

## Introduction

Welcome to our e-bulletin where we share some of our interesting cases. We hope this gives you some ideas for your own work and alerts you to when it might be possible to take advice or refer cases on to us. We are always interested in complex and strategic cases.

As the recession continues, we would like to take forward cases around redundancy, problems with accessing benefits and community care and mental health service cuts.

Solicitors Anne-Louise Livesey and Zoe Antoniou have recently joined us to cover maternity leave posts. Carla Rogers and Ashleigh Garcia, trainee solicitors, started their training contracts with us in September.

**Maura McCallion**

**Assistant Director (Casework & Training)**

**November 2009**

## Social security



### DLA and European law

A client referred by Fermanagh CAB had an indefinite award of Disability Living Allowance (DLA) of high rate mobility and low rate care component. He moved to Donegal when his wife got a job there in 2002. He continued to receive Incapacity Benefit from the UK and he did not tell the DLA office about the move. His award was suspended in 2004 and superseded in 2005. An overpayment of £7,500 was raised and our client appealed. However, the Department has revised the decision on the basis of

our submissions, cancelled the overpayment, and paid arrears up to 2005. This is because we were able to identify a Commissioner's decision that says that supersession decisions at that time, other than about disability issues, only took effect from the date of the decision. We have also now appealed the decision on the basis that he remains entitled under European law to receive DLA. This will test the new policy on residence rules in old cases where export is requested and also the issue of whether mobility can be exported.

Also on interpretation of European law, we acted for an American who is married to a UK national residing in Northern Ireland. She has a spousal visa which has a condition of 'no recourse to public funds' but had claimed Disability Living Allowance. The Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000 provide that a person is exempt from the immigration condition for DLA if s/he is a family member of an EEA national. There is a British Commissioner decision which interprets this as meaning an EEA national who is exercising treaty rights, for example, to move within the European Union for work. We appealed the refusal of DLA and argued that the British Commissioner's decision was wrong and that the provision should be given a literal interpretation. Our appeal was allowed by the tribunal but is being appealed to our NI Social Security Commissioner.

### JSA and Accession State nationals

We have three Jobseeker's Allowance (JSA) appeals on whether A8 nationals who have completed more than twelve months, but not complied with the Worker Registration Scheme, can rely on Article 7 (3) of Directive 2004/38/EC for a right to reside. Article 7(3) provides that a person who is no longer employed can retain status if, having worked twelve months, s/he became involuntarily unemployed and registered for work. In two of the cases, the men did not realise they had to re-register when re-employed by the same employer.

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We are challenging the requirement to re-register on proportionality grounds. We have won one of these appeals at a tribunal. This issue is likely to be appealed to the Social Security Commissioner.

### Cross border workers

We have two appeals ongoing about the entitlement of a woman to claim Child Benefit and her right to reside. As her husband was working in the Republic, we are arguing that she had a right to reside in the UK as a family member of a self-sufficient cross border worker, and therefore did not need to register.

### Recovery of overpayment

We have asked the Court of Appeal to order a Social Security Commissioner to state a case for the Court of Appeal. The case was referred by Derry CAB. The Commissioner's decision concerned the recovery of an overpayment of Carer's Allowance. The Department had made a decision, but had not notified the claimant to vary entitlement. A second decision to recover the overpayment was made and communicated to the claimant. The error in not sending the first decision was eventually rectified. The question was whether the failure to follow the legal requirements was fatal to recovery. The Commissioner held that it was not fatal. As the Commissioner had refused leave to appeal, we made a direct application to the Court of Appeal. The hearing on whether the Commissioner must state a case will come up early next year.

## Employment



### Unfair dismissal

We represented a man who worked as a maintenance worker at a nursing home. In October 2008, his employer made a significant reduction to his wages without his agreement. Our client wrote a letter of grievance about the deduction and was dismissed.

He claimed unfair dismissal arising from assertion of a statutory right. He had less than one year's service and, in order to succeed in his claim, he had to prove that the dismissal was directly caused by the fact that he had raised a grievance. The employer claimed that the dismissal was unrelated to the grievance and that our client had been dismissed due to lack of work. We represented the client at tribunal. The tribunal rejected the employer's defence and found that our client had been dismissed for complaining about his wage cut. The case was due to be remitted to the tribunal for a remedy hearing but settled before that hearing for £10,000.

We also settled two cases of unfair dismissal for £8,000 overall where the employer treated the employees as having resigned for leaving their work place after a difficult interaction.

### Racial discrimination

Our third client in a group of care workers from Poland settled his claim with a local care agency which had paid him less than Northern Irish colleagues. The agency has now paid out £37,500 as a result of the uncovering of this unlawful discriminatory practice.

## Immigration



### Permission to work

We have lodged an application for judicial review in a potential test case against the Secretary of State for the Home Department (Home Secretary), challenging his failure to follow and apply a binding decision of the English Court of Appeal. The case concerns permission to work for individuals whose claims for asylum are outstanding.

### Removal of a British passport

The Law Centre is acting in proceedings before the Court of Appeal, *ZO (Somalia) and Another v Secre-*

### ADVICE LINE HOURS

**Belfast Office:**

Monday-Friday, 9.30 am-1.00 pm

**028 9024 4401**

**Western Area Office:**

Monday-Friday, 9.30 am-1.00 pm

**028 7126 2433**

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*tary of State for the Home Department [2009] EWCA Civ 442* which concern a challenge to the Secretary of State's decision to deny our client British citizenship and to remove a British passport. Issues of statelessness under international law and human rights are engaged.

### Child trafficking - forced labour

We successfully resolved a complex child trafficking / forced labour case involving a wide variety of statutory bodies, Social Services and the Police Service amongst others. As this was the first case of its kind in Northern Ireland, we involved ECPAT UK, a specialist child trafficking charity. The child, who was referred to us when he was fourteen, was placed on the Child Protection Register and an interim care Order was put in place to ensure his safety.

He has now been recognized by UKBA (the Competent Authority) as a victim of human trafficking. While his case did not fit squarely within the Refugee Convention and his asylum claim was refused UKBA has now granted him Discretionary Leave to remain in the UK for three years as a result of the exceptional circumstances of his case. We continue to co-operate with the police service in respect of an ongoing criminal investigation.

## Community care



### Nursing home fees

We recently acted on behalf of an adult who was charged a third party top-up fee by the Trust in connection with a relative's placement in a nursing home. We challenged the legality of this charge and this case was successfully settled in our client's favour without the need for judicial review action.

### Autism diagnosis

Another recent case involves a challenge to a trust around its failure to correctly assess and identify the needs of a vulnerable adult. No substantive diagnosis of the adult's condition had ever been achieved by the trust, although family members had always believed that their relative exhibited autistic type tendencies. We successfully argued the need for an independent diagnostic assessment to be conducted by a professional with a specialism in autism. Following this assessment, our client was diagnosed with autism spectrum disorder.

### Direct payments

A judicial review application was successfully settled when the trust agreed to offer direct payments instead of a day centre placement in order to meet our client's needs.

## Mental health



### Unlawful detention

We recently negotiated a settlement in a case of unlawful mental health detention for £10,000. The main focus of the case was that the Trust had failed to comply with Article 13 (4) of the Mental Health (NI) Order which states that, for this first annual renewal of detention, two psychiatrists must be involved. One of them must be completely independent, ie not on the staff of the detaining hospital, nor should they have provided previous detention reports. In this case, the doctor had been involved in the client's earlier detention and so the legislative safeguard was not in place for this long term patient.

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

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