

## Introduction

Welcome to our first casework e-bulletin of 2006. The bulletin describes some of the cases we are working on. It might give you some ideas for your own work or you might identify that you have a similar case to refer to us. Please use our morning telephone advice line if you want to find out more about any of these cases.

Our child support service has now finished due to funding coming to an end, however we are delighted to announce that we have received funding for a mental health legal representation service. We will be recruiting staff and aiming to launch the service in the summer of this year.

**Maura McCallion,**  
Assistant Director (Casework Services)

## Social Security



### European Court of Human Rights

The UK government has agreed on principle to offer a friendly settlement in the ECHR challenges to the failure to pay widowers the equivalent benefits to those available to widows prior to April 2001. The friendly settlement is only being offered in cases covering failure to pay the equivalent of Widow's Payment and Widowed Mother's Allowance. In cases concerning Widow's Pension, the UK government continues to argue that there is objective justification for any discrimination. As a result, two test cases, White and Runkee, are proceeding to a full hearing. The friendly settlement will entail paying compensation to cover what a widower would have been paid if entitled to the equivalent widow's benefit plus interest on the payments. There are 22 cases before the European Court of Human Rights and the Law Centre is providing representation in 20 of them.

### Social Security Commissioner

We are currently representing in a case arguing that Regulation 14 (2) (c) of the Working Tax Credit

(Entitlement and Maximum Rate) Regulations 2002 contravenes Article 8, Article 1 of Protocol 1 and Article 14 of the European Convention on Human Rights and the Human Rights Act 1998 in so far as it operates to prevent our client having a childcare element included in the calculation of her Working Tax Credit, because the child needs cared for in the family home, when it was clearly envisaged by the tax credit scheme that parents of disabled children would seek to work and claim tax credits.

A hearing before the Commissioner will consider the correct interpretation of European law for a returning UK national who, having worked in Germany, wished to claim Jobseeker's Allowance (JSA). The person had worked in Germany and then was not economically active before returning to the UK. He was subjected to a residence requirement and this is the basis of the appeal. The legal questions involve interpretation of the term 'worker' in European law (Regulation 1612/68), whether it is lawful and proportionate to subject him to a habitual residence test and require that he show an appreciable period of residence in the UK before being entitled to JSA.

The Law Centre is also representing in a number of cases before the Commissioner regarding the interpretation of GP evidence at Disability Living Allowance (DLA) tribunals. In those cases where a GP is asked how far s/he thinks a person can walk without experiencing severe discomfort and the GP states "not known", tribunals have concluded from this that the person therefore does not have any restriction in her/his walking ability because if s/he did, s/he would have told her/his GP about it and the GP would have stated it in her/his evidence. We will be asking the Commissioners to consider if this is the correct interpretative approach, given that the GP's answer does not indicate if the person has or does not have a restriction in her/his walking, only that the GP does not know how far s/he could walk.

### Tribunal

The Law Centre is taking a test case challenging the amended habitual residence test as it is applied to an A8 worker. The applicant is a Polish national who

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worked for over twelve months but was not registered under the Home Office Worker Registration Scheme. Following a breakdown in her relationship, she gave up work to look after her daughter and was turned down for Income Support on the grounds that she did not have a right to reside for the purposes of the habitual residence test. The Law Centre successfully argued at Tribunal that the Accession Treaty 2003 does not derogate from Articles 12 and 39 of the EC Treaty and Article 7(2) of Regulation 1612/68 and Regulation 1408/71. It was argued that the current arrangements discriminate against A8 workers and are contrary to European law. The decision has been appealed to the Social Security Commissioner by the Social Security Agency.

The Law Centre is challenging a decision of the Jobs and Benefits Office not to pay a Training Allowance to a trainee at a technical college who is the dependent of a Lithuanian national with the status of worker and resident in Northern Ireland. We are arguing that non-payment of this allowance is contrary to European Law with particular reference to EC Regulation 1612/68 and Regulation 1408/71.

## Immigration



### High Court - Judicial Review

We were successful in getting leave to apply for judicial review of a decision by the Home Office to remove our Eritrean client and her children from the UK. Our client had initially claimed asylum in Malta but had experienced a number of difficulties there, including separation from her children. She came to Northern Ireland and asked for her claim to be considered here but despite the Law Centre's submissions as to why she should be allowed to stay in the UK to have her claim considered, arrangements were made for her removal. As part of the legal challenge to the removal decision, we also obtained a court order for the family to be brought back to Northern Ireland from Scotland. We were then successful in obtaining bail to allow her to be reunited with her husband in Belfast. There are a number of policy issues about the decision to start removal as well as the manner in which it was carried out, and we are following these up. We are also continuing with the

judicial review to challenge the decision that she should not be allowed to stay here to make her asylum claim.

We were also successful in a judicial review of a decision to certify our Nigerian client's asylum claim as clearly unfounded and therefore removing her in-country appeal rights. The client is afraid that her child will be subjected to female genital mutilation if she is returned to Nigeria.

### Asylum and Immigration Tribunal

The Law Centre has been successful in an important test case before the Tribunal. This case concerns the right of a mother to stay in the UK with her Irish born child, whom she is able to support financially as she runs a business here. The case was a challenge to the current immigration rules and it was argued that, in several ways, the rules flout the letter and the spirit of last year's European Court of Justice ruling in *Zhu*. Most significantly, it was argued that the rules contradict the Court's explicit finding that the origin of the primary carer's resources is immaterial, in that they effectively preclude those resources from deriving from employment. We had expert opinion from the AIRE (Advice on Individual Rights in Europe) Centre in London to assist our argument and the Director of the Centre gave evidence. The Home Office has applied to challenge this decision.

Two clients were recently successful before the Tribunal. One client from Iran who is perceived as anti-Muslim and fears return on this basis was successful after a reconsideration hearing and another client, who had experienced ill treatment in the mental health system in Turkey, won his asylum appeal and is awaiting papers.

### Applications

The Law Centre represented five nurses from the Philippines, who had problems as a result of what appeared to be their employer's failure to make an in time application to extend their Work Permit. The consequence of this would normally be that the nurses would have to leave the UK and would be very unlikely to get permission to re-enter as they would be regarded as having breached immigration rules by staying even for the short period after the expiry of their permit.

This would have meant that their plans to work in Northern Ireland and make a life here would be at an

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end. The Law Centre drafted an application asking the Home Office to exercise discretion in their favour and as a result they have all been given limited leave to remain until July 2006. This is to enable them to find alternative Work Permit employment. This is a significant and unexpected success. The Law Centre also assisted the nurses in applying for JSA given the application to the Home Office. The Law Centre worked closely with UNISON on this case.

## Community Care



### Court of Appeal

We are attempting to continue our Court of Appeal case on home adaptations for a client who has MS, despite her no longer being financially eligible for legal aid. We are seeking a protective costs order from the court which would prevent the other parties to the case obtaining costs against our client in the event that she were to be unsuccessful in her appeal. This is the first time the Court of Appeal in Northern Ireland will have heard such an application.

### High Court - Judicial Review

Judgement is awaited in a judicial review application against Armagh and Dungannon HSS Trust on responsibility for financial assistance with rent during a period when a client is required to pay rent on two houses, a property which is being adapted for his needs as a disabled person and temporary accommodation while the works are being carried out. This case was referred by Housing Rights Service.

A potential judicial review case is being explored on a trust's decision to place our client under guardianship and require her to live in a care home rather than at home with a care package. This case was referred by the Alzheimer's Society.

We are in the early stages of a potential judicial review challenge to a decision by Newry and Mourne Social Services Trust not to provide immediate funding for Anti-TNF treatment to a woman suffering from aggressive rheumatoid arthritis even though the drug is that recommended by National Institute for Clinical Excellence as the most effective treatment for this disease. Our

client has been placed on a waiting list of approximately three to four years. The case, raises important issues affecting a large number of patients in Northern Ireland. Although funding for the drug has recently been made available, the issue as it relates to our client remains unresolved.

A potential judicial review of a decision, by Ulster Community and Hospitals Trust, to place a young man, who sustained a serious spinal injury, in a nursing home rather than immediately fund a domiciliary care package following hospital discharge, was avoided. The trust responded to Law Centre involvement by agreeing to fund the domiciliary care package.

In a case with Ulster Community and Hospitals Trust which provides domiciliary care to a client with complex care needs, issues were raised around careworker recruitment difficulties and the provision of care by male rather than female careworkers. The trust has agreed to accommodate our client's wishes for the time being. However, we see this as an issue that may come up again with this man or other people.

## Employment



### Industrial Tribunal

We were successful in obtaining a ruling from the Tribunal that our client, a man who worked in a garage, had been unfairly dismissed. The client had complained about his health and working conditions and shortly thereafter had been dismissed. The case has been relisted for legal argument on the remedy to be granted.

A case of failure by an employer to follow the new rules on grievance and disciplinary procedure was settled for our client with a payment of £1,500. A further case is going to tribunal and may be a test case on the new grievance and disciplinary rules. Our eleven clients were dismissed without the correct procedures being followed.

We acted successfully in a case of constructive dismissal which involved a lot of correspondence work and the matter was settled (for a payment of £3,000 reflecting the financial loss and an agreed reference) without the need to lodge an IT1. This outcome was once again heavily influenced by the new statutory grievance procedure. We advised the client from the lodging of

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the initial grievance letter and through an exhaustive hearing and appeal hearing process, at the end of which all of the issues had been explored and both sides had a clear idea of their position and the merits of their case. Although this process involved a lot of work at an early stage, it did result in a resolution without recourse to the tribunal in a case where our client felt very strongly about the manner in which she had been treated.

Another long-running case involving disability discrimination was settled for £9,000 immediately before hearing even though the respondent had made no offer up to that stage.

In another case, our client had lodged his IT1 outside the three month time limit so a pre-hearing review was arranged to determine whether it was fair and equitable to allow him to proceed. The reasons for the late submission included his initial attempts to resolve the matter through correspondence with his employer (unlikely to be sufficient reason on its own) and the subsequent serious illness and death of his brother. Negotiation with the respondent resulted in payment of £5,000 in settlement before that review, which meant that our client avoided running the risk of having his claim struck out.

We have also recently successfully resolved a case involving unilateral change of contract and unlawful deductions from wages. The employer, a large cleaning company, had reduced the rate of overtime pay for our two clients without any notice or consultation. Their attempts to address the matter through the grievance procedure were totally ignored. The sums of money at stake were very small, so that it was not economically viable to retain a solicitor, but our clients felt that the manner in which the change was imposed and the refusal to deal with their concerns internally, forcing them to lodge tribunal proceedings, was unacceptable.

This would have been a test case on the level of punitive award the tribunal would make for a blatant failure to follow the statutory grievance procedure, and we indicated to the respondents that we would also seek costs, since we believed that they had no defence to the claim of unlawful deduction from wages. The respondents agreed to pay back all monies deducted, confirmed that the former rate of overtime pay was correct, acknowledged their failure to follow proper grievance procedures and undertook to carry out a review of the manner in which grievances were dealt with in their Belfast office.

## Child Support



### Test case

We will be winding down our Child Support work from the end of March 2006 due to the end of the Welfare Reform Modernisation funding programme which enabled us to provide this service. However, in the meantime, we are taking a test case to challenge the operation of Regulation 8(2)(b)(i) of the Child Support (Maintenance Calculation and Special Cases) Regulations (NI) Order 2001 which specifies that in equal shared care situations the parent who is *not* in receipt of Child Benefit is treated as the non-resident parent and is therefore liable for Child Support.

Our client is a mother who has equal shared care of her two daughters under the terms of a shared residency order. The father is in receipt of Child Benefit for one daughter and our client receives Child Benefit for the other daughter. The father has made an application for Child Support in respect of the daughter for whom he receives Child Benefit and our client has been deemed to be the non-resident parent and is therefore liable to make Child Support payments. We wish to challenge this decision on the basis that it contravenes Article 1 of Protocol 1 and Article 8 of the Human Rights Act 1988, on the basis that in equal shared care situations *neither* parent should be liable to pay Child Support except perhaps in limited exceptions, for example where one parent receives Income Support or Income-based JSA.

For copies of decisions referred to in this bulletin please contact Mary Blair, Law Centre librarian.

Law Centre court judgments are available on line on the Northern Ireland Court Service website at:

[www.courtsni.gov.uk/en-GB/Judicial+Decisions/](http://www.courtsni.gov.uk/en-GB/Judicial+Decisions/)

**Copies of this report in large text format are available on request. Contact Publications Department at Law Centre (NI), telephone 028 9024 4401.**

**ADVICE LINE HOURS Belfast Office:**

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