OCTOBER 2014 Journal of Legal Action Group

Legal Action

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HUMAN RIGHTS

RIGHT TO LIFE

RIGHT TO LIBERTY AND SECURITY

RIGHT TO A FAIR TRIAL

RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE

FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

FREEDOM OF EXPRESSION

FREEDOM OF ASSOCIATION

RIGHT TO MARRY

PROTECTION OF PROPERTY

RIGHT TO INSTRUCTION

RIGHT TO FREE ELECTIONS

... caring?

PAULINE THOMPSON MEMORIAL LECTURE:
'CARING AS A HUMAN RIGHT?'

LAG

LAG
the access to justice charity

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

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Published by LAG Education & Service Trust Ltd, a registered charity incorporated in England (1095065).
3rd Floor, Universal House, 88–94 Wentworth Street, London E1 7SA

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

Legal Action citation: October 2014 *Legal Action* 2

A legal training fault-line?

The Solicitors Regulation Authority (SRA) introduced the SRA Training Regulations 2014 – Qualification and Provider Regulations in July to replace the training contract with a requirement that, to qualify as a solicitor, an individual must complete a 'period of recognised training' with a firm, partnership or other body authorised by the SRA. The SRA wants organisations that train solicitors to move away from training contracts to a skills-based training programme.

To gain experience to meet the criteria contained in the SRA's nine practice skills standards, trainees will have to undertake both contentious and non-contentious work, including advocacy and oral presentation, and case and transaction management. The Law Society believes that the downside of a skills-based approach is that trainee solicitors could qualify by confining their experience to a narrow area of work and lose out on the breadth of experience they would have gained under a training contract.

Traditionally, under a training contract, trainees undertake 'seats' in three or four areas of law. The system of seats is expensive for firms as, usually, after six months in one department, a trainee moves to his/her next seat, ie, just at the point where s/he would be likely to become productive and generate income for the firm.

LAG believes that when it works properly, the system of seats gives trainee solicitors comprehensive knowledge and experience, beyond the field in which they choose to specialise eventually, on which they can draw in their professional life. The system is also more likely to give trainees the ability to switch between different areas of law during their career.

However, it is likely that the new regulations may make it easier for paralegal staff working in firms to qualify as solicitors. Many firms rely on paralegals to undertake casework supervised by a solicitor. While these staff are often highly skilled and experienced, paralegals are usually paid less than trainee solicitors working in the same practice because they lack a professional qualification. The SRA's new regulations may also make it easier for paralegals' experience to count towards training for a qualification; although it was common for paralegals to offset their work experience against their training contract and obtain a six-month reduction in its duration. The Chartered Institute of Legal Executives (CILEx) points out that the majority of its 20,000 members are already working as paralegals while undertaking the training to become legal executives. LAG hopes that the new SRA regulations will lead to more flexibility in the process of qualifying as a solicitor akin to that which exists in relation to the CILEx qualification.

LAG spoke to the Institute of Paralegals (IOP) about the new SRA regulations, and it gave a completely different perspective on the issue. While the IOP believes that some paralegals working in firms may be more likely to be able to qualify as solicitors, it says that this is neither the aspiration of the vast majority of IOP members nor in the interests of most of the firms that employ them.

Setting standards: the future of legal services education and training regulation in England and Wales, the June 2013 Legal Education and Training Review report where the proposals for the practice skills standards were first trailed, estimated that 215,000 jobs would be needed in the legal sector by 2020. CILEx believes that many of the new jobs created in the sector will be for paralegals, and they should be given opportunities to obtain a professional qualification. IOP believes that the predicted growth in the legal services market will come from non-regulated firms such as will writers and paid McKenzie friends.

There is no doubt that new ways of providing legal services should be encouraged. We acknowledge that some of these services, while not owned and supervised by solicitors, can play an important role in serving the public. After all, the largest paralegal service, Citizens Advice Bureaux (CABx), has been doing so for 75 years. However, like CABx, such services should work to ethical standards and have in place safeguards such as professional indemnity insurance.

More flexibility in the provision of training to the lawyers of the future is important to ensure diversity. It is also important to give paralegal staff the opportunity to qualify as solicitors if they should wish to do so. However, LAG's main concern about the anticipated expansion in the legal services job market is that it will not, for the most part, create employment opportunities for advisers – qualified or otherwise – in the areas of law of benefit to communities that are poor or disadvantaged; however, that discussion will have to be the subject of a future editorial.

Crime lawyers JR success

A judicial review brought by criminal legal aid practitioners against the government's plans to tender for police station and magistrates' court work has been successful. The challenge was brought by the London Criminal Courts Solicitors' Association and the Criminal Law Solicitors' Association, with financial backing from the Law Society (see September 2014 *Legal Action* 4). In *R (London Criminal Courts Solicitors' Association and Criminal Law Solicitors' Association) v Lord Chancellor* [2014] EWHC 3020 (Admin), 19 September 2014, the court found that the Lord Chancellor had failed to consult properly on two reports about the likely impact of the proposed contract round.

The court quashed the government's plan to reduce the number of duty contracts by roughly two-thirds, from around 1,600 to 525 contracts. According to the judgment, the government needed to consult on the two reports by accounting firms KPMG and Otterburn Legal Consulting,

Joy Merriam, a criminal practitioner and chairperson of the Law Society Access to Justice Committee, described the judgment as a 'triumph of the individual against the might of the state', and told LAG she believes that 'the current proposals on criminal legal aid will devastate the supplier basis and affect access to justice for those accused by the state'.

Subsequently, on 24 September, the Ministry of Justice (MoJ's) opened 'Transforming legal aid: crime duty contracts', an online-survey consultation on the reports undertaken by the accounting firms (including the MoJ's response to the analysis), the findings/assumptions used in their analysis, as well as the number of duty provider contracts that should be tendered in the imminent procurement exercise.

Also on 19 September, Rights of Women (RoW) was successful at the permission stage in a judicial review challenging the rules on qualifying for legal aid in domestic violence cases. Emma Scott, director of RoW, told LAG that it was 'an important step in holding the government to account on their promise that family law legal aid would remain available for victims of domestic violence'. She believed that the current regulations are 'simply too restrictive' and do not reflect 'the government's own definition of domestic violence'.

■ See: www.judiciary.gov.uk/judgments/the-queen-on-the-application-of-lccsa-and-clsa-v-the-lord-chancellor/.

■ For more information, visit: https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-crime-duty-contracts. The consultation closes on 15 October 2014.

Fall in ET cases continues

Figures released last month by the Ministry of Justice (MoJ) show a continuing decline in employment tribunal (ET) cases: *Tribunals statistics quarterly: April to June 2014*.

In the three months to June 2014, a total of 3,792 single claims were brought, which was 70 per cent fewer cases than in the same period last year. The MoJ attributed the reduction to the introduction of fees in July 2013. It also states that the introduction of the early conciliation procedure from April this year has contributed to the fall in cases (page 8).

Justice minister, Shailesh Vara, argued that taxpayers should not have to pay for the ET Service, which costs £74m to run. In contrast, Shadow Business Secretary, Chuka Umunna, in a speech to the TUC Congress last month, described the fees as a 'barrier to workplace justice' and pledged to abolish them if Labour returns to government after the general election.

UNISON, the trade union, challenged the introduction of the fees in judicial review proceedings on the ground of their discriminatory impact (see *R (UNISON) v Lord Chancellor and Equality and Human Rights Commission (intervener)* [2014] EWHC 218 (Admin), 7 February 2014; June 2014 *Legal Action* 4). In a Court of Appeal hearing on this case, which took place last month, the MoJ agreed that in the light of the latest figures a new hearing should take place as soon as possible.

■ *Tribunals statistics quarterly: April to June 2014* is available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/352914/tribunal-statistics-quarterly-april-june-2014.pdf.

Barristers report legal aid caseload nose-dive

A survey of barristers undertaken by the Bar Council found that just over 65 per cent undertook less family legal aid work and around 55 per cent undertook less work in civil legal aid. Just over 61 per cent reported that there was an increase in members of the public expressing difficulty in accessing legal advice and representation.

The findings formed the centrepiece of a report on the impact of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 that was published last month. The report highlights barristers' concerns about the adverse impact of the LASPO Act on the public's ability to access advice and representation to enforce their legal rights.

■ *The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): one year on. Final report* is available at: www.familylaw.co.uk/system/redactor_assets/documents/1311/LASPO_One_Year_On_-_Final_Report__September_2014_.pdf.

Interim payments for criminal legal aid

The Ministry of Justice (MoJ) has made some small concessions on fees in criminal cases through Criminal Legal Aid (Remuneration) (Amendment) (No 2) Regulations 2014 SI No 2422. The regulations, which came into force on 2 October 2014, make changes to interim payments for legal aid and reintroduce graduated fees for trials that do not go ahead (known as 'cracked trials').

Law Society president, Andrew Caplen, welcomed the changes, but warned that 'the scale of the fee cuts and the impact of the contract changes being introduced mean that many of our members will regard this as too little, too late to save their businesses'.

Val on the move

Val Williams, editor of *Legal Action*, is leaving after 19 years at LAG. She has been appointed as editor of the Chartered Institute of Legal Executives' (CILEx) monthly magazine, the *CILEx Journal*.

LAG's director, Steve Hynes, said: 'Val is much loved and admired by everyone at LAG and she will be greatly missed. LAG's staff, authors and board members would like to thank her for her marvellous work and wish her the best of luck and success in the future.'

Nic Madge, a circuit judge and long-standing co-author of *Legal Action*'s 'Recent developments in housing law' articles, said: 'It's impossible to imagine what it will be like writing for the magazine without Val being there to edit material. I will miss her terribly. Her dedication to the magazine and to her authors defies description. Her departure will be a huge loss to LAG.'

news feature

Low Commission welfare rights survey: decisions and redress

James Sandbach, campaigns and research manager at the Low Commission, writes:

Our systems for reviewing, challenging or correcting individual state decisions on citizen's entitlement, for example, benefit claims, are going through profound change. Reforms to judicial review, legal aid scope, tribunal procedures and internal reviews, alongside developments in public services online technologies, are changing the landscape of how citizens can get mistakes put right when dealing with public authorities. The range of legal and non-legal redress routes – usually referred to as the 'administrative justice system' – extends from decision-making subject to internal reviews, complaints to public sector ombudsmen and appeals to courts and tribunals.

Increasingly, government is placing confidence in 'internal review' processes, rather than external and independent review and appeal procedures. The clearest example of this approach in practice is the introduction of 'mandatory reconsideration' in welfare decisions (under the Welfare Reform Act 2012). But just how robust is this internal review route? How can we ensure that reviews take place thoroughly, at arms length from decision-makers, and operate on the basis of objective fairness? What information and advice do claimants now need to get a fair hearing, and how accessible are second-stage appeal and tribunal procedures as a result of these changes?

The Low Commission is undertaking a survey on these issues, drawing on front-line evidence from welfare rights advisers. It would be hugely helpful for all professionals, volunteers and advisers involved in welfare rights work to complete our short survey (see below).

The issue is very important, not just for the 'rule of law', but for any large service-delivering organisation, whether public or private, it is about ensuring that 'customers' receive what they are entitled to and get a good service, and that there is accountability, feedback and learning when things go wrong. In the private sector, the best companies take complaints, including those progressed through ombudsmen, arbitrators or the courts, as a valuable source of market intelligence and customer feedback, and are sensitive to reputational impact. Yet public sector leaders all too often fail to learn how to treat complaints and appeals as important sources of intelligence and learning about what is really happening on the front line. And, in an increasingly mixed economy of contracted-out or privately operated public services, it can be difficult to know exactly where accountability lies, and what checks and balances operate over millions of decisions that affect people's lives. This is especially the case with welfare benefits decision-making.

■ The survey can be completed at: www.surveymonkey.com/s/DX2NG7S.

news feature

Update on the All-Party Group on Legal Aid

Eleanor Sanders, project worker to the All-Party Group (APG) on Legal Aid, writes:

The APG held its latest meeting on 3 September 2014 to consider 'Where to turn now for legal advice? Assisting constituents after the cuts to legal aid'. The meeting took the form of a drop-in breakfast briefing and was a good opportunity for MPs and peers to meet representatives from across the legal aid sector to discuss their concerns and consider the future of advice provision. A key message was the need for a genuine political impetus to improve the system.

Helping constituents after the cuts

The meeting was addressed by an excellent panel of speakers who focused on the effects of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 and possible solutions to the advice deficit caused by the legal aid cuts. Karl Turner MP, chairperson of the APG, commented that his constituents found that they had nowhere to turn for help with their legal problems. He added that MPs were not best-placed to offer individuals specialised legal advice.

Kate Green MP called the situation post the LASPO Act an 'absolute disgrace' which had 'shut out the poorest and most disadvantaged' from accessing legal assistance. She listed the services in her area that had either closed or had to cut back vital (and unreplaced) advice provision.

Andy Slaughter MP said that currently the government was reaping the problems sown by the LASPO Act. Following the next general election in May 2015, the incoming administration would face the difficult task of 'restoring a system of access to justice that would be worthy of the name'.

Clients in search of legal advice

Two more speakers then offered valuable insights from their own experience of assisting clients. Jenny Beck, co-chairperson of the Legal Aid Practitioners Group and director of family law, head of professional practice at Co-operative Legal Services, spoke of the struggle faced by clients trying to get help and by those trying to assist them.

Ruth Hayes, director of Islington Law Centre® and vice-chairperson of the Law Centres Network, gave a vivid account of the desperation felt by individuals who cannot get support. She reported that some Law Centre clients had not eaten for days and were getting by without a regular income; many felt that they were living precarious lives, only a few steps away from losing everything and becoming homeless.

Lord Low discussed the shape a reformed system might take. He outlined the recommendations of the report from the Low Commission on the Future of Advice and Legal Support. The key points were that there should be a minister with cross-departmental responsibility for overseeing a new strategy for advice on social welfare law, and that funding should be sought not just from government, but from diverse, and perhaps innovative, sources such as a levy on payday loan companies.

Legal aid cuts impact statement.

This column documents evidence of the effect of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012. Readers are invited to send in relevant information for publication. Submissions of up to 500 words will be published in full and, on request, anonymised. E-mail: fbawdon@lag.org.uk using the message title 'Legal aid cuts impact statement'.

The secret diary of a legal aid solicitor: the day-to-day story of a high street practitioner

An anonymous legal aid solicitor suspects that the community action which is being deployed to halt the closure of the local library would not be present to save the high street's solicitors' firms from shutting down because of the cuts.

Last night I attended a meeting at a local church in aid of the 'Save the library' campaign. My local library has been under threat from property developers for years; fortunately, a concerted, energetic and well-supported campaign by local people has ensured that the developers get some of their 'Yuppie flats', but they give us some space for a community library. Through gritted teeth, it is true; however, we still get our space and that is a victory for the campaign.

What impressed me was the fact that 300 people would turn up for a meeting (with the first episode of BBC 1's 'Strictly Come Dancing' as competition for bums on seats) and not only speak and contribute, but buy raffle tickets to support the cause and give of their very valuable time.

How many of the public (let's forget about lawyers for the moment), would turn up to a meeting to support a solicitors' firm or barristers' chambers? Sadly, I suspect that it would be very few: libraries capture the imagination, lawyers do not.

Yet, like the Siberian tiger, the Arabian oryx and the Iberian lynx, legal aid lawyers are looking extinction in the eye. We are a very precarious species and becoming rarer all the while. The number of firms doing legal aid is dropping constantly and will continue to go down in the coming years.

My legal aid revenues are beginning to diminish as, of course, they had to given the rigours of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Yet, the rigours of legal aid audits are even more extreme: the paperwork we have to plough through is much more difficult and time consuming.

As I write this column, I am told that all the paper forms are about to be torn up, and we will be making legal aid applications online 'quite soon'; however, because of difficulties in the pilot in the North East, nobody knows when this project will go live. There is a fear that the new system will make matters more difficult rather than easier.

Some of my younger legal aid lawyers are desperately looking for a way out: seeking jobs with local authorities or looking to retrain into conveyancers or commercial litigators. No one wants to stay and make a long-term career in the legal aid business.

And that is where we are looking at a very serious problem indeed. It may not be fast upon us, it may take ten years to materialise, but sooner or later the current crop of partners are going to retire and there will be nobody queuing up to replace them: there will be a void and, sadly, a void that will not be replaced.

All of a sudden, the greatest legal aid system in the world will wither and die. Perhaps then the community, the public and those who need a lawyer will realise that there was a cause they should have been fighting for.

Impact of legal aid changes on children revealed

The first in-depth examination of the impact of the April 2013 legal aid changes on children was published last month by the Office of the Children's Commissioner for England in a 'child rights impact assessment'. The research included interviews with children and young people, desk-based research and legal analysis. Key findings on the changes include the following:

Although 'exceptional funding' was meant to be available in cases where failure to fund could infringe the applicant's rights under the Human Rights Act 1998 or under EU law, in practice this requires complex preparatory work, impractical for a child without a solicitor.

- Only 57 cases were granted exceptional funding compared with the 3,700 the Ministry of Justice expected.
- In the family courts, the number of private cases:
  - —where both parties were represented fell from 46 per cent to 30 per cent;
  - —where neither party was represented rose from 12 per cent to 22 per cent;
  - —where one party was unrepresented rose from 42 per cent to 48 per cent.

Dr Maggie Atkinson, Children's Commissioner for England, said: 'The human cost of Legal Aid reforms is clearly immense. Behind the evidence in our research are countless heart rending stories of children and vulnerable young adults whose lives have been seriously affected by their inability to access legal representation. This means, in effect, that they cannot seek, let alone receive, justice.'

■ *Legal aid changes since April 2013: Child rights impact assessment*, and *The impact of legal aid changes on children since April 2013: Desk-based research and Participation work with children and young people* are available at: www.childrenscommissioner.gov.uk/content/publications. Press release 'Children's Commissioner's research shows vastly underestimated impact of Legal Aid changes on children', 24 September 2014, available at: www.childrenscommissioner.gov.uk/content/press_release/content_554.

No Mad Laws campaign

The No Mad Laws campaign aims to highlight the disastrous effect that the coalition government's legal aid and judicial review reforms will have on Gypsy and Traveller communities. The campaign's steering group describes the impact of these changes.

Judicial review

Most judicial review claims are settled successfully before the application for permission is heard. Yet the government has now brought into force provisions which mean that legal aid providers will not be paid on a judicial review claim unless either permission is granted, or the matter is settled before permission without costs being awarded to the claimant and then the Legal Aid Agency exercises its discretion and decides to pay the provider. Thus, legal aid providers will have to take such claims at risk and are unlikely to do so unless the merits of the claim seem very good. Gypsies and Travellers may need to challenge unlawful decisions by local authorities concerning, for example, stop notices, direct action against a site without planning permission or eviction of an unauthorised encampment.

Evictions of unauthorised encampments

There is a severe shortage of lawful caravan sites for Gypsies and Travellers in England and Wales: many still have to resort to unauthorised encampments on public land or the roadside. Before the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 came into force in April 2013, a Gypsy or Traveller camped on public or local authority land, who wished to challenge the legality of the public body's decision to evict, could do so by defending possession proceedings in the county court.

However, the LASPO Act excluded trespassers such as Gypsies and Travellers residing on unauthorised encampments from scope. As a consequence, Gypsies and Travellers who have reason to defend possession proceedings on the ground that the decision to evict was unlawful, now have to lodge a judicial review claim in the High Court and seek a stay of the county court action; this increases delay and expense, assuming of course that they can find a legal aid provider who is still willing to take on such a case.

Mobile Homes Act 1983

In 2011, the Westminster Government complied with the European Court of Human Rights' judgment in *Connors v UK* App No 66746/01, 27 May 2004, and gave Gypsies and Travellers living on local authority caravan sites security of tenure by amending the Mobile Homes Act (MHA) 1983 so that it covered such sites. The MHA as amended also gave other important rights concerning, for example, written statements, pitch fee reviews, the resiting of mobile homes, the right to have a residents' association, etc. In 2013, the Welsh Government followed suit. However, when the LASPO Act came into force, it restricted the scope of legal aid to possession actions and serious disrepair cases with the result that Gypsies and Travellers living on public run sites are unable to take action to enforce their new rights.

Exceptional funding

During the passage of the LASPO Bill through parliament, the government placed great emphasis on the provision of exceptional funding when defending its proposals to limit the scope of legal aid. The government stated that exceptional funding was, in part, intended to ensure that the failure to provide advice and representation to someone would not result in a breach of article 6 (right to a fair hearing) of the European Convention on Human Rights, and that it would act as a vital safety net.

However, Ministry of Justice statistics show that the overwhelming majority of exceptional funding claims are refused.*

It is absolutely clear to us that, in many of these cases, article 6 is breached because clients are simply unable to represent themselves at court hearings and there is no equality of arms.

Campaign recommendations

- The legal aid regulations relating to the payment for work done on judicial review claims pre-permission should be withdrawn and legal aid should be reinstated for judicial review.
- Trespassers should be brought back within the definition of 'loss of home' for the purposes of legal aid.
- As proposed by the Low Commission on the Future of Advice and Legal Support, in its report, *Tackling the advice deficit. A strategy for access to advice and legal support on social welfare law in England and Wales*, housing law should be brought back within scope for legal aid and there should be an urgent radical overhaul of the provision of exceptional funding.

**Ad hoc statistical release: legal aid exceptional case funding application and determination statistics: 1 April 2013 to 31 March 2014*, April 2014, available at: www.gov.uk/government/statistics/ad-hoc-statistical-release-covering-exceptional-case-funding-in-legal-aid-statistics.

- The campaign's petition is available at: http://you.38degrees.org.uk/petitions/no-mad-laws.
- The No Mad Law campaign steering group comprises: Cathay Birch, Gypsy campaigner, Jo Gregson, South West Law Solicitors, Chris Johnson, Community Law Partnership, Dr Simon Ruston, planning consultant and Marc Willers QC, Garden Court Chambers.

Justice Committee holds second LASPO Act evidence session

On 2 September the Justice Committee, chaired by Sir Alan Beith, heard its second evidence session about the impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 as part of its ongoing inquiry (see June 2014 and September 2014 *Legal Action* 8 and 6 respectively). The witnesses were as follows:

- Dave Emmerson, co-chairperson of legal aid committee, Resolution;
- Jane Robey, director, National Family Mediation;
- Susan Jacklin QC, chairperson, Family Law Bar Association;
- Nicola Jones-King, co-chairperson, Association of Lawyers for Children;
- Clare Laxton, public policy officer, Women's Aid;
- Emma Scott, director, Rights of Women; and
- Phillippa Newis, policy officer, Gingerbread.

- The report of the second oral evidence session is available at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/impact-of-changes-to-civil-legal-aid-under-laspo/oral/12309.pdf.
- The report of the first oral evidence session is available at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/impact-of-changes-to-civil-legal-aid-under-laspo/oral/11320.pdf.

Luke Clements, Cerebra Professor of Law and director of the Centre for Health and Social Care Law, University of Cardiff, gave the inaugural Pauline Thompson memorial lecture at the Law Society last month. Pauline, who died in January this year, was co-author with Luke of LAG's *Community Care and the Law*. She was, until 2011, on the editorial board of LAG's *Community Care Law Reports*. This is an abridged version of the lecture. The full text is available at: www.lag.org.uk.

Caring as a human right?

Lucy Scott-Moncrieff, the former President of the Law Society, welcomed Pauline's many family, friends and colleagues to the event. Before the lecture, Stephen Knafler QC paid a moving tribute to Pauline, which is reproduced in full.

Stephen Knafler QC:

Ladies and gentlemen, colleagues, friends and family of Pauline, my name is Stephen Knafler and, on behalf of the Legal Action Group, I am very privileged to welcome you to the Pauline Thompson memorial lecture: 'Caring as a human right?' Professor Luke Clements will deliver that lecture in just a few minutes, but first I wanted to express, on behalf of Legal Action Group, our deep respect, admiration and love for Pauline and the valuable work that she undertook for many years.

For a barrister such as myself, one of the first things that springs to mind about Pauline's work is *Community Care and the Law*, the community care practitioners' authoritative, must-have book, on which Pauline and Luke collaborated in recent years. I personally have two copies, one at work and one at home quite close to my bed for when those nagging doubts arise in the middle of the night. When one imagines Luke's voice or Pauline's, saying some of the words in that book, those nagging doubts are immediately laid to rest. But Pauline's joint authorship of that mighty tome is just one aspect of the important and influential figure that she became in the community care world.

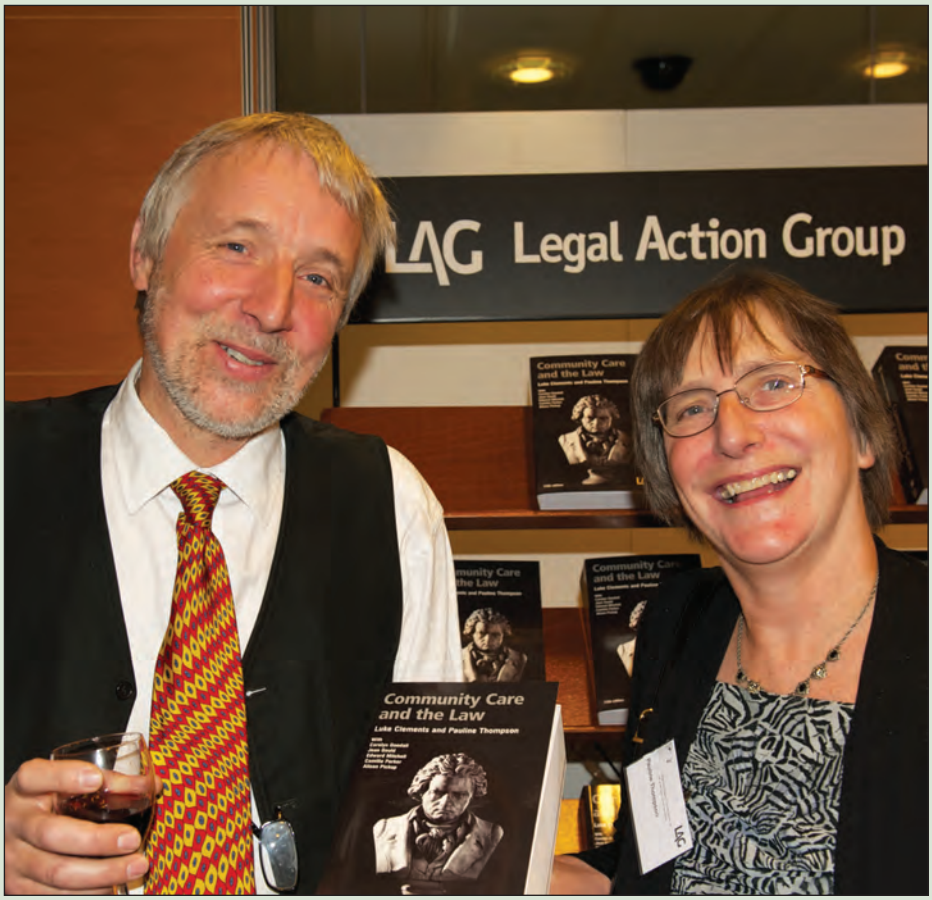
In addition to the social work and advisory work that dominated Pauline's early career, she also came to write the *Paying for Care Handbook* and the *Disability Rights Handbook*, was a dedicated, committed policy officer for Age Concern, joined the editorial board of the *Community Care Law Reports* some 17 years ago, when they first began, which is when I first got to know her and was a regular trainer for the Legal Action Group. How Pauline fitted all of this in with her singing, her bird-watching, her travelling and her photography and so on is a marvel, and I think the clue may lie in her seemingly inexhaustible supply of wonderful, positive energy. There is a particularly resonant passage in LAG's obituary for Pauline:

Her persistence led to the revocation of the liable relative rule, which Pauline demonstrated had forced spouses into poverty. She was alert to any opportunity to make a difference; no consultation opportunities escaped her. For instance, Pauline worked determinedly to improve the NHS continuing healthcare framework and, as the lead for the Making Decisions Alliance, to influence the passage of the Mental Capacity Act 2005. She always knew what was going on, from case-law developments, through every policy initiative and ombudsman decision. Pauline networked like no one else; even from her hospice bed, she joked that she was networking to ensure that people from different parts of her life had got to know each other so that we wouldn't be strangers at her memorial service.

Understandably, and quite rightly, Pauline was awarded the OBE in 2010 in recognition of her achievements. It is a tribute to Pauline's qualities as a person and as a protagonist in the community care world that so many have made it here tonight, particularly with the threat of a lecture all about law to follow. Inevitably, not all who wish to come were able to, and I have been given just a couple of messages to read out.

Jane Campbell, Baroness Campbell of Surbiton, has written to say how sorry she is not to be able to attend the lecture. She sends her best wishes. She worked with Pauline during the early years of the Independent Living Fund and says that Pauline was a great inspiration, she's sorely missed. Sally Greengross, Baroness Greengross, former Director General of Age Concern, has said: 'Sadly I'm abroad but would have loved to have come. Pauline was a remarkable woman and this is a very fitting tribute to her work.'

Pauline will be greatly missed at the Legal Action Group and at the *Community Care Law Reports* just as much as elsewhere, not just for her seemingly inexhaustible supply of energy, know how and a willingness to help, but because she was so nice, so good humoured and so caring. In all the 17 years that I knew her, whilst her passionate commitment to the plight



LEGAL ACTION GROUP

Luke and Pauline pictured at the reception to celebrate the launch of the fifth edition of their book Community Care and the Law. *The event was also held to mark Pauline's retirement as its co-author.*

of vulnerable individuals always shone through, and I do mean always, I never once heard her say anything unkind even about the government, even about lawyers. She never talked down to anybody, even us lawyers, although the temptation must have been strong sometimes. She was learned, wise, good humoured and tolerant and I think that the title of Luke's talk, 'Caring as a human right?', very much reflects the woman that I knew.

Her colleagues and friends at LAG will remember her as an inspiration, as a standard to be achieved and with abiding love for the rest of our lives. Thank you.

Luke Clements (abridged version):

Carers are the subject of my talk – specifically people caring on an unpaid basis for elderly, ill and disabled people – but in a wider context (and not addressed this evening) carers generally – carers of children and paid carers. In this talk I argue that carers will be the next group to acquire protected status: that their historic moment has come. This proposition raises many questions – which I will attempt to answer – not least the historical upheaval that is precipitating this belated recognition of their rights.

Is it really feasible to suggest that [carers] can expect to be the objects of human rights protection: that caring can be seen as a 'universal human right' and in any event what would be the benefit of such protection? There are many reasons why recognising the 'right to care' as a human right would make a practical difference. In the current discussion, it can be said that 'universal human rights' are one of the few forces that can withstand neoliberal demands – and this is of course why the mass media is, in general, so uniformly hostile to the human rights discourse.

Neoliberalism is obsessed with the 'making a financial case': the dominance and unbuckable nature of markets. One can, of course, make a very strong economic case for slavery and for the institutionalising of disabled people, but these options are not acceptable state policies since they would require a violation of fundamental human rights.

Where then would the right to care be located? Caring could be seen as the right to associate or, indeed, as a form of expression as the human touch is as close as we can get to direct expression. Most probably, however, the right is best located within the broad embrace of the right to private and family life (European Convention on Human Rights article 8, International Covenant on Civil and Political Rights article 17 and American Convention on Human Rights article 11). In the European context, this is particularly so given its expansive conceptualisation by the Strasbourg Court: embodying the notion of dignity and of non-interference by the state of an individual's relations with other human beings – not treating people adversely because they choose to care or creating systems that condemn them to penury and ill-health (*Botta v Italy* (1998) 26 EHRR 241).

R (A and B) v East Sussex CC (No 2) [2003] EWHC 167 (Admin); (2003) 6 CCLR 194 concerned the competing rights of carers and disabled people in the context of a manual handling dispute. In his analysis of the case, our national treasure (now) Lord Justice Munby observed:

> *If article 8 protects [the disabled persons'] physical and psychological integrity – and it plainly does – then equally article 8(2) must … protect their carers' physical and psychological integrity. And if article 8 protects [the disabled persons'] dignity rights – and in my judgment it does – then equally article 8(2) must protect their carers' dignity rights* (para 118).

Article 8 of the European human rights convention was also held to be relevant in *R (Bernard) v Enfield LBC* [2002] EWHC 2282 (Admin); (2002) 5 CCLR 577, where a local authority was held to have failed to take positive measures to enable the disabled person and her carer 'to enjoy, so far as possible, a normal private and family life' (para 32).

There are, in addition, many human rights provisions of direct applicability to the right to care and the rights of carers, for example:

- The obligation in … Convention on the Rights of Persons with Disabilities article 28(2)(c) that states provide support for persons with disabilities 'and their families'.
- General Comment 5 of the Committee on Economic, Social and Cultural Rights (1994), which stresses the importance of financial support for 'individuals (who are overwhelmingly female) who undertake the care of a person with disabilities'.
- General Comment 9 of the Committee on the Rights of the Child (2007), which

stresses the need for the special care and assistance required by family members caring for disabled children.

- The obligations in the Convention on the Elimination of All Forms of Discrimination against Women on states to 'enable parents to combine family obligations with work responsibilities and participation in public life' (article 11(2)(c) and see article 16).
- The Council of Europe Recommendation Rec (2006)19 which calls for 'the removal of barriers to positive parenting, whatever their origin' and for employment policies that 'allow a better reconciliation of family and working life' (3(ii)).

Last year Magdalena Sepúlveda Carmona, the then UN General Assembly's Special Rapporteur, filed a report 'focusing on women caregivers' in which she bemoaned the lack of attention paid by human rights advocates and monitoring bodies to the 'human rights implications of unpaid care work' (para 4).[1] If there was any doubt that caring could be a human rights issue, it is dispelled by this report stating as it does that 'it is hard to think of a human right that is not potentially affected in some way by the unequal distribution and difficulty of unpaid care work' (para 27). The report's summary says: 'the failure of states to adequately provide, fund, support and regulate care contradicts their human rights obligations, by creating and exacerbating inequalities and threatening women's rights enjoyment' (page 2).

The report addresses the issue of dependency and associative discrimination noting that 'in many ways the rights of caregivers are symbiotically intertwined with the rights of care receivers: overburdening caregivers with unpaid care work has an impact on the quality of the care they are able to provide' (para 11).

In the Special Rapporteur's opinion, the consequence of states failing to 'adequately regulate, fund or provide care' is that the 'burden shifts to families who have to make their own arrangements … this generally means that women assume the bulk of the work, to the detriment of their human rights enjoyment' (para 8). The report requires states to construct their social welfare support systems in such a way that they 'do not create significant inequalities between those who have an interrupted participation in the labour force — due for example to parenthood, care for older persons or persons with disabilities — and those who do not' (para 87). It concludes by calling for states to consider 'unpaid care work as a major human rights issue' and, in particular, to take measures to 'alleviate women's poverty resulting from unpaid care work across their life cycle' (para 109).

Conclusion

Carers are about as stretched as they can possibly be and neoliberal governments are very aware of this problem, particularly the 'gender voting gap'. Put simply, over the last 20 years women (particularly younger women) are not tending to vote neoliberal, opting for parties that offer more (not less) 'government'. US President Obama had a 56 per cent to 44 per cent lead over Mitt Romney in the 2012 election. In the UK, there is considerable evidence to suggest a similar gap, for example, a *Guardian*/ICM poll in November 2013 suggested that Labour led among women voters 45 per cent to 26 per cent. What is quite clear is that the possibility of such a gap is something that politicians take seriously. In my research for *Does your carer take sugar? Carers and human rights: the parallel struggles of disabled people and carers for equal treatment*, I reviewed the Cabinet papers from the first Margaret Thatcher administration, which were released under the 30-year rule, and these disclosed a near 'obsession' with addressing the needs of working women.[2]

Neoliberalism has no answers to these questions … Until the system is radically reformed, all it can do is to obfuscate and offer opiates. The Care Act 2014 is a prime example. It is being implemented with indecent haste so it can be trumpeted as a 'triumph for carers' at the next election. It is not. It is a distraction.

I believe very firmly that we are now at a turning point: a point at which the pendulum is ready to swing in a different direction: a time when the dominant political discourse of the last 50 years is collapsing and that the pivotal reason for this is the state's inability to deliver the basic human rights demands of carers.

1 *Sixty-eighth session Item 69 (c) of the provisional agenda* Promotion and protection of human rights: human rights situations and reports of special rapporteurs and representatives. Extreme poverty and human rights*, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2437791.

2 *The Washington and Lee Journal of Civil Rights and Social Justice* (2013) 19:2 p342. See: www.lukeclements.co.uk/whats-new/.

The following is an abridged version of the obituary that appeared in (2014) 17 CCLR March 2014

Pauline Anne Thompson OBE
1950–2014

Legal Action Group and the editorial board of *Community Care Law Reports* record with great sadness the death of Pauline Thompson, on 13 January 2014 at the age of 63 after a long battle with cancer. Pauline was an active member of this editorial board from 1997 to 2014, and co-wrote the 4th and current (5th) editions of *Community Care and the Law*, with Luke Clements.

After many years in social work, Pauline moved into benefits advice in Bolton and acquired the most extraordinarily comprehensive knowledge and understanding of the intricacies of the system in general and of paying for care in particular. In 1996 she took up the post of policy officer for care finance with Age Concern (now Age UK) where she remained until her semi-retirement in 2010. A tireless campaigner for the rights of older people, Pauline had a directness of approach to everyone with whom she came into contact, combining formidable intelligence with thorough research, persistence and an eloquence peppered with wit. She was resolutely herself, never too deferential towards the ministers and civil servants whom she sought to persuade; a characteristic that contributed to her effectiveness as a campaigner.

Pauline's tenacity was recognised by Baroness Greengross in her remarks in the House of Lords, and, to the great delight of her family Pauline was awarded an OBE for services to older people in 2010.

Pauline's death is a personal sorrow for many of us, but she has made a unique and powerful contribution to the ongoing struggle for a better and more dignified life for older people living with disability and ill-health. Pauline leaves behind her mother, Margaret, sister and brother-in-law, niece and nephew and great nieces and nephews.

LAG is grateful to Stephen Knafler QC for paying tribute to Pauline on its behalf.

LAG would like to thank Luke Clements for delivering the lecture and the Law Society for co-hosting the event.


CAROLINE O'DWYER

LAG's 'Chasing Status' research, which has just been published, aims to tell the stories of people with irregular immigration status (see box below). Some will have lived and worked in the UK nearly all their lives, unaware of their lack of status or their risk of deportation to a country they last saw decades ago. Fiona Bawdon, the journalist behind the study, explains.

The unintended victims of 'a hostile environment'

From December 2014, private landlords in Birmingham and the Black Country could face a £3,000 fine if they fail to check the immigration status of new tenants, as changes introduced by the Immigration Act 2014 begin to be phased in. The reform is the latest in a series of legislative changes by successive governments aimed at making life all but unlivable for anyone who is in the UK illegally. Speaking last year on BBC Radio's 'Today' programme, Home Secretary Theresa May explained that she wanted to create a 'hostile environment' for illegal immigrants. 'Most people will say it can't be fair for people who have no right to be here in the UK to continue to exist as everybody else does with bank accounts, with driving licences and with access to rented accommodation.'

Yet, what the Home Secretary fails to acknowledge is that as well as those who are in the UK illegally, there is also another virtually invisible – and rarely acknowledged – group, who also cannot easily prove their legal status (because of lost documents or poor government record-keeping) or whose status is 'irregular' for a variety of legitimate reasons. They may not be its intended target, but this group is also being badly hit by these legislative changes.

'Chasing Status' tells the stories of people we describe as 'surprised Brits' because of their shock at finding that their immigration status is being questioned after they have lived, worked and paid taxes in the UK for many decades. Although they are not the intended targets of immigration crackdowns, they are now finding themselves threatened with destitution, unable to work or claim benefits, after being caught out by legislative changes they had no idea applied to them. With legal aid removed for immigration cases, they can no longer get expert legal help to resolve their status; if the legal aid residence test is eventually introduced (where claimants have to prove 12 months' lawful residence to be eligible) they will not get it for anything else either.

Not as British as they thought they were

The six oldest 'Chasing Status' interviewees (whose ages range from 53 to 60) have been in the UK a total of 260 years. They entered the UK as children, and were educated, married – and then raised families – here. They have national insurance numbers and driving licences, pay their taxes and (until recently) could work and claim benefits, just like anyone else. Until being asked for proof of their immigration status by employers or the JobCentre, none had any reason to question it. In their interviews, they tell of disbelief at discovering that they are not as British as they thought they were: 'I thought I was going crazy'; 'It felt really strange'; 'I thought it was a joke, at first'.

Several interviewees had difficulties after the loss of their original passports, which had the crucial 'indefinite leave to remain' stamps, and the then UK Border Agency (UKBA) claimed to have no record of them. The now defunct UKBA (which was replaced by UK Visas and Immigration in March 2013) was notoriously dysfunctional, a problem compounded by lack of clarity about the record-keeping practices of any of its predecessors four or five decades earlier.

One of the report's recommendations is for greater openness from the Home Office about its archiving and destruction policies, and for it to accept that some records may be inaccurate or incomplete because of the passage of time. The report also calls for the creation of a dedicated casework team at the Home Office to deal with these cases, and for such applicants to be entitled to continue working or claiming benefits while their status is resolved. As one interviewee says: 'I've worked. I've contributed – but I'm being treated like I've just come here.'

A copy of the 'Chasing Status' research report is included with this issue. 'Chasing Status' forms part of Legal Action Group's Immigration & Asylum Law Project, which is funded by Unbound Philanthropy. For more information, contact Fiona Bawdon at: fbawdon@lag.org.uk.

Family and children's law review

Nigel Humphreys and **Rachel Rogers** keep readers up to date with legislation, practice matters and case-law relating to family and children's law in their twice-yearly series.

POLICY AND LEGISLATION

Family justice system reforms: all change

On 22 April 2014 we saw some of the most significant changes to the family justice system in England and Wales for a generation.[1] Many of these reforms are welcome, such as the introduction of the single Family Court. We are now six months into working with the reformed system and many family work professionals have raised initial concerns about increasing delays and inconsistent implementation across the country. Resolution is monitoring the practical operation of the reformed system to determine whether these issues stem from the reforms themselves, or from other problems such as the dramatic increase in litigants in person after the legal aid cuts. The main changes are:

- The introduction of a single Family Court, replacing the current three tiers of court for family cases – an aspiration which has been discussed for 40 years.
- Most applicants for private family law proceedings have to attend a mediation information and assessment meeting (MIAM) before making an application to the court. Both applicants and respondents can expect more robust judicial management in relation to their approach to attendance at a MIAM or use of court dispute resolution where appropriate.
- The introduction of child arrangement orders, with the abolition of labels like 'residence' and 'contact', which were felt to be the cause of much litigation.
- The introduction of a 26-week time limit for completing care cases.

In addition, the government set up a Family Mediation Task Force chaired by David Norgrove, charged with coming up with recommendations to improve mediation numbers. The task force submitted its report in June, with a number of recommendations including reform of the 'unhelpful' language used in court forms, the Ministry of Justice (MoJ) paying for all MIAMs for 12 months and the abolition of fault-based divorce.[2]

On 20 August 2014 the government published its response to the task force's recommendations, announcing plans to fund the first single mediation session for both parties.[3] This met with a mixed response from many in the sector – while the announcement was welcomed in some quarters, it also came in for criticism. Resolution and other organisations noted that this measure would make little difference to mediation take-up as it is limited to cases where at least one party is eligible for legal aid.

A brighter future: what has happened since the Family Justice Review?

On 20 August 2014 the MoJ and the Department for Education released a new report, *A brighter future for family justice*, a summary of all the changes that have taken place since the Family Justice Review in 2011.[4]

The report looks at what progress has been made against the review's recommendations. Some of the findings from the report are as follows:

- The average length of care and supervision cases dropped from 55.6 weeks to 32 weeks between January 2011 and March 2014, a reduction of 42.4 per cent. A statutory 26-week time limit for public care and supervision cases was introduced in April 2014.
- The average length of Children Act (CA) 1989 s8 private law cases has remained in the range of approximately 15–20 weeks.
- The fall in referrals to family mediation following the implementation of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 in April 2013 is attributed in the report partly to fewer people visiting solicitors, who had previously been a referral route into a MIAM. The removal of most private law work from the scope of legal aid means that this referral route to MIAMs no longer exists.

Transparency on the agenda

On 15 August 2014 the President of the Family Division, Sir James Munby, issued a consultation paper, *Transparency – the next steps,* looking at the potential to open up access to Family Court proceedings and information to the public, to foster a better understanding of the workings of the court.[5]

The President is currently seeking 'preliminary, pre-consultation views' on the possibility of hearing certain types of family case in public, particularly on the type of case that might be appropriate for public hearing, necessary restrictions and safeguards, and what form a pilot might take.

This is obviously a controversial topic and will undoubtedly attract much debate in family law circles over the coming months. Any comments or suggestions should be sent to Andrew Shaw at: Andrew.shaw@judiciary.gsi.gov.uk. Comments should be sent by the end of October.

Children and Vulnerable Witnesses Working Group finds Family Court 'lagging behind'

The interim report from a working group on cases involving children and vulnerable witnesses has recognised that more needs to be done to ensure adequate protection in the courts, for example, for victims of abuse being cross-examined by their alleged abuser without representation.

The Children and Vulnerable Witnesses Working Group, set up by President of the Family Division, Sir James Munby, is reviewing guidelines on children's involvement and communication with the professionals working on their case and how children and vulnerable people give evidence in family proceedings. Children are considered to be vulnerable people for the purposes of the review.

The *Interim report of the Children and Vulnerable Witnesses Working Group*, released on 31 July 2014, criticises the current arrangements in the Family Court, noting that the Family Court 'lags woefully behind' the criminal justice system, with processes that are no longer tolerated in the Crown Court.[6]

The next step for the working group is consultation with Family Division judges and the Family Justice Council, followed by a wider consultation on proposed new rules on issues such as identifying vulnerable witnesses and the procedure for provision of special measures, which are anticipated to be in place by the beginning of 2015.

Court bundles

Practice Direction 27A (PD 27A) took full effect on 31 July 2014, introducing a maximum limit for court bundles in family cases of 350 pages. This prevents the majority of family cases reaching the previous court bundle bolt-on of 351 pages or over, under the Family Advocacy Scheme. For hearings on or after 31 July

2014, a bolt-on will be available based on the size of the advocate's bundle. The old court bundle bolt-on will still apply to any hearings before 31 July 2014.

The Legal Aid Agency (LAA) has provided reassurance that it does not anticipate that its approach to claims for payment will change significantly. Resolution has been keen to ensure that the need to provide an explanation for documents included in the paginated index applies to those which do not fall within PD 27A paras 4.2 and 4.3.

A new Advocates Attendance Form (EX506) was made available on the court service website on 31 July 2014. However, the LAA will allow a short period of grace if old forms are used inadvertently.

Legal aid residence test struck down

In July 2014 the government's proposed legal aid residence test – which sought to apply a criterion of one year's residence in the UK to applications for legal aid for family mediation – was struck down. A judicial review was undertaken by the Public Law Project (PLP) leading to the residence test being declared unlawful by the Divisional Court. The judgment, which was unanimous, was expressed in robust terms: *R (Public Law Project) v Secretary of State for Justice* [2014] EWHC 2365 (Admin), 15 July 2014.

Lord Justice Moses said: 'Certainly it is not possible to justify such discrimination in an area where all are equally subject to the law, resident or not, and equally entitled to its protection, resident or not' (para 84).

He also said:

I conclude the instrument is ultra vires and unlawful. I conclude that LASPO does not permit such a criterion to be introduced by secondary legislation. It extends the scope and purpose of the statute and is, accordingly, outwith the power conferred ... (para 50).

The MoJ has stated its intention to appeal. Parliament will consider the introduction of the test again, subject to the outcome of this appeal. The parts of family law still eligible for legal aid, other than family mediation, would be exempt from the test.

New child maintenance fees introduced

On 30 June 2014 the Minister for Work and Pensions, Steve Webb MP, announced the introduction of charges for people applying to the Child Maintenance Service.[7]

All new applicants to the Child Maintenance Service from 30 June 2014 will be charged a one-off application fee of £20. This application fee will not apply to victims of domestic violence and abuse, or to applicants aged 18 or under. Enforcement fees, ranging from £50 to £300, were also introduced from the same date for absent parents who evade payment.

Resolution is monitoring the impact of the charges, particularly on the many vulnerable families that use the Child Maintenance Service.

CASE-LAW

Care proceedings: establishing threshold on the basis of likelihood of future harm; relevance of previous findings of possible harm to another child

■ **Re J (Children)**

[2013] UKSC 9,
20 February 2013

This case dates back to February of last year, but we did not comment on it at the time. It is the leading authority joining together the difficult issues of establishing causation of injuries to children, and the relevance of previous findings against parents. These issues continue to trouble the courts and practitioners.[8]

In this case, a couple, Mr and Mrs J, had the care of three children aged seven, six and three at the time of the Supreme Court hearing. There had been a finding in previous care proceedings that Mrs J or her former partner had caused fatal injuries to her previous child, T-L. T-L died at the age of three weeks as a result of asphyxia, and was found to have suffered multiple fractures and bruising. The judge in the care proceedings relating to T-L found that either Mrs J or her former partner had caused T-L's death, but he could not identify which. They both had colluded to hide the truth (para 8).

In the current proceedings, Judge Hallam sitting in the High Court on 25 November 2011 found that the possibility that Mrs J had caused the death of T-L was not enough to establish the threshold criteria (CA 1989 s31(2)) in the current proceedings, and she dismissed the case.

The local authority, Stockton-on-Tees BC, appealed to the Court of Appeal, which reached the same conclusion on 3 April 2012 ([2012] EWCA Civ 380). The Court of Appeal gave permission to appeal to the Supreme Court.

The Supreme Court also dismissed the local authority's appeal, and in the leading judgment of Lady Hale gave a very useful review of relevant authorities in the House of Lords and the Supreme Court.

Under CA 1989 s31(2), a court may only make a care or supervision order if it is satisfied:

(a) that the child concerned is suffering, or is likely to suffer, significant harm; and

(b) that the harm, or likelihood of harm, is attributable to –

(i) the care given to the child, or likely to be given to him ... not being what it would be reasonable to expect a parent to give to him; or

(ii) the child's being beyond parental control.

Once the threshold is crossed, section 1(1) of the Act requires the court to move on to 'the welfare stage', treating the welfare of the child as its paramount consideration and having regard to the 'welfare checklist' in section 1(3).

Where a child has clearly suffered significant injuries, the first limb of section 31(2)(a) is of course established, that is that the child concerned 'is suffering ... significant harm'. The authorities are clear that in establishing the 'attributability' test of section 31(2)(b) in these circumstances, it is not necessary for the court to establish who had caused the injuries. As Lady Hale points out in her judgment, the case of *Lancashire CC and another v Barlow and another* [2000] UKHL 16, 16 March 2000; [2000] 2 AC 147 is the House of Lords' authority that it is only necessary to show that the harm is attributable to the absence of reasonable parental care (paras 22–23). Although this refers principally to the child's primary carers, where the care of the child was shared as in the *Lancashire* case, it can also include those who shared that care.

The authorities also show that, once the threshold stage has been crossed, then at the 'welfare' stage the inclusion of a parent in a pool of possible perpetrators is relevant when considering the welfare checklist, including 'any harm which [a child] has suffered or is at risk of suffering' under section 1(3)(e) (paras 29–31).

The question posed in this case was 'if inclusion in a pool of possible perpetrators can be taken into account ... both for the purposes of the attributability criterion and at the welfare stage of the inquiry, then why can it not be taken into account for the purposes of the likelihood criterion in section 31(2)(a)?' (para 33). In other words, was the inclusion of Mrs J in the possible pool of perpetrators in relation to the death of her child T-L itself enough to cross the threshold in these proceedings on the basis that the three children now in her care, who have not suffered any harm, are likely to do so in future?

The Supreme Court was unanimous in answering this question in the negative. Where a child has not suffered harm, 'the mere possibility, however real, that another child may have been harmed in the past by a person who is now looking after the child with whom the court is now concerned is not sufficient' (para 4).

The threshold conditions are there to protect both the child and his/her family from unwarranted interference by the state. There must be a clearly established objective basis for such interference. Without it, there will be no 'pressing social need' for the state to interfere in the family life enjoyed by the child and his/her parents, which is protected by article 8 of the European Convention on Human Rights ('the convention'). 'Reasonable suspicion … cannot be a sufficient basis for the long term intervention, frequently involving permanent placement outside the family, which is entailed in a care order' (para 44).

Comment: The Supreme Court pointed out that this appeal had been put in an artificially narrow way. As Lord Wilson pointed out, it is a 'vanishing rarity' for a past finding of a person's possible perpetration of injuries to a child not to be accompanied by other findings of ill-treatment, neglect or failure to protect (para 70).

Finances on divorce: effect of dishonest non-disclosure

■ Sharland v Sharland

[2014] EWCA Civ 95,
10 February 2014

Mrs Sharland's claim for financial provision on divorce came to a final hearing before Sir Hugh Bennett in the High Court in Liverpool on 9 July 2012 (see [2013] EWHC 991 (Fam), 29 April 2013). On the fifth day of the hearing, the parties reached an agreement after they had both given evidence. They had agreed on a 50/50 split of all the matrimonial assets, compromising just under £16 million of cash and properties and the husband's shareholding in the company he founded. There was a significant dispute about the value of the husband's shareholding, the husband asserting it was worth about £31.5 million, and the wife £47.25 million. The husband gave evidence that it was unlikely that he would be able to dispose of his share (by an initial public offering (IPO)) for some five to seven years. On this basis, the judge indicated that the wife's share in the future disposal of the husband's shares would be likely to be tapered to take into account future value added to the company by the husband's efforts, a value which would not constitute a 'matrimonial asset'. The wife therefore took a greater share of the liquid assets, £10.35 million, the husband retaining £5.64 million, in exchange for 30 per cent of the net sale proceeds of the shares at a future date.

A consent order was approved by the judge but, before it had been sealed by the court, on 30 August 2012 the wife's solicitors made an urgent application to reopen the case on the basis of fraudulent non-disclosure by her husband. He accepted in an affidavit subsequently lodged that, contrary to his claim at the hearing that no disposal of his shares was likely in the imminent future, plans to do so had in fact been in full swing from January 2012. The wife's case was that this was a dishonest and misleading non-disclosure. Had she known of the imminent possible sale of the company shares, she would not have accepted a 30 per cent share, which took into account delay in disposal and possible tapering.

However, the trial judge refused the wife's application to reopen the case on the basis of the authority of *Livesey (formerly Jenkins) v Jenkins* [1984] UKHL 3, 13 December 1984; [1985] AC 424. Lord Brandon said in that case:

It is not every failure of frank and full disclosure which would justify a court in setting aside an order of the kind concerned in this appeal. On the contrary, it will only be in cases when the absence of full and frank disclosure has led to the court making, either in contested proceedings or by consent, an order which is substantially different from the order which it would have made if such disclosure had taken place that a case for setting aside can possibly be made good (quoted at para 10).

Between the date when the consent order was agreed on 13 July 2012, and April 2013 when the judge decided on the wife's application to set aside the order, there had been no capital IPO or flotation, and the husband's evidence was that it was no more imminent than he had originally (falsely) suggested. The settlement gave the wife by far the greater share of the liquid assets and she was still entitled to 30 per cent of the value of the shares in due course. Any order that the judge might have made if proper disclosure had taken place would not substantially differ from the agreement reached. The non-disclosure was in that sense immaterial.

The wife appealed to the Court of Appeal, and the majority of the Court of Appeal judges dismissed her appeal. Giving the leading judgment, Lord Justice Moore-Bick said:

It may be unusual for a judge to conclude that despite a deliberate failure by one party to give full and frank disclosure the resulting order should not be set aside, but ultimately that must depend on the nature of the non-disclosure and its effect on the outcome of the proceedings. In this case the husband's non-disclosure was deliberate and dishonest, but because of the rather unusual circumstances there were good reasons for concluding that it had not resulted in an order significantly different from that which the court would otherwise have made … In my view the judge was entitled to hold that the wife had not made out sufficient grounds for re-opening the hearing (para 25).

Lord Justice Briggs dissented, referring to the general principle that 'fraud unravels all' (para 35). He distinguished the *Livesey* case on the basis that that case dealt with simple non-disclosure, rather than fraud. Where fraud in the obtaining of an order has been conclusively established, 'the interests of justice trump the interest in finality' (para 41). He also took the view that the wife had been deprived of an opportunity of a full hearing, including cross-examination of the husband on his later claim that there was still no imminent prospect of the sale of the shares.

Comment: This case has attracted considerable comment, appearing to some commentators, including Lord Justice Briggs, to encourage dishonesty and concealment of assets in financial cases. Mrs Sharland has now been given permission to appeal to the Supreme Court.

Care proceedings: procedure on appeal: whether a rehearing is required

■ Re B (a child)

[2014] EWCA Civ 565,
9 May 2014

In April 2012 Staffordshire CC began proceedings seeking a care order in relation to B, a child who was then two months old. The parents conceded that the threshold under CA 1989 s31 was satisfied on the basis of domestic violence in their relationship, their lack of co-operation with the local authority, and the exposure of B to the risk of sexual abuse from the paternal grandfather.

However, the parents were positively assessed by an independent assessment agency, which recommended that B be returned to his parents' care. A plan to do so was implemented in January 2013, but by February, the local authority found out that the father had stayed overnight at the paternal grandfather's home (albeit that there was no question that B had accompanied his father during the visit or had otherwise been exposed to any risk), bringing into question his understanding of the need to protect B from his own father and the co-operation of the parents with the local authority.

The local authority therefore changed its care plan, and sought a placement order to authorise adoption under the Adoption and Children Act (ACA) 2002. The magistrates at Burton-upon-Trent made final care and placement orders on 13 June 2013.

The parents appealed to Birmingham County Court, and the appeal was heard by Her Honour Judge Clarke on 14 August 2013, but dismissed. The judge found that the

magistrates' decision was 'wrong' on the basis described in the case of *Re B* [2013] UKSC 33, 12 June 2013 (see March 2014 *Legal Action* 12). The magistrates had:

- failed to carry out a sufficient welfare analysis, identifying the benefits and detriments of the realistic welfare options (see *Re B-S* [2013] EWCA Civ 1146, 17 September 2013, reported in March 2014 *Legal Action* 13);
- failed to evaluate the proportionality of a placement order in relation to its interference with the right to respect for family and private life provided by article 8 of the convention;
- failed to undertake a 'global and holistic' evaluation of B's welfare, comparing a placement order with other realistic options (see *Re B-S* above).

However, the judge went on to 'fill the gaps' left by the magistrates, by revisiting the exercise herself and concluding that the magistrates had come to the right decision and that the appeal should be dismissed.

The parents appealed again to the Court of Appeal, which allowed the appeal and remitted the proceedings to be determined afresh in the county court. The question considered by the Court of Appeal was when it is right for a judge to 'fill the gaps' in the defective reasoning on a first instance decision and to confirm it, and when s/he should direct a full re-hearing.

The Court of Appeal held that the appeal judge had erred in this particular case because she did not have the appropriate evidence to enable her to revisit the reasoning exercise:

- The final evidence of the social worker did not include any welfare analysis or balance, or deal with the question of why the adoption of B was necessary or required (see *Re B* [2013] UKSC 33 above).
- The local authority's permanence report also failed to identify the benefits and detriments of each realistic long-term option, or to address the proportionality of the proposed plan.
- The guardian's report did not make a proper analysis of why it was necessary to dispense with the parents' consent in accordance with ACA s52(1)(b).

Lady Justice Black made it clear that an appeal involves two distinct stages – the first being to decide whether the first instance decision was 'wrong' and whether the appeal should be allowed; and the second being what should happen from that point on (para 45). At the second stage, the judge needs to decide whether there needs to be further evidence or a re-hearing, or whether the judge can 'plug the gaps'. Lady Justice Black said that she did not wish to be thought to be 'discouraging the use by an appeal judge of the power to support a shaky first instance decision on the basis of his or her own welfare evaluation or to substitute his or her own decision in a proper case' (para 61). She declined to set out the attributes of a 'proper case', because the decision must be fact-dependent (para 61). She did go on, however, to give an example of a case which should be re-heard, where 'factual findings that were necessary for the determination of the matter had not been made', as in the present case (para 63).

Private law children proceedings: court placing a child into care on its own motion

■ Re K (Children)

[2014] EWCA Civ 1195, 2 September 2014

The parents in this case had been engaged in litigation concerning their two sons for some ten years. When the boys were aged 14 and 12 respectively, Her Honour Judge Marshall, sitting in the Family Court at Swindon, removed them summarily from the day-to-day care of their mother. The older boy was placed with foster carers under an interim care order made on the court's own motion, that is without any application having been made for a care order.

Repeated orders had been made in the proceedings for the boys to spend time with their father, including time in the summer holidays. The court was sufficiently concerned about risk of harm to the children to make an order, on 23 May 2014, for a report under CA 1989 s37(1), which provides that:

Where, in any family proceedings in which a question arises with respect to the welfare of any child, it appears to the court that it may be appropriate for a care or supervision order to be made … the court may direct the appropriate authority to undertake an investigation of the child's circumstances.

Shortly after this order was made, the boys 'absconded' from their father's home, and were found in the care of a former child minder (para 18). At the hearing before Judge Marshall on 3 June 2014, she decided that the children would suffer a high level of emotional harm if they remained in their mother's care. She made an interim care order in respect of the older boy, and a child arrangements order in respect of the younger boy providing for him to live with his father.

The mother appealed to the Court of Appeal, which on 30 July 2014 set aside the orders made and remitted the applications to a High Court judge for a case management hearing. In holding that the judge was wrong to make an interim care order, the Court of Appeal set out useful guidance for the exercise of the court's jurisdiction in such cases, which also provides a useful reminder of the general conditions for the summary removal of children into care.

In the leading judgment of Lord Justice Ryder, he said that: 'The procedural protections of notice and an opportunity to be heard apply to a jurisdiction that is available to the court of its own motion just as much as they do to a jurisdiction invoked on a party's application' (para 33).

The court confirmed that the tests to be applied where a removal into public care is being considered by this route are:

- whether the court '"is satisfied that there are reasonable grounds for believing that circumstances with respect to the child are as mentioned in section 31(2)" (the interim threshold as set out in section 38(2) CA 1989)' (para 35);
- whether the court 'is satisfied that the child's safety demands immediate separation' (para 35) (see *Re L-A (Children)* [2009] EWCA Civ 822, 14 July 2009; [2010] 1 FLR 80);
- whether the court is satisfied that removal is in the best interests of the child (the welfare analysis); and
- having regard to a comparative analysis of the options, whether the court is satisfied that removal is a proportionate interference with the child's and other relevant persons' article 8 convention rights.

Comment: This case provides clear guidance for the exercise of the court of its powers to order the immediate removal of children, and a warning against making hasty decisions in the face of difficult and urgent circumstances.

1 See: www.justice.gov.uk/family-justice-reform.
2 Available at: www.justice.gov.uk/downloads/family-mediation-task-force-report.pdf.
3 See: www.gov.uk/government/news/more-free-mediation-sessions-for-separating-couples.
4 Available at: www.gov.uk/government/publications/whats-happened-since-the-family-justice-review-a-brighter-future-for-family-justice.
5 Available at: www.judiciary.gov.uk/publications/consultation-family-transparency-the-next-steps/.
6 Available at: www.judiciary.gov.uk/publications/president-of-the-family-divisions-consultation-interim-report-of-the-children-and-vulnerable-witnesses-working-group-31st-july-2014/.
7 See: www.gov.uk/government/news/fairness-for-families-children-and-taxpayers-as-new-child-maintenance-system-is-launched.
8 See, for example, 'The judge's dilemma: *Re J*', John Hayes QC, [2014] Family Law vol 44, p91.

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Community care law update

Karen Ashton and **Simon Garlick** highlight the latest stage of the implementation of the Care Act (CA) 2014 and other legislation, and various Department of Health (DoH) policy initiatives. This update concentrates on a number of interesting developments in case-law, particularly in relation to the functions of NHS bodies.

POLICY AND LEGISLATION

Care Act 2014

Practitioners will be aware that the DoH is now considering the results of its consultation on draft regulations and draft guidance under the CA 2014.[1] The DoH's original paper did not include consultation on either the costs cap or the changes to assessing charges; however, the government now says that it will consult on these issues later this year.

The government's plan is to replace all existing guidance with one suite of guidance.[2] The implications for individuals with disabilities, and their carers, of these major developments in community care law will be considered in a later article in this series following the DoH's response to the consultation.

Autism strategy

On 2 April 2014, the DoH published *Think autism: fulfilling and rewarding lives, the strategy for adults with autism in England: an update*.[3] The document revises the first-ever national autism strategy for England, *'Fulfilling and rewarding lives': the strategy for adults with autism in England* (2010).[4]

Think autism has been published to fulfil the secretary of state's duty under Autism Act 2009 s1 to publish and keep under review the strategy for meeting the needs of adults in England with autistic spectrum conditions. Three key proposals in the updated strategy are as follows:

- The development of communities that are autism-aware.
- The creation of the Autism Innovation Fund to promote innovative local services 'particularly for "lower level" support for those not meeting eligibility criteria for statutory support … [including] models which will support early intervention or crisis prevention' (para 3.3).
- An enhanced commitment to better data collection and joined up information and advice services.

Care leavers

The Care Planning and Care Leavers (Amendment) Regulations ('the Amendment Regs') 2014 SI No 1917 came into force on 18 August 2014. The regulations amend the Care Planning, Placement and Case Review (England) Regulations (CPPCR(E) Regs) 2010 SI No 1917 and the Care Leavers (England) Regulations (CL(E) Regs) 2010 SI No 959.

The CPPCR(E) Regs make provision about care planning for children who are looked after by a local authority, and the CL(E) Regs) make provision about support to be provided to certain children and young people who are no longer looked after by a local authority. The Amendment Regs import new duties on local authorities to consider, at all stages of assessment, care planning and review of both looked after children and children leaving care (including on review of pathway plans), what needs such children may have relating to their status as trafficked individuals or unaccompanied asylum-seeking children.

Regulatory reform of the Care Quality Standards

On 7 July 2014, the DoH published *Requirements for registration with the Care Quality Commission: response to consultations on fundamental standards, the Duty of Candour and the fit and proper persons requirement for directors*.[5] The document is the DoH's combined policy announcement and response to what had been three separate consultations.[6]

The DOH announced that, from October 2014, the Duty of Candour and the fit and proper persons requirement will apply to NHS bodies only; however, from April 2015 it will be extended to all Care Quality Commission (CQC)-registered providers.

The fundamental standards

The fundamental standards, which introduce significant changes to CQC registration regulations, will be brought in for all providers in April 2015. The regulations apply to activities regulated by the CQC, and therefore not to activities for which the Office for Standards in Education, Children's Services and Skills (Ofsted) is the registration authority under the CA 2000 (ie, broadly, services for children and young people or relating to the provision of education or skills).

The changes represent one part of the government's response to the findings of a number of inquiries, for example, the Mid Staffordshire NHS Foundation Trust public inquiry (the Francis Inquiry).[7] *Requirements for registration with the Care Quality Commission: Annex A* contains the final regulations which have been laid before parliament under the affirmative statutory instrument procedure.[8] The draft Health and Social Care Act 2008 (Regulated Activities) Regulations (HSCA 2008(RA) Regs) 2014 set out the fundamental standards, and insofar as they apply to NHS bodies, the Duty of Candour and the fit and proper persons requirement. The draft regulations are expected to come into force on 1 October 2014. Subsequent regulations will introduce the Duty of Candour and the fit and proper persons requirement for all other registered providers.

The fundamental standards are 'intended to be common sense statements that describe the basic requirements that providers should always meet, and set out the outcomes that patients or care service users should always expect to receive'.[9] The DoH says that the registration requirements have been redrafted as clear outcomes with stronger enforcement action available, where necessary.

Under the new regulatory scheme, certain of the fundamental standards, all of which can be enforced through the CQC's civil enforcement powers, have offences attached to them. The breach of a standard will become an offence if it reaches a certain threshold (in general, where a breach results in avoidable harm or a risk of harm to the service user). In the event of such a breach, the CQC can prosecute immediately. The previous requirement that a pre-prosecution notice, in effect, a warning, had to be served before a prosecution could be brought has been removed.

Care and treatment provided without the consent of the relevant person will always be an offence. If the service user lacks capacity to provide consent, the registered provider must act in keeping with the Mental Capacity Act (MCA) 2005, ie, in the service user's best interests. MCA ss5 and 6 will apply to protect the person doing the act from liability for assault where s/he acts reasonably believing that another person lacks capacity and that the act is in his/her best interests.

Other standards to which offences are attached include the following:

- care and treatment must be safe;

■ service users must be protected from abuse; and
■ the nutritional and hydration needs of service users must be met.

In all of these cases, the maximum penalty for a breach is a £50,000 fine. Breaches of standards relating to complaints, good governance and the Duty of Candour may also amount to offences carrying a maximum fine of £2,500.

Under the draft HSCA 2008(RA) Regs, it will be a defence for providers 'to prove that they took all reasonable steps and exercised all due diligence to prevent the breach of any of those regulations that has occurred' (reg 22(3)). In addition, the CQC's civil enforcement powers include issuing warnings, attaching conditions to registration and cancelling registration. These powers will apply to all standards, including the following:
■ that people must be treated with dignity and respect;
■ that care and treatment must be appropriate and reflect people's needs and preferences, ie, 'person-centred care' (reg 9(1)); and
■ that sufficient numbers of suitably qualified, experienced and skilled staff must be deployed.

Of particular interest to community care practitioners will be the 'person-centred care' standard (above), which sets out providers' obligations in more detail than the current essential standard: for example, compliance with the standard includes 'enabling and supporting relevant persons to understand the care or treatment choices available to the service user and to discuss, with a competent health care professional or other competent person, the balance of risks and benefits involved in any particular course of treatment' (reg 9(3)(c)). The 'dignity and respect' standard includes 'supporting the autonomy, independence and involvement in the community of the service user' (reg 10(2)(b)).

The Duty of Candour

The draft HSCA 2008(RA) Regs set out the entirely new Duty of Candour and oblige the health service body to 'act in an open and transparent way with relevant persons in relation to care and treatment provided to service users in carrying on a regulated activity' (reg 20(1)). A 'relevant person' is the service user or a person acting on his/her behalf if the service user:
■ is under 16 and not competent to make a decision in relation to his/her care or treatment; or
■ is over 16 but lacks capacity; or
■ s/he has died (reg 20(7)).

The duty therefore applies to provider organisations rather than to individuals.

Specifically, where a 'notifiable safety incident' occurs, the health service body must provide a notification to the relevant person, which must include an account of what occurred, details of what further enquiries have been carried out, and their result, and an apology (reg 20(2)(a)). The registered provider must also provide 'reasonable support' in relation to the incident (reg 20(2)(b)). This could include independent advocacy.

For health care bodies, a notifiable safety incident is any unintended or unexpected incident occurring in the course of a regulated activity which has caused, or could cause, death, severe harm, moderate harm or prolonged (ie, more than 28 days in duration) psychological harm to the service user. 'Moderate harm' is defined as harm requiring a moderate increase in treatment and causing significant, but not permanent, harm (reg 20(7)).

For all other providers, the notification process will be broadly the same, but the threshold (which will be set out in subsequent regulations before April 2015) will be that the incident has caused or could cause serious injuries which will include prolonged pain or prolonged psychological harm.

Fit and proper persons requirement

The fit and proper persons requirement applies to individual providers, partnerships and directors of CQC-registered providers. Individuals filling such roles must be of 'good character', have appropriate skills and experience and be of sufficient good health to carry out their role (regs 4(4)(a), 5(3)(a), 6(3)(a) and 7(2)(a)). Proposed directors must not have been involved in any serious misconduct or mismanagement when carrying out a regulated activity (or equivalent activity abroad).

Other providers, and registered managers, must be able to provide the CQC with prescribed information (under draft HSCA 2008(RA) Regs Sch 3), which encompasses satisfactory evidence of conduct in any previous employment in health or social care or children or vulnerable adults (including evidence of why that employment came to an end). Although there are some absolute bars, for example, being an undischarged bankrupt or being included in a barred list maintained under the Safeguarding Vulnerable Adults Act 2006, the regulations are not prescriptive about what constitutes 'good character'. Providers are required under Sch 4 Part 2 of the draft regulations to consider whether the person has been convicted of an offence, and whether a person has been 'erased [or] removed [from,] or struck-off' a professional register.

The CQC is consulting on draft guidance on how providers can meet the requirements of the draft HSCA 2008(RA) Regs and on how the commission will use its enforcement powers.[10] The consultation runs until 17 October 2014.

New charging guidance

The DoH has issued new guidance on how to apply a relative's property disregard in response to the judgment in *R (Walford) v Worcestershire CC and Secretary of State for Health (interested party)* [2014] EWHC 234 (Admin), 10 February 2014; May 2014 *Legal Action* 32.[11] The National Assistance (Assessment of Resources) Regulations 1992 SI No 2977 Sch 4 para 2(b)(ii) requires a local authority to disregard the value of a care home resident's interest in a property where it is occupied, in whole or in part, as his/her home by a family member or relative falling into a prescribed category, for example, aged 60 or over. The guidance identified three principles from *Walford*:
■ The disregard applies when a relative occupies the property as his/her main or only home.
■ The relative does not have to be physically present in order to be considered to be occupying the property.
■ The answer to the question of whether the individual qualifies is not fixed at a particular point in time and is open to review to take account of changing circumstances.

The guidance uses two examples to illustrate the difference between occupation and occupation as the occupant's only or main home:

… take somebody who is an artist and uses a room at their parents' house as a studio, living elsewhere, never sleeping in the premises. That person would be occupying premises but not as their home – the disregard would not apply.

… take somebody who leaves the parental home to travel the world for several years. They never put down permanent roots and live nomadically. The premises might be their home but they are not in occupation – the disregard would not apply (paras 7a and 7b).

The second example is perhaps the most controversial. Although the guidance stresses that emotional attachment is not sufficient (there must be 'occupation') it also acknowledges that 'there may be circumstances where quality is more important than quantity of occupation' (para 10).

There is no requirement for a relative to have occupied the property before the resident moved into the care home. If the disregard does come into effect after the resident has moved into residential care, there may already be a deferred payment agreement in place. The guidance points out that a local authority cannot terminate the agreement on the basis of this kind of change in circumstances, even though there will be no element of the future charge which would fall to be deferred because

the property would, from that point on, be disregarded.

Comment: As the court held in *Walford*, the question of whether or not a relative meets the disregard conditions can, at any point, be reviewed. The guidance seems to be attempting to limit the impact of its interpretation by suggesting that where a relative moves into the property after the resident has moved into the care home, the timing and purpose of the move may be relevant to establishing whether it is the relative's main or only home. As long as the property is a relative's main or only home following the move, the relevance of the motive for the move is highly questionable.

The government used this guidance to announce its intention to change the law from April 2015 under the CA 2014 (above). Under the proposed new regulations a relative must have been in occupation since before the resident moved into the care home if the latter is to qualify for the mandatory disregard. (This is reflected in the CA 2014 materials put out for consultation (see above).) The local authority will retain discretion to disregard if appropriate to do so. Statutory guidance is to set out the factors to be taken into account when exercising that discretion.

Offences of ill treatment or wilful neglect

In June 2014, the government published *New offences of ill-treatment or wilful neglect: government response to consultation*.[12] The original consultation ended in March 2014.[13] The consultation response confirmed the government's intentions to create these new offences, which have been added as clauses 19–24 to the Criminal Justice and Courts Bill. The provisions will come into effect in March 2015.

The offences are to apply in all formal health or adult social care settings and to children's health care, although there will be exemptions for some kinds of childcare settings and services, for example, schools, children's homes and for childcare provision. They will only apply to formal care, ie, where there is an employment or contractual element to the provision. The offences will not depend on the extent of harm to the individual: they will focus entirely on the conduct of the care provider.

Interestingly, there will not only be an individual practitioner offence, but a corporate offence modelled on the offence of corporate manslaughter. Penalties for convicted organisations will not only be financial, but also include both a publicity order and a remedial order.

2014/15 NHS Choice Framework

The DoH published what was described as a 'policy paper' on choice in the NHS on 1 April 2014.[14] The purpose of the policy paper, which replaces 2013/14 Choice Framework, is to provide information about patients' rights to choose as opposed to creating new rights. It includes a reference to the extension to mental health services of the right to choose where a first outpatient appointment is to be provided. The previous exclusion of this type of health care for this right, which was found in National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations ('the Responsibilities and Standing Rules Regs') 2012 SI No 2996 reg 40(1)(c) was repealed, on 1 April 2014, by National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) (Amendment) Regulations 2013 SI No 2891 reg 4(2)(a).

CQC and Local Government Ombudsman

On 12 May 2014, the Local Government Ombudsman (LGO) and the CQC announced new working arrangements to transfer enquiries between the two organisations, where appropriate.[15] Instead of telling enquirers to contact the other organisation themselves, the LGO and the CQC will be able to transfer callers directly. It is unclear from the LGO press release whether this arrangement applies to telephone enquiries only.

Social Services and Well-being (Wales) Act 2014

The Act received royal assent on 1 May 2014; however, according to the written statement issued by Gwenda Thomas, Deputy Minister for Social Services, it will not come into force until April 2016.[16] There will be consultation on the first tranche of regulations in November 2014, which will cover areas such as assessment and eligibility, adult protection and direct payments. Consultation on the second tranche of regulations, which will cover, among other things, charging and children in need, begins in May 2015. Following each consultation, regulations and associated codes of practice will be laid in the Assembly, ie, in May 2015 and then winter 2015 respectively.

New complaints procedures in Wales

New complaints procedures have been introduced in Wales from 1 August 2014. The Social Services Complaints Procedure (Wales) Regulations 2014 SI No 1794 bring in the new procedures for complaints about the exercise of social services functions apart from certain functions capable of being exercised under the Children Act 1989 and the Adoption and Children Act 2002. (These are to be handled using the procedure introduced for that purpose by the Representations Procedure (Wales) Regulations 2014 SI No 1795).

The main change is the removal of the third-panel stage. There are now two stages: informal local resolution and independent investigation. If the complainant is not satisfied at the end of stage two, s/he can take the matter to the Public Services Ombudsman for Wales. Statutory guidance has been issued: *A guide to handling complaints and representations by local authority social services*.[17]

CASE-LAW

NHS responsibilities

■ R (JF by her litigation friend RW) v NHS Sheffield Clinical Commissioning Group

[2014] EWHC 1345 (Admin), 2 May 2014

JF had multiple physical and mental impairments. She lacked capacity to take decisions about care and required frequent hospital admissions. JF was assessed as eligible for NHS continuing healthcare, and therefore responsibility for funding and arranging her care in the community lay with the defendant clinical commissioning group (CCG). Before being cared for in the community, JF had been in a nursing home and when admitted to hospital had been accompanied by her carers; however, this no longer happened after JF's discharge to the community, where she received only one-to-one domiciliary support.

JF's family believed that, in hospital, she required the one-to-one care she had in the community and sought to establish that the CCG was under a duty to fund such extra care. Initially, the argument had been brought on the basis that such arrangements were in JF's best interests for the purposes of the MCA. That claim was not sustainable because, save in exceptional circumstances, the Court of Protection's role was to make decisions on behalf of an incapacitated person from available options (as explained in *(1) ACCG and (2) ACC v MN, Mr N and Mrs N* [2013] EWHC 3859 (COP), 20 November 2013; May 2014 *Legal Action* 36).

In this case, the provision of additional care was a decision for the CCG to make, but it was not being offered as an option. The claim, therefore, proceeded as a judicial review. The principle argument advanced on JF's behalf relied on National Health Service Act (NHSA) 2006 s3 as amended by Health and Social Care Act 2012 s13, which imposes a duty on

CCGs to arrange provision of hospital accommodation, treatment and care 'to such extent as it considers necessary to meet the reasonable requirements of the persons to whom it has responsibility'. It was argued that therefore it was the duty of the CCG to supplement what the claimant characterised as the standard package of care, which the acute hospital trust provided, with additional services that the CCG had assessed JF as requiring in the community.

The court held that this submission was 'unworkable in practice and unjustifiable in principle' (para 44). It was founded on a misapprehension that the acute trust was not itself under a duty individually to assess the needs of patients admitted to its hospital, and it would be 'not merely wastefully duplicative but also clinically inappropriate for the commissioner of services to attempt either to determine in advance or to second-guess how the hospital should meet a patient's needs during the admission' (para 45). Furthermore:

If, as is the case here, the CCG has commissioned the provision of all hospital services as are necessary to meet the reasonable requirements of its patients, it will have discharged its [section] 3 duty. It does not have to go further and direct the provider of the hospital services how it should treat individual patients (para 46).

The judge found that if the claimant was not satisfied with the level of care provided by the hospital trust, she should have used the hospital complaints procedure or, ultimately, private law remedies. Furthermore, by the time of the hearing the NHS trust had decided that the claimant required one-to-care, and therefore the case against the CCG was academic.

Comment: It seems that in contrast to the position of an individual whose care is funded by a local authority, which remains responsible for ensuring that a commissioned provider meets the assessed needs of that individual, a CCG which commissions an acute NHS trust to provide care for one of its patients does not retain that responsibility because its commissioning responsibility under NHSA s3 is generic rather than particular to the individual patient. Notwithstanding that the dispute here was about staffing ratio (which, arguably, is in fact unlikely, in a busy acute ward, to be decided through a bespoke planning process) and not details of fine clinical judgment, the court came to the clear conclusion that the needs which JF had been assessed as having in the community could not be read into an acute hospital setting. The court was satisfied that, in reaching its own decision, the acute trust had taken into account the detailed decision support tool which described JF's level of health care needs in the community.

■ R (Whapples) v Birmingham Crosscity Clinical Commissioning Group and Secretary of State for Health (interested party)

[2014] EWHC 2647 (Admin), 30 July 2014

The claimant, who had severe physical symptoms thought to stem from post-traumatic stress disorder, was assessed as eligible for NHS continuing healthcare. W argued that the defendant CCG was under an obligation to provide her with the accommodation she required under NHSA s3, ie, as part of its duty to provide her with free NHS healthcare. The CCG denied responsibility. It argued that the claimant could access housing through the Housing Act 1996 or, failing that, through exercise of the local authority's duty under National Assistance Act (NAA) 1948 s21. It was not in dispute that the reference to 'other accommodation' in NHSA s3(1)(b) was capable of covering ordinary accommodation. The claimant argued that the CCG too was under a duty to provide accommodation, relying on the National Framework for NHS continuing healthcare and NHS-funded nursing care (November 2012 (revised)): 'Where an individual has a primary health need and is therefore eligible for NHS continuing healthcare, the NHS is responsible for providing all of that individual's assessed health and social care needs – including accommodation, if that is part of the overall need' (para 33).[18]

The court disagreed. It found that the National Framework and accompanying practice guidance clearly envisaged local authorities having primary responsibility for meeting the accommodation needs of someone requiring state housing, and that NHS bodies were not responsible for meeting the accommodation costs of those living in their own homes. The court noted that:

The budgets of NHS bodies such as the CCG to deliver health care of that kind are under considerable pressure. If there are other ways in which other needs of an individual can be met, such as their need for accommodation, which do not divert resources from the NHS's core mission to provide a universal health care service, it is legitimate to expect that there should be careful exploration of those means before recourse is made to NHS funds to meet those other needs (para 15).

It was also argued by the claimant that an alternative plan to place her in accommodation where she would receive care would fall foul of Housing Benefit Regulations 2006 SI No 213 reg 9(1)(k), so that the claimant would not be entitled to housing benefit to meet her rent as she would be treated as being in residential care. The court rejected this argument, finding that it could:

… not … possibly be the case that the provision of any element of health care at all at a person's own home has the effect of converting their home into a 'care home', with the effect that they lose the right to housing benefit and with the further effect that the full cost of their accommodation is forced upon the NHS. That is not something that happens in practice. It would … involve a bizarre interpretation of the concept of 'care home' in the NHS Act and the housing benefit regulations (para 52).

Comment: There can, of course, be an economic incentive for individuals to argue that services should be provided by the NHS, as they are free; however, in neither *JF* nor *Whapples* was there any financial gain to the claimant in arguing that the CCG should provide services. Both cases faced clear legal difficulties from the outset, but they perhaps illustrate that arising from both the culture of 'integration' of services and the complex and, at times, unclear divisions of responsibility between different parts of the NHS, there are uncertain areas of overlap between and within social and health care.

Status of NICE guidelines

■ R (Rose) v Thanet Clinical Commissioning Group

[2014] EWHC 1182 (Admin), 15 April 2014

In this case, the Administrative Court considered (among a number of other issues) the obligations of the defendant CCG to comply with guidelines issued by the National Institute for Health and Care Excellence (NICE). The claimant required a bone marrow transplant and chemotherapy; she sought NHS funding for a procedure to preserve her eggs before treatment. The CCG decided not to fund the treatment.

The functions of NICE derive from the National Institute for Health and Care Excellence (Constitution and Functions) and the Health and Social Care Information Centre (Functions) Regulations 2013 SI No 259. Under these regulations, NICE issued 'technology recommendations' with which NHS England and CCGs must comply (reg 7) and NHS England alone must comply (reg 8); furthermore, NICE issued generic advice, including clinical guidelines (reg 5). The claimant asserted that the CCG had unlawfully failed to adhere to the NICE guideline relevant to funding the treatment in issue. In contrast to the position with technology recommendations, there was no explicit statutory duty to comply

with regulation 5 guidelines.

The CCG conceded that the NICE guideline was a public law relevant consideration to which it was obliged to have regard; however, the CCG argued that it was entitled to depart from the guideline with good reason, which was that it considered that the evidence base for the guideline was not sufficiently strong. The judge analysed the broad statutory duties of NHS commissioners set out in Responsibilities and Standing Rules Regs Part 7. He found that the duty to have regard to NICE guidelines under regulation 5 applied to the development of general policies on treatment and funding developed by CCGs and NHS England; furthermore, the duty to give reasons for any general policy not to fund a particular intervention must include 'clear, lawful reasons for departing from the relevant NICE recommendation' (para 107).

Ultimately, and for fact-based reasons, the claimant failed in her challenge. However, the judge proceeded to comment (it appears obiter dicta) on the way in which the CCG, in developing its new policy for this area of treatment, had engaged with the relevant NICE guideline. (This policy was not in force at the time of the decisions challenged by the claimant.) He found that the CCG had simply disagreed with NICE that the evidence base was sufficiently strong to justify funding the type of treatment:

... the issue in the ... case is whether CCGs may legitimately disagree with NICE on matters concerning the current state of medical science. NICE's view is that the evidence base supports the effectiveness of oocyte cryopreservation, and the CCG's sole basis for not following the NICE recommendation is that it disagrees. No basis or reasoning on grounds of exceptionality has been put forward. In my judgment the defendant could have found other reasons for not following the NICE recommendation, but not this one (para 92).

Alternatively, the CCG had failed to provide a reasoned explanation of why it was not following the relevant NICE guideline. Accordingly, the trust's new policy, which recommended, contrary to the NICE guideline, that in general the treatment should not be funded, was unlawful.

Comment: The proposition which is arguably implicit in the judgment is that as NICE evaluations include cost benefit analysis of treatments, ie, its recommendations are made on the basis of not only clinical effectiveness but cost, NHS bodies are not entitled to depart from those guidelines because of resource constraints alone. This would appear to be a gloss on the general approach of the courts that prioritisation of limited NHS resources is a matter which must be left to NHS bodies, and is not a decision with which the courts should interfere (*R v Cambridge Health Authority ex p 'B' (A Minor)* [1995] EWCA Civ 49, 10 March 1995). In *R v Cambridge HA*, Lord Bingham commented:

Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the court can make.

It could be argued that in this case the court's approach to NICE guidelines is more in keeping with the aspiration, within both social and health care provision, to bring national consistency to classes of decisions which have, in the past, varied according to postcode. The judgment is especially interesting when considered in the context of the enlarged ambit of NICE, which now produces joint health and social care quality standards, for example, on the care of people with dementia and the health and well-being of looked after children.

Care provision and article 8

■ McDonald v UK

App No 4241/12,
20 May 2014,
[2014] ECHR 492,
June 2014 Legal Action 47

Following the Supreme Court's judgment in *R (McDonald) v Kensington and Chelsea RLBC* [2011] UKSC 33, 6 July 2011; October 2011 *Legal Action* 28, Ms McDonald took her case to the European Court of Human Rights (ECtHR). The ECtHR found that there had been a breach of Ms McDonald's rights under article 8 of the European Convention on Human Rights ('the convention') for the period during which the local authority had reduced funding for assistance at night without having reassessed her; however, from the point of reassessment there was no breach as although there had been interference in her right to respect for private life, it was both proportionate and 'necessary in a democratic society' as required by article 8.

Mental Health Act 1983 s117: the responsible local authority

■ R (Wiltshire Council) v Hertfordshire CC and SQ (interested party)

[2014] EWCA Civ 712,
22 May 2014

The case concerned a dispute between Wiltshire County Council and Hertfordshire County Council about which local authority was responsible for the aftercare to be provided to a particular individual, SQ, under Mental Health Act (MHA) 1983 s117. SQ had lived in Wiltshire for the first 24 years of his life and, from the age of 18, had had almost continuous contact with local psychiatric services. In 1995, he was detained in hospital under MHA s37 (a hospital order made by the Crown Court) and was detained under that Order until 2003 in Hampshire and then in Cambridgeshire until 2009, first in Hampshire and then in Cambridgeshire. In 2006, a mental health review tribunal ordered SQ's discharge on condition that he lived in a 24-hour-staffed hostel approved by the responsible medical officer and the social supervisor; however, the discharge was to be deferred until a suitable placement was found. The discharge, which did not happen until 2009, was to a placement in Stevenage, in Hertfordshire. SQ lived there until 2011, when he was recalled and detained again, but in a hospital in Hertfordshire. In 2014, he was conditionally discharged again to the same residential placement in Stevenage. The question was, at that point, which authority was responsible for his aftercare services. Hertfordshire rejected Wiltshire's view that it (ie, Hertfordshire) was responsible, and Wiltshire issued judicial review proceedings. Permission was refused, and Wiltshire applied to the Court of Appeal. Permission was granted, and the case retained by the Court of Appeal.

Section 117(3) provides that the responsible social services authority was the one 'for the area in which the person concerned was resident or to which he is sent on discharge by the hospital in which he was detained'. This did not mean that the authority for the area where the patient is sent on discharge suddenly becomes responsible. The last words in the subsection create a fallback position 'to cater for the situation where a patient does not have a current place of residence' (*R v Mental Health Review Tribunal ex p Hall* [1999] 3 All ER 132). Furthermore, the period of hospital detention was to be disregarded (*R (Hertfordshire CC) v Hammersmith and Fulham LBC and JM (interested party)* [2011] EWCA Civ 77, 15 February 2011). It was not therefore disputed that, at the time of his first discharge, SQ was resident in Wiltshire.

The issue was whether the first discharge and redetention had broken the chain. The Court of Appeal held that they had not done so. SQ's residence in Hertfordshire at the residential placement was not voluntary; he was required to live there. Mr Justice Bean said: 'I consider it clear that where a person has been made subject to a hospital order with restrictions, then conditionally discharged, then recalled to hospital, and then conditionally discharged for a second time, for the purposes of [section] 117(3) of the Act he is still to be treated as "resident in the area" of the same local authority as that in which he lived before

the original hospital order was made' (para 20). The fact that SQ did not want to return to Wiltshire did not alter the position.

Comment: The court commented on the changes to MHA s117 that will come into effect in April 2015 as a result of the implementation of the CA 2014. In particular, CA 2014 s75(3) introduces a test of where the person was 'ordinarily resident' immediately before being detained, and there will be powers for the secretary of state to resolve disputes as there are currently for the resolution of disputes concerning ordinary residence for the purpose of NAA s21. However, given that the new test largely reflects the position reached in case-law on the current test, it is unlikely to change the outcome in many, if any, cases.

Charging for residential care

■ R (ZYN) v Walsall MBC

[2014] EWHC 1918 (Admin), 12 June 2014

ZYN was a severely disabled woman, who had been assessed as needing non-residential community care services. The council had assessed her as having to pay the full cost of those services from 1 April 2011. This assessment had taken into account compensation in settlement of a personal injury claim in 2003.

The statutory guidance on charging for non-residential services, *Fairer charging policies for home care and other non-residential services*, has been found to mean that the rules for assessing capital in the charging assessment for residential care apply to assessments for non-residential services (*Crofton (A patient suing by his father and litigation friend John Crofton) v National Health Service Litigation Authority* [2007] EWCA Civ 71, 8 February 2007; [2007] 1 WLR 923). The National Assistance (Assessment of Resources) Regulations 1992 SI No 2977, as amended, are the relevant regulations for the assessment of charges for residential care. Schedule 4 para 19provides that certain types of capital can be excluded, including capital that would fall to be disregarded under Income Support (General) Regulations 1987 SI No 1967 (IS(G) Regs) Sch 10 para 44(1)(a) or (b), as amended.

(1) Any sum of capital to which sub-paragraph (2) applies and–

(a) which is administered on behalf of a person by the High Court or the County Court under Rule 21.11(1) of the Civil Procedure Rules 1998 or by the Court of Protection; [or]

(b) which can only be disposed of by order or direction of any such court …

(2) This sub-paragraph applies to a sum of capital which is derived from–

(a) an award of damages for a personal injury to that person; (para 44).

In this case, the money was managed originally by a receiver, JL, who was appointed in 2002 by the old Court of Protection. Under the transitional provisions of the MCA, on 1 October 2007 the receiver became a deputy. On 19 November 2008, the new Court of Protection made an order superseding earlier orders appointing a receiver/deputy for ZYN. The new order expressly appointed JL as a deputy and permitted her to withdraw a sum not exceeding £50,000 a year for the use and benefit of ZYN without needing to obtain prior approval of the court.

In the judicial review challenge to the lawfulness of the assessment, it was argued that the IS(G) Regs, as amended, dealing with the exclusion of capital referred to the old Court of Protection (ie, pre-October 2007) and not the new Court of Protection. The court held that there was no reason to attribute to parliament an intention that, when the MCA came into force, there should be a change in policy; therefore, it was appropriate to take an updating approach to the interpretation of the relevant legislation (para 49).

Where funds are managed by a deputy, they are being administered, on behalf of the incapacitated person by the Court of Protection, for the purpose of the IS(G) Regs, as amended. Where there is an order permitting a deputy to withdraw funds without further order of the Court of Protection that money, until spent, remains part of a fund which can only be disposed of by an order or a direction of the court. The client's compensation, therefore, fell to be excluded from the financial assessment.

Closure of day centres: the duty to consult

■ R (LH) v Shropshire Council

[2014] EWCA Civ 404, 4 April 2014

The case concerned the adequacy of consultation when a local authority proposed to reconfigure its day care service and then decided to close a day centre. LH had learning disabilities and attended Hartleys Day Centre. The issue was whether the council's general consultation about the new approach, which it said plainly contemplated the closure of some day centres, was sufficient or whether, as LH contended, there should have also been specific consultation on the closure of Hartleys. The claim also argued that here had been a breach of the public sector equality duty (PSED) under Equality Act 2010 s149.

The challenge was unsuccessful at first instance. The issue to be determined by the Court of Appeal was put in the following way:

The question at the heart of this appeal is whether a proposal for reconfiguration of services provided to adult users which makes clear that some (as yet) unidentified day centres are going to have to close is a sufficiently concrete proposal to put out for consultation or whether consultation in relation to that reconfiguration having occurred, it is necessary for the local authority to mount a fresh consultation in relation to any individual day centre which it seeks to close (para 21).

Having considered two consultation cases concerning the closure of residential care homes, the court found that there was a duty to consult on the closure of a day centre:

Although closure of a residential home is clearly more serious than closure of a day centre and, although it can be said that the closure of Hartleys does not amount to an outright withdrawal of a service because the council will discuss with users alternative courses of action which are available within their personalised budget, closure of day centres is undoubtedly a serious step to take from the perspective of their users and those who care for them. For the carers, the day centre will always afford a welcome respite. Even in the Devon and Durham case there was not an outright withdrawal of the service since residents would be accommodated in other homes. In all the circumstances I can see no satisfactory distinction between this case and that case (para 26).

The question was, therefore, whether the consultation that had been undertaken was adequate. The council argued that it was for the local authority to choose the method of consultation and the court should not intervene unless it was *Wednesbury* unreasonable. The court distinguished this case from *R v Camden BC ex p Cran* (1996) 94 LGR 8 (which had been cited in support of the council's proposition) on the ground that the latter concerned a statutory duty to consult. Where the source of the duty was the common law duty to act fairly, then the question was whether the exercise undertaken was a fair one: fairness was a matter for the court, not the council, to decide. The court concluded that the failure to consult on the closure of the specific day centre, ie, Hartleys, was unlawful. On the question of compliance with the PSED, the court found no defect other than the failure to consult, which added nothing to the first ground.

Although the council had undertaken not to close the day centre or take irrevocable steps towards closure, this undertaking lapsed on the giving of judgment at first instance. No application for interim relief was made in the course of the appeal, and the day centre had

closed by the time the Court of Appeal gave judgment. The remedy given, therefore, was not to quash the decision to close the day centre, but a declaration that the failure to consult was unlawful.

Comment: The Court of Appeal's clear finding that there will be a duty to consult on a proposed closure of a day centre was very helpful. Although most local authorities probably already operate on the basis that they will consult on such major changes, this case puts the issue beyond doubt. The clear statement that, when the source of the duty to consult is the common law duty to act fairly, the adequacy of a consultation process was a matter for the court is also significant. If the Court of Appeal had accepted the council's proposition that it was a matter for the local authority, subject to *Wednesbury* unreasonableness, this would have seriously undermined the duty to act fairly.

Paying an adequate rate for residential care

■ Abbeyfield Newcastle Upon Tyne Society Ltd v Newcastle City Council

[2014] EWHC 2437 (Ch), 17 July 2014

Abbeyfield was a registered charity which ran care homes and supported sheltered homes in the Newcastle area. The council had, historically, paid a fee per resident placed in a care home whatever the quality of service provided. However, in 2005 the council began to look at the issue of quality which, inevitably, raised the issue of graded fee rates. In 2007, the council commissioned a report from PricewaterhouseCoopers on the cost of residential care for older people in its care. The subsequent report recommended that graded rates be used. The recommendation was accepted in principle, although the details were different to the original proposal; in particular, the council decided to pay Grade 1 homes at Grade 2 rates.

In 2009, Abbeyfield entered an agreement with the council which included payment at £427 per placement subject to the possibility of variation in the light of any assessment of the individual's needs. The agreement also provided for a price review mechanism that could be triggered not more than six months before the expiry of the agreement. This was known as the pre-placement agreement (PPA).

In addition to this agreement between Abbeyfield and the council, there was a tripartite agreement between both parties and the individual resident ('the user agreement'). The PPA expired on 1 April 2010, but the user agreement with the resident continued for his/her lifetime unless terminated in keeping with the contract terms. However, the termination rights were quite limited; for example, Abbeyfield could only end the user agreement if the council was more than 28 days in arrears or if the resident's behaviour was persistently unsocial or was such that it seriously affected the other residents.

Abbeyfield invoked the price review mechanism on 1 January 2010. Immediately following this request, the council wrote to all care homes saying that the application of the indexing provision in the contract, which allowed an adjustment to be made each year of the contract, would produce a reduction in fees to be paid in the future. However, the council was prepared to offer to fix fees at the current rate for three years, ie, from April 2010 to end March 2013.

The council did not engage in setting up a price review process in keeping with the contract; therefore, the representative organisation Care North East implemented the process. This resulted in a report which concluded that the cost of care was higher than the fee freeze offered by the council.

A number of providers, including Abbeyfield, refused to agree the council's proposals. However, in October 2011 the council notified the providers that, as they had not agreed, it would only pay the rate payable under the old agreement for existing residents and would stop making new placements: all providers except Abbeyfield then signed up to the council's terms.

Abbeyfield eventually commenced proceedings in July 2012. The charity alleged unjust enrichment on the council's part, in refusing to pay what a reasonable person in the council's position would have had to pay, and breach of contract. By this point, the council had fixed rates again from April 2012 until April 2013 and Care North East started judicial review proceedings challenging the lawfulness of that decision on the basis that it had not had due regard to the actual costs of care in breach of the statutory guidance LAC(2004)20. That challenge was successful and required the council to reconsider as a result of which process they increased their rate from £455 to £473.20 from April 2012 and from April 2013 to £482.66.

The judge focused, first, on the user agreement. He noted that it was a lifelong agreement but the PPA was not; he concluded that the price review mechanism must have been for the purpose of fixing the amount to be paid for services users even if no new PPA agreement between the council and the care home was to be agreed. The judge found an implied term that if the price fixing mechanism broke down, as it had in this case, the council would pay a reasonable rate. He concluded that the reasonable rate was one:

> *… which enables the parties to comply with their respective statutory obligations, which followed the statutory and non-statutory guidance (or deviated from it for proper and clearly articulated reasons) and in which the council took into account all relevant considerations and exclude irrelevant considerations* (para 46).

The reference to guidance was a particular reference to LAC(2004)20 (above), which requires a local authority to set a 'usual cost' figure and, when doing so, to have due regard to the actual costs of providing care (para 44). The judge fixed the reasonable rate by drawing a straight-line graph between the rate set for April 2009 (ie, £436) and that set after the judicial review from the end of April 2012 (ie, £473) both of which he took to have been lawfully set. He found that the rate payable from the beginning of April 2010 to the end of March 2011 was £450, and the rate payable from the beginning of April 2011 to the end of March 2012 was £460.

The council had argued that Abbeyfield's claim was an abuse of process as the charity should have proceeded by way of judicial review. The judge concluded:

> *The consideration of these issues did incidentally involve the examination of a public law issue (how did the 'reasonable rate' payable under the user agreement relate to the 'usual cost' which capped the council's liability?). But that incidental consideration does not in my judgment bar Abbeyfield from seeking to establish its private rights by action* (para 53).

Comment: This is yet another case on the adequacy of payments made to the private sector for the provision of care to enable a council to discharge its statutory obligations. This issue is not only of interest to care providers and local authorities: for service users it is always of concern that the care provided be of adequate quality, and the amount paid for that care will always be a relevant factor in the delivery of quality care. The Choice Directions (see above) and the associated statutory guidance have proved to be useful in combating the setting of fee levels which may put safety, and the quality of services, at risk.

1 Available at: www.gov.uk/government/consultations/updating-our-care-and-support-system-draft-regulations-and-guidance. The consultation ran from 6 June 2014 to 15 August 2014.
2 Visit: http://careandsupportregs.dh.gov.uk/.
3 Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/299866/Autism_Strategy.pdf.
4 Available: www.theabilityhub.org/sites/default/

files/Autism_report_1.pdf.

5 Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/327561/Consultation_response.pdf.

6 The three consultation papers were as follows: *Introducing fundamental standards: consultation on proposals to change CQC registration regulations*, January 2014, available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/274715/Introducing_Fundamental_Standards_-_a_Consultation.pdf. *Introducing the statutory Duty of Candour: a consultation on proposals to introduce a new CQC registration regulation*, March 2014, available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/295773/Duty_of_Candour_Consultation..pdf. *Strengthening corporate accountability in health and social care: consultation on the fit and proper person regulations*, March 2014, available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/298328/Corporate_accountability_consultation_response..pdf.

7 *Report of the Mid Staffordshire NHS Foundation Trust public inquiry*, available at: www.midstaffspublicinquiry.com/report.

8 *Annex A – Final regulations*, available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/327562/Annex_A.pdf.

9 See note 5, page 9.

10 Available at: www.cqc.org.uk/sites/default/files/20140725_fundamental_standards_and_enforcement_consultation_final.pdf.

11 Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/322906/Relatives_Property_Disregard_Guidance_final.pdf.

12 Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/319042/Ill-treament_or_wilful_neglect_consultation_response.pdf.

13 *New offence of ill-treatment or wilful neglect: consultation document*, available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/285426/20140226_WN_consultation_doc_-_For_publication.pdf.

14 Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/299609/2014-15_Choice_Framework.pdf.

15 LGO press release, available at: www.lgo.org.uk/news/2014/may/lgo-cqc-working-together-help-people-find-right-solution-social-care-concerns.

16 Written Cabinet Statement 2014, Social Services and Well-being (Wales) Act: approach to implementing the subordinate legislation to be made under the Act, 16 July 2014, available at: http://wales.gov.uk/about/cabinet/cabinetstatements/2014/sswellbeing/?lang=en.

17 Available at: http://wales.gov.uk/docs/dhss/publications/ 140730complaintsen.pdf.

18 Available at: www.gov.uk/government/uploads/.

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Police misconduct and the law

Stephen Cragg QC, **Tony Murphy** and **Heather Williams QC** continue their six-monthly review of important developments in the law relating to police misconduct.

Malicious prosecution: who is the prosecutor?

In the following case the Court of Appeal confirmed that a flexible, non-technical approach should be taken to when a police officer may be a 'prosecutor' for the purposes of the tort of malicious prosecution.

■ Commissioner of Police of the Metropolis v Copeland

[2014] EWCA Civ 1014, 22 July 2014

The claimant attended a police custody suite to act as an appropriate adult for her son. Following a dispute with the custody sergeant she was arrested for allegedly assaulting one of the officers (B). She was arrested by another officer (D), who had not seen the incident but was acting on the basis of B's complaint to her. Officer B made a statement in which he claimed he was punched by the claimant. The claimant was detained and then subsequently charged with assaulting the officer in the execution of his duty. The claimant was initially convicted, but her conviction was quashed on appeal.

The claimant sued in malicious prosecution on the basis that B was a 'prosecutor' for the purposes of the tort of malicious prosecution, as his false account had procured her prosecution. The defendant disputed this as he had not made the decision to charge her, which had been made by an officer who was not involved in the incident, after he had received advice from the Crown Prosecution Service (CPS). The trial judge decided that if the jury found B had fabricated his account, then he was a prosecutor for these purposes. The jury duly did so and the judge therefore ruled that the claim in malicious prosecution was made out.

The jury also found in the claimant's favour in respect of her false imprisonment claim and part of her assault claims. She was awarded £25,200 in damages.

The claim in false imprisonment was based on the principle confirmed by the Court of Appeal in *Davidson v Chief Constable of North Wales* [1994] 2 All ER 597, 31 May 1993, that a person may be liable in false imprisonment for an arrest made by another if s/he had deliberately lied and procured or directly encouraged that arrest. The court's rejection of the submission that the trial judge had erred in placing the onus of proof for establishing the legality of Officer B's actions on the commissioner is discussed on page 31 of this issue.

The Court of Appeal also dismissed the appeal concerning the malicious prosecution claim. The correct test, identified by the House of Lords in *Martin v Watson* [1996] 1 AC 74 (HL), 14 July 1995, was whether the individual in question had 'set the law in motion' against the claimant (para 25) and the fact that s/he was not technically the prosecutor did not enable him/her to escape liability where s/he was 'in substance the person responsible for the prosecution having been brought' (para 26). The court cautioned against over-complication and emphasised that this simple test should be applied. In this instance the judge had applied the correct test in concluding that in making the false statement alleging assault, B was 'in substance the person, or at the very least, a person responsible for the prosecution being brought' (para 33).

Comment: This decision is significant in stemming the tendency of defendants to argue that a police officer who made a false statement concerning the claimant's actions is not a 'prosecutor' for the purposes of a malicious prosecution claim if the officer did not also make the decision to charge. This approach, if correct, emasculates the availability of the tort as a remedy against abuse of power, since in that kind of situation a claim cannot be based on the actions of the person who made the decision to charge either, as usually that individual is unaware of the statement's falsity as s/he did not witness the events in question.

The Court of Appeal rejected the submission that the maker of the false statement could only be a 'prosecutor' where there were no other sources of evidence, so that no independent discretion could be exercised by the person making the charging decision. This

clarification is important because in the vast majority of instances, as here, a defendant will be able to identify some additional evidence that did not emanate from the maker of the false statement. However, the Court of Appeal made clear that provided the 'in substance' test is met, the availability of additional evidence is not fatal. As the court explained, the submission was based on a mis-reading of a passage in *Martin v Watson*. A similar submission was rejected by the Court of Appeal in *Ministry of Justice v Scott* [2009] EWCA Civ 1215, 20 November 2009. The commissioner is not seeking permission to appeal to the Supreme Court, so it is to be hoped that this issue has now been resolved.

False imprisonment: detention before arrest

■ Walker v Commissioner of Police of the Metropolis

[2014] EWCA Civ 897,
1 July 2014

The appellant was unsuccessful at trial in his claim for, among other things, false imprisonment and appealed HHJ Freeland QC's judgment.

It was accepted by the police that the appellant's initial detention for a few seconds in a doorway (prior to his arrest) was not for the purposes of effecting an arrest but for the purpose of pursuing enquiries into his partner's allegation of assault against him. It was also accepted that this amounted to a detention. Notwithstanding this, the trial judge declined to find that the appellant had been falsely imprisoned during this time on the bases that the detention was brief, trivial, technical, and while it restricted the appellant's movements, it did not amount to a deprivation of liberty.

The Court of Appeal disagreed and upheld the appeal on this point, awarding £5 in damages. It found that it is not acceptable to interfere with a person's liberty by confining him/her in a doorway, except to effect an arrest or prevent an imminent breach of the peace. The court also emphasised that deprivation of liberty is a Strasbourg, not a common law, concept and there can be a deprivation of liberty without false imprisonment or vice versa. See also page 30 of this issue.

Comment: This judgment is a useful reminder of the limits on the coercive powers of the state outside of an arrest or breach of the peace situation. In view of the agreed facts, any other conclusion would have been concerning in this case. An appeal predicated on Police and Criminal Evidence Act 1984 (PACE) s28 failed on the basis that the appellant knew from what the officer said that he was being arrested for conduct he had immediately carried out.

False imprisonment: third party complaints to police and witness immunity

The following is a troubling decision which appears to have been made without relevant case-law being cited to the court.

■ Crawford v Jenkins

[2014] EWCA Civ 1035,
24 July 2014

The claimant brought claims in false imprisonment and under the Protection from Harassment Act (PHA) 1997 against his former wife. The false imprisonment claim related to his detention by police following his ex-wife's complaint to them that he had breached court orders in attending an open day at their children's school; he contended that the complaint was false.

The Court of Appeal held that the judge below had been correct to dismiss the false imprisonment claim on the basis that the cause of action was founded on the defendant's statements to the police which were caught by the witness immunity principle considered in *Taylor v Director of the Serious Fraud Office* [1998] UKHL 39, 29 October 1998; [1999] 2 AC 177 and *Darker v Chief Constable of West Midlands Police* [2000] UKHL 44, 27 July 2000; [2001] 1 AC 435. Insofar as the claim under the PHA was based on the defendant's complaint to the police, witness immunity applied to defeat this claim too.

While the claims may have been weak on their facts, the determination was made as a preliminary issue, without any trial of the facts on the basis of the claimant's pleaded claim.

Comment: No previous case has decided that witness immunity precludes a claim in false imprisonment against a complainant who procured the claimant's arrest by making a false complaint to the police. The Court of Appeal's reasoning was based on the proposition that witness immunity generally applies to tortious claims other than malicious prosecution and analogous torts concerned with malicious abuse of the court's processes and that it extended to acts preparatory to the making of a witness statement, where the cause of action was founded on what would or might become the contents of such a statement. The court relied in particular on *Westcott v Westcott* [2008] EWCA Civ 818, 15 July 2008; [2009] QB 407, where the immunity was held to apply to a defamation claim based on the contents of a false complaint to police.

If this decision stands, the implications could be far-reaching. However, there may be a good argument for saying that it was reached per incuriam (made without reference to relevant case-law).

Argument in the Court of Appeal revolved around whether the present claim was analogous to actions for malicious prosecution or other malicious abuse of process, so that a similar exception to witness immunity should apply. From the judgment it appears that the court viewed the claim as a novel one and was not made aware of the well-established *Davidson v Chief Constable of North Wales* line of authority (recently discussed by the Court of Appeal in *Commissioner of Police of the Metropolis v Copeland* (above)), which would have been binding upon the court and which establishes that liability in false imprisonment may lie with a person who has procured an arrest made by police by making a false complaint. There is no suggestion in the *Davidson* line of cases that such claims infringe the principle of witness immunity.

Furthermore, there is a clear distinction between an action in defamation, which is founded on the contents of the complaint, and an action in false imprisonment, where the essence of the claim is the procuring of the claimant's detention, which must be justified as lawful, if challenged. The court also appears to have assumed that a claim in false imprisonment could lie in any event against those who had made the arrest. However, in this kind of situation the arresting officer would be able to rely on the original complaint as legitimising his or her actions by affording reasonable grounds for suspicion.

Undercover operations

■ DIL and others v Commissioner of Police of the Metropolis

[2014] EWHC 2184 (QB),
2 July 2014

The claimants were women (environmental activists and social justice campaigners) who claimed damages in relation to undercover police officers who had engaged in long-term sexual relationships with them as part of the surveillance of their activities.

In response to claims for deceit, assault, misfeasance in public office and negligence against the commissioner, the police resorted to a response of 'neither confirm nor deny' (NCND) in response to both general and specific complaints as to the officers' alleged conduct. The defence in the case stated that this was to protect undercover officers and to uphold the effectiveness of operations and the prevention and detection of crime. The claimants' case was that for the purposes of Civil Procedure Rules (CPR) 16.5 the commissioner was able to admit or deny the allegations, and if he failed to deal with the allegations then, as set out in CPR 16.5(5), he should 'be taken to admit that allegation'.

Bean J found that there were, indeed, circumstances where the police would be able to rely on the NCND principle in cases where

the identity of informers or current investigations or investigatory methods would otherwise be revealed. However, where the undercover unit had been disbanded and there was no continuation of the operational methods challenged there could be no public policy reason to permit the police to reply on the NCND principle where arguably illegitimate operational method had been used as a tactic, but was no longer so used. Two of the undercover police officers had disclosed their involvement and the NCND principle could not apply to the allegations against them. The commissioner was allowed to rely on the NCND principle in respect of two officers who had not already admitted their involvement in the undercover operations. As both had been named in the media Bean J thought that this may in fact 'only postpone the day of reckoning' (para 47). The commissioner was ordered to amend his pleadings accordingly.

Comment: This case helps define the NCND principle, and shows that the court is prepared to look critically at its use, but also shows how it can be used even where officers have been named in the media and it is fairly clear that their involvement and identity has been established.

Police discipline

■ R (Miller) v Chief Constable of Merseyside Police and others

[2014] EWHC 400 (Admin), 20 February 2014

The claimant, a minor, was successful in judicially reviewing a finding that his allegations of misconduct against two police officers were 'not proved' at their respective misconduct meetings; and in challenging as unlawful his removal from part of the misconduct meetings, along with his mother.

The court held that the 'not proven' conclusions of the misconduct meetings were irrational in light of the available evidence, which included CCTV footage and the presiding officer's own expressed concerns regarding the officers' conduct.

The claimant and his mother had without explanation been excluded prematurely from the meetings, in contravention of Police (Conduct) Regulations 2008 SI No 2864 reg 31(3), a provision described by Stewart J as important in 'providing for open justice' (para 11). Such a situation raised the real possibility of bias and was sufficient to require a re-hearing of the misconduct hearings in and of itself. The claimant was also awarded his costs.

Comment: This decision demonstrates that disciplinary outcomes and processes can be susceptible to challenge on the right facts, helped here by CCTV and Independent Police Complaints Commission (IPCC) criticisms of the officers. The court did not need to decide in the event whether a defendant's refusal to provide a reasoned decision and/or transcript of a misconduct meeting constitute grounds for judicial review, as reasons were eventually provided.

Judicial review and misconduct policies

■ R (Woods and another) v Chief Constable of Merseyside Police

[2014] EWHC 2784 (Admin), 7 August 2014

This was a claim brought by police officers against their own force. The chief constable had instituted a misconduct procedure against the officers known as the service confidence procedure (SCP). This provided a framework for dealing with loss of confidence in individual members of staff. The officers were the subject of the SCP but were never told the reason for this. They judicially reviewed the decision of the chief constable to dismiss their appeals to findings under the SCP. The chief constable successfully applied for public interest immunity to protect his reasoning and submitted a 'closed' statement to the court, which the officers did not have access to. The chief constable also claimed that judicial review did not apply to the invocation of the SCP because it related to deployment of staff or operational matters.

The High Court held that the decisions under the SCP had sufficient public law content to mean that its application was susceptible to judicial review. However, where the chief constable had needed to apply for public interest immunity to protect the reasons for the use of the SCP, then the court would be reluctant to interfere with the decision-making process. The chief constable was prevented from providing full open reasons for the decision and there would have to be clear evidence of dishonesty or bias or caprice before the court would intervene. This would mean that the court would have to be satisfied that there could be no possible reason which might justify the decisions taken.

Comment: On the one hand this decision shows the breadth of police functions and policies which may be open to judicial review. On the other hand, the decision indicates the difficulties for both decision-makers and the court where there are legitimate reasons why public interest immunity applies to the central information relating to the challenged decision.

Public law unlawfulness and trespass

■ Tchenguiz and another v Director of the Serious Fraud Office

[2014] EWCA Civ 472, 15 April 2014

This case concerned a claim for trespass following a successful judicial review of the lawfulness of search warrants relating to the appellants' home and work premises. In the judicial review application the court held, among other things, that in making its application for search warrants to the Old Bailey, the Serious Fraud Office (SFO) had made material non-disclosure and factual misrepresentations which vitiated the grant of the warrants. The warrants were quashed and the 'entries, searches and seizures' conducted pursuant to the warrants were declared to be unlawful.

The appellants' claim for damages for trespass was transferred to the Queen's Bench Division, and the SFO initially conceded the claims, but subsequently argued that simply because the Administrative Court had declared its actions unlawful, that did not mean that the appellants were entitled to damages.

The appellants' case was that once the search had been declared unlawful, it was not possible for the SFO then to defend the claims for trespass: there was no such thing as 'public law unlawfulness' limited to remedies in the Administrative Court.

The Court of Appeal disagreed with this analysis, and said that findings of unlawfulness in public law did not entitle the appellants to damages in private law, and in any event the claim for damages for trespass had not been before the High Court.

Comment: This case is a reminder that a successful judicial review application quashing the issue of search warrants will not necessarily lead to a successful claim for damages for trespass. It is always possible to include a claim for tortious damages in a claim for judicial review, but a court would need to be clear that it was dealing with this claim as well as the judicial review application.

Human Rights Act 1998: damages

■ DSD and NBV v Commissioner of Police for the Metropolis

[2014] EWHC 2493 (QB), 23 July 2014

DSD and NBV were victims of the serial rapist John Worboys. In a liability judgment of February 2014 the High Court found the defendant in breach of article 3 (prohibition of torture and inhuman or degrading treatment or punishment) of the European Convention on Human Rights ('the convention') for failing to conduct an effective investigation into the rapes and made a declaration to that effect (see [2014] EWHC 436 (QB); April 2014 *Legal Action* 18). Mr Justice Green considered in this separate judgment whether the claimants were also entitled to a financial remedy on the facts of this case.

The defendant argued that, although a modest financial award would usually be

appropriate for a breach of this kind, no award should be made to the claimants as they had already received compensation from the Criminal Injuries Compensation Authority (CICA) (£13,500 and £2,000 respectively) and from suing John Worboys (£10,000 each). The claimants would also have received a higher amount from suing John Worboys (£20,000 each) if the costs of their unsuccessful claim against his motor insurers had not had to be deducted. Green J held that the above payments should be taken into account but that awards of £22,250 and £19,000 respectively should still be made to reflect the fact that the previous payments had not compensated the claimants for the additional loss caused by the police failings. This comprehensive judgment reviewed the relevant authorities in detail and provided the following guidance:

■ Human Rights Act (HRA) 1998 s8(3) requires that parallel awards and damages must be taken into consideration when deciding whether to award damages as part of just satisfaction under the HRA; however, that will not necessarily mean a zero HRA award or a nominal sum. This is a fact-sensitive exercise.

■ The HRA is not a tort statute concerned solely with the award of compensation. Its paramount objective is to bring violations to an end, with compensation a secondary factor adopting an equitable approach.

■ The main factors to take into account when assessing quantum are: nature of harm; treatment costs; duration of breach; nature of failings (operational or systemic); overall context of violations; any bad faith by the defendant; any contributory conduct by the claimant; any other reason for an enhanced award; whether award sits with range of similar Strasbourg/domestic awards; any other payments; 'modesty'; 'totality' approach.

■ A 'totality' approach requires one to stand back and consider whether the final sum is a reasonable one in all the circumstances, rather than applying an overly mechanistic approach divorced from the overall context.

■ When considering Strasbourg authorities it is also necessary to take account of inflation and of the 'purchasing power' of that award in the context of the cost of living in the relevant country. This is why awards for similar breaches can be lower when made against Eastern European countries.

■ The range of Strasbourg awards for similar article 3 violations (taking account of inflation and cost of living) are:

– €1,000 to €8,000 for a nominal or low award;

– €8,000 to €20,000 for a routine violation with no serious long-term mental health issues or unusual aggravating factors;

– €20,000 to €100,000+ where aggravating features such as medical evidence of material psychological harm or recognised mental illness; physical harm or crime by the state; long-term systemic or endemic failings by the state.

Comment: This judgment provides welcome and detailed guidance on the correct approach to assessing HRA damages. It should hopefully avoid bad points being taken by defendants in that regard.

HRA: article 2

■ R (Duggan and Delezuch) v (1) Association of Chief Police Officers (2) Chief Constable of Leicestershire Police and others

[2014] EWCA Civ 388,
7 March 2014

The families of Mark Duggan (who was fatally shot by police) and Rafal Delezuch (who died following police restraint) sought judicial review of Association of Chief Police Officers (ACPO) guidance (mirrored in Leicestershire Constabulary guidance) stipulating that officers involved in a shooting or where death or serious injury has occurred should not be isolated from one another, save than in narrow circumstances (for example, to prevent forensic cross-contamination). The claimants were refused permission at an oral hearing in the Divisional Court partly because it was more appropriate in Laws LJ's view to consider the entirety of the article 2 (right to life) inquiry in the round.

The Court of Appeal granted permission to proceed with the judicial review on the basis that: 'if there is, as is argued by the applicants, a policy which inherently carries with it an unacceptable risk of a result which is illegal, ie, collaboration leading to a challenge under article 2, then that policy is itself illegal' (para 14).

Comment: The Court of Appeal has decided to retain the substantive hearing of this application for judicial review (an indication perhaps of the importance of this issue). A full hearing will take place before the Court of Appeal on 14/15 October 2014. The IPCC has also opened a consultation on conferring and other post-incident procedures.

HRA: the right to be forgotten

■ R (T and B) v Chief Constable of Greater Manchester and Secretary of State for the Home Department

[2014] UKSC 35,
18 June 2014,
[2014] 3 WLR 96

In this case the Supreme Court upheld the Court of Appeal's conclusions that the obligation to disclose all cautions for the purposes of criminal record checks, as set out in Police Act (PA) 1997 Part V was incompatible with the article 8 right to respect for private life, as were the disclosure provisions in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 SI No 1023 ('the 1975 Order'). B was a would-be care worker whose caution for a minor offence interfered with her ability to access the care worker employment market. T was a would-be teacher with cautions dating back to his childhood.

The Supreme Court had little trouble finding that the relevant provisions interfered with T's and B's article 8 rights and had 'significantly jeopardised entry into their chosen field of endeavour' (para 20).

In relation to the disclosure of data relating to T's and B's cautions under the PA 1997, the majority of the Supreme Court took the view that the interference was not 'in accordance with the law' within the meaning of article 8(2), and was therefore unlawful. The reasoning in this regard appears in the judgment of Lord Reed. Relying on the case of *MM v UK* App No 24029/07, 13 November 2012; [2012] ECHR 1906, which concerned the disclosure of an individual's conviction for child abduction pursuant to a version of the PA 1997 that was materially identical to that considered in the case of *T and B*, he held: 'That judgment establishes, in my opinion persuasively, that the legislation fails to meet the requirements for disclosure to constitute an interference "in accordance with the law"' (para 119).

There was unanimity among the judges that the interference with T's and B's article 8 rights arising from both the PA 1997 and the 1975 Order was not necessary in a democratic society, and therefore unjustified. Lord Wilson considered that the legislative provisions served the 'supremely important' objective of protecting various members of society, particularly vulnerable groups (paras 30 and 40). Nonetheless, it was noted that T's and B's criticism of the regime was 'obvious' (para 41). Of particular force was the point that the regime operated 'indiscriminately' (para 41). The legislation at issue made no attempt to separate the spent convictions and cautions which should, and should not, be disclosed by reference to a number of factors such as the kind of offence, the circumstances in which the person committed the offence, the time that had elapsed since the offence, and the age of the person at the time. The court concluded that the regime set up by the PA 1997 and the 1975 Order failed the requirement of necessity, going further than was necessary to accomplish the statutory objective, and failing to strike a fair balance between T's and B's rights and the interests of the community.

Comment: The judgment is an important milestone in the development of the 'right to be forgotten'. It is becoming increasingly

unsustainable for the state to justify retaining and disclosing information about a person's criminal history without a proper justification for doing so, and at least a mechanism whereby a person can apply for or expect that in certain circumstances the information will be destroyed or withheld from disclosure.

Selection of assessors in discrimination claims

In the following case the Court of Appeal provided guidance as to the appropriate assessors to sit on discrimination claims in the county court and the process to be followed in relation to their appointment.

■ Cary v Commissioner of Police for the Metropolis

[2014] EWCA Civ 987,
17 July 2014

Mr Cary brought a claim of discrimination on the ground of sexual orientation under the Equality Act (Sexual Orientation) Regulations 2007 SI No 1263. He contended that he had been less favourably treated than a heterosexual person would have been in the way that officers had handled and then dismissed his formal complaint, in turn concerning the police not progressing his report of homophobic abuse from a neighbour.

Proceedings were issued in the Central London County Court (CLCC) and a direction was made for the trial to be heard by a circuit judge and an assessor. The claimant's solicitor asked the court office for an assessor with experience of sexual orientation discrimination. The assessor who was booked sat as a lay member in the employment tribunal (ET) and had particular experience of issues relating to sexual and racial harassment; she had only heard a couple of cases involving sexual orientation discrimination in the ET.

At the commencement of the trial the claimant objected to her selection, arguing that assessors with particular experience in sexual orientation discrimination were required. The Court of Appeal upheld the trial judge's rejection of this submission. There was no rule that assessors must have experience in respect of the particular strand of discrimination at issue; the skills involved in evaluating whether an alleged discriminator had in fact been influenced (consciously or otherwise) by the protected characteristic in question were honed by dealing with complaints of discrimination more generally, so that a specific expertise in sexual orientation discrimination was not needed. This was confirmed by the broad terms of Equality Act (EqA) 2010 s114; the only applicable statutory requirement was that contained in County Courts Act (CCA) 1984 s63(1) for those appointed to have 'skill and experience in the matter to which the proceedings relate'.

Comment: The Court of Appeal acknowledged that although the exception rather than the rule, there could be cases that required an assessor with more specialist expertise; potential examples identified were disability claims contending that particular adjustments should have been made and religious discrimination cases involving knowledge or understanding of a particular belief.

The court also emphasised the importance of complying with CPR 35.15 and the related Practice Direction, and set out the process to be followed in future. This is likely to involve a substantial change from the current practice in courts such as the CLCC.

This process involved the court addressing at an early stage: whether there is any reason not to have one or more assessors; the matter(s) on which the assistance of the assessor(s) should be sought; what sort of assessor(s) should be appointed; and his/her identity(ies). The court indicated that the parties should try to reach agreement on these points. They should make representations and suggestions and the court should resolve each of these matters as part of giving case management directions; they required judicial determination and could not be left to the court administration.

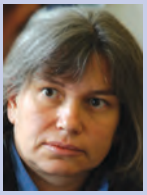
The judgment also discusses the sources of assistance available to the court in identifying suitable assessors, given that the parties would often invite the court to nominate appropriate individuals. In such circumstances, the rules required that the parties be notified of the identity and relevant qualifications of the nominated person(s) 21 days before the appointment was made, so that there was an opportunity for objection to be made.

Award for injury to feelings in discrimination claims

■ Cadogan Hotel Partners Ltd v Ozog

UKEAT/0001/14/DM,
15 May 2014

The Employment Appeal Tribunal confirmed that the ten per cent uplift in awards of general damages required by *Simmons v Castle* [2012] EWCA Civ 1039, 26 July 2012 applied to compensation for injury to feelings in discrimination cases, made in accordance with *Vento v Chief Constable of West Yorkshire Police (No 2)* [2002] EWCA Civ 1871, 20 December 2002; [2003] ICR 318 (and up-rated for inflation as identified in *Da'Bell v National Society for Prevention of Cruelty to Children* UKEAT/0227/09/CEA, 28 September 2009; [2010] IRLR 19).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Police station law and practice update

Ed Cape continues his six-monthly series on police station law and practice. This article covers recent developments in policy and legislation as well as recent significant case-law.

POLICY AND LEGISLATION

PACE and the Codes of Practice

New disclosure obligations

The Police and Criminal Evidence Act 1984 (PACE) Codes of Practice C and H were revised with effect from 2 June 2014, by virtue of Police and Criminal Evidence Act 1984 (Codes of Practice) (Revisions to Codes C and H) Order 2014 SI No 1237.[1] These revisions were necessary in order to give effect to the European Union (EU) Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.[2] The fear, expressed in 'Police station law and practice update', April 2014 *Legal Action* 12, that the Home Office would take a minimalist approach to revising the codes, was misplaced. Article 11 of the Directive uses the term 'transposition', requiring member states to bring in the law, regulations and administrative provisions necessary to comply with the Directive. Overall, the revised codes do faithfully 'transpose' the provisions of the Directive into domestic law (this is true with regard to the investigative stage of the criminal process, but not at subsequent stages, in respect of which the Ministry of Justice appears to have taken the view that no action is necessary; of particular concern is the fact that there is no provision for informing defendants of their procedural rights, no right of access to documents in advance of a bail hearing, and only limited rights to disclosure of case information and materials in the case of summary proceedings) although they give investigating and custody officers a great deal of discretion about what information and documents to disclose in individual cases.

Moreover, the Association of Chief Police Officers (ACPO), in a 'Position Statement' issued in June 2014, encourages police officers to ignore the new provisions (*National policing position statement: pre-interview briefings with legal advisers and information to be supplied to unrepresented detainees,* National Investigative Interviewing Strategic Steering Group). In particular, it states that pre-interview disclosure does not have to be given to unrepresented suspects, and that '[l]egally the police do not have to disclose anything other than what is recorded on the suspect's custody record' (pages 1 and 2, respectively). Neither statement is correct, and they directly contradict the provisions of Code C paras 3.4(b) and 11.1A (Code H paras 3.4(b) and 11.1). In this context, defence lawyers will need to be fully aware of the relevant provisions, and be ready to argue for greater disclosure.

The three major changes to the codes are:

- more information to be given to suspects about their procedural rights;
- a new obligation on the police to disclose information about the suspected offence before interview; and
- a new obligation to disclose documents relevant to the lawfulness of the arrest and detention.

These changes are explained in detail as follows:

- *Information about procedural rights* – section 3 of Codes C and H has been revised to increase the amount of information that must be given to suspects about their procedural rights, and a revised Notice of Rights and Entitlements has been issued reflecting the new obligations.[3] Codes C and H para 3.2A now provides that detainees must be given an opportunity to read the notice, and this should be interpreted as meaning that detainees should be given the opportunity to read it before being asked to acknowledge receipt and whether they wish to exercise rights set out in the notice, such as the right to consult a solicitor. Note that a volunteer does not have to be given the written notice, but must be informed in writing about the arrangements for obtaining legal advice, and must be given oral notice of other relevant rights (Code C para 3.21(b)). (A 'volunteer' is a person who, for the purpose of assisting with an investigation, attends the police station or other place where a constable is present or accompanies a constable to a police station or any such other place without having been arrested (PACE s29 and Code C para 3.21).) There is no equivalent provision in Code H since Code H only applies to persons arrested under Terrorism Act (TA) 2000 s41.
- *Information about the suspected offence* – before being interviewed, a suspect, and his/her solicitor if the suspect is represented, must be given sufficient information to enable him/her to understand the nature of the suspected offence and why the suspect is suspected of committing it, in order to allow for the effective exercise of the rights of the defence (Code C para 11.1A). This is modified in the case of a person arrested under TA 2000 s41 in that the information must be sufficient to enable the suspect to understand the nature of his/her suspected involvement in the commission, preparation or instigation of acts of terrorism (Code H para 11.1). Contrary to the ACPO statement of June 2014, these paragraphs make it clear that the disclosure obligation applies to unrepresented suspects in the same way as it applies to those who have a solicitor. As to the extent of information to be disclosed, Code C Note for Guidance 11ZA states that it should normally, as a minimum, include a description of the facts relating to the suspected offence that are known to the officer, including the time and place in question (see Code H Note for Guidance 11ZA for the modifications in respect of a person arrested under TA 2000 s41). The decision about what to disclose rests with the investigating officer, but Code C para 11.1A and Code H para 11.1 provide that while the information must always be sufficient for the person to understand the nature of the offence (or nature of suspected involvement in acts of terrorism), 'this does not require the disclosure of details at a time which might prejudice the (criminal) investigation'.

These provisions clearly give investigating officers a great deal of discretion, and they are likely to continue to take a strategic approach to disclosure. The reference to the time and place of the suspected offence goes no further than the information that, under Code C Note for Guidance 10B, must be given on arrest. However, while on arrest a person must be informed of the nature of the offence, prior to interview the person must be given sufficient information to enable him/her to understand the nature of the offence. Furthermore, the information given must be sufficient to enable the suspect to exercise his/her rights, and one of those rights is the right to silence. Therefore, the information disclosed should be sufficient to enable the suspect to decide whether to exercise that right. In more complex investigations, or those that involve important documents, or concern suspicion of historical offences, the disclosure requirement is potentially extensive. It is likely that there will be a degree of tension between investigating

officers and defence lawyers as to the level of disclosure, but the new provisions do, at least, provide some basis for negotiation. This will be important because the enforcement mechanism is weak: challenges are to be dealt with by an inspector as a complaint (Code C para 3.26). One provision that may help if lack of, or inadequate, disclosure is relevant in subsequent court proceedings is that the investigating officer must make a record of what was disclosed and when it was disclosed (Code C para 11.1A).

■ *Documents relevant to the lawfulness of arrest and detention* – Codes C and H para 3.4(b) provides that documents and materials which are essential to challenging the lawfulness of a detainee's arrest and detention must be made available to the detainee or his/her solicitor. Documents and materials are 'essential' if they are capable of undermining the reasons and grounds which make the arrest and detention necessary. The codes do not state when such documents and materials must be disclosed, but since the paragraph is under the heading 'Initial action', the implication is that disclosure should first be considered at the time of the initial detention decision. However, it is a continuing obligation, and the codes expressly provide that it also applies when reviews of detention are conducted, and on an application for a warrant of detention, at charge, and when the decision about post-charge bail or detention is made. A record must be made of what is made available, and how and when it was made available. The decision on disclosure rests with the custody officer at the time of initial detention and on charge, with the review officer on review of detention, and with the officer making an application for a warrant of further detention (see Code H para 3.4(b) for variations in respect of a person arrested under TA 2000 s41), but the investigating officer is under a duty to bring relevant documents and materials to the attention of the officer who makes the disclosure decision (Codes C and H Note for Guidance 3ZA). The codes do not specify the documents and materials that should be considered for disclosure, but since those that are 'capable of undermining' the necessity for detention must be disclosed (as opposed to those, which in the officer's opinion, do undermine necessity), they may include the arresting officer's pocket book, the pocket books or statements of other officers present at the arrest, and the crime report. Code of Practice G Note for Guidance 2 provides that before making a decision to arrest, an officer should take into account 'any facts and information that are available, including claims of innocence made by the person, that might dispel the suspicion'. Where a suspect is arrested following voluntary attendance at a police station, or where a suspect is arrested who was willing (or who would have been willing if asked) to attend the police station voluntarily, documents that should be disclosed might include any that record information regarding voluntary attendance, or any that may be relevant to the decision to arrest a person following a prior arrangement for voluntary attendance. In the past, the courts have held that custody officers are entitled to assume that an arrest is lawful, (see *DPP v L and S* [1999] Crim LR 752, 14 December 1998) but in the context of the new disclosure obligation, arguably a custody officer (or review officer, or court on an application for a warrant of further detention) should take appropriate action if the documents or materials disclosed demonstrate that arrest or detention was not necessary.

The new disclosure obligations challenge long-standing practices of the police in treating the disclosure of relevant information as a matter entirely for them to determine. In particular, police are likely to continue to withhold information that they want to confront suspects with in interview. However, the provisions do provide a basis for defence lawyers to explore information relevant both to arrest and detention, and to the suspected offence. While the codes require the relevant officer to record what was disclosed and when, defence lawyers may also want to pursue any refusal to disclose information or documents, asking the officer to provide a reason for any such refusal. Failure to provide the information, documents or materials required by the codes may be relevant to a decision regarding whether inferences should be drawn under Criminal Justice and Public Order Act 1994 ss34, 36 or 37, and also to whether a confession or other prosecution evidence should be excluded under PACE ss76 or 78.

Other developments

There have been two other developments regarding PACE and the Codes of Practice:

■ Revised *Service Police Codes of Practice*, including Codes A–G, was introduced with effect from 2 June 2014.[4]

■ PACE was applied (subject to the modifications in Schedule 1) to officers of the National Crime Agency who have been designated as constables (under Crime and Courts Act 2013 ss9(2) and 10(1)) by the Crime and Courts Act 2013 (Application and Modification of Certain Enactments) Order 2014 SI No 1704, as from 4 August 2014.

Low-value shoplifting

Anti-social Behaviour, Crime and Policing Act (ASBCPA) 2014 s176 inserted a new section 22A into the Magistrates' Courts Act 1980 which provides that low-value shoplifting is a summary-only offence (subject to the right of an accused to elect trial). Low-value shoplifting is theft from a shop, where the value of the goods does not exceed £200 (see *Guidance. Implementing section 176 of the Anti-social Behaviour, Crime and Policing Act 2014: low-value shoplifting. Guidance for police in England and Wales*, Home Office, June 2014).[5] However, by virtue of section 176(6) low-value shoplifting continues to be treated as an indictable offence for the purposes of PACE. This means that police powers that are only available in respect of indictable offences, such as the power to enter and search property to effect an arrest (PACE s17(1)(b)), and powers of entry and search following arrest (sections 18 and 32), and also civilian power of arrest under section 24A, continue to apply in respect of low-value shoplifting.

Terrorism

The right of a person detained for examination under TA 2000 Sch 7 to consult with a solicitor whether or not the person is detained at a police station – which was clarified by Home Office Circular 105/2013 following the judgment in *Elosta v Commissioner of Police for the Metropolis* [2013] EWHC 3397 (Admin), 6 November 2013 (see 'Police station law and practice update', April 2014 *Legal Action* 13) – has been put on a statutory footing by ASBCPA s148 and Sch 9. Schedule 9 para 5 inserts a new para 7A into TA 2000 Sch 8, which provides that where a person detained under TA 2000 Sch 7 asks for a solicitor, the person may not be questioned until s/he has consulted a solicitor (or no longer wishes to do so), unless the examining officer reasonably believes that postponing the questioning until then would be likely to prejudice determination of relevant matters. The right to consult a solicitor is a right to do so in person, unless the examining officer reasonably believes that the time it would take to consult a solicitor in person would be likely to prejudice determination of the relevant matters (TA 2000 Sch 8 para 7A(5)).

A code of practice for examining officers was introduced by the Terrorism Act 2000 (Code of Practice for Examining Officers and Review Officers) Order 2014 SI No 1838, with effect from 31 July 2014.[6]

Bail

A solicitor has raised with the author a question regarding the relationship between warrants of further detention and police bail. Where a suspect, having been granted bail under PACE Part IV, attends the police station in accordance with that bail or is arrested under PACE s46A having failed to surrender to bail, any time during which the suspect was in police detention prior to the grant of bail is

included for the purpose of calculating the maximum period of pre-charge detention, but any time during which the suspect was on bail is not (PACE s47(6)). This would apply in calculating the maximum period of pre-charge detention where that maximum period had been extended by a warrant of further detention.

Could a warrant of further detention validly be granted if the police know, at the time they apply for the warrant, that they intend to bail the suspect without charge? The issue does not appear to have been judicially considered. Section 43(1) of PACE requires the court, in considering an application for a warrant of further detention, to be satisfied that there are reasonable grounds for believing that 'the further detention of the person to whom the application relates is justified'. Further detention is only justified if 'detention without charge is necessary to secure or preserve evidence … or to obtain such evidence by questioning' (PACE s43(4)(a)). On the face of it, if the police know that they are going to bail the suspect following grant of the warrant, further detention of the suspect cannot be necessary. The police might argue, however, that if they took a decision to bail a person only after a warrant had been granted, they would be permitted to do so, and that obtaining a warrant in the knowledge that they intend to bail the suspect makes no substantive difference.

If bail is granted to a person who has not been charged with an offence after a warrant is granted, such bail could be granted under PACE s37(2) and conditions could be attached. If bail is only granted under PACE s41(7) on the expiry of a detention time limit, conditions cannot be attached (since by section 47(1A) conditions can only be attached to bail granted under section 37). Could a person be bailed under section 37 in circumstances where the detention time limit has expired? It was held in *R (Torres) v Commissioner of Police of the Metropolis* [2007] EWHC 3212 (Admin), 17 December 2007 that bail could be granted under section 37(2) in all circumstances where it could be granted under section 34(5) (grounds for detention have ceased to apply), and it is likely that the same approach would be taken in respect of bail under section 41(7). If this is correct, the police would not be at a disadvantage by being refused a warrant of further detention.

However, if the detention time limit has expired, while the police would be able to proceed to charge the suspect on the suspect's surrender to bail, they would not be able to detain the suspect for further questioning, unless there was sufficient time left on the detention clock to enable them to apply for a warrant of further detention at that point. They could be hampered in doing so given that the application must be made before expiry of the time limit, and it was held in *R v Sedgefield Justices ex p Milne* (1987) 5 November, unreported, Lexis No CO/1318/87, that the time of the application is the time that the officer makes the application on oath and gives evidence (and not the time that they notify the court that they intend to make the application).[7] On the other hand, if the police have discovered new evidence during the period of bail, section 47(2) provides that the person may be re-arrested if this is justified, and in these circumstances the detention clock starts again.

CASE-LAW

Arrest

■ Walker v Commissioner of Police of the Metropolis

[2014] EWCA Civ 897,
1 July 2014

The police were called to premises following a complaint of domestic assault. There was conflicting evidence as to what occurred on their arrival outside the premises, but the judge preferred the evidence of police officer A. A stated that on arrival, he heard the complainant say that the appellant, W, had punched her and believed, as a result, that he had reasonable grounds to arrest W. However, he decided to make enquiries first in the hope of avoiding arrest. His first words were, 'Calm down mate or you will end up getting arrested'. The officer did not touch or take hold of W, but did confine him to a doorway and made it clear that he was not free to move. W became agitated, tried to push past the officer, swore at him, and threatened to 'bang him'. A tried once more to calm him down, but W swore again at the officer and pushed him in the chest. At this point, A arrested W for 'public order'. W resisted arrest and bit A on his arm and finger. W was subsequently charged with assault on a police officer, but acquitted following close of the prosecution case on the grounds that his initial detention was unlawful, and that W's reactions were reasonable. W's civil action against the police for false imprisonment, assault and malicious prosecution failed on all counts, but he was granted leave to appeal in respect of three issues: whether his initial detention amounted to false imprisonment; if so, whether his reaction was a reasonable and proportionate exercise of self-defence; and whether the officer's explanation that he was arrested for 'public order' satisfied the requirements of PACE s28(3).

In considering the first issue, the court reviewed the case-law on the question of how far a police officer can go in restricting a person's freedom of movement in circumstances where s/he is not exercising his/her power of arrest (or other power such as that of stop and search). Broadly, a police officer has no greater power than a member of the public, so that anything that goes beyond 'the acceptable conduct of an ordinary member of the public' amounts to false imprisonment, 'as where he uses the threat, actual or implied, to use force if the other person does not comply' (para 23). Applying those principles to the facts of the instant case, the actions of A went beyond the acceptable conduct of a member of the public (para 30), and thus W was unlawfully imprisoned in the doorway, if only briefly (para 33). With regard to the issue of whether W's reaction was reasonable and proportionate, the court was not prepared to interfere with the judge's finding that it was not. On the third issue, the court referred to the decision in *Taylor v Chief Constable of Thames Valley Police* [2004] EWCA Civ 858, 6 July 2004 in which it was held that PACE s28(3) requires that the person arrested be 'told in simple, non-technical language that he could understand, the essential legal and factual grounds for his arrest' (quoted at para 39 of the *Walker* judgment). The court wavered on whether informing W that he was being arrested for 'public order' satisfied this test because the words used can denote a wide variety of offences. However, it concluded that, on the facts, they were sufficient because 'the particular legal label of a particular offence [does not] matter so much if the arrested person knows that he is being arrested for the conduct he has immediately carried out, a fortiori in the face of the arresting officer, and after warnings that such conduct may lead to his arrest' (para 43). See also page 24 of this issue.

Comment: The officer in this case appears to have taken the reasonable approach that, in the context of a volatile situation, he wanted to consider the facts before taking the decision of whether an arrest was justified. Unfortunately, in doing so, he effectively detained W for a short period and, since he was not at that point arresting him, that detention was unlawful. While this amounted to a false imprisonment, the court showed its displeasure in coming to this finding by awarding W the sum of only £5. The court took the view that the officer had engaged in 'sensible policing' (para 48), and Tomlinson LJ suggested that the result might have been different if the police had argued that W was arrested because of an apprehended breach of the peace rather than for a public order offence. It is not clear that this would have helped the police case. First, the officer did not suggest that this was the reason for arrest. Second, even if it had been,

the officer would still have been required to have informed W of the grounds for his arrest since PACE s28(3) applies to any arrest, not only an arrest for an offence. With regard to the obligation to inform an arrested person of the 'legal and factual' grounds for the arrest, Code C Note for Guidance 10B states that an arrested person must be given 'sufficient information to enable them to understand that they have been deprived of their liberty and the reason they have been arrested'. While informing a person of the offence for which the person is arrested satisfies the requirement that s/he be informed of the legal grounds for arrest, it must be questioned whether it satisfies the requirement that s/he be informed of the factual grounds for the arrest.

■ Commissioner of Police of the Metropolis v Copeland

[2014] EWCA Civ 1014, 22 July 2014

C attended the police station to act as appropriate adult for her son. A dispute arose involving C's use of her mobile telephone while the custody officer was reading her son his rights, and she was asked to leave the custody suite. Believing that she was refusing to do so, the custody officer instructed two officers standing behind her to escort her out. One of them, B, alleged that C struck him twice. Subsequently, B went to the response room and asked D if she was free to carry out an arrest, telling her that he had been punched twice to the side of his face by C. D then went to the custody suite and arrested C for assault occasioning actual bodily harm. C was subsequently charged (by an officer other than B) and convicted of assaulting B in the execution of his duty, but that conviction was quashed on appeal which the prosecutor, having reviewed the CCTV evidence, did not oppose. C successfully sued the police for assault, false imprisonment and malicious prosecution. The jury found that the police had not used reasonable force when she was initially taken hold of by the two officers, and that she had been assaulted when she was arrested. The commissioner appealed the jury's verdict on the grounds that it was perverse and against the weight of the evidence.

The Court of Appeal was of the opinion that no conclusion adverse to the commissioner could have been reached by the jury unless it took the view that B had lied when he said that he had been punched twice by C, and that other police witnesses had also lied. A key question was where the burden of proof lay in respect of these alleged lies. The court held, following existing case-law, that it is for the police to establish the lawfulness of an arrest, and this included proving that B acted in good faith in asking D to arrest C. Where an arrest was procured by someone other than the arresting officer, and that person had deliberately lied in order to procure or directly encourage the arrest, then the arrest is unlawful (para 19). On the facts, the commissioner could not prove that the arrest was lawful unless he could establish that B was acting in good faith in requesting D to arrest C. Furthermore, for the purposes of malicious prosecution, the issue was not which officer actually took the charge decision, but who was responsible for the prosecution being brought (para 33). On the facts, the jury was entitled to conclude that this was B. See also page 23 of this issue.

Comment: The standard test for determining whether an arrest is lawful is derived from the judgement in *Castorina v Chief Constable of Surrey* [1996] LGR 241:

- did the arresting officer actually suspect that the person arrested was guilty of the offence (a subjective test);
- if so, was there reasonable cause for that suspicion (an objective test);
- if the answers to the first two questions are in the affirmative, did the arresting officer exercise his/her discretion in accordance with *Wednesbury* principles.

This was confirmed in *Al Fayed and others v Commissioner of Police of the Metropolis and others* [2004] EWCA Civ 1579, 25 November 2004, in which Auld LJ said that '[i]n determining all *Castorina* questions the state of mind is that of the arresting officer' (para 83). However, the court in *Copeland* took the view that where an arrest has, in effect, been procured by another officer, the state of mind of the arresting officer is not relevant since '[t]hat state of mind was entirely influenced by and dependent upon' what the arresting officer had been told by B (para 18). If B deliberately lied, then since the arrest of C was entirely attributable to B's allegation, it was unlawful and it resulted in false imprisonment. The decision has interesting implications since police officers often arrest on the basis of information supplied by others. However, it is important to note that in this case the court found that the arresting officer had no other information on which she could form her suspicion. The result would have been different if, for example, she had also received information from another source or had observed the incident herself.

Legal advice

■ R (McDonagh) v Chief Constable of Leicestershire Constabulary

[2013] EWHC 4690 (Admin), 19 December 2013[8]

M was arrested on suspicion of theft, and requested legal advice. A solicitor attended the police station, was given some disclosure and then had a private consultation with M in his cell. After the consultation the solicitor asked to speak to L, another client arrested in respect of the same matter. The custody officer told him that the officers were ready to interview M, and that he should attend that interview before speaking to L. The solicitor refused, and after a 'standoff, in which voices on one or both sides were raised' the solicitor was required to leave the police station under implied threat of force if he did not do so (para 3). M brought a civil action against the police. The court found a breach of Code of Practice C para 6.8, which provides that unless an exception in paragraph 6.6 applies a person detained at a police station who has been permitted to consult a solicitor 'shall be entitled on request to have the solicitor present when they are interviewed'. None of the exceptions applied, and the effect of the custody officer's actions was to prevent M from having his solicitor present at his interview. The court granted a declaration that this amounted to a breach of article 6(3)(c) of the European Convention on Human Rights ('the convention'), and awarded damages.

Comment: Where a solicitor is acting for more than one suspect arrested in respect of the same, or a related, offence the police are often keen to ensure that information is not given to a second suspect which has been obtained during the course of the police interview with the first suspect. A solicitor acting in such circumstances should always consider the potential for a conflict of interests, but as Code C Note for Guidance 6G makes clear, the question of conflict is for the solicitor to resolve having regard to their professional code of conduct.[9] Code C para 6.6 does permit a suspect who has requested a solicitor to be interviewed without having received legal advice in certain circumstances, but unless it is a case where the police are permitted to delay access to a lawyer (see Code C Annex B), none of the exceptions apply when the solicitor is already at the police station. The police might have argued that since M had had a consultation with his lawyer prior to the interview, he had received legal advice. However, paragraph 6.8 makes it clear that the right extends to having the lawyer present at the interview. In making the declaration the court resorted to article 6(3)(c) of the convention, although it could be argued that the court could have made a declaration that the police were in breach of PACE s58(1) since this provides that a person arrested and held in custody is entitled to consult a solicitor 'at any time', and in this respect is more detailed than the convention.

A question that was not explicitly dealt with in the judgment (which was given by consent) is what procedure should have been followed when the police sought to exclude the solicitor

from the police station. Code C paras 6.9–6.11 provide that a solicitor may only be required to leave an interview if his/her conduct is such that the interviewer is unable properly to put questions to the suspect, and the decision must be made by an officer not below the rank of superintendent. The code does not make provision for exclusion of a solicitor from a police station (as opposed to exclusion from a police interview), but in the light of this decision, the police would be well-advised to adopt a similar procedure in such circumstances.

Search of premises

■ R (AB and CD) v Huddersfield Magistrates' Court and Chief Constable of West Yorkshire Police

[2014] EWHC 1089 (Admin), 10 April 2014

The police obtained a search warrant under PACE s8 in respect of premises occupied by the claimants. The claimants were members of the family of MS who was wanted in connection with a lethal house fire, and who were suspected of assisting MS to leave the country. They were also solicitors who practised in criminal law, including as duty solicitors. In that capacity they were well known to the police. The claimants challenged the validity of the warrant on a number of grounds, including that the police had not informed the magistrates that the claimants were solicitors, nor that the police expected to find significant quantities of items subject to legal privilege (para 7). They also challenged the legality of a search of their premises conducted under PACE s18 following the arrest of a person identified as ZH who had stayed there for one night with a view to surrendering voluntarily to the police the following day. The court quashed the search warrant, and found the search under PACE s18 to have been unlawful.

Comment: Where the police apply for a search warrant without notice they are under an obligation to make full and frank disclosure. As the court stated:

> *... there is no part of the process that should be regarded as a formality. Each application must be carefully and precisely formulated so as to satisfy both the statutory requirements and the duty of full and frank disclosure; and a decision to issue may only be taken after that level of critical scrutiny that is required when the court is asked to sanction a substantial invasion of fundamental rights* (para 13).

It was obvious, said the court, that the duty of disclosure required the police to inform the magistrates that the claimants were solicitors, with the consequence that material that might be seized under the warrant would include significant quantities of material that was legally privileged. This was particularly important because under PACE s8(1) magistrates may issue a search warrant if, among other things, they are satisfied that there are reasonable grounds for believing that material on the premises 'does not consist of or include items subject to legal privilege'. Therefore, the question for the police in considering what information to provide to the magistrates was not whether it was certain that material within the ambit of the warrant would consist of legally privileged items, but whether they had reasonable grounds for believing that items included in the warrant would not consist of or include them (para 19). Put in this way, the obligation on the police to inform the magistrates of the profession of the claimants was clear. (For the proper procedure to be adopted in cases involving the search of premises or homes of solicitors, see *R (S and others) v Chief Constable of the British Transport Police and another: Practice Note* [2014] 1 WLR 1647.)

Section 18 of PACE empowers a police officer to enter and search any premises 'occupied or controlled by a person who is under arrest for an indictable offence, if he has reasonable grounds for suspecting that there is on the premises evidence, other than items subject to legal privilege' that relates to the offence for which the person is under arrest or some other similar or connected offence. As the court recognised, there is no statutory definition of 'occupied or controlled' and it appears that it has not been judicially defined. The court held that since section 18 specifically links the authorising of the search to the reasonable belief that there will be evidence on the premises for which the person has been arrested, the arrested person's occupation of the premises must be such as to support the belief that it will have caused or contributed to the presence of such evidence (para 46). While a short stay may be sufficient to give rise to such a belief, for example, where the person has been arrested on suspicion of a drugs offence, in the instant case there was nothing to suggest that such a belief could be sustained.

1 Code C is available at: www.gov.uk/government/publications/pace-code-c-2013; and Code H is available at: www.gov.uk/government/publications/pace-code-h-2013.
2 Available at: http://eur-lex.europa.eu/.
3 Available at: www.gov.uk/notice-of-rights-and-entitlements-a-persons-rights-in-police-detention.
4 Available at: www.gov.uk/government/publications/jsp-397-service-police-codes-of-practice.
5 Available at: www.gov.uk/government/publications/low-value-shoplifting-guidance-for-police.
6 A draft copy of the code is available at: www.gov.uk/government/publications/draft-code-of-practice-for-examining-officers-and-review-officers-under-schedule-7-to-the-terrorism-act-2000.
7 See further Ed Cape, *Defending Suspects at Police Stations*, 6th edition, LAG, October 2011, p345.
8 Thanks to Stephen Oldham for drawing attention to this case, via Twitter.
9 See further *Defending Suspects at Police Stations* (above), p168.

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Update on the Court of Protection – Part 3

The resumption of this series of articles on developing trends within the Court of Protection's jurisdiction and procedural matters of significance for practitioners coincides with the publication of LAG's *Court of Protection Handbook: a user's guide*. Sophy Miles considers developments in Court of Protection practice during the first half of 2014. See July/August 2014 *Legal Action* 15 for Part 1 of this article and September 2014 *Legal Action* 51 for Part 2.

CASE-LAW

Damages claims in the Court of Protection

The Local Authority v Mrs D (by her litigation friend the Official Solicitor) and Mr D [2013] EWCOP B34, 10 July 2013 concerned an application by the Official Solicitor for damages for breach of her rights under the European Convention on Human Rights ('the convention'). The application was made within the Court of Protection, following permission by the Court of Protection. The court had made declarations that Mrs D, who had Huntington's disease, had been unlawfully deprived of her liberty. The case concerned a depressingly familiar catalogue of errors surrounding the refusal of the local authority to allow Mrs D to return to her husband from a respite placement that he had initially agreed to, and the failure to bring the matter before the court in a reasonable time. The claim was that the local authority had:

- wrongly failed to bring the issue of Mrs D's deprivation of liberty before the Court of Protection for determination before 10 April 2012;
- failed to take into proper consideration Mrs D's own objections to and distress at her enforced residence at the care home;
- failed to recognise that the purpose of the Mental Capacity Act (MCA) 2005 procedures is to uphold the substantive and/or procedural convention rights of persons lacking capacity.

The compromise was that the local authority would, without accepting liability:

- make an apology to Mrs D for the delay in bringing these proceedings;
- pay a sum of £15,000 to Mrs D;
- pay the reasonable costs of the action incurred by Mrs D's litigation friend;
- pay a sum of £12,500 to her husband Mr D;
- pay Mr D's reasonable costs of the action.

Comment: In approving the compromise the court noted that the purpose of damages under the convention and the Human Rights Act (HRA) 1998 is not restitutionary but vindicatory – to give 'just satisfaction'. The court was only able to compare two cases – *Hillingdon LBC v Neary (by his litigation friend the Official Solicitor) and Neary* [2011] EWCOP 1377, 9 June 2011 (£35,000 for a year approved by a judge of the Queen's Bench Division) and the much older delay cases against the Mental Health Review Tribunal: *R (KB and others) v Mental Health Review Tribunal and Secretary of State for Health* [2003] EWHC 193 (Admin), 13 February 2003 (£4,000 for four months for one of the claimants, JR). The court approved the current case as within a reasonable range, though towards the lower end if *Neary* was seen as a bench mark rather than a high water mark. The court noted that sadly Mrs D was now unaware of any admission of liability or judicial finding of the breach of her convention rights and it would be wrong to delay receipt of the award any longer than necessary.

Procedural issues

Disclosure

RC v CC (by her litigation friend the Official Solicitor) and X Local Authority [2014] EWCOP 131, 30 January 2014 was an appeal against a decision on disclosure by HHJ Cardinal ([2013] EWCOP 1424, 8 May 2013) and was heard by the President of the Court of Protection, Sir James Munby.

The case had concerned an application by RC, the birth mother of CC, who had been adopted as a young child. CC lacks capacity to decide whether to have contact with RC. RC had been given permission to make the application. She sought disclosure of a clinical psychologist's reports relating to CC and of three social workers' statements. HHJ Cardinal concluded that RC should have a redacted copy of the clinical psychologist's report but not the social workers' statements. These were to be disclosed to RC's legal representatives, but on the basis that they did not disclose them to RC without leave of the court.

The President referred to the principle of open justice but also to the historical acceptance that wardship and lunacy proceedings would be exceptions to this rule. This is now reflected in Administration of Justice Act 1960 s12 (providing that it is contempt of court to disclose information about cases before the Court of Protection).

The Supreme Court has recognised that there will be cases concerning children where decision-makers take into account material that has not been seen by the parties (see, for example, *Re A (A Child)* [2012] UKSC 60, 12 December 2012). Munby J, as he then was, had said in *Re B (Disclosure to Other Parties)* [2001] 2 FLR 1017, 19 July 2001 that orders for non-disclosure should not be made

> *... unless the situation imperatively demands it. No such order should extend any further than is necessary. The test, at the end of the day, is one of strict necessity* (quoted at para 15).

The test for strict necessity in children cases involves consideration of:

- whether disclosure would involve a real possibility of significant harm to the child;
- if it would, the court should consider whether the overall interests of the child would benefit from non-disclosure, bearing in mind the risk to the child and the possible benefit of the material being tested;
- if the interests of the child point towards non-disclosure, the court's next and final step is to weigh the interests of the child against the interest of the party seeking disclosure;
- in many cases the answer will not be yes or no but may involve disclosure subject to safeguards or in stages.

The President held that these principles apply to cases concerning adults in the Court of Protection. HHJ Cardinal's judgment, properly understood, did not mean that the Court of Protection applied different principles to the family courts but that the application of the principles may differ.

The President agreed that the redacted psychology report provided RC with the information she needed to conduct her case. With regard to the social work evidence, HHJ Cardinal approached the question as whether RC 'needs to see' evidence when the correct test was whether it was necessary for her not to see the evidence. The President also agreed that HHJ Cardinal's reasons for refusing disclosure of the whole of the report – rather

than considering redaction – were inadequate. Furthermore, the judge should not have ordered disclosure to counsel on the basis that it was withheld from his client without the consent of counsel, who could not give such consent without instructions.

Privacy and publicity

Redbridge LBC v G (by her litigation friend the Official Solicitor), C and F [2014] EWCOP 485, 26 February 2014 was originally brought under the inherent jurisdiction by the local authority which was concerned that G was being exploited by C and F, her carers. She was ambivalent about them, at some points – including at court – expressing her appreciation of them and at others complaining that they had trapped her. There had been numerous visits, and obstruction by C and F had led to the involvement of the police. Both the independent doctor, Dr Barker, and independent social worker considered G's capacity was undermined in the presence of C and F, but Dr Barker considered that G further had an impairment of or disturbance in the function of the mind or brain.

The judge approached capacity as a two-stage test, first looking for the presence of the impairment; and then looking at whether that was sufficient to render G incapable of making the relevant decisions – namely, who should live with her; property and affairs; and litigation capacity. With regard to the first element, the judge accepted the evidence of Dr Barker. It was agreed by all parties that G lacked litigation capacity. G could not understand sufficient relevant information about her property and affairs or her living arrangements and could not reliably retain it or weigh it. The judge accepted that 'the influence and controlling behaviour of C and F … will have further compromised the ability of G to make decisions and understand what is happening to her' (para 81).

G had executed both health and welfare, and property and financial affairs lasting powers of attorney (LPAs) in favour of C who applied to register them. The property and financial affairs application was defective so the LPA was not registered and a panel deputy was appointed. The health and welfare LPA was registered but the court directed the attorney (C) not to exercise powers pending the outcome of the application.

In **Re G (Adult), Redbridge LBC v G (by her litigation friend the Official Solicitor), C and F** [2014] EWCOP 1361, 1 May 2014, the President considered an application by Associated Newspapers Limited (ANL) to be joined as a party to various applications by the local authority in respect of G, an elderly woman. The applications included an order preventing C from taking G to any public protests, demonstrations or meetings with the press. The court had concluded at the earlier hearing that the consideration of this order required an assessment of G's capacity to communicate with and engage with the press. ANL sought to be joined as a party to the proceedings and to provide its own instructions to the expert, but subsequently refined the application and sought to be joined as an interested party in respect of certain issues.

The President held that ANL was not ultimately seeking to publish material that was already in existence but material that might subsequently come into existence, namely that which ANL received from G. He further held that, if G lacked capacity to communicate with and engage with the press, then the decision whether G should impart information to the press was to be taken in G's best interests and that did not give rise to a justiciable issue between ANL and G. However, the President held, if the court made the decision that it was not in G's best interests to impart information to ANL, then G's best interests should be balanced against ANL's rights under article 10 (right to freedom of expression and information) of the convention. The President therefore concluded that there was no need for ANL to be a party to the assessment either of G's capacity to communicate with the press or of her best interests in this regard (if she lacked capacity), nor was this desirable for the purpose of Court of Protection Rules (COP Rules) 2007 SI No 1744 r73. Indeed it was undesirable, as this would extend the number of persons who would be entitled to the extensive access to documents relating to G.

In a subsequent judgment (*Re G (Adult) (Costs)* [2014] EWCOP 5, 10 June 2014) the President directed that ANL pay 30 per cent of the costs of the Official Solicitor and 30 per cent of the costs of the local authority.

In **The Press Association v Newcastle Upon Tyne Hospitals Foundation Trust** [2014] EWCOP 6, 17 June 2014, Peter Jackson J considered the question of the continued confidentiality after P's death of information gathered in litigation during her lifetime. LM was a Jehovah's Witness with a history of mental illness and had been admitted to hospital in a deteriorating condition which would have required a blood transfusion. In an earlier hearing in open court, the judge had granted a declaration that it would be lawful to withhold a blood transfusion, and LM had died shortly afterwards. A reporting restriction order was made preserving LM's anonymity and the Press Association applied to set it aside. The authorities suggested that after P's death, P would no longer require the special protection from publicity, but the position of others – such as P's family or care staff – was relevant. The current case, however, raised the question as to whether in fact LM had a claim to anonymity after her death – she had no known family or friends.

The judge concluded that in some cases it may be necessary and proportionate to uphold after death the confidentiality that existed in life. Following that, he applied the balancing test and reached the view that none of the information provided about LM in the judgment was of particular sensitivity and did not reflect any discredit on LM who had faced great challenges in her lifetime. Nor was there a risk that others would suffer as a result of her being named.

The judge said:

There is a proper interest in the name of a person who dies being a matter of public record, whether or not there is to be an inquest. The right to privacy is only likely to outweigh this consideration in very special circumstances. Mr Dodd also makes the important point that there is a public interest in the media being able to report LM's unusual and fateful decision in an engaging manner.

I take account of the fact that LM was a private person who would not have wanted her private information to be made public. I also have regard to her medical confidentiality. In this instance, that has not been extensively breached. The fact that she suffered from mental illness would have been apparent to those who knew her and little detail is given of her physical illness. Nor can it be said that to reveal her name would deter applications in similar situations when the degree of scrutiny given to this case is considered.

All things considered, I find that the balance in this case falls in favour of discharging that part of the order that confers anonymity on LM. But there is a balance to be struck, and in other cases the conclusion might be different (paras 46–48).

Contempt of court

In **A Local Authority v B, F and G** [2014] EWCOP B18, 21 March 2014, HHJ Cardinal considered whether the Court of Protection has the power to make what is known as a *Hadkinson* order. The factual background was that P's father had been sentenced to a term of imprisonment for contempt of court which he had not served as he had remained in Scotland out of the jurisdiction of the court. He had repeatedly failed to file evidence that might have assisted the court in determining P's best interests but continued to attack the local authority applicant in his position statements.

HHJ Cardinal took the view that despite the father's manoeuvrings, a final hearing had to take place, with the father's involvement or not. However, he decided to go further. He quoted from the Court of Appeal in *Hadkinson v*

Hadkinson [1952] 2 All ER 567, a case where a mother removed a child to Australia and sought to appeal an order to return the child. The court refused to hear her appeal while she remained in contempt of court. In that case Lord Denning said:

… the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues it impedes the course of justice in the cause by making it more difficult for the court to ascertain the truth or enforce the orders which it may make, then the court may, in its discretion, refuse to hear him until that impediment is removed or good reason is shown why it should not be removed (quoted at para 16).

This case comfortably fell within the circumstances outlined by Lord Denning and the judge was satisfied that the Court of Protection had the same powers to deal with contempt as the Family Division. He made orders prohibiting the father from taking any further part in the proceedings unless he attended in person at each hearing. The father could only be heard though an advocate in his absence on an application to vary the order. The judge concluded that the order was consistent with the father's article 6 rights (right to a fair trial).

Comment: The circumstances in *B, F and G* were extreme but it is easy to see these orders being used more widely in the case of litigants who disobey the court and whose behaviour is said to impede justice, and where the threat of exclusion from the proceedings may prompt compliance by the defaulting party.

Assessment of capacity

In **NCC v PB (by her litigation friend the Official Solicitor) and TB (by his litigation friend the Official Solicitor)** [2014] EWCOP 14, 21 March 2014, Parker J considered the capacity of PB, a woman with longstanding schizophrenia, and a high level of intelligence. She was married to TB, and both lacked litigation capacity and were both represented by the Official Solicitor. PB was 79 and TB was 50 and there was a history of failed attempts to support them together which had led to them living in squalid and dangerous conditions. Parker J declared it to be in PB's best interests to remain living at F House, a specialist care home where TB was able to visit including overnight stays. There was no issue about the capacity of either to marry: the contested issue was PB's capacity to decide where to live, her contact arrangements with TB and her care arrangements.

Parker J considered the wording of MCA s2(1) which states:

For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain (quoted at para 55).

At issue was whether PB's decision-making was compromised 'because of' her impairment (following *PC v City of York Council* [2013] EWCA Civ 478, 1 May 2013, where the Court of Appeal had stressed the importance of establishing the 'causative nexus' between the two). Parker J held that the Court of Appeal's ruling did not require an expert to address the presence of 'an impairment of, or a disturbance in the functioning of, the mind or brain' (MCA s2(1)) after addressing the question of ability to make the decision: it did not matter in what order the two issues were taken, as long as the causative nexus was established.

In this case, PB's relationship with TB was a great influence on her. It was suggested on behalf of PB that MCA s2(1) required that 'because of' means 'is the sole cause of'. Parker J rejected this and commented:

I agree with Ms Burnham that where there are several causes it is logically impossible for one of them to be 'the effective cause'. I agree that to hold otherwise would lead to an absurd conclusion because even if impairment or disturbance were the most important factor, wherever there were other factors (however little part they might play) the s2 MCA 2005 test would not apply.

There is nothing convention incompatible in the concept that multiple factors may affect a decision. Otherwise a person with impaired capacity whose disturbance/impairment of mind operates to disable her from weighing and using information would not fall within the protection of the Act.

It seems to me that the true question is whether the impairment/disturbance of mind is an effective, material or operative cause. Does it cause the incapacity, even if other factors come into play? This is a purposive construction (paras 84–86).

On the question of what constitutes an 'unwise decision', MCA s1(4) provides that: 'A person is not to be treated as unable to make a decision merely because he makes an unwise decision.' When considering unwise decisions and the tension between risk and autonomy, the judge commented:

The Court of Appeal re-emphasised in IM v LM *that decisions to enter into sexual relations are 'visceral', instinctual or emotional (as indeed is conception), and do not require complex intellectual analysis. It is not necessary to weigh risk which may be ignored by capacitous individuals, such as emotional entanglement or heartbreak. But it does require understanding of the immediate consequences and risk: sexually transmitted disease and pregnancy.*

This decision requires PB to factor in immediate and serious consequences. The principle of autonomy must have limits, or there would be no intervention under the MCA 2005.

Where a decision has consequences of a serious impairment of health or welfare, the court is not considering a decision which is merely unwise. Ms Street submits that the foreseeable consequences must be proximate and not remote. The foreseeable consequences here are all too proximate, and have been repeatedly demonstrated. PB is unable to use this information to take into account foreseeable proximate consequences (paras 97–99).

Comment: In cases concerning the ability to make a decision about an intimate personal relationship, there is frequently a difficult interface between P's impairment and other factors such as emotional attachment and loyalty. The fact that these other factors come into play does not prevent the court from finding a lack of capacity providing the impairment plays a role.

Case management

Parker J made a number of pertinent comments about the case management and preparation in *Re PB* (above). These are set out below:

I recognise the importance of this field of litigation. I recognise the need to promote the convention rights of as well as to protect the vulnerable and the incapacitated. But in cases under the Children Act 1989 equally important human, convention and protective issues arise. As in the Court of Protection, the court has to have regard to the overriding objective. Experts are not routine and have to be 'necessary', and the necessary expertise may come from the social worker.

Baker J in CKK and KK *[2012] EWHC 2136 (COP) and Butler-Sloss J in* Ms BS v An NHS Hospital Trust *[2002] EWHC 429 (Fam) [2002] 2 All ER 449 reminded clinicians that a close professional relationship with P might lead them to be drawn to a supportive or emotional rather than analytical approach to capacity. I do not read these comments as supporting the appointment of an 'independent' expert as the first line approach*

before the treating clinician has even set out the reasons behind the certificate of incapacity. Second opinions must be justified: and not just ordered as a matter of routine until there is no reason to doubt the first.

I am told Moor J queried the need for further evidence and the time estimate but was assured by the Official Solicitor that this was 'reasonable' in order to ensure that the matter could be 'properly resolved' by the court. I cannot imagine that Moor J envisaged that there would be five reports in all, a 'schedule of agreement' which was in fact not truly agreed, all of which led to considerable confusion, muddle, and prolongation of the court process. It certainly led to a prolonged examination of the witnesses, as fine distinctions in use of language and formulation of ideas were pursued and analysed.

The social care evidence has been crucial. The assessment of capacity is in the end for the judge on the basis of all the facts (see in particular Baker J in CC & KK & STCC *[2012] EWHC 2136 (COP)) echoed by me in* YLA & PM MZ *COP 1225464. After all a single expert can be challenged by the process of cross-examination.*

Attempts have been made to encourage if not direct Court of Protection practitioners to comply with basic sensible rules of case management in order to assist the judge. Moor J's attempt to bring some order to the proceedings failed. The most basic of requirements, to provide a witness time estimate template, was ignored. Thus at the commencement of the hearing I was met with an assertion that there was insufficient time available: particularly for lengthy cross-examination. I had to take counsel in detail through the list of potential witnesses, and the issues which they were to address, in order to create a plan for the hearing of the case. This took up time. All this should have been done beforehand and a late return was no excuse. Specialist counsel had been on board throughout. Ms Street submitted that Dr Barker's evidence was still so unclear as to require two hours cross-examination by her alone. I managed to shorten this a little. Even so the case proceeded much more slowly than was necessary. In my view this should have been a two day case at most.

Before seeking a four day listing the advocates should have provided for Moor J a precise broken down time estimate of what time was required for each witness, submissions and judgment, focused on the actual issues, or likely issues. I insist on this at directions hearings, and I find that I can usually shorten the individual times required, and the overall time estimate, very considerably in the process. Time estimates must be adhered to.

A judge cannot easily understand the issues, or give an effective ex tempore judgment, without a chronology of essential dates. I asked for one at the outset. It was produced part of the way though the hearing, obviously in a hurry, and a number of important dates, particular court hearings, were not included. I had to trawl though the applications and orders in the bundle and the many lengthy statements in order to produce the analysis of the history above which I have found so essential here.

Fact finding schedules should be produced in a way which makes it easy for the judge to utilise them as a tool for delivery of judgment. The contents of the document produced were in fact useful, but difficult to use. I hope it is not churlish to complain that it was created in landscape rather than portrait, that when answered the page references were omitted, and there was no space for the judge's comments. It would have been even more useful if there had been a chronology.

The evidence could have been addressed much more shortly. The actual issues raised were:

i) The psychiatric evaluation of PB.

ii) The extent to which TB's influence or pressure affected capacity: the legal issue arising from that was a matter for the judge.

iii) The extent to which PB's beliefs may have been causative of her decision making: the interpretation of the words 'because of' was for the judge and not the witnesses.

iv) Whether any potential decisions were simply unwise: again as Dr Barker recognised this was really a matter for judicial evaluation.

The joint statement should have addressed starkly:

i) Is there impairment or disturbance, if so what is it and what is its effect?

ii) What is the decision to be made?

iii) What is the information necessary to make that decision?

iv) Is the person able to retain, use or weigh, that information and/or communicate that decision?

v) Is there a lack of capacity and if so why?

And if the experts do not agree, they must make it clear. If they have not made it clear, they must be asked to do so. If their disagreement does not affect the outcome that is one thing. If they disagree on the fundamental issue, they must say so. The experts are not a jury considering whether they can give a unanimous verdict. There is no duty to 'harmonise' views if in reality the experts do not agree. It simply makes the task of the judge more difficult.

Practitioners need to ask themselves:

i) What do I really need to challenge?

ii) What does the judge need to know?

iii) What is actually arguable and what is not?

Effective steps must be taken to reduce evidence to the essential. In Farooqi *Lord Judge emphasised the requirement that cross-examination should proceed by short, focussed question rather than by comment, opinion and assertion. I also note that in The Law Commission lecture given last year Lord Judge stated (as I was taught) that in principle no question should be longer than one line of transcript. In any event, the judge is interested in the answer, not the question.*

Advocates need to be able to control the witness by the form and structure of their questions and not permit discursive replies or to allow the witness to ramble (particularly if the witness has the tendency to be prolix). There is no necessity for a long introduction: apart from anything else it may distract and confuse the witness and the judge.

Examination must not proceed by way of 'exploration' of the evidence: ie a debate, or by putting theory or speculation, rather than by properly directed questions which require an answer.

This is all the advocates' responsibility. However hard a judge tries to speed the process, this takes up time and interrupts the flow, and often leads to a debate with the advocate. Also it can give the wrong impression to the lay client about the judge's view of them or their case.

Where two parties have the same case to put, the same points must not be repeated.

Finally the advocate needs, if facts are challenged, to put the client's case.

I note and am glad to see that in IM v LM *the Court of Appeal approved Peter Jackson J's decision to determine the issues in a two hour hearing. The second opinion psychiatrist was not cross-examined. I am sure that in that case it helped that there had been judicial continuity throughout* (paras 129–147).

Comment: Practitioners should be aware of this judgment which calls for a focused and forensic approach. The comments regarding experts in particular link with the prevalent suggestion that the COP Rules should be 'tightened up' to harmonise with the requirement – now in Children and Families Act 2014 s13(6) – that expert evidence must be necessary to assist the court to resolve the proceedings justly.

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Mental health law update – Part 2

Joanna Dean, **Alison Fiddy**, **Robert Robinson**, **Joanna Sulek** and **Angela Truell** report on the latest developments in policy, legislation and case-law relating to mental health law. Part 1 of this article was published in September 2014 *Legal Action* 12.

POLICY AND LEGISLATION

In a welcome new development, the Department of Health (DoH) has asked the Law Commission, the government's law reform advisory body, to extend its review of mental capacity and detention to consider the entire legal framework of the Mental Capacity Act (MCA) 2005's deprivation of liberty safeguards (DOLS).[1]

The process for authorising deprivations of liberty in care homes and hospitals is bureaucratic, lacking any automatic independent judicial oversight. In other care settings, only the Court of Protection can authorise deprivation, often resulting in a remote, lengthy court process with insufficient involvement of the person subject to the MCA.

In July 2014, the Law Commission announced that its 12th annual programme of reform would include a project to consider how deprivation of liberty should be authorised and supervised, but only in settings other than hospitals and care homes.

Stakeholder consultation and the impact of the Supreme Court judgment in the two appeals of *P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council and another; P and Q (by their litigation friend the Official Solicitor) v Surrey CC* [2014] UKSC 19, 19 March 2014; June, July and September 2014 *Legal Action* 47, 20 and 51 have now led the DoH to ask the Law Commission to widen the review's scope.

In March 2014, the House of Lords Select Committee on the Mental Capacity Act 2005's report of its post-legislative scrutiny of the MCA had found the DOLS 'not fit for purpose' and called on the government to replace them.[2]

Soon afterwards, the Supreme Court confirmed that disabled people had the same right to liberty as others. It ruled that in the context of the MCA, the acid test for deprivation of liberty was whether a person was free to leave his/her placement and under continuous supervision there (see *Cheshire West* above). Following this judgment, local authorities reviewed their care arrangements for people lacking capacity, which resulted in increased numbers of DOLS authorisations and many more Court of Protection applications. The Law Commission's final report, with proposals for new legislation, will be published in 2017 after extensive consultation.

CASE-LAW

Interface between the Mental Health Act and the Mental Capacity Act

■ AM v (1) South London and Maudsley NHS Foundation Trust and (2) Secretary of State for Health

[2013] UKUT 0365 (AAC), 6 August 2013

Charles J, sitting as Chamber President, gave guidance to decision-makers under the Mental Health Act (MHA) 1983 about the use of the MHA 1983, or alternatively the MCA, in respect of a patient, such as AM in the present case, who was in hospital for the purpose of receiving treatment for mental disorder and lacked capacity to consent but does not object to being in hospital or to receiving treatment. (The distinction made in the MHA 1983 between assessment (section 2) and treatment (section 3) is not relevant for this purpose.)

The case arose because the First-tier Tribunal did not discharge AM from MHA 1983 s2, despite the submission of her representative that, as a matter of law, the hospital treatment she was receiving for mental disorder could be provided to her under the MCA, and if necessary she could be made subject to the MCA DoLS should it be considered that the circumstances in which she was being kept in the hospital deprived AM of her liberty. The representative had argued that because of the availability of the MCA, detention under MHA 1983 s2 was not warranted. (MHA 1983 s72(1)(a)(i) requires the tribunal to discharge the patient if it is not satisfied that 'he is suffering from mental disorder ... which warrants his detention in a hospital'.)

The first proposition which can be derived from Charles J's judgment is that in these factual circumstances there is a choice to be made, that is to say, between the MHA 1983 and the MCA (including DOLS if appropriate). The second proposition is that the law lays down the following principle to be applied by decision-makers when they are called on to make that choice in any given case – this is referred to in the judgment as the MHA 1983 'necessity test' and it requires the decision-maker to choose 'the alternative that best achieves the objective of assessment or treatment of the type described in ss2 and 3 MHA in the least restrictive way' (para75 iv)). Charles J derived this principle from the European Court of Human Rights (ECtHR) case-law, referred to in paragraph 15 of the judgment, which he interprets as saying 'that for detention to be "warranted" it has to be "necessary" in the sense that the objective set out in the relevant statutory test cannot be achieved by less restrictive measures'.

As to what factors may be relevant to the practical application of the 'necessity test', the judgment has little to say either generally or with reference to the particular facts of AM's case. Charles J did, however, state that the MHA 1983 Code of Practice was correct in saying that it will generally, but not always, be more appropriate to rely on the MCA in the case of a person who was in hospital for the purpose of receiving treatment for mental disorder, lacked capacity to consent and was not objecting. He also approved the guidance in paragraph 4.21 of the MHA Code of Practice, which described situations where, exceptionally, it may not be possible to rely on the MCA in such a case.

The exceptions include the following:

- the lack of capacity is fluctuating or temporary and the patient is not expected to consent when capacity is recovered;
- a degree of restraint needs to be used which would not be permissible under the MCA because it cannot be said to be proportionate to the risk to the patient, as opposed to the risk to other people; and
- 'there is some other specific identifiable risk that the person might not receive the treatment they need if the MCA is relied and that either the person or others might potentially suffer harm as a result'.

It appears, therefore, that the effect of the judgment is to confer a broad discretion on MHA decision-makers, including the First-tier Tribunal, in applying the 'necessity test' to the facts of individual cases. According to the judgment, in order to ensure compliance with article 5 of the European Convention on Human Rights ('the convention'), decision-

makers under the MHA 1983 must additionally satisfy themselves, in a case where 'there is a risk that cannot sensibly be ignored that a compliant incapacitated person will be being deprived of his liberty' that the alternative MCA regime (DOLS) is practically available (para 67). Only if so satisfied may they properly conclude that the MHA 1983 should not be used in a given case because the MCA would be less restrictive.

Comment: This decision is problematic for those representing patients under the MHA 1983. This is not just because it fails to offer clear guidance, but because of the risk that it may be interpreted as an invitation to decision-makers to pick and choose between the alternative statutory frameworks according to factors that they consider significant but which do not necessarily bear on whether the MHA 1983 or the MCA would be less restrictive in a given case. So, for example, it could be argued that the MHA 1983 is less restrictive because it contains a statutory safeguard, in the form of a second opinion, where a person is not capable of consenting to medication prescribed for mental disorder or, alternatively, that the MCA is less restrictive because it does not contain the panoply of powers found in the MHA 1983 for taking and conveying a person who is 'liable to be detained'. It surely was not Charles J's intention that decision-makers should base their decision on an analysis, in the abstract, of the different features of the two statutory regimes. Indeed, had that been his intention presumably he would have carried out the exercise himself. It would be clearer, and arguably would fit better with the ECtHR jurisprudence to which Charles J referred, if the judgment stated that the 'necessity test' was to be applied with reference only to the question whether the choice of one or the other alternative would in a given case result in a less restrictive care plan. However, this is not what Charles J said.

A further problem in interpreting and applying the judgment arises because it fails to distinguish between two separate principles. The first, which refers to the scope of detention powers under the MHA 1983, is that in general the use of the MHA 1983 is not justified in a case where a patient lacking capacity does not object to being admitted to hospital for the purpose of receiving treatment for mental disorder or to receiving the treatment. (See MHA 1983 s131(1) and the decision of the House of Lords in *R v Bournewood NHS Trust ex p L* [1998] 3 All ER 289.) The second is the 'least restrictive' principle that Charles J derived from the ECtHR jurisprudence to which he referred in his judgment. The first answers the question, when is it necessary as a matter of domestic law to use MHA 1983 detention powers; the second answers a quite different question, which is whether a deprivation of liberty is lawful under the convention.

Finally it should be noted that, in the light of the judgment of the Supreme Court given earlier this year in the *Cheshire West* case (above), the issue of choice between alternative statutory regimes is now more prominent than when Charles J gave his judgment in August 2013. Applying the 'acid test' in *Cheshire West*, it is difficult to envisage a case in which a person lacking capacity to consent is not being deprived of liberty as a result of being a psychiatric in-patient.

Transfer from medium security to high security

■ R (L) v West London Mental Health NHS Trust and (1) Partnerships in Care (2) Secretary of State for Health (interested parties)

[2014] EWCA Civ 47,
29 January 2014

The issue before the Court of Appeal was the fairness of the decision-making procedure involved in the transfer of a patient detained under MHA 1983 s37 from a medium security hospital to Broadmoor high security hospital. The process for such a transfer is initiated by a clinician from the medium security hospital requesting an assessment by the high security hospital and giving reasons why transfer is considered necessary. An assessment is then carried out by a clinician from the high security hospital. Both these assessments are considered by the high security hospital's admissions panel, which makes the decision whether to accept the patient.

The court proceeded on the basis that such transfer decisions, which may have significant adverse consequences for the individual concerned, are subject to the requirements of common-law procedural fairness (para 64). In deciding on what those requirements are in this context three important factors were identified. First, the nature of the decision was a clinically-based medical evaluation of the future risk to the patient and to others. Second, there is often a need for such transfers to be executed with urgency. Third, the decision has a 'rationing' aspect because of the scarcity of beds in high security hospitals, with the high security hospital's admissions panel acting as gatekeeper (para 78). The court concluded that:

> *... absent urgency, a clinical reason precluding such notification, or some other reason such as the exposure of other patients or staff to the risk of harm, the 'gists' of the letter of reference to the high security hospital by the hospital that wishes to transfer the patient and the assessment by the clinician from the high security hospital should be provided to the patient and/or his or her representative ... [T]his can be done by enclosing them with a largely pro forma communication informing the patient and/or his representatives that, if they disagree with the factual or clinical triggers for the reference or assessment, they can make submissions in writing which will be considered by the Panel* (para 99).

Comment: Before this case there was no specific guidance concerning the right of a detained patient to participate in the decision-making process for transfer to a high security hospital. The first instance decision ([2012] EWHC 3200 (Admin), 13 November 2012), which provided lengthy and highly prescriptive guidance, was criticised in the Court of Appeal as being 'likely to induce in those doctors who are charged with the difficult task of deciding whether a patient's condition requires his move from a medium to high-security hospital with a sense not only of despair but of a belief that judges do not understand the practical consequences and difficulties inherent in the exercise of clinical judgments respecting patients suffering from mental illness' (para 104). The Court of Appeal, by contrast, endeavoured to create a process which as well as being fair to the individual patient is also practical and not unduly demanding of clinicians and administrators.

Section 117 aftercare

■ R (Wiltshire Council) v Hertfordshire CC and SQ (interested party)

[2014] EWCA Civ 712,
22 May 2014

This is another case in which two local authorities were in dispute about which of them was responsible for providing, and therefore funding, MHA 1983 s117 aftercare for a discharged patient. Unlike previous cases where the issue has arisen, this decision concerned a conditionally discharged restricted patient.

SQ lived in Wiltshire until 1995, when he was made subject to a restricted hospital order under MHA 1983 ss37 and 41 by the Crown Court. In 2009 he was conditionally discharged to supported accommodation in Hertfordshire. This was funded by Wiltshire Council under its section 117 duty to provide aftercare to SQ. In 2011 SQ was recalled to hospital by the secretary of state under MHA 1983 s42(3). Subsequently he was conditionally discharged again to the same supported accommodation in Hertfordshire.

Wiltshire argued that the effect of SQ's period of residence in Hertfordshire was to transfer section 117 responsibility to Hertfordshire County Council. The Court of Appeal rejected this argument, and in so doing

distinguished this case from that of an unrestricted patient who, on being discharged from detention, is placed in accommodation in the area of a different local authority. The effect of previous case-law is that, in relation to an unrestricted patient, the authority in which the patient was placed acquires section 117 responsibility should the patient be detained subsequently under a section of the MHA 1983 (for example, section 3) which gives rise to the section 117 duty (see *R (Hertfordshire County Council) v Hammersmith and Fulham LBC* [2011] EWCA Civ 77, 15 February 2011). The key distinction, according to the Court of Appeal, is that in the case of a restricted patient such as SQ, the liability to be detained, or to be recalled to detention following conditional discharge, derives from the original order made by the Crown Court; while in the case of a patient detained under MHA 1983 s3 'each admission to hospital involves a fresh decision, and generally the patient has been living in the community beforehand without restrictions' (para 15).

Comment: There remains one type of case that has not yet been subject to a judgment given in judicial review proceedings. It is that of an unrestricted patient, detained under MHA 1983 s3 or s37, who is discharged from hospital on a community treatment order (CTO) and resides outside the area of the authority which is responsible for section 117 aftercare. If the CTO is revoked subsequently, the question would arise when the patient is next discharged into the community whether responsibility under section 117 remains with the original local authority or is passed to the authority for the area in which the patient was residing while under the CTO. The legal significance of revocation, as provided by MHA 1983 s17G(2), is that the patient's detention thereafter 'shall have effect as if the patient had never been discharged from hospital under the community treatment order'. The logic of the decision in SQ's case points to the conclusion that in this scenario, following revocation of the CTO, the duty under section 117 would remain with the original authority.

Medical treatment for mental disorder

■ Nottinghamshire Healthcare NHS Trust v RC

[2014] EWCOP 1317,
1 May 2014

This case concerned a patient, RC, detained under the MHA 1983 with diagnoses of antisocial and emotionally unstable personality disorders. RC was a Jehovah's Witness and had made an advance decision under MCA s24 and s26 refusing a blood transfusion, even if his life was at risk. It was accepted that he had the capacity to make the advance decision and still retained capacity to refuse a blood transfusion.

RC had a history of causing himself serious self-harm, including on one occasion in February 2014 slashing his brachial artery. The legal issue which arose in the case was whether, assuming that it was clinically appropriate to do so, giving RC a blood transfusion in these circumstances, without his consent, would be medical treatment for his mental disorder which would thus be authorised by MHA 1983 s63 (an advance refusal under the MCA does not prevent treatment being given for mental disorder without consent to a detained patient under the MHA 1983). The interpretation of the scope of section 63 in a given case must be based on MHA 1983 s145(4). This provides that any reference in the Act to medical treatment in relation to mental disorder 'shall be construed as a reference to medical treatment the purpose of which is to alleviate, or prevent a worsening of, the disorder or one or more of its symptoms or manifestations'.

It was agreed by the parties' experts that RC's self-harming behaviour was in response to emotional distress, and done with the intention of distracting himself from distressing thoughts and feelings (para 27). RC's expert argued that, regardless of the clinical explanation for RC's behaviour, a blood transfusion was, by its very nature, not medical treatment for mental disorder:

... any treatment with a blood transfusion is not, in my opinion a treatment for mental disorder, nor is it treatment for a symptom of that mental disorder. It is a treatment for a physical consequence of a symptom of the mental disorder; hypovolaemic shock or life-threatening anaemia (quoted at para 28).

Mostyn J rejected this analysis and found that, in the circumstances of RC's case, a blood transfusion could be given under section 63, if clinically appropriate:

It cannot be disputed that the act of self harming, the slashing open of the brachial artery, is a symptom or manifestation of the underlying personality disorder. Therefore to treat the wound in any way is to treat the manifestation or symptom of the underlying disorder. So, indisputably, to suture the wound would be squarely within section 63. As would be the administration of a course of antibiotics to prevent infection. A consequence of bleeding from the wound is that haemoglobin levels are lowered .... it is my view that to treat the low haemoglobin by a blood transfusion is just as much a treatment of a symptom or manifestation of the disorder as is to stitch up the wound or to administer antibiotics (para 31).

Comment: This is not a surprising outcome as it is consistent with the decision of the Court of Appeal in *B v Croydon Health Authority* [1995] Fam 133, 29 November 1994 to which it has been said MHA 1983 s145(4) is intended to give statutory effect. RC's case was taken to court not by RC himself but by, or on behalf of, his responsible clinician, Dr S, who was of the view that even if a blood transfusion could be lawfully given under MHA 1983 s63 it would have been ethically wrong to override RC's wishes, which were based on his religious convictions as a Jehovah's Witness. Mostyn J agreed with Dr S:

In my judgment it would be an abuse of power in such circumstances even to think about imposing a blood transfusion on RC having regard to my findings that he presently has capacity to refuse blood products and, were such capacity to disappear for any reason, the advance decision would be operative. To impose a blood transfusion would be a denial of a most basic freedom (para 42).

Adequacy of the First-tier Tribunal's reasons

■ MS v North East London Foundation Trust

[2013] UKUT 092 (AAC),
18 February 2013

A challenge was made to the adequacy of the reasons given by the First-tier Tribunal for not discharging a patient detained under MHA 1983 s3. There were two elements to the challenge. First, that the tribunal had in its reasons referred in error to the statutory criteria for MHA 1983 s2 in the case of patient detained under section 3. Second, that the tribunal failed to give adequate reasons for concluding that detention was necessary.

On the first point, the judge in the Upper Tribunal found that the tribunal had made an error, but had not misdirected itself as to the law that it must apply when determining the case of a patient detained under MHA 1983 s3. In reaching this conclusion the judge accepted that, in comparison with section 2, the words of section 3 and the corresponding criteria to be applied by the tribunal under section 72 impose a higher standard to be satisfied if the patient's detention is to be upheld. However, in concluding that, in this case, the First-tier Tribunal did not apply the wrong standard, the Upper Tribunal reasoned thus:

The First-tier Tribunal in its mental health jurisdiction deals with a limited number of legal issues. That does not diminish their importance, but it does mean that the members of the tribunal quickly become familiar with the legal tests appropriate to

different cases. And that makes it more likely that the judge made a slip in writing the reasons than that the panel as a whole made a slip in making a decision (para 14).

However, with reference to the second point, the judge concluded nonetheless that the reasons were inadequate:

The … doctor's report was a difficult document to assess. It was affected by the use of the wrong language and by its confused focus, at least at the beginning. Faced with that evidence, it was important for the tribunal to analyse the evidence to ensure that the doctor's opinions could properly be related to the relevant criteria. And its reasons had to show that that had been done. But the judge has not set out any such analysis. He has stated findings of fact. The need for detention is not self-evident from those findings (para 16).

The First-tier Tribunal's decision was therefore set aside.

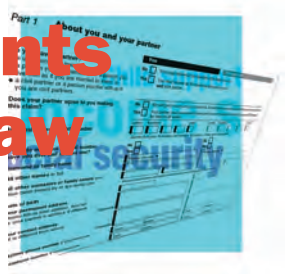
Another point that arose in the case was the failure of the First-tier Tribunal to explain in its reasons why, having decided against discharge, it had not made the statutory recommendation requested by the patient's representative. The judge found that the tribunal should have explained why it did not make the recommendation. Its failure to do so was an error of law, but one that would not justify setting aside the decision as it could be remedied by adding to the reasons by way of an amendment under Tribunals, Courts and Enforcement Act 2007 s9(4)(b).

Comment: This decision highlights an important, and possibly not uncommon, failure in reasons given by the First-tier Tribunal when upholding a patient's detention. There may, in practice, be relatively few cases where the need for detention is self-evident from the findings of fact. The tribunal's reasons must therefore explain why the facts, as found by the tribunal, justify detention. This necessarily requires the tribunal to assess the risks and to make what is essentially a value judgment.

1 See: http://lawcommission.justice.gov.uk/areas/capacity-and-detention.htm.
2 Available at: www.publications.parliament.uk/pa/ld201314/ldselect/ldmentalcap/139/139.pdf.

Joanna Dean, Alison Fiddy, Joanna Sulek and Angela Truell are solicitors in Mind's Legal Unit. Robert Robinson is a non-practising solicitor and fee-paid judge of the First-tier Tribunal (Mental Health).

Recent developments in social security law – Part 2



Simon Osborne and **Sally Robertson** continue their six-monthly series. Part 1 of this article appeared in September 2014 *Legal Action* 23. This article reviews recent case-law developments in both means-tested and non-means-tested benefits.

NON-MEANS-TESTED BENEFITS (INCLUDING EMPLOYMENT AND SUPPORT ALLOWANCE)

Disability living allowance

■ Secretary of State for Work and Pensions v YB

[2014] UKUT 80 (AAC), 7 February 2014
(CSDLA/235/2013)*

The claimant suffered from retinitis pigmentosa, and although she had some visual ability indoors with ambient lighting, her vision outdoors was extremely poor. She was refused the high rate of the mobility component, on the ground that she did not satisfy the blind or severely visually impaired criteria. That was because she did not pass on the 'Snellen scale', which was a test applied indoors with specific ambient lighting. The First-tier Tribunal allowed the claimant's appeal on the basis that she would pass the criteria when outdoors. The secretary of state appealed.

Judge Sir Crispin Agnew of Lochnaw Bt QC allowed the secretary of state's appeal. He substituted a decision that the claimant was not entitled to the high rate of the mobility component. The relevant rule was at Social Security (Disability Living Allowance) Regulations 1991 SI No 2890 reg 12(1A). The tribunal had erred in applying an out-of-doors test. It had been held in *Secretary of State for Work and Pensions v MS (DLA)* [2013] UKUT 0267 (AAC), 28 May 2013 that the Snellen test was an objective test and that the claimant therefore either satisfied that test and qualified for the high rate, or did not. The judge agreed with that (para 19), and as the claimant did not satisfy the Snellen test she did not qualify.

However, the judge considered that regulation 12(1A) breached article 14 (prohibition of discrimination) of the European Convention on Human Rights ('the convention') in that it discriminated 'between persons who have a visual acuity that is the same in the consulting room taking the Snellen test as it is outdoors and persons that have a particular Snellen test reading in the consulting room, but whose visual acuity outside is significantly worse' (paras 22–23). There was nothing to suggest that the secretary of state had really addressed the situation where a person might have better visual acuity indoors than s/he did outdoors. The judge held, therefore, that regulation 12(1A) 'has no reasonable or objective justification and is accordingly ultra vires' (para 37). For the same reasons, the secretary of state had failed in his equality duty, which then existed under the Equality Act (EqA) 2006 (paras 40–42). However, the judge considered that he could not construe regulation 12(1A) in a way that was compatible with the convention (para 39), and that he did not have jurisdiction to reduce or set the regulation aside; besides which, there were claimants who did satisfy the regulation and needed it to get the higher rate.

Comment: The response of the secretary of state has been to appeal to the Court of Session.

Employment and support allowance

A recent decision held that tribunals should not assume that the claimant could safely undertake work-related activity merely on the basis of his/her ability to attend meetings in other contexts, and reiterated the principle that the secretary of state should provide relevant evidence. Also, the Upper Tribunal clarified that an appeal against the 'time limiting' of contributory employment and support allowance (ESA) after a year of not being in the support group could be made at the point where the benefit is terminated. Finally, a divergence in the case-law on how to decide whether it was reasonable to expect a claimant to use a manual wheelchair has been resolved by a three-judge panel.

■ AP v Secretary of State for Work and Pensions (ESA)

[2014] UKUT 0035 (AAC), 24 January 2014
(CE/3144/2013)

The appeal to the First-tier Tribunal concerned a claimant whose health conditions included depression and panic attacks. The evidence included statements from the claimant's NHS cognitive behavioural psychotherapist that she had been advised to, as far as possible, reduce her contact with stressful situations, and that before returning to work, 'coping skills and support networks' would first have to be in place. The tribunal held that she did not have limited capability for work-related activity. The claimant's evidence was considered vague and contradicted by other evidence, and the tribunal considered that she could attend interviews because she had been able to meet the tribunal, her NHS psychotherapist and the approved healthcare professional who had examined her.

Judge Mark held that the claimant was to be treated as having limited capability for work-related activity, as she satisfied the 'substantial risk' rule at Employment and Support Allowance Regulations 2008 (ESA Regs 2008) SI No 794 reg 35(2). The tribunal had erred in its treatment of the claimant's evidence. Regarding the finding that the claimant's ability to meet her psychotherapist indicated that she was capable (without substantial risk) of work-related activity, the judge said:

I am wholly unable to understand the rationality of this conclusion. There is a world of difference between attending regular therapy sessions with a psychotherapist and having to attend interviews with [*Department for Work and Pensions (DWP)*] *employees at the jobcentre* (para 18).

Furthermore, there was no evidence from the DWP about the ability of its Jobcentre staff to deal with somebody with the claimant's mental health problems and no evidence that steps would be taken to provide the sort of coping skills and support networks referred to by her psychotherapist. Therefore, the tribunal had no facts on which to base its opinion that the claimant was capable (without substantial risk) of work-related activity (para 21).

The secretary of state should have provided evidence about the sort of activity that the claimant could have undertaken without substantial risk. Where a claimant had mental health problems and risk was clearly at issue, 'the secretary of state has a duty to the tribunal under regulation 2(4) of the Tribunal Procedure (First-tier Tribunal) (SEC) Regulations 2008 to provide evidence' (para 24). The judge concluded that it was 'more likely than not' that 'the likely approach of the DWP to the claimant, if she were found not to have limited capability for work-related activity, would have posed a substantial risk to her mental health at a time which was plainly a crisis time for her' (para 34). Therefore, the judge substituted a decision that the claimant satisfied regulation 35(2) and so was to be treated as having limited capability for work-related activity (paras 32–36).

■ MC and JH v Secretary of State for Work and Pensions (ESA)

[2014] UKUT 0125 (AAC), 17 March 2014
(CE/3994/2012 and CE/2390/2013)

The appeals in these cases raised the question of whether a claimant could appeal against the termination of an award of contributory employment and support allowance after 365 days in the work-related activity group (ie, against 'time-limiting' of the award) and argue that they should instead be in the support group at the point where the decision to terminate the award is made. Judge Rowland held that they could.

The judge accepted a submission that any consideration of the question of whether a period of entitlement to contributory ESA has come to an end, 'necessarily raises the question' of whether, at the time the decision is effective, the claimant is a member of the support group – and so not subject to time-limiting (para 36). Although the secretary of state can, in general, rely on the previous decision placing the claimant in the work-related activity group, he was not bound to do so, and could reconsider the question. It followed that the First-tier Tribunal could also consider this (para 37).

However, if the claimant has not raised the issue of support group membership either on revision or supersession or in the grounds of appeal, it may well be appropriate for an application to strike out the appeal to be made, as the claimant's acceptance of work-related activity group membership could be inferred. Yet even then, it may be that it would need to be shown that the claimant was aware of the criteria for inclusion in the support group (para 38). On the facts of the present cases, the judge was satisfied that the claimants both had the right of appeal against termination for time-limiting of their awards, and could argue in those appeals that the awards should in fact continue on the basis that, at the time of the termination, they were members of the support group (ie, had limited capability for work-related activity) (para 41).

■ PR v Secretary of State for Work and Pensions (ESA)

[2014] UKUT 0308 (AAC), 4 July 2014
(CE/327/2013 and CE/509/2013)

The key issue was the application, to claimants without a wheelchair, of the wording in activity 1 of Schedule 2 to the ESA Regs 2008, regarding mobilising with a manual wheelchair (or other aid), 'if such aid is normally, or could reasonably be, worn or used'. A three-judge panel was convened to resolve a split in the Upper Tribunal case-law between decisions which had said that all his/her circumstances, including the claimant's ability to store or purchase a wheelchair, must be taken into account, and those which said that only more narrowly functional (or medical) factors were included. Mr Justice Charles, His Honour Judge Martin and Judge Rowland decided that, although in principle all the circumstances of the individual claimant should be taken into account (ie, including the claimant's personal circumstances), in practice: 'the circumstances that should exist in the modern workplace and the availability of manual wheelchairs will mean that in most cases the home environment of a claimant is unlikely to be important and it would be possible for the secretary of state to ensure that the availability of manual wheelchairs is also not a live issue' (para 2).

In so deciding, the judges drew, in particular, on the decision of Judge Wikeley in *AS v Secretary of State for Work and Pensions (ESA)* [2013] UKUT 0587 (AAC), 20 November 2013, in which he said that the activities and descriptors in Schedule 2 'do not exist in some sort of artificial or parallel universe, entirely divorced from the real world of work', and that the test applies 'in the context of the needs of a modern workplace and the level of activity that an employer attuned to the requirements of disability discrimination law can reasonably expect' (*AS* paras 19 and 21). Adopting that, the judges in the present case held that:

Many of the practical problems … are likely to be soluble, given the modern workplace and an employer who is conscious of his or her obligations under the Equality Act 2010 … [D]isability employment advisers clearly also have a role to play in advising as to the solution (para 74).

So, for example, where a claimant cannot store a manual wheelchair at home, it might be pointed out that 'the solution to the problem might be to make arrangements for a manual wheelchair to remain in the workplace' (para 74).

The judges then set out the following more specific guidance to the application of activity 1 to claimants who do not normally use manual

wheelchairs (paras 75–82):

- the test must be applied on the basis that the notional employer has a modern workplace and is prepared to make reasonable adjustments (para 76);
- that 'all medical considerations' need to be taken into account, including consequences attendant on wheelchair use such as muscle wasting (para 77);
- that although the home environment is potentially relevant, an inability to use or store a manual wheelchair there is unlikely to be as important as suggested in some previous case-law (para 78);
- that the availability of manual wheelchairs is a question of fact; in Great Britain at least there are powerful arguments for not requiring there to have been an NHS assessment before use of a manual wheelchair is considered reasonable (para 79);
- the Access to Work scheme may make it unnecessary to consider availability of wheelchairs in each case, if the secretary of state is able to show that such a scheme will fill any gaps in availability; however, if not, the issue will remain a live one, and will need to be addressed in secretary of state submissions in each case (para 80);
- it is necessary for the secretary of state to show, in decisions or submissions, why it was thought that the particular claimant's capability for work should be assessed on the basis that the claimant uses the aid or appliance (para 81).

MEANS-TESTED BENEFITS AND TAX CREDITS

A couple of recent decisions have commented on the approach to who counts as a couple for the purposes of income support (IS) and tax credits respectively. In the former, there is an emphasis on the importance of the public acknowledgement (ie, by the claimant) of a committed emotional relationship; in the latter, attention was drawn to the distinct approach in tax credits law to the situation of married couples.

■ JP v Secretary of State for Work and Pensions (IS)

[2014] UKUT 0017 (AAC), 17 January 2014
(CIS/1638/2012)

In this IS case, the claimant was considered to be living together with another person 'as if they were civil partners' (ie, cohabiting as a couple with someone of the same sex), which is part of the definition of a 'couple' in Social Security Contributions and Benefits Act 1992 s137(1) and (1A). The claimant was a woman who owned her home jointly with another woman, Ms R. They had a joint mortgage and a joint account for that. They both lived in the house. However, the claimant said that she was not in a couple with Ms R, and had not had a relationship since the death (in 1976) of her husband. She described Ms R as a friend and companion. Ms R said that she had become more of a carer for the claimant as her health had deteriorated. The First-tier Tribunal rejected the claimant's appeal. It held that there was evidence of a shared household and a degree of financial interdependence which went far beyond friendship.

Judge Levenson held that the claimant was not a member of a couple. The tribunal, as the secretary of state conceded, had not given adequate reasons for not accepting the claimant's testimony (para 16). Also, the tribunal had not approached the question of whether the claimant was cohabiting correctly. He noted the decision of Judge Jacobs in *PP v Basildon DC* [2013] UKUT 0505 (AAC), 12 October 2013, which had pointed to problems with the traditional 'signposts' of cohabitation, and emphasised the importance of an emotional relationship to the concept.

While not disagreeing with that, Judge Levenson added: 'However, the very fact that a party denies that there is an emotional relationship in itself severely undermines the notion that there is such a relationship and in my opinion it would require very strong evidence indeed (and more than just the disbelieving the claimant or witness) to displace that denial' (para 31). Furthermore, the judge considered that public acknowledgement of the relationship was essential. For cohabitation to be shown:

> *... a committed emotional loving relationship must be established and publicly acknowledged ... An unacknowledged relationship cannot be the equivalent of marriage or a registered civil partnership which are, in their very nature, public acknowledgement of an emotional relationship ... It is for those alleging [cohabitation] to prove that there is a publicly acknowledged committed emotional loving relationship* (para 33).

■ DG v Her Majesty's Revenue and Customs (TC)

[2013] UKUT 0631 (AAC), 13 December 2013
(CTC/1487/2013)

In this tax credits case, the claimant was entitled as a single person. HM Revenue and Customs (HMRC) discovered that the claimant was still living in the same house as her husband and issued revised decision notices declaring her entitlement to be nil, ie, because she should (allegedly) have been claiming as a couple. She appealed. The claimant explained that in no way did she maintain a relationship with her husband, that she was in a new relationship but did not live with her new partner, and had been unable to leave the matrimonial home due to financial constraints.

The First-tier Tribunal dismissed the claimant's appeal. It held that 'under Income Support regulations' a married couple (that is, a married couple) were a couple if members of the same household, and on the evidence here there was a shared household, and the couple were not separated (paras 4–8, quoted at para 15).

Judge Wikeley held that on the facts the claimant was entitled to tax credits as a single person. The tribunal had erred in applying the wrong test, ie, in adopting the social security (IS) test for married couples. That test did refer to being members of the same household; however, the test for tax credits did not (para 40). The relevant test for whether people married to each other are a couple for tax credit purposes is at Tax Credits Act 2002 s3(5A)(a), and says that such people are a couple if they are neither 'separated under a court order' nor 'separated in circumstances in which the separation is likely to be permanent'. The judge accepted that whether there was a single household could be a highly significant consideration in deciding whether a couple not separated under a court order were likely to be permanently separated; however, the judge said that if the emphasis put on that by Judge Lane in *Her Majesty's Revenue and Customs v PD (TC)* [2012] UKUT 230 (AAC), 2 July 2012 was intended to suggest that a shared household necessarily and inevitably meant that the couple were not separated, then he must respectfully disagree (paras 28–30).

Rather, the test of separation 'must focus on the relationship between husband and wife, and a married couple may be separated whilst living in the same household, whether or not they have a court order to that effect' (para 36). On the facts of this case, the judge accepted that although sharing a household, the claimant was likely to be separated permanently from her husband, and that therefore she was entitled to tax credits as a single person.

Housing benefit: 'bedroom tax'

Two decisions – one of the Court of Appeal and the other of the High Court – have dismissed challenges (based on human rights arguments) to the so-called 'bedroom tax' (referred to by the government and the DWP as the 'removal of the spare room subsidy'). Further challenges are likely.

■ R (MA and others) v Secretary of State for Work and Pensions

[2014] EWCA Civ 13, 21 February 2014

In this decision the Court of Appeal rejected a

challenge to the decision of the High Court in *R (MA and others) v Secretary of State for Work and Pensions* [2013] EWHC 2213 (QB), 30 July 2013.

The claimants were a number of disabled adults with varying circumstances, but who had been subject to the bedroom tax. Their arguments to the court were as follows:

- that the bedroom tax constituted unlawful discrimination against disabled people, as in breach of article 14 of the convention read with article 1 of Protocol No 1 (protection of property); and
- that the bedroom tax was made in breach of the secretary of state's public sector equality duty under EqA 2010 s149 to have 'due regard' to the need to eliminate discrimination and advance equality of opportunity for disabled people.

The court held unanimously that the bedroom tax breached neither article 14 nor the public sector equality duty.

Regarding article 14, the court held that the alleged discrimination was indirect discrimination (or so-called *Thlimmenos* discrimination, the distinction between the two was unnecessary here) and the relevant test for deciding if it was not justified was if the measure is 'manifestly without reasonable foundation' (paras 47 and 49). Giving the lead decision, the Master of the Rolls said that it was not realistic to look at the relevant rule (Housing Benefit Regulations 2006 (HB Regs 2006) SI No 213 reg B13) in isolation. Rather, it had to be considered as part of a 'package for dealing with the problem of under-occupation', that included certain exemptions from the bedroom tax and reliance on discretionary housing payments (DHPs) for others (para 40). Looked at in this way, and taking into account the secretary of state's stated reasons for the bedroom tax, the discrimination was justified (para 71).

Regarding the public sector equality duty, the principal question was whether, in the process leading to the making of the decision, the decision-maker had 'due regard' to the relevant considerations (para 83). The court considered that the secretary of state had shown that he 'well understood that there are some disabled persons who, by reason of their disabilities, have a need for more space than is deemed to be required by their non-disabled peers' (para 92). The scheme had been considered 'in great detail' by the secretary of state and by parliament (para 92). Also, the adequacy of the DHP scheme had been considered and kept under review. The process did not breach the secretary of state's public sector equality duty.

Comment: Leave to appeal to the Supreme Court has been applied for.

■ Rutherford and others v Secretary of State for Work and Pensions

[2014] EWHC 1613 (Admin), 30 May 2014

The claimants were a disabled child and his maternal grandmother and step-grandfather. Carers for the child stayed overnight in the home twice a week, and needed a bedroom in which to sleep. There was no suggestion that the care and accommodation was not required. From 1 April 2013, the maternal grandmother's eligible rent for the home was reduced by 14 per cent as a result of the application of the 'bedroom tax' (ie, as provided for at HB Regs 2006 reg B13). Although refused initially, DHPs were awarded and had been renewed, and were completely covering the shortfall in benefit. The claimants argued that the rules unlawfully discriminated against them and others in their position (under article 14 of the convention), and sought a declaration that regulation B13 must be read as allowing a bedroom in the assessment for an overnight carer of a disabled child.

Judge Mr Justice Stuart-Smith, though granting permission for the challenge to be made, rejected the claimants' arguments. He held that the rules at regulation B13 were one element of a scheme which also included DHPs, and that considering the scheme as a whole, and that DHPs were in this case entirely plugging the financial gap left by the reduction in housing benefit, any discrimination against the claimants was not 'manifestly without reasonable foundation', and so was not unlawful. In so holding, the judge had particular reference to the decision of the Court of Appeal in *MA and others* [2014] EWCA Civ 13 (above), and the earlier decision of the same court in *Burnip and others v Birmingham City Council and others* [2012] EWCA Civ 629, 15 May 2012. The judge attached particular importance to the fact that in *Burnip* (in which unlawful discrimination against a disabled child had been found) the court had found that DHPs were not plugging the gap caused by housing benefit reduction, but in the later *MA* case it found that DHPs, now better resourced, constituted part of an overall scheme that had been considered and approved by parliament (paras 28–41).

The judge held that 'the effect of *Burnip* and *MA* taken together is that, while a scheme including the use of DHPs as the conduit for payment may be justifiable, it will not be justified if it fails to provide suitable assurance of present and future payment in appropriate circumstances' (para 48). However, unlike in *Burnip*, the evidence in the present case was not that DHPs could not be relied on to plug the identified 'discriminatory gap' (para 51). The claimants could not point to any financial detriment thus far, and given the extent of the disabled child's needs and the fact that the county council had available sufficient funds, 'a decision to withhold DHPs would appear to be unjustifiable' (para 53). The judge concluded that 'there is at present adequate assurance that the Claimants will continue to benefit from awards of DHPs to plug the gap that would otherwise exist' (para 54). Although he also had evidence of problems regarding DHPs in England and Wales as a whole, the judge considered it 'common ground that this case falls to be decided on its facts' (para 60). As on those facts there was no 'serious flaw leading to an unreasonable discriminatory effect', the need to apply for a DHP was not a substantial detriment, and the secretary of state had a wide margin of appreciation in making the scheme, he therefore rejected the claimants' challenge (paras 60–61).

Comment: Application for permission to appeal to the Court of Appeal has been made.

Housing benefit: adaptation for disability

In this decision the Court of Appeal held that the approach taken in previous case-law to what counts as adapting the dwelling for disablement needs in the housing benefit rules was too restrictive in allowing only changes to the fabric and structure of the dwelling, and that relevant adaptations could, depending on the facts, include things like redecoration.

■ R (Mahmoudi) v Lewisham LBC and another

[2014] EWCA Civ 284, 6 February 2014

The claimant, who required kidney dialysis three times a week, accepted a new, more suitable tenancy but had to accept it straightaway, ie, before he actually moved in. A delay in moving in of just over two weeks occurred, partly because the property had been left in a dirty condition and needed redecoration, as the claimant needed the property to be clean in order to avoid infection and allow home dialysis.

Under HB Regs 2006 reg 7(8)(c)(i), it was possible to be entitled to housing benefit for a short period before moving in where the delay 'was necessary in order to adapt the dwelling to meet the disablement needs of that person or any member of his family'. However, applying *R(H) 4/07*, 11 October 2006, he was refused benefit under that rule as redecoration (and furnishing) did not count, as in order to do so it was considered that the adaptation had to 'alter, change or add to the structure or fabric' of the dwelling (para 7). The Court of Appeal held that to be too restrictive an approach. Instead, the court agreed with an approach under which 'to adapt' could mean 'to make fit, to change or modify to suit a purpose' and that, as in this case, could include decoration

where this was related to the claimant's disablement needs (paras 13–14).

Comment: Subsequently, official guidance (Memo DMG 6/14, DWP, September 2014) was issued applying this decision to the similar housing cost rules in IS, income-based jobseeker's allowance, income-related ESA and pension credit.

Right to reside and habitual residence test

Recent decisions of the European Court of Justice (ECJ) have considered the right to reside of family members on the basis of 'dependence' on a European Union (EU) citizen, and right to reside for 'retained worker status' where work was stopped becuase of pregnancy.

■ Reyes v Migrationsverket (Judgment of the Court)

C-423/12,
16 January 2014

The claimant was a Philippine citizen. She had grown up in the Philippines in the care of her grandmother, her mother having moved to Germany to work. Her mother obtained German citizenship, and eventually moved to Sweden to live there with a Norwegian man whom she married. The claimant's mother and stepfather had both remained in contact with her, and regularly sent money to her in the Philippines to support her. The claimant never worked or received social assistance in the Philippines, where she eventually qualified as a nursing assistant. The claimant came to Sweden and applied for the right to reside (via an application for a residence permit) on the basis that she was a family member of her mother and stepfather, on whom she was dependent. This application was refused by the Swedish authorities on the basis that she could have supported herself in her country of origin (ie, the Philippines).

The ECJ considered whether the claimant had a right to reside under EC Directive 2004/38/EC (known as the Residence Directive) article 2(2)(c), ie, the provision including within the definition of 'family member' those who are 'the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b)'. Specifically, the court was asked to consider if a member state could require a direct descendant, who is 21 years or older, to have tried to obtain employment or help with supporting him/herself from the authorities of his/her country of origin or otherwise support him/herself. The court was also asked if, in interpreting 'dependant', the fact that the claimant was well placed to obtain employment and intended to work in the member state could mean that the claimant would no longer be regarded as a dependant.

The court answered both questions in the negative. The fact that, in circumstances such as those in this case, an EU citizen regularly and for a significant period sent money to the claimant to support himself/herself in the state of origin showed a real dependence, and in those circumstances the claimant could not be required to show that s/he had tried to obtain employment or subsistence support from the authorities in the state of origin (paras 24 and 25). Regarding the second question, the fact that a relative was deemed to be well placed to obtain employment and start work in the member state did not affect the interpretation of the requirement that s/he is a 'dependant' (paras 29–33).

■ Saint Prix v Secretary of State for Work and Pensions

C-507/12,
19 June 2014

The claimant was a French national, who came to the UK and worked mainly as a teaching assistant for 11 months before commencing studies. Later (following time as a student and registering with an employment agency), she did some work in nursery schools. However, she stopped that work on the ground that, being six months pregnant, it was too strenuous for her. Her claim for IS was rejected on the grounds that she had lost her status as a worker and did not have the right to reside. The UK Supreme Court made a reference to the ECJ asking, in essence, whether under EU law a woman who gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth, retains the status of 'worker'. The ECJ answered in the affirmative. Specifically, article 45 of the Treaty on the Functioning of the European Union 'must be interpreted as meaning that a woman who gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth retains the status of "worker", within the meaning of that article, provided she returns to work or finds another job within a reasonable period after the birth of her child' (para 47). In order to decide whether that latter period was reasonable, the national court should 'take account of all the specific circumstances of the case in the main proceedings and the applicable national rules on the duration of maternity leave' (para 42).

Pregnancy and the aftermath of childbirth was, however, not to be equated with incapacity for work due to an illness. The court noted that it had held consistently that pregnancy must be clearly distinguished from illness (paras 29–30). Rather, worker status was retained here, first, because the concept of 'worker' had to be interpreted broadly: freedom of movement for workers entailed the right of nationals of member states to move freely within the EU and to stay there to seek employment, and that consequently classification as a worker did not necessarily depend on the actual or continuing existence of an employment relationship (paras 33–36). Second, it could not be argued (contrary to the contention of the UK government) that article 7(3) of the Residence Directive, which does not refer to pregnancy in this context) contained an exhaustive list of the circumstances in which worker status might be retained (para 37). The court accepted that a Union citizen would be deterred from exercising her freedom of movement within the EU if having given up work due to pregnancy, she risked losing her worker status, and further noted that EU law gave special protection for women in connection with maternity, such as that continuity of residence was not affected, among other things, by an absence of up to 12 months for 'important reasons such as pregnancy and childbirth' (paras 44–45).

Comment: This is a very welcome confirmation of the rights of women EU workers who stop work due to pregnancy. It is also worth noting that the court held that Directive 2004/38/EC was not exhaustive on when worker status was retained.

* File reference numbers are included only to assist with accessing decisions. The file number may, for instance, be used when accessing decisions on the Administrative Appeals Chamber's database. Readers should note that the file number is neither the official citation nor part of it.

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Recent developments in housing law

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

POLITICS AND LEGISLATION

New housing legislation

The Housing (Wales) Act 2014 received royal assent on 17 September 2014. Its provisions, to be brought into force in stages, will:

- reform homelessness law (including placing a stronger duty on local authorities to prevent homelessness and allowing them to use suitable accommodation in the private sector);
- introduce a compulsory registration and licensing scheme for private rented sector landlords and letting and management agents;
- place a duty on local authorities to provide sites for Gypsies and Travellers where a need has been identified; and
- give local authorities the power to charge 50 per cent more than the standard rate of council tax on homes that have been empty for a year or more.

The Housing (Scotland) Act (H(S)A) 2014 received royal assent on 1 August 2014. The provisions of the Act will:

- end the right to buy in Scotland;
- give social landlords more flexibility in the allocation and management of their housing stock;
- introduce a First-tier Tribunal to deal with disputes in the private rented sector;
- give local authorities new discretionary powers to tackle disrepair in the private rented sector;
- introduce a new regulatory framework for letting agents in Scotland;
- modernise the site licensing regime for mobile home sites with permanent residents; and
- place new requirements on private sector landlords to fit carbon monoxide detectors and carry out electrical safety checks every five years.

The first commencement order was to be laid in parliament during September 2014 with the first provisions coming into force in November 2014.

The Affordable Homes Bill passed to its committee stage following a House of Commons second reading debate on 5 September 2014. This private members' bill would make significant changes to the housing benefit (HB) rules relating to unoccupied bedrooms in social housing ('the bedroom tax'). On 3 September 2014, the UK government updated its online toolkit for councils and advice workers about the current arrangements: *Local authorities and advisers: removal of the spare room subsidy* (Department for Work and Pensions (DWP), September 2014).[1]

Homelessness

The latest official figures on applications made to local housing authorities in England for homelessness assistance were published in July 2014: *Statutory homelessness: January to March quarter 2014 England (revised)* (Department for Communities and Local Government (DCLG), 31 July 2014).[2] They show that 58,440 homeless households were in temporary accommodation on 31 March 2014. Of those, 12,910 were housed in other local housing authority districts, an increase of 41 per cent in one year in the number placed out of district. Of the 58,440 households, 4,370 were in bed and breakfast (B&B) style accommodation.

Among rough sleepers, those under immigration conditions requiring that they have no recourse to public funds face particular difficulties. A new report seeks to address the issues for those rough sleepers in London: *Accommodation in London for rough sleepers with no recourse to public funds and the potential for developing a referral pathway* (Housing Justice, July 2014).[3]

Housing and anti-social behaviour

Most of the new legal tools and powers to control anti-social behaviour contained in the Anti-social Behaviour, Crime and Policing Act 2014 were brought into force in England on 1 October 2014: the Anti-social Behaviour, Crime and Policing Act 2014 (Commencement No 6) Order 2014. They include new mandatory grounds for possession against secure and assured tenants and new provisions for closure orders and injunctions. The Home Office has published statutory guidance on the new provisions: *Reform of anti-social behaviour powers: statutory guidance for frontline professionals* (Home Office, July 2014).[4]

Possession claims by landlords

Landlord possession claims in county courts fell from 194,645 in 2002 to 134,961 in 2010. But the number has since increased by 26 per cent to 170,451 in 2013. This increase has been in stark contrast to the 29 per cent decline in the number of mortgage possession claims over the same period. The second quarter of 2014 recorded 38,509 landlord possession claims, the second highest second quarter figure since 2009: *Mortgage and landlord possession statistics quarterly: April to June 2014* (Ministry of Justice statistics bulletin, August 2014).[5] There were 10,000 landlord repossessions by county court bailiffs in April to June 2014.

Letting and managing agents

The Redress Schemes for Lettings Agency Work and Property Management Work (Requirement to Belong to a Scheme etc) (England) Order 2014 SI No 2359 requires all letting and property management agents to become members of an approved redress scheme to which actual and prospective landlords and tenants can complain and seek compensation. The provisions came into force on 1 October 2014. The sanction for failure to join a redress scheme is a penalty of up to £5,000. Enforcement is to be undertaken by local trading standards officers with a right of appeal to a First-tier Tribunal. On 5 September 2014, the housing minister, Brandon Lewis MP, issued a call to all letting and managing agents to join a scheme before the deadline: *Letting agents need to move quickly to sign up to redress schemes* (DCLG press release, 5 September 2014).[6]

The Consumer Rights Bill Part 3 Chapter 3 contains provisions designed to ensure that letting agents' fees are transparent. Once in force, the requirements will be backed by a penalty of up to £5,000 for non-compliance. The bill has already passed through the House of Commons and starts its committee stage in the House of Lords on 13 October 2014.

Tenancy deposits

Clause 31 of the Deregulation Bill contains proposed new sections 215A–215D for the tenancy deposit provisions of the Housing Act (HA) 2004. The new sections will address pre-April 2007 deposits and the effect on deposits of renewal of tenancies. The changes are considered necessary following the Court of Appeal decision in *Superstrike Ltd v Rodrigues* [2013] EWCA Civ 669, 14 June 2013; [2013]

HLR 42, CA. The bill has already passed through the House of Commons and starts its committee stage in the House of Lords on 21 October 2014.

Lettings to migrants

The provisions of Immigration Act 2014 ss20–37 are designed to prevent landlords from letting to certain migrants. There is to be a phased implementation of those provisions. On 1 December 2014, they will be brought into force in Birmingham, Wolverhampton, Dudley, Walsall and Sandwell: the Immigration Act 2014 (Commencement No 3) Order 2014.

To help landlords prepare for the changes, the UK government has produced a free factsheet, *Tackling illegal immigration in privately rented accommodation* (Home Office, August 2014);[7] an information leaflet, *Right to rent* (Home Office, September 2014);[8] and a draft code of practice: *Code of practice on illegal immigrants and private rented accommodation* (Home Office, September 2014).[9] For further advice landlords can also access an online checking system called the 'Right to rent tool'[10] or call a Home Office helpline: 0300 069 9799.

Social housing

The UK government has published a new guide about the ways that council and housing association tenants in England can get involved in making their neighbourhoods a better place to live: *Tenants leading change* (DCLG, July 2014).[11] A new report has made a case for targeted intervention to tackle the worst council housing estates: *The estate we're in: lessons from the front line* (Policy Exchange, 2014).[12]

Those tenants seeking to move away from council ownership of their homes will need to initiate a stock transfer process. The detailed rules about such transfers have been published in a new transfer manual: *Housing transfer manual: period to 31 March 2016* (DCLG, July 2014).[13] As an incentive to transfer, local authorities and tenant groups can apply for funding towards writing off housing debt. Up to £100 million is available: DCLG press release, 14 July 2014.[14]

The social housing regulator for England, the Homes & Communities Agency (HCA), has produced new guidance on how tenants of social housing can pursue complaints against their landlords.[15] The housing minister has also written to the National Housing Federation, the Chartered Institute of Housing and the Local Government Association, urging them and their members to ensure that tenants know how to complain if they need to: DCLG press release, 7 July 2014.[16] The results of the *Big Tenant Survey 2014* (Housing Partners, September 2014) suggest high levels of tenant dissatisfaction with social landlords.[17]

The Welsh government is consulting on proposals to require social landlords in Wales to self-report issues to regulators: *Consultation document: guidance on notifiable events for registered social landlords* (Welsh government, August 2014).[18]

Right to buy

There has been a significant increase in the number of right to buy applications in England. In the first quarter of 2014/15, councils sold an estimated 2,845 dwellings under the right to buy scheme: 31 per cent higher than the 2,171 sold in the same quarter of 2013/14: *Right to buy sales: April to June 2014, England* (DCLG, August 2014).[19]

Clause 29 of the Deregulation Bill (see above) would reduce the qualifying period to acquire the right to buy in England from five to three years in order to stimulate further sales, and is likely to come into force shortly after the bill is passed.

The Housing (Right to Buy) (Maximum Percentage Discount) (England) Order 2014 SI No 1915 provides that the maximum percentage discount when exercising the right to buy in respect of a house is 70 per cent (the same percentage discount as flats). Subject to transitional provisions, the Order took effect on 21 July 2014.

A new prescribed form RTB1, for claiming the right to buy, came into effect on 4 August 2014: the Housing (Right to Buy) (Prescribed Forms) (Amendment) (England) Regulations 2014 SI No 1797. The new form is available online.[20] Tenants wanting to buy their own homes can now ring a dedicated local rate helpline to speak to a member of the new Right to Buy Agent Service: 0300 123 0913.

Leaseholders and service charges

In 2012/13, there were 4.1 million homes in England owned on long leases, of which 2.4 million were occupied by their owners and 1.7 million were rented out to tenants: *Residential leasehold dwellings in England: technical paper* (DCLG, August 2014).[21]

In October 2013, the UK government consulted on proposals to cap the service charges for major works payable by local authority leaseholders in England: *Consultation on protecting local authority leaseholders from unreasonable charges* (DCLG, October 2013).[22] In August 2014, it published a summary of responses to that consultation: *Protecting local authority leaseholders from unreasonable charges: analysis of consultation responses and next steps* (DCLG, August 2014).[23]

In the light of those consultation responses, the government issued revised service charge directions to social landlords to cap the charges to leaseholders for future major works funded by government. The Social Landlords Mandatory Reduction of Service Charges (England) Directions 2014 provide that:[24]

- where repair, maintenance and improvement works to leaseholders' properties relate to programmes of work on tenanted stock wholly or partly funded by a secretary of state or the HCA, the service charge payable by a resident leaseholder over any five-year period is capped at £15,000 in London and £10,000 in the rest of England;
- the cap applies to councils and private registered providers in England; and
- the cap does not cover any leaseholders who, at the time the work commences, are not occupying their leasehold property as their only or principal home.

The separate Social Landlords Discretionary Reduction of Service Charges (England) Directions 2014 permit social landlords to reduce service charges for the costs of repair, maintenance or improvement to below the level of the mandatory cap where they consider it appropriate and reasonable to do so, subject only to certain specified criteria to which the landlord must have regard when making a decision.[25]

The Competition and Markets Authority (CMA) is conducting a market study into residential property management. In August 2014, it announced that it had found some leaseholders appear to suffer from a lack of control over aspects of property management, and may experience excessive or unnecessary charging for services arranged by property managers, poor service quality, insufficient transparency, poor communication and ineffective redress. It conducted a short consultation in August and September on a range of possible remedies: *Residential property management services: an update paper on the market study* (CMA, August 2014).[26] Its report is expected in November 2014.

HUMAN RIGHTS

Article 8

■ Lemo and others v Croatia

App Nos 3925/10, 3955/10, 3974/10, 4009/10, 4054/10, 4128/10, 4132/10 and 4133/10,
10 July 2014,
[2014] ECHR 755

In the 1970s, the applicants moved into flats in Mlini, Dubrovnik, as employees of a publicly-owned enterprise, Mlini Hotels. In 1991, the Protected Tenancies (Sale to Occupier) Act gave the holders of such tenancies of publicly-owned flats the right to purchase under favourable conditions. Later, Mlini Hotels was privatised. The applicants sought to purchase

their flats from Mlini Hotels but their requests were refused. Some time after 2000, Mlini Hotels brought separate civil actions in the Dubrovnik Municipal Court seeking the eviction of all the applicants, on the ground that they had no legal basis to occupy the flats. They counterclaimed, seeking recognition of their protected tenancies and judgments in lieu of the contracts of sale. They argued that they had been occupying the flats for lengthy periods and had paid the rent and all utility bills. They claimed the right to occupy the flats permanently. The court accepted the plaintiff's claims and dismissed the applicants' counterclaims. They were all forcefully evicted from the flats in 2010. They complained to the European Court of Human Rights (ECtHR), alleging that there had been a breach of article 8 of the European Convention on Human Rights ('the convention').

The court stated that whether a property is to be classified as a 'home' is a question of fact and does not depend on the lawfulness of the occupation under domestic law. In this case, the applicants had sufficient and continuous links with the flats for them to be considered their 'homes' for the purposes of article 8. The eviction orders amounted to an interference with their right to respect for their homes. The national courts' decisions were in accordance with domestic law and the interference therefore pursued the legitimate aim of the protection of the rights of the owner of the flats. The central question was, therefore, whether the interference was proportionate and 'necessary in a democratic society'. Although article 8 contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to afford due respect to the interests safeguarded by article 8. Any person at risk of an interference with his/her right to a home should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under article 8, notwithstanding that, under domestic law, s/he has no right to occupy the property concerned. Such an issue does not arise automatically in every case concerning an eviction dispute. If an applicant wishes to mount an article 8 defence to prevent eviction, it is for him/her to do so and for a court to uphold or dismiss the claim.

In this case, the national courts had confined themselves to finding that occupation by the applicants was without legal basis, and made no further analysis as to the proportionality of the measure to be applied against them. By failing to examine these arguments, the national courts did not afford the applicants adequate procedural safeguards and the decision-making process was not fair and did not afford due respect to the interests safeguarded to the applicants. There was, therefore, a violation of article 8. The court awarded non-pecuniary damage and noted that under the Croatian Civil Procedure Act an applicant may file a petition for the reopening of civil proceedings in respect of which the ECtHR has found a violation of the convention.

Comment: It is interesting to note that the ECtHR appeared to make no distinction between the way in which article 8 proportionality has to be considered in a claim by a private landlord in comparison with one brought by a public sector landlord.

POSSESSION CLAIMS

Counterclaims and old possession orders

■ Midland Heart Ltd v Idawah

[2014] EW Misc (B48),
11 July 2014

The claimant landlord began a claim for possession based on rent arrears in August 2002. No defence was filed and in November 2002 an order for possession was made. Over the years, there were seven orders suspending warrants for possession. In October 2013, the claimant was again given permission to request the reissue of a warrant of possession. The defendant tenant applied again to suspend the warrant of eviction and for permission to bring a counterclaim for disrepair. District Judge Williams granted that application. The claimant appealed.

HHJ Grant dismissed the appeal. After referring to *Rahman v Sterling Credit Limited* [2001] 1 WLR 496, CA, he concluded that the district judge did not make an error in law in permitting the tenant to raise a counterclaim which included either in fact or in effect a claim to set off. He had not exercised his discretion outwith the ambit of discretion that was available to him. It was clear from the transcript that the district judge did have regard to the issue of delay. The ground of appeal that the district judge had not had regard to the fact that the claimant had been deprived of a limitation defence had not been raised below.

Permission to appeal: new evidence

■ Crawley BC v Irvine

Queen's Bench Division,
21 July 2014

A judge made an order for possession, based on the availability of suitable alternative accommodation. The tenant applied for permission to appeal against that decision and for permission to adduce fresh evidence, which allegedly demonstrated that there were anti-social behaviour problems in the area where the alternative accommodation was situated. The local authority attended the permission proceedings but did not participate in them. The judge made no determination on the permission to appeal application but ordered the case to be remitted for reconsideration in the light of the fresh evidence. The local authority appealed.

Patterson J allowed the appeal. The fresh material the tenant had sought to adduce was easily accessible and available at the time of the original trial. He had given no reason for not seeking to adduce that evidence then. It was clear from the decision to grant possession that a firm conclusion had been reached that there was no real risk of anti-social behaviour in the area where the alternative accommodation was located. Furthermore, it was evident from the transcript of the permission proceedings that anti-social behaviour had not been a major issue before the judge and that, in allowing the evidence to be adduced, he had not considered the *Ladd v Marshall* principles as he was required to do under the Civil Procedure Rules (CPR). Taking all of those factors together, including the fact that the local authority had had no opportunity to address the judge on whether the evidence should be adduced, the decision to adduce had been wrong and unfair. The judge had not been entitled to order remittal. Patterson J set aside the judge's order and substituted one refusing both permission to appeal and permission to adduce the fresh evidence.

Scottish assured tenancies

■ AP and MP v DO and SO

[2014] ScotSC 79,
Sheriffdom of South Strathclyde Dumfries and Galloway at Dumfries,
6 August 2014

In 1980, Mr AP and Mrs MP bought a house, with an adjacent cottage which they intended to let out as a holiday cottage. From December 2004, Mr DO and Mrs SO stayed in the holiday cottage on various occasions. They developed a close relationship with Mr AP and Mrs MP. In 2007, Mr AP and Mrs MP built a second house in their vegetable garden, with the intention of residing in it. While the second house was being built, Mr AP had a heart attack and he and his wife abandoned their plans to move into the second house as his health would not permit it. However, they arranged for Mr DO and Mrs SO to occupy the second house on the understanding that they would assist them with collecting firewood and gardening. Mr DO and Mrs SO agreed to this arrangement and gave up their council tenancy in England. After moving in, Mr DO and Mrs SO did help to collect firewood and garden. Mrs SO also helped run Mr AP and Mrs MP's B&B business at the holiday cottage. She was paid £40 per week for this. Initially, no rent was charged for

the second house, but after discussions about the availability of HB, the parties agreed a rent of £300 per month as this was the maximum amount that would be paid by the local authority as HB. The parties did not enter into any form of written lease. In 2010, the parties' personal relationship began seriously to deteriorate. An altercation took place and by the date of judgment, they were no longer on speaking terms. Mr AP and Mrs MP claimed possession.

Sheriff George Jamieson found that there was a relationship of landlord and tenant between the parties. The tenancy was originally a contractual assured tenancy (H(S)A 1988 s12) and after termination by notice to quit became a statutory assured tenancy. Mr AP and Mrs MP were not entitled to recover possession under H(S)A 1988 Sch 5 Ground 1(b) ('at least one of them requires the house as his or his spouse's only or principal home') because the original intention to move into the second house altered when Mr AP had his heart attack. Sheriff Jamieson also rejected a claim for possession based on arrears of rent because the alleged arrears had not been quantified.

■ Eastmoor LLP v Bulman

[2014] ScotSC 85,
Sheriffdom of South Strathclyde Dumfries and Galloway at Dumfries,
5 June 2014

Mr Bulman had a short assured tenancy (H(S)A 1988). The tenancy agreement provided: 'If any of the events referred to in Grounds 8, 11, 12, 13, 14, 15 or 16 of Schedule 5 of the Housing (Scotland) Act 1988 occur, the landlord shall be entitled not only to recover from the tennant [sic] all loss or damage caused by the tenant which they may thereby sustain and all rents due and which may become due in addition may forthwith put an end to this lease and may commence proceedings for possession.' His landlord sought possession on the ground that he was more than three months in arrears of rent.

Sheriff George Jamieson formed the opinion that the action was incompetent and accordingly dismissed it. H(S)A 1988 s18(6)(b) provides that: 'The sheriff shall not make an order for possession of a house which is for the time being let on an assured tenancy … unless - (b) the terms of the tenancy make provision for it to be brought to an end on the ground in question' (judge's emphasis, para 7). He found that the clause in the agreement was poorly drafted and failed to comply with section 18 because it mentioned, but did not specify, what the grounds were and wrongly assigned to the landlord the right to 'forthwith' put the lease to an end if the grounds occurred. In any event, the lease could only be brought to an end within the contractual period on an order for possession granted by the sheriff under section 18.

ASSURED SHORTHOLD TENANCIES

Signature of agreement

■ Begum v Khan

[2014] EWCA Civ 752,
1 April 2014

The claimants sought repayment of a £1,000 deposit paid in respect of an assured shorthold tenancy allegedly signed by the parties in March 2010. The defendant argued that she had never granted an assured shorthold tenancy to the claimants and had never seen the tenancy agreement annexed to the claim form. An expert, who was jointly instructed, concluded that there was 'very strong evidence to support the proposition that [the defendant] signed the assured shorthold tenancy agreement' (para 5). HHJ Simon Brown QC held that, on the balance of probability, the defendant had indeed signed the tenancy agreement and had received £1,000 paid by the claimants pursuant to it.

Lewison LJ refused permission to appeal on the papers. The judge did not rely solely on the evidence of the handwriting expert, but on his own view of the defendant, having seen and heard her give evidence. The criticisms of the judge made in the skeleton argument had no real prospect of success. Laws LJ 'entirely agree[d] with Lewison LJ' and refused a renewed application for permission to appeal (para 16).

False assurances by agent

■ Kalganova v Matumorya and Mandazi

St Albans County Court,
7 July 2014[27]

The claimant entered into two agreements with a person purporting to be a lettings agent. The first was a 'Residential Lettings Service Agreement'. The second gave the agent a lease of the relevant property. The agent then entered into an agreement with the defendants under which they were given an assured shorthold tenancy of the property. The claimant discovered that various assurances made by the agent were (as she asserted) false. She sought to obtain possession of the property on the ground that the defendants were trespassers.

District Judge Cross dismissed the possession claim. He found that the claimant had been induced to enter into the lease agreement with the agent by fraud, but the agreement was effective to transfer to the agent an estate in the property giving rise to exclusive possession as a tenant and the right to have the place occupied by his clients. The claimant was not, therefore, entitled to possession of the property immediately. Although she was entitled to avoid the contract, it had not been avoided when the agent granted the sublease or when proceedings were issued and therefore the basis of the claim had not been made out. Even if the head lease had been determined, the defendants would have a valid assured shorthold tenancy, held from the claimant, by virtue of HA 1988 s18.

Harassment and eviction

Damages

■ Webb v Singh and Liberty Estate Agents Limited

Birmingham County Court,
18 July 2014[28]

Ms Webb was an assured shorthold tenant who lived with her four-year-old son. She visited a relative for three weeks and was away from the premises during this time. When she returned, late one evening, the locks had been changed and she was unable to gain access. She and her son had to spend four and a half months between relatives' houses until she was re-housed. She had eight months remaining under her tenancy agreement. When she contacted the agent to gain access to her belongings, he refused to give it unless she paid a 'storage fee'. She was therefore deprived of all her belongings, including furniture, clothes and children's items.

District Judge Mian concluded that both the landlord and the landlord's agent had worked together to unlawfully evict the tenant. They had done so in order to re-let the premises. The judge also found that the eviction caused great disruption to Ms Webb and her family. Her son lost his place at the local school and was without a school placement for some time. If it were not for her family, she would have been homeless. She was without any access to her belongings and had to re-build her life.

The judge awarded a total of £27,975 in damages, comprising:

- general damages of £16,875;
- special damages of £5,000;
- aggravated and exemplary damages of £4,000;
- damages under HA 2004 s214 of £1,575; and
- the return of the deposit: £525.

■ Whittingham v Uddin

Clerkenwell and Shoreditch County Court,
14 August 2014[29]

Mr Whittingham brought a claim for damages for breach of quiet enjoyment, harassment and disrepair against his landlord. For a period of up to three years, the premises suffered from defective windows throughout, water penetration in the bedroom, some internal leaks in the kitchen and WC and some external

disrepair. The landlord failed to carry out any repairs despite repeated complaints. In respect of the harassment, Mr Uddin took 'all the steps he could think of to make the tenant's life uncomfortable and as difficult as he could'. He did so in order to force the tenant to leave without having to go through the court process. Over a period of three years, he:

- inflated the rent (something that he was not entitled to do);
- made threats of violence;
- turned off the gas and electricity supply by damaging the pipes;
- frequently attended the premises (on occasions with others) and let himself in; and
- changed the locks to the front of the premises. The tenant was only let back in after other tenants gave him a key.

The police were called on a number of occasions but no action was taken. The landlord also sent a series of e-mails, some of which amounted to harassment.

District Judge Sterlini awarded a total of £26,650 plus interest. This included the following:

- £10,650 for disrepair. This comprised:
  – £1,800, being a 100 per cent reduction in the rent for a six-week period in November and December 2013 when the claimant had to move out because the premises were uninhabitable; and
  – a global award of £7,500 to reflect other items of disrepair over a period of three years (including a 17 per cent reduction in rent over this period);
- £1,000 for defective chattels that were provided under the terms of the tenancy agreement and that were broken but not repaired/replaced;
- £350 for the cost of plumbing repairs paid by the tenant;
- £10,000 general damages for harassment;
- £3,000 aggravated damages; and
- £3,000 exemplary damages.

FRAUD

Sentence for fraudulent right to buy applications

■ R v Hamza

Court of Appeal (Criminal Division), 21 August 2014

The defendants made applications to exercise the right to buy, which contained false representations that:

- the property was one applicant's sole or principal residence;
- the other applicant had resided at the property for the previous 12 months; and
- the applicants were sisters.

If the applications had been successful, the discount on the property would have been just under £50,000. However, the applications were refused because the local authority discovered that one defendant had been occupying a number of other addresses where she had been in receipt of benefits, and information from the passport service showed that the defendants were not related. They were both charged and pleaded guilty to fraud. The judge held that the fraud did not fit neatly into the Sentencing Council's definitive guideline on fraud but referred to the second category of confidence fraud, involving a degree of planning, in the range of £20,000 to £100,000, which gave a starting point of three years' custody for a £60,000 fraud and a range of two to five years' custody. He considered that after a trial the appropriate sentence would have been 30 months, and reduced that to 20 months for the guilty pleas.

The defendants' appeals were dismissed. The fraud was a serious one involving cheating the right to buy scheme. There was dishonesty from the outset, and planning. The offending easily passed the custody threshold. There was a significant aggravating feature of persistence in making two applications. Both defendants knew what they were doing and suspension of the sentences could not be justified, even considering the defendants' individual circumstances. The judge had found both defendants equally culpable and was right to do so. His sentencing adequately reflected their individual mitigation. It was correct that the fraud did not fit neatly within the sentencing guidelines. Looking at the matter overall the judge's starting point and the sentences were not manifestly excessive.

Deposits and director disqualification

■ Secretary of State for Business, Innovation and Skills v Weston and Williams

[2014] EWHC 2933 (Ch), 5 September 2014

Premier Places (Letting) Ltd and Premier Places (Redditch Lettings) Ltd were letting agents for residential properties. Mr Weston was the controlling director of both companies. Mr Williams was a director of a company that provided accountancy services to both companies. Mr Weston made applications for both companies to be registered with The Dispute Service (TDS) in accordance with the tenancy deposit provisions of HA 2004 Chapter 4. Those applications in turn required that the companies must (a) be regulated by an approved body; and (b) hold tenants' deposits in a ring-fenced client account. Mr Weston accordingly made applications for both companies to register with the National Approved Lettings Scheme (NALS). The statements made by Mr Weston in the applications to TDS and NALS, as to the way deposits were held, were false because deposits were mostly paid into the ordinary bank accounts of the companies and in effect used as working capital. Mr Williams procured the issue of the accountant's reports required for the two companies to be registered with NALS. He was not himself a chartered or certified accountant, and so falsified the signature of a suitably qualified member of his staff on those documents.

When the police investigated, they found that of a total of £521,550 received by way of tenants' deposits, only £74,351 was held in appropriate client accounts. The companies became insolvent and there was a shortfall due to depositors of at least £63,000. That was paid by insurers so that the loss fell on them and not the tenants. Both Mr Weston and Mr Williams pleaded guilty to fraud. Mr Weston accepted that his actions were deliberate and dishonest and that he knew they were in breach of the legislative requirements. Both men received suspended sentence orders. The sentencing judge decided not to impose a directors' disqualification order. Later, the secretary of state brought a claim in the High Court seeking disqualification orders against both men under Company Directors Disqualification Act 1986 s2.

HHJ David Cooke found that the jurisdiction of the civil court expressly given by section 2 must necessarily arise after a conviction. However, the question of whether a subsequent application to the civil court amounted to an abuse of process was a separate matter. In this case, the claim was no more than an attempt by the secretary of state to obtain a different decision from the civil court than was given on identical issues by the criminal court. The Crown Court had the issues placed before it and had made a positive decision to refuse an order. It was unfair that the defendants should be exposed to the same claim on two occasions. That unfairness was not relieved by the argument that the claim was being pursued by a different entity. An important consideration was the period that had elapsed since the offences without any evidence of further unfit conduct and the fact that risk to the public was reduced by both defendants' acceptance of their dishonesty. HHJ Cooke refused to make the orders sought.

DEFAMATION

■ Cooke v MGN Limited

[2014] EWHC 2831 (QB), 13 August 2014

Following the *Benefits Street* series of television programmes broadcast on Channel 4, the *Sunday Mirror* published an article with

the front page headline, 'MILLIONAIRE TORY CASHES IN ON TV BENEFITS STREET'. It also referred to Midland Heart Housing Association and its chief executive, Ruth Cooke. In a subsequent defamation action, Bean J determined the natural and ordinary meaning of words contained in the article.

HOUSING ALLOCATION

Local Government Ombudsman
Complaints
■ **Enfield LBC**
13 016 900,
12 May 2014
In April 2013, the complainant applied to join the council's housing register. It took the council until July 2013 to send him an assessment form, which he completed and returned. On 16 August 2013, the council decided that he was not eligible to join the register but it did not send out notice of that decision until 21 September. He asked for reasons, which were not sent until mid-October. He then applied for a review. That was not determined until January 2014 when the council agreed he was eligible to join the register.

On a complaint to the Local Government Ombudsman (LGO), the council accepted that the application had not been properly assessed and that its communications had not been as clear as they should have been. The ombudsman considered that there had also been delays. The council agreed to pay £250 compensation.

■ **Newham LBC**
13 016 745,
14 May 2014
In January 2013, the complainant bid for a property under the council's choice-based lettings scheme. She was the second highest bidder but was not invited to view because the council discovered that she had previously been a homeowner. It suspended her application for housing allocation pending further checks. It did not ask for information about the previous home until May 2013 and it took until July 2013 to make a decision to lift the suspension.

The LGO accepted that enquiries into eligibility had to be undertaken but decided that six months had been too long. However, no injustice requiring compensation had occurred because no appropriate properties were let in the period of suspension to applicants with lower priority than the complainant.

Scottish Public Services Ombudsman
Complaint
■ **Angus Council**
201304223,
June 2014
The council operated a scheme under which it made incentive payments to council tenants who were willing to transfer to smaller accommodation. The complainants successfully registered under that scheme at its inception. Much later, in June 2013, they moved to a smaller property and claimed a payment. The council declined payment on the basis that funding for the scheme had ended on 31 March 2013 and that the scheme did not re-start until new funding was secured in September 2013.

The Scottish Public Services Ombudsman found that while the decision made was strictly correct, the council had failed to inform directly those registered under the scheme that funding had ended. Recommendations made included:

■ a review of procedures to keep tenants informed; and
■ a review of the decision to decline payment in this case.

HOMELESSNESS

Applications
Local Government Ombudsman
Complaints
■ **Plymouth City Council**
13 014 046,
7 April 2014
The complainant (Mrs X) visited the council's offices to discuss her housing needs. She had no permanent accommodation and was staying temporarily with her daughter. She said her situation was very stressful as her son-in-law was not happy with her staying at his home. During the meeting, the council became concerned about Mrs X's benefit situation. It was aware she had previously been living abroad, knew she was not working, but was unsure if she was entitled to benefits. The council officer told Mrs X to go to the DWP to sort out her benefit issues and then come back to discuss her housing. Mrs X wrote to the council a few days later to complain about the meeting. She was dissatisfied with the way the council had handled her housing needs and she also complained about the rudeness of the officer. The council closed the case file, without contacting Mrs X or responding to her complaint, as she had not returned to discuss her housing situation further.

The LGO found that the council was at fault in not having treated Mrs X as seeking homelessness assistance and in failing to conduct enquiries into her application: HA 1996 s183. It was also at fault in not responding to the complaint. The council agreed to apologise and to pay Mrs X £1,150.

■ **Birmingham City Council**
13 017 548,
7 May 2014
The applicant first attended the council's offices on 5 February 2013 and gave the council reason to believe she was homeless: HA 1996 s183. She was not interviewed by a homeless officer for nearly a month. She provided the required documentation on the day after her interview with a homeless officer in March 2013 but a decision on her homelessness application was not reached until 13 May. There was no evidence that the council made further enquiries into the application after the March 2013 interview. Between March and May the applicant missed opportunities to bid for properties that she would have been allocated had her application been processed more quickly.

The LGO could see no reason why it had taken longer than the 33 working days mentioned in the Homelessness Code of Guidance para 6.16 to reach a decision. The delay caused the applicant to be in temporary accommodation for five months longer than she should have been.

The council agreed to pay £400 (£50 a month for the five months' delay and £150 for the applicant's time and trouble).

Interim accommodation
Local Government Ombudsman
Complaint
■ **Brent LBC**
13 008 940,
9 May 2014
In February 2013, the applicant, a vulnerable adult with mobility needs, approached the council saying he could not return to his parent's home. The council was satisfied that he may be homeless, eligible for assistance and in priority need. It secured interim accommodation: HA 1996 s188. The Care and Support Team referred him to floating support services but housing staff did not act on this referral. The council did not inspect the interim accommodation, which proved unsuitable for the applicant's needs given his disabilities. It took the council until May 2013 to make a decision on the application for homelessness assistance. The applicant lodged a complaint under the council's complaints procedure.

The council upheld his complaint because it recognised that it had not inspected the interim property offered, and agreed to change its policy so that it now inspects interim property offered to vulnerable applicants. It also upheld a complaint that it had failed to act quickly on the referral to Start Plus delaying his support

service. To remedy the injustice the council paid £350 and apologised. Although the ombudsman found further fault in the delay in making a decision on the application for homelessness assistance, no further recompense was recommended.

Priority need

Intentional homelessness

■ Haile v Waltham Forest LBC

UKSC 2014/0185,
30 July 2014

An appeal panel of the Supreme Court has granted the applicant permission to appeal from the decision of the Court of Appeal upholding a finding that she had become homeless intentionally: see [2014] EWCA Civ 792; July/August 2014 *Legal Action* 55. The appeal is currently listed to be heard on 29 January 2015.

■ Rodger v South Cambridgeshire DC

[2014] EWCA Civ 916,
2 May 2014

Mr Rodger was an assured shorthold tenant of a housing society flat. The tenancy agreement contained a service charges covenant. His HB only covered the core rent and he accrued arrears of the weekly charge for heating and lighting. Although he agreed to clear the arrears, he failed to do so. The society served a HA 1988 s21 notice and obtained a possession order. Mr Rodger applied to the council for homelessness assistance. A reviewing officer decided that he had become homeless intentionally. HHJ O'Brien dismissed an appeal from that decision.

Mr Rodger made a renewed application for permission to bring a second appeal, contending that the heating charge was higher than was justified; it had been unreasonably increased; it was based on estimated rather than actual consumption; and, accordingly, he had not been liable to pay it.

Aikens LJ refused permission to appeal. The points Mr Rodger wanted to pursue had not been taken in the possession claim or on an appeal from the possession order. There was 'no answer' to the findings of the reviewing officer that the failure to pay had led to the making of the possession order (para 16). The proposed appeal did not meet the threshold in CPR 52.13 for a second appeal.

■ Alasadi v Oxford City Council

Oxford County Court,
1 August 2014[30]

Mr Alasadi was a refugee from Syria and the tenant of a privately rented flat. The rent was paid from his HB. To obtain entry to the UK for his children and his wife, he had to sponsor them under immigration rules, which required him to show he had resources to accommodate them without use of public funds. He gave up the tenancy and moved in with his brother. That enabled him to increase his uncommitted income and stop his benefit claim. Later, when his family joined him, his brother asked him to leave.

The council decided that he had become homeless intentionally by giving up the flat. His case was that he had done the only thing open to him to get his family out of Syria. Although the council accepted his account of the facts, it considered that they were not relevant because the definition of intentional homelessness required a 'deliberate' act (HA 1996 s191) and Mr Alasadi had chosen to give up his flat.

Recorder Morgan held that the council erred in law in that it did not consider it was appropriate to engage with Mr Alasadi's arguments and it did not consider that Mr Alasadi's arguments were relevant to its decision. There was no express engagement with the important and relevant question of whether Mr Alasadi could, in reality, be said to have had a 'choice' or whether he acted out of necessity when leaving his home. Accordingly, the council did not properly consider whether he 'deliberately' left the flat.

Suitable accommodation

Local Government Ombudsman

Complaints

■ Croydon LBC

13 008 594,
17 March 2014

■ Croydon LBC

13 006 148,
9 April 2014

These two complaints were among several arising from the council's practice of placing homeless families in B&B or other non-self-contained accommodation for periods in excess of the statutory absolute maximum of six weeks: Homelessness (Suitability of Accommodation) (England) Order 2003 SI No 3326 articles 3 and 4. The council assured the LGO that the practice had since ceased – in May 2013.

In the first case, the ombudsman recommended payment of £200 per month for the period beyond the six-week maximum. In the second case, where the complainant was in shared accommodation for 14 weeks in all, the council agreed to make a payment of £250.

Comment: Westminster City Council had agreed with the LGO to pay £500 compensation for each family kept in B&B accommodation for longer than six weeks in 2011, with a further £83.33 payment for every subsequent week spent in such accommodation: 12 009 140; November 2013 *Legal Action* 33. However, contrary to assurances given to the ombudsman, the council was reported to have failed to pay the agreed amounts to all of the more than 400 entitled families: 'Delay in B&B compensation for homeless families', *Inside Housing*, 29 May 2014. The level of awards in these London cases contrasts with the recommendation of £2,000 for a Birmingham family which stayed in B&B accommodation for 17 weeks in all: see 12 001 546; July/August 2013 *Legal Action* 23.

■ Newham LBC

13 017 531,
3 June 2014

The council accepted that it owed the complainant the main housing duty under HA 1996 s193. In 2012, it provided him with temporary accommodation pursuant to that duty. He became seriously ill, was paralysed from the waist down, and confined to a wheelchair. His accommodation was on the second floor, with no lift, and so was inaccessible. He asked the council to move him to other suitable temporary accommodation. In August 2013, his solicitors activated the council's complaints procedure. The council failed to provide other temporary accommodation and the complainant remained in the same flat until he secured permanent accommodation in February 2014.

The LGO decided that the council was at fault. It was unable to show that its officers had done any work to find alternative temporary accommodation except for one instance triggered when the complaint finally reached Stage 3 of the council's procedures. An award of £2,100 compensation was recommended.

1 Available at: www.gov.uk/government/collections/local-authorities-removal-of-the-spare-room-subsidy.
2 Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/339003/Statutory_Homelessness_1st_Quarter__Jan_-_March__2014_England_20140729.pdf.
3 Available at: www.housingjustice.org.uk/data/__resources/620/GLA-report-draft-2.pdf.
4 Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/332839/StatutoryGuidanceFrontline.pdf.
5 Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/341560/mortgage-landlord-possession-statistics-April-June-2014.pdf.
6 Available at: www.gov.uk/government/news/letting-agents-need-to-move-quickly-to-sign-up-to-redress-schemes.
7 Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/341876/Factsheet_Landlords_Aug_14.pdf.
8 Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/350662/Landlords_infographic_client_visual_v4.pdf.
9 Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/350211/Landlords_scheme_-_draft_Code_of_Practice.pdf.
10 See: https://eforms.homeoffice.gov.uk/outreach/lcs-application.ofml.
11 Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/331663/140

717_Tenants_Leading_Change_FINAL.pdf.
12 Available at: www.policyexchange.org.uk/images/publications/the%20estate%20were%20in.pdf.
13 Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/329907/140704_Manual_2014_Final__2_.pdf.
14 Available at: www.gov.uk/government/news/100-million-fund-will-put-power-in-the-hands-of-tenants.
15 Available at: www.homesandcommunities.co.uk/ourwork/complaining-about-your-landlord.
16 Available at: www.gov.uk/government/news/support-to-resolve-social-tenants-complaints.
17 Available at: http://bigtenantsurvey.housingpartners.co.uk/Download/Housing%20Partners%20Big%20Tenant%20Survey%202014%20Summary%20Report%20Final.pdf.
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26 Available at: www.gov.uk/cma-cases/residential-property-management-services.
27 Nichola Neophytou, solicitor, Foster & Foster and Tessa Buchanan, barrister, London.
28 Community Law Partnership, solicitors, Birmingham and Marina Sergides, barrister, London.
29 Hodge, Jones & Allen, solicitors and Marina Sergides, barrister, London.
30 Turpin & Miller, solicitors, Oxford and Marina Sergides, barrister, London.


Nic Madge is a circuit judge. Jan Luba QC is a barrister at Garden Court Chambers, London. He is also a recorder. **The authors are grateful to the colleagues at notes 27–30 for transcripts or notes of judgments.**

review

The Children Act
Ian McEwan

A teacher at my secondary school used to re-read one Jane Austen book a year as a treat. Ian McEwan's new books (or novellas?) are my treat. There are only a few authors whose next book I eagerly await, and Ian McEwan is one of them. Incidentally, I am not worried about terminology: is this a book or a novella? Who cares: this book is one I read in a day. It is just over 220 pages in hardback. I was completely absorbed in the world portrayed.

Lengthy reviews have been written in most newspapers and magazines. Now I am not a family lawyer and, indeed, am not a practising solicitor any more, but I did carry out family work years ago and I know a fair bit about family law procedures. So, will family lawyers, or any lawyers, have to grit their teeth to read *The Children Act*? No, I don't think so.

The story is straightforward: a family judge, Fiona Maye, has to deal with a case where a teenage boy needs a blood transfusion which will probably save his life. His parents and the boy (he is almost 18) are refusing to allow the transfusion. In her private life, the judge has been told by her husband that he is either about to embark on (or has possibly started) an affair.

The judge decides to visit the boy to find out his true wishes before giving judgment and from her personal involvement a chain of events is set off. Fiona Maye is suffering emotionally from a decision she made a few weeks earlier about conjoined twins and if one should live. ('Blind luck, to arrive in the world with your properly formed parts in the right place, to be born to parents who were loving, not cruel, or to escape, by geographical or social accident, war or poverty. And therefore to find it so much easier to be virtuous'.

The book explores a number of difficult legal scenarios. Should a 'westernised' mum keep her children at a mixed-sex school when her estranged partner wants them schooled within a strict faith? There is a haunting reference to the case of a professional woman, who was convicted of causing the deaths of her two babies based on statistics quoted by a pathologist who turned out to be wrong, and her subsequent jailing, release and death. A case of alleged satanic abuse where children are removed from their families turns out to be untrue. No names are mentioned, so all are treated as fictional cases. But all lawyers, and most readers, will know which cases these scenarios are based on.

So, there are beautifully written summaries of some of the very difficult decisions that are made in the family courts. If you have ever tried to summarise a case to make it of interest, you will appreciate how well these are written. And how cleverly the author portrays the difficult decisions facing family judges, particularly when balancing parents' sincerely held beliefs about how children should be brought up against societal expectations.

The issues in this book are many, but all written so well. What do you say to your partner, who wants the excitement of an affair before his sixties, but wants the marriage to survive? Other reviews have commented on the childlessness of the couple, but that seemed to be very sensitively portrayed and of some importance, although not over played. I loved the minor characters: the judge's clerk, the nurses and the social worker, who is outwardly chaotic but perceptive.

It is a long time since Ian McEwan's 1978 novel, *The Cement Garden*, about how children manage when left without parents or any adult influence. I remember finding that book profoundly shocking on many levels. This book makes me want to re-read *The Cement Garden* because it seems that *The Children Act* is a more sophisticated exploration of how society treats children and how children's welfare can be considered in the complex world in which we live, where issues about how children should be raised are not subject to consensus.

Lawyers may argue that their client does have his/her child's welfare at heart, but the more you think about it the more you realise how complex section 1 the Children Act 1989 is. As set out at the start of the book: 'When a court determines any question with respect to … the upbringing of a child … the child's welfare shall be the court's paramount consideration'.

Carol Storer, director, Legal Aid Practitioners Group.

Jonathan Cape, ISBN 978 0 22410 1 998, 224pp, September 2014, £16.99.

Legal aid round-up

This series aims to give legal aid practitioners an overview of important, topical matters of interest and concern. In this article, Carol Storer reveals the Legal Aid Practitioners Group's (LAPG's) ten top tips for dealing with the Legal Aid Agency (LAA). See also page 54 of this issue. (See *Legal Action* online for this article with hyperlinks to LAA and other named documents.)

Ten top tips

Matthew Howgate* and I have been travelling round the country running pop-up courses about coping with the post-Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act world. So, I thought that we should identify, from feedback over the past year, our ten top tips.

1 Information

It is essential that everyone carrying out legal aid work in a practice receives the fortnightly e-mail 'Legal Aid Bulletin' from the LAA. Get everyone signed up to the bulletin and make sure that people read it. The LAA also provides online 'News/latest updates' and free courses for legal aid providers.

2 'It's not rocket science!'

I asked LAPG's committee members for their top tips:

- Fed up with work being disallowed? Make sure that you record every item of work you do, time it and clearly explain the reason for any particularly lengthy attendance. This is basic, but it really matters.
- Keep a time record for the work you do: a missing six minutes a day per fee earner can make the difference between profit and loss.
- Know your matter list, ie, when a file is opened; last worked on; work in progress; disbursements closed; billed; paid; and boxed.
- Make sure that fee earners take responsibility for and keep on top of the costs limitations on their certificates, and make sure that all matters are billed in a timely manner, ie, as soon as the matter is finished.
- Organise the firm so that you delegate tedious but essential jobs, for example, applying for legal aid, arranging expert assessments, amending certificates and preparing court bundles: DELEGATE!
- E-mail queries to the LAA so that you have a written response on file in case of further issues. Keep copies of key issues and responses from the LAA so that inconsistencies in approach can be raised.
- Smile! It helps to relieve stress.

3 Electronic handbooks

The *Civil finance electronic handbook* and the *Escape cases electronic handbook* are designed for caseworkers. These new guidance manuals include caseworker queries and clarifications on specific issues that you may find useful. They combine guidance from other sources (for example, the *Costs Assessment Guidance 2013: for use with the 2013 Standard Civil Contract*, the *Means assessment guidance* and the *Lord Chancellor's exceptional funding guidance (non-inquests)*). However, the LAA makes clear that both handbooks should be used with the contract specification and other guidance such as the *Costs assessment guidance*. The handbooks will be updated regularly to reflect current processes.

4 Checklists

If you use the following checklists, you will find that there will be fewer rejects by the LAA.

- Court-assessed claim 1a checklist;
- LAA-assessed claim 1a checklist;
- CIV claim 2 checklist;
- CIV claim POA 1 checklist;
- Certificate outcomes checklist;
- High or Very High Cost Case claim checklist;
- LAA-assessed claim 5 (FGF) checklist;
- LAA-assessed claim 5a (FAS) checklist; and
- LAA-Judicial Review assessed claim 1 checklist.

The following feedback comes from the LAA:

- use the checklists;
- track any rejects and get senior staff in the practice to be aware (so that they can institute any necessary changes to improve procedures); and
- query whenever you think that the LAA has got it wrong. The relevant e-mail address details are at the end of any reject letter.

5 The LASPO Act: it is out unless it is in

The legal aid scheme and its scope are set out in the LASPO Act and the corresponding regulations. The starting point is the *Lord Chancellor's guidance under section 4 of Legal Aid, Sentencing and Punishment of Offenders Act 2012*, which covers both scope and procedures.

It is critical to have LASPO Act Sch 1 Part 1 and the Civil Legal Aid (Merits Criteria) Regulations 2012 SI No 104 to hand. *Frequently asked questions: Legal aid transformation*, which was last updated in 1 July 2014, is helpful on some of the early scope and procedural questions.

6 Contracts/tenders

- As soon as a tender is announced look at all the information so that you can prepare your bid.
- Never leave the responsibility of submitting the bid to just one person in the organisation.
- Make sure that you know who the e-mail contacts are under the E-Bravo system. Make sure you notify the LAA of replacement contacts if people leave.

7 Exceptional case funding

If you think that you may apply for exceptional case funding for a client, everything that you need to know is set out by the Public Law Project.

8 Residence test

I really hope that I am wrong, but I think that if the residence test is introduced it will virtually wipe out civil legal aid in England and Wales (see September 2014 *Legal Action* 56 and 58). At present, the government's appeal has not been listed, so there is every possibility that the proposals will not make it onto the statute book before the general election in May 2015. However, if the residence test comes in, you will need to be prepared.

9 Legal help: can you afford to do this work?

If you have analysed the income from, against the cost of, carrying out legal help work, and have identified the risk factors and are still doing this work, then great. If you have not done a cost-benefit analysis recently, now might be the time to start.

10 When you feel exhausted by another problem

This is what an LAPG committee member said when I asked him how he and his colleagues cope when it has been a bad day: 'We have some very committed people. It becomes an additional part of the struggle to enforce somebody's rights.'

Carol Storer is director of LAPG. Matthew Howgate* is an independent consultant. LAPG's annual conference will be held on 10 October in London, at which the perennially popular 'LAA top tips' session will be run.

Recent developments in practice management

Legal aid is always changing, but there are ways of ensuring that you stay up to date. In this article, Vicky Ling puts you on the right track for keeping up with the Legal Aid Agency (LAA). See also page 53 of this issue.

LAA website

The LAA is moving its website to the GOV.UK website, along with around 300 other agencies.[1] The existing links shown below which will continue to work, but bear in mind that there could be teething problems.

LAA Bulletins

The first thing to do is sign up for the LAA's e-mail news bulletins:[2]

- *The Legal Aid Bulletin* appears fortnightly. It covers news and updates aimed at practitioners working in legal aid and is sub-divided into civil/family, crime and general topics.
- *The Advocates' Bulletin* is a similar monthly newsletter covering news and updates aimed at solicitor advocates and barristers.

Legal Aid Handbook

Simon Pugh and I write a legal aid blog.[3] It was designed initially to keep the *LAG Legal Aid Handbook* up to date between editions, but has turned into a free legal aid news website and updating service. You can sign up for our e-mails to update you when we do a new post. We cover things from a practitioner's point of view, including items which are not included in the LAA bulletins. We get particularly positive feedback on the resources page (Simon's masterwork), which aims to provide links to all the essential legislation and guidance from one place.

LAA guidance on funding and costs assessment

This is a key area for all legal aid practitioners and keeping up to date can prevent costly disputes with the LAA. The agency has published some useful guidance:[4]

- The *Civil finance electronic handbook* is useful as the LAA has been keeping it updated. It was created from LAA caseworker queries and requests for clarification on specific issues. There is information on many aspects of submitting claims, the checks that are carried out and how to avoid rejects.

The electronic handbook also provides information about costs limitations, including how costs are reduced if limitations are exceeded. It covers: scope, change of solicitor and 'show cause', including the provisions under the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 whereby you can still get paid for carrying out work during a show cause period as long as the certificate is not then discharged.

It covers enhancement of fees as well as the Care Proceedings Graduated Fee Scheme, the Private Family Law Representation Fee and the Family Advocacy Scheme, including late submission of claims. There is also a helpful section on disbursements, including guidance on what VAT should and should not be added. Appeals, inter partes costs, the statutory charge and Very High Cost Cases (VHCCs) are also covered. The appendices contain links to other authorities and guidance. This is a 'must have' for every firm doing civil legal aid!

- The *Escape cases electronic handbook* also has its uses as it attempts to pull together most relevant rules and guidance for escape fee cases.[5] However, for some issues, eg, evidence of means, you still need to use other sources such as the LAA's eligibility calculator for practitioners.[6]

The statutory charge manual is prepared by the LAA's legal team. It goes into more detail on this topic than the electronic handbook, so is a useful supplement for tricky statutory charge questions.

- The *Criminal bills assessment manual* (usually referred to as C-BAM) sets out the LAA's approach to costs assessment where work is undertaken in the magistrates' court under a representation order. The guidance is applied when assessing non-standard fee claims and for costs compliance audits of fee claims.

Note also that there is a crime version of the legal aid calculator.[7]

Lord Chancellor's guidance on the LASPO Act

Old legal aid hands mourn the passing of the Access to Justice Act 1999 scheme, the Funding Code and its helpful guidance. The Lord Chancellor's guidance is the best the post-LASPO Act world can offer.[8] It does not answer every question but is worth looking at. The following guidance is available:

- *Lord Chancellor's guidance on civil legal aid*;
- *Lord Chancellor's guidance on exceptional funding*.

Director of Legal Aid Casework's guidance on domestic violence evidence

This is vital for all private family law practitioners and gives detailed guidance on evidence to satisfy scope requirements for private family law matters prescribed in the Civil Legal Aid (Procedure) Regulations 2012 SI No 3098 as amended regs 33 and 34.[9] It has been updated to cover amendments to the regulations which took effect in April 2014, and changes in rules about when convictions are 'spent', in June 2014.

LAA online training

What we think of as cuts, the LAA calls its 'Legal Aid Transformation programme' (LAT). The LAA has provided training on this, covering the scope cuts in April 2013 and more recently, changes to family fees, with the introduction of the single Family Court. Short online training modules are available on the LAA's training website. They are pretty basic but they are a good start, particularly for anyone returning to practice after a career break or moving into legal aid for the first time.[10]

1 Visit: www.gov.uk/government/organisations/legal-aid-agency.
2 Visit: www.justice.gov.uk/legal-aid/newslatest-updates/legal-aid-bulletins/sign-up-for-legal-aid-bulletins.
3 See: www.legalaidhandbook.com.
4 Available at: www.justice.gov.uk/ legal-aid/funding.
5 Available at: www.gov.uk/government/uploads/system/uploads/attachment_data/file/345815/Electronic_handbook_-_guidance_for_escape_case_claims.pdf.
6 The civil version of the calculator is available at: http://civil-eligibility-calculator.justice.gov.uk/.
7 Available at: www.justice.gov.uk/legal-aid/assess-your-clients-eligibility/crime-eligibility/criminal-eligibility-calculator.
8 Available at: www.justice.gov.uk/funding/funding-guidance.
9 The evidence guidance is available at: https://www.justice.gov.uk/funding/funding-guidance.
10 The training modules are available at: http://legalaidtraining.justice.gov.uk/.

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