

Introduction

Welcome to the first electronic version of our casework bulletin. We hope you had no trouble downloading this short document and that you find the content useful. The aim is to keep you up to date with our strategic cases and to give you ideas for your own casework. We are always keen to have test case points referred to us by members and will be glad to keep you involved in how the cases progress.

Maura McCallion,
Assistant Director (Casework Services)

Social Security



Court of Appeal

The case of Quinn v Department for Social Development was heard in June 2004 and was ultimately unsuccessful. This case concerned the approach of the tribunal and then the Commissioner to the medical evidence in this Disability Living Allowance case. This case was referred to the Law Centre by Ms Quinn's councillor.

Social Security Commissioner

We are dealing with a number of cases which are concerned with the interaction of EC law and social security law. An appeal to the Commissioner has been lodged for a person who was refused Income Support on return to Northern Ireland from another EU state. One of the main issues to be addressed is whether this lone parent applicant is a worker for the purposes of Regulation 1408/71/EEC. This case was referred by Gingerbread.

Our test case before the Commissioner [C1/02(SF)] on whether the absolute time limit imposed for claiming the Sure Start maternity grant is compatible with article 8 ECHR was unsuccessful and legal aid was not granted for an appeal to the Court of Appeal in this particular case. However, the argument is being re-run in another case with different facts and involving an out of time

claim for a Bereavement Benefit. It is hoped that the different factual circumstances may increase the prospect of success on the legal argument.

A Tribunal of Commissioners is due to decide soon whether the approach to renewal of DLA claims recommended in C12/03-04 (DLA) should be followed here rather than that the approach outlined in a Tribunal of Commissioners in Great Britain, CDLA 2751/03. The decision in C12/03-04 held that the Department had no legal authority to disallow a renewal claim for DLA in advance of the effective renewal date and this is the approach which the Law Centre is arguing should apply. The subsequent GB decision stated that an early renewal claim could be disallowed and be effective prior to the renewal date, to the detriment of the applicant.

The Law Centre was successful in an Incapacity Benefit case before the Commissioner (C25/02-03(IB)) which will be of interest to advisers. This stated that in order to show that a relevant change of circumstances has occurred to permit supersession, it would be necessary for the decision maker to show in what way circumstances have changed. This means that in many cases there will need to be a clear baseline of what the original circumstances were so that the current circumstances can be viewed in light of them and any change identified. If a case reaches a tribunal and the original papers are missing and the change cannot be identified, as in this case, then the tribunal must allow the appeal.

A recent Child Support case before the Commissioner, CSC2/03-04, was allowed on the basis that the tribunal had erred in law in failing to consider the welfare of the children concerned when making its ruling on an appeal against a reduced benefit decision. The Law Centre submission that the provisions on reduced benefit did not comply with article 8 ECHR, the right to respect for private and family life, was not ruled upon by the Commissioner although he commented that the regulations were probably compatible as the welfare of the child is the paramount consideration.

Social Security Appeal Tribunal

At tribunal level, we were successful in an appeal for a woman with multiple sclerosis who had been refused Incapacity Benefit on the basis of work being done by her. We were able to establish that the work was therapeutic and that the Incapacity Benefit should still be paid.

CASEWORK BULLETIN

2004 Number 2

**Immigration****Court of Appeal**

The Court of Appeal recently heard applications for leave to apply for judicial review by Meng Jun Gao and Mei Chi Yang. This case addressed the gap in the new immigration legislation which seeks to replace judicial review of Immigration Appeal Tribunal decisions with a new procedure known as statutory review. The legislation did not make clear provision for what was to happen to Northern Irish cases. Until this case, a client living in Northern Ireland was expected to fund a statutory review in London without access to legal aid, among other logistical and jurisdiction barriers. During the Court of Appeal hearing which highlighted these difficulties, the government announced that it would introduce legal aid for Northern Irish cases and the case has been adjourned as a result. We represented Mei Chai Yang, referred by Causeway Chinese Welfare Association, and worked closely with the solicitor for the other appellant.

Statutory Review

We have had some successful results from our cases before the Administrative Court in London, using the new procedure, challenging decisions of the Immigration Appeal Tribunal not to grant leave to appeal. We have been successful in overturning the granting of leave to appeal to the Home Office on the basis that the evidence relied on is out of date and questionable in relation to an asylum case for a Nepalese client.

Judicial Review

We were successful in obtaining leave to apply for judicial review and bail at the High Court for a Nigerian client. This case concerns the detention at the international airport of our client who had come over from London despite his visitor's visa being valid for the UK. One of the issues for judicial scrutiny is the extent to which the UK immigration authorities are attempting to enforce immigration control for the Republic of Ireland from Belfast and if so, what is the legal basis for such action.

Immigration Appeal Tribunal

We have a number of cases where leave has been granted to appeal the decisions of immigration

adjudicators in Belfast. These include the case of a Chinese man who is a Falun Gong practitioner, another Chinese asylum seeker whose case involves the enforcement of the one child policy, an Algerian victim of the GIA and an asylum seeker from Bangladesh.

Immigration Adjudicator

We have a number of appeals against refusals of EEA family permits for people in Northern Ireland attempting family reunion.

An entry clearance appeal involving human rights argument is being pursued for a client who wishes to bring her elderly and ill mother over from India to live with her.

Political asylum appeals successes include the case of a female Falun Gong practitioner who now has refugee status.

Employment**Court of Appeal**

We have lodged an appeal against the decision of an industrial tribunal which took into account the client's condition at the time of hearing in relation to disability discrimination rather than at the time of the dismissal. The tribunal is currently drafting a case stated. This is an important test case which could be useful across the UK as the point has not gone beyond Employment Appeal Tribunal level in England.

Industrial Tribunal

The Law Centre secured a substantial settlement for a worker who was dismissed following his refusal to sign an agreement to "opt out" of the maximum 48 hour working week stipulated by the Working Time Regulations. Recent media reports have highlighted the issue of long working hours and the widespread use and abuse of these opt-out agreements. The European Commission is currently investigating the validity of the opt-out procedure allowed in the UK, as it is the only country in the European Union where such an exception applies.

A number of cases have been undertaken on behalf of migrant workers, who can be especially vulnerable to

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**

CASEWORK BULLETIN

2004 Number 2



exploitation by employers. The issues raised are often cross disciplinary and input from our immigration and social security advisers allows the Law Centre to address the complex individual problems comprehensively. In one case, referred by CAB, employment was terminated immediately before a visa was due to expire, rendering the employee vulnerable to immediate deportation; in another, issues of unfair dismissal, denial of holidays, and illegal failure to pay tax all arise.

The issue of whether deductions from a migrant worker's wages paid over to an employment agency might constitute an unlawful deduction is also being explored for a Bulgarian client referred by Omagh Independent Advice Centre.

An ongoing case has arisen out of a factory closure where the Department of Employment and Learning made payments to our clients due to the insolvency of the employer. An application has been made to the industrial tribunal which will look at the calculations and how holidays were treated. The issue is when the holiday year commences for purpose of calculation. The employer is relying on a supposed verbal agreement that the holiday year starts on 1 January. The Law Centre is arguing this is contrary to employment legislation and that, in the absence of written agreement, the holiday year for each employee commences on different dates. This case was referred by Dove House.

by a trust to reduce a day care placement from five days to three days without the provision of an alternative or a reassessment of need to show a reduced level of need for day time activities. The trust has now arranged for an alternative service which meets the client's needs.

Leave to apply for judicial review was recently granted to challenge the detention of a client with a learning disability on the basis of severe mental impairment. The case, Hamill v the Mental Health Review Tribunal for Northern Ireland, will involve an analysis of whether the tribunal applied the correct test in finding that the client has a severe mental impairment.

The court has also been asked to look at whether detention is necessary when but for a lack of community resources the client would be able to live in a community setting. Progress on this point would be of assistance to a number of people with learning disabilities still in long term institutions due to inadequate funding of community options.

The case also involves a challenge to the role of the medical member of the tribunal as being in breach of article 6 ECHR as the client's original solicitor was not able to make representations on the examination and opinion of the medical member, thereby preventing a fair hearing.

Community Care



Judicial review

A judicial review challenging the failure of a social services trust to assist a disabled client with the adaptation of the heating system within her home was unsuccessful for the individual client but was useful in establishing that the trust is under a duty to carry out assessments of need in such cases and cannot simply refer the matter to the Housing Executive. Although this case was a challenge by Jean Withnell to a decision of Down Lisburn Health and Social Services Trust, the practice across all trusts has been similar to date. This issue is now being raised with those responsible for the policy of agreeing the division of work between trusts and the housing executive in this area.

Another judicial review, Brimstone v Sperrin and Lakeland HSS Trust, involved a challenge to a decision

Housing



House of Lords

In February, the Court of Appeal ruled that there was not unlawful age discrimination in the NIHE's previous house sales policy. This case was appealed to the House of Lords on whether or not the right to buy issue is within the ambit of a protected ECHR right but leave was refused. The next stage is an application to the European Court of Human Rights in Strasbourg where it will be argued that this restrictive approach to the interpretation of 'ambit' undermines the effectiveness of article 14 ECHR in preventing discrimination.

Judicial Review

The case of Donnelly v Northern Ireland Housing Executive involving neighbour intimidation, originally referred by Housing Rights Service, ended with the High Court declaring that the sale of the house to the perpetrator family under the right to buy legislation

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**

CASEWORK BULLETIN

2004 Number 2



was void and the house is still treated as in public ownership. NIHE have now reviewed their earlier decision not to take possession proceedings and will be taking action to end the tenancy and recover possession.

A potential judicial review, referred by Housing Rights Service, was resolved prior to lodging of papers in relation to a finding by the Housing Executive that a client was intentionally homeless. The client had been living under 'use and occupation' permission in the property from which she moved due to neighbour problems. The issue is whether the reason for leaving the property could be lawfully held to be the lack of a tenancy and therefore the 'fault' of the client. NIHE reviewed its decision and agreed that the client should be offered permanent accommodation.

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 <http://www.courtsni.gov.uk/en-GB/Judicial+Decisions/Judgments>