LegalAction

September 2018

Legal Aid Lawyer of the Year awards: winners 2018!

Ramifications of *Bawa-Garba*

Mental health: focus – MHA review

Employment law update

Housing: recent developments

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News and comment

Opinion and analysis

Law and Practice

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The case of Wendy Lomax illustrates the geographic and bureaucratic lottery that civil legal aid has become

As is well documented in some areas of law, the firms and not-for-profit agencies providing legal aid are too thinly spread for potential clients to get help. The Law Society's heat map research, which showed wide areas of the country served by only one or two providers, pretty much nailed this point with regard to housing law providers, leading to its campaign to end legal aid deserts.[1] For many people, getting legal aid can come down to whether they are lucky enough to live in the right part of the country or find a provider who is prepared to make an extra effort to take on their case and, if necessary, to battle with an often-obstructive Legal Aid Agency (LAA) to do so.

The case of Wendy Lomax, which was successful in the Court of Appeal ([2018] EWCA Civ 1846), illustrates the geographic and bureaucratic lottery that civil legal aid has become. Ms Lomax is severely disabled and lives in a specially adapted bungalow in rural north Dorset. For health reasons, she wants to move to Gosport to be near her family, who live 70 miles from her present home. Gosport BC decided that she did not meet the definition of homelessness (see Housing Act 1996 ss175 and 177).

Fortunately for Ms Lomax, she is a former member of the RAF and was able to get some advice from the RAF Benevolent Fund. It quickly decided, though, that her case was beyond its expertise but could not find a firm locally to take it on. By a stroke of good fortune, it made contact with Diane Sechi, a solicitor at South West London Law Centre (SWLLC).

Obtaining supporting evidence for the case would be crucial, so Sechi initially ran the case under SWLLC's community care law contract. Dorset CC undertook what she describes as a 'brilliant care needs assessment' that supported the move to Gosport for health reasons and established the grounds to argue the case under the Housing Act.

Gosport BC's refusal of her homelessness application was upheld on a review, and a subsequent appeal was dismissed by HHJ Sullivan QC, sitting at the County Court at Portsmouth. Following the dismissal, the barrister who had been instructed by the Law Centre, Martin Hodgson, immediately drafted a supportive opinion on the merits of the case for the purposes of extending the funding.[2] As SWLLC only had 21 days to bring an application for leave to appeal to the Court of Appeal, securing an extension to the legal aid certificate to cover the cost of this was crucial.

Solicitor Diane Sechi believes the LAA's erroneous understanding of procedure was tantamount to an obstruction to the administration of justice.

Sechi says the Legal Aid Agency (LAA) has been 'appalling' in its treatment of Ms Lomax's case. With the deadline to apply to the Court of Appeal looming, the LAA refused the application for legal aid to support the second appeal case on the spurious grounds that SWLLC had to apply to the judge sitting in the county court for leave to appeal. Further, the LAA maintained that it could not take a decision on the application for further funding without first seeing the transcript of the judgment. The LAA got the procedure wrong.

It's clearly stated in the Civil Procedure Rules 1998 (CPR) that in an application for an appeal of a county court decision, 'which was itself made on appeal' (see r52.7), permission is required from the Court of Appeal. Moreover, there is a procedure to follow to obtain an approved transcript. Not only does this take time, but it also has a cost attached. That cost was part of the funding application. This left SWLLC with the difficult decision of having to cover the costs of the application to the Court of Appeal while challenging the LAA regarding its interpretation of the CPR.

Having finally accepted the application, the LAA decided that there were insufficient merits to allow funding, notwithstanding that counsel had already provided a written opinion – after considering the Civil Legal Aid (Merits Criteria) Regulations 2013 SI No 104 – that the prospects of the appellant succeeding on a further appeal were good to very good. SWLLC challenged the LAA's decision and, eventually, that decision went to external adjudication. An independent funding adjudicator upheld SWLLC's application and funding was finally granted, as was permission to appeal to the Court of Appeal. Sechi believes the LAA's erroneous understanding of procedure, which led to an unacceptable delay during a crucial time period, was tantamount to an obstruction to the administration of justice and a denial of access to rights.

According to Sechi, Gosport BC has decided not to appeal to the Supreme Court and will now carry out a further review. It is to be hoped that Ms Lomax's case will eventually lead to a good outcome for her and her family. The case has also set a useful precedent, but the vagaries of the civil legal aid system lead us to believe that there are many people in a similar position who will never get the help they need to enforce the law. ■

1 www.lawsociety.org.uk/Policy-campaigns/Campaigns/Access-to-justice/end-legal-aid-deserts/.
2 Hodgson has written an article on the Court of Appeal's decision in the case, which will appear in the October 2018 issue of *Legal Action*.

The LAG Community Care Law Conference 2018: Fundamental Rights and Social Care is on 12 October 2018 in London. For more details and to book a place, see: www.lag.org.uk/events (see also page 2 of this issue).

Steve Hynes
LAG director

Solicitors' firm fundraising to save threatened Family Drug and Alcohol Court National Unit

A solicitors' firm raising cash to save a pioneering family courts project has told *Legal Action* it can save the service if the government will match funding of £125,000 that has been pledged by donors.

The Family Drug and Alcohol Court (FDAC) National Unit supports 10 FDACs working in 15 courts across 23 local authority areas. A funding crisis means it is under threat of closure at the end of September.

The FDAC model co-ordinates the work of social workers and other professionals in assisting parents with problems related to drug and alcohol addiction. Through regular communication between the agencies and the judge involved with a case, the FDACs have been effective in keeping children with their parents rather than them entering the care system on a long-term basis.

The Manchester- and London-based firm Hall Brown has been raising money to try to save the service. James Brown, a founding partner at the firm, told *Legal Action*: 'We only undertake private family law work, we don't do legal aid or care work, but we do know the value that FDAC adds with its problem-solving approach to some of the most difficult cases the courts face.' When it heard about the funding crisis at the unit, his firm launched an appeal to, among others, the top 50 private family law firms to save the service.

At the time of writing, Hall Brown had received pledges of £100,000 over the next three years to support the work of the unit. One donor had agreed to make the amount up to £125,000 if the government matches this cash to reach the £250,000 needed each year to run the service.

Brown says he is 'disappointed with the response from the family law community': some are taking the view that they should 'not let the government off the hook', while other firms have already committed to other charity donations. Hall Brown has not approached legal aid firms for help as it recognises 'such firms make little or no profit'.

Hall Brown is working with parliamentarians to persuade the government to come up with the extra cash. 'We are not letting go of this,' Brown said, as he believes the unit plays a vital role in supporting the courts and persuading local authorities to establish FDACs locally. According to him, the family courts need to 'head away from the binary right or wrong system' on the care arrangements for children. He is of the opinion that the FDAC approach of getting the parties to 'sit down in the round and try and fix it' is deserving of government support as it works for families and ultimately makes savings to the public purse.

Legal Aid Agency loses judicial review on complex case fees

A defendant in a complex fraud case has won a judicial review on the amount of remuneration to be paid by the Legal Aid Agency (LAA) to his choice of defence counsel: *R (Ames) v Lord Chancellor* [2018] EWHC 2250 (Admin).

In common with many complex fraud cases, this case fell into the definition of a very high cost case (VHCC). Legal aid in VHCCs is paid on a different basis from other criminal cases before the Crown and higher courts. Since 2014, after a dispute between the government and the bar over proposed changes to the VHCC legal aid scheme, the LAA has paid defence lawyers in these cases under the interim fixed fee offer (IFFO) scheme.

The main issue in the case was the amount of remuneration offered by the LAA to pay for the review of defence documents. The case is unusual because most of the documents held by the company involved in the alleged fraud had not been required by the Serious Fraud Office. The defence team estimated that there were nearly 100m pages of evidence that needed reviewing. The LAA, after representations from the defence team, made a revised final offer of just over £1.2m in fees based on 1.3m pages of evidence.

In a letter dated 19 January 2018, the LAA refuted criticisms that had been levelled at it by counsel for the accused and argued it had no obligation to disclose the 'calculator' or other methodology that the Criminal Cases Unit (the specialist department at the LAA that deals with VHCCs) had used to arrive at the fee.

In their judgment, Holroyde LJ and Green J found (at para 78) that:

> *... the failure to disclose the 'calculator' was a breach of the LAA's duty of transparency and clarity, that it has introduced serious procedural unfairness into the operation of the IFFO scheme in this case, and that no rational basis has been shown for the non-disclosure.*

They also said that the LAA had made errors in its calculations to arrive at the fee it had offered.

Tony Edwards, a leading criminal law solicitor and author of *Criminal costs: legal aid costs in the criminal courts* (LAG, 2016), told *Legal Action* that the judgment shows that the process of fixing fees in VHCCs is open to judicial review (there is no right to appeal decisions made by the LAA in these cases). He welcomed the High Court's decision, arguing that it confirms the ruling in the Law Society judicial review ([2018] EWHC 2094 (Admin); see page 6 of this issue): 'This is further confirmation that the LAA must be open and transparent in its dealings with the professions,' he said.

'This judgment demonstrates the difficulties the LAA has in setting fair remuneration in complex cases,' said Vicky Ling, a consultant and co-editor of the *LAG Legal Aid Handbook 2018/19*. She believes the LAA has been 'overtaken by technology' in trying to grapple with setting fees to review large amounts of evidence held digitally.

Court closures: call for evidence

Solicitor and LAG author Sue James is attempting to document the impact of the civil and criminal court closures as part of a wider campaign. She would like *Legal Action* readers to get in touch with her if their local court has closed, setting out:

1. which court has closed;
2. where the work has been transferred to;
3. the knock-on effect of the increased workload; and
4. access issues for clients.

Please email her at: sue.james@hflaw.org.uk.

EU citizens' rights after Brexit – the latest state of affairs

Jan Doerfel

In June this year, the Home Office published its most detailed document yet setting out EU citizens' rights after Brexit.

In the *EU Settlement Scheme: statement of intent* (21 June 2018):

1. The government committed to a 'straightforward, user-friendly system for EU citizens and their family members' (page 4) and confirmed that it will be 'looking to grant, not for reasons to refuse' (page 2), will 'work with applicants to help them avoid any errors or omissions', 'engage with applicants and give them a reasonable opportunity to submit supplementary evidence' and apply a principle of evidential flexibility 'to minimise administrative burdens' (page 21, para 5.15). Automated checks of HMRC and Department for Work and Pensions records will assist applicants to establish their continuous residence, keeping the documentary evidence the applicant is required to provide to a minimum.
2. The deadline for applications under the EU Settlement Scheme will be 30 June 2021.
3. In line with the draft Withdrawal Agreement with the European Union (19 March 2018), the EU Settlement Scheme will mean that:
   - EU citizens and their family members who, by 31 December 2020,[1] have been continuously resident in the UK for five years will be eligible for 'settled status', enabling them to stay indefinitely. (This means it will not have been necessary to have exercised treaty rights during that period to qualify for residence.)
   - EU citizens and their family members who arrive by 31 December 2020, but will not yet have been continuously resident here for five years, will be eligible for 'pre-settled status', enabling them to stay until they have reached the five-year threshold. Thereafter, they can apply for settled status.
   - All applications will be subjected to checks against UK criminality and security databases and – where appropriate – against overseas criminal records checks. If there is 'serious or persistent criminality' or there are 'other public policy reasons' (page 12, para 3.2), applications will be refused.
   - There will be a right to administrative review to challenge the refusal of applications made under the EU Settlement Scheme. The government has also expressed its intention to give those applying under the scheme from 30 March 2019 a statutory right of appeal.
   - Applications will cost £65 for those aged 16 or over and £32.50 for under-16s. Where an application for 'pre-settled status' has previously been made, no new fee is payable for an application for settled status. Where persons already hold permanent residence documents, these will be exchanged for confirmation of settled status at no extra cost.
   - Close family members (a spouse, civil partner, durable partner, dependent child or grandchild, or dependent parent or grandparent) living overseas will be able to join an EU citizen resident here after the end of the implementation period, where the relationship existed on 31 December 2020 and continues to exist when the person wishes to come to the UK. Future children are also protected in certain circumstances.

The government should provide a route to settlement along the same lines as covered by the EU Settlement Scheme for all those who hold derivative rights at any time prior to and/or on 31 December 2020.

The *Statement of intent* has met many concerns regarding the situation of EU citizens and their family members, including in relation to future family reunion and the situation of disabled EU citizens and stay-at-home parents, and has come some way during the negotiations with the EU,[2] which is to be commended.

It has not, however, specified the post-Brexit position of individuals with derivative residence rights as a result of EC law[3] (such as *Zambrano* carers, ie, non-EU citizens who are primary carers of British citizens), which, the government's *Statement of intent* says, will be set out within post-Brexit immigration rules. I believe that to meaningfully protect the right to private and family lives of persons with derivative rights and their family members, the government should provide a route to settlement along the same lines as covered by the EU Settlement Scheme for all those who hold derivative rights[4] at any time prior to and/or on 31 December 2020.[5]

On 28 August 2018, the government opened a private pilot scheme for EU settlement applications and published its first guidance for Home Office staff, *EU Settlement Scheme – EU citizens and their family members* (v1.0),[6] on how to consider such applications. The private pilot is open to eligible applicants in the North West, covering some universities and NHS trusts.[7] The EU Settlement Scheme will open fully by March 2019. ■

1 The end of the implementation period.
2 See comparisons of EU/UK positions on citizens' rights at: www.gov.uk/government/publications/joint-technical-note-on-the-comparison-of-eu-uk-positions-on-citizens-rights.
3 Pursuant to the Court of Justice of the European Union (CJEU) judgments such as *Harrow LBC v Ibrahim* Case C-310/08, 23 February 2010, *Teixeira v Lambeth LBC* Case C-480/08, 23 February 2010, *Chen and others v Secretary of State for the Home Department* Case C-200/02, 19 October 2004 and *Ruiz Zambrano v Office national de l'emploi* Case C-34/09, 8 March 2011.
4 As per the jurisprudence of the CJEU or as per the UK's practice and/or case law in cases where this goes beyond current CJEU jurisprudence.
5 It is also notable that for much of the negotiations with the EU, the UK government was committed to treating some categories of derivative rights holders (namely children of former EU citizen workers who are in education in the UK) as 'independent right holders eligible for permanent residence' (see the comparisons of EU/UK positions on citizens' rights of 31 August 2017 and earlier).
6 See: www.gov.uk/government/publications/eu-settlement-scheme-caseworker-guidance.
7 Adam Withnall, 'EU citizens make first applications to remain in UK after Brexit', *Independent*, 28 August 2018.

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Law Society victorious in criminal legal aid fees judicial review, but what about access to justice?

Steve Hynes

It remains to be seen whether or not the government will decide to appeal the High Court's judgment in the Law Society's judicial review of the revised litigators' graduated fee scheme (LGFS) ([2018] EWHC 2094 (Admin)).* If it does, its lawyers will have to get around some pretty trenchant criticism of the Ministry of Justice's (MoJ's) decision-making process.

The case concerned the government's decision to introduce a revised LGFS (set out in the Criminal Legal Aid (Remuneration) (Amendment) Regulations 2017 SI No 1019). The scheme is the means by which solicitors are paid to prepare cases for defendants in the Crown Court. A formula is used to set the fees, which includes the number of pages of prosecution evidence (PPE). The MoJ consulted on a revised formula that cut the fee for considering PPE. Part of the rationale for this was the impact of *R v Napper* [2014] 5 Costs LR 947 (see para 3 of the instant judgment), which widened the definition of what could be included as PPE. The lord chancellor argued that *Napper* had led to the inclusion of electronic evidence, which had inflated costs. Despite overwhelming opposition expressed in the consultation on the revised LGFS, it was introduced from 1 December 2017, prompting the Law Society to launch the judicial review.

The High Court found that, in the consultation process, the government had failed to refer to the £33m a year by which the *Napper* decision had allegedly increased legal aid expenditure or provide any analysis of how it arrived at such a figure. The MoJ's counsel's argument as to why it did not do this essentially amounted to: 'Criminal legal aid lawyers are not daft. They knew we wanted to save £33m and so, as part of the consultation, they should have asked us what we had based this on.' In rejecting this argument, the judges (Leggatt LJ and Carr J) provided two choice quotations that raised a chuckle:

In short, no reason – let alone a good reason – has been given for not disclosing during the consultation process the [Legal Aid Agency (LAA)] analysis and its results (para 86).

It is difficult to express in language of appropriate moderation why we consider these arguments without merit (para 93).

Failures in the LAA's statistical analysis of the alleged impact of *Napper* were at the heart of the court's second ground for deciding that the new LGFS should be quashed. In the course of the proceedings, the LAA admitted that it had got its sums wrong and revised the £33m figure down to £31m (see para 117). This and other failings led the court to conclude that if an accurate set of statistics had been disclosed as part of the consultation, this might have resulted in the lord chancellor making a different decision.

Two other grounds – that the decision confounded a legitimate expectation (not the Law Society's strongest argument) and that it would curtail access to justice – were rejected by the court. From a policy perspective, the latter is the most interesting. The Law Society relied on *R (Unison) v Lord Chancellor* [2017] UKSC 51 to argue that the new LGFS breached the common law right of access to justice.

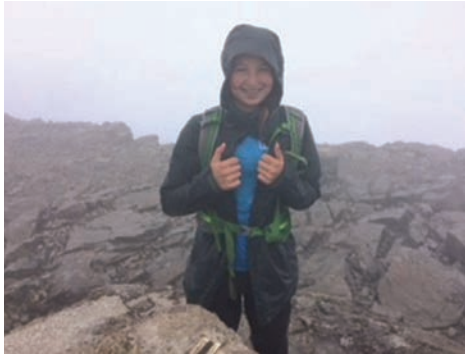
It would seem from the judgment that the MoJ accepted that there is a constitutional right of access to justice, paid for by the state if necessary, for those accused of a crime (see para 129). Following the reasoning in *Unison*, the court concluded that whether the effect of the fee change infringed this right was a decision it could make after considering the relevant evidence (see para 133). It concluded, though, that the Law Society had not shown that the change to the LGFS would 'have the systemic effect of preventing some criminal defendants from obtaining adequate legal assistance' (para 136).

The High Court's judgment on this point begs the question what evidence is needed to prove a systemic effect on access to justice? The answer, I'd conclude, is more firms walking away from criminal legal aid work and more miscarriages of justice. Policy-makers should intervene before it comes to this, rather than leaving it to the courts to do so. ■

* In an update on its website posted on 14 August, the LAA stated that the lord chancellor is still considering whether to appeal the judgment ('Crime news: updated position on litigators' graduated fee scheme', LAA news story). In new claims under the LGFS, the LAA advises providers to submit claims for up to the 10,000 pages of evidence threshold that was in place before the rule change. It advises that claims made after 1 December 2017, when the rules (now quashed by the High Court) were changed from the 10,000-page threshold to 6,000 pages, should be resubmitted. At press time, *Legal Action* understood that a decision on any appeal would have to have been made by the end of August unless the lord chancellor applied to the Supreme Court for an extension of time to do so.

Steve Hynes, LAG director.

Poppy completes Three Peaks Challenge in aid of Lady Hale book appeal



Poppy Harling, a 15-year-old student from Essex, raised over £2,000 for LAG's *Judge Brenda* book appeal by completing the Three Peaks Challenge over 22/23 July.

She began by ascending Ben Nevis, at 1,345 metres the highest mountain on the British Isles, before moving onto Scafell Pike in the Lake District, and completing the challenge by scaling Snowdon (Yr Wyddfa) in Wales. Scafell Pike is the highest mountain in England and Snowdon is the highest in Wales. She told *Legal Action* that the weather was 'terrible' over the two days she undertook the walks, with the summit of Snowdon being the 'worst as it was pouring with rain and cloudy'.

Poppy, pictured at the summit of Ben Nevis, has undertaken a number of sponsored walks in the past, raising money for, among other causes, refugees in Calais. She felt inspired to help LAG's appeal as she feels Lady Hale is an inspirational role model, though she is keeping her options open about her own career plans and is aiming to study environmental science at university.

Thanks to donations from Poppy and others, combined with a grant from the Sigrid Rausing Trust, LAG has reached its fundraising target for the book, which will be published next year.

The positive impact of disabled facilities grants is being hampered by austerity economics

Luke Clements

Disabled facilities grants (DFGs) are not, perhaps, the most well-trodden field of social welfare law, straddling as they do two of its most impoverished regions: social care and housing. However, the law and practice concerning DFGs exemplifies the dysfunctional perversity at the heart of our welfare system.

There is almost complete agreement that DFGs are good things: central government has recently increased funds for them; the research shows that they are remarkably cost-effective; and, of course, for disabled people they can be of incalculable importance in promoting independent living. Yet many councils are trying to curtail the number of awards they make. Looked at from their perspective (through their end of the 'targets and terror' telescope), this can be seen as entirely rational.

In England, DFGs are processed by housing departments, although core funding for the grants comes from central government. The government is in the process of doubling this funding (to £500m) in part due to the 'growing evidence ... [that] poor housing costs the NHS at least £1.4bn per annum'.[1] Separate evidence from social services authorities indicates that DFGs for older people could produce savings of at least £2.78m a year (for a smaller council) and that for disabled young people the savings could be five-fold.[2]

Local authority responses

The evidence for the benefits of DFGs seems overwhelming, so what have councils done?

- In response to the duty to process and pay grants within 12 months of the application form being submitted, almost half of all English councils have simply restricted access to their application forms,[3] and even when a form is obtained and submitted, it appears that the time limit is, in practice, routinely missed.[4]
- In response to the new central government funding, some authorities have cut their contributions, leaving their budgets unchanged or even reduced.[5]
- Since the central government funding is not ring-fenced, some councils are not spending the allocations on DFGs.[6]

In the context of austerity economics, these responses may be rational. Councils often have to forgo cost-effective investments in favour of short-term crisis payments. Managers are under enormous pressure to stay within budget. Almost all the savings that flow from a DFG payment (ie, from the housing budget) will appear in another budget (ie, social services or the NHS). In the absence of integrated decision-making, the housing manager has little or no power to act outside their mandate, which is to stay within budget.

The government response

Time alone will tell. The Ministry of Housing, Communities and Local Government and the Department of Health and Social Care commissioned the University of the West of England to conduct an independent review, to report by the end of May 2018.[7] The unpublished report sits on the government's table. ■

1 *2017-19 Integration and Better Care Fund policy framework*, Department of Health/Department for Communities and Local Government, March 2017, page 12.
2 Luke Clements and Sorcha McCormack, *Disabled children and the cost effectiveness of home adaptations & disabled facilities grants: a small scale pilot study*, Cerebra, June 2017, pages 10 and 16.
3 Luke Clements and Sorcha McCormack, *The accessibility of disabled facilities grant application forms in England*, Cerebra, July 2018, page 3.
4 *The long wait for a home*, Leonard Cheshire Disability, April 2015, page 2.
5 *The accessibility of disabled facilities grant application forms in England*, ibid, page 8, para 2.17, *Disabled facilities grants for home adaptations*, Briefing Paper No SN03011, 22 July 2018, page 11, table 2, *The long wait for a home*, ibid, page 9, and Sheila Mackintosh and Philip Leather, *The disabled facilities grant: before and after the introduction of the Better Care Fund*, Foundations, June 2016, page 6.
6 *The long wait for a home*, ibid, page 9.
7 See *Housing for older people. Second report of session 2017-19*, HC 370, Communities and Local Government Committee, 9 February 2018, page 21, para 43, and www.foundations.uk.com/dfg-adaptations/dfg-review/.

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Legal aid to be reinstated for immigration matters for unaccompanied and separated child migrants

The legal aid minister, Lucy Frazer QC, has announced another climbdown by the government (House of Commons Written Statement HCWS853, 12 July 2018): after a five-year campaign led by the Children's Society, legal aid for unaccompanied and separated child migrants in non-asylum cases will be reinstated.

The Children's Society estimates that up to 15,000 children were denied access to justice through a combination of a lack of legal aid and spiralling increases in application fees (Helen Connolly, Richard Crellin and Rupinder Parhar, *Cut off from justice: the impact of excluding separated and migrant children from legal aid*, August 2017 update, page 16). The charity had successfully fought a judicial review against the government on the issue.

The change is the latest policy U-turn on legal aid into which the government has been forced. After the Law Centres Network's successful judicial review in June ([2018] EWHC 1588 (Admin); see page 42 of this issue), ministers are having to rethink their plans for the housing possession court duty schemes. In April this year, the Legal Aid Agency conceded another judicial review (see June 2018 *Legal Action* 7), following which it announced plans to extend legal aid to victims of modern slavery and trafficking.

Matthew Reed, chief executive of the Children's Society, said: 'This is an important change in policy which will go a long way to protecting some of the most marginalised and vulnerable young people in our communities' ('Legal aid decision offers new hope for unaccompanied migrant children', Children's Society press release, 12 July 2018). He also commended the government for making the change.

In her written statement, Frazer said an amendment to LASPO would be laid after all interested parties had been consulted.

LEGAL AID LAWYER OF THE YEAR AWARDS

LALYs 2018: celebr humanity, integrity

On the evening of 17 July, the day The Law Society's successful challenge to legal aid cuts for criminal solicitors began in the High Court, 500 people gathered in a balmy London to celebrate the tireless work of legal aid lawyers up and down the country. Catherine Baksi reports.

Catherine Baksi

In its sweet 16th year, the Legal Aid Lawyer of the Year awards, known affectionately as the LALYs, honoured the then soon-to-be president of the Family Division, Sir Andrew McFarlane, with the outstanding achievement award. Sir Andrew is the first person to assume the role who has practised as a legal aid childcare lawyer. A long-time supporter and former judge of the LALYs, he described himself as a 'champion of legal aid' and praised the 'intelligence, humanity, integrity and grit' of the 34 finalists and 12 winners, whom he was 'humbled' to be among.

Constrained by judicial office, Sir Andrew said he was not able to give the speech he would otherwise have given. Instead, he engaged in an exercise of 'thought transference'. Assuming the posture of Rodin's *Thinker*, he asked the audience to cheer at the end of his thought transmission if they agreed with him. Needless to say, his exercise was greeted with rapturous applause and the odd wolf-whistle.

Despite the judicial shackles, Sir Andrew highlighted the importance of legal aid lawyers in helping people assert their rights and hoped they were made use of.

'It's all very well, and it's really good, that we live in a country that has developed a sophisticated idea of human rights. But those rights are no good to anybody unless the person has access to them,' he said. Lawyers are the 'key' to accessing those rights and without lawyers 'access to rights is really an empty phrase'.

Stressing the importance of the work done by legal aid lawyers to communities and society in general, he cautioned that although legal aid is a calling and practitioners are 'not in it for the money': 'It's important that you're not taken advantage of because you've got a vocation.'

Other awards recognised lawyers working at the cutting edge, whose cases transform their clients' lives and play a key part in the evolution of the law, also transforming the lives of countless others. Lewis Kett, who won the legal aid newcomer award, was part of a team that challenged a new Home Office policy of disregarding torture by non-state agents when considering whether asylum-seekers should be detained; public lawyer of the year Harriet Wistrich led the first-ever successful challenge to a Parole Board decision in the *Worboys* case; and housing lawyer of the year Giles Peaker worked on the Homes (Fitness for Human Habitation) Bill.

Aika Stephenson, one of the first defence lawyers to use the Modern Slavery Act successfully to ensure that vulnerable young people groomed by gangs into selling drugs are recognised as victims, rather than treated as offenders, won the criminal defence award. This was her second LALY, having received the young legal aid lawyer award in 2007. Aika explained that she had brought her son to the ceremony 'so he would know why I can't always be there to do what he wants me to'.

Looking back to when the LALYs were launched, Jenny Beck, co-chair of the Legal Aid Practitioners Group (LAPG), which organises the awards, said: 'None of us could have predicted that 16 years on, we would have seen great swathes of essential advice and support removed entirely from legal aid. The fact that people on the fringes of society, the poor and disempowered, would not even have sufficient access to justice to learn of their rights would literally have been unthinkable back then.'

Noting the devastating effects of being unable to get simple legal advice, Beck urged the government to listen to legal aid lawyers as it carries out the post-implementation review of LASPO. 'We have no axe to grind. We want to work with you and we do know what we are talking about,' she said.

Among the gloom, Beck highlighted successes, including the Law Centres Network's victorious High Court challenge over the housing possession court duty scheme contracts and the restoration of immigration legal aid for separated and unaccompanied migrant children, thanks to Islington Law Centre and others.

She celebrated the 'exceptional, dedicated and talented' lawyers still coming into the profession, in particular the inspirational Justice First Fellows, many of whom were present, and led a warm tribute to Sheila Donn of Philcox Gray, the winner of last year's family (public) award, who died recently.

'There can't be anybody in the room who doesn't feel beleaguered, but tonight is our chance to regroup and re-energise, so we can continue to do what we do best – protecting those whose voices can't otherwise be heard and making our country a fairer one,' said Beck, handing over to broadcaster Anna Jones and Baroness Doreen Lawrence, whose son Stephen was murdered in South London 25 years ago, who presented the awards.

RA

Winners of the 2018 LALYs with Anna Jones and Baroness Doreen Lawrence

RA

Around 500 guests attended the ceremony in central London to laud the people 'protecting those whose voices can't otherwise be heard'

LAPG

The Legal Aid Lawyer of the Year awards are organised by the Legal Aid Practitioners Group.
***Legal Action* is media partner to the awards.**

PHOTOGRAPHS: Robert Aberman (RA); Richard Gray/Rugfoot Industries (RG)

ating 'intelligence, y and grit'

Legal aid newcomer sponsored by Friends of LALY18

RG

Lewis Kett
Duncan Lewis

Lewis was one of the lead solicitors in a successful challenge to a new Home Office policy of disregarding torture by non-state agents when considering whether asylum-seekers should be detained. One supporter said: 'Lewis shows what can be achieved with ability, hard graft and no little bravery ... he is an inspiration to the next generation of trainees.' Accepting the award, he said: 'At a time like this, when the hostile environment is getting worse, immigration and asylum is an area where we have to fight back, and I'm happy to play my part.'

Legal aid barrister sponsored by The Bar Council

RG

Martha Cover
Coram Chambers

Martha (pictured with Law Society president Christina Blacklaws) is head of Coram Chambers, co-chair of the Association of Lawyers for Children and has been a family legal aid barrister for nearly 40 years. She campaigns, sets precedents, holds public bodies to account, ensures families are not broken up when they don't need to be, and fights to ensure that children's best interests are at the fore. Described as 'brilliant', 'unchanging' and 'lacking pomposity', supporters said she is 'completely lovely' with vulnerable clients, but 'fierce and unafraid' in court.

Children's rights sponsored by Anthony Gold

RA

Dan Rosenberg
Simpson Millar

Dan was praised for his incredible work in education, community care and public law. A mother who had battled for years to get support for her six children with disabilities and complex needs said: 'The first time I read an appeal for court written by Dan, years of stress and frustration simply melted away. I honestly felt lighter and I smiled for the first time in weeks.'

Family including mediation sponsored by Resolution

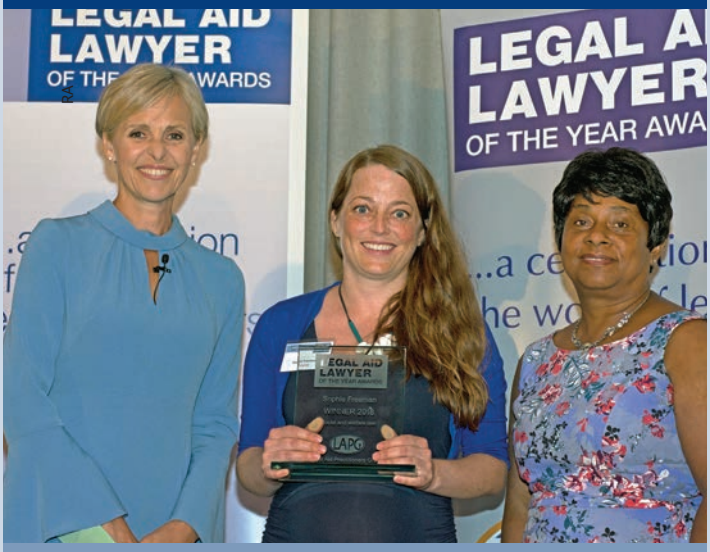
RG

Tony McGovern
Creighton & Partners

Tony was praised for his unshakeable commitment to the most vulnerable children and young people. One supporter said he travels long distances to take instructions from his often troubled and damaged young clients, because he wants them to 'see the face of the person' who is representing them, and he has a knack of bringing even the most hostile young clients around to trust him.

Social and welfare sponsored by Tikit

RA



Sophie Freeman

Coram Children's Legal Centre

Sophie has led Coram's immigration casework for the past five years, working for children and young people in asylum and human rights cases, many of whom are victims of trafficking and abuse. Model Sophie Dahl, who asked her to help a 17-year-old Syrian boy, said: 'She's a great lawyer and a great human.' Accepting the award, Sophie said the UK immigration and asylum process is 'unforgiving' and the Home Office's attitude has not changed since the Windrush scandal. 'The hostile environment remains very hostile,' she commented.

Practice management sponsored by Accesspoint

RG

Adam Makepeace

Tuckers Solicitors

Adam's work was described as the 'bedrock' of Tuckers and his 'entrepreneurial spirit' was credited with securing the survival of the business and achieving financial stability, despite 40 per cent fee cuts in real terms. One supporter said working with Adam gave him the 'confidence that it is still possible to do legal aid work without ending up in a debtor's prison or an early grave'. Adam said: 'We stand behind the people who are doing amazing work at the coalface.'

Access to justice through IT sponsored by The Legal Education Foundation

RA

CaseRatio

Tuckers Solicitors

CaseRatio is a software package developed for criminal defence firms, which aims to increase speed and efficiency and allows collaboration between firms, police station representatives and advocates. Developed by Tuckers, the firm makes the software freely available to other defence firms. Back on the stage, this time with colleague Chirag Pareek, Adam Makepeace said IT had 'limitless potential' to improve access to justice, but the challenge was getting people to use it.

Legal aid firm/not-for-profit agency sponsored by The Law Society

RG

Ealing Law Centre

Ealing Law Centre was set up five years ago in what would otherwise have been an advice desert. Local MP Virendra Sharma praised its vital, life-changing work for people who are at crisis point. On behalf of the centre, Vicky Fewkes said: 'We provide what legal aid should be providing but is no longer provided by the Legal Aid Agency.'

Criminal defence sponsored by DG Legal

RG

Aika Stephenson

Just for Kids Law

Aika has specialised in youth justice work throughout her 17-year career. She leads the criminal defence team at Just for Kids Law, which she co-founded in 2006. Last April, it became the first UK charity to hold a criminal legal aid contract. She is driven by her determination to bring systemic change that benefits all children and young people caught up in the criminal justice system.

Public law sponsored by Irwin Mitchell

RA

Harriet Wistrich

Birnberg Peirce

Described as 'a dogged champion of women and an inspiration to women', the 'indefatigable' Harriet has had an incredible year: the Supreme Court upheld human rights as a remedy for victims where the police have failed to investigate sexual and violent crimes; the High Court ruled that disclosing the criminal records of women convicted of prostitution offences, when they had been trafficked and groomed into sex work, was a breach of their article 8 rights; and she led the first successful challenge to a Parole Board decision in the *Worboys* case.

Housing sponsored by Garden Court Chambers

RG

Giles Peaker

Anthony Gold

Giles, aka housing law blogger Nearly Legal, was described as a 'housing law legend'. During the past year, he has been active in housing law reform, working with Karen Buck MP on her Homes (Fitness for Human Habitation) Bill, which should get royal assent in early 2019. Accepting the award, he said 'housing safety' is at the core of what needs to be addressed after the Grenfell Tower fire. 'Housing is fundamental to everything ... if you haven't got a safe home everything is at risk.'

Outstanding achievement sponsored by Matrix

RG

Sir Andrew McFarlane

Called to the bar in 1977, Sir Andrew McFarlane took silk in 1998, was appointed to the High Court in 2005 and the Court of Appeal in 2011, and became president of the Family Division in July. Lesser-known facts about him are that he has a pet donkey and was an aspiring magician.

His career in family law was set after being sent as a junior barrister to Nottingham to act for a distraught mother whose children had been summarily removed on the issue of wardship proceedings. He later said of the case: 'I could not believe that the state could simply walk into someone's home and remove their children before giving them notice and allowing them to be heard in court. The impact on me of realising that not only could this happen under the law, but that it was a fairly regular occurrence, is hard to overstate.'

In 1991, he and David Hershman wrote *Children Law and Practice*, published on the day the Children Act 1989 came into force. From 2003 to 2005, Sir Andrew was chair of the Family Law Bar Association, where he recalled his reaction to proposed cuts the then Labour government was seeking to make to the graduated fee scheme: 'How dare they do that,' he said at the time, adding that he could not possibly say that now he was a judge.

Accepting the award with humility, he said: 'I don't deserve an outstanding achievement award for my career as a legal aid lawyer. I was the same as everyone else who is a legal aid lawyer ... I was just a hack. I got on and did it.'

As a judge, he said, he could no longer comment on government policy, but said he was a 'real champion' of LAPG and pledged to cheer its members on. Though he will be the first president to have practised family legal aid, he said there were several other High Court judges who had had legal aid careers. 'So, there are people at the heart of the judiciary who understand the journey you are on now and respect it deeply and want to champion your continued involvement in this work and thank you for it.'

Sue James

"My Canadian experience has taught me that we absolutely need legal aid. We can't allow any further cuts."

'Travel to learn,' said Winston Churchill, 'return to inspire.' It's one of his lesser-known quotations, but applicable to my recent journey to Ontario, Canada to learn about its system of social justice. I was only away two weeks, but a lot seemed to happen during that time: HM Courts and Tribunals Service announced the closure of my court (for the third time); the Ministry of Justice (MoJ) was defeated in the High Court by the Law Society (see page 6 of this issue); and it actually rained.

Why Canada?

In February 2018, I was awarded a Churchill Fellowship to travel. It's a yearly award, competitive, but if you have an idea that can bring positive change for others then you're in with a chance. Mine had two aspects: looking at the use of 'Trusted Help' in Canada, and health/justice partnerships in Australia. This was the first leg of my trip.

It came about because of my experience of seeing increasing numbers of people in housing crisis, not having the help they need in the wake of LASPO. The door of the court is often the first place someone has access to advice and representation, and by this time they have the trauma of possibly losing their home. I wanted to find out how we can help people get early advice, before they reach crisis point, now that legal aid is no longer available for this purpose.

What did I learn?

What I found in Ontario was healthy legal aid provision, fully funded legal clinics and a justice system that puts people at its heart. It has 74 legal clinics that represent on poverty law issues and a private bar that represents on criminal, family and immigration law. The clinics have yearly presumptive funding and the bar is funded by legal aid certificates, similar to the UK.

The Law Foundation of Ontario (LFO) was set up in 1974 with a mandate to improve access to justice. It does this by giving 75 per cent of its revenue to Legal Aid Ontario and the remaining 25 per cent to innovative projects, services and research. This revenue derives from interest accrued from mixed trust accounts held by lawyers and paralegals. In the years 2005–14, this averaged $38m per annum.

It's the LFO that is funding the 'Trusted Help' projects. I went to find out more about the upskilling of community workers to 'issue spot' and connect people with the lawyers who can help them. Ontario is huge, and distance and language are barriers to accessing legal advice, but the projects are finding ways to resolve these issues. More on this to come in a later issue of *Legal Action*, but it was such a contrast to my daily experience of working within our legal aid system.

How to inspire?

Well that's a little harder, but it must be time for change when a High Court judgment opens with: 'This is another claim for judicial review of a decision by the lord chancellor ...' The judgments in both the Law Centres Network (see page 42 of this issue) and Law Society judicial reviews give me hope. The judicial scrutiny of the MoJ's decision-making reflects the feelings of irrationality we have long felt over the last decade of cuts. The judicial comments in the Law Society's judicial review, in response to the MoJ's case, are scathing. They had no words that were deemed suitable: 'It is difficult to express in language of appropriate moderation why we consider these arguments without merit.' Surely the MoJ is no longer fit for purpose, its title now almost Orwellian.

What my Canadian experience has taught me is that we absolutely need legal aid. We can't allow any further cuts to happen. We need to fight the systemic attack on our justice system together, across the whole sector, on all fronts. Which brings me nicely to one of Churchill's better-known speeches ... ■

Sue James is supervising solicitor at Hammersmith & Fulham Law Centre and a founding trustee at Ealing Law Centre.

In praise of: **Sir James Munby**

Sir James Munby retired as president of the Family Division at the end of July. He remained outspoken on the cause of access to justice right up to his last days in office.

Speaking at the sixth annual 'Voice of the child' Family Justice Young People's Board conference, in his last week as president, he lambasted the government for not dealing with the problem of alleged victims of abuse being cross-examined by the alleged perpetrators, or, indeed, the needs of other vulnerable witnesses. In typically incisive style, Sir James criticised the government's failure to find parliamentary time to bring forward the necessary legislation when it had managed to decide whether 'a person hearing bankruptcy cases should be called a registrar or a judge' in the Courts and Tribunals (Judiciary and Functions of Staff) Bill.

Access to justice was a preoccupation of Sir James throughout his term in office. At one point, it looked as though one of his judgments (*Q v Q* [2014] EWFC 31) would lead to an alternative, court-based system of public funding in some cases in which parties could not access legal aid. In a related judgment (*Re D (A Child)* [2014] EWFC 39), he described the then justice secretary Chris Grayling's legal aid policy as 'unprincipled and unconscionable'.

To mark his retirement his colleagues came up with a great leaving present for Sir James, who was a train buff long before he was a lawyer. A one-third scale working steam locomotive was named 'The Flying Munby' for the day at a model railway in Kent. *Legal Action* rather hopes he'll become known as the 'Campaigning Munby' in his retirement years, rather than for his association with railways.

All at LAG

Angela Patrick

Banking on judicial error?

In July 2005, William Hammerton was committed for contempt arising from his conduct in family proceedings. The judge who ordered his committal made a number of errors, including a failure to ensure that he had access to legal representation. In September 2016, the European Court of Human Rights (ECtHR) awarded him €8,400 in damages. In *Hammerton v UK* App No 6287/10, 17 March 2016, the court refused to order damages pursuant to article 5 of the European Convention on Human Rights (ECHR). The government accepted that there had been a violation of article 6(1) and (3), although argued that the finding of a violation was adequate to provide just satisfaction. The court found Mr Hammerton had been deprived of a fair hearing in violation of article 6(1) in conjunction with article 6(3)(c) and damages were awarded in light of the additional time he spent in prison as a result. In addition, as Human Rights Act 1998 (HRA) s9(3) meant the domestic courts were unable to award him damages for those breaches, there was a separate violation of article 13 and the right to an effective remedy.

The government has published a draft Remedial Order on changes to HRA s9(3) (*A proposal for a Remedial Order to amend the Human Rights Act 1998*, Ministry of Justice, July 2018) to expand the circumstances when judicial errors can attract damages. The Joint Committee on Human Rights (JCHR) will report on the Order in the autumn and has called for evidence. Without amendment, this Order is unlikely to bring relief to many beyond those who find themselves in circumstances nearly identical to those of Mr Hammerton.

The Human Rights Act 1998 (Remedial) Order 2018

The draft Human Rights Act 1998 (Remedial) Order 2018 proposes the circumstances when damages can be recovered for judicial error – in HRA s9(3) – will be widened, but only slightly. Damages will only be recovered in cases involving a contempt of court, where a person is deprived of legal representation due to a judicial act incompatible with ECHR article 6, and the person is committed to prison either in circumstances where they would not otherwise have served time, or where the time served is longer than it would have been if they'd been represented by a lawyer (see the proposed new s9(3A)).

This neglects any other case where damages might be awarded in Strasbourg for a violation of ECHR article 6, but yet is barred by the reformed s9(3) in proceedings at home. There is nothing in the reasoning of the ECtHR in *Hammerton* that means the impact of the judgment on article 13 need be so confined. Beyond committal, there remain a range of scenarios where a judicial error – albeit in good faith – might amount to a violation of article 6 and the imprisonment of an individual (see, for example, *R (MA) v Independent Adjudicator* [2014] EWHC 3886 (Admin) at para 118, where Laing J concluded that s9(3) would provide a complete answer to an article 6 claim for damages in the context of a challenge to extra days imposed by an independent adjudicator).

Is the Remedial Order effective?

The power to make Remedial Orders in HRA s10(1)(b) is in broad terms. It must appear to a minister – having regard to a finding of the ECtHR – that a provision of legislation is incompatible with an obligation of the UK under the ECHR. The requirement in s10(2) that there be 'compelling reasons' for the use of the Remedial Order constrains ministers to consider carefully whether an Order is an appropriate mechanism for reform. However, where a judgment plainly identifies a legal barrier to an effective remedy in the application of a general immunity or a blanket procedural bar, it appears illogical to conclude that there are compelling reasons only to fast-track removal of the bar in one specific set of facts, in this case, committal proceedings.

The purpose of any Remedial Order must not be to overreach. However, where a judgment does give ministers a basis to consider that further violations will arise because of the way that domestic law operates, taking too narrow an approach would waste both parliamentary and court time by inviting further litigation.

By maintaining the wider bar in HRA s9(3), the government removes the capacity for the domestic courts to consider when damages might be required by ECHR article 6 and defers any question of an effective remedy in these cases to Strasbourg. The government argues that the bar must be carefully circumscribed to protect the principle of judicial immunity. However, s9(3) currently trusts judges to consider when article 5(5) requires financial compensation. The courts have taken a careful approach. For example, in *LL v Lord Chancellor* [2017] EWCA Civ 237; [2017] 4 WLR 162, a case involving multiple judicial errors, the Court of Appeal confined a rare award of damages to its facts (see paras 116–120). Leaving the task of also ascertaining when damages attach to violations of article 6 is unlikely to result in any judicial enthusiasm to stray beyond the bounds of the requirements of the ECHR, or the case law from Strasbourg.

What next?

The draft Order is now subject to scrutiny by the JCHR before a final version is laid before parliament. Anyone with clients aggrieved by unlawful judicial decision-making that led to their imprisonment might highlight the effects of the s9(3) bar on recovery of damages, for which the only viable remedy would still remain in Strasbourg.

The government's proposals for change should be welcomed. However, they don't go far enough. Mr Hammerton had to wait over a decade for compensation. The legacy of his claim should not be to provide a remedy at home for only a few and the guarantee of a repeat trip to the ECtHR for others. ■

Angela Patrick is a barrister at Doughty Street Chambers. She is chair of the Human Rights Lawyers Association and sits on the LAG board of trustees. She writes in her personal capacity.

Civil legal aid: changes to civil and family costs

With the start of the 2018 Standard Civil Contract this month, Paul Seddon examines the changes to claiming costs in civil and family work that it introduces.

Paul Seddon

The 2018 Standard Civil Contract[1] started on 1 September 2018, aligning all of the previous contracts into one contract for the first time since the Standard Civil Contract was introduced in 2010.

There are numerous changes from the previous contracts, some of which concern civil and family costs. I would love to say that these are for the better, but most provide further restrictions on what can be claimed, in particular interpreters' fees and disbursements not subject to prescribed rates/fees under the Civil Legal Aid (Remuneration) Regulations 2013 SI No 422 (Remuneration Regulations) (uncodified disbursements). However, as ever in costs (particularly legal aid costs), forewarned is forearmed.

Aside from the Remuneration Regulations (and the Civil Procedure Rules 1998 (CPR)), sections 1–6 (and section 7 for family work) of the 2018 Standard Civil Contract Specification[2] are of most relevance to claiming civil legal aid costs, and it is here that the bulk of changes affecting costs are found. The transitional provisions of the specifications (section 1) provide that, subject to category specific rules and the transitional provisions of secondary legislation, they (including procedures for assessment remuneration) apply to all work done under their particular contract. This means, for example, that once a provider starts a new contract, any disbursements they incur from that date will be subject to the new list of excluded disbursements under the corresponding specification to that contract.

Also of particular note, the new provisions for interpreters and translators and non-codified disbursements apply to any incurred after the start of the 2018 contract, including those on cases started under the previous contract(s).

Manual

The Legal Aid Agency's (LAA's) digital *Legal aid manual*, published by Thomson Reuters, was closed in August 2015, and it appears that no further publication with consolidated amended statutory instruments (particularly the raft of amendments to the Remuneration Regulations) etc, that so many of us were hoping for, is going to materialise. The 'manual' is now defined in the Standard Terms as 'a dedicated section on our website comprising links to relevant legal aid legislation, the Standard Terms, the Specification and other materials relevant to the performance of contract work and compliance with this contract published by us from time to time', and refers to the Civil legal aid: civil regulations, civil contracts, and guidance webpage.[3]

Points of Principle

Points of Principle of General Importance[4] (PoPs) do not feature in the new contract. They have not been included in any civil contract since the 2013 civil contracts, but applied to family, immigration and asylum, and housing and debt (2013 Standard Civil Contract Specification: General Rules (May 2016 amendment), sections 1–6),[5] and welfare benefits in London, the South East, and the Midlands and East (2013 Standard Civil Contract (Welfare Benefits) Specification: General Rules, sections 1–6).[6] Decisions by the LAA on assessment of costs can be appealed and referred to an independent costs assessor (ICA), who is an experienced solicitor in private practice (paras 6.67–6.77 of the 2013 Contract Specification and 2013 (Welfare Benefits) Specification). Under the 2013 and previous civil contracts, there is a further right of appeal from an ICA's decision in the form of applying for a PoP to be certified.

The LAA (on the PoPs webpage) defines a PoP as 'a statement which seeks to clarify an existing provision of the contract or other guidance published by the [LAA] relating to the assessment of costs' and an application to certify a PoP can be made by a provider, director of legal aid casework or assessor within 21 days of receipt of the ICA's decision. Applications are determined by a costs appeal committee and, if certified, a PoP becomes binding on costs assessors. All PoPs and the procedure for applying for one were contained within the PoP manual, found on the LAA website. The provision for PoPs and costs appeal committees is omitted from the 2018 contract. The provision still applies to cases opened under contracts where there was the right to apply for a PoP. It is unclear how the LAA will operate in practice without PoPs, the extent to which previously certified PoPs will bind its future assessment decisions, and/or how much it will choose to acknowledge them as being persuasive and, if departing from them, explain why they are no longer reasonable to follow. Without this further right of appeal to the LAA, the only route to challenge a costs decision would be by way of judicial review.

Audits

Costs audits for controlled work have been amended (paras 4.47–4.50 of the Contract Specification). Findings of 'mis-claiming' and 'over-claiming' have been introduced. 'Mis-claiming' is defined as 'claiming in a manner that [the LAA considers to be] clearly contrary to the contract and where no discretion arises as to payment. For instance, claiming using the wrong rates, or incorrectly claiming VAT'. 'Over-claiming' means 'claiming more than [the LAA determines] to be reasonable on assessment, but where discretion arises as to the amount allowable. For instance, claiming one hour for an attendance where on assessment [the LAA considers] that only 30 minutes would have been reasonable or claiming a disbursement where [the LAA considers] that it was not reasonably incurred'.

A sample of at least 20 files can be requested (or fewer if you have less than this since the last audit was undertaken). For mis-claiming, the period to sample from has been increased from one year to two (after the claims have been submitted), or up to six years prior where an official investigation is underway or the LAA considers it reasonable to do so upon receiving a report. For over-claiming, the period is since the

last contract compliance audit, or the 12 months before the date the sample is requested.

Interpreters and uncodified disbursements

Under paras 2.47–2.51 of the Contract Specification, you must use interpreters with qualifications listed in para 2.48 and a note must be placed on each client's case file confirming that the interpreter or the agency through which they are supplied holds such a qualification, and which qualification it is. A 'non-qualified interpreter' can be used in exceptional circumstances, a non-exhaustive list of which is provided at para 2.50:

(a) where it would cause undue delay and/or increased costs (above the prescribed rates);
(b) where the client requests an interpreter of a specific gender and such request cannot reasonably be accommodated otherwise than by the use of a non-qualified interpreter (eg where the client has been a victim of domestic violence);
(c) where there is a rare language or dialect which cannot reasonably be accommodated otherwise than by the use of a non-qualified interpreter;
(d) where there is an emergency requirement which cannot reasonably be accommodated otherwise than by the use of a non-qualified interpreter;
(e) where you have contacted three interpreters who meet the qualification requirements … and none are willing or available as required.

Where a non-qualified interpreter is used, you must record on file what the exceptional circumstances are and why there was no alternative. The LAA can also require you to only use interpreters under its nominated translation framework upon giving you three months' notice.

Non-codified disbursements have caused issues for many providers in the past few years, with the LAA attempting to assert that three quotes have to be shown as evidence that the supplier's fee is reasonable, even though there is no such requirement under the current contracts, and costs law decisions by the courts say that reasonableness and proportionality should primarily be based on the assessor's experience and knowledge. However, this is now a requirement under the new Contract Specification (paras 4.26–4.27), and when you incur a non-codified disbursement you must obtain at least three quotes (unless the LAA agrees this is inappropriate) and select the one that you believe to be the best value for money in the circumstances, including, but not limited to, the need for speed and competence/expertise of the provider. If you cannot do this, you must advise the LAA and provide it with further information it reasonably requires.

The LAA acknowledges that exceptional circumstances, which dictate best value for money with reference to the need for speed and competence/expertise, will only be identified once disbursements incurred under such scenarios are claimed, and the same will apply to as yet unidentified circumstances where a non-qualified interpreter must be used. This indicates a degree of uncertainty for providers as to whether the LAA will accept their judgement calls as correct. Prior authority should be sought in these situations, but of course this is unlikely to be an option where expedition is required.

Witness intermediaries have been added to excluded disbursements listed in section 4 of the Contract Specification (para 4.28). The LAA has confirmed to the consultative bodies that it will not fund assessment reports for the need for witness intermediaries.

Enhancements

The provision that the LAA 'will' apply an enhancement (percentage mark-up) on hourly rates where the threshold test is met has been changed to 'may', ie, it is no longer binding but rather it is permissive (para 6.13 of the Contract Specification). The change from mandatory to optional application of the level of enhancement to be made (paras 6.15–6.16), in accordance with the long-established provisions, does raise concerns that it gives the LAA scope to simply ignore applications for enhancements, rather than having to provide an assessment decision that can be appealed, or to apply alternative factors on a case-by-case basis.

'Class of work' has been removed from the provisions for enhancement, although this is unlikely to have any effect. Class of work is a category of costs to which enhancements can be applied to elements of work under a single item in a court bill, eg, hearings where advocacy, attendance on client and travel and waiting are claimed with an enhancement for, say, exceptional speed or exceptional complexity on non-funding preparation work under the documents section of the court bill. Its removal indicates that there was an expectation that enhancements would no longer be assessed by the courts, but that is not the case and as long as court bills in the form prescribed under the CPR are required, it is unlikely that the LAA will, in practice, be able to refuse the use of this mechanism.

Family-specific provisions

Minimum 15 per cent enhancement

On a more positive note, those accredited under the Law Society's Children Law Accreditation Scheme (also known as Children Act Panel members) can now claim the 15 per cent minimum enhancement for any case remunerated under family rates, not just cases under certificates that include cover for children proceedings (paras 7.23–7.24 of the Contract Specification). Under the previous contracts, a certificate had to include proceedings relating to children in order for a Children Act Panel member to qualify for the 15 per cent minimum, but this requirement has been removed from the 2018 contract.

Related proceedings

Although more relevant to the issue of obtaining public family law certificates, the argument that an order sought in private family law proceedings, which could avoid public law proceedings, means those proceedings are 'related proceedings', and thus public family law legal aid applies, has been known to cause issues when a provider has sought to claim their costs. This has now been put firmly to an end and the 2018 contract expressly provides that such private law proceedings are not related proceedings (paras 7.46–7.47 of the Contract Specification). ■

1 Except where otherwise indicated, the documents referred to in this article are available at: www.gov.uk/government/publications/standard-civil-contract-2018.
2 Unless otherwise specified, references to the Contract Specification are to this set of documents.
3 www.gov.uk/guidance/civil-legal-aid-civil-regulations-civil-contracts-and-guidance.
4 www.gov.uk/guidance/legal-aid-points-of-principle-of-general-importance-pop.
5 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/526402/2013-standard-civil-contract-specification-general-provisions-1-6-ame….pdf.
6 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/406170/2013-welfare-benefits-specification-2015-anti-social-behaviour-amendments.pdf.

Paul Seddon is a regulated costs lawyer and owner of Seddon Costs Law. He contributed the chapter on civil and family costs to the *LAG Legal Aid Handbook 2018/19*, available via www.lag.org.uk/bookshop.

Tragedy heaped upon tragedy

Jake Taylor and Stephen Reynolds examine the case of Dr Hadiza Bawa-Garba.

Doctors in uproar, a historic vote of no confidence in their regulator, a young patient dead, and the subsequent conviction, suspension and erasure from the medical register of the junior doctor in charge of his care. The case of Dr Bawa-Garba goes to the heart of the current state of the often-fractious relationship between doctors and their regulator, the General Medical Council (GMC).

While the final decision of the Court of Appeal on 13 August 2018 ([2018] EWCA Civ 1879), reversing Dr Bawa-Garba's erasure, provides useful guidance for lawyers and advisers on the proper approach to the conviction of a medical practitioner for gross negligence manslaughter, in the context of fitness to practise sanctions under the Medical Act (MA) 1983, the wider ramifications of the case are being seen and felt in hospitals and surgeries around the country. This article seeks to explain Dr Bawa-Garba's unusual and poignant case, and to clarify what actually took place at the various stages of proceedings.

Background

Jack Adcock died at the Leicester Royal Infirmary children's assessment unit (CAU) on 18 February 2011. A 'thriving little boy' (para 5 of the Court of Appeal (Civil Division) judgment), Jack had a number of conditions, including Down's syndrome and long-term bowel and heart abnormalities. He was six years old at the time of his death.

On the morning of 18 February 2011, Jack was taken to see his GP, who had him admitted to the Leicester Royal Infirmary CAU. Jack presented with dehydration caused by vomiting and diarrhoea, slow breathing and slightly blue lips. The doctor on duty that day, and in charge of Jack's care, was Dr Bawa-Garba. She was then a registrar in year six of her specialty postgraduate training. She had only recently returned to work after having her first baby. During the later proceedings, she was described as having had an 'exemplary record' as a doctor. On the day, she had worked a double shift of 12-13 hours without a break.

Jack was admitted to the CAU at 10.15 am, where he was unresponsive and limp. He was seen by Dr Bawa-Garba, who erroneously diagnosed him with a stomach bug and dehydration. Jack was in fact suffering from pneumonia and in urgent need of antibiotics. This was not diagnosed until much later in the day.

There were significant difficulties on the day – difficulties that would later be described as 'failings' by the NHS trust. These included staff shortages, a reliance on agency nurses who were not experienced with the CAU systems, significant IT failings that meant a delay in obtaining test results, and a lack of more senior doctors on duty, leaving Dr Bawa-Garba as the most senior.

When it came to Jack's care, Dr Bawa-Garba was later said to have failed to check the first blood test when it became available at 10.44 am, and to have failed to check the X-ray when it became available at around 12.01 pm (this was not viewed by Dr Bawa-Garba until 3 pm). It was not until approximately 4.15 pm that Dr Bawa-Garba viewed the blood tests, at which point, it was said, she did not appreciate their significance. It was also alleged that Dr Bawa-Garba failed to note that Jack's heart medication should be discontinued, meaning that he received an evening dose when he should not have done.

Jack's pneumonia caused his body to go into septic shock and resulted in organ failure. At 7.45 pm, this caused his heart to fail. Despite efforts to resuscitate him, Jack was pronounced dead at 9.20 pm (the resuscitation efforts were initially and briefly hampered by the mistaken belief that Jack was a child in the 'do not resuscitate' category). The cause of death given after the post-mortem was systemic sepsis and pneumonia combined with Down's syndrome and his heart condition.

The trial

Dr Bawa-Garba was charged with gross negligence manslaughter and subsequently stood trial before Nicol J and a jury at Nottingham Crown Court. The prosecution case was that Jack's care was deficient over a prolonged period of time, that the clinical signs of sepsis were evident at the time of his admission, and that Dr Bawa-Garba's failure to correctly and promptly diagnose this was grossly negligent. It was alleged that the results of the initial blood tests, together with Jack's medical history, physical condition and symptoms, would have shown any competent junior doctor that Jack was in shock. The judge directed the jury that the prosecution had to show that Dr Bawa-Garba's professional performance was 'truly exceptionally bad'.

On 4 November 2015, following 25 hours of deliberation, and by a majority verdict of 10 to two, Dr Bawa-Garba was convicted of gross negligence manslaughter. A nurse on duty at the time (Isabel Amaro) was also convicted of the same offence, while the ward sister (Theresa Taylor) was acquitted. On 14 December 2015, Dr Bawa-Garba was sentenced to two years' imprisonment, suspended for two years.

The trust

A serious untoward incident inquiry was completed on 24 August 2012. The inquiry was unable to identify a single root cause of Jack's death, but it concluded that numerous aspects of the clinical process required change and that failings had taken place.

The criminal appeal

Dr Bawa-Garba sought leave from the Court of Appeal (Criminal Division) to appeal her conviction on the basis that the directions of law given to the jury in the course of the judge's summing up were wrong. This concerned the direction that the prosecution had proved its case if the jury were sure that Jack died significantly sooner because of the negligence of Dr Bawa-Garba. Sir Brian Leveson P, giving the judgment of the court, held that the

direction encompassed the fact that the jury had to be sure that the treatment would have saved or significantly prolonged Jack's life. On 8 December 2016, leave to appeal the criminal conviction was refused ([2016] EWCA Crim 1841).

The Medical Practitioners Tribunal

Following her conviction, Dr Bawa-Garba was referred to the Medical Practitioners Tribunal (MPT). On 22 February 2017, the MPT found that Dr Bawa-Garba's fitness to practise was impaired by virtue of her conviction, and that such a finding was required in order to maintain public confidence in the profession and promote proper professional standards and conduct. The MPT accepted that Dr Bawa-Garba had remediated the specific clinical failings that had been identified.

In June 2017, the MPT came to determine the appropriate sanction and imposed an immediate suspension for a period of 12 months. In doing so, the tribunal found that Dr Bawa-Garba's actions and conviction were not fundamentally incompatible with continued registration; that public confidence in the profession would not be undermined by a lesser sanction; and that she had remedied her failings. The MPT's sanction decision specified six matters that it took into account as providing a 'context of wider failings'. They were: (1) failings on the part of the nurses and consultants; (2) medical and nursing staff shortages; (3) IT system failures that led to abnormal laboratory test results not being highlighted; (4) deficiencies in handover; (5) accessibility of the data at the bedside; and (6) the absence of a mechanism for an automatic consultant review (see para 72 of Court of Appeal (Civil Division) judgment).

The GMC appeal to the High Court

To the consternation of many doctors, the GMC then made use of its recently acquired power to appeal under MA 1983 s40A(3). The GMC argued that the MPT had failed to take proper account of the statutory duty to consider public confidence in the profession and that it had come to a view that she was less culpable than the verdict of the jury established.

The GMC's appeal was heard in the High Court on 7 December 2017. Ouseley J commented that the MPT had, in imposing a suspension instead of erasure, attached significant weight to the aforementioned 'multiple systemic failures' at the hospital at the time. The MPT's decision was not consistent with, and did not respect, the verdict of the jury as it should have. He considered that the tribunal had reached its own, less severe view of the degree of Dr Bawa-Garba's personal culpability. On that basis, the court overturned the decision of the MPT and held that the only appropriate sanction was that of erasure from the register ([2018] EWHC 76 (Admin)).

The appeal to the Court of Appeal (Civil Division)

Dr Bawa-Garba was granted permission to appeal on 23 March 2018. The main issue on appeal was whether the High Court was right to interfere with the MPT's decision on sanction. It was noted that caution was required, given that a specialist adjudicative body, such as the MPT, has experience and expertise that the court lacks.

The court first considered whether the MPT had made an error of principle in determining the appropriate sanction. In considering this question, the court reached a number of conclusions. It observed that the task and approach of a jury is fundamentally different from that of a professional tribunal. The Crown Court and the MPT are different bodies with different functions, addressing different questions, at different times. Second, the court explained that 'different degrees of culpability are capable of satisfying the requirements of gross negligence manslaughter' (para 77), with some failings being more serious than others. Indeed, the fact that the offence itself encompasses different degrees of culpability is reflected in the range of sentences available, and the imposition of a suspended sentence was significant in this regard. Accordingly, the fact that the MPT had imposed a sanction of suspension rather than erasure did not mean that it had viewed Dr Bawa-Garba's culpability as lower than that required for gross negligence manslaughter. Instead, a sanction of suspension was perfectly consistent with the view of Dr Bawa-Garba's culpability that was expressed in the jury's verdict and in Nicol J's sentencing remarks. Thus, the tribunal 'was not disrespecting the verdict of the jury' (para 78), because it was not deciding that Dr Bawa-Garba's failings were anything less than 'truly exceptionally bad'. Instead, it was engaged in a different exercise: that of evaluating the case to determine the most appropriate sanction to satisfy the statutory objective of protecting the public.

The court then moved on to consider whether the decision to suspend Dr Bawa-Garba was a decision that was 'properly and reasonably open' to the MPT. It concluded that it was, and that it was 'impossible' (para 87) to say otherwise. The court noted that the relevance and application of the *Sanctions guidance** will always depend on the particular circumstances of a case, and that there is no requirement to impose a sanction of erasure in cases of gross negligence manslaughter.

For these reasons the Court of Appeal allowed Dr Bawa-Garba's appeal and set aside the decision of the Divisional Court. Her case was therefore remitted to the MPT for her suspension to be reviewed.

Conclusion

For practitioners and lawyers alike, the Court of Appeal's judgment is highly significant for at least two reasons. First, because it clarifies that criminal courts and professional tribunals perform fundamentally different roles, with different approaches and different objectives. Second, because it confirms that a conviction for gross negligence manslaughter will not necessarily result in a sanction of erasure, and that there is no presumption that it should. The judgment thus makes it clear that being convicted of gross negligence manslaughter is not, in principle, incompatible with continuing to practise medicine.

Reviews and recommendations

In light of the considerable public and professional interest that Dr Bawa-Garba's case attracted, Professor Sir Norman Williams was tasked with conducting a rapid review into gross negligence manslaughter in the healthcare setting. He concluded his review (*Gross negligence manslaughter in healthcare: the report of a rapid policy review*, June 2018) by providing a number of recommendations, including that a working group be set up to provide a clear position on the law of gross negligence manslaughter, and that the GMC's right to appeal decisions of the MPT be removed. The government has welcomed Professor Williams's findings, but the policy ramifications of Dr Bawa-Garba's case are likely to continue to unfold: Dame Clare Marx has been commissioned by the GMC to conduct an independent review into cases of gross negligence manslaughter, and will report on her findings early next year. ■

* www.mpts-uk.org/decisions/1655.asp.

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Vicky Ling

What's in the 2018 Civil Contract?

With the contract starting this month, it's important to make sure you know what's in it.

The legal aid 2018 Standard Civil Contract started this month. The Legal Aid Agency (LAA) has tried to bring the requirements into line with the 2017 Crime Contract, and there are other changes too. This article highlights some key elements of the new contract, but it is important to set some time aside to read it in full! The documents you'll need to familiarise yourself with are:

- Contract for Signature, Key Information, Tables and Annexes – sent out by the LAA with contract offers.
- Office Schedule – sent out by the LAA with contract offers.
- 2018 Standard Civil Contract Standard Terms, General Specification and Category Specific Rules – download from the LAA's website.[1]

Don't forget to notify the LAA of any changes to your organisation during the lifetime of the contract. For example, if in private practice, new directors/members will need to provide indemnities (Standard Terms 4.6). Also, if any of your answers to questions in a tender document should change in relation to a suitability question, you must notify the LAA, which can review whether you are still suitable to hold a contract (Standard Terms 2.1). If you change legal entity or merge, the LAA may novate the contract to the new entity (Standard Terms clause 22).

A new requirement has been introduced, due to Public Contracts Regulations 2015 SI No 102 reg 113, that requires the LAA to make payment within 30 days of determination of a valid and undisputed claim (Standard Terms 14.11), although it does not prevent the LAA from subsequently recouping a payment on assessment. Similarly, you have to pay sub-contractors within 30 days (Standard Terms 3.3(b)(i)).

Specification

As the name implies, this contains the detailed rules that apply to the way work is carried out on a day-to-day basis. Sections 1–6 are general and apply to all. Subsequent sections are category specific. Where the two conflict, the latter take precedence (Specification para 1.2).

A new requirement has been introduced that requires the LAA to make payment within 30 days of determination of a valid and undisputed claim.

Matter starts

Under the new contract, you can self-grant up to an additional 50 per cent of matter starts per year, but you must notify your contract manager first (Specification para 1.21). You can apply to the LAA for further matter starts if you need to (Specification para 1.23). If you are granted additional matter starts, they will be reflected in your allocation in the next schedule (Specification para 1.24).

Note that you can use up to 25 per cent of matter starts using remote methods of communication, without ever seeing the client (Specification para 3.17). You will need to make an appropriate ID check if you advise a client by remote means (Specification para 3.18).

Supervisors

In most categories of law, you need at least one full-time equivalent (FTE) supervisor. Part-time equivalent supervisors are only acceptable in the following categories of law: welfare benefits; clinical negligence; claims against public authorities; and public law (see the category specific sections of the Specification). For this purpose, a FTE means the equivalent of one individual working five days a week and seven hours on each such day (excluding breaks) (Specification para 2.10(a)). A FTE supervisor can cover up to four FTE members of staff and two offices (which may be for two different providers) (Specification para 2.26).

Controversially, the LAA has changed its interpretation of Specification para 2.10(a), although only one word was changed in the text, making it difficult to spot: 'have at least one full time (or full time equivalent) supervisor *working* in that category' (emphasis added). The change only became clear from a LAA response in a FAQ:

Q.3.3 If one person meets the standards to be a supervisor on more than one category of law, can they be considered to be a full time equivalent supervisor on those two categories? A. No …[2]

This has caused problems for some organisations, particularly in rural areas, as there is a shortage of people who meet the supervisor requirements. It also increases the cost of delivering legal aid services. ■

1. www.gov.uk/government/publications/standard-civil-contract-2018.
2. See *Procurement process for face to face contracts from September 2018: frequently asked questions*, page 10 for full text.

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Young Legal Aid Lawyers

Katherine Barnes

Oliver Carter

> **"Now that the devastating effects of LASPO are clearly apparent, there is a growing consensus that enough is enough."**

At times in recent years, it has felt like the post-implementation review of Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) Part 1 is the only game in town for campaigners seeking to repair the crumbling edifice of access to justice. Now that the review is underway, the onus is on us all to make the case for legal aid as best we can to the Ministry of Justice (MoJ).

With this in mind, we have been listening to YLAL members across the country to ensure that our written submission to the LASPO review reflects the concerns and ideas of aspiring and junior legal aid lawyers nationwide. We have met directly with the MoJ LASPO review team, and attended superb conferences on the review organised by the Legal Aid Practitioners Group in London (15 June) and on 'Legal aid and society' by the Public Law Project (PLP) in Manchester (19 July).

We are also engaging with MPs across the political spectrum to try to build consensus where possible – as called for by Lord Willy Bach and Sir Henry Brooke following the publication of the excellent final report by the Bach Commission on Access to Justice, *The right to justice* (Fabian Society, September 2017).

One of the fruits of this work was a brilliant article by Alex Chalk MP for ConservativeHome ('If British values are to be realised, Conservatives must fight for legal aid', 9 June 2018), which made the Conservative case for legal aid, with particular support for publicly funded early legal advice and updating of the strict financial eligibility criteria. As Chalk argued in his article – which was the brainchild of YLAL committee member and PLP Justice First Fellow Ollie Persey – if the rule of law and the notion of 'fair play' are to mean anything, 'it is vital that legal redress is available to all – regardless of income or background'.

Recent reports by the Joint Committee on Human Rights (JCHR) (*Enforcing human rights. Tenth report of session 2017–19*, HC 669/HL Paper 171, 19 July 2018) and the Justice Committee (*Criminal legal aid. Twelfth report of session 2017–19*, HC 1069, 26 July 2018) have added to the substantial evidence base for positive reform and to the growing consensus that there is a crisis in access to justice that requires urgent attention. Indeed, the Justice Committee found the difficulties facing the criminal justice system to be so serious and urgent that it was necessary to take the unusual step of publishing the report without a public call for evidence or a response from the government (see page 6, para 9).

> **While access to justice has been severely restricted, we should not forget the significant victories won in the courts and following direct action.**

The JCHR quoted our written submissions* in relation to the financial eligibility criteria for civil legal aid (see page 14, para 36 of the report), and made important conclusions and recommendations to address the 'damaging effects of legal aid reforms' (pages 46–47). The committee shared the concerns of many witnesses that 'the pressures caused by the reforms to legal aid are having a severe impact on legal aid professionals, damaging morale and undermining the legal profession's ability to undertake legal aid work, leading to consequent grave concerns for access to justice, the rule of law and enforcement of human rights' (page 25, para 83).

It can be tempting to lapse into hopelessness and pessimism at the prospect of the government blithely ignoring the mass of evidence of the hardship caused to ordinary people by LASPO and subsequent reforms. While access to justice has been severely restricted, we should not forget the significant victories won in the courts and following direct action on the domestic violence eligibility criteria, exceptional case funding, pre-permission judicial review work, prison law legal aid, two-tier contracts, the housing possession court duty schemes, the residence test, employment tribunal fees and the 40 per cent cut in the number of claimable pages of prosecution evidence in Crown Court cases.

The next access to justice issue to be litigated may be a battle over backdating of legal aid certificates where providers need to carry out urgent work to protect their clients' interests. The case is being brought by Duncan Lewis Solicitors, and argues that the Civil Legal Aid (Procedure) Regulations 2012 SI No 3098 do not prohibit the backdating of funding to the date of the initial application or, in the alternative, that the regulations are unlawful and should be quashed. Permission has been granted by the court.

In short, the time is ripe for meaningful and much-needed reform. Now that the devastating effects of LASPO are clearly apparent, there is a growing consensus that enough is enough. This applies not only to judges, but increasingly to politicians across the political spectrum. In this context, it is critical that full advantage is taken of the next great opportunity for change, the LASPO review. YLAL therefore calls on all readers of *Legal Action* to make their voices heard by contributing to the review process – it's #time4justice. ■

* http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/enforcing-human-rights/written/78213.html.

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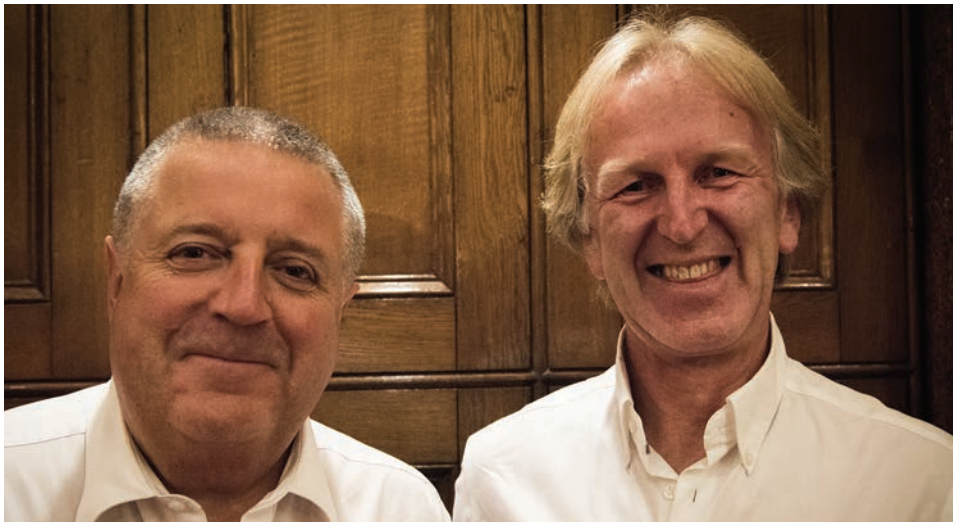
Nic Madge's retirement

> Our collaboration spawned a close and enduring friendship that will last our lifetimes.

Following Nic Madge's retirement as *Legal Action* housing author, long-time friend and co-author Jan Luba QC shares his thoughts and memories.



(l-r) Jan Luba QC and Nic Madge at the Hoop and Grapes, Farringdon, in 2017

This issue of *Legal Action* is destined to become a collector's item! It is the first ever to carry the article 'Recent developments in housing law' without the name of 'Nic Madge' appearing as a co-author.

Nic and I began to write this series of articles some 33 years ago, with the first being published in September 1985. Three decades on, the current article (see page 39) is the only one – in all that time – that has not had Nic's input.

As readers will know, Nic recently retired from the circuit bench. He received well-attended judicial send-offs at both Luton Crown Court and the County Court at Central London. Lavish tribute was rightly paid by his colleagues from bench and bar. I myself hope that the unique contributions of his earlier life in legal practice and of his selfless extra-judicial activities will be suitably marked by a more informal event later this year, to be attended by the scores of practitioners who have come to know and admire him.

He has not relinquished (just yet) all his legal writing, but it seemed sensible for his place to be taken on 'Recent developments' by a housing lawyer very much in touch with day-to-day legal practice. I am delighted that his son Sam, with whom he co-authors the *Housing Law Casebook*, has been able to pick up the baton. I cannot claim to expect to be still writing the articles with Sam in 33 years' time, but who knows? However long it endures, I am sure it will be as productive a partnership with son as with father.

Nic has recently claimed that 'Recent developments' was 'his' idea (see Sue James, 'Sharing knowledge, empowering people', November 2017 *Legal Action* 8). As in so much else we have done together, he is probably the one of us most likely to be right. Back then, he was the latest new solicitor to join Bindmans and I was a fledgling in-house welfare rights specialist with the CAB service. For reasons that I am sure neither of us fully understands, our working partnership proved smooth and (largely) harmonious from start to finish.

We have ended our co-authorship of the articles in a very different time from when we started. It gives me the greatest pleasure to think that there may be readers of our recent articles who were yet to be born – or were still at school – when we first put our fingers to our typewriters for 'Recent developments' in the mid-1980s.

Early articles were generated in wine-bar-based discussions over carbon paper copies of our respective initial, typed texts. After a few years of writing together – in an age before the internet, mobile phones or email – we embraced with relish the chance to move to perforated sheets of continuous printout from our early Amstrad 8256 word processors. From then on, we rode the fresh waves of new technology into the new era of Word, track-changes, spell-checkers and more. As ever, Nic led us through those changes from the front.

It would not be appropriate for me to comment on the value (or otherwise) of our articles to those who have had cause to read them. In any event, I would be unlikely to address the subject with the clarity and authority already given to it by the kind and masterful John Gallagher ('"Recent developments in housing law" at 25', September 2010 *Legal Action* 8).

What should be highlighted is the legacy of the many initiatives our series of articles generated. Not only did similar series spring up in other subject areas in *Legal Action*, but 'Recent developments' begat two sub-series of its own: 'Housing repairs update' and 'Housing benefit update'. Of course, it was Nic who had the vision and energy to organise, catalogue and collate our collaborative material into what became the *Housing Law Casebook*.

What I can and must do is mark the incredible value that I personally derived from working in partnership with Nic on the hundreds of articles we must have written together over those many, many years. Our collaboration spawned a close and enduring friendship that will last our lifetimes.

It also blessed us with the opportunity to work with a string of first-class editors and sub-editors at LAG. If we each have any lasting skills as writers, they were honed by those wonderful people. I remain in their debt.

But it is with Nic I finish, as I started. He was the 'wizard'. I was the 'apprentice'. If we produced a little magic over the past many years, it was by my 'accident' and by his 'design'. ■

Jan Luba QC is a circuit judge.

Prison law: recent developments

Hamish Arnott and Simon Creighton report on the new policy regarding the secretary of state's representation at parole hearings and case law on his role in judicial review, transfers to open prison, video links and access to justice, category A reviews, and cases in the European Court of Human Rights.

Hamish Arnott

Simon Creighton

Parole

Secretary of state's representation at parole hearings

Although the secretary of state for justice is formally a party to proceedings before the Parole Board (see rule 2 of the Parole Board Rules 2016 SI No 1041 (PBR)), it has in recent years become increasingly rare for him to be represented at hearings. One of the outcomes of the *Worboys* judgment (see July/August 2018 *Legal Action* 31) has been the review of the circumstances in which the secretary of state will be represented. Although he was represented in that case, there was concern over his role, in particular the failure to ensure that relevant material was contained in the dossier provided to the board.

The new policy, *Use of secretary of state representatives in parole proceedings – criteria* (Ministry of Justice/HM Prison & Probation Service, 28 June 2018), now clarifies when the secretary of state will provide a representative in parole hearings, who will 'usually be an experienced probation practitioner' although counsel may be used when 'the case is likely to give rise to non-routine questions of law and/or counsel's particular expertise in inquisitorial questioning may be helpful'. Cases will be considered individually, though generally a representative will be used where one or more of the following criteria are met:

- The case is particularly complex due to the nature and volume of the evidence and/or the report writers have put forward conflicting views on the risks the prisoner presents.
- Prison and probation witnesses require preparation and support due to the nature of the case or approach taken by the offender's legal representatives.
- In cases where an offender has been recalled to custody and the offender is disputing that there was a proper and lawful basis for that recall. In such cases, the secretary of state's representative will explain why officials agreed formally to revoke the offender's licence.

Secretary of state's role in judicial review

- **R (Davenport) v Parole Board** [2018] EWHC 410 (Admin), 2 March 2018

In this case, a recalled mandatory lifer challenged the reasons given by the Parole Board for upholding the recall decision. The prisoner argued that the board's reasons were legally deficient as: they failed to analyse the evidence; there were no proper findings of fact in relation to the contested allegations; and there was no proper explanation as to how the findings made demonstrated a risk of serious harm.

The Parole Board, in line with its litigation strategy, adopted a neutral stance in the judicial review. At the hearing the judge, without further argument, accepted that the board's decision should be quashed absent any answer to the prisoner's complaints. However, the judge was concerned that the secretary of state for justice had not been included as an interested party in the proceedings. As the secretary of state was not represented at the parole hearing and given that the grounds review focused solely on the board's decision, the prisoner's legal representative had not thought it necessary to do so.

The judge noted that as the secretary of state is a party to parole hearings under the PBR (see above), Civil Procedure Rules Practice Direction 54A para 5.1 applied. This states: 'Where the claim for judicial review relates to proceedings in a court or tribunal, any other parties to those proceedings must be named in the claim form as interested parties ...'

The judge therefore directed that the claimant should amend the claim form and serve on the secretary of state, which would allow the secretary of state to indicate whether there was any intention to defend the claim, failing which an order would be made quashing the board's decision. In the event, the secretary of state indicated that he did not wish to defend the claim.

Comment: This case is a clear reminder that the secretary of state must always be included as an interested party in challenges to parole decisions. The fact that, in recent years, representation at hearings by the secretary of state has been exceptional (which may well change in light of the above policy) has led to a widespread practice of not doing so unless there was such representation or unless the claim also challenged a secretary of state's decision. A failure to do so in light of this decision might risk costs sanctions of any delay caused.

The case also demonstrates one of the problems with the board's litigation strategy where it indicates it will take a neutral stance. On any view, the deficiencies in the board's reasons in this case were clear. The grant of permission stated that in the decision 'there appears to be no analysis of the evidence ... [or] findings related to the issues' (see para 3 of judgment). The board was invited to review its stance following the grant of permission but refused to do so, which caused several months' further delay during which time the prisoner remained detained. Clearly, the board should review the merits of claims where it has adopted a neutral stance once permission has been granted so that appropriate cases can be conceded, and its litigation strategy should be amended accordingly.

Transfers to open prison

- **R (Hutt) v Parole Board** [2018] EWHC 141 (Admin), 17 January 2018

When considering whether to recommend that a prisoner serving an indeterminate sentence should be transferred to an open prison (such recommendations are not binding on the secretary of state for justice), the board is required to apply directions given by the secretary of state as to matters to take into account.* These directions focus primarily on risk to the public, but also require risk to be balanced against the potential benefits to the prisoner of transfer.

This is another in a long line of cases (see, for example, *R (Vigrass) v Parole Board* [2017] EWHC 3022 (Admin); March 2018 *Legal Action* 16) where the court has quashed the decision of the board for failing in its reasons to demonstrate that the balancing exercise has been carried out. Although the board in this case set out the test to be applied from the directions there was 'no identification by the panel, expressly or otherwise, of the specific factors which should have been taken into account in the separate balancing exercise which was to have been undertaken when considering a transfer to open conditions, as opposed to the test to be applied when considering whether to release the applicant on licence' (para 16).

Conditions

Video links and access to justice

- **R (Michael) v Governor of Whitemoor Prison**
  Administrative Court, unreported, 26 June 2018

The prisoner challenged the governor's decision that he should attend a hearing at the county court by video link, rather than in person. He was a life-sentenced prisoner held in a high security prison who was bringing proceedings against solicitors seeking documents required in his application for permission to appeal against conviction. He had previously resisted a strike-out application where he appeared by video link.

The judge held that the decision did not breach the prisoner's right to a fair trial under article 6 of the European Convention on Human Rights (ECHR). While article 6 did require a litigant to be able to present their case effectively, and for there to be equality of arms, the judge was satisfied that these requirements could be met by use of video link on the facts of this case.

The judge also rejected an argument that the Prison Service policy on production at court (Prison Service Order 4625) unlawfully fettered the governor's discretion by allowing security risk to outweigh the interests of justice (para 4.2). The judge considered that the policy was sufficiently flexible as it states that '[i]f it appears that the prisoner's case will suffer detriment if they do not attend, this would be a strong case for allowing the production' (para 2.2).

Category A reviews

- **R (Steele) v Secretary of State for Justice**
  [2018] EWHC 1072 (Admin), 26 March 2018

This was a challenge to a decision to refuse a category A prisoner an oral hearing during the course of his category A review. The claimant had received a life sentence in 1998 for murder with a tariff of 23 years and had been classified as a category A prisoner throughout his sentence. He maintained his innocence.

In 2016, the local advisory panel (LAP), which is composed of prison staff and chaired by a prison governor, considered his case and recommended that he should be downgraded. This recommendation was rejected by the defendant. At the next annual review in 2017, the LAP again recommended downgrading. The claimant had not completed work designed to address his offending behaviour and felt unable to complete work at his current prison as he felt unable to work with staff there. Nevertheless, the LAP noted that his offences had been committed 25 years ago and that his age, maturity and rejection of a pro-criminal lifestyle, combined with his exemplary prison conduct, led them to conclude that he could be safely downgraded to pursue this work in a category B prison.

This recommendation was also rejected. The director did not consider that prison behaviour was sufficient to demonstrate a significant reduction in risk against the background of a refusal to discuss or address the risk factors related to his serious offending. The test for downgrading was to be applied to the risk that would be posed if the prisoner was unlawfully at large and not in a lower security prison and this test had not been met.

The claimant relied on the guidance in Prison Service Instruction (PSI) 08/2013, which addresses the circumstances in which oral hearings might be appropriate. He contended that four of the relevant criteria had been met in his case:

(1) there was a factual dispute about his willingness and ability to attend relevant offending behaviour courses;
(2) there was a dispute in respect of expert opinion insofar as the LAP had relied on and endorsed the view of expert psychologists;
(3) he had been a category A prisoner for more than 20 years and was now 74 years old; and
(4) the case had reached an impasse.

The judgment rejected the contention that there was a factual dispute and considered that the question of whether there has been a change in attitudes is a matter of assessment rather than fact. On the question of a dispute on the expert opinion, although it was accepted that the LAP is an expert body, the judgment noted that the psychological opinions were not specifically referred to in the 2017 decision and that a disagreement between the LAP and the defendant did not in itself constitute a dispute between experts.

Turning to the question of how the length of time that had been served was dealt with, the judgment expressed concern that the decision-maker had wrongly interpreted the policy to require there to be some other compelling reason to hold an oral hearing other than just the length of time served. However, taken in the round, the judge was unconvinced that an oral hearing would actually add anything to the decision-making process.

On the final point concerning impasse, it was accepted that the case had reached an impasse due to the claimant's position in relation to the conviction and the proposals for work that were available to him. However, the way to resolve that impasse was apparent without the need to convene an oral hearing.

Comment: The judgment is coherent but is, in some aspects, a triumph of form over substance. The circumstances in which an oral hearing might be necessary, as set out in PSI 08/2013, were all met in this case and yet there was a retreat from the broader understanding of the benefits of an oral hearing as an aspect of the legitimacy of the decision-making process into a technical analysis of what might be uncovered through an oral hearing. This approach has a degree of circularity, particularly in circumstances where the critical issue is very often the individual's attitudes and opinions, which are not always capable of being accurately distilled into a written report. The approach to the impasse issue is slightly more troubling as the answer provided in the judgment is for the prisoner to undertake offending behaviour work even though the impasse arises from the maintenance of innocence.

Recent cases in the European Court of Human Rights

Article 5 and parole

- **Etute v Luxembourg**
  App No 18233/16, 30 January 2018

This is potentially a very important case concerning the applicability of article 5(4) to determinate parole decisions which, unfortunately, is only published in French (although one of the concurring judgments is written in English). The case concerned a prisoner who had had the benefit of conditional release under article 100 of the Luxembourg Criminal Code. This article confers a discretionary power of release during the course of a determinate sentence. If the conditional release is later revoked, the individual is recalled to prison and restarts their custodial term from the point of release (ie, the time spent in the community under supervision does not count towards the period to serve back in custody).

The court's approach was that the decision to recall the prisoner to custody was a new event made on the basis of new factual developments:

The applicant's re-incarceration with effect from 4 November 2015, for the purpose of serving the portion of sentence remaining at the time when he was released subject to conditions, depended on a new decision, namely that to cancel the conditional release. This decision specifically arose from the observation that the applicant was no longer respecting the conditions attached to his conditional release, namely not to commit a new offence and to stop frequenting places where drugs were present ... In these circumstances, the court considers that the question concerning respect of the conditions imposed on the applicant under the conditional release was crucial in determining the legality of his detention from 4 November 2015. ***The court considers that this is a new question regarding the re-incarceration following cancellation of the conditional release.*** *The internal court order should therefore allow the applicant access to a judicial appeal that satisfies the requirements of article 5(4) of the convention to resolve this question* (para 33, emphasis added).

The decision is important as it appears to conflict directly with previous decisions that have held that for prisoners serving determinate sentences, release on licence and recall do not engage article 5(4) as the original criminal sentence authorises detention until the sentence expiry date. As the original sentencing process satisfies the requirements of article 5(1), no new issues under article 5 can arise during the currency of that sentence (see, for example: *Brown v UK* App No 968/04, 26 October 2004, unreported; and *Ganusauskas v Lithuania* App No 47922/99, 7 September 1999; [1999] Prison LR 124).

Although the judgment does not address this apparent conflict, it is dealt with at some length by two concurring judgments. The first, from Judge Pinto de Albuquerque, expressly doubts the correctness of *Brown*. The second, from Judge Kūris, also points to the divergence between *Etute* and *Brown* and goes on to note the weight that was attached to *Brown* by the Supreme Court in *R (Whiston) v Secretary of State for Justice* [2014] UKSC 39; [2015] AC 176. In *Whiston*, the Supreme Court had commented that article 5(4) does not apply to the recall of prisoners serving determinate sentences, albeit that in a dissenting judgment Lady Hale was of the view that the observations on determinate prison sentences should be treated as obiter as the case concerned home detention curfew.

Comment: The judgment comes at an interesting time in the debate over

article 5(4) and determinate sentences. The domestic courts have held that *Whiston* is binding authority for the proposition that article 5(4) has no application to determinate prison sentences. As noted above, *Whiston* had relied heavily on earlier decisions of the European Court of Human Rights, noting in particular that *Brown* had not even crossed the admissibility threshold (see *R (Youngsam) v Parole Board* [2017] EWHC 729 (Admin); September 2017 *Legal Action* 19, a decision which is due to be considered by the Court of Appeal in December 2018). However, the problem of identifying a clear principle that can be cross-applied from one jurisdiction to another remains.

Prison conditions

- **Sokolov v Russia**
  App No 63392/09,
  28 November 2017

The applicant was serving a prison sentence of five years and was held in a prison 2,400 km away from his family. Shortly after his conviction his mother died and five months later his father also died. He was refused permission to attend either funeral by reference to the Russian law that made no provision either for a leave of absence for a remand prisoner or for attendance at a funeral held outside the region where the convicted prisoner was detained.

The court held that the Russian authorities did not give any consideration to the applicant's individual situation, in particular the fact that he lost both of his parents in quick succession. The court considered that 'the formal application of [these] legislative provisions, combined with a lack of genuine desire to find another solution enabling the applicant to attend his mother's and father's funerals, was incompatible with the state's duty to carry out an individualised evaluation of his particular situation and to demonstrate that the restriction on his right to attend a relative's funeral was "necessary in a democratic society"' (para 48). Although the judgment recognises that restrictions on attending funerals do not in themselves breach article 8, on the particular facts of this case there had been a violation of article 8.

In a further finding, it was held that placing a convicted prisoner in a remote penal facility, given the long distances involved and the realities of the Russian transport system, affected his ability to maintain contacts with his close family and amounted to an interference with his right to respect for family life and so also amounted to a breach of article 8. The applicant also succeeded in further complaints concerning his pre-trial detention, including being held in a metal cage during that period.

- **Peňaranda Soto v Malta**
  App No 16680/14,
  19 December 2017

In this judgment, the court reiterated the importance of confidential access to the court and other ECHR organs. Even though letters to lawyers may be opened in circumstances where there are concerns about illicit enclosures and where appropriate safeguards are in place, there is no such discretion in respect of the court. On the facts of this case, it was clear that some letters had been opened and this breached article 34 of the ECHR. The seriousness with which the court viewed this breach was reflected in an award of €3,000 compensation (even though the substantive complaint about an alleged violation of article 3 was not upheld).

* The most recent version of these directions is at: www.gov.uk/government/publications/secretary-of-states-directions-to-the-parole-board-april-2015.

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Mental health: focus

Joanna Dean, Stephen Heath and Michael Henson-Webb examine Mind's research conducted in light of the independent review of the Mental Health Act 1983 and its interim report.

Joanna Dean

Stephen Heath

Michael Henson-Webb

In 2017, the government commissioned Professor Sir Simon Wessely to carry out an independent review of the Mental Health Act (MHA) 1983. The review will explore how the legislation is currently used and its impact on service users, families and staff, and make recommendations for improving the legislation and related practices.

Some of the things the review is looking at (see *Terms of reference – independent review of the Mental Health Act 1983*, 4 October 2017) are:

- rising rates of detention under the Act;
- the disproportionate number of people from black, Asian or minority ethnic (BAME) communities detained under the Act;
- the balance of safeguards available to patients, such as tribunals, second opinions, and requirements for consent; and
- the effectiveness of community treatment orders (CTOs) and the difficulties in getting discharged.

This article looks at the review's interim report (1 May 2018) in light of Mind's engagement and considers some of the recommendations that we would like to see in the final report. Unless otherwise specified, page numbers refer to the interim report.

Mind's engagement

We are here to provide advice and support to anyone experiencing a mental health problem and to campaign to improve mental health services, raise awareness and promote understanding. This calls for a deep understanding of the needs and experiences of people with mental health problems, which comes from involving people with lived experience in our work.

Our work on the review has been no different in that regard, and we have appointed a steering group of six people with varying experiences of compulsion under the MHA 1983, and understanding of BAME communities, to guide our engagement. We have chosen to focus heavily on the experiences of people from BAME backgrounds. We have done this, first, because one of the review's

terms of reference is to focus on 'the disproportionate number of people from black and minority ethnicities detained under the Act', and, second, because the disparity of outcomes under the MHA 1983 for certain communities has been a troubling and intractable issue for too long. We want to make sure the review is bold and positive in how it tackles these issues to ensure the mental health system functions equally well for all communities.

So far, under the guidance of our steering group, we have held focus groups and workshops around the country. We have also held telephone interviews with patients who have experience of being detained. At the time of writing, we are still examining what people are telling us, but some themes are emerging.

Services

The terms of reference to the review acknowledge that '[s]ome of the solutions are likely to lie in practice rather than the legislation itself. The review should consider practice-based solutions wherever possible'. It will come as no surprise to most people that we are hearing loud and clear that mental health services are either sub-standard or, in many cases, non-existent.

A clear emerging theme is that the early provision of good-quality mental health services in the community is vital to address the rising detention rates under the MHA 1983. But what we are hearing over and over again is that people are having to get to the point of crisis to access any services. One service user of a homelessness project in an English coastal town told us: 'You need earlier interventions. You have to get to the point when you snap, or they see you snap, and then they have to make a major decision whether to section you.'

We have also heard of people not being able to access services when they have felt themselves clearly in desperate circumstances. One man told us: 'What about when I self-harmed, slit my throat and was not sectioned? You can't access services. You ask to be sectioned, but they just let you go. When I cut my throat the mental health team came out but they just let me go.'

Some people have told us of massive delays in accessing services, even at times when they have been very unwell. Others have made the obvious point that mental health crisis is not something that restricts itself to office hours and that there should be more out-of-hours service provision. As one individual put it: 'It feels like there is an on-and-off switch to mental health care.'

Many people from BAME backgrounds told us they simply did not trust the mental health system to provide for their needs and felt misunderstood by mental health professionals. They felt the system was not framed in a way that fitted with people's conceptions of emotional or spiritual well-being, and it was not provided by or in consultation with the BAME communities or in the right locations.

There were criticisms of the physical environment in which services are delivered, where buildings are in a poor state of repair and unhygienic. There was also a fair amount of criticism for some staff. This ranged from the observation that facilities were obviously understaffed, with the knock-on effect on the ability of staff to deliver an adequate service, to allegations of incompetence, provocation, intimidation and racism. A number of people highlighted the need for adequate staff training, particularly in equality issues, and for more BAME staff in higher positions.

There is clearly a serious issue about the range of mental health care that is available and information about how to access it. As observed, there is an absence of culturally appropriate provision for people from BAME communities. People particularly spoke of the fact that they could not access talking therapies or had to wait lengthy periods for them. By far the most common issue was over-reliance on medication. People felt this was the default response to serious mental distress. 'Don't just throw tablets down people's throats just to shut them up, you know what I mean, find out what is wrong and help them basically.' This was especially so for the African-Caribbean people we spoke to, who felt that there appeared to be many more African-Caribbean men who were overmedicated in psychiatric wards.

Advocacy

Our engagement has revealed very strong support for advocacy. People, on the whole, were grateful for the high level of support they received from advocates and valued the fact that they were independent from the hospitals in which people were detained. However, a number of people told us they would welcome that support before sectioning and many had difficulty accessing advocates even when they were entitled to them. People from BAME backgrounds said they would welcome culturally appropriate advocacy services. Many would also welcome the involvement of their family or carers at an earlier stage and at the point of sectioning (indeed, advocacy draws strong support from whoever we speak to).

Sectioning

Sectioning is often experienced as a highly stigmatising and traumatising intervention. As suggested earlier, there was an overwhelming view that early, accessible, good-quality and culturally appropriate mental health services would generally obviate the need for sectioning. If there is to be compulsory detention, it should be very much a last resort.

We spoke to some people who felt that detention under the MHA 1983 should not be predicated on a 'mental disorder' (s1). A person's diagnosis was often a point of contention, fraught with cultural misunderstandings about how individuals from different communities manifest trauma. Another difficulty highlighted in our engagement was that there is no realistic way to challenge a diagnosis and some suggested that this might be a matter that a mental health tribunal should be able to consider. There was a feeling that a person's mental health needs should be the starting point for consideration of intervention, rather than mental disorder, and that mental health legislation should be rights-based.

Our engagement also revealed concern that the current 'protection of other persons' element in the criteria for detention (MHA 1983 ss2(2)(b) and 3(2)(c)) opens the door to unconscious (and perhaps even conscious) bias against some communities. African-Caribbean men, especially, are often perceived as violent and aggressive, and this perception may account for their disproportionately high detention rates and play out throughout their MHA 1983 journey (*Mental Health Act statistics, annual figures: 2016–17, experimental statistics*, NHS Digital, 10 October 2017). Perhaps this is also behind the feeling among people from BAME communities that sectioning can be a humiliating process, especially when accompanied by a heavy-handed police presence.

In-patient treatment

This overlaps with the observations about services more generally, but people had little positive to say about their hospital treatment under section. African-Caribbean men in particular felt that hospitals are little more than containment centres where they are controlled by medication until they are discharged (disproportionately onto CTOs – see below) with inadequate support. Many people did not find hospital a therapeutic environment. They felt staff view it as easier to manage patients by medication rather than to provide treatment and person-centred therapy. Some bluntly told us that hospital is simply not conducive to recovery.

Those we spoke to would welcome greater involvement by advocates, family and carers. There was support for people being able to make advance decisions to set out the sorts of treatments they would and/or would not want if they became unwell.

Community treatment orders

People had very negative experiences of CTOs. Black or black British people are nine times more likely than white people to be made the subject of CTOs (*Mental Health Act statistics, annual figures 2016/17: data tables*, table 3c), and the people we spoke to clearly felt that there was discrimination involved here – the numbers speak for themselves. We were told that being on a CTO was like being 'between a rock and a hard place' and 'only a little better than hospital'. African-Caribbean people felt they were not trusted with their medication and the CTO regime was experienced as coercive, intrusive and often hugely unsupportive. One person told us of the embarrassment of having numerous health workers attending their home, and of having to take medication in front of staff. People we spoke to welcomed the idea of being able to challenge the conditions of a CTO in a tribunal.

Discharge

Many people we spoke to told us they were unsupported on discharge from section. The journey into hospital, experienced by many as receiving no support in the community, crisis and then being subject to coercive compulsory powers of the MHA 1983, was mirrored by the discharge. 'You need more intensive support when you come out of hospital. To go from all that, then you fall off a cliff and you're all on your own.'

Care plans were described by some as not joined up, with no communication between different local services, and by one person as 'a complete joke'. Genuine co-production in the making of care plans, with the input and support of family and carers, was welcomed by the people we spoke to.

Mind's view of the interim report

Before detention

Addressing rising numbers of detention under the MHA 1983
The report recognises that there are numerous reasons for the rise in the number of people in detention, and that changing the law will not, by itself, reduce that number.

The overwhelming view from our engagement was that earlier help can avoid detention and that racist and stereotyped judgements around risk and diagnosis have led to oppressive use of the MHA 1983. We welcome the review's attention to interventions such as joint crisis plans, crisis resolution teams, etc, that could reduce the use of the MHA 1983. We would like to see a well-resourced and well-functioning acute and crisis pathway that is sensitive to the needs of, and is equally accessible to, people from BAME communities and includes a range of good-quality mental health services in the community. However, it is also important to reduce the incidence of crises, which will involve resourcing wider community mental health services and earlier support for people's resilience and well-being.

Mind's Birmingham-based Up My Street programme and its evaluation (Lorraine Khan et al, *Against the odds: evaluation of the Mind Birmingham Up My Street programme*, Centre for Mental Health, 5 July 2017) shows the importance of promoting resilience and well-being among young African-Caribbean men and how this can be approached. The National Institute for Health and Care Excellence's recently published quality standard *Promoting health and preventing premature mortality in black, Asian and other minority ethnic groups* (QS167, May 2018) incorporates BAME people's involvement in the design of health and well-being programmes, their representation in peer and lay roles, and their access to mental health services in a range of community settings.

There needs to be a sufficient level of mental health provision, of sufficient quality, to meet all communities' needs. This will require national standards and a national commitment to resourcing the services. The outcomes of the *Five year forward view for mental health* (NHS England, February 2016) seek to deliver better access to services, a greater focus on prevention and early intervention, and increased choice. Implementation of its recommendations will be critical.

The new mental health strategy post-2021 should prioritise prevention, treatment and support, recovery and equality. It is crucial that it takes a 'whole person' approach that recognises societal factors and does not just focus on the diagnosis. Alternative, evidence-based, non-clinical interventions should be mainstreamed and build on the success of collaborative models where the statutory and voluntary sectors work together as partners.* Inequalities need to be seriously addressed, including the recognition of institutional and structural barriers to equality.

At the same time, there need to be individual, enforceable rights to treatment and care. People should have this entitlement anyway, but it can also be seen as a reciprocal duty on the part of the state: if the state is taking away someone's liberty, there should be a duty on it to provide the services a person needs to avoid detention in the first place.

Therefore, we would like to see rights and duties to assessment and/or services, to urgent/emergency response, to co-produce and have meaningful involvement in treatment and care planning, as well as to the provision of appropriate information and advocacy to make these rights effective for BAME communities and other marginalised groups.

This would entail proper resourcing of public mental health that includes BAME-specific and -inclusive programmes, as well as national clarity, agreement and commitment as to what this would require. National guidance and support for commissioners and providers should be provided to enable them to meet everyone's needs, including those in BAME communities. Such guidance could cover:

- what people should expect from community mental health services;
- what people should expect from an acute and crisis mental health care pathway;
- commissioning from specialist and community organisations including BAME organisations;
- cultural relevance of services;
- competence of staff;
- workforce diversity, especially at more senior levels; and
- advocacy, including from cultural peers.

Decision to detain under the MHA 1983, and renewals
The purpose of state intervention should be to meet a person's mental health needs. All decisions about mental health care and treatment should, as far as possible in the circumstances, be made by that person or based on the best possible understanding of their wishes.

The current Eurocentric system is inherently racist and damages, rather than supports, some BAME communities. Both the diagnostic criteria and the process of diagnosis allow for cultural misunderstandings and the perpetuation of stereotypes, and are thus detrimental to BAME communities.

Basing the MHA 1983 on mental disorder is discriminatory and not compliant with the UN Convention on the Rights of Persons with Disabilities because it makes disability the basis for forced placement and treatment. We recommend that the Act be based on mental health needs rather than disorder, which would enable a focus on a therapeutic, supportive purpose rather than the current medical model.

There also needs to be increased diversity in services to ensure that staffing reflects our society, along with proper training in relation to unconscious (and conscious) bias, and culturally appropriate advocacy should be available before key decisions are made. These, along with greater patient involvement in decision-making, such as joint crisis plans and advance statements, and family involvement (with consent), may prevent a trajectory of unnecessary compulsion.

Police role

The initial involvement of police is sometimes unavoidable during crises, but it often indicates shortcomings in mental health services. The review recognises that 'interactions with the police can be upsetting and stigmatising, and at the very least not therapeutic. This is particularly the case for certain BAME communities, such as African and Caribbean individuals' (page 25).

We believe people with mental health problems should, where possible, be treated by health professionals rather than managed by police. The involvement of police should be reduced and this objective should be implemented and monitored. Furthermore, police cells should never be used as places of safety. The Crisis Care Concordat (18 February 2014) should be built upon to incorporate this principle and crisis responses such as street triage extended.

We want to see the Mental Health Units (Use of Force) Bill receive royal assent. We hope it will improve transparency by collating better data and highlighting problem areas, and will reduce the use of force (including coercion) in mental health hospitals by ensuring police wear body cameras when called to mental health settings.

We also support the implementation of the recommendations in relation to healthcare from Dame Angiolini DBE QC's *Report of the independent review of deaths and serious incidents in police custody* (Home Office, 30 October 2017).

During detention

Consent to treatment
The review will consider whether mental capacity should play a role in detention and/or treatment under the MHA 1983 but will not be recommending an immediate fusion of that Act and the Mental Capacity Act (MCA) 2005 'not least because this would take many years to design' (page 28). We have written previously about the potential benefits of having a system of involuntary treatment only for those who lack the mental capacity to make that decision (May 2017 *Legal Action* 35), including better parity between physical and mental health, better compliance with international human rights standards and tackling stigma towards those with mental health problems. The review rightly points out that some people who are treated involuntarily later value the intervention; we also heard these views.

However, there are still many questions to answer. What does mental capacity mean in the psychiatric context? Who would not be covered under a capacity model? How could these two Acts be integrated? This will certainly take time. The unified Mental Capacity Act in Northern Ireland is not yet in force over 10 years after its recommendation in the Bamford Review 2007. At the very least, the review needs to make specific recommendations to ensure the necessary work is undertaken: a loose statement that this may be a future option for reform will get lost and will not take us any further forward on these fundamental issues.

In the meantime, there are ways to engrain questions of capacity within the MHA 1983 so that we at least have an appreciation of the importance of mental capacity and develop a better understanding of the people detained under that Act who do lack capacity regarding treatment decisions. With that understanding, we can then start to consider the consequences of capacity-based reform.

Interface between the MHA 1983 and the MCA 2005

With fusion of these two Acts off the table for the foreseeable future, we need to get to grips with their overlap. A person receiving treatment for their mental health in hospital who lacks the capacity to consent to their admission can potentially be detained under either Act. The review will need to look at where to draw the line. One solution could be to have the MCA 2005 cover all those who lack capacity and the MHA 1983 cover capacitous refusal. This would provide a more principled distinction than whether or not the patient objects, as is largely determinative at present, and would incorporate the consideration of capacity into mental health services. However, as the Liberty Protection Safeguards (the Deprivation of Liberty Safeguards replacement) are still in embryonic form, it is very difficult to say at this stage which Act better serves patients. An analysis of the pros and cons of each is outside the scope of this article, but we can say that there are marked differences between the two regimes that are difficult to justify given their significant overlap.

Autonomy

Moving away from questions of capacity, the review could do much to ensure that views of patients are better taken into account when making a variety of decisions under the MHA 1983. If we look to the MCA 2005, we get a statutory framework for substitute decision-making that applies in a wide range of decisions. It tells us what determines the decision – best interests – and a range of factors that must be taken into account in determining those best interests. It requires us to take into account the views of the person in question and consult with other relevant parties. It also tells us what we can do if there is a disagreement over best interests.

Compare this with a decision under the MHA 1983 on, say, whether or not a patient should have leave to their family home. We know who has the power to make that decision but almost nothing about how it is made or what factors are taken into account. We presume that the patient and others will be consulted, but there is no specific duty to do so. And if the patient doesn't like the decision, they are going to struggle to get a judicial review off the ground.

The review could therefore recommend a system that provides patients with far more transparency, greater involvement and effective means to challenge decisions that can be incredibly important to them.

Procedural safeguards

We have written previously on options for reform of the tribunal (March 2018 *Legal Action* 39). We recommended that the powers of the tribunal be extended so that patients are able to appeal against matters other than their detention, such as treatment, leave and the hospital in which they are detained. We are pleased that the review will be considering '[w]hether service users should be able to appeal to the tribunal against compulsory treatment decisions'. We urge the review to go further and consider other aspects of detention. In particular, the review should look at the Scottish model, whereby the tribunal considers the patient's treatment plan as a whole and particular matters within it (see the Mental Health (Care and Treatment) (Scotland) Act 2003). Patients are able to challenge individual parts of their treatment plan. This would be a huge step in empowering patients.

The review notes the overlap in the discharge functions of the tribunal and hospital managers, and asks whether the latter is necessary. We have heard suggestions that the managers very rarely discharge and, as a lay panel, do not provide much of a safeguard for patients. We suggest there is insufficient evidence on the potential importance of this appeal mechanism to patients. The discharge rate of the tribunal is around 10 per cent (*Monitoring the Mental Health Act in 2016/17*, Care Quality Commission (CQC), July 2018, page 35, figure 12), so it would not take many discharges by managers for this to be a significant mechanism. We also do not know what other benefits patients derive from these hearings. Anecdotally, we have been told that they can provide a useful forum to challenge a patient's care and increase momentum towards discharge. Without more understanding of the role that hospital managers play, it would seem premature to remove these appeals as an avenue for discharge.

Leaving hospital

Community treatment orders

We are pleased that the review is 'not persuaded that CTOs should remain in their current form' (page 36). Research has shown that they do not achieve their aim of reducing the risk of readmission (Professor Tom Burns DSc et al, 'Community treatment orders for patients with psychosis (OCTET): a randomised controlled trial', *The Lancet*, vol 381, issue 9878, 11 May 2013, pages 1627–1633) and our engagement has shown that they are perceived as coercive and intrusive to those subject to them. We are not persuaded that they should remain in any form. Other powers exist: MHA 1983 s17 can be used for short-term testing in the community where necessary, subject to regular reviews, and the MCA 2005 exists to authorise long-term arrangements for those who lack the capacity to consent to them.

We would urge the review to be bold on this. There may be niggling doubts that while CTOs may be overused, they are necessary for just the right patient. It would certainly be possible to review the criteria for their use, and the power of recall, or set a maximum duration, but if the tool for compulsion in the community exists, given the increasing risk aversion that the review has noted, we will inevitably revert to the 'better safe than sorry' approach that has led to the current levels of CTO usage.

Care planning

Good care planning is integral to improving people's experience of detention and aftercare. Detention should not just be about ensuring that people take medication; it should also be a part of meeting their needs holistically when all else has failed. It is interesting how differently we approach social care. Under the Care Act (CA) 2014, you will have an assessment of your needs and the local authority will agree with you, in so far as is possible, how each of those needs will be met. What we hear too much of with regard to the MHA 1983 is that once you're in, you're in, and you will get what you're given.

The CQC's *Monitoring the Mental Health Act* regularly reports on poor care planning, and in its latest report (2016/17) stresses that things are not getting better: consideration of patients' views is down; patient involvement is down; and consideration of patients' particular needs is down (or, at least, that's what the evidence provided to it suggests).

We suggest that a statutory framework for care planning would help, both during and after detention, and perhaps beforehand. This could unite the various care planning tools and frameworks under which those in receipt of mental health services often fall. It could provide a framework into which more regard for the patient's wishes and feeling could be put. It could tie into an extension of tribunal powers so that the tribunal can make decisions on important matters other than discharge.

Aftercare

We are pleased that the review agrees that 'a general right to aftercare must continue' (page 37). The right support on discharge is vital in keeping people well and reducing the need for readmission to hospital. But we know that MHA 1983 s117 doesn't work in practice for too many, including those who told us they left hospital with no support at all.

We also hear about difficulties with aftercare through our legal helpline. The most common issue is confusion: people frequently do not know if they are entitled to aftercare or whether the support they are receiving is provided under s117. This is often because of the difficult overlaps between s117 and other forms of support, most notably social care under the CA 2014. We also know that the support people receive under s117 varies massively depending on where they live and the arrangement between their local clinical commissioning group and their local authority.

We believe there should be a clear process for assessment, planning and review of aftercare needs. Everyone should have a clear care plan that sets out what support they are receiving and the arrangements should that support need to change. The people affected should be far more involved in that process, instead of feeling as though they'll get what they're given. All of this could be included in a statutory process similar to that used in the CA 2014.

Conclusion

As previously identified, the MHA 1983 is in urgent need of reform. People from BAME communities have little confidence in mental health services; stereotyping, lack of cultural awareness and use of coercion create widespread mistrust. We believe people should be able to access mental health care, treatment and support when they need it, collaborate in their care and, as far as possible, make their own decisions about whether to accept the care and treatment offered. If the law reflected these principles, it would be a fundamentally different Act.

* For example, Cambridgeshire, Peterborough and South Lincolnshire Mind's Sanctuary (part of the crisis care pathway in Peterborough and Cambridgeshire), the Benefits for Better Mental Health service in Oxfordshire delivered by Oxfordshire Mind as part of a collaboration with the NHS trust and six local mental health organisations, and information and options, and recovery worker posts in Buckinghamshire to help people when they are leaving hospital.

Joanna Dean and Stephen Heath are lawyers at Mind. Michael Henson-Webb is Mind's head of legal.

Social security: recent developments

Simon Osborne examines recent developments in case law relating to claims and overpayments, decisions and appeals (including tribunals), human rights and EU law.

Simon Osborne

Claims and overpayments

In most cases, it is a basic condition of entitlement to benefit that a requirement regarding a national insurance number – the so-called 'NINO requirement' – is satisfied. As the following decision of the Upper Tribunal (UT) makes clear, that does not necessarily require that a number has actually been issued to the claimant, in circumstances where they have applied for one and provided sufficient information or evidence.

- **OM v HMRC**
  [2018] UKUT 50 (AAC),
  4 February 2018
  (CF/1556/2016)

In this child benefit case, the 'NINO requirement' was considered in the context of a situation where the claimant had applied for a NINO but had not been issued with one.

UTJ Mitchell held that the First-tier Tribunal (FTT) erred in holding that actually being allocated a NINO is the only way to satisfy the NINO requirement (for child benefit, located at Social Security Administration Act 1992 s13(1A)). That can also be satisfied (per s13(1B)(b) of the Act) by supplying evidence or information so as to allow a NINO to be allocated.

On the facts of the case, the judge was unwilling to hold, as invited to do so by HMRC, that the refusal of the claimant's application for a NINO meant in itself that he had not met that test. Where Social Security (Crediting and Treatment of Contributions, and National Insurance Numbers) Regulations 2001 SI No 769 reg 9 applies, if the evidential requirements there are *not* met, the applicant has not provided sufficient evidence or information. If, however, they *are* met, the applicant has provided sufficient evidence or information, unless the Department for Work and Pensions has disclosed additional criteria that must also be met for a NINO to be allocated.

Decisions and appeals

Separate decisions of the UT have raised concerns about the quality of official responses in appeals to the FTT. Regarding tax credits, the UT clearly considers that there is a general and persistent problem. Some complexities about the finality of FTT decisions in tax credit cases have been clarified. Concern about responses in personal independence payment (PIP) appeals are more specific and may lead to further authority.

- **HO v HMRC (TC)**
  [2018] UKUT 105 (AAC),
  16 March 2018
  (CTC/865/2016)

In this decision, UTJ Wright wrestled with a number of complex considerations regarding the effect of FTT decisions in tax credit cases and, in particular, the ability of HMRC to alter those decisions after the appeals.

Specifically at issue were provisions in the Tax Credits Act (TCA) 2002, in particular how the provision about appeals at s38 relates to HMRC powers to make various decisions under s18 (so-called 'final' decisions) and ss19–21 and 21A (various powers to conduct enquiries, make decisions on 'discovery', and change decisions for official error and on review). In essence, the judge concluded that existing authority on the superiority of FTT decisions (in particular *R(IB) 2/04*) applied equally to appeals under the TCA 2002. So, for example, a decision on an appeal against a decision under TCA 2002 s18 precludes HMRC from making another s18 decision. But tribunal decisions are capable of further and separate HMRC decisions if provided for by the TCA 2002, ie, under ss19, 20 and (arguably) 21.

The complexity in this case had been exacerbated by the poor quality of HMRC decision-making and submission to the FTT. UTJ Wright commented that the appeal 'reveals yet again the inadequacy of first instance decision-making conducted by HMRC under the Tax Credits Act 2002 and the inadequacy of HMRC's explanation for its decision-making in its decisions and appeal responses provided to the First-tier Tribunal. That has been the subject of commentary in, regrettably, too many Upper Tribunal decisions' (para 3).

- **LH v Secretary of State for Work and Pensions (PIP)**
  [2018] UKUT 57 (AAC),
  15 February 2018
  (CPIP/1261/2017)

This decision also features comment from the UT on the adequacy of official responses to the FTT, specifically responses from the work and pensions secretary in the context of appeals concerning PIP.

UTJ Rowland expressed concern about the practice, in some PIP appeals at least, of the response to the tribunal not setting out all the descriptors and points that may be scored (ie, by only including those in which points had already been awarded). In obiter comments, the judge said this raised concerns about observation of Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 SI No 2685 rr2 and 24(2)(e) (need for parties to be able to participate fully and for responses to state grounds for opposing the appeal).

In a clear warning shot across the bows, he considered it likely that in a future case, the UT will 'consider it necessary to rule on the adequacy of … responses in personal independence payment cases that do not inform appellants of the terms of descriptors that the secretary of state has found not to be satisfied and the points that might be scored in respect of them' (para 40).

Tribunals

The potential relevance of evidence not included in the appeal papers, and nature of the FTT's need to consider calling for such evidence, continues to lead to comment in the UT. The following decisions illustrate the margin for different approaches. Tribunals do need to attend to the facts as well as what is expressly submitted, and exercise their own judgement. However, the second of the decisions below gives renewed emphasis to the point that where a claimant is represented by an experienced representative, depending on the other facts, the absence of a request for an adjournment may well validate the tribunal's decision to proceed.

- **DL v Secretary of State for Work and Pensions**
  [2018] UKUT 94 (AAC),
  20 March 2018
  (CE/3887/2016)

The claimant had been on employment and support allowance (ESA) since 2009. In 2016, she failed a repeat work capability assessment. There was no reason to suppose that the claimant's condition had improved, but neither the claimant's representative nor the FTT called for a history of the adjudication of the claimant's ESA. The tribunal dismissed her appeal.

UTJ Ward allowed the claimant's further appeal and remitted the case to a fresh tribunal. The tribunal erred in failing to call for the 'missing' history and evidence of the case. The tribunal had not exercised its inquisitorial function. Also, the ESA in this case was a long-standing award and the claimant's condition did not appear to have changed much on the available evidence. Taking away someone's ESA after they had been on it for seven years, in the absence of (for example) obviously ameliorating treatment, was a significant step. Adequate explanation of this meant the tribunal needed to know the history and the relevant evidence behind it.

The judge rejected a submission from the work and pensions secretary that the tribunal had not erred by failing to call for the evidence from the history of the case. The work and pensions secretary relied on the decision in *JC v Secretary of State for Work and Pensions (ESA)* [2015] UKUT 706 (AAC), which held (at para 71) that it was not necessary to have the evidence of a claimant's previous assessment 'in each and every case', and the endorsement there of a requirement for there to have been an 'assertion' that there had been no change in the claimant's condition for the previous adjudication history to be called on.

But UTJ Ward said it would be wrong to judge whether there had been such an 'assertion' by 'abstract consideration of the semantics of the words used'

(para 12). In *FN v Secretary of State for Work and Pensions (ESA)* [2015] UKUT 670 (AAC); [2016] AACR 24; September 2016 *Legal Action* 19, the panel expressly contemplated (at para 102) whether the tribunal ought to have 'inferred for itself' that a submission of no change was made. It was a job for the tribunal, said UTJ Ward, 'to listen to and interpret what it is being told, orally and in writing. Context is very important' (para 12). Tribunals will understand that some conditions heal and others do not, and on the facts of this case the natural reading of the claimant's letter of appeal, with its reference to her accident in 2006 and continuing need for help, was indeed that her condition had not changed.

- **MH v Secretary of State for Work and Pensions (ESA)** [2018] UKUT 194 (AAC), 31 May 2018 (CSE/66/2018)

The claimant was held not to have limited capability for work, having scored zero points in the work capability assessment. She therefore was not entitled to ESA. The FTT dismissed her appeal. Although the claimant was awarded nine points in the mobilising descriptor, that was insufficient to result in her having limited capability for work. On appeal to the UT, the claimant argued that the tribunal erred in ignoring her award of PIP, which was at both components at the enhanced rate.

UTJ Poole QC refused the claimant's appeal. On the facts of the case, the tribunal had not erred in proceeding without considering the evidence of the PIP award. In *AG v Secretary of State for Work and Pensions (ESA)* [2017] UKUT 413 (AAC); April 2018 *Legal Action* 15, it had been noted that there was in general no reason why a tribunal could not rely on the absence of an adjournment request in order for further evidence to be obtained where the claimant had an experienced welfare benefits representative. In the present case, the claimant had such a representative, who made no request for an adjournment to get the PIP evidence, including when they were addressed at the start and end of the hearing by the tribunal, and despite the fact that the tribunal mentioned the PIP asking representatives if they had anything to say. Given that, the tribunal did not err in failing to adjourn.

Further, although the judge admitted that the PIP evidence 'might have had some relevance' (para 13), that did not mean the tribunal was unable to decide the case lawfully and fairly without obtaining it. The PIP evidence was just one type of potentially relevant further evidence. On the facts of the present case, the tribunal had a significant amount of medical and other evidence including previous medical reports. Overall, the judge considered that there was already sufficient evidence for the tribunal to support the facts it found and the conclusions it reached.

Human rights and equal treatment

The courts have made a number of recent decisions in this field. The availability of the argument of justification of indirect discrimination again features prominently, but it remains the case that claimants are not wholly unsuccessful. Challenges for claimants regarding the benefit cap and the two-child limit have been rejected, but are the subject of further appeal. Regarding universal credit (UC), the current lack of 'transitional protection' for certain severely disabled claimants who transfer to the benefit and find that they are worse off than on their previous benefit has been held unlawful. The work and pensions secretary is appealing but rule changes aimed at rectifying the problem are planned.

The issue of rights to retirement pension for male-to-female transsexual claimants has again featured, this time in a decision of the Court of Justice of the European Union (CJEU). The result is that pre-December 2014 requirements for an existing marriage to be annulled for such a claimant to have full rights as a woman were unlawful.

More widely, in what some at least will consider a perplexing development, the Court of Appeal has held that neither FTTs nor UTs have the power to apply a remedy for human rights breaches, even where that is by virtue only of secondary legislation.

Benefit cap

- **R (DA and others) v Secretary of State for Work and Pensions** [2018] EWCA Civ 504, 15 March 2018

This decision of the Court of Appeal is on the work and pensions secretary's appeal against the decision of the High Court in this case ([2017] EWHC 1446 (Admin); September 2017 *Legal Action* 22). The High Court had found unlawful discrimination against lone parents with children aged under two. By a majority decision, the Court of Appeal allowed the work and pensions secretary's appeal, holding that the cap did not unlawfully discriminate against such claimants.

Giving the lead decision for the majority, Sir Patrick Elias considered (with particular reference to statistics on the effect of the cap) that the problems encountered by lone parents with children under two were not 'sufficiently proportionately disabling … to make it unjust not to treat them differently' (para 135). As a consequence, there was no unlawful discrimination. Considering the position of the children themselves did not substantively alter that. In the dissenting judgment, McCombe LJ considered that the High Court had been entitled to find that there was an unjustified failure to treat lone parents with young children differently, and considered the witness evidence about the different position of such lone parents of equal significance with the statistical evidence.

Note: This decision is the subject of a further appeal to the Supreme Court (UKSC 2018/0061), where it was heard alongside a challenge (brought by CPAG) regarding all lone parents (*R (DS and others) v Secretary of State for Work and Pensions* UKSC 2018/0074) in July 2018.

Two-child limit

With certain exceptions, no child element is included in child tax credit (CTC) regarding a third or subsequent child born on or after 6 April 2017. A similar rule, regarding any third or subsequent child whenever they were born but with some transitional protection, applies in UC. The rules were the subject of a challenge by judicial review in the following CTC case.

- **SC and others v Secretary of State for Work and Pensions and others** [2018] EWHC 864 (Admin), 20 April 2018

The claimants were three families in different circumstances but all in receipt of CTC with a third or subsequent child born on or after 6 April 2017 for whom no child element of CTC was payable. They argued that the limit was in breach of the European Convention on Human Rights (ECHR). This was on the basis that: (1) the legislation directly breached articles 8 (right to family life) and 12 (right to marry and found a family; (2) the legislation breached article 14 (prohibition of discrimination) when read with those articles or article 9 (right to freedom of thought, conscience and religion) and article 1 of Protocol No 1 (right to possessions).

Ouseley J dismissed all of those arguments. The judge could see no ECHR authority that held that article 8 was directly engaged by the absence of any particular social security benefit or level of it. He accepted the government's description of the legislation as being to ensure that welfare spending was sustainable, and fair to the taxpayer while protecting the most vulnerable. There was little or no evidence of direct interference with family planning. Neither article 8 nor article 12 were engaged directly.

Regarding article 14 (discrimination) and article 1 of Protocol No 1, the judge did not consider that an expectation of an increase in CTC for a third or subsequent child was enough to constitute a 'possession'. Neither was there sufficient link with article 12 and the right to found a family. Regarding article 8 and discrimination, the two-child limit did not come within the ambit of article 8. The judge considered that there was no removal of an existing benefit with a direct and real effect on family life so as to establish a sufficient link with article 8.

Further, there was no basis for ignoring the other state support for third or subsequent children that continued unaffected. In any case, the judge considered the undoubted indirect discrimination against women to be justified as, given the aims of the legislation, it was not 'manifestly without reasonable foundation'. The judge did not consider that 'children with multiple siblings' constituted a 'status' for article 14 purposes. Even if it were such a status, the differential treatment against this group was justified, for the same reasons as in relation to women. Further, although the UN Convention on the Rights of the Child might be a relevant interpretative aid regarding alleged discrimination against children, it was plain that the best interests of children overall had been a primary consideration, and so regard to that convention did not reveal unjustified discrimination.

The judge did consider that, in the rules about exception to the two-child limit for non-parental caring arrangements, there was an unlawful irrationality in the requirement, in effect, for the cared-for child to be the third or subsequent child. There was no rational justification for a parent's decision as to whether to have a child of their own to be affected by the separate decision of whether or not they should care for someone else's child. The rules determining the ordering of the children regarding this exception were therefore unlawful.

Note: The claimants have been granted permission for a further appeal to the Court of Appeal. The government has announced that it is not appealing the finding about the rule on ordering children, and is to amend the rules so as to apply the finding to the exceptions about both non-parental carers and adoptive parents.

Universal credit

Currently, claimants can transfer (or 'naturally migrate') to UC from their current benefit if they decide to claim UC. Typically, this follows a change in their circumstances in which they are effectively obliged to make such a claim. There is no transitional protection to the former level of benefit in such cases. That is due only to apply to a secretary of state-led, 'managed migration' process, due to begin in 2019.

- **R (TP and AR) v Secretary of State for Work and Pensions**
  [2018] EWHC 1474 (Admin),
  14 June 2018

The High Court held that, in the case of severely disabled claimants who were obliged to claim UC after moving house, the lack of transitional protection to the severe disability premium (SDP) (and enhanced disability premium (EDP)) in the former 'legacy' benefit was unlawful.

The claimants had both been in receipt of income-related ESA and housing benefit that included the SDP and EDP. When they moved to a new local authority housing area, their housing benefit ended and (since they had moved to a UC full service area) they were obliged to claim UC instead, so also terminating their income-related ESA. UC includes neither the SDP nor the EDP, and as there are no transitional protection rules in such 'natural migration' cases, the claimants were significantly worse off.

Lewis J held that in these circumstances, the lack of transitional protection was unlawful. The migration to UC of disabled claimants entitled to the SDP and EDP who move to another local authority housing area without (as the evidence showed) considering the need for any transitional protection was 'manifestly without reasonable foundation' (para 86). Further, although this unlawful discrimination was not simply on the basis of disability (as the severely disabled who moved within the same local authority area did not naturally migrate to UC), there was discrimination between the severely disabled who moved to a new local authority area (the judge considered these to constitute a 'status' for the purpose of the discrimination rule at ECHR article 14) and those that did not. Therefore, the judge issued a declaration of a breach of the claimants' human rights. It was now open to the work and pensions secretary to decide an appropriate remedy.

Note: The work and pensions secretary is appealing. But she has also announced that 'in order to support the transition for those individuals who live alone with substantial care needs and receive the [SDP], we are changing the system so that these claimants will not be moved to [UC] until they qualify for transitional protection' as well as an 'ongoing payment' to such claimants who had already migrated (House of Commons Written Statement HCWS745, 7 June 2018). Draft rules on transitional protection have now been issued, with finalised rules expected in autumn 2018.

In the meantime, a separate challenge in this field, regarding claimants who claimed UC following a decision (for example, about ESA) that was later shown to have been wrong, but who could not return to their former benefit, is before the courts (*R (TD, AD and IM) v Secretary of State for Work and Pensions* CO/590/2018).* No hearing date was available at the time of writing.

Retirement pensions and transsexuals

- **MB v Secretary of State for Work and Pensions**
  Case C-451/16,
  26 June 2018

This decision of the CJEU results from a referral by the UK Supreme Court of a challenge to the Court of Appeal decision in this case (*MB v Secretary of State for Work and Pensions* [2014] EWCA Civ 1112; March 2015 *Legal Action* 34). The CJEU held that rules that had, in effect, required that a transsexual person must have annulled their existing marriage before they could become entitled to a retirement pension at an age applicable to their acquired gender were unlawful (see Gender Recognition Act 2004).

The Court of Appeal had held that the requirement (in place until 10 December 2014) for a transsexual person to have annulled their marriage before they could acquire a full gender recognition certificate (GRC) resulted in a lawful decision that the claimant, who had not annulled her marriage, was not entitled to be treated as a woman for retirement pension purposes, and therefore could not acquire a pension at the age of 60. The claimant, a male-to-female transsexual who remained married to a woman, was therefore held to be not entitled to a pension at that age.

The CJEU held that was wrong under European law. European provisions on sex discrimination (in Council Directive 79/7/EEC) must be interpreted as precluding rules that required a transsexual person who had changed gender not only to fulfil 'physical, social and psychological criteria' but also to satisfy a condition of not being married to a person of their acquired gender in order to be entitled to a state retirement pension.

The court noted that EU member states, when exercising their competence regarding civil status and legal recognition of gender change, must comply with EU law, in particular with rules about non-discrimination. In the present case, the requirement for the claimant to have annulled her marriage before becoming entitled to a pension as a woman was in contrast, regarding someone who changed gender after marrying, with persons who had retained their birth gender and were married, and who could get a pension irrespective of their marital status. The court held that constituted direct (ie, unlawful) discrimination on grounds of sex, and was prohibited by Council Directive 79/7/EEC.

Note: The coming into force of relevant parts of the Marriage (Same Sex Couples) Act 2013, on 10 December 2014, meant that from that date marriage annulment was no longer required as a condition of entitlement to a full GRC.

Remedy for human rights breaches

The following decision now has a somewhat complex history, but in essence arises from a challenge to the application of the so-called 'bedroom tax' by adult housing benefit claimants unable to share a bedroom due to disability. The breach of their human rights has been established and is not in question. However, the work and pensions secretary has successfully challenged the fact that the UT went on to apply a remedy in the light of that breach. Arguably, that success somewhat confounds the finding of a human rights violation, and (at least regarding rules in secondary legislation) is hard to reconcile with the clear requirement to apply rules in line with human rights provisions.

- **Secretary of State for Work and Pensions v Carmichael and Sefton Council**
  [2018] EWCA Civ 548,
  20 March 2018

This decision of the Court of Appeal is on the work and pensions secretary's appeal against the UT's decision in *Secretary of State for Work and Pensions v Carmichael and Sefton BC (HB)* [2017] UKUT 174 (AAC); September 2017 *Legal Action* 22. The issue was whether a FTT or UT has the power to substitute its own remedy where it is established that there has been a violation of the claimant's human rights.

The UT had held that, in the case of secondary legislation, it had such a power. In this case, therefore, where the claimant's human rights had undoubtedly been breached by the 'bedroom tax' rules (regarding a couple unable to share a bedroom because of disability), the UT had ordered that his housing benefit be calculated without the reduction required. However, by a majority decision, the Court of Appeal allowed the work and pensions secretary's further appeal, holding that neither the FTT nor the UT had the power somehow to disapply the bedroom tax rules. All they could do was make a 'declaration' of a breach of human rights, so that the claimant was able to pursue a claim for damages in the courts. Giving the lead decision for the majority, Flaux LJ held that the UT had exceeded what was permissible and should have limited itself to making a declaration that the bedroom tax rules had violated the claimant's human rights. That remedy was sufficiently effective as Human Rights Act (HRA) 1998 s8 clearly envisaged that, and in the present case the claimant had in any case received discretionary housing payments.

In the dissenting judgment, Leggatt LJ considered there was a distinction between violations by primary legislation, which could indeed only be subject to a declaration, and (as here) violations by subordinate legislation (and in which the violation was not inherent in the primary legislation). In such cases, there was no power to make a declaration and 'no objection' to declining to give effect to the offending rule, something that was indeed required under HRA 1998 s6.

* See: www.cpag.org.uk/content/universal-credit-disability-and-transitional-protection for details.

Simon Osborne is a welfare rights worker at Child Poverty Action Group. This is the first of a two-part article, the second of which will be published in the October 2018 issue and will review case-law in means-tested and non-means-tested benefits (including right to reside) as well as tax credits.

Employment: update

Philip Tsamados summarises the latest policy and legislation, and cases on discrimination, practice and procedure, contractual rights, and unfair dismissal.

Philip Tsamados

Policy and legislation

Brexit

The government has published its white paper, *The future relationship between the United Kingdom and the European Union* (Cm 9593, Department for Exiting the European Union, July 2018) setting out its proposals on leaving the EU. Paras 121–123 deal with social and employment issues and reassuringly state that '[e]xisting workers' rights enjoyed under EU law will continue to be available in UK law on the day of withdrawal' and that, given the UK's strong record on employment protection and in the context of the UK's vision for its future relationship with the EU, 'the UK proposes that the UK and the EU commit to the non-regression of labour standards'.

Good Work Plan

The government has published *Good work: a response to the Taylor Review of modern working practices* (Department for Business, Energy and Industrial Strategy, February 2018), which, as the name indicates, is its response to *Good work: the Taylor Review of modern working practices*, published in July 2017 (see September 2017 *Legal Action* 39). The proposals do not go as far as those set out in the Taylor report and are, to varying degrees, somewhat woolly. In particular, there are no proposals to reform the law relating to employment status, which was a key element of the Taylor Review. Instead, the matter will be put out to consultation. There will also be consultations on other elements of the Taylor report: enforcement of employment rights recommendations; agency workers recommendations; and measures to increase transparency in the UK labour market.

Employment tribunal statistics

The Ministry of Justice has issued provisional employment tribunal statistics within the *Tribunals and gender recognition statistics quarterly: October to December 2017 (provisional)* (8 March 2018). These statistics show the continuing increase in the number of claims received by employment tribunals (ETs) during October to December 2017 after the abolition of fees on 26 July 2017 following the Supreme Court decision in *R (Unison) v Lord Chancellor* [2017] UKSC 51 (see September 2017 *Legal Action* 39). Single claim receipts, disposals and outstanding caseload all increased by 90 per cent, 21 per cent and 66 per cent respectively. Multiple claim receipts increased by 467 per cent,* disposals decreased by 55 per cent, and caseload outstanding increased by 27 per cent. There are also statistics relating to applications for refund of fees between 20 October 2017 (when the refund scheme was introduced; see March 2018 *Legal Action* 22 for more details) and 31 December 2017. During that period, 4,800 refund applications were received, of which 3,337 refund payments were made at a total value of £2,758,316.

Acas early conciliation statistics

The Advisory, Conciliation and Arbitration Service (Acas) has published statistics of the numbers of early conciliation notifications received during April 2017 to March 2018 (*Conciliation update: April 2017–March 2018*). These show that between April and July 2017, Acas received approximately 1,700 notifications per week, but following abolition of ET fees on 26 July 2017, this increased to approximately 2,400 per week between August 2017 and March 2018.

Payslips

The Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) Order 2018 SI No 147 comes into force on 6 April 2019. Under Employment Rights Act (ERA) 1996 s8, employers are obliged to provide employees with written itemised pay statements (ie, payslips) at or before the time of payment of wages. These pay statements must set out the gross pay and all deductions made from it. This order requires employers to provide additional information as to the number of hours that are being paid to those employees whose pay varies according to the number of hours worked. The intention behind it is that such employees can readily determine whether or not they have been paid correctly for the number of hours worked.

Discrimination

Disability

Perceived disability

Workers can be treated less favourably at work because of a wrong assumption, eg, that the worker is of a certain age, nationality or religion, or has a certain disability. This is referred to as perceived discrimination. Although the Equality Act (EA) 2010 does not explicitly say that discrimination by perception is included, it has always been thought to be so because of the definition of direct discrimination within s13(1):

A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Further, the *Employment: statutory code of practice* (Equality and Human Rights Commission, 4 September 2015) refers to perceived discrimination expressly at para 3.21 (page 50).

The law is largely untested and the following case is the first appellate decision to confirm that perceived discrimination is covered by s13.

- **Chief Constable of Norfolk v Coffey** UKEAT/0260/16/BA, 19 December 2017

Ms Coffey, a police constable with some hearing loss, was refused a transfer from Wiltshire to Norfolk Constabulary because the latter rejected her application. This was on the basis that her hearing was below the medical standard. However, her impairment was not sufficient to have a substantial adverse effect on her ability to carry out normal day-to-day activities.

Ms Coffey brought an ET claim for perceived disability discrimination. She put the claim as one of direct discrimination under EA 2010 s13. Her case was not that she had a disability, but that her hearing loss did not fall within the legal definition of disability (within EA 2010 s6) because it did not have, and was not likely to have, a substantial adverse effect on her ability to carry out day-to-day activities, including working activities. The discrimination by Norfolk Constabulary was that the chief inspector rejected her transfer because she perceived that Ms Coffey was a disabled person. The ET upheld her claim and Norfolk Constabulary appealed.

The Employment Appeal Tribunal (EAT) dismissed the appeal and found as follows:

- Section 13 is wide enough to encompass perceived discrimination in respect of not just the protected characteristic of disability, but all other protected characteristics. There was no reason to doubt that the Court of Justice of the EU would

recognise direct discrimination on the grounds of perceived disability. The answer will not depend on whether the putative discriminator A perceives B to be disabled as a matter of law, ie, A's knowledge of disability law. It will depend on whether A perceives B to have an impairment with the features that are set out in the legislation.
- Even the situation where the putative discriminator A knows that B has an impairment and does not consider that it presently has a substantial adverse effect, but wrongly perceives that it may well do so in the future, could fall within the ambit of the legislation.
- The difficulty for the respondent was that while the chief inspector denied in evidence that she thought Ms Coffey was disabled at the relevant time, her witness statement was explicable only on the basis that she thought Ms Coffey's condition could well have progressed to the extent that she would have to be placed on restricted duties; that risk was at the very least part of the reason why the chief inspector rejected her application for a transfer. The correct focus was not on her understanding of the law, which was incomplete, but on whether she perceived the claimant to have an impairment that had the features set out in the definition of disability. If Ms Coffey's condition were to have progressed to the extent that it required her to be placed on restricted duties, there would have been a substantial adverse effect on her day-to-day activities, having regard to the definition of disability. Hence, despite her protestation to the contrary, the chief inspector did perceive the claimant to be disabled.

Discrimination arising from disability

EA 2010 s15 defines discrimination arising from disability as follows:

(1) A person (A) discriminates against a disabled person (B) if –
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

In the following case, the Court of Appeal found that for discrimination arising from disability to occur, an employer does not require knowledge of the consequences of disability.

- **City of York Council v Grosset** [2018] EWCA Civ 1105, 15 May 2018

Mr Grosset had cystic fibrosis. He was dismissed from his job as a teacher on grounds of gross misconduct after he showed a class of 15-year-olds an 18-rated horror film. His explanation was that he had been subjected to an increased workload, leading to stress about his health, when a new head teacher was appointed, and that his error of judgement arose from his concerns. An ET found that the stress arose from his disability and held that he had been unfavourably treated because of something arising in consequence of his disability, which the employer had not justified on an objective basis.

On appeal to the Court of Appeal, the employer argued that EA 2010 s15(1)(a) requires the employer not just to know that the employee has a disability, but also to know that the behaviour in question arose from the disability. The court rejected this and found as follows.

A proper construction of the section requires an investigation of two distinct causative issues: first, did A treat B unfavourably because of an (identified) 'something'; and second, did that 'something' arise in consequence of B's disability? The first issue involves an examination of A's state of mind, to establish whether the unfavourable treatment occurred by reason of A's attitude to the relevant 'something'. In this case, the first issue, the relevant 'something', was that the employer dismissed the claimant because he showed the film. The second issue, whether it arose in consequence of B's disability, is an objective matter: whether there was a causal link between B's disability and the relevant 'something'. Here, the ET was entitled to find that there was such a causal link. It was also entitled to find the dismissal was not proportionate.

Practice and procedure

Vento guidelines

In the March 2018 update (page 22), I reported that the presidents of the ETs of England and Wales, and Scotland had issued joint guidance as to the approach to be taken by ETs in calculating the compensation for injury to feelings and psychiatric harm in discrimination cases.

The presidents have now issued a first addendum to that guidance, uprating the amount of the *Vento* bands to take into account changes in the RPI All Items Index released on 20 March 2018 (*Presidential guidance: employment tribunal awards for injury to feelings and psychiatric injury following De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879: first addendum to presidential guidance originally issued on 5 September 2017*, 23 March 2018). These revised amounts apply to claims presented on or after 6 April 2018 and are as follows: a lower band of £900 to £8,600 (less serious cases); a middle band of £8,600 to £25,700 (cases that do not merit an award in the upper band); and an upper band of £25,700 to £42,900 (the most serious cases), with the most exceptional cases capable of exceeding £42,900.

Time limits

Failure to make reasonable adjustments

Where a provision, criterion or practice (PCP) applied by an employer puts a disabled worker at a substantial disadvantage in comparison with those who are not disabled, the employer must take such steps as it is reasonable to have to take to avoid the disadvantage (EA 2010 s20(3)). This is referred to as the duty to make reasonable adjustments.

A worker who wishes to bring a claim based on their employer's failure to make reasonable adjustments must do so within the time limit set out in s123(1), ie, within three months of the act complained of or within such other period as the ET thinks just and equitable. If the act is an omission to do something, as is more likely in claims for failure to make reasonable adjustments, this is deemed to take place on the date the employer decides on it (s123(3)). In the absence of any evidence to the contrary, this means the date when the employer takes any step inconsistent with doing the omitted act or, otherwise, the date on which the employer might reasonably have been expected to do the omitted act (s123(4)).

In the following case, the Court of Appeal had to consider how these provisions applied to a disabled employee's claim of failure to make reasonable adjustments.

- **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640, 28 March 2018

The claimant was a psychiatric nurse therapist working for the respondent health board. For many years, she suffered from a depressive illness, the severity of which fluctuated and was largely controlled by medication. She was recognised as disabled for the purposes of EA 2010 s6. She was absent from work for a prolonged period because of her illness and no measures were put in place to redeploy her. She came back to work for periodic meetings to review her absence and at one meeting suffered alleged harassment. Ultimately, she was found to be incapable of work because of ill health and dismissed from her employment. In March 2012, she brought claims for discrimination on the grounds of her disability and of harassment.

The ET found that the health board had failed in its duty under EA 2010 s20 to make reasonable adjustments, such as offering her an alternative post, during the period between April and August 2011. The ET also found that time in which to bring the reasonable adjustments claim did not begin to run until 1 August 2011 and that, while both claims were outside the three-month time limit specified in EA 2010 s123, it was just and equitable to extend the time for bringing them. It also found that she had suffered unlawful harassment. The EAT upheld that decision.

The health board appealed, contending that, under s123(4), the date when time began to run for the purpose of calculating the relevant time limit for the failure to make reasonable adjustments, namely on the expiry of the period in which the employer might reasonably have been expected to make the adjustment, was also the date when a breach of that duty first occurred; that therefore, no breach of that duty occurred before 1 August and no breach could have occurred later because the ET had found the claimant then to be unfit for work; and that the ET had misdirected itself by failing to place a burden on the claimant to demonstrate that it was just and equitable to extend time.

The Court of Appeal held:

- The date on which time begins to run for the purposes of bringing the claim under s123(4) is not also determinative of the date when an employer was first in breach of its duty to make reasonable adjustments under s20. Section 123(4) only deals with the question of when time begins to run for the purposes of the deadline for bringing proceedings. It does not determine when a breach of the duty to make reasonable adjustments first occurs.
- If the time limit for bringing the claim ran from the date on which the employer came under a duty to make reasonable adjustments, a worker could be unfairly prejudiced as they might have reasonably believed that their employer was taking steps to address the relevant disadvantage, when in fact the employer was doing

nothing at all. If this went on for more than three months, by the time it became or should have become apparent to the claimant that the employer was in fact sitting on its hands, the primary time limit for bringing proceedings would already have expired.
- An ET has the widest possible discretion under s123 to allow proceedings to be brought within such period as is thought just and equitable. Relevant factors that should almost always be considered are the length of, and reasons for, the delay and whether the delay had prejudiced the respondent. There is no requirement within s123 for an ET to be satisfied that there was a good reason for the delay or that time cannot be extended in the absence of an explanation for the delay from the claimant. However, if there is any explanation or apparent reason for the delay and the nature of any such reason, these are relevant matters to which the tribunal ought to have regard. Given the width of the discretion there is very limited scope to challenge an ET's decision on an appeal.

Early conciliation

Since 2014, Acas early conciliation has been a compulsory stage before the bringing of the majority of ET claims. Under Employment Tribunals Act (ETA) 1996 s18A, a prospective claimant to an ET first has to notify Acas, within the requisite time limit, under the early conciliation scheme, by providing certain prescribed information. The requisite ET time limit stops while the process ensues so as to allow Acas to seek to promote a settlement between the prospective claimant and respondent. At the end of this process, Acas will issue a certificate with a number on it, which the claimant requires in order to proceed to lodge their claim. The statutory provisions setting the requisite time limits for bringing claims were altered to take account of the time between commencing early conciliation (day A) and receipt of the certificate confirming the end of the conciliation period (day B). In respect of claims under the ERA 1996 (similarly under the EA 2010 and other employment statutes), ERA 1996 s207B sets out two mechanisms for the extension of time:

(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.
(4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

In the following case, the EAT considered whether these bases of extending time to account for early conciliation were sequential or alternative (although the answer was already relatively clear).

- **Luton BC v Haque** UKEAT/0180/17/JOJ, 12 April 2018

Mr Haque's employment ended on 20 June 2016. He notified Acas under the early conciliation scheme on 22 July 2016, which was the date of notification (day A). The early conciliation certificate was issued on 22 August 2016 (day B). The three-month time limit to bring his claim expired on 19 September 2016. The period of conciliation was 31 days. The claim form was presented on 18 October 2016. The dispute in this case was whether the 31-day period of conciliation extended the time limit from 19 September to 20 October (ie, 31 days after 19 September) or whether the effect of ERA 1996 s207B(4) meant that time expired one month after day B, ie, on 22 September, in which case his claim was out of time.

The EAT confirmed that the provisions are applied sequentially. First, the time limit is extended by the period of conciliation. Next, if (and only if) the time limit would then expire prior to a month after day B, the time limit expires at the end of that month. This ensures there is always a minimum of one month between the end of early conciliation and time expiring.

Contractual rights

Unlawful deduction from wages

In the September 2017 update (page 41), I reported two EAT cases that reached differing conclusions as to whether ETs have the power to interpret contractual terms, when determining the amount properly payable for the purposes of establishing whether an unauthorised deduction from wages has occurred under ERA 1996 s13 (*Agarwal v Cardiff University* UKEAT/0210/16/RN and *Weatherilt v Cathay Pacific Airways Ltd* UKEAT/0333/16/RN).

The matter has been considered again by the EAT in the following case involving the construction of complex contractual provisions.

- **Tyne and Wear Passenger Transport Executive T/A Nexus v Anderson and others** UKEAT/0151/16/BA, 15 January 2018

One of the employer's grounds of appeal was that, following *Agarwal*, neither the ET nor the EAT had any jurisdiction to consider the meaning of the contract in the context of ERA 1996 s13. Following an analysis of the case law considered in each of the above EAT decisions, HHJ Hand QC concluded that the ET and the EAT did have jurisdiction:

Employment judges nowadays deal with complicated matters and I do not think that contractual construction is any more complicated than other matters that they deal with routinely. On balance, therefore, I do not think there is a procedural argument in favour of an exclusionary rule preventing the employment tribunal from dealing with questions of contractual construction in Part II claims (para 83).

Working time

The question before the EAT in the following case was whether an ET could make an award in respect of injury to feelings under ERA 1996 s49 in respect of a claim of detriment for asserting working time rights under s45A. Section 49 deals with remedies in respect of all of the 'rights not to suffer detriment' complaints contained within Part V.

- **South Yorkshire Fire & Rescue Service v Mansell and others** UKEAT/0151/17/DM, 30 January 2018

The EAT held that all claims of detriment under ERA 1996 Part V were akin to claims of discrimination and victimisation (for which an award for injury to feelings could be made). The question of whether an award for injury to feelings should be made was a question of fact in each particular case.

Agency workers

Agency Workers Regulations 2010 SI No 93 (AWR) reg 5 provides that agency workers meeting the qualifying period are entitled to the same basic working and employment conditions as if they had been directly recruited by the hirer, whether as an employee or worker. The qualifying period is satisfied when an agency worker has worked in the same role with the same hirer at some stage during each of 12 continuous weeks during one or more assignments (reg 7(2) and (4)).

- **Kocur v Angard Staffing Solutions Ltd and Royal Mail Group Ltd** UKEAT/0181/17/BA, 23 February 2018

Mr Kocur worked for Angard, an employment agency supplying temporary workers to the Royal Mail Group. He alleged that both respondents failed to comply with their obligations under the AWR by providing him with only 28 days' annual leave and 30 minutes of paid rest breaks, whereas direct recruits were entitled to 30.5 days' annual leave and one-hour paid rest breaks. The ET dismissed his claim and found that the differences in annual leave and rest breaks were compensated for by his higher rate of hourly pay. Mr Kocur appealed.

The EAT found in his favour in respect of Angard. The EAT held that when assessing equality of treatment under the AWR, a term-by-term approach is required, rather than examining all the employment conditions as a package. Failure to provide an agency worker with the same annual leave entitlement and paid rest breaks as those enjoyed by the hirer's permanent employees could not, therefore, be compensated for by an enhanced hourly rate of pay.

Employment status

In the March 2018 update (pages 24–25), I reported a number of appeal cases in which the courts were scrutinising the often complex operations of so-called gig economy employers purporting to employ operatives on a self-employed basis with the effect of bypassing employment law protection and obligations.

One of these cases was the Court of Appeal decision in the *Pimlico Plumbers* (PP) case ([2017] EWCA Civ 51). This was PP's appeal against the finding of an ET at a preliminary hearing that one of its plumbers, Mr Smith, was not genuinely self-employed in business on his own account but was a worker within ERA 1996 s230(3) and Working Time Regulations 1998 SI No 1833 (WTR) reg 2(1), and that his working situation also fell within the definition of 'employment' under EA 2010 s83(2)(a). Accordingly, the ET found that it had jurisdiction to consider his disability discrimination, holiday pay and unauthorised deductions complaints.

A 'worker' is defined within ERA 1996 s230(3) as someone who has entered into, or works under, a contract of employment (commonly referred to as 'limb (a)') and any other contract whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not, by virtue of the contract, that of a client or customer of any profession or business undertaking carried on by the individual (referred to as 'limb (b)'). WTR reg 2(1) contains the same definition for the purposes of those regulations.

The matter has now been heard by the Supreme Court, which also upheld the ET's finding.

In another case, the EAT considered whether an Addison Lee courier was a worker or genuinely self-employed under WTR reg 2.

- **Pimlico Plumbers Ltd and another v Smith**
  [2018] UKSC 29,
  13 June 2018

The Supreme Court held that the ET was entitled to find that Mr Smith was a 'worker' for the purposes of the WTR as well as in PP's 'employment' for the purposes of the EA 2010. In particular, the court found that the ET had been entitled to have regard to a number of factors that indicated that Mr Smith was not in self-employment with PP being his client or customer, namely:

- the requirements that he:
  - wear a PP-branded uniform;
  - drive its branded van;
  - carry an identity card; and
  - follow administrative instructions from PP's control room;
- the terms of when and how much PP was obliged to pay him, and the references to wages, gross misconduct and dismissal; and
- the restrictions on his working activities following termination within the contractual agreements.

- **Addison Lee Ltd v Gascoigne**
  UKEAT/0289/17/LA,
  11 May 2018

Mr Gascoigne was a cycle courier with Addison Lee. The ET upheld his claim that he was a limb (b) worker within the meaning of WTR reg 2 and in consequence entitled to holiday pay. It held that the written terms of contract between the parties, describing Mr Gascoigne as an 'independent contractor', did not reflect the reality of the relationship. Further, it held that during the period when he was 'logged on' to the respondent's app, there was a contract with mutual obligations for 'jobs' to be offered and accepted.

The EAT upheld the ET's finding that Mr Gascoigne was a worker under the WTR and was not a genuinely self-employed independent contractor. He was therefore entitled to statutory holiday pay. The ET was entitled to find that on the facts there was a contract during the log-on periods with the necessary mutuality of obligations.

Notice

When is notice received?

- **Newcastle upon Tyne Hospitals NHS Foundation Trust v Haywood**
  [2018] UKSC 22,
  25 April 2018

Ms Haywood's job was made redundant by the NHS trust. On 20 April 2011, the trust sent a letter to her home address by recorded delivery giving her 12 weeks' notice of the termination of employment ending on 15 July 2011. Ms Haywood was on holiday at the time and the letter could not be delivered. It was returned by the Royal Mail to the sorting office. Her father-in-law collected it and took it to her house on 26 April 2011. Ms Haywood read it on 27 April 2011, on return from her holiday. Her case hinged on the date when notice of termination of employment began to run. This was important because if Ms Haywood's employment terminated by reason of redundancy on or after her 50th birthday on 20 July 2011, she would be entitled to claim a higher retirement pension. If it terminated before that date, she would be entitled to a lower pension.

The Supreme Court held by a majority that if an employee is dismissed by written notice sent by post, where there is no express contractual provision governing when the notice period starts to run, there is an implied term that it only begins to run from the date on which the letter is received by the employee and the employee has either read or had a reasonable opportunity to read it.

Unfair dismissal

Whistle-blowing

Under ERA 1996 s103A, it is automatically unfair to dismiss an employee because they have made a protected disclosure. Further, under s47B, workers (including employees) have the right not to be subjected to a detriment other than dismissal for making a protected disclosure. The disclosure must fall within certain categories (ERA 1996 s43B) and be disclosed to the correct person in the correct way (ss43C–43H).

The case of *Cavendish Munro Professional Risks Management Ltd v Geduld* UKEAT/0195/09 established that a worker must have disclosed information and not simply made an allegation. But in *Kilraine v Wandsworth LBC* UKEAT/0260/15/JOJ, the EAT cautioned ETs to take care in the application of this principle because the two categories of information and allegation were very often intertwined. The EAT found that the question was whether a given phrase or paragraph was one or the other. That was to be determined in the light of the statute itself. That question was simply whether it was a disclosure of information.

Kilraine has now been considered on further appeal to the Court of Appeal.

- **Kilraine v Wandsworth LBC**
  [2018] EWCA Civ 1436,
  21 June 2018

Ms Kilraine brought a claim in the ET that she had been unfairly dismissed and suffered detriments because she had made four protected disclosures to her employer that it had or was failing in legal obligations to which it was subject. The ET decided that three of the four allegations should be struck out and the EAT dismissed the appeal. Ms Kilraine appealed to the Court of Appeal on the basis that the ET had been wrong to conclude that the third and fourth disclosures were not protected disclosures.

The Court of Appeal dismissed the appeal. It held that the ET had gone wrong in law in having thought that *Cavendish Munro* supported the proposition that a statement was either information within ERA 1996 s43B(1) or an allegation outside that provision, and that the EAT's reasoning and conclusion, that the third disclosure was not a qualifying disclosure, were correct. However, the court further found that the EAT had correctly held that the error in the ET's approach had been immaterial and its conclusion had not been affected by any error of law. Furthermore, the fourth disclosure had not involved disclosure of matters that had had sufficient factual content so as potentially to qualify as disclosure of information for the purposes of s43B(1).

* At first glance, this figure seems very high but consists of 548 multiple claim cases, containing an average of 58 claims per multiple case, an increase from 265 cases at an average of 21 claims per case received during the same period in 2016, and includes one multiple claim of 30,000 individual claims brought against a large airline company.

Philip Tsamados has been a specialist in employment law for over 27 years. He was a solicitor in private practice and for many years worked at Central London Law Centre's employment unit and latterly for Whitechapel Legal Advice Clinic based at Tower Hamlets Citizens Advice.

Recommended reading

Equality and Human Rights Commission
Turning the tables: ending sexual harassment at work, 27 March 2018

Women and Equalities Committee
Sexual harassment in the workplace. Fifth report of session 2017–19, HC 725, 25 July 2018

Government Equalities Office
Dress codes and sex discrimination – what you need to know, May 2018

Acas
'Acas launches new religion and belief guidance to help prevent discrimination at work', news release, 21 May 2018

IDS Employment Law Brief	***Issue no***
Taylor Review: the government's response	1088
Violence at work: the legal implications	1089
Employment status in the 21st century	1090
GDPR: what employers need to know – 1	1091
GDPR: what employers need to know – 2	1092
Dealing with persistent short-term absences	1095
Enforcement agencies: an overview	1096
Pre-termination negotiations: five years on	1097
Protecting an employer's reputation	1098
Disabled employees – dealing with misconduct	1079
Managing disability-related absence	1080
Warnings	1081
Gender pay reporting: the new rules	1082
Preparing for an end to free movement	1083
Cases to look out for in 2018	1085
Calculating pension loss – the new guidelines	1086
Discrimination: injury to feelings awards	1065

Community care: update

Karen Ashton and Simon Garlick highlight the latest developments in Local Government and Social Care Ombudsman complaints, care and support costs, the Think Autism strategy, the latest carers action plan, social care funding, NHS commissioning, NHS Continuing Healthcare, personal health budgets, responsibility for care, and the Mental Capacity (Amendment) Bill.

Karen Ashton

Simon Garlick

The Local Government and Social Care Ombudsman

In *Building for the future: annual report and accounts 2017–2018* (HC 1325, 11 July 2018), the Local Government and Social Care Ombudsman (LGSCO) recorded that 57 per cent of the 4,331 cases dealt with by investigation led to complaints being upheld. Of complaints received, 16 per cent related to adult care, resulting in 1,625 decisions (some of which will have been reached without formal investigation). During the year, the ombudsman published 42 'public interest' reports. These are reports relating to individual complaints where the ombudsman considered that there was:

- recurrent fault;
- significant fault, injustice or remedy;
- a high volume of complaints about one subject;
- a significant topical issue (eg, new legislation);
- systemic problems and/or wider lessons to be learnt; or
- non-compliance with a recommendation.

In the adult social care field, these included a number of complaints about charging issues highlighted in previous articles. The ombudsman also published four 'focus reports', one of which – *The right to decide: towards a greater understanding of mental capacity and deprivation of liberty* (July 2017) – is relevant to adult social care.

Comment: The powers of the ombudsman derive from Local Government Act 1974 Part 3. Section 31(2) places a duty on an authority on receipt of an investigation report 'within the period of three months beginning with the date on which they received the report, or such longer period as the local commissioner may agree in writing, to notify the local commissioner of the action which the authority have taken or propose to take'. Section 31(2B) provides that the ombudsman's recommendations are for actions 'to remedy the injustice to the person aggrieved and to prevent similar injustice being caused in the future'.

As the cases below show, the ombudsman uses these provisions to adopt a quasi-regulatory role, requiring local authorities to disclose, review or change policies, to carry out reviews of large numbers of similar cases and remedy injustices identified by those reviews, to alter their commissioning terms with care providers, and to arrange for training of staff. In all cases, the authorities are required to submit a report to the ombudsman to confirm the action taken, and to provide proof.

Guidance on good practice: remedies (May 2018) explains the ombudsman's 'broad discretion to recommend remedies which we judge to be suitable. This includes recommending remedies for people who may not have complained to us but might have been affected by any failings we identify' (page 2). The guidance says the ombudsman 'will recommend systemic changes such as a review of practice, policy or procedure if we think it is likely further mistakes may affect others in the future' (page 3).

According to the annual report, 43 per cent of local authorities thought that the 'visibility' of the ombudsman had increased, as has the number of reports issued. While the findings of reports are technically non-binding on local authorities, there is no appeal mechanism and successful judicial reviews of the ombudsman's investigations are extremely rare.

The prominence of the ombudsman's role contrasts with the paucity of legal challenges to decisions made under the Care Act (CA) 2014, which is likely to reflect in part the scarcity of providers with community care expertise. It remains the case that the ombudsman's procedure is essentially backward-looking and not well suited to cases requiring urgent action or the interpretation of statute.

- **Complaint against Wiltshire Council**
  LGSCO Complaint No 16 015 946, 12 April 2018

Mrs N complained that the council had wrongly cut the respite provision, and reduced funding for transport to a day centre, for her adult son (P), who had severe learning disabilities and epilepsy. He required support for all personal care and was often awake at night. Mrs N had additional care responsibilities for her husband, who had very poor mobility.

In 2007, the council had adopted a points-based 'matrix assessment tool' (MAT) to calculate the award of respite. That tool involved awarding a number of points to an adult based on their needs, their existing provision and the needs of their (informal) carer, and multiplying the total by a figure (the 'coefficient', inevitably less than one) reached by dividing the total number of respite beds available per year by the total number of beds required by adults following assessment, in order to reach the number of nights to be awarded for any particular individual. The council's policy document explained its policy that reductions of respite should never be more than 20 per cent in any one year. In fact, the council's records showed that the same coefficient of about 0.4 had been used every year.

The council's policy in relation to transport to day services was that it would provide transport if 'the failure of the council to provide transport [would] result in an eligible need for services going unmet' (paras 24 and 76). The policy asserted that transport would not normally be funded for those with a motability vehicle.

For a number of years until a review in 2015, P had been awarded 104 nights of respite per year (four per fortnight) and – notwithstanding that he had a motability vehicle – the council funded transport to his day centre every week day. In January 2016, the family moved. Mrs N claimed that in discussions with the council, she was assured that her son could continue to attend the same day service notwithstanding that it was a 50-mile round trip journey from the new address. In mid-2016, the council informed Mrs N that:

(a) her son's transport to the day centre was being reduced to four days per week; on the remaining day she could provide transport or pay £30 per day; and
(b) her son's respite provision was cut to 68 nights per year following application of the MAT, a reduction of about 35 per cent, which it said it would phase in over a five-month period.

Declining the ombudsman's request to restore the cut in respite during the investigation, the council said the adult's level of respite was 'at the top level' (para 60). The council maintained that it had never assured Mrs N that her son could continue to attend the same day services, as she maintained. During the investigation, the council provided the ombudsman with its 'bandings' for respite care, and said that Mrs N's son was in the top band and that he could not receive more.

The ombudsman found that the council may have created an expectation that P's existing service would continue unchanged, which it said might give Mrs N grounds to resist the change in transport funding. It found the

withdrawal of transport funding to be a 'cost cutting exercise' (para 74) unrelated to assessment of individual need and therefore unlawful. Additionally, it amounted to requiring Mrs N as a carer to give care that she was not both willing and able to give. The ombudsman found (referring to paras 11.22–11.23 of the *Care and support statutory guidance*) that while banding of needs and use of resource allocation systems was permitted as a guide to assessment of need, they were useful only as starting points and might not be appropriate for all groups, especially those with multiple complex needs, and that the MAT, being designed to ration resources, was incompatible with the CA 2014, which requires local authorities to meet eligible needs. Furthermore, the council had failed to follow its own policies both by failing to recalculate the 'coefficient' annually and by reducing respite by more than 20 per cent in a year.

The council accepted the ombudsman's recommendations. Quite apart from recompensing P and Mrs N, it agreed to stop using the MAT and to take the following wide-ranging steps:

- *Review other files for evidence of use of the MAT. It should write promptly to anyone similarly affected and review their cases; […]*
- *Inform the ombudsman of the numbers of people involved and undertake to review all cases within a further three months;*
- *Ensure all staff receive training in the requirements of the Care Act and the relevant guidance; and*
- *Review all relevant documents to ensure they reflect the current law* (para 103).

- **Complaint against Bromley LBC**
  LGSCO Complaint No 16 005 445, 28 February 2018

The adult in question (N), a 22-year-old man with autism and other disabilities, was from July 2013 provided with a personal budget by the local authority, paid as direct payments to his mother. He was provided with a specialist residential college placement in another local authority area. The budget was to cover the costs of his care at home during holidays, which included specialist day care and 28½ hours of one-to-one care at home per week, with small additions for the costs of insurance, employing care staff, and transport.

In October 2015, without any reassessment having taken place, the council reduced the one-to-one care to 25 hours per week. At the same time, N's specialist day centre closed, but the council neither provided an alternative, nor provided Ms M with funding to enable her to source suitable support. Consequently, very considerable responsibility fell on Ms M to provide informal care. The reduced amounts paid for holiday care were not paid regularly, and after a period of suspension of payments because Ms M failed to provide invoices to prove expenditure, the backdated and reinstated amounts were put in a 'holding account' to which Ms M had no access, which the council said was an error. As a consequence, Ms M was unable to pay for the care that N needed in 2015/16. There were further complaints that the council failed to pay for the insurance premium and travel costs, and that when, in December 2015, the family moved to another local authority area, the council withdrew its funding for care before funding from the new local authority was in place.

The ombudsman found fault in the failure to review annually, the reduction of the care package without reassessment and the failure to provide specialist care when N's day care services closed. The other failures of the council were also found to arise from its fault. The ombudsman recommended that the council make payments for inconvenience and distress to N and his mother amounting to £2,865, and went on to say:

And, to improve services for others in the future, it should also:

- *ensure care and support is reviewed at least on an annual basis;*
- *ensure that money paid periodically for a fixed period of care is paid at specific times and in specific amounts;*
- *review its use of 'holding accounts' so emergency money sent to individuals is immediately accessible; and*
- *train officers so parts of complaints are not missed from responses* (para 34).

- **Complaint against South Tyneside MBC**
  LGSCO Complaint No 16 005 776, 13 February 2018

In this case, Mr Y had been employed as a domiciliary care worker by an agency when allegations were made in 2014 that he was verbally abusive to the family of the person he was supporting. Subsequent allegations arose from the report of a whistle-blower, and from a separate safeguarding alert that he had sworn at a person he was supporting and failed to check his continence pad. The allegations led to safeguarding investigations being carried out under the council's Safeguarding Adults Procedural Framework, which it had created in compliance with the Department of Health's (as it then was) *No secrets: guidance on developing and implementing multi-agency policies and procedures to protect vulnerable adults from abuse*, originally issued in March 2000.

The ombudsman found that in relation to two of the three investigations, there were failures to provide Mr Y with draft investigation reports, in accordance with the council's procedures, to allow him an opportunity to correct factual errors prior to investigation meetings, and a failure on the part of the council to properly record its approach to dealing with the allegations separately and cumulatively.

Following the outcome of the safeguarding investigations, which found the allegations proved, Mr Y attempted to use the council's complaints procedures but was told by the council that it would not accept a complaint as he was simply dissatisfied with the outcome of the safeguarding process and there was no reasonable chance of the complaint being upheld. The ombudsman concluded that Mr Y's dissatisfaction was also about the safeguarding procedure leading up to the decisions and that the council should therefore have considered his complaint.

In addition to recommending that the council apologise to Mr Y and pay him £400 for the avoidable delay and distress, time and trouble of making the complaint, the ombudsman also required the council to:

- *provide us with a copy of its current procedure, and say how it complies with current law and guidance. (The legislative framework on safeguarding investigations has changed since the events of this complaint); and*
- *remind all relevant staff of the importance of accurately recording safeguarding meetings and decisions. Recording should show how the council reached a decision. This should be communicated to staff, and evidence provided to us.*

- **Complaint against Norfolk CC**
  LGSCO Complaint No 16 013 790, 27 February 2018

In accordance with Care and Support (Charging and Assessment of Resources) Regulations 2014 SI No 2672 reg 18 and Sch 2 para 2, the value of an adult's main home should be disregarded from an assessment of a permanent resident's capital for the first 12 weeks of them moving into a care home. The *Care and support statutory guidance* makes clear that when arranging a care home placement, councils 'must ensure that at least one accommodation option is available and affordable within the person's personal budget' (para 8.37). If there is no such option, the council must arrange care in a more expensive setting, but is not permitted to request a top-up payment.

In this case, Mrs B had less than the maximum of £23,250 in savings, disregarding her property, and so was entitled to be provided with a personal budget to meet her eligible needs. The council decided that her need could be met in a care home for £461 per week, and assessed her contribution under the charging regulations to be £275 per week. Mrs B's son, Mr C, arranged for her to be placed in a more expensive home. He complained that the council had not explained the nature of his mother's personal contribution, or what a top-up was. He said that had he known that after her capital reduced below £23,250, she would be responsible for topping up the cost of care beyond £461 per week, amounting to £252 per week, he would have arranged a more affordable care home.

The ombudsman found that there had been failures to explain the charging process to Mr C, and a failure to properly record what information was given to him. In addition to a recommendation for individual recompense, the ombudsman required the council to carry out a widespread review of its relevant processes, provide training to staff and, specifically, to review cases over the preceding 12 months and, where appropriate, remedy any injustice.

- **Complaint against Liverpool City Council**
  LGSCO Complaint No 16 010 110, 26 February 2018

Ms X made a number of complaints to a BUPA care home at which her mother Mrs Y was placed about the standard of care provided to her. She also made complaints about the responses of the home and the council to her complaints, specifically that in June 2016 she and a doctor had been prevented from entering the care home to see her mother (an allegation denied by BUPA) and, which BUPA accepted, that she and her partner had been banned from visiting her mother following an incident at the home to which the police were called.

During the investigation, the ombudsman concluded that the June 2016 incident had happened, but that there was no evidence of an incident to which the police had been called. He noted that there was no evidence that Ms X had ever been given a warning, that any end point was put on the ban,

or any review of it arranged – all of which would have been in compliance with Care Quality Commission (CQC) guidance (*Information on visiting rights in care homes*, November 2016).

The ombudsman concluded that Ms X and her partner were banned as a result of making what he found to be valid complaints about Mrs Y's care. This represented a breach of Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 SI No 2936 reg 16(1), the CQC's guidance to which (*Guidance for providers on meeting the regulations*, March 2015)[1] states:

Complainants must not be discriminated against or victimised. In particular, people's care and treatment must not be affected if they make a complaint, or if somebody complains on their behalf.

When Ms X complained to the council, it simply referred her to BUPA. In addition to a recommendation for individual recompense, the ombudsman required BUPA to review relevant policies and procedures, and the council to ensure it considered people's complaints, rather than referring complainants back to the care providers. Specifically, the ombudsman required the council to 'check that care providers with whom it has commissioning arrangements have written procedures for banning visits by relatives that comply with guidance set out by the Care Quality Commission' (para 53).

Costs of care and support

- **Royal Mencap Society v Tomlinson-Blake; Shannon v Rampersad and Rampersad (t/a Clifton House Residential Home)**
  [2018] EWCA Civ 1641, 13 July 2018

Reversing the decision of the Employment Appeal Tribunal (UKEAT/0143/16/DM, UKEAT/0244/16/DM and UKEAT/0290/16/DM; November 2017 *Legal Action* 22), the Court of Appeal has decided that sleep-in workers, defined as workers 'contractually obliged to spend the night at or near their workplace on the basis that they are expected to sleep for all or most of the period but may be woken if required to undertake some specific activity' (para 6), 'are to be characterised for the purpose of the [National Minimum Wage Regulations 2015 SI No 621] as available for work, within the meaning of regulation 15(1)/32, rather than actually working, within the meaning of regulation 3/30, and so fall within the terms of the sleep-in exception in regulation 15(1A)/32(2)' (para 86).

The successful appeal was brought by Mencap in respect of its employee and respondent to the appeal, Ms Tomlinson-Blake, to whom it had paid a total of £29.05 for a nine-hour sleep-in shift. She was required to remain at a house in which two adults with autism resided and was provided with her own bedroom and shared bathroom facilities. She was required to keep a 'listening ear' (see para 92), and to get up and intervene if she judged it necessary. In a period of 16 months, she had had to do so on only six occasions. On occasions when she had to get up, she was not paid for the first hour's work but was paid for anything beyond that. The expectation of the contract was that she would get a good night's sleep as she was sometimes allocated the immediately following morning shift.

The judgment has been greeted with relief but no enthusiasm by Mencap. The organisation's chair, Derek Lewis, said:

The prospect of having to make large unfunded back payments had threatened to bankrupt many providers, jeopardising the care of vulnerable people and the employment of their carers.

Many hardworking care workers were given false expectations of an entitlement to back pay and they must be feeling very disappointed. We did not want to bring this case. We had to do so because of the mayhem throughout the sector that would have been caused by previous court decisions and government enforcement action, including serious damage to Mencap's work in supporting people with learning disabilities.

What is clear though, is that dedicated care workers deserve a better deal. They work hard and support some of the most vulnerable people in society, but many are among the lowest paid. We and many other providers have been paying for sleep-ins at a higher rate for over a year now, and we intend to continue despite the court's decision. We now call on government to fulfil its responsibilities by legislating so that all carers are entitled to this, and their employers are funded accordingly.[2]

It is not yet clear whether the judgment will be appealed to the Supreme Court. Mencap said the value of back payments in the sector had the EAT judgment been upheld was thought to be in the region of £400m.

Comment: Some guidance on the implications of this ruling for the calculation of personal budgets and direct payments is needed urgently.

Think Autism strategy governance refresh

In response to the realisation that progress in achieving the objectives of the statutory autism strategy is not as quick as hoped for, the Department of Health and Social Care (DHSC) has published *Think Autism strategy governance refresh* (April 2018). The refresh involves identifying 19 overarching objectives that were 'identified from the existing strategy, and have a direct read across to the core aims of the Autism Act and the associated statutory guidance' (page 4).

The 19 objectives are grouped into five domains:

- measuring, understanding and reporting the needs of people with autism;
- workforce development;
- health, care and well-being;
- specific support; and
- participation in the local community.

Some of the objectives of most interest to community care practitioners are:

- '[h]ealth and care staff … who have a direct impact on, and make decisions about, the lives of autistic adults have appropriate specialist knowledge of the condition';
- '[p]reventative support in line with Care Act 2014'; and
- '[a]ccess to an appropriate range of accommodation options' (page 5).

'Task and Finish' groups are to be established for each of the domains, the members of which 'have the levers, authority and ability to take action to realise the objectives in each specific area' (page 4). At least two of the members of each group will be self-advocates.

There is to be a new executive group to oversee overall progress, which will present an annual report to an 'accountability meeting' chaired by a DHSC minister. There will be a formal review of the strategy in 2019.

Comment: The acceptance that progress towards achieving the goals of the Autism Act 2009 is not what it should be is to be welcomed, but it is questionable whether a 'refresh' of governance is likely to improve matters when budgets are so tight. Perhaps what is needed are some specific individual statutory duties creating enforceable rights.

Carers action plan

On 5 June 2018, the government published *Carers action plan 2018–2020: supporting carers today*, which focuses on five areas:

- services and systems that work for carers;
- employment and financial well-being;
- supporting young carers;
- recognising and supporting carers in the wider community and society; and
- building research and evidence to improve outcomes for carers.

In a written statement (House of Commons Written Statement HCWS732, 5 June 2018), the care minister, Caroline Dinenage, said the needs of carers would be 'central to the forthcoming green paper on care and support'.

The future of social care funding in England and Wales

As previous articles have highlighted, there are increasing concerns about the pressure on adult social care funding. As publication of the government's green paper on older people's social care is awaited, the Health Foundation and the King's Fund have published a report, *A fork in the road: next steps for social care funding reform* (May 2018). According to the authors, the 'fork' is 'between a better means-tested system and one that is more like the NHS; free at the point of use for those who need it' (page 2).

The report examines and costs different models of social care funding, including the current scheme, the 'cap and floor' proposals put forward by the Conservative party in the June 2017 election, and the provision of free personal care. It also examines the options for raising revenue (including the introduction of a hypothecated element of general taxation), public perceptions and attitudes, and the policy implications of acting or not acting, concluding: 'The ongoing green paper process must lead to major improvement. Without it, real people will suffer and public anger will rise at continuing inaction in the face of ever more serious warnings' (page 50).

A joint report by the Welsh Local Government Association and the Association of Directors of Social Services Cymru (*WLGA and ADSS Cymru evidence to the Health, Social Care and Sport Committee on the Welsh government draft budget 2018–19*, HSCS(5)-27-17 Papur 4/Paper 4, October 2017) estimates that by 2021/22 an extra £344m will be required due to a combination of increased workforce costs and a growing ageing population.

On 18 June 2018, the then health and social care secretary, Jeremy Hunt, announced that the long-awaited green paper has been postponed until the autumn.[3]

NHS commissioning

- **R (Hutchinson and others) v Secretary of State for Health and Social Care and another** [2018] EWHC 1698 (Admin), 5 July 2018

This concerned 'an issue of great public interest, namely whether the secretary of state and NHS England have the lawful power to promulgate a new model for the provision of health and social care in England. The new model is termed an Accountable Care Organisation ("ACO" or "ACO model")' (para 1). The essence of the ACO model is that clinical commissioning groups (CCGs) would commission a wider range and geographical spread of services from fewer, much larger organisations – which might be private or public bodies – using contracts of much longer duration. The intention of the model is to create 'a more efficient and seamless health and social care path for patients' (para 3).

While the ACO model was to be optional for CCGs to use, it was 'a reasonable inference to draw from the facts that the secretary of state and the NHS England would promote a "*max*" version of the ACO policy whereby CCGs tender long-term contracts covering whole areas with wide scope and a substantial degree of autonomy over health care choices and resource allocation' (para 17, emphasis in original).

Full details of the ACO model, together with a draft contract, were published by NHS England in August 2016.[4] Draft regulations were published by the health secretary in September 2017. Complaints about lack of consultation were addressed by the decision in January 2018 to undertake a full consultation on the ACO proposals and draft contract. The judicial review dealt with two challenges: the first that the ACO model was so radical that it was outside the powers of CCGs in the NHS Act 2006 to adopt it; the second was that the proposals lacked sufficient clarity and transparency.

The second challenge failed because the court decided that in the context of the decision of the health secretary and NHS England to retreat to the pre-consultation stage, the principle of clarity and transparency did not apply: until the policy was sufficiently developed 'the public authority should have a wide leeway to moot proposals, brainstorm, take soundings, play devil's advocate, work up and then reject ideas, try out different texts or drafting proposals and then discard them, and even make mistakes, all without fear that inadequacies or infelicities of drafting will be criticised and subjected to litigation risk' (para 132). However, the judicial review was not, as a whole, premature as the principal issue of whether the ACO model was ultra vires needed to be determined before the health secretary and NHS England could proceed to consult on it.

The court held that the ACO model is not ultra vires of the NHS Act 2006. The essence of the claimants' objection to the ACO model was that 'the breadth and scope of the powers being conferred upon ACOs … are so great that they will, inevitably, involve the unlawful delegation, and abrogation, of duties by CCGs [and] the policy is inconsistent with the NHSA 2006 and could only be introduced by new legislation which would thereby enable parliament to exercise proper scrutiny. CCGs are public and accountable statutory NHS bodies with defined roles subject to important statutory duties operating within a legislative regime of checks and balances. ACOs, by contrast, may be private, for profit, bodies with no statutory functions free from the statutory duties imposed on CCGs and from legislative checks and balances' (para 55).

The court carried out a detailed analysis of the submissions of the parties to determine whether under the model and draft contract the powers retained by the CCGs enabled them to continue to fulfil their statutory duties. It noted that the duty on CCGs under the Act to arrange for the provision of services is couched in deliberately broad terms. The statutory duties imposed on CCGs are framed in 'broad and un-prescriptive' terms (para 97). Parliament had accorded CCGs a wide discretion as to how their functions are to be performed. Further, as the main responsibility of CCGs is to engage in commissioning, they would observe and perform their statutory functions 'by including in contracts with service providers obligations which reflect those overarching duties, and which take account of their continuing natures' (para 99). The judge noted that the draft ACO contract prohibited the ACO from doing anything that would place the commissioning CCG in breach of its statutory duties, and therefore '[a]rranging to award a contract *via* a commissioning process to a single entity for the whole of a CCG's geographical territory for the *full suite* of health services for which a CCG is responsible is also within the statutory powers of a CCG' (para 115, emphasis in original).

Comment: CCGs cannot, of course, 'delegate' their statutory duties to third parties, but the court's decision permits as lawful a model of commissioning that might, in practice, enable a CCG to hand over responsibility, including resource allocation, for all of its services to a single, possibly private, entity.

NHS Continuing Healthcare policies, human rights and equality

In March 2018, the Equality and Human Rights Commission (EHRC) warned 13 CCGs that they faced judicial review proceedings on the ground that their NHS Continuing Healthcare policies were unlawful ('NHS facing court action over unlawful policies', EHRC news release, 19 March 2018). The concern was that arbitrary caps of funding and the failure to consider individual needs were forcing those who were able to live independently into residential care. In response, most agreed to review their policies but the results will be monitored by the EHRC ('NHS U-turns on discriminatory policies', EHRC news release, 31 May 2018). The 13 CCGs are:

- Brent;
- Coventry and Rugby;
- Dudley;
- East and North Hertfordshire;
- Eastern Cheshire;
- Harrow;
- Hillingdon;
- Lincolnshire West;
- Redditch and Bromsgrove;
- South Cheshire;
- Vale Royal;
- Warwickshire North; and
- West Cheshire.

The EHRC's May 2018 release identified only one CCG that had failed to engage at that time – Haringey – and the EHRC was considering what further action it might take.

Comment: Practitioners who undertake NHS Continuing Healthcare work in any of the areas listed may well want to seek clarification from their local CCG of any amendments made to its policy as a result of its internal review and to contact the EHRC to ask in what ways that body was concerned about that particular CCG's policy in order to assess the adequacy of those reforms.

Consultation on extending right to personal health budgets

The executive summary of *A consultation on extending legal rights to have for personal health budgets and integrated personal budgets* (DHSC/NHS England, 6 April 2018) acknowledges that, currently, the only specific 'right to have' a personal health budget (PHB) arises for those in receipt of NHS Continuing Healthcare. The proposal is to extend this right to other groups 'to ensure that for people who want a personal health budget and/or an integrated personal budget to address their needs, and if deemed clinically appropriate, the system is in place to ensure they can receive one' (page 5). Those groups are:

- *People with ongoing social care needs, who also make regular and ongoing use of relevant NHS services.*
- *People eligible for [Mental Health Act (MHA) 1983] section 117 aftercare services, and people of all ages with ongoing mental health needs who make regular and ongoing use of community based NHS mental health services.*
- *People leaving the armed forces, who are eligible for ongoing NHS services.*
- *People with a learning disability, autism or both, who are eligible for ongoing NHS care.*
- *People who access wheelchair services whose posture and mobility needs impact their wider health and social care needs* (page 6).

It is important to remember that a PHB is not a direct payment (DP). A DP is only one method for using a PHB (see page 10, para 17). As matters currently stand, there is no right to a health DP – just a discretionary power (subject to exceptions) for a CCG to make such a payment in lieu of provision of a service. However, the consultation also proposes that those who have a PHB for NHS Continuing Healthcare-funded home care should have a right to have a DP (page 8, para 7) and asks for views on whether each of the above groups should have such a right.

The consultation stresses at para 10 (pages 8–9) that PHBs are a matter of choice for the individual concerned and do not replace 'traditional routes' of receiving care. The consultation ran from 6 April to 8 June 2018. The government's conclusions will be included in the long-awaited green paper on social care, along with so much else.

Disputes between local authorities and CCGs over responsibility for care

- **R (Wolverhampton Council) v South Worcestershire CCG and Shropshire CCG** [2018] EWHC 1136 (Admin), 26 March 2018

This case concerned a dispute between three authorities as to who

was responsible for providing care to a patient, known for the purpose of this judgment as VG. In summary, for many years the council had paid for the costs of VG's care but asserted that the relevant CCG should meet the costs. Shropshire CCG's case was that it would be ultra vires its statutory powers to fund VG's care. The court decided to determine this as a preliminary issue and if it were to find for Shropshire CCG on this issue, it would then stay the claim to allow the council and South Worcestershire CCG time to try to reach agreement. On the other hand, if Shropshire was found to be wrong, then 'their entire approach would have been held to be flawed' (para 8) and so it would be appropriate to stay to allow all parties time to reconsider their positions.

VG had profound learning difficulties and other disabilities. He originally lived with his parents in Wolverhampton. In September 2011, the council decided he should attend a school in Shropshire and, that same month, he was registered with a GP practice close to the school, within the area of Shropshire Primary Care Trust (PCT). He continued to be so registered until 1 April 2013, when the PCT was replaced by Shropshire CCG. The council had already requested Wolverhampton PCT to assess VG for eligibility for NHS Continuing Healthcare, but the PCT determined that he was ineligible. The council asked for a review and, in May 2013, Wolverhampton CCG took over that process. However, by that time, VG had registered with a Shropshire GP and so, Wolverhampton CCG said, under the new rules, which applied from 1 April 2013, responsibility transferred to Shropshire CCG, which agreed to take over the review.

The review noted that the plan was that VG would move to a specialist care home for people with autism in a matter of weeks. The decision support tool made a recommendation for eligibility and this was signed off on 23 September 2013, after VG had moved to the care home and had registered with a GP in South Worcestershire. VG received a letter dated 21 October 2013 saying that he had been found eligible and Shropshire CCG was therefore responsible for his care costs.

The judge summarised the statutory scheme that imposes on a CCG responsibility for the provision of health services for those for whom GP services are provided by a member of that CCG. However, the relevant regulations (NHS Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012 SI No 2996) provide for responsibility for additional groups including for those where:

… the CCG has made an arrangement in the exercise of its commissioning functions … by virtue of which the person is to be provided with services to meet his or her continuing care needs (Sch 1 para 3(a)).

Shropshire CCG argued that 'made an arrangement' required that it had entered into a concluded contract for services. This was disputed by the other parties and the judge agreed, but he went on to say:

It is not enough, in my view, that the CCG had begun the process of determining what arrangement would be appropriate. The words in paragraph 3 'by virtue of which the person is to be provided with services …' contemplates a concluded arrangement which makes provision for certain services to be provided at some time in the future (para 28).

By the time VG moved to his new GP practice, the decision-making process had not been completed. Therefore, Shropshire CCG was not responsible for VG.

The council had sought to argue that Shropshire CCG had sufficient powers to make payment by virtue of either the general power in NHS Act 2006 s2 to do anything to facilitate the discharge of its functions, or the power in s256 that allows a CCG to pay a social services authority for expenditure it incurs when performing its functions that have an impact on the health of the individual concerned or have an effect on or are connected with NHS functions. These arguments were rejected by the court.

Comment: The judge's displeasure at the fact that the dispute had reached the courts was made clear. The judgment opens as follows:

2. … The Court of Appeal and this court have repeatedly indicated how much they deprecate this sort of litigation, where substantial amounts of public money are spent by public bodies arguing about which of them is responsible for the performance of a particular public duty …

3. … the NHS and the Local Government Association ought urgently to work together to devise a mechanism by which such disputes can be resolved without resort to expensive legal proceedings.

However, given that the issue raised was one of vires, it is difficult to see how it could have been resolved in any other way.

The Mental Capacity (Amendment) Bill

On 13 March 2017, the Law Commission published *Mental capacity and deprivation of liberty* (Law Com No 372), its final report and a draft bill for the replacement of the deprivation of liberty safeguards (DoLS), contained currently in Mental Capacity Act (MCA) 2005 Sch A1, by a new system to be known as 'liberty protection safeguards', and broader amendments to the Act. In the Mental Capacity (Amendment) Bill 2017–19, the government has now published its proposals – also to be known as 'liberty protection safeguards' (LPS) – to amend DoLS, but the bill is both more limited and fundamentally different from the Law Commission's scheme. Fuller analysis of the bill will appear in a later issue, but the following features of the new proposals are likely to be of relevance to community care practitioners:

- The Law Commission's proposal to amend MCA 2005 s4 to oblige that 'particular weight' is given by decision-makers to P's wishes ('P' being the person thought to lack, or lacking, capacity) (clause 8(4) of the Law Commission's draft bill) is left out.
- So too are the Law Commission's proposals to tighten up the procedure for making fundamental decisions under MCA 2005 s5 (the 'general defence' provision), the proposals for 'advance consent' to deprivation of liberty, and the proposals for regulation-making powers for supported decision-making (clauses 9, 6 and 12 respectively of the Law Commission's draft bill).
- The LPS will not encompass 16–17-year-olds, as the Law Commission recommended (page 62, recommendation 5).
- The interface between the MCA 2005 and the MHA 1983 remains unchanged.
- MCA 2005 s4B will be enlarged to allow for urgent deprivations of liberty (clause 2 of the 2017–19 bill).
- The criteria for deprivation of liberty no longer include that the arrangements are in P's 'best interests'. Rather, P must lack capacity to consent to them, and be of 'unsound mind', and the arrangements must be 'necessary and proportionate' (new Sch AA1 Part 2 para 11(a)–(c)).
- The route to challenging authorisations of deprivation of liberty will remain very similar to the present MCA 2005 s21A, so challenges still go to the Court of Protection, and not to a tribunal.
- Local authorities or CCGs will be the responsible bodies for making (by process of 'pre-authorisation review') or renewing authorisations (new Sch AA1 Part 2 para 18(1)). Where P is objecting to the arrangements (but not, as the Law Commission recommended, where risk to others is a factor) the review must be carried out by an 'approved mental capacity professional' (AMCP) (new Sch AA1 Part 2 para 18(2)).
- Where P is in a care home, the manager of the care home will be responsible for assessing and setting out in a statement to the responsible body (for the purposes of pre-authorisation review) what is, under DoLS, the direct responsibility of social care professionals, including:
  - P's 'mental capacity' to consent to the arrangements;
  - whether P is of 'unsound mind';
  - the results of consultation with others about P's wishes and feelings;
  - why the arrangements are necessary and proportionate;
  - notifying the responsible body whether the requirements for appointing an 'appropriate person' and/or an independent mental capacity advocate are met and who, in the opinion of the manager, that should be;
  - informing the responsible body whether P is objecting;
  - conducting reviews (triggered by a 'reasonable request');
  - whether the 'mental health requirements' are met; and
  - whether in the case of P who lacks capacity to request an advocate it is in their best interests to have one (new Sch AA1 Part 2 para 14).
- Authorisations are renewable after 12 months, then three years (new Sch AA1 Part 3 para 26).

Comment: The government has, at the second reading of the bill in the House of Lords, already acknowledged that it requires substantial reconsideration. Quite apart from the missed opportunity to introduce what most commentators consider sensible amendments to the MCA 2005 – for example, by extending the LPS to 16–17-year-olds, and strengthening s5 – the bill gives rise to many concerns including the following:

- The purpose of the Law Commission's proposals was that in most cases, authorisation of deprivation of liberty would become an integral part of care and support planning, and so made in advance of the arrangements being put into place. Under the bill, as under DoLS, authorisation will be ex post facto.
- There appears to be no duty, save

in cases involving an AMCP, to ensure P's wishes and feelings are determined by consultation with them.
- There is a huge and unrealistic burden placed on care home managers (the cost of which is arguably underestimated in the impact assessment, which allows minimal costs for care homes to familiarise themselves with the new framework, and does not appear to allow any costs associated with the onerous duties of care home managers under the new Sch AA1 Part 2 para 14, in particular) to carry out assessments that they are unlikely to be qualified, or have the resources, to conduct (new Sch AA1 Part 2 para 14).
- The bill says that statutory responsibility (and presumably therefore responsibility for breaches of P's rights under articles 5 and 8 of the European Convention on Human Rights) remain with the responsible bodies, rather than with care home managers, but the process envisages care home managers providing a statement (as above) electronically that will form the basis of the authorisation. It is unclear how in such cases – save those involving an AMCP – responsible bodies can authorise without exposing themselves to significant risk of litigation if the care home manager's assessments turn out to be wrong. Further, it is not clear how the bill's provisions sit with CA 2014 s73, which, in certain circumstances, extends the ambit of Human Rights Act 1998 claims to private providers.
- Care home managers whose statement will effectively form the basis for the responsible body's decision to authorise or not are in a position of conflict, in particular in the case of self-funders, on whose much greater levels of fees many care homes rely to enable them to continue accepting local authority-funded residents.

1 www.cqc.org.uk/guidance-providers/regulations-enforcement/regulation-16-receiving-acting-complaints#guidance.
2 www.mencap.org.uk/advice-and-support/stopsleepincrisis.
3 www.gov.uk/government/speeches/secretary-of-states-oral-statement-on-the-nhs-funding-plan.
4 www.england.nhs.uk/new-business-models/publications/.

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Housing: recent developments

Jan Luba QC and Sam Madge-Wyld cover news and legislation updates as well as cases on trespass, unlawful eviction/harassment, possession claims, long leases, property conditions, right to buy, rent review, housing allocation, homelessness, and housing for children.

Jan Luba QC

Sam Madge-Wyld

Housing law news and legislation update

Housing Court

In a speech delivered on 2 July 2018, the housing secretary, James Brokenshire MP, said his government would be 'launching a call for evidence in the autumn to better understand and improve the experience of people using courts and tribunal services in property cases, including considering the case for a specialist Housing Court'.[1]

Eligibility for accommodation

The Allocation of Housing and Homelessness (Eligibility) (England) (Amendment) Regulations 2018 SI No 730 and the Persons Subject to Immigration Control (Housing Authority Accommodation and Homelessness) (Amendment) Order 2018 SI No 729 both came into force on 9 July 2018. They make changes to eligibility for social housing allocation and homelessness assistance by amending earlier regulations to provide that persons who have been transferred to the UK under Immigration Act 2016 s67 and have leave to remain under Immigration Rules para 352ZH (which require the UK government to relocate to the UK and support a specified number of unaccompanied children from Europe) are eligible for social housing and homelessness assistance if they meet the habitual residence test.

The changes are explained in a letter dated 18 June 2018 from the Ministry of Housing, Communities and Local Government (MHCLG) to local housing authorities.[2]

Housing and legal aid

A new guide to obtaining legal aid in the form of exceptional case funding for housing litigation, not otherwise within the scope of the mainstream legal aid scheme, has been published: *How to get legal aid exceptional case funding (ECF) in housing law* (ECF Short Guide 1, Public Law Project, 10 July 2018).

Repairs

The Homes (Fitness for Human Habitation) Bill 2017–19 is continuing its parliamentary journey with UK government support. It has passed through the Public Bill Committee stage and will now be considered at report stage on 26 October 2018. The Local Government Association (LGA) has expressed its support for the bill in its useful Commons briefing: *Local Government Association briefing: Homes (Fitness for Human Habitation and Liability for Housing Standards) Bill – Committee Stage, House of Commons, 20 June 2018*.

Housing and anti-social behaviour

New definitive guidance has been published on sentencing for breach of criminal behaviour orders and other court orders: *Breach offences – definitive guideline* (Sentencing Council, June 2018). The guidance will help courts imposing penalties in committal proceedings for breach of housing-related anti-social behaviour injunctions. It comes into force on 1 October 2018.

The House of Commons Library has published a useful briefing paper outlining powers, tools and resources available to deal with anti-social behaviour: *Constituency casework: anti-social behaviour* (Briefing Paper No CBP 7270, 29 June 2018).

Housing-related anti-social behaviour in England is covered in two further Commons Library briefing papers:

- *Anti-social neighbours living in private housing (England)* (Briefing Paper No SN01012, 27 February 2017); and
- *Tackling anti-social behaviour in social housing (England)* (Briefing Paper No SN00264, 24 February 2017).

Private renting

UK government policy

The UK government's policy intentions in respect of the private rented sector in England are set out in *Government response to the Housing, Communities and Local Government Select Committee report: private rented sector* (Cm 9639, MHCLG, July 2018). The paper states that the government is strengthening the rights of tenants and delivering savings through the Tenant Fees Bill and by supporting the Homes (Fitness for Human Habitation) Bill, but also acting to ensure that:

- all landlords are members of a redress scheme so that tenants have quick and easy resolution to disputes;

- all letting agents are registered and are members of a client money protection scheme to provide assurance to tenants and landlords that their agent is meeting minimum standards;
- local authorities have the tools they need to act against rogue landlords and agents to protect tenants; and
- the benefits of, and barriers to, longer tenancies in the sector are explored and consideration is given to what action could be taken to overcome these barriers.

'How to' guides for landlords and tenants

The UK government has published a series of online guides, for landlords, tenants and agents: 'Online guides will help renters and leaseholders to know their rights' (MHCLG press release, 26 June 2018). They aim to drive up living standards in the private rented sector and will be reviewed in light of any new legislation to ensure tenants, landlords and leaseholders are supplied with up-to-date information. The four guides are:

- *How to rent: the checklist for renting in England* (reissued on 9 July 2018);
- *How to let: a guide for current and prospective private residential landlords in England*;
- *How to lease: a guide for current and prospective leaseholders in England*; and
- *How to rent a safe home: a guide for current and prospective tenants in England*.

Fees paid by tenants and landlords

The UK government's Tenant Fees Bill 2017–19 will abolish most upfront fees for tenants in England and cap security deposits at the equivalent of six weeks' rent. This bill has passed its Public Bill Committee stage. The report stage is scheduled for 5 September 2018. A new House of Commons Library briefing paper provides background to the bill, including information on current practice in Scotland, Wales and Northern Ireland: *Tenant Fees Bill 2017-19: analysis for report stage* (Briefing Paper No CBP-7955, 19 June 2018). It also explains the bill's provisions and summarises reactions from tenants, landlords and letting agents. The bill is accompanied by an impact assessment.

The Welsh government's Renting Homes (Fees etc) (Wales) Bill includes provision for:

- prohibiting certain payments made in connection with the granting, renewal or continuance of standard occupation contracts; and
- the treatment of holding deposits.

The Welsh Assembly Equality, Local Government and Communities Committee has issued a call for evidence on those topics that closes on 7 September 2018.

In England, Housing and Planning Act 2016 s134 provides that the secretary of state may make regulations about the approval or designation of client money protection schemes for the purposes of s133 (that section requires a property agent to be a member of an approved or designated government-administered client money protection scheme). The Client Money Protection Schemes for Property Agents (Approval and Designation of Schemes) Regulations 2018 SI No 751 came into effect on 21 June 2018.

The UK government has produced guidance for prospective client money protection schemes on the conditions for approval, the application process and ongoing monitoring requirements: *Applying to become an approved client money protection scheme: guidance for prospective schemes* (MHCLG, July 2018). It has been accepting applications from prospective scheme providers since 27 August 2018.

The related Client Money Protection Schemes for Property Agents (Requirement to Belong to a Scheme etc) Regulations 2018 were still in draft at the time this article was written. It is intended that property agents will be required to join a scheme before 1 April 2019.

Longer tenancies

A recent UK government consultation (conducted in July and August 2018) invited responses on: (1) the benefits of, and barriers to, private landlords offering longer tenancies; and (2) a proposed model for a three-year tenancy with a six-month break clause: *Overcoming the barriers to longer tenancies in the private rented sector* (MHCLG, 2 July 2018). A summary of responses will be published later this year. See also 'Three-year tenancies to pile pressure on buy-to-let landlords' (Kate Palmer, *Sunday Times*, 8 July 2018).

Recovering possession

A new updated version of a free *Section 21 validity checker* has been published by social housing consultant Mark Prichard.[3] See also Zoe McLean-Wells, 'Residential tenancies: the ever-developing intricacies of s21 of the Housing Act' (2018) 362 *Property Law Journal* 11.

Renting to migrants

The Joint Council for the Welfare of Immigrants (JCWI), supported by the Residential Landlords Association, has sought a judicial review of the UK government's 'right to rent' policy, which requires landlords to undertake checks to ensure they do not let to tenants who have no right to rent accommodation in the UK: 'JCWI threatens legal action if government do not evaluate right to rent fully' (JCWI press release, 16 May 2018). The hearing has been listed for 18–19 December 2018.

Houses in multiple occupation

With effect from 1 October 2018, mandatory licensing of houses in multiple occupation (HMOs) will be extended so that smaller properties used as HMOs in England, which house five people or more in two or more separate households, will, in many cases, require a licence. The new provisions are likely to apply to around 160,000 HMOs.

Also, new mandatory licence conditions have been introduced, prescribing national minimum sizes for rooms used as sleeping accommodation and requiring landlords to adhere to council refuse schemes. The details are set out in new UK government guidance for councils: *Houses in multiple occupation and residential property licensing reform: guidance for local housing authorities* (MHCLG, June 2018).

Selective licensing

Selective licensing allows local housing authorities to make it compulsory for all private rented accommodation in a specified area to have a licence. On 20 June 2018, the UK government announced a review of how selective licensing is used and how well it is working: 'Government publishes key licensing changes to further protect tenants' (MHCLG press release, 20 June 2018). The review's findings will be reported in spring 2019. There will be an update on progress in autumn this year.

Tenancy terms

Welsh ministers have powers to prescribe 'supplementary provisions', which may be incorporated into occupation contracts for residential lettings. They deal with the practical matters that help to make the contract work, such as a term requiring the contract-holder to pay the rent on the agreed dates and to look after the dwelling. The Welsh ministers have launched a consultation seeking views on (1) the draft Renting Homes (Supplementary Provisions) (Wales) Regulations and (2) the draft Renting Homes (Supported Standard Contracts) (Supplementary Provisions) (Wales) Regulations: *Renting Homes (Wales) Act 2016 – regulations relating to supplementary provisions* (Welsh government, 23 July 2018). Responses should be made by 14 October 2018.

Social housing

Policy

On 14 August 2018, the UK government published its green paper on future policy in relation to social rented housing: *A new deal for social housing* (Cm 9671, MHCLG). It sets out a series of proposals and invites responses by 6 November 2018.

There is an associated paper inviting evidence on the regulation of social housing providers: *Review of social housing regulation call for evidence* (MHCLG, August 2018).

Disabled facilities grants

The House of Commons Library has produced a new briefing on disabled facilities grants (DFGs) and other help aimed at securing essential home adaptations: *Disabled facilities grants for home adaptations* (Briefing Paper No SN03011, 22 July 2018).

Researchers have found that around half of local authorities in England are failing to make application forms for DFGs freely available to prospective applicants: *The accessibility of disabled facilities grant application forms in England* (Cerebra, July 2018) (see page 7 of this issue).

Trespass

- **Basingstoke and Deane BC v Loveridge and others**
  High Court (Queen's Bench Division), 30 July 2018

Basingstoke and Deane BC applied for an interim injunction preventing the defendant Travellers from camping within a defined area. It adduced evidence that there had been 160 unauthorised encampments within its area in the last two years. The use of the sites caused a nuisance to the inhabitants of the area as they led to: fly tipping; dumping of waste and products harmful to hygiene; noise and smoke; confrontations with landowners; and lasting damage to the appearance of the sites. The council had previously failed to control the problem by using bollards, exercising its powers under Criminal Justice and Public Order Act 1994 s77 to direct Travellers away from the land and by seeking the assistance of the police because the Travellers had moved on to other sites within the same area.

Peter Hughes QC, sitting as a judge of the High Court, granted the injunction with a power of arrest. The unauthorised encampments

had caused a number of serious consequences and had imposed a significant financial burden on the council and other landowners tasked with clearing the sites. It was appropriate to grant the injunction: the authority had carried out an equality impact assessment before proceeding with the application, which had considered the concerns of those affected; the problem had persisted for over two years in a small area; the other methods to control the problem had failed; and because of the negative impact the behaviour was having on the area and its residents.

As to the scope of the prohibited area, the council had taken care to ensure it was not larger than was necessary and proportionate. The court was satisfied that it was just and proportionate in all the circumstances to make the order. This included making a power of arrest as there had been threats of violence made to landowners.

Unlawful eviction/harassment

- **Insalaco v One Room UK, De Sousa and Teixeira**[4]
  County Court at Willesden,
  6 July 2018

On 4 December 2016, One Room UK granted Mr Insalaco an assured shorthold tenancy of a bedroom for a term of eight months. A deposit of £400 was paid and £400 rent was payable fortnightly. A representative of One Room UK notified Mr Insalaco that he would come to collect the rent on particular rent days and if Mr Insalaco was not at the property, a late payment charge would be levied if the rent was not subsequently paid at One Room UK's office. The address of the office was never given.

On 4 February 2017, Mr Insalaco went on holiday for a week. He left a note on his door explaining this. On 10 February 2017, Mr Insalaco, on his return, discovered that the code to get into the block had been changed. A friend, who also lived in the flat, advised that she had seen his belongings packed into boxes. Mr Insalaco spent the night sleeping on a friend's sofa. He contacted One Room UK; it refused to readmit him to the room. He was unable to find alternative accommodation and was forced to sleep on a number of friends' sofas in the UK, France and Morocco. Eventually, in September 2017, he was able to stay with friends in more stable accommodation.

Mr Insalaco instructed solicitors, who contacted One Room UK. They spoke to someone who refused to give an address for service. A letter before claim was sent to an email address that had been provided to Mr Insalaco. Some of his belongings were subsequently returned to his solicitors, but some were damaged. He applied for, and was granted, permission to serve a claim form on One Room UK by email. A claim was issued and default judgment was entered after no defence was filed.

At a disposal hearing, at which the defendants did not attend, Employment Judge Glennie awarded Mr Insalaco:

(a) general damages of £125 per night for the 202 days in which he was sofa-surfing;
(b) £50 per night for the 60 days in which he was able to sleep in more secure accommodation;
(c) £1,000 for harassment resulting from the eviction and the refusal to provide an address at which to pay the rent at the beginning of the tenancy;
(d) special damages of £1,952.10;
(e) aggravated damages of £1,500 in lieu of the failure to engage with Mr Insalaco's solicitors;
(f) exemplary damages of £1,500 (Mr Insalaco having conceded that this behaviour was at the lower end of the scale for awards of exemplary damages);
(g) £400 for the return of the deposit; and
(h) £1,200 arising from the failure to protect the deposit.

Mr De Sousa and Mrs Teixeira were added as defendants after evidence was presented to the court that they were trading as One Room UK. Costs were also awarded on the indemnity basis.

- **Warnes v De Baer**[5]
  County Court at Hastings,
  30 January 2018

In December 2012, Mr de Baer let a basement flat to Mr Warnes. Over a period of three days in June 2013, Mr de Baer, believing that Mr Warnes had vacated the flat, instructed his agent to remove the claimant's belongings. Once the flat was empty, Mr de Baer or his agent changed the locks. Mr Warnes, who had not in fact vacated the flat, was forced to sleep on the streets for around four weeks and then slept on a friend's sofa.

In June 2013, he issued a claim for damages and an injunction for his reinstatement. Mr de Baer failed to file a defence and judgment was entered against him for damages to be assessed by the court. An injunction for Mr Warnes' reinstatement was made but discharged on 12 August 2013 when Mr de Baer invited him to return to the property and he indicated to the court that he no longer wished to move back into the property.

Following a disposal hearing in September 2017, District Judge Barbara Wright awarded Mr Warnes:

(a) general damages of £200 per day for the 28 days in which he was street homeless and £100 per day for the 27 days he was staying with a friend until he formally indicated to the court that he no longer wished to return to the flat;
(b) aggravated damages of £1,500 reflecting the fact that he had not proceeded with his application for reinstatement and had declined the invitation to move back into the property;
(c) exemplary damages of £500 in light of the fact that there was no evidence of Mr de Baer having profited from his actions other than avoiding the expense of recovering possession through the court;
(d) special damages of £500 for Mr Warnes' lost belongings; and
(e) his costs.

Possession claims

- **Bharti v Abdul Basir**[6]
  County Court at Clerkenwell and Shoreditch sitting at the Stratford Housing Centre,
  27 July 2018

The defendant was an assured shorthold tenant. The claimant was his landlord. The defendant received housing benefit (HB), which covered almost half of his rent. On 5 February 2018, the local housing authority decided he was not entitled to HB. The defendant appealed. In the meantime, he was unable to pay all of his rent. The claimant brought a claim for possession and, as more than two months' arrears were outstanding, relied on Housing Act (HA) 1988 Sch 2 Ground 8.

On 10 July 2018, around two weeks before the hearing, the First-tier Tribunal (FTT) allowed the defendant's appeal against the termination of his HB and determined that the defendant had been entitled to HB from 5 February 2018. Once the backdated payment was made, the defendant's rent arrears would fall below the Ground 8 threshold. However, on 27 July 2018, at the date of the hearing, the payment had not been made. The defendant argued that this constituted an unusual and exceptional circumstance that permitted the court to adjourn the claim to enable the sum to be paid.

Deputy District Judge Vokes adjourned the claim. The circumstances, in his experience, were very unusual and were sufficiently exceptional to fall within the category of cases identified in *North British Housing Association Ltd v Matthews* [2004] EWCA Civ 1736; [2005] HLR 17; February 2005 *Legal Action* 35 that permitted a court to adjourn a possession claim where Ground 8 would otherwise be satisfied.

- **Royal Brompton & Harefield Hospitals Charity v Roupell and Head**
  [2018] EWHC 1873 (Ch),
  23 July 2018

Mr Roupell and Mr Head became tenants of Royal Brompton & Harefield Hospitals Charity's (the charity's) predecessors in title in 1981 and 1970 respectively. Both originally occupied their homes under fixed terms that had since expired. Until 2016, it had not been disputed that they occupied their homes as statutory tenants with the protection of the Rent Act 1977. In 2016, the charity served both tenants with HA 1988 s21 notices. In June 2017, the charity issued a claim for possession against both tenants, relying on the expiry of the notices. The charity argued that the tenants were incapable of acquiring the protection of the Rent Act 1977 because the interest of the charity under the tenancy constituted hospital property and was, until 2015, held in trust for the Crown for the purposes of a government department.

The claim for possession was dismissed. The two homes were not hospital property that had ever been vested in a Minister of the Crown; both properties were endowments that had been retained by the charity's board of governors. It therefore followed that Crown immunity under Rent Act 1977 s13 did not apply. Even if it had, the charity was estopped from denying that the tenants should be treated as having equivalent statutory protection as afforded by the Rent Act 1977 (*Daejan Properties Ltd v Mahoney* (1995) 28 HLR 498). The charity had, until 2016, always treated the tenants as having the protection of the Rent Act 1977 and the tenants had relied on those representations to their detriment, ie, they had passed up the offer of secure council accommodation.

- **Paragon Asra Housing Ltd v Neville**
  [2018] EWCA Civ 1712,
  26 July 2018

Mr Neville was the assured tenant of Paragon Asra Housing Ltd (Paragon). Paragon brought a claim for possession after it was alleged that he had breached the terms of his tenancy by committing acts of anti-social conduct, including racist abuse, threats to kill and other harassment, which the court described as intolerable and alarming to his neighbours. Mr Neville admitted that he had committed some of those acts but defended the claim on the

grounds that he had a personality disorder and his conduct arose as a consequence of his disability. He therefore argued that his eviction constituted discrimination arising from his disability under Equality Act (EA) 2010 s15.

The court made a suspended possession order for 14 months, which required Mr Neville to comply with the conditions of his tenancy agreement that prohibited anti-social conduct. He almost immediately failed to comply with the terms and Paragon sought a warrant to enforce the possession order. Mr Neville applied to suspend the warrant. At a hearing, all of the allegations against him were found proved and the application to suspend the warrant was dismissed. District Judge King held that as the court had previously considered the question of whether the eviction of Mr Neville would amount to unlawful discrimination under EA 2010 s15, it was not obliged to do so again. Mr Neville's appeal to a circuit judge was allowed and Paragon was granted permission to apply to the Court of Appeal.

The Court of Appeal allowed the appeal. A court, considering an application to suspend a warrant under HA 1988 s9, may not reconsider the question of whether an eviction is disproportionate under EA 2010 s15 if the court making the possession order has already conducted an analysis of whether the eviction would be proportionate, unless there has been a material change in the defendant's circumstances. In this case, there had been no change in Mr Neville's circumstances. It therefore followed that the district judge had been right to refuse to suspend the warrant of possession.

- **Sutton LBC v Dolan**[7]
  County Court at Central London, 17 July 2018

The claimant let a property under an introductory tenancy to the defendant's partner. Six months after the tenancy was granted, the defendant's partner died. On 17 March 2017, the claimant served a notice to quit on the personal representative of the deceased at the property. That notice was said to expire on 17 April 2017. The claimant also served a copy of that notice on the Public Trustee. There was no record of when this occurred but the officer who served the notice gave evidence that she usually posted such notices to the Public Trustee on the same day as she did to the property. The Public Trustee confirmed receipt of the notice in a letter dated 13 April 2017. That letter stated that the notice had been entered onto its register on 12 April 2017.

The defendant did not give up possession and the claimant brought a claim for possession. The defendant resisted the claim on the grounds that it was unclear when the notice was served on the Public Trustee.

Recorder Aldous QC made an order for possession. This was not a case in which the Public Trustee had been sent a copy of the notice many months after the notice to quit had been served on the property. It was more likely than not that the notice had been received by the Public Trustee shortly after it had been served on the property and therefore was received within sufficient time for it to determine the tenancy on 17 April 2017.

- **Dondore Incorporated and Hitt v Fetaimia and Fetaimia**
  [2018] EWHC 1832 (Ch), 18 July 2018

The first claimant, Dondore Inc, was the registered freehold owner of a flat in a mansion block (the property). The second claimant, Mr Hitt, held the entire share certificate, and was the sole director, of Dondore Inc. The defendants, Mr and Mrs Fetaimia, occupied the flat and had done so for many years. No written agreement formally recorded the status of their occupation. The defendants resisted a claim for possession brought by Dondore Inc on the grounds that Mrs Fetaimia had purchased the entire shareholding of Dondore Inc from Mr Hitt.

The claim for possession was dismissed. The evidence before the court demonstrated that Mrs Fetaimia was the beneficial owner of all of the shares in Dondore Inc and such shares were held on trust for her by Mr Hitt.

- **Havering LBC v Eales**
  High Court (Queen's Bench Division), 13 July 2018

Ms Eales was the non-secure tenant of a property let by Havering LBC. She had been diagnosed with a personality disorder. She admitted committing racially-aggravated verbal and physical assaults against her neighbour and, in 2017, she was convicted of a racially-aggravated public order offence. Havering served a notice to quit. On its expiry, Havering issued a claim for possession and an injunction to prohibit Ms Eales from residing at the property.

Ms Eales claimed that both the injunction and the possession claim amounted to unlawful discrimination under EA 2010 s15 and that the decision to seek possession was unlawful on public law grounds because Havering had failed to refer her case to the vulnerable persons panel in breach of its own policy. The basis of her defence was that she was disabled, her behaviour was a consequence of her personality disorder and there was a less intrusive means of controlling her behaviour, namely an injunction that controlled her behaviour but did not exclude her from the property.

A psychiatrist concluded that it was not possible to address Ms Eales' personality disorder until she took steps to address her alcohol and drug addiction. A district judge found that the cause of her behaviour was her substance misuse and not her personality disorder. A possession order was made and an injunction was granted. Ms Eales appealed.

Sir Alistair MacDuff, sitting as a deputy High Court judge, dismissed the appeal. The district judge had been entitled to find that Ms Eales' behaviour had not arisen because of something arising in consequence of her disability. In any event, it was apparent when the judgment was read as a whole that the district judge had also considered that Ms Eales' eviction was proportionate as it was no more than was necessary in order to achieve the objective of protecting her neighbours from her criminal behaviour. That was the correct decision. The failure of Havering to refer Ms Eales' case to its vulnerable persons panel in breach of its own policy did not vitiate its decision to bring its claim for possession. In all the circumstances, it could not be said that this failure meant that the decision to recover possession was one which no reasonable housing authority could have taken.

- **R (Law Centres Federation Ltd (t/a Law Centres Network)) v Lord Chancellor**
  [2018] EWHC 1588 (Admin), 22 June 2018

The Law Centres Network (LCN) brought a claim for judicial review of a decision to reduce the number of housing possession court duty schemes (HPCDSs) from over 100 to 47 and to introduce price-competitive tendering for the HPCDS contracts. The Legal Aid Agency (LAA) accepted that any cost savings from the reduction would be negligible. The LAA decided, however, to implement the change in the belief that it would make the HPCDSs more profitable for those providers that operated them and thereby reduce the risk of their withdrawing from scheme contracts.

However, there was no evidence that existing providers were withdrawing from the existing scheme contracts because they were unprofitable and there was no evidential explanation for why the LAA thought larger scheme areas would be regarded as more attractive by providers. In contrast, in responses to the consultation, a number of existing providers expressed concern at the proposals: 48 of the 63 consultees were fundamentally opposed to the proposals. Evidence expressly refuted the suggestion that small contracts were not sustainable and concern was raised as to the impact on clients using the service. Despite these responses, and no further evidence being obtained, the LAA concluded that 'moving to larger service delivery areas was the appropriate course of action' (para 52). No equality impact assessment was undertaken as the LAA did not consider that the change would impact upon clients using the service.

One consequence of the reduction of the number of schemes was that fewer providers obtained contracts. While a number of law centres were retained as agents by those who had successfully bid for the schemes, the income received by such law centres for providing the same service was significantly reduced. One law centre gave evidence that its income was to reduce by two-thirds.

The claim for judicial review succeeded. Andrews J held that there was no evidence that reducing the number of HPCDSs would make the schemes more profitable and sustainable. In fact, the only evidence, which was received from the consultation, suggested that the contrary was true. In the circumstances, the decision was one that no reasonable decision-maker could reach on the evidence before it. The LAA had also failed to have due regard to the public sector equality duty. The LAA had failed to appreciate that the reduction in the number of schemes might result in the closure of law centres or, at best, limit the ability of law centres to provide additional services to clients that were not covered by legal aid and therefore unlikely to be provided by firms of solicitors awarded the new contracts.

- **Okpoti v Taylor**[8]
  County Court at Central London, 2 July 2018

Ms Okpoti was an assured shorthold tenant. Ms Taylor was her landlord. Ms Taylor served a HA 1988 s8 notice after Ms Okpoti failed to pay her rent and, when it expired, she issued a claim for possession. The s8 notice erroneously described HA 1988 Sch 2 Ground 8 as being satisfied in respect of a tenancy, in which rent was paid monthly, if three months of arrears were outstanding and did not state the earliest date at which Ms Taylor would be entitled to bring a claim for possession. At the first hearing, Ms Okpoti contended that while more than two months' rent was outstanding, the s8 notice was

defective and she had a counterclaim for harassment that would extinguish some or all of the rent arrears.

District Judge Bishop found that the form of the s8 notice was substantially to the same effect as the prescribed form and was therefore a valid notice. While she also made directions for Ms Okpoti's counterclaim to be heard, she made a possession order under Ground 8 despite not deciding the amount of the arrears that were owed to Ms Taylor. Ms Okpoti appealed.

HHJ Dight allowed the appeal. The s8 notice was defective: it contained inaccurate information about when Ground 8 would be satisfied and failed to warn the tenant as to when a claim for possession could be brought. The claim for possession ought to have been dismissed. In any event, it was inappropriate to make a possession order under either Ground 8 or Ground 10 before the court had decided Ms Okpoti's counterclaim as there was a real possibility that had the counterclaim succeeded, it would have reduced or extinguished the defendant's rent arrears.

Long leases

Reasonable adjustments

- **Plummer v Royal Herbert Freehold Limited**[9]
  County Court at Central London, 27 May 2018

Mr Plummer was the leasehold owner of a flat within a development. The development included the Royal Herbert Leisure Club (the club), which comprised a swimming pool, gym, sauna, changing rooms and bar. Royal Herbert Freehold Ltd (Royal Herbert) was the freehold owner of the development and responsible for its management.

In 2001, Mr Plummer was diagnosed with multiple sclerosis. He purchased his flat with his wife in 2010. All lessees within the development were obliged under their leases to pay an annual fee to become members of the club. In 2010, the rules were relaxed to permit non-residents to become members at the discretion of Royal Herbert. The sole means of access to the club was via a long staircase with 17 stairs. Initially, Mr Plummer was able to access the swimming pool down the stairs on crutches. The majority of the time, however, he needed to be lifted down the stairs by his carer.

In 2011, Mr Plummer asked Royal Herbert to install handrails in the changing rooms, lino flooring, a shower seat and a stairlift to enable him to make better use of the facilities of the club. It refused to do so despite making a number of other improvements to the club. Mr Plummer issued a claim for damages and an injunction requiring Royal Herbert to carry out the reasonable adjustments he had requested.

District Judge Avent allowed the claim. The starting point was to consider whether Royal Herbert, in providing access to the club, was a manager of premises or a service-provider (as the duty on service-providers to make reasonable adjustments was more extensive, ie, a manager of premises is never required to make an adjustment that constitutes an alteration to a physical feature, which the installation of a stairlift would have involved). Royal Herbert was a service-provider as any member of the public was entitled to join the club at its discretion.

Royal Herbert's refusal to make the requested adjustments was unreasonable. The installation of the handrails, a shower seat and lino flooring ought to have been carried out in 2011. The works were not difficult to carry out, were relatively inexpensive and would not have resulted in the closure of the club. Moreover, the provision of such items would have gone a considerable way to avoiding the substantial disadvantages Mr Plummer faced.

It would also have been reasonable to have installed a stairlift, which would have been likely to cost somewhere between £15,000 and £20,000. The club's accounts demonstrated that this would have been affordable, but even if it was not, it would not have been unreasonable to require the club to take out a loan over five years or to create a sinking fund to raise the monies from other lessees. That said, it was not appropriate to make an injunction because the evidence before the court was that Mr Plummer's medical condition had deteriorated so that it was no longer possible for him to use the club even with the reasonable adjustments being made.

Royal Herbert was also found to have indirectly discriminated against Mr Plummer. Royal Herbert had a practice of not undertaking works or adjustments to the club that did not benefit all its members. That put Mr Plummer and other disabled persons at a particular disadvantage as it meant works that only benefited disabled people would never be undertaken. While a fair and balanced approach might appear to be laudable, it was contrary to the purposes of the EA 2010, which were to produce equality of results rather than equality of treatment. As the works were affordable, the discriminatory effect on Mr Plummer was not proportionate and could not be justified. He was awarded damages of £9,000 and his costs.

Administration charges/ jurisdiction of FTT

- **Avon Ground Rents Ltd v Child** [2018] UKUT 204 (LC), 20 June 2018

Avon Ground Rents Ltd (Avon) was the freehold owner of a block of flats. Ms Child was the leasehold owner of a flat within the block. Avon issued a money claim in the county court for the payment of service and administration charges by Ms Child. The county court ordered that the claim be '[s]ent to First Tier Property Tribunal for a determination' (see para 7) under Commonhold and Leasehold Reform Act (CLRA) 2002 s176A.

After proceedings had been issued, Avon incurred the further sum of £4,425 in legal costs litigating the dispute. Such costs were not demanded formally from the lessee but sent to the FTT in the form of a costs schedule two days before the final hearing, after the FTT had indicated that it would sit as the county court at the end of the proceedings in accordance with the Residential Property Dispute Deployment Pilot.

The FTT, in its written decision given after the hearing, determined that only 35 per cent of the service and administration charges were payable. The FTT, within the same written decision, also decided that Avon was only entitled to payment of half of the legal costs it had incurred because the sums, which were administration charges, were disproportionate and an unreasonable amount. The FTT subsequently notified the parties that a county court 'judgment' had been drawn up and issued (see para 16). Avon appealed to the Upper Tribunal (UT) and to a circuit judge in respect of the FTT's decision not to award Avon its legal costs of the proceedings. Both appeals were subsequently consolidated.

Holgate J (chamber president) and HHJ Hodge QC allowed the appeal in part. The FTT did not have jurisdiction to determine whether the costs incurred after county court proceedings were issued were payable. Such costs were not administration charges as they had not been demanded and therefore were not yet payable. Only the county court had jurisdiction to determine whether the legal costs were payable. In this case, it was apparent that it was the FTT, as opposed to the county court, that had decided that only half of Avon's legal costs were payable because the reasoning formed part of the FTT's decision. While all FTT judges were able to sit as county court judges, this did not extend to lay members of the FTT. In future, it would be necessary for the FTT judges, when sitting as judges of the county court, to ensure they do not involve their fellow FTT members when exercising the county court's jurisdiction. It was not possible for the parties to agree that the FTT's jurisdiction could be extended to cover questions that were not within its jurisdiction.

The only way that the FTT could consider whether post-issue legal costs were payable was if the lessee made an application under CLRA 2002 Sch 11 para 5A for an order reducing or extinguishing the lessee's liability to pay an administration charge in respect of litigation costs. On such an application being made, the FTT would have jurisdiction to determine whether to reduce or extinguish any litigation costs that may be incurred if it is just and equitable to do so. On such an application being made, it would also be open to the county court or FTT to determine that it is just and equitable to reduce a lessee's liability to pay legal costs that were disproportionate to the sums in dispute, the issues involved and the level of representation appropriate to deal with those matters. In cases that were limited to whether a service or administration charge was reasonable in amount, and did not involve disputes of fact or questions of law, it would be unlikely to be reasonable to have instructed solicitors to undertake the litigation. A professional managing agent familiar with the issues ought to be capable of conducting the litigation without recourse to lawyers.

Property conditions

- **R v Bains**[10]
  Leeds Crown Court, 16 July 2018

Mr Bains was a letting agent responsible for the management of a house let to a family. In 2015, he was asked to fit smoke alarms in the house. In breach of the Smoke and Carbon Monoxide Alarm (England) Regulations 2015 SI No 1693, he declined to do so. On 20 February 2016, there was a fire at the house that resulted in the deaths of two young children. He was prosecuted under Health and Safety at Work etc Act 1974 s3(1) on the basis that he had failed in the conduct of his employment to, so far as was reasonably practicable, prevent persons not in his employment from being exposed to risks to their health and safety.

Mr Bains pleaded guilty to the offence.

He was sentenced to 12 months' imprisonment.

Right to buy

- **Milton Keynes Council v Bailey** [2018] UKUT 207 (LC), 17 July 2018

Mr Bailey was the secure tenant of a semi-detached bungalow located in a cul-de-sac comprising similar bungalows. Milton Keynes Council was his landlord. The primary source of heating to the bungalow was an eco-biomass boiler run on bulk wood pellets. Such pellets were delivered to the tenant in 15 kg bags. Mr Bailey sought to exercise his right to buy the bungalow under HA 1985 Part 5. The council refused his request on the grounds that the bungalow was particularly suitable for occupation by elderly persons and was therefore not subject to the right to buy. He appealed to the FTT (Property Chamber).
The FTT allowed the appeal on the grounds that an elderly person would ordinarily be unable to lift the bags of wood pellets and therefore this meant that the property was not suitable for elderly persons.

Mr McCrea FRICS allowed an appeal by the council to the UT. The property appeared to have been designed for use by elderly persons and was located in a cul-de-sac with similar types of bungalows. It would therefore be surprising if it was not particularly suitable for occupation by elderly persons. When all the relevant factors were looked at in aggregate, the eco-biomass boiler did not lead to a different conclusion, especially in circumstances where the FTT had ignored the fact that the council made arrangements for the boiler to be filled as and when it was required.

Rent review

- **Robertson v Gordon Webb** [2018] UKUT 235 (LC), 20 July 2018

Mr Robertson was an assured tenant. Mrs Gordon Webb was his landlord. Mrs Gordon Webb served a HA 1988 s13 notice in order to increase Mr Robertson's rent. She did so by posting it through his letterbox. Mr Robertson did not refer the notice to the FTT (Property Chamber) before the date that the new rent was to take effect. He referred the notice to the FTT a month or so later. The FTT decided that it lacked jurisdiction to determine the new rent because the time for doing so had passed.

An application for permission to appeal against that decision was refused by the FTT and the UT. Mr Robertson was, however, granted permission to judicially review the refusal to grant permission by the UT on the grounds that it had neglected to consider the merits of his appeal. Under Civil Procedure Rules 1998 r54.7A(9)(b), the refusal to grant permission to appeal is automatically quashed if the UT or interested party does not request that there be a full judicial review in the High Court. In the instant case, no request for a full hearing was made and, as a result, the UT gave directions for there to be an oral hearing to determine whether permission to appeal should be granted afresh.

Holgate J refused permission to appeal. It is well settled that the FTT lacks jurisdiction to determine a new rent after the date of the new rent specified in a s13 notice has expired. The judge granting permission to judicially review that decision had failed to consider the question of jurisdiction at all and the merits of application were irrelevant. The strict time limit prescribed by HA 1988 s13 did not breach Human Rights Act 1998 Sch 1 article 6.

Housing allocation

- **R (TW, SW and EM) v Hillingdon LBC** [2018] EWHC 1791 (Admin), 13 July 2018

This is the first of two claims for judicial review (see *YG* below) relating to three aspects of the council's December 2016 housing allocation scheme, namely: (1) a condition that only households with at least 10 years' continuous residence in-borough qualified to join the three welfare-based bands (A–C) of its housing register (the residence qualification); (2) the awarding of additional preference for such households who were in bands C and B of the housing register (the residence uplift); and (3) the awarding of additional preference for those in bands C and B who were working households on low income (the working household uplift).

In this claim, the claimants were all of Irish Traveller descent and living in temporary accommodation. TW was a lone parent caring for SW, her two-year-old child. EM could not work by reason of disability and was a full-time carer for his three adult disabled children.

The claim was pursued on three grounds:

(1) that both the residence qualification and the residence uplift discriminated indirectly and unlawfully under EA 2010 ss19 and 29 against persons with the protected characteristic of race, and that, as Irish Travellers, the claimants had such a characteristic;
(2) that the working household uplift discriminated indirectly and unlawfully under the same statutory provisions against persons with the protected characteristics of disability and sex, the former applying to EM's household and the latter to TW as a single parent; and
(3) in formulating the three provisions under challenge the council acted in breach of its obligations under Children Act (CA) 2004 s11(2).

Supperstone J declared that the residence qualification and uplift were unlawful, and that the council had acted in breach of its obligations under CA 2004 s11(2) in formulating and maintaining those provisions. The claim for judicial review was allowed to that extent. He did not consider that the working household uplift was unlawful or that the council acted in breach of its obligations under CA 2004 s11(2) in formulating and maintaining that provision.

- **R (YG) v Hillingdon LBC** [2018] EWHC 1937 (Admin), 26 July 2018

The claimant in this case was a refugee. He sought to challenge the same provisions of the December 2016 allocation scheme in relation to residency. His primary claim was that the rule unlawfully discriminated against him as a refugee and a foreign national because refugees would, as a class, find it more difficult to satisfy the rule.

Mostyn J rejected the claim. He said:

He is discriminated against in favour of long-term residents not because he is a refugee but because he is a short-term resident. Nobody is suggesting that discrimination on that basis is to be impugned. Indeed, as I have pointed out, it has been expressly authorised by parliament and strongly encouraged by the government (para 15).

[Counsel for the claimant argued that] the circumstances of a refugee and those of a voluntary migrant from Yorkshire or France are different because the refugee has no choice but to apply in Hillingdon whereas the analogue comes to Hillingdon by choice. Further, the refugee may be more vulnerable as a result of the persecution he has suffered which has resulted in the award of refugee status. All of this is true, but so what? The reason that each has started the 10-year journey may be different but that is immaterial to the process of starting the clock and counting the days, which is all that the measure stipulates (para 17).

The decision in *TW* (above) could be distinguished because:

... it is surely much more likely that an Irish Traveller will not complete the 10-year journey than his or her analogue. The Traveller and the analogue are unalike cases which should be treated differently. But the same cannot be said when comparing a recently arrived refugee to his or her analogue. In my opinion, for the purposes of assessing the impact of the 10-year rule, when it comes to starting the clock and counting the days their situations are the same. I therefore do not find that there is any actual discrimination here (paras 18–19).

If there had been discrimination, there would need to be a 'strong and obvious case before the court [would] interfere' with the council's justification of it (para 22). The council's scheme of priorities was 'not manifestly without a reasonable foundation' (para 39).

A challenge based on alleged breach of the public sector equality duty contrary to EA 2010 s149 also failed. The council had carried out two equality impact assessments (EIAs). The judge said:

The first EIA expressly and conscientiously considered the impact of the scheme on people arriving from outside this country. The second EIA did so implicitly. There was no failure to give due regard to any of the section 149 matters, let alone an irrational or perverse omission (paras 45–46).

An irrationality challenge was also unsuccessful:

Finally, the claimant says that the 10-year rule is irrational in terms of its length. It is, apparently, a national record, and twice as long, at least, as any other such condition anywhere else. I cannot accept this argument. The guidance given by the government set a minimum level but no maximum. It cannot be said that to adopt a 10-year rule is outwith the power granted by parliament or at variance with the guidance given by government (para 47).

Homelessness

Inquiries

- **Complaint against Ealing LBC** LGSCO[11] Complaint No 17 007 432, 17 April 2018

There is no statutory timescale in which councils must complete homelessness inquiries. The 2006 *Homelessness*

code of guidance for local authorities (Department for Communities and Local Government, July 2006) para 6.16 stated that councils should deal with inquiries as quickly as possible, carry out a preliminary assessment on the day of application and, wherever possible, complete inquiries within 33 working days (while stating that councils should be able to complete inquiries earlier than that in most cases).

The complainant applied to the council for homelessness assistance on 22 June 2017. She was not notified of the decision on her application until December 2017, 125 working days later. The ombudsman found that there had been significant initial delay:

[T]he council did not make inquiries into her homelessness until the end of August 2017. This is a significant delay. The council has accepted that it should not have waited two months to take further action after Miss X gave it documents it had requested (para 63).

The council had then wasted time investigating unnecessary matters:

The council made significant inquiries into Miss X's accommodation history even though the law only required it to establish her last settled address and the circumstances in which she came to leave that address. The council investigated Miss X's address history over a significant period of time, including addresses on her children's birth certificates. This added to the time the council took to make a decision. This is fault. The council should have limited itself to matters it had to take account of in reaching a decision on Miss X's homelessness (para 64).

Some of the delay was the responsibility of Miss X but the council was 'liable for a delay of three months in the investigation which includes the two months it has accepted' (para 71). The delay caused injustice:

The injustice caused to Miss X by the council's delay in investigating was frustration, and uncertainty about her family's future. Miss X's distress about the unsuitability of the family's accommodation [see below] was also compounded by the time it took for the council to reach a decision on her homelessness (para 73).

The ombudsman recommended that the council apologise to Miss X and pay £100 for the avoidable frustration caused as a result of the delays in dealing with her homelessness application.

Interim accommodation

- **Complaint against Ealing LBC** LGSCO Complaint No 17 007 432, 17 April 2018

Miss X was homeless. She had four children and was pregnant with her fifth. She suffered with a pregnancy-related condition causing pelvic pain. On her homelessness application, the council provided interim accommodation (HA 1996 s188) on the third floor comprising two beds in one bedroom, at £345 per week. The accommodation had its own bathroom and cooking facilities but was referred to as 'a bed and breakfast'. The council assumed Miss X would obtain discretionary housing payments (DHPs) to meet the shortfall between her benefits and the charges.

The ombudsman found that:

Due to a shortage of suitable accommodation the council had no alternative than to place Miss X and her family there. However, it should have been clear to the council that it was placing Miss X in unsuitable accommodation based on the number of people in her household compared to the size of the accommodation. The suitability assessment, which the council had completed [on the day of the application], said the family needed three bedrooms, but it placed the family in a one-bedroom property (para 50).

Miss X complained about the condition of the property. The ombudsman found that '[o]n the balance of probabilities, we are satisfied the accommodation was also unsuitable because of repair issues including mould and wet walls' (para 54). Substantial arrears accrued because Miss X could not afford the charges. The ombudsman found that the 'decision that Miss X would be paid DHPs was not based on any evidence of entitlement' (para 56).

The ombudsman was satisfied that this was not an isolated case of the provision of unsuitable interim accommodation. He stated that 'the council does not have an adequate supply of suitable accommodation to meet its statutory duties' (para 59) and that:

The evidence the council provided suggests it is likely there are other households in unsuitable accommodation. The council should ensure that any households in accommodation that it knows is unsuitable for any reason, are told about their right to complain. The council should also advise these households they can complain to the ombudsman if they remain unhappy following the council's complaint response (para 74).

The placement of homeless people in unsuitable accommodation was not the result of accidental error or inadvertence:

The council says it would never knowingly or deliberately place anyone in unsuitable accommodation, and so it has not yet accepted our recommendation that it should write to households that it places in unsuitable accommodation. However, this conflicts with our finding in Miss X's case. The council's suitability assessment stated the family needed three bedrooms, and it placed them into accommodation with one bedroom. In such circumstances, where the accommodation available does not meet the requirements in a suitability assessment, the council is knowingly placing a family into unsuitable accommodation (para 75).

The ombudsman was using his 'powers to publish this report to bring the issue to the attention of the public' (para 78). The council agreed to apologise and pay £1,500 (calculated at £300 per month) for five of the months that the family lived in unsuitable accommodation. It also agreed to write off the arrears accrued.

Intentional homelessness

- **Doka v Southwark LBC** UKSC 2018/0034, 15 May 2018

An appeal panel of the UK Supreme Court refused an application for permission to appeal from the decision of the Court of Appeal in this case ([2017] EWCA Civ 1532; November 2017 *Legal Action* 42). Its reasons were that:

(1) the application did not raise an arguable point of law of general public importance which ought to be considered at this time;
(2) the applicable principles were authoritatively laid down in the cases of *Din and another v Wandsworth LBC* [1983] AC 657 and *Haile v Waltham Forest LBC* [2015] UKSC 34; July/August 2015 *Legal Action* 50; and
(3) 'this is not a case in which they should be reviewed even through there may be errors in the reasoning in the Court of Appeal, which should not be treated as authoritative'.

- **Oduneye v Brent LBC** [2018] EWCA Civ 1595, 5 July 2018

Ms Oduneye was the tenant of a flat. She received jobseeker's allowance (JSA) and also HB. The council received information indicating that she had begun to run her own business as a self-employed person and that her entitlement to JSA had ceased. The council told her that she needed to provide proof of her income and other financial information, failing which her claim to HB could be terminated. It did not receive a response within the time it had specified. A decision was taken to terminate the claim. Ms Oduneye was sent a notification of the decision, providing her with details of her right of appeal. No appeal was lodged. Two further claims for HB were later made but again suspended or closed for failure to provide required information. Ms Oduneye therefore did not receive HB payments from December 2013 and accrued arrears of over £11,000. Her landlord obtained a possession order and she was evicted on 15 April 2015.

On the same day, Ms Oduneye made another application for HB and this time provided bank statements, proof of her identity, tax credit notification letters and a request for her claim to be backdated. That claim resulted in two payments to her former landlord: (1) around £3,100 for the period 20 October 2014 to 5 April 2015; and (2) around £5,400 for the period 16 December 2013 to 19 October 2014. The council later concluded that the two payments had been made in error and that they constituted overpayments. However, because the errors had been made by council officers, it would take no steps to recover them.

On an application for homelessness assistance, the council decided that she had become homeless intentionally: HA 1996 s191. That decision was upheld on review and HHJ David Mitchell dismissed an appeal from the review decision.

The Court of Appeal dismissed a second appeal. Kitchin LJ stated:

Drawing the threads together, I am satisfied that the reviewing officer was entitled to find that the original decision was correct and that Ms Oduneye accrued rental arrears because she failed to provide the council with the information it needed to process her housing benefit claim and because she failed to pay the shortfall between the rent and her housing benefit. The reviewing officer was also entitled to find that the property was affordable; that Ms Oduneye was intentionally homeless because she deliberately failed to pay the rent; that she lost the property as a direct result of her failure to pay the rent; that she ceased to occupy the property following her eviction; that the property was suitable for her occupation; and that it was reasonable for her to continue to

occupy the property. The reviewing officer has made no error in the way she approached the issues before her (para 41).

Suitability

- **Complaint against Brighton and Hove City Council**
  LGSCO Complaint No 16 017 200, 10 May 2018

The complainant and her autistic son were homeless. The council accepted that it owed her the main housing duty (HA 1996 s193) and she was initially placed in self-contained temporary accommodation leased from a private landlord. When the lease expired, the council offered her a downstairs flat in another council's area. At the first viewing, the complainant knew it would not be suitable as she heard a lot of noise from the flat above and her son's condition was aggravated by noise. She later said the tenant in the flat above swore frequently and made a lot of noise. The flat also did not have enough room for the son's sensory equipment. However, the council confirmed the offer and told her that the only alternative would be bed and breakfast accommodation.

The offer was reluctantly accepted but after an adviser took up the case, the council carried out a suitability assessment and decided that the property was not suitable. While the family was waiting to move out, the complainant reported more noise nuisances and an instance when her neighbour threatened to stab her and kill her son. A housing officer contacted the authority for the area in which the flat was situated. It reported a nine-year history of anti-social behaviour by the neighbour, and that it had issued three anti-social behaviour orders against her. However, these issues were not investigated until almost two months after the family had moved into the unsuitable accommodation.

The ombudsman recommended that the council should: apologise to the complainant; pay her £750 to recognise the injustice caused to her and her son by leaving them in unsuitable accommodation; pay £100 for a six-month delay in reimbursing storage charges; and pay a further £150 for the time and trouble caused by its delay and poor handling of the complaint.

On publication of the report, the ombudsman, Michael King, said:

This family were caused significant stress being placed in thoroughly unsuitable accommodation by the council, and at one point they were even split up because of the neighbour's poor behaviour. While I appreciate the strains councils are under to find the right accommodation, particularly in areas of high property prices, they still need to ensure the suitability of the accommodation they are offering ('Council places woman and autistic son in flat below nuisance neighbour', LGSCO news release, 18 July 2018).

Reviews and appeals

- **Kamara v Southwark LBC; Leach v St Albans CDC; Piper v South Bucks DC**
  [2018] EWCA Civ 1616, 12 July 2018

In each of these second appeals, it was contended that there had been a failure by the reviewing officer to point out to the homeless applicant that the right to make representations orally included a right to do so at a face-to-face meeting: see *Makisi v Birmingham City Council* [2011] EWCA Civ 355; May 2011 *Legal Action* 36. The question for the Court of Appeal was whether a minded to letter, required by Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 SI No 71 reg 8(2), *must specify in terms* that the applicant (or a representative) may make representations to the reviewer orally at a face-to-face meeting. In all three cases, the reviewing officer had framed the relevant part of the minded to letter in terms of the language of reg 8(2)(b) alone and in none of the cases had the applicants' solicitors asked for a face-to-face meeting.

The appeals were dismissed. Patten LJ stated:

The rights granted to the [applicants] are set out in regulation 8(2)(b) and (so far as material) were stated verbatim in the minded-to letters which their solicitors received. Given that the respondents in each case have notified the [applicants] of their right to make representations to the reviewer orally or in writing or both as provided in the regulation, the only question is whether the obligation to 'notify' an applicant of these things means any more than that.

In my view it does not. Although, as is clear from Makisi, *the right to make oral representations may be exercised at a face-to-face meeting, that is evident from the language of regulation 8(2)(b) itself. Like Etherton LJ, I consider that the most obvious meaning of that phrase is one which connotes some kind of meeting or hearing at which the applicant or his representative can make their points in response to the minded-to letter. It is not necessary to expand the scope of the notification in order for an applicant or his advisors to understand that* (paras 25–26).

Any other approach 'would be productive of uncertainty in relation to what is intended to be a straightforward administrative procedure carried out by the staff of local housing authorities' (para 27).

Housing for children

- **Complaint against Islington LBC**
  LGSCO Complaint No 17 011 285, 29 May 2018

Miss X was a child aged 16 when she and her mother became homeless from their social housing accommodation. The council provided interim accommodation in another borough (council B) but ultimately decided that the mother had become homeless intentionally and withdrew the temporary accommodation there. At the same time as her eviction, Miss X asked the council's children's services department to help her. It subsequently directed her to approach council B, where she had lived in the temporary accommodation, and it declined to help her. Council B declined to help as the family were no longer living in its area.

The ombudsman found:

There was no fault in the council advising Miss X to contact council B for assistance when she was living in its area. The courts have said that councils have a responsibility to children within their area even if they were placed there by another council. However, council B has not accepted any responsibility for Miss X and she is no longer resident in its area (para 23).

Once council B had declined to act, the council should have done so:

Even if the council did not believe it was legally responsible for carrying out the assessment it was under a duty to secure co-operation from council B in addressing Miss X's needs. Its failure to contact council B was also fault (para 25).

Further, '[w]hilst the council believed council B's children's services were responsible for Miss X, the council failed to identify that Miss X was threatened with homelessness' (para 26). The council had been at fault:

Statutory guidance says the council should have clear protocols between children's services and housing departments to 'prevent young people from being passed from pillar to post'. The council failed to provide proper assistance to Miss X and she was caused significant distress as a result of the uncertainty around her housing (para 29).

In addition to its making a payment to Miss X of £400, the ombudsman recommended:

If the council believes that council B is responsible for Miss X under the Children Act 1989 it should work with council B to resolve any disputes. Miss X should not be disadvantaged by any disagreements and the council should provide any necessary services until the disputes are settled (para 34).

1 www.gov.uk/government/speeches/policy-exchange-housing-speech.
2 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/717762/SI2018730_Allocation_Regulations_letter.pdf.
3 It is available for download at: https://markprichard.co.uk/documents/s21-validity-checker.
4 William Ford, solicitor, Osbornes Law, London, and Daniel Clarke, barrister, London.
5 Jo Holden, solicitor and senior partner, Holden and Co LLP, Hastings.
6 Simon Mullings, caseworker, Edwards Duthie Solicitors, London.
7 Ivy Williams, solicitor, South London Legal Partnership, and Rea Murray, barrister, London.
8 Jeinsen Lam, solicitor, South West London Law Centre and Sarah Salmon, barrister, London.
9 Nick Webster, solicitor, Leigh Day, London, and Catherine Casserley, barrister, London.
10 See 'Letting agent jailed for failing to fit smoke alarms following fatal house fire', National Fire Chiefs Council news release, 19 July 2018.
11 Local Government and Social Care Ombudsman.

Jan Luba QC is a circuit judge. Sam Madge-Wyld is a barrister at Tanfield Chambers. They would like to hear of relevant cases in the higher or lower courts. They are grateful to the colleagues at notes 4–9 above for providing details of the judgments.

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