death, as well as the direct cause of death itself.

In *Sacker*, the Lords applied the principles above, and found that the jury should have been given the opportunity to express its view on the surrounding causes of death of a young woman in prison, and thus quashed the simple verdict of suicide.

Practical issues

In reaching these conclusions, the Lords were clearly concerned about the scale of the problem of suicide in prison, expressed as follows:

> *While the suicide rate among the population as a whole is falling, the rate among prisoners is rising. In the 14 years 1990–2003 there were 947 self-inflicted deaths in prison, 177 of which were of detainees aged 21 or under. Currently, almost two people kill themselves in prison each week. Over a third have been convicted of no offence. One in five is a woman (a proportion far in excess of the female prison population). One in five deaths occurs in a prison hospital or segregation unit. Forty per cent of self-inflicted deaths occur within the first month of custody.* (*Middleton*, para 5)

As a result, the statistics:

> *. . . highlight the need for an investigative regime which will not only expose any past violation of the state's substantive obligations already referred to but also, within the bounds of what is practicable, promote measures to prevent or minimise the risk of future violations.* (*Middleton*, para 5)

The new regime will apply to all cases where the state has an obligation to carry out an effective official investigation, under article 2, into a death. It will be especially applicable in cases involving deaths in custody, hospital and other situations where, arguably, the state – through its systems or its employees – could have done more to prevent a person's death.

The cases underline the importance that some coroners already place on investigating the circumstances of such a death fully. The biggest difference will relate to the role of a jury at the end of an inquest. The Lords commented as follows: '. . . it must be for the coroner, in the exercise of his discretion, to decide how best, in the particular case, to elicit the jury's conclusion on the central issue or issues.' (*Middleton,* para 36)

The Lords found that the following methods could be considered:
■ A narrative form of verdict in which a jury's factual conclusions are summarised briefly; and
■ Inviting a jury's answer to factual questions put by the coroner: for example, where and when the death took place; the cause or causes of such death; the defects in the system which contributed to the death; and any other factors which are relevant to the circumstances of the death.

It will be open to parties appearing or represented at an inquest to make submissions to the coroner on the means of eliciting a jury's factual conclusion.

The one example of a possible verdict relevant to a suicide in custody case, given by the House of Lords, was as follows: 'The deceased took his own life, in part because the risk of his doing so was not recognised and appropriate precautions were not taken to prevent him doing so.' (*Middleton,* para 45). Indeed, in the first prison suicide inquest after *Middleton* and *Sacker* (into the death of Kerry Lambourne at HMP Eastwood Park),[1] this was exactly the verdict reached by the jury on 12 March 2004.

Conclusion

Major reform of the inquest system is currently under consideration by the government. However, the judgments of the House of Lords in *Middleton* and *Sacker* now present a real opportunity for the inquest system to provide satisfaction for the families of people who die while in the care of the authorities, and to press home the need for important reforms to ensure there are fewer such deaths in future.

■ Stephen Cragg is a barrister at Doughty Street Chambers, London WC1.

1 Thanks to Marcia Willis-Stewart of Birnberg Peirce for the information.

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LEGISLATION UPDATER

CRIME

Criminal Justice and Court Services Act 2000 (Commencement No 12) Order 2004 SI No 780

This Order brings into force Criminal Justice and Court Services Act 2000 s57 (drug testing persons in police detention) within the Cambridgeshire, Leicestershire, Northumbria and West Midlands police areas.

The provision has already been commenced in the police areas of Nottinghamshire, Staffordshire and the metropolitan police district under SI No 2232/2001, the police areas of Bedfordshire, Devon and Cornwall, Lancashire, Merseyside, South Yorkshire and North Wales under SI No 1149/2002, the police areas of Avon and Somerset, Greater Manchester, Thames Valley and West Yorkshire under SI No 1862/2002 and the police areas of Cleveland and Humber under SI No 709/2003. In force 1 April 2004.

Crime (International Co-operation) Act 2003 (Commencement No 1) Order 2004 SI No 786

This Order brings into force the provisions of the Crime (International Co-operation) Act 2003, which are listed in articles 2 and 3, on 26 March 2004 and 26 April 2004, respectively.

Criminal Justice Act 2003 (Commencement No 3 and Transitional Provisions) Order 2004 SI No 829

This Order brings into force the provisions of the Criminal Justice Act (CJA) 2003, which are listed in articles 2,3 and 4, on 5 April, 1 May and 14 June 2004 respectively. The provisions include:

- Article 2(4) which ensures that a jury summons issued before the commencement of the provisions dealing with jury service in CJA Sch 33 is dealt with under the rules applicable at the time of issue; and
- Article 2(5) and (6) which relates to the commencement of ss325–327 of the CJA (arrangements for assessing etc risks posed by sexual or violent offenders).

Sexual Offences Act 2003 (Commencement) Order 2004 SI No 874

This Order brings the provisions of the Sexual Offences Act 2003 into force, on 1 May 2004, in so far as they are not already in force. Ss138 and 141 to 143 came into force on royal assent.

Crime (International Co-operation) Act 2003 (Designation of Prosecuting Authorities) Order 2004 SI No 1034

This Order designates prosecuting authorities for the purposes of s7(5) of the Crime (International Co-operation) Act 2003. S7(1) of that Act provides for any judicial authority listed in s7(4) to issue a request for assistance in obtaining outside the United Kingdom any evidence specified in the request for use in criminal proceedings or investigations in the United Kingdom. S7(5) provides that, in relation to England and Wales or Northern Ireland, a designated prosecuting authority may itself request such assistance.

In force 26 April 2004.

Magistrates' Courts (Crime (International Co-operation)) Rules 2004 SI No 1048

These Rules provide for the practice and procedure to be followed in magistrates' courts in England and Wales in connection with proceedings under the Crime (International Co-operation) Act 2003 Part 1. In force 26 April 2004.

EMPLOYMENT

Employment Zones (Amendment) Regulations 2004 SI No 1043

These regulations amend the Employment Zones Regulations 2003 SI No 2438, which make provision for jobseeker's allowance claimants to participate in an employment zone programme established by the Secretary of State in areas of Great Britain known as 'employment zones', to assist jobseekers to obtain sustainable employment.

In force 26 April 2004.

FAMILY

Advocacy Services and Representations Procedure (Children) (Amendment) Regulations 2004 SI No 719

The Adoption and Children Act 2002 imposes a duty on local authorities to provide advocacy services for certain categories of complainant under the Children Act (CA) 1989 representations procedure. It inserts into the Act a new section (s26A) which requires local authorities to make arrangements for the provision of assistance, including assistance by way of representation, to care leavers and children who make or intend to make representations using the procedures under ss24D and 26(3) of the Act.

Among other things, these regulations specify who may not provide assistance under these arrangements for a care leaver or child making, or intending to make, such representations (reg 3), and also require local authorities to provide information about advocacy services and to offer help in finding an advocate (reg 4).

In force 1 April 2004.

Child Benefit and Guardian's Allowance (Miscellaneous Amendments) Regulations 2004 SI No 761

These regulations amend the Child Benefit and Guardian's Allowance (Administration) Regulations 2003 (SI No 492/2003: 'the Administration Regulations') and the Child Benefit (General) Regulations 2003 (SI No 493/2003: 'the General Regulations').

Reg 2 amends the Administration Regulations to provide that a claim for child benefit or guardian's allowance, made on or after 6 April 2004, by a person who has claimed asylum and who is notified that he/she has been recorded as a refugee by the Secretary of State, and claims that benefit or allowance within three months of that notification, shall be treated as having been made on the date on which the claimant first claimed asylum.

Reg 5 makes minor corrections to reg 9 of the General Regulations, restoring the position in respect of entitlement to child benefit in the case of persons under the age of 19 who are receiving advanced education or training under a relevant training programme, to what it had been before 7 April 2003.

In force 6 April 2004.

HOUSING

National Assistance (Sums for Personal Requirements and Assessment of Resources) (Amendment) (England) Regulations 2004 SI No 760

These regulations make further amendments to the National Assistance (Assessment of Resources) Regulations 1992 ('the Assessment Regulations') The Assessment Regulations concern the assessment of the ability of a person to pay for accommodation arranged by local authorities under Part 3 of the National Assistance Act 1948.

In force 12 April 2004.

IMMIGRATION

Immigration (Restrictions on Employment) Order 2004 SI No 755

S8 of the Asylum and Immigration Act 1996 (the 1996 Act) provides that an employer commits an offence if he/she employs a person subject to immigration control who has reached the age of 16, if the employee has not been granted leave to enter, or remain in, the United Kingdom, or if his/her leave is not valid and subsisting or is subject to a condition precluding him/her from taking up employment.

S8(1) of the 1996 Act provides that the offence is not committed if the employee satisfies one of the conditions to be specified in an Order made by the Secretary of State. Article 3 specifies these conditions. The conditions are similar to those specified in Part I of the Schedule to the Immigration (Restrictions on Employment) Order 1996, which is revoked by this Order.

The condition specified in article 3(2) of the Order differs from that specified in para 2 of Part 1 of the Schedule to the earlier

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Order, in that it has been modified to reflect the changes to the immigration appeals system brought about by the Nationality, Immigration and Asylum Act 2002.

In force 1 May 2004.

Asylum Support (Amendment) Regulations 2004 SI No 763

These regulations, which come into force on 12 April 2004, replace the table in reg 10(2) of the Asylum Support Regulations 2000, as amended. They increase the total value, for any week, of asylum support in the form of vouchers redeemable for cash, or a cash payment, which may generally be expected to be provided under s95 of the Immigration and Asylum Act 1999, in respect of the essential living needs of a person or qualifying couple.

They increase the total value provided for a qualifying couple to £61.11 from £60.03; for a lone parent aged 18 or over to £38.96 from £38.26; for a single person aged 25 or over to £38.96 from £38.26; for a single person aged at least 18 but under 25 to £30.84 from £30.28; for a person aged at least 16 but under 18, except a member of a qualifying couple, to £33.50 from £32.90 and for a person aged under 16 to £42.27 from £38.50.

These regulations also revoke the Asylum Support (Amendment) (No 2) Regulations 2003.

Immigration Employment Document (Fees) (Amendment) Regulations 2004 SI No 1044

These regulations amend the Immigration Employment Document (Fees) Regulations 2003 (the 2003 Regulations). The 2003 Regulations impose a requirement that applications for different types of immigration employment document be accompanied by a specified fee and provide exceptions to this requirement. In these Regulations reg 2(3) replaces the original reg 5 of the 2003 Regulations with a new reg 5 that excepts from the fees requirement those applications for an immigration employment document that are made in respect of a national of a state which has ratified the Council Of Europe Social Charter (signed in Turin, 18 October 1961) or the Council of Europe Revised Social Charter (signed in Strasbourg, 3 May 1996).

In force 1 May 2004.

INQUESTS

Coroners (Amendment) Rules 2004 SI No 921

S8 of the Coroners Act 1988 gives the coroner power to summon a jury in a case where an inquest is to be held with a jury. Rule 51 of the Coroners Rules 1984 (the 1984 Rules) makes provision for excusal from jury service. This provision is, in many respects, similar to the arrangements for excusal from jury service in the Crown Court, the High Court and county courts under s9 of the Juries Act 1974 (the 1974 Act) which has been amended by paras 3 to 6 of Schedule 33 to the Criminal Justice Act 2003.

The changes made by these Rules are intended to amend the 1984 Rules so that, as far as appropriate, they reflect the arrangements for excusal from jury service which will exist under the amended provisions of the 1974 Act.

In force 5 April 2004.

LEGAL AID

Community Legal Service (Scope) Regulations 2004 SI No 1055

These regulations amend Schedule 2 to the Access to Justice Act 1999 so as to exclude from the scope of the Community Legal Service (subject to any directions made under s6(8) of that Act) help in relation to attending an interview conducted on behalf of the Secretary of State with a view to his reaching a decision on an asylum claim.

In force 1 April 2004.

POLICE

Independent Police Complaints Commission (Investigatory Powers) Order 2004 SI No 815

This Order gives the Independent Police Complaints Commission (the IPCC), its officers and employees powers under Part 3 of the Police Act 1997 (the 1997 Act) and Parts 2 and 4 of the Regulation of Investigatory Powers Act 2000 (the 2000 Act), equivalent to those exercisable by the police.

Article 2 modifies the 1997 Act and article 3 modifies the 2000 Act.

In force 1 April 2004.

Police Reform Act 2002 (Commencement No 8) Order 2004 SI No 913

This Order brings into force in England and Wales the provisions of the Police Reform Act 2002, set out in article 2, on 1 April 2004.

The provisions of that Act, set out in article 3, are brought into force on 30 April 2004 in England.

Independent Police Complaints Commission (Transitional Provisions) (Amendment) Order 2004 SI No 1092

This Order rectifies an omission in the Independent Police Complaints Commission (Transitional Provisions) Order 2004 (SI No 671/2004) which makes transitional provision in connection with the coming into force of a new system of handling complaints against the police.

This Order provides that the Independent Police Complaints Commission will take over the supervision of other matters which had been voluntarily referred to the Police Complaints Authority (the Authority) by a police authority or chief officer of police, as well as the supervision of complaints which had previously been referred to the Authority (as is already provided for in that earlier Order).

Where such a matter has already been dealt with by the Police Complaints Authority, it may not then be recorded as a complaint or a conduct matter under the new regime.

In force 15 April 2004.

PRACTICE AND PROCEDURE

Civil Procedure (Modification of Supreme Court Act 1981) Order 2004 SI No 1033

This Order amends the Supreme Court Act 1981, and in particular ss29 and 31, to provide that the orders of mandamus, prohibition and certiorari are to be known instead as mandatory, prohibiting and quashing orders, not just in that Act but in any primary or secondary legislation extending to England and Wales.

S31(4) is amended to give the High Court, on an application for judicial review, the power to award restitution or the recovery of a sum due, in addition to the existing power to award damages.

In force 1 May 2004.

Crown Court (Amendment) Rules 2004 SI No 1047

These Rules amend the Crown Court Rules 1982 (the 1982 Rules) to provide for the practice and procedure to be followed in the Crown Court in England and Wales in connection with proceedings under Part 1 of the Crime (International Co-operation) Act 2003 (the 2003 Act).

The rules in the Schedule to these Rules replace, subject to the savings in rule 1(3), rules 30 to 32 of the 1982 Rules, as inserted by the Crown Court (Amendment) Rules 1991. The rules that have been replaced concern provisions in the Criminal Justice (International Co-operation) Act 1990 that have been replaced by ss3, 4, 7 and 15 of the 2003 Act.

In force 26 April 2004.

Courts Act 2003 (Commencement No 5) Order 2004 SI No 1104

This Order is the fifth Commencement Order made under the Courts Act 2003 and brings into force, on 1 May 2004, various provisions and repeals relating to –

Part 8 (MISCELLANEOUS): Alteration of place fixed for Crown Court trial (s86); appeals to Court of Appeal: procedural directions (s87); discharge of fines by unpaid work: regulations to prescribe the hourly sum (s97 and para 1(2) of Schedule 6); Official Solicitor: Northern Ireland (s103); alteration of place fixed for Crown Court trial: Northern Ireland (s104); fees: Northern Ireland (s106).

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