

Safeguarding vulnerable groups Implications of the Human Rights Act 1998 for the Vetting and Barring Scheme



Introduction

This briefing reports on a recent decision of the High Court in England and Wales concerning the current Vetting and Barring Scheme in operation across England, Wales and Northern Ireland. The Scheme operates to prevent unsuitable persons from working with children and vulnerable adults. The Court considered how certain provisions within this scheme affect the rights protected by the Human Rights Act 1998.

Vetting and Barring Scheme

Under the Safeguarding Vulnerable Groups Act 2006 ('the 2006 Act'), the Independent Safeguarding Authority (ISA)¹ was created to maintain two lists of persons barred from working with children and vulnerable adults respectively. The ISA operates throughout England, Wales and Northern Ireland. It is required to make decisions about whether an individual should be included in one or both lists. Certain sections of the 2006 Act are directly applicable to Northern Ireland and provision for the creation of counterpart legislation was included in the 2006 Act. The corresponding legislation took the form of the Safeguarding Vulnerable Groups (NI) Order 2007.

The Safeguarding Vulnerable Groups legislation requires two aligned 'barred lists' be kept; one for those who are barred from engaging in 'regulated activity'² with children, and one for those barred from engaging in regulated activity with vulnerable adults. Schedule 3, Part 1 of the 2006 Act sets out how someone may be included in the chil-

dren's barred list. Part 2 covers the rules in relation to the adults' barred list. The equivalent legislation applicable in Northern Ireland is contained within Schedules 1 & 2 of the 2007 Order ('the 2007 Order').

The legislation makes it a criminal offence:

- a. for individuals who are included on either of the barred lists to engage in regulated activity;³
- b. for individuals to engage in regulated activity without being subject to 'monitoring';⁴
- c. for relevant employers to neglect to check an individual's status in the Scheme before engaging in regulated activity.⁵

Who will be included on barred lists under the current scheme?

There are four routes to inclusion on barred lists under the current scheme. The first two routes involve automatic inclusion in one or both lists. The remaining two routes will lead only to consideration for inclusion, with the person first being given a right to make representations as to why s/he should not be included on a barred list.

Route 1: Automatic inclusion⁶

A conviction or caution for some serious offences satisfies this barring condition. The person will have no right to make representation or a right of appeal in these cases. Such offences would include, for example, a sexual offence committed against an individual with a mental disorder.

Route 2: Inclusion subject to consideration of representations⁷

This applies to people who have been convicted of, or been given cautions, for a number of less serious offences. This too is an automatic bar. It permits a right to make representations and a right of appeal but only after inclusion on the list. Such offences would include, for example, murder or kidnapping.

Route 3: Behaviour⁸

A discretionary bar for relevant conduct. This includes, for example, conduct which endangers or is likely to endanger a child or vulnerable adult. A right to make representations before being placed on either of the barred lists is permitted.

Route 4: Risk of harm⁹

A discretionary bar where evidence suggests that a person may present a 'risk of harm' to children or vulnerable adults. A right to make representations before being placed on either of the barred lists is permitted.

The Decision in Royal College of Nursing & Ors, R (on the application of) v Secretary of State for the Home Department & Anor

In this case, a challenge was brought by the Royal College of Nursing and four of its members in relation to the lawfulness of the Vetting and Barring Scheme with particular reference to a person's inclusion in a barred list under Route 2 of the Scheme. Three of the nurses had been placed on barred lists under Route 2 but had subsequently made representations and were later removed.

The first nurse had accepted a caution for doing an act of cruelty on a child or young person under sixteen years. Whilst the nurse was at work, his wife had left their children at home unattended. She was arrested. The nurse attended the police station voluntarily and he received a caution.

The second nurse was cautioned for the same offence when she left her son, aged eleven, unattended at home whilst she went shopping.

The third nurse had accepted a caution for sexual assault. He had kissed a young woman without her consent after he had offered her a lift in his car.

The fourth nurse was a 'route 3' case and was not placed on either barred list during the hearing. It had been alleged that she had attended her workplace whilst under the influence of alcohol.

The nurses challenged the lawfulness of the scheme on four grounds¹¹. It was the first ground which succeeded. The Court ruled that the Safeguarding Vulnerable Groups Act

2006 is incompatible with Article 6 of the European Convention on Human Rights. This was because the current Vetting and Barring Scheme requires the ISA to place people who have been convicted or cautioned for a wide range of offences on the barred lists without the right to make representations prior to listing. So, even if representations made after a person has been placed on one or both barred lists are successful, the person will have undergone a period of being placed on either or both barred lists without any right to defend her/his position. Once on the list, s/he is unable to work in her/his chosen profession during that time. S/he could in effect be on the list for many months before being given the chance to make representations.

Relevance of Article 6

The relevant part of Article 6 reads: '*In the determination of his civil rights and obligations.....everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.....*'.

Mr Justice Wyn Williams considered that inclusion on a barred list does amount to the determination of a civil right within the mean-

ing of Article 6(1). He stated that: *'the inclusion of a person's name upon one or more of the barred lists under the 2006 Act is an act which is concerned with that person's civil right to remain in the employment currently enjoyed or, if the person is unemployed, to engage in the whole of the wide variety of jobs available in the nursing sector.'*¹²

In defence of the Scheme, the Secretary of State argued that the Route 2 approach represents a proportionate 'holding' exercise which removes workers from close contact with children and/or vulnerable adults while the ISA considers that worker's representations as to why s/he should be removed from the list. The Court did not accept this argument. It was noted that there was a significant delay between the offences being reported and the claimants' names being put on the barred lists. During this period, the individuals were working as nurses without adverse patient consequences.

Mr Justice Wyn Williams reasoned that the automatic inclusion of all persons convicted or cautioned for specified offences could not be justified simply to cater for what must be a very small number of truly urgent cases. In appropriate circumstances, it should be possible for the ISA to decide rapidly whether an offender should be included on a barred list.

Implications of this decision in Northern Ireland

The decision is significant as the corresponding provisions of the 2007 Order mirror those provisions set out in the 2006 Act. The 2007 Order could therefore also potentially be considered incompatible if a similar challenge was brought in Northern Ireland.

In its Programme for Government, the Coalition committed to reviewing the Vetting and Barring Scheme to scale it back to 'common sense levels'. Following the review, central government intends to remodel vetting and

barring arrangements.¹³ One of the recommendations put forward in the report that followed the review is that automatic barring should only apply for those serious offences which provide a clear and direct indication of risk. The decision in the Royal College of Nursing case been accepted by ministers and it follows that the existing vetting and barring process must be changed in any new scheme. This will have clear implications for the existing Vetting and Barring Scheme operating in Northern Ireland. It is expected that there will be legislation to introduce changes in 2012. In the interim, the existing Vetting and Barring Scheme will remain open to challenge on human rights grounds.

Notes

1. Established as the 'Independent Barring Board' under Section 1 of the Safeguarding Vulnerable Groups Act 2006.
2. What comprises regulated activity is set out in Schedule 4 to the 2006 Act and Schedule 2 of the 2007 Order and includes a range of specified activities that provide an opportunity for certain close contact with children or vulnerable adults, other activities in key settings such as schools and care homes which provide an opportunity for contact and key positions of responsibility such as the Commissioner for Children and Young People for Northern Ireland.
3. See s7 of the 2006 Act / s11 of the 2007 Order
4. See s8 of the 2006 Act / s12 of the 2007 Order
5. See s9 of the 2006 Act / s13 of the 2007 Order
6. See, in the case of the adults' barred list, Schedule 3, paragraph 7 of the Safeguarding Vulnerable Groups Act 2006 and Regulation 6 of the Safeguarding Vulnerable Groups Act 2006 (Prescribed

Criteria and Miscellaneous Provisions) Regulations 2009. The corresponding NI legislation is Schedule 1, paragraph 7 of the Safeguarding Vulnerable Groups (NI) Order 2007 and Regulation 7 of the Safeguarding Vulnerable Groups (Prescribed Criteria and Miscellaneous Provisions) Regulations (Northern Ireland) 2009.

7. See, in the case of the adults' barred list, Schedule 3, paragraph 8 of the SVGA 2006 and Regulation 6 of the Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009. The corresponding NI legislation is Schedule 1, paragraph 8 of The Safeguarding Vulnerable Groups (NI) Order 2007 and regulation 8 of the Safeguarding Vulnerable Groups (Prescribed Criteria and Miscellaneous Provisions) Regulations (Northern Ireland) 2009.

8. See, in the case of the adults' barred list, Schedule 3, paragraph 9 of the SVGA 06. The corresponding NI legislation is Schedule 1, paragraph 9 of the Safeguarding Vulnerable Groups (NI) Order 2007.

9. See, in the case of the adults' barred list, of Schedule 3, paragraph 11 of the SVGA 06. The corresponding NI legislation is Schedule 1, paragraph 9 of the Safeguarding Vulnerable Groups (NI) Order 2007.

10. [2010] EWHC 2761

11. Paragraph 34. The other three grounds of challenge were rejected by the court. They were:

(i) the scheme as operated does not allow individuals who are given a right to make representations to do so orally rather than solely in writing, contrary to Article 6 ECHR;

(ii) the scheme does not give individuals placed on a barred list the opportunity of a full merits review on appeal contrary to Article 6 ECHR and;

(iii) the minimum barring period of ten years for a person aged 25 or over is disproportionate and in breach of Article 8 ECHR.

12. Paragraph 47.

13. Vetting and Barring Scheme Remodelling Review -Report and Recommendations. Available at www.homeoffice.gov.uk/publications/crime/vbs-report

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