

Introduction

Welcome to our casework e-bulletin. I hope it gives you an insight into our current cases. If it highlights an issue which you have been working on or if you are struggling to find a solution to a legal problem in one of our areas of specialism then you can ask us to take the case on by contacting us on our telephone advice line.

Since our last e-bulletin, Kerry Lynn has joined our casework team and will be working on immigration law.

Maura McCallion

Assistant Director (Casework Services)

February 2008

Social Security



Migrant worker cases

We are awaiting hearing on our test case appeal against a decision of the Northern Ireland Court of Appeal. The case will have UK wide significance as the first of this type of case to go to the House of Lords. The court held that it was lawful to restrict access to Income Support for our Polish client who had worked here for over twelve months but had failed to register her second job when she moved workplace. Our client was in need of Income Support as she had to give up work to look after her child when her relationship broke down. Child Poverty Action Group and the Public Law Project are seeking permission to intervene in support of our appeal to the House of Lords on the lawfulness under European law of the restrictions placed on eligibility for benefits for European Accession State nationals. The Treasury solicitors in London are also involved alongside the DSD's legal team.

Several recent cases have focused on the erroneous application of the right to reside test. We acted for a Canadian woman who was refused Pension Credit when she was forced to separate from her husband due to

domestic violence. Her husband was from Northern Ireland and when she had joined him here she had applied for an EEA family permit as the spouse of an Irish national who was exercising European Treaty rights working in Northern Ireland. The Pension Credit Service changed its decision after receiving our appeal. It accepted that the client had a right to reside and that this was not lost by the separation.

We acted for a woman with serious mental health problems who was refused Income Support under the habitual residence rules. She had been habitually resident in the Republic of Ireland and during a period of extreme illness had come to Northern Ireland and was admitted to hospital. The Income Support branch changed its decision after we appealed on the basis that the required place of habitual residence does not have to be the United Kingdom but can also be the Channel Islands, the Isle of Man or the Republic of Ireland so she did in fact satisfy the habitual residence test.

The Law Centre successfully represented a Portuguese woman who was refused Income Support during a period of additional maternity leave on the basis that she had lost her right to reside. We argued that she retained worker status as she was still in employment (her job remained open for her return). The Department revised its decision after receiving the appeal and backdated the payment of Income Support. The client has now returned to her job. This case was referred by Dungannon CAB.

Notional capital

The Law Centre acted for a client who had sold her home and spent the equity. She moved into rented accommodation. Under the capital rules on disposal of an asset, she had not been receiving benefit for six months and was at risk of being evicted from her rented flat. We made submissions on her behalf that in disposing of the capital, her significant operative purpose was not to maintain or increase her entitlement to benefit. After interview, the Department accepted that it would be unable to sustain an argument that her significant operative purpose was to maintain or increase her entitlement to benefit at tribunal.

As a result, her entitlement to Income Support was reinstated and backdated to the date of disallowance. We were also able to avert imminent eviction on the basis that we could offer her landlord assurances that, having regained entitlement to Income Support, she would be able to apply for and request backdating of Housing Benefit.

CASEWORK BULLETIN

2008 Number 1



Immigration



European Court of Human Rights

We are acting for a Nigerian man and his Irish / British fiancée and have submitted an application to the European Court of Human Rights challenging the requirements of permission to marry under the Certificate of Approval Scheme operated by the UK government, which entails making a payment of £295. The application is supported by Mark Durkan MP, who sponsored an early day motion in the House of Commons on this issue, and the London based AIRE (Advice on Individual Rights in Europe) Centre.

Applications

We successfully obtained indefinite leave to remain for a Thai national who had suffered domestic violence at the hands of her British / Irish spouse. We represented an Iraqi national in his asylum application and he was successful in being recognised as a refugee. We also, after a long time, were successful in obtaining leave to remain for a Sri Lankan client and his family.

The Home Office withdrew its decision against two of our clients, a Russian national and an American national, further to our representations that the Home Office decision in each case was unlawful.

We have lodged an application on behalf of Irish born children and their non national parents based on article 8 of the European Convention on Human Rights. The grounds of the application are that to remove the non national parents from the UK would result in the constructive removal of their very young Irish born children and that the rights of the children should weigh in their favour when carrying out the article 8 balancing exercise in respect of the family.

Appeals

We have been given permission, on the order of a Senior Immigration Judge, for a further appeal in the case of an orphaned Chinese minor whose case concerns the best interests of the child principle. This case was referred by social services.

We recently won an appeal against a decision by the Border & Immigration Agency to refuse to issue an EEA (European) Residence Card. The application was as an extended family member, on the basis of a durable relationship. The couple had been living together for less than two years, but had a child. By the time the

appeal was heard they were two weeks short of establishing two years co-habitation.

We have an appeal pending in relation to a young man who had previously been given leave to remain in the UK by the government under a policy in place at that time. On holiday abroad he lost his Home Office travel document and the embassy refused to issue him with a new travel document to enable him to return to the UK. After living abroad destitute for a period of time, he had no option but to enter the UK without documents. The grounds of appeal against the refusal to issue a travel document rely on Court of Appeal decisions which say that even though a policy is no longer in place, in certain circumstances, an individual should still be able to benefit from that policy.

Employment



Industrial tribunals

We represented a Polish worker at tribunal in an unlawful deduction of wages case. The client worked for a construction company and had a number of complaints including: unauthorised deductions from wages for 'diesel and insurance' expenses (the claimant gave evidence that £32 per week was deducted from each employee who travelled by van to work sites); underpayment of wages and failure to pay holiday wages.

The tribunal held that the claimant was entitled to £1,236.76 compensation but uplifted this by 45% on account of the employer's failure to comply with the statutory grievance procedures. The tribunal found that the employer had 'used foul language and treated the claimant's letter with contempt'. The total award to the client was £1,779.33. This case was referred by Omagh Independent Advice Centre.

A number of calls to the advice line have been about failure to pay wages for short term work. It remains to be seen whether this is a systematic practice in some employment agencies. It can have a particularly punitive effect on migrant workers who may not have access to any other source of support. The Law Centre is representing one Polish worker who was left without payment over the Christmas period and consequently was unable to pay his rent.

We have a new constructive dismissal case where the employee felt she had to resign due to her employer's practice of shouting at her. We are arguing that this is a good example of conduct likely to destroy trust and confidence between employer and employee and therefore a breach of contract.

ADVICE LINE HOURS**Belfast Office:**

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CASEWORK BULLETIN

2008 Number 1

**Mental Health****Judicial review**

The Law Centre successfully challenged a Mental Health Review Tribunal decision to continue the detention of a young man with learning disability in Muckamore hospital under the Mental Health (NI) Order 1986. The essence of the judicial review application was a challenge to the manner in which the tribunal had reached its decision as well as to the adequacy of its reasons.

The tribunal panel had based a large part of its decision upon evidence taken from the trust about the lack of suitable alternative accommodation in the community. The High Court held that the tribunal had fallen into the 'trap of merely reciting a general formula or the statutory prescribed criteria' and 'it does not address the reasons for coming to that conclusion and does not meet the substance of the case which the Tribunal needed to advance to meet the criteria of Article 77'. Equally, no 'systematic analysis has been undertaken in this instance with the decision-maker making the material findings of facts necessary to sustain the argument that the statutory criteria have been fulfilled'. The court ordered that the decision of the tribunal be quashed and the matter remitted to a differently constituted tribunal.

Importantly, this decision is the first of its kind in which the court has been prepared to embark upon such a robust critique of decision-making and adequacy of reasons by a Mental Health Review Tribunal in Northern Ireland. The court also emphasised that in cases where important human rights such as the right to liberty were at stake, the court must review decisions with 'heightened scrutiny'.

Tribunal

The Law Centre acted for a man with a severe learning disability and mental illness who had been detained for several years in hospital. He applied to the Mental Health Review Tribunal for discharge and the tribunal

found that the trust had not proved that the legal criteria for continuing detention were satisfied. He agreed to remain in an open ward until satisfactory aftercare arrangements could be made to enable him to return to the community.

Community Care**Judicial reviews**

Our judicial review of the Northern Health and Social Care Trust's restrictive policy on eligibility for free care for people in residential care did not progress due to the death of the client. The judge declined to allow the case to proceed on the basis of its public importance. We are now looking at an alternative way of having the legal issues around the difference between health and social care examined by a court.

We have been granted leave to judicially review a decision of the Belfast Health & Social Care Trust. This case involves the lack of domiciliary care staff and residential units for brain injured young people, in general, and the total absence of facilities for brain injured women, in particular. The challenge raises a number of important issues including resource allocation and sex discrimination. Human rights arguments, particularly under articles 8 and 14, will also be made.

We have been granted legal aid funding to apply for leave to judicially review the decisions of the South Eastern Health & Social Care Trust not to provide respite for two young men. Both have an assessed need for residential respite. This need was met until they turned nineteen and left Children's Services. The trust acknowledges that it has no appropriate facilities to accommodate these young men who have highly specialised needs as a result of their severe disabilities. The cases are likely to raise important questions, again concerning statutory duties and resource allocation, and also regarding the definition of a children's home. Human rights arguments, particularly under article 8, will also feature.

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

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/

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