CASEWORK BULLETIN

2014 Number 1

Law Centre (NI)

Welcome to the first casework bulletin for 2014.

We have included a few cases to highlight our work and show where you may be able to get advice or refer cases on to us. We are always interested in complex or strategic cases.

Do remember to come to our practitioner group meetings if you want to discuss these cases or others in more detail. The dates of upcoming meetings are on www.lawcentreni.org and members of the Law Centre receive email reminders.

We welcome feedback on our work so if this report raises any comments please get in touch.

Our advice line operates from the Belfast office, 028 9024 4401, and the Western Area office, 028 7126 2433, from 9.30am to 1pm Monday to Friday.

Jennifer Greenfield, Assistant Director, Casework and Training, Law Centre (NI)

Community care

Judicial review

JR60 – Law Centre (NI) took a judicial review on behalf of a woman who was referred to us by the Pro-Bono Unit of the Bar Library in Belfast. The case was of wide public interest and involved the strategic matter of Article 8 of the European Convention on Human Rights (the right to a private life) and access to social services records.

The barristers involved acted on a pro-bono basis and a Protective Costs Order was put in place to protect the applicant from any legal costs liability.

The applicant had been a child in care. She was seeking the return of the original social care records from the time she spent under the care of the Western and Southern Health and Social Care Trusts. She was also seeking the destruction of any copies held by the trusts. She believed that these records, which contained highly sensitive material, should be within her exclusive control and possession.

We argued that the decision to continue retaining these records was disproportionate and in breach of her Article 8 right to private life. We also argued that the trusts had no legal basis on which to hold the records.

The court delivered its judgment on 19 September 2013: JR60's Application [2013] NIQB 93

The judge rejected the application and found that the trusts had acted lawfully and proportionately. He added that his provisional view is that the Code of Practice, Good Management, Good Records 2011, which the trusts had followed, is in accordance with common law.

Assessment and services obtained

Law Centre (NI) acted on behalf of a woman who had broken both her ankles and had undergone surgery in hospital.

Owing to her reduced mobility, she had asked the hospital social work team for an assessment of her need for a cleaning service when she returned home until she was fully recovered. The Western Trust advised her that she would have to pay

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for any services and would not be entitled to an assessment of her needs.

Following representations by the Law Centre, the trust carried out an assessment of her needs and agreed to provide a cleaning service in her home until she had recovered.

Care package reinstated

Law Centre (NI) acted on behalf of a man who has a range of severe and complex needs arising from his autism and epilepsy. He is cared for primarily at home by his parents.

Owing to a change in services, in April 2013, the Southern Trust made a decision to remove his domiciliary care package. No alternative service was provided to meet his needs or those of his parents as primary carers.

After the Law Centre issued a judicial review pre-action protocol letter, the trust reversed its earlier decision and agreed to reinstate the previously provided care package in its entirety.

Immigration

Decision to remove to the Republic quashed

Law Centre (NI) acted on behalf of a Sudanese family which was at risk of being returned from Northern Ireland to the Republic of Ireland and facing the possibility of deportation back to Sudan. In August 2013, the High Court ruled that the family should remain in the UK while the Home Office made a decision as to whether to admit them into the asylum system to allow their claim to be determined.

Based on independent in-country reports, the UK's position is that it is not safe to return non-Arab Dafuris to Sudan. As a result, asylum is normally granted to applicants. The position in the Republic is different and non-Arab Dafuris are not automatically granted asylum and can therefore be deported.

In 38 cases before Belfast's High Court, Sudanese individuals and families who moved from the Republic to Northern Ireland are challenging a Home Office decision to return them to the Republic of Ireland under the Dublin II Convention where they may face deportation. The Convention allows countries to remove applicants to the country where the original asylum claim was made.

The ruling was the first of these cases to reach the High Court. The judgement upheld our argument that the best interests of the children of the family were served by remaining in Northern Ireland. The judge also considered the issue of the treatment of the asylum seekers in the Republic of Ireland. The judge set out a number of independent reports detailing deficiencies in the treatment of asylum seekers in the Republic and the low rate of success with appeals, but did not hold that these amounted to systemic deficiencies.

Following the judgement, the Home Office has agreed to consider our client's asylum claim in the UK.

EEA family permits

Law Centre (NI) appealed a decision to refuse EEA family permits to minor twins and their mother. The children have a dual British/Irish citizen stepfather and a dual British citizen sister, all resident in Northern Ireland.

Our appeal, on grounds of EU law rights of free movement and Article 8 ECHR, was allowed.

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The Home Office lodged an 'out of time' application to challenge these decisions to the Upper Tribunal. We wrote an objection to this based on the best interest of children principle. The Tribunal refused the Home Office permission to go to the Upper Tribunal.

There is ongoing delay in issuing visas. The The Home Officehas stated that this is because of legally complex issues. We are pursuing the matter.

EU citizens and protection against removal

We acted on behalf of an EU national who was detained under immigration provision on the day he was released from jail.

The sentencing judge in the criminal courts had determined that his custodial sentence should be followed by eighteen months on licence with a view to attending drug counselling during the licence period.

We appealed against the Notice of Intention to Deport and the Home Office argued that he should not be released because he posed a serious risk to the public. We presented the Pre-Sentencing Reports compiled by the probation service, which stated that he did not pose a risk to the public although there was a high risk of re-offending. The immigration judge accepted our argument and our client was released.

The appeal against deportation was heard in May last year.

Caselaw has, up to now, held that the extent of protection against removal from the UK, in EU law terms, rests on the period of residence in the UK and that time spent in prison does not count towards residence for these purposes.

We argued that periods in custody should not be focused on. Instead, the tribunal should look at the extent of his integration into UK life, both private and family life, as per the recent test set out by LJ Pill in Court of Appeal in case of FV (Italy).

We argued that when considering this, he qualifies for the higher level of protection as set out in the Immigration (EEA) Regulations 2006. Under these regulations, the Secretary of State can only remove someone if it can be demonstrated that they pose an 'imperative' risk to security in the UK.

The Tribunal accepted these submissions and allowed the appeal on this EU law ground as well as article 8 ECHR family life grounds.

The Home Office applied for permission to appeal this decision to the Upper Tribunal but this was unsuccessful.

Social security

Seasonal workers and JSA

We took a case to the Social Security Commissioner on behalf of a seasonal worker who works on Lough Neagh during the eel fishery season, May to September.

A single man with no dependants, he has been a seasonal worker for about 40 years. In the past, he had found work during the off season doing casual employment and sometimes, when no work was available, he received Jobseeker's Allowance.

In 2011, he claimed JSA but was refused on the basis that, when averaged over the year, his income from self-employment exceeded his applicable amount. A tribunal disallowed his appeal and the Law Centre represented him before the Social Security Commissioner.

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The Commissioner held:

- the claimant should not be deemed to be in remunerative work during periods when not engaged in the activity of eel fishing;
- a seasonally self-employed person cannot be equated to someone who is self employed all year round. During periods of no work, the claimant did not have income as a self employed earner and for the purpose of regulation 95 of the JSA regulations had no income. It is only where he claims benefit during a period in which he is gainfully employed that his earnings would fall to be calculated under regulation 95.

The Commissioner decided the case himself and determined on the facts that the claimant was entitled to JSA for the period in question.

Child Benefit and Tax Credit delays resolved

On referral from Horn of Africa People's Aid, we helped a Somali national who was having problems with her claim for Child Tax Credit and Child Benefit. She arrived with her family in the UK in January 2013 and claimed asylum on the same day. She was granted refugee status on 28 March 2013. She made claims to CTC and CB on 30 April 2013. The claims were made through her local Jobs and Benefits office.

There is an ongoing problem with delays in the processing of claims for Child Benefit and Child Tax Credit, especially for refugees – there seems to be a common acceptance that these claims take six months to process.

Following representations the claims were processed and awards backdated.

Defining appropriate interpretation of ESA descriptors

We took a case to the Social Security Commissioner on behalf of a man who had lost his ESA award.The award had been superseded and it had been decided that he did not have limited capability for work. He had appealed but the decision had been upheld.

The Commissioner held that the appeal tribunal had misdirected itself in relation to the statutory test for bending and kneeling. The tribunal saw no reason why the claimant would find difficulty with this descriptor considering his own evidence that he could pick up a light object from the floor with the support of a chair.

Chief Commissioner Mullan held in this case that the appeal tribunal had in mind the incorrect test concerning a claimant's ability to perform the descriptors associated with the activity of bending or kneeling.

He stated "an ability to perform descriptors 3(b) or (c) which can be achieved only by holding on to or pushing up on an object such as a piece of furniture must...be disregarded."

The unfavourable tribunal decision was set aside and the case was remitted to the tribunal for re-determination.

Employment

Unfair transfer to zero-hour contract

We recently represented a group of four employees whose employer had approached them to consult in advance of the transfer of their employment. They were told that they were not being made redundant, but that their department was being outsourced to another company.

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They approached us for advice, and we found out that the incoming company proposed that they would be working according to their business model under zero-hourscontracts and paid on commission. Not only would the changes to their terms and conditions be in breach of the TUPE Regulations, but if they went along with this transfer then their employment would be brought to an end without any compensation for notice, redundancy or holiday pay. The zero-hours contract would no longer be employment, as there would not be sufficient mutuality of obligation.

The employer continued to proceed as if this was a valid transfer of employment under TUPE, and continued presenting it to the employees as such, even though the employees were expressing concern.

We wrote to the employer on their behalf, outlining the legal inconsistencies and reminding the employer of its legal responsibilities and potential liability. The employer subsequently decided not to proceed with the proposed transfer.

One of the employees agreed to accept a redundancy package, while the others continue to be employed.

Requirement to take on flexible shift patterns may be sex discrimination

Large organisations may wish to harmonise terms for all employees, but this often does not recognise the diversity of competing complications and caring commitments in people's lives. In a recent case, we represented an employee who had been told she would have to work flexible shift patterns, and if she could not she would have to leave.

She had previously been working defined hours during the week. As she lived a significant distance from her workplace and could not drive, she had to rely on public transport. There were no buses that she could use on a Sunday or late at night, so she could not comply with the proposed change.

Another factor was that she provided respite care for her disabled sister over the weekend, and the proposed change would impact on this arrangement. It is generally recognised that it is predominantly women who seek to avail of working patterns that will allow them to act as carers for family members. A requirement that work hours be fully flexible is often likely to be incompatible with fixed caring commitments, and will therefore adversely affect women disproportionately compared to men. An issue of indirect sex discrimination would therefore arise.

She really enjoyed her work and wanted to stay, but was very upset at the way this issue had been put to her and at the prospect of losing her job. We drafted a grievance on her behalf and then wrote to the employer to alert them to the legal issues including breach of contract and possible constructive dismissal and attempting to persuade them to reconsider.

Following a grievance hearing, the employer agreed that the employee could continue to work her regular hours and she was happy to return to her job.

Mental health

Delayed discharge from hospital

Following the High Court decision in JR47 ([2013] NIQB7) regarding the resettlement of a patient with a learning disability who had experienced a long delay in being discharged from hospital, the

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Law Centre has been considering the implications of the judgement.

Where people have been eligible for discharge but there have been continuing delays, we are exploring whether or not the trusts can be said to be acting in accordance with the decision of Mr Justice McCloskey and in particular paragraph 87d where he says: 'I declare that in those cases where an assessment has been carried out, the Department and/or its statutory agent/s is/are under a duty to provide the assessed social care benefit within a reasonable time.'

Guardianship

We had sought judicial review on behalf of a person who was placed under a guardianship order through the Mental Health Order (NI) 1986, and who was not permitted by the trust to leave his residence without an escort to supervise him. The issue was whether the statutory framework gives the trust the power to impose such a condition.

We were unsuccessful in this case but we have appealed. The case awaits judgment of a relevant case, 'Cheshire West', which was heard by the Supreme Court on 23 October 2013, because similar issues are involved.

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