Recent developments in housing law

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

POLITICS AND LEGISLATION

Assured tenancies

On 1 October 2010, the Assured Tenancies (Amendment) (England) Order 2010 SI No 908 took effect. The Order lifted the rent ceiling, above which a tenancy cannot be an assured tenancy, from £25,000 to £100,000 per annum: Housing Act (HA) 1988 Sch 1 para 2(1)(b). The result was that thousands more tenants became assured tenants overnight.

For those with tenancies originally commencing on or after 28 February 1997, the tenancy will normally be an assured shorthold. Some landlords have treated the change as requiring them to place deposits taken from existing tenants under the protection of a tenancy deposit scheme. Communities and Local Government (CLG) has created a webpage of frequently asked questions about the change to assist landlords and tenants.[1]

Tenants in mortgaged property

CLG has issued a free booklet of non-statutory guidance on the Mortgage Repossessions (Protection of Tenants etc) Act 2010 and the regulations made under it, which came into force on 1 October 2010 (as described in October 2010 *Legal Action* 28): *Guidance to the Mortgage Repossessions (Protection of Tenants etc) Act 2010*.[2]

Scottish private rented sector

Although the coalition government has abandoned the Labour government's plans for further regulation of private sector landlords in England, a wholly different approach is being taken in Scotland. In October 2010, the Scottish Parliament began consideration of the Private Rented Housing (Scotland) Bill (SP Bill 54) designed to tighten further the regulation of that sector in Scotland.

Housing benefit

In September 2010, the Department for Work and Pensions published three research papers addressing topics related to private sector tenancy rents and housing benefit. They are:

- *Low income working households in the private rented sector.*[3]
- *Private landlords and the local housing allowance system of housing benefit.*[4]
- *Tenants' and advisers' early experiences of the local housing allowance national rollout.*[5]

Local authority housing benefit departments are required to refer claims for housing benefit from tenants living in the private rented sector to the Valuation Office Agency (VOA). The rent officers employed by the VOA carry out a series of determinations in every case referred. A monthly data table of the local reference rents produced by that exercise can now be accessed by both landlords and tenants.[6]

Homelessness

In September 2010, the coalition government issued new non-statutory guidance to local authorities in England to help them evaluate more accurately the number of rough sleepers in their areas: *Evaluating the extent of rough sleeping: a new approach* (CLG, September 2010).[7]

The guidance follows completion of a consultation exercise in respect of which a summary of responses has been published: *Consultation on proposed changes to guidance on evaluating the extent of rough sleeping. Summary of responses* (CLG, September 2010).[8]

Housing grants

The Housing Renewal Grants (Prescribed Form and Particulars) (Revocation) (England) Regulations 2010 SI No 2417 came into force on 31 October 2010. They repeal a host of earlier regulations prescribing the content of applications for disabled facilities grants and other housing grants. The intention is that local authorities should be left free to devise their own application forms.

Housing associations in Wales

The Welsh Assembly Government (WAG) has published the new guidelines against which it will assess the performance of housing associations in Wales: *Developing a modern regulatory framework for housing associations in Wales: delivery outcomes* (WAG, September 2010).[9]

Social housing sales

The latest statistics on social housing sales to sitting tenants in England during 2009–10 were released in September 2010: *Social housing sales to sitting tenants, England, 2009–10* (CLG, September 2010).[10] The figures cover sales through Right to Buy, Preserved Right to Buy, Right to Acquire, Social HomeBuy and other outright or shared equity sales to sitting tenants.

HUMAN RIGHTS

Article 8

■ Kay v UK

App No 37341/06, 21 September 2010

For the facts of this case, see *Lambeth LBC v Kay*; *Leeds City Council v Price* [2006] UKHL 10; [2006] 2 AC 465; May 2006 *Legal Action* 37.

In the European Court of Human Rights (ECtHR), the UK government did not dispute either that the properties in question were the 'homes' of the occupants for the purposes of article 8(1) of the European Convention on Human Rights ('the convention') or that Lambeth's decision to seek possession orders and the subsequent granting of the orders constituted an 'interference' with their right to respect for their homes. Both the government and the occupants agreed that the interference was in keeping with the law and pursued the legitimate aim of protecting the rights and freedoms of others. It protected the local authority's right to regain possession of its property from someone who had no contractual right to be there and ensured that the statutory scheme for housing provision was properly applied. The central question for the ECtHR to examine was whether or not the interference was proportionate to the aim pursued and thus 'necessary in a democratic society' (para 50).

The ECtHR stated as follows:

■ An interference will be considered 'necessary in a democratic society' in pursuance of a legitimate aim if it answers a 'pressing social need' and, in particular, if it is proportionate to the legitimate aim pursued. While it is for the national authorities to make the initial assessment of

necessity, the final evaluation as to whether the reasons cited for the interference are relevant and sufficient remains subject to review by the ECtHR for conformity with the requirements of the convention (para 65). In making their initial assessment of the necessity of the measure, the national authorities enjoy a margin of appreciation in recognition of the fact that they are better placed than international courts to evaluate local needs and conditions. The margin afforded to national authorities will vary depending on the convention right in issue and its importance for the individual in question (para 66).

■ The requirement under article 8(2) that the interference be 'necessary in a democratic society' raises a question of procedure as well as one of substance (para 67).

■ The court welcomed:

... the increasing tendency of the domestic courts to develop and expand conventional judicial review grounds in the light of article 8. A number of their lordships in [Doherty and others v Birmingham City Council *[2008] UKHL 57*] *alluded to the possibility for challenges on conventional judicial review grounds in cases such as the applicants' to encompass more than just traditional* Wednesbury *grounds ... To the extent that, in light of* Doherty*, the gateway (b) test set out by Lord Hope in* Kay *should now be applied in a more flexible manner, allowing for personal circumstances to be relevant to the county court's assessment of the reasonableness of a decision to seek a possession order, the court emphasises that this development occurred after the disposal of the applicants' proceedings* (para 73).

The ECtHR found a breach of article 8 in its procedural aspect because the decision by the county court to strike out the occupants' article 8 defences meant that the procedural safeguards required by article 8 for the assessment of the proportionality of the interference were not observed. As a result, they were dispossessed of their homes without any possibility of having the proportionality of the measure determined by an independent tribunal (para 74).

It was far from clear that, had a domestic tribunal been in a position to assess the proportionality of the eviction, the possession order would not still have been granted. The court therefore awarded €2,000 non-pecuniary damages to each occupant to compensate for feelings of frustration and injustice (para 78). An article on this important ECtHR judgment will appear in December 2010 *Legal Action*. See also page 31 of this issue.

■ Neville v South Dublin CC

[2010] IEHC 67,
19 March 2010

Mr Neville's parents rented a home from the council, but both died. After their deaths, Mr Neville discharged an illegally held firearm and fled to the UK. He was extradited and given a three-year suspended sentence together with a 12-month probation bond. When the council heard about this, it decided that:

■ he was a person who had engaged in anti-social behaviour;

■ he was not the tenant of the dwelling; and

■ he was residing there without permission.

The council sought to repossess the house through a summary process by which the Gardai (police) removed the front door and downstairs window and directed Mr Neville to leave the dwelling in keeping with the Irish Housing (Miscellaneous Provisions) Act 1997 s20. He sought judicial review.

O'Neill J refused to grant mandamus. The judge considered the applicability of article 8 of the convention. He found that the nature and extent of Mr Neville's occupation of the house fell beneath the threshold for asserting that it was his 'home' for the purpose of engaging his article 8 rights. Furthermore, although the eviction was unlawful and ultra vires the council's powers under section 20, Mr Neville had not been entitled to succeed to the tenancy. He was a trespasser and the council was entitled to recover possession.

■ Quinn v Athlone Town Council

[2010] IEHC 270,
8 July 2010

Ms Quinn was a tenant of the council. Following service of a notice to quit in September 2008, the council sought an order for possession. Ms Quinn defended those proceedings, but an order was made because she had no security of tenure and the local court was required to grant the order in those circumstances. In July 2009, she sought judicial review, contending that the process of eviction without providing her with an opportunity to defend the claim on its merits was a violation of her rights under article 8.

The Irish High Court rejected her claim. The proper target of her challenge should have been the service of the notice to quit which ended her tenancy. Her claim for judicial review of that decision was out of time.

Article 6 and delay

■ Băjănaru v Romania

App No 884/04,
21 September 2010[11]

Ms Băjănaru obtained the title to two plots of agricultural land in 1991. There was then a dispute about that title which was resolved in her favour. The decision was confirmed by the Court of Appeal in Bucharest in September 1999. She became entitled to possession of the land in March 2002. She was not able to obtain possession of it until April 2005. She complained to the ECtHR.

The ECtHR found violations of article 6(1) (right of access to a court) and article 1 of Protocol No 1 (protection of property). It was not disputed that the delays were attributable to the Romanian authorities. In the absence of a valid excuse, failure by the authorities to execute a final judgment within a reasonable time amounted to a violation of article 6. The government had not put forward any arguments leading to a different conclusion. The court concluded that the state had not deployed the necessary steps to execute the judgment. The court awarded damages of €3,000.

POSSESSION CLAIMS

Assured shorthold tenancies

■ Suvini v Anderson

Staines County Court,
13 August 2010[12]

Ms Suvini let a property to Mr Anderson on an assured shorthold tenancy from 18 August 2007 to 17 August 2008 with a rent of £1,200 payable on 15 August 2007 and 15 January 2008. A further tenancy was granted for another 12 months from 18 August 2008 to 17 August 2009, rent being payable bi-monthly in advance starting on 11 August 2008. After August 2009, the tenancy continued on a periodic basis. A notice under HA 1988 s21(4)(a) was served on 1 April 2010 seeking possession 'after 17 June 2010 or, if later, the day on which a complete period of your tenancy expires next after the end of two months from the service of this notice'.

At the subsequent possession hearing, the landlord argued that the periods of the tenancy were as set out in the tenancy agreement and so possession should be given. The tenant argued that the start and finish dates of the periods had been changed by the changed payment provision. If that was the case, the notice did not expire until 10 August and the landlord would have to rely on the saving provision. As proceedings were issued before 10 August, there would be a defence to the claim.

After referring to *Church Commissioners for England v Meya* [2006] EWCA Civ 821; [2007] HLR 4, District Judge Batcup ruled that the notice was valid and made a possession order. The tenant is seeking to appeal to a circuit judge.

After the possession order

■ Islington LBC v Markland

Clerkenwell and Shoreditch County Court, 13 July 2010[13]

Mr and Mrs Markland were joint secure tenants. Their relationship broke down and in December 2008 Mrs Markland left the premises. In May 2009, she served a notice to quit determining the tenancy. She alleged that she was the victim of domestic violence. As a result of this, she was rehoused. In July 2009, Islington notified Mr Markland that it would not be granting him a sole tenancy of the premises as he was a perpetrator of domestic violence. He disputed these allegations. Islington issued a possession claim, which was listed before a district judge in January 2010. Mr Markland appeared unrepresented. He handed in a pro forma defence and a written note, the substance of which was that he was the victim, had not been afforded a fair hearing by Islington and had a public law defence. He was given no opportunity to elaborate on his possible defence. The judge proceeded on the basis that he had no defence, as the joint tenancy had been lawfully determined. She made a possession order and gave a money judgment for £1,995.

Relying on *Forcelux Ltd v Binnie* [2009] EWCA Civ 854; December 2009 *Legal Action* 16, Mr Markland applied to set aside the possession order under Civil Procedure Rules (CPR) 3.1(2)(m) and/or CPR 3.1(7). He filed a draft fully pleaded defence asserting a gateway (b) defence, namely that Islington had failed to make a lawful determination about whether to grant him a sole tenancy of the premises or to secure suitable alternative accommodation under Islington's relationship breakdown policy.

District Judge Sterlini dismissed that application, holding that he had no jurisdiction to set aside the possession order. The appropriate procedure was an appeal under CPR 52. He granted permission to appeal.

HHJ Cryan dismissed the appeal against District Judge Sterlini's judgment but extended time to appeal against the possession order. He granted permission to appeal, allowed the appeal and gave case management directions. At the first hearing, the district judge had the options of either:

- deciding the case; or
- giving case management directions (CPR 55.8(1)).

When a claim is genuinely disputed on grounds which appear to be substantial, the court should give case management directions (CPR 55.8(2)). The powers under CPR 3 were residual and were not to be used where provision is made elsewhere in the rules. In *Forcelux v Binnie*, the Court of Appeal had had to fall back on CPR 3 because there was no other provision under which the court could have acted. In this case, Mr Markland had attended and had produced a defence. The district judge had decided that there was no substantive defence. She made a final order. To permit an application to set aside such an order would offend the principle of finality. CPR 52 provided the appropriate remedy where it was contended that there had been any procedural unfairness at a hearing. HHJ Cryan had no hesitation in allowing the appeal. Although the district judge had read the defence and note, she had given Mr Markland no opportunity to explain what he meant by a possible public law defence and he had been shut out from presenting a fuller case. Busy possession lists present a judicial challenge; however, the procedure adopted had been unfair and fatally flawed.

■ Southern Housing Group v Doran

Clerkenwell and Shoreditch County Court, 13 September 2010[14]

An outright possession order based on HA 1988 Sch 2 Grounds 12 and 14 was made against Ms Doran in June 2010 in her absence. Islington obtained a warrant for possession which was due to be executed at 12.20 pm on Monday, September 13. On Friday, September 10, Ms Doran made an application to set aside the possession order, or, in the alternative, to suspend the warrant.

District Judge Stary dismissed that application because it was not supported by evidence, particularly in relation to her claim to have discontinued her defence of the possession claim as a result of her chronic alcohol dependency, domestic violence and intimidation from her former partner. At the hearing, Islington made an application that she be debarred from making any further application to suspend the warrant. District Judge Stary refused this, but ordered that any further application could only be made if supported by evidence.

Evidence about alcoholism was obtained from the Family Drug and Alcohol Court late on Friday, September 10. However, Ms Doran only gave instructions to her solicitors at 11.40 am on Monday, September 13. As a result, it was not possible to issue the application before execution of the warrant. Ms Doran's solicitors contacted Islington and told the council that an application to suspend would be made. Islington was asked to direct the court bailiff to refrain from executing the warrant so that the application could be made. The council was put on notice that if the warrant was executed, an application to set it aside on the ground of oppression would be made. This request was refused and the warrant was executed at 12.20 pm. An application to set aside the warrant was made and heard later the same day.

District Judge Sterlini found oppression and set aside the warrant. He found that Islington's insistence on its strict legal rights to enforce the possession order and execute the warrant was, in the circumstances of the case, manifestly unfair (*Southwark LBC v Sarfo* (2000) 32 HLR 602 at 609). He granted permission to appeal.

SERVICE CHARGES

■ Southern Housing Group Ltd v Leasehold Valuation Tribunal

[2010] UKUT 237 (LC), 15 July 2010

Tenants of two social landlords applied to the Leasehold Valuation Tribunal (LVT) to review their service charges. The LVT decided that it had jurisdiction because in each case the tenancy agreements provided for 'variable' charges within Landlord and Tenant Act (LTA) 1985 s18(1)(b). The landlords appealed.

The Upper Tribunal dismissed the appeals. In each case the LVT had correctly construed the tenancy agreements as providing for variation of charges which fell within the LTA.

■ Phillips v Plymouth Community Homes Ltd

Southern Rent Assessment Panel, 27 July 2010[15]

Mr Phillips was the lessee of a flat, but did not live there. He was liable under his lease to pay service charges. He requested that communications be sent to his home address. Before replacing the roof, the landlord sent consultation letters to the flat, not to Mr Phillips' home address. The first he knew about the replacement of the roof was a demand for £3,654 as his contribution towards its cost. He applied to the rent assessment panel (RAP) for a determination of his liability to pay service charges.

The RAP found that the landlord had not complied with the consultation requirements contained in LTA s20. Some of the consultation letters failed to give reasons for carrying out works and did not give addresses to which observations should be sent or dates by which such observations had to be received. Furthermore, consultation letters had not been sent to the address specified by Mr Phillips. Accordingly, the maximum amount recoverable for the cost of roof works and the administration and supervision of the contract was £250. The RAP rejected the landlord's application to dispense with the consultation requirements. Furthermore, even if the landlord had complied with the statutory requirements, the lease did not provide for

the recovery of the cost of improvements, as opposed to repairs. There was no evidence of leaks or disrepair making it reasonable to replace the roof.

HOMELESSNESS

Definition of homelessness

■ Hashi v Birmingham City Council

Birmingham County Court, 20 August 2010[16]

The claimant was the tenant of a small flat which she occupied with her three children. She applied to the council for homelessness assistance under HA 1996 Part 7 on the basis that her home was so overcrowded that it was no longer reasonable to occupy it: s175(3). Her solicitors submitted a report from an independent environmental health consultant who advised that while the property was not statutorily overcrowded within the meaning of HA 1985 Part X, there was a Category 1 'Crowding and Space' hazard for the purposes of HA 2004. The council decided that the claimant was not homeless because she did not meet 'the prescribed assessment criteria for local authorities to consider', ie, the HA 1985 statutory overcrowding standards. On a review of that decision, the council arranged an inspection which found that there was a 'significant Category 2 Crowding and Space hazard'. The reviewing officer upheld the earlier decision.

HHJ Oliver Jones QC allowed an appeal and quashed that decision. He held that:

■ there had been either a total reliance or an over-reliance on the test of statutory overcrowding which 'was wholly wrong';

■ there had been a failure to give a rational explanation for rejecting the independent advice in favour of the council's own assessment of the degree of hazard. Although a reviewing officer could prefer the latter, s/he was obliged to give reasons for doing so;

■ the reviewing officer had taken into account an irrelevant consideration, namely that the claimant had been awarded priority points for overcrowding on the council's allocation scheme. The real issue for determination was whether or not it was reasonable for the claimant to continue in occupation.

The judge commended the *Regulation of 'crowding and space' in residential premises guidance* (LACoRS, June 2009) as an 'essential tool' in the assessment of overcrowding.[17]

Intentional homelessness

■ Mondeh v Southwark LBC

Lambeth County Court, 25 August 2010[18]

The claimant was an assured shorthold tenant of a one-bedroom flat which he occupied with his wife and their two children. The landlord served notice seeking possession under HA 1988 s21. A few weeks after it expired, the claimant left. The claimant then applied to the council for homelessness assistance. His application form referred to an 'illegal eviction' and to the landlord using force. The council decided that he had become homeless intentionally. On a review of that decision, the claimant was interviewed and gave further details of racial abuse and harassment that had escalated after service of the notice. He said that it had got so bad that he had had to leave. The reviewing officer upheld the original decision noting that the claimant had not given a full account until after the council's initial adverse decision.

HHJ Welchman allowed the appeal and quashed the review decision. He held as follows:

■ The failure to give the full information earlier was readily explained by the council's lack of further inquiry into the information initially provided on application. The reviewing officer had not been justified in finding that it suggested that the claimant's account was unreliable.

■ The reviewing officer's decision, while noting the fact that the claimant had earlier coped with the landlord's conduct, had failed to address the real question of whether it would have been reasonable to have remained at the point at which he left. The fact that he had coped earlier was not necessarily evidence that he could have continued to do so.

■ The review decision failed to mention the *Homelessness code of guidance for local authorities* (July 2006) para 8.32, which provides:

> *… where a person applies for accommodation or assistance in obtaining accommodation, and:*
>
> *(a) the person is an assured shorthold tenant who has received proper notice in accordance with s21 of the Housing Act 1988;*
>
> *(b) the housing authority is satisfied that the landlord intends to seek possession; and*
>
> *(c) there would be no defence to an application for a possession order;*
>
> *then it is unlikely to be reasonable for the applicant to continue to occupy the accommodation beyond the date given in the s21 notice, unless the housing authority is taking steps to persuade the landlord to withdraw the notice or allow the tenant to continue to occupy the accommodation for a reasonable period to provide an opportunity for alternative accommodation to be found.*

While the guidance was not binding and a reviewing officer was free to depart from it, the officer should have at least addressed the guidance and given reasons for departing from it.

Local connection

■ X v Ealing LBC

Brentford County Court, 14 July 2010[19]

The claimant and her children fled their homeland and applied for asylum in the UK. They were provided with National Asylum Support Service (NASS) accommodation in the north of England. When the claimant's application for asylum was granted, she was required to leave the NASS accommodation. The claimant decided to apply for homelessness assistance in Ealing because her daughter had secured a bursary to study at a private school in its area. The council provided interim accommodation in Hounslow while it considered her application. Ealing decided that it owed the main housing duty (HA 1996 s193) but that the claimant had no connection with its area (HA 1996 s199). The council notified her that it had decided to refer her application to the authority for the area in which NASS had earlier placed her. The decision was upheld on review. The reviewing officer was not satisfied that the school place amounted to 'special circumstances' sufficient to give rise to a local connection with its area: s199(1)(d).

HHJ Powles QC allowed an appeal and varied the decision to one that the claimant did have a connection with Ealing. He held that there had been two errors in the reviewing officer's decision:

■ The officer had asked first whether or not there were special circumstances that could give rise to a local connection, answered that in the negative and then decided that there was no local connection. The correct approach was to ask first whether or not an applicant had a real connection with an area (see *R v Eastleigh BC ex p Betts* [1983] 2 AC 613) and then whether or not that connection arose by reason of any of the factors in section 199(1).

■ Had the question been asked in that way, no reasonable authority could have decided otherwise than that the claimant had a connection with Ealing. By the date of the review decision, her child had been in school there for three months. The claimant had chosen specifically to seek housing in Ealing

for that reason and was living as close to the school as she could. It was irrational to suggest that she had no connection with Ealing given that this was the only area of the UK with which she had had a connection by choice. The background of the successful asylum application and the award of the school place were plainly 'special circumstances' within section 199(1)(d).

Reviews

■ Shacklady v Flintshire CC

Mold County Court, 7 May 2010[20]

The claimant sought a review of the council's decision to refer her homelessness application to another local housing authority under the 'local connection' provisions of HA 1996 Part 7. The council arranged for the review to be conducted by an independent specialist contractor. The claimant was given a letter signed by both the contractor and a senior council officer notifying her of the outcome of the review. The claimant appealed to the county court on the ground, inter alia, that the council had not contracted out the review function lawfully.

HHJ Gareth Jones allowed the appeal. He held that while a local authority is free to contract out the review function (see *De-Winter Heald v Brent LBC* [2009] EWCA Civ 930) it must do so lawfully and, in particular, must comply with the rules about authorisation of a contractor. The Deregulation and Contracting Out Act 1994 s69(5) provides that: 'An authorisation given by virtue of an order under this section– (a) shall be for such period, not exceeding 10 years, as is specified in the authorisation.' The council could not produce any written authorisation in respect of the contractor and the only document it could trace contained no time-limited authorisation or any indication of a ten-year maximum period of appointment. The absence of any written record containing a period of appointment was a serious departure from the statutory requirements and could not be waived. The authorisation to the contractor was invalid and the review decision was a nullity.

1 Available at: www.communities.gov.uk/housing/privaterentedhousing/annualrentalthreshold/.
2 Available at: www.communities.gov.uk/publications/housing/mortgagerepossessionguidance.
3 Available at: http://research.dwp.gov.uk/asd/asd5/rports2009-2010/rrep698.pdf.
4 Available at: http://research.dwp.gov.uk/asd/asd5/rports2009-2010/rrep689.pdf.
5 Available at: http://research.dwp.gov.uk/asd/asd5/rports2009-2010/rrep688.pdf.
6 See: www.voa.gov.uk/publications/LocalRefRents/index.htm.
7 Available at: www.communities.gov.uk/publications/housing/roughsleepingevaluate.
8 Available at: www.communities.gov.uk/publications/housing/evaluatingroughsleepingresponse.
9 Available at: www.chcymru.org.uk/news/11267.html.
10 Available at: www.communities.gov.uk/publications/corporate/statistics/socialhousingsales200910.
11 This judgment is only available in French.
12 James Browne, Lamb Chambers, London.
13 Hopkin Murray Beskine, solicitors, London and Robert Latham, barrister, London.
14 Keith Clarke, Burke Niazi, solicitors, London.
15 Ann Holdsworth, Shelter, Plymouth.
16 James Stark, barrister, Manchester and Carol Harfield, Community Law Partnership, solicitors, Birmingham.
17 Available at: www.lacors.gov.uk/lacors/upload/22755.pdf.
18 Edward Fitzpatrick, barrister, London and Emma Prescott and Jenny White, Fisher Meredith, solicitors, London.
19 Patricia Tueje, barrister, London and Eugene MacLaughlin, Scully and Sowerbutts, solicitors, London.
20 Robert Latham, barrister, London.

Nic Madge is a circuit judge. Jan Luba QC is a barrister at Garden Court Chambers, London. He is also a recorder. The authors are grateful to the colleagues at notes 12–16 and 18–20 for transcripts or notes of judgments.

Disabled children and the right to education

In *A v Essex CC and the National Autistic Society (intervener)* [2010] UKSC 33, 14 July 2010; (2010) 13 *CCLR* 314, the Supreme Court considered the nature and extent of the right to education for disabled children.[1] Steve Broach suggests that, in the light of the decision in *A v Essex CC*, the international human right to education adds little to the protection afforded to disabled children's education by domestic law.

The right to education plays a 'fundamental role' in a democratic society, with a status similar to the right to life and the right to freedom from torture and inhuman and degrading treatment (*Timishev v Russia* App Nos 55762/00 and 55974/00, 13 December 2005 at para 64; (2007) 44 EHRR 37). The Council of Europe has identified education as a 'basic instrument of social integration' for disabled children.[2] Yet far too many disabled children in England and Wales continue to be left without any education and still more are not getting an education that meets their needs. Special educational provision remains a battlefield between parents and local authorities (LAs), with educational achievement for disabled children 'too low and the gap with their peers too wide'.[3] While not all disabled children will have special educational needs, the majority will have such needs, particularly those with more severe and complex disabilities such as autism. 'Special educational needs' means that the child has a learning difficulty calling for special educational provision: Education Act (EA) 1996 s312(1). 'Special educational provision' means provision which is additional to, or otherwise different from, educational provision made generally for children of the relevant age in local schools: EA s312(4).

This article looks at the main domestic and international guarantees of the right to education for disabled children. It focuses on the consequences of *A v Essex CC*, and suggests that, following this judgment, the domestic guarantees of education for disabled children are now more important than the right found in article 2 of Protocol No 1 to the European Convention on Human Rights ('the convention').

Duties to disabled children under the EA 1996

There are two primary domestic law duties which guarantee the right to education for disabled children in England and Wales. First, for disabled children with special educational needs which are substantial enough to require their LA to 'determine' the provision necessary to meet them through a statement