

## **PILA Bulletin, 8 October 2009**

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### **1. Public Interest Litigation: Foy Case - No Movement Two Years On**

On 19 October it will be two years since Mr Justice McKechnie delivered his judgment in the High Court in the Lydia Foy case, granting the first Declaration of Incompatibility with the European Convention on Human Rights under the ECHR Act, 2003. Judge McKechnie said that Irish law was incompatible with the Convention because it failed to provide for legal recognition of transgendered persons in their acquired, or new, gender.

The Judge also expressed considerable frustration that five years after he had called on the government to "urgently review" the issue of transgender recognition – in an earlier ruling in the Foy case – nothing had been done about it. As a result, he said, Ireland was very much isolated amongst the member states of the Council of Europe.

Two years on from Judge McKechnie's ground-breaking decision and despite strong calls for change in the law from the Council of Europe's Commissioner for Human Rights and the UN's Human Rights Committee, the Government has still done nothing about this issue, other than appeal the decision to the Supreme Court.

Ireland is now totally out of step with every country in the European Union and almost all the countries of the Council of Europe and is at odds with clear decisions of the European Court of Human Rights, which has asserted the right to recognition of a transgendered person's new gender identity.

However there are no signs that the Government has begun to plan for changes in the law, which now seem inevitable, even though a decision of the Supreme Court could be 3 or 4 years away.

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## **2. EU to get Commissioner for Fundamental Rights**

EU Commission President Joe Manuel Barroso has pledged to create a new post of Commissioner for Fundamental Rights.

In his speech to the European Parliament on 15 September, just before he was re-elected as President of the Commission, Mr Barroso set out his policy and programme and pledged to "create a Commissioner for Justice, Fundamental Rights and Civil Liberties, including citizens' and minority rights, as a reflection that the EU is a community of rights and values".

Mr Barroso also committed himself to work on "a Women's Charter as a way of commemorating the 15<sup>th</sup> anniversary of the Beijing Conference, in 2010".

If the new Commissioner is given significant powers and works closely with the Fundamental Rights Agency to make full use of the Charter of Fundamental Rights, this could present an opportunity to create a stronger culture of human rights at the heart of the European Union.

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## **3. UK: New Supreme Court takes on first case**

On 5 October 2009, the new Supreme Court opened its doors after the pioneer supreme court justices were sworn in the previous Thursday. The move of transferring judicial authority from the House of Lords and establishing the new court is an attempt to provide greater clarity in the constitution by further separating the legislature from the judiciary.

The court is to be an independent institution presided over by independently appointed law lords. It will be housed in the historic Middlesex Guildhall on London's Parliament Square, which lies opposite the Houses of Parliament and close to Westminster Abbey and the Treasury.

Its first case was chosen for its public importance will be to consider the case of "A" which involves UN Security Council and Treasury "freezing orders", which as implied, effectively

freeze a person's or entity's assets. These are said to be the most severe counter-terrorism issue since control orders and have never been debated by parliament. The justices are to consider whether the power to make such orders interferes with fundamental rights as well as to judge the criminal offences created by the orders and the procedures to challenge them.

Proceedings at the court will be filmed and sometimes broadcast, making it the only court in the UK to do so. Further information on the court can be found at its new website at: <http://www.supremecourt.gov.uk/index.html> and barristers from Matrix and Olswang Chambers will edit a blog on the new court: <http://www.ukscblog.com/>.

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#### **4. UK: Challenge to law that allows UK employers to force workers to retire at the age of 65 unsuccessful**

Age Concern and Help the Aged spearheaded a case before the High Court in the UK challenging the rule that a worker in the UK must retire when they reach the age of 65 without any redundancy payment even if they do not wish to retire. The forcible retirement is legitimate as long as the employer adheres to the correct procedure. It is expected however that the government will bring forward a review of the retirement age to 2010. Some believe that this signals an end to the default retirement age of 65.

The judge in the case said that a compelling case existed for the compulsory retirement age to rise. Employees have the right to request to continue to work beyond the date when their employer wishes them to retire but the employer is entitled to refuse this request without giving a reason. An employer can also refuse to recruit someone who is over the age of 65.

The judgement was welcomed by employers the over 260 pending compensation cases brought by people who did not wish to retire will now likely be dismissed. In the UK, 1.4 million people work beyond state pension age and it has been suggested that many more would if their employer allowed it.

The judgement on the case of the *Queen on the Applicant of Age UK and Secretary of State for Business, Innovation & Skills and the Equality and Human Rights Commission, HM Attorney General* can be read at the following address: <http://www.bailii.org/ew/cases/EWHC/Admin/2009/2336.html>

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#### **5. USA: Urban Justice Center's Mental Health Project assists in achieving victory for 4300 Adult Home Residents with Mental Illness**

After six years of litigation and a five-week trial, on September 8 2009, a United States District Judge ruled that New York State violated the Americans with Disabilities Act and the Rehabilitation Act by housing 4,300 people suffering from mental illnesses in institutional homes. One former State official testified in the case that the adult homes were "institutional living at...its worst," like "little ghettos" that "impede community integration." The State will now be obligated to offer supported housing and services to residents of adult homes with mental illnesses in an integrated location, appropriate to their needs.

The Urban Justice Center was established in New York twenty five years ago. It engages in a combination of direct legal service, systemic advocacy, community education and political organising to assist vulnerable groups. Its Mental Health Project provides essentials such as food, housing, medical care and disability benefits to low-income people with mental illnesses. They also litigate to challenge systemic problems.

Together with the Urban Justice Center, a range of others worked on the case including, the Bazelon Center for Mental Health Law, MYF Legal Services, New York Lawyers for the Public Interest and Disability Advocates. Pro bono counsel on the case was Paul, Weiss, Rifkind and Wharton & Garrison. The case, *Disability Advocates, Inc v. Patterson* 03 Civ. 3209 (NGG) (MDG) can be downloaded at:

[http://www.bazelon.org/pdf/DAIreponse\\_%20to\\_%20state\\_%20proposedfindings.pdf](http://www.bazelon.org/pdf/DAIreponse_%20to_%20state_%20proposedfindings.pdf).

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## **6. UN Human Rights Committee first to declare that police identity checks motivated by race or ethnicity violate international human rights law**

The United Nations Human Rights Committee has become the first international tribunal to declare that police identity checks based on race or ethnicity encroach upon international human rights law and principles of non-discrimination.

The case involved a naturalised Spanish citizen who was stopped by a National Police officer in Valladolid train station in Spain. She was the only person to be stopped and asked for identity on the train platform and was the only black person present. After launching a legal challenge, the Spanish Constitutional Court in 2001 found in favour of the practice of replying on specific physical or racial characteristics as "reasonable indicators of the non-national origin of the person who possess them". They argued that racial criteria are "merely indicative of the greater probability that the interested party [is] not Spanish." This lent legitimacy to a policy of ethnic profiling that had been well-documented by human rights monitoring bodies.

In July 2009, the UN Committee concluded that though identity checks might be permitted for protecting public safety, the prevention of crime, or the control of illegal immigration, "the physical or ethnic characteristics of the persons targeted should not be considered as indicative of their possibly illegal situation in the country." They went on to say that identity checks should not be carried out in such a manner that "only people with certain physical characteristics or ethnic backgrounds are targeted" as this would negatively affect the dignity of those targeted and aid the spread of xenophobic attitudes among the population. It would further be inconsistent with an effective policy to overcome racial discrimination, they said.

The European Court of Human Rights ruled on ethnic profiling in 2005 in a case called *Timishev v. Russia*. In finding a violation of the article prohibiting discrimination (Article 14) and the freedom of movement (protocol 4, article 2), it was held that the applicant had been subjected to different treatment concerning his right to liberty of movement without justification as it was "solely" due to his ethnic origins.

The UN Committee monitor the UN International Covenant on Civil and Political Rights 1966 and its implementation by participating states. An individual who claims that her rights under the Covenant have been violated by a State party may bring a communication before

the Committee, provided that the State has recognised the competence of the Committee to receive such complaints.

The judgement in *Timishev v. Russia*, (Applications nos. 55762/00 and 55974/00) can be found on the online database of the European Convention of Human Rights at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database/>.

The view of the UN Human Rights Committee in the communication of *William v. Spain*, Communication No. 1493/2006 is available on the FLAC website at <http://www.flac.ie/publications/pila-bulletin-8-october-2009/>.

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## **7. Community Legal Education: Equality Authority training for NGOs, Dublin, Limerick, Tullamore**

As part of the European Year of Equal Opportunities, the Equality Authority is hosting a range of one-day training and networking events for NGOs working with people across the nine equality grounds provided for in equality legislation – gender, family status, marital status, sexual orientation, religion, age, disability, race, membership of the Travelling Community. The events are taking place in Limerick (October 6), Dublin (October 13), and Tullamore (October 21).

The training session in Dublin will focus on “embedding equality in policy and media work” and will include expert speakers who outline the importance of addressing structural inequalities, map out the social and economic policy landscape and identify strategies for engaging with policy makers and the media at national level. It will draw on the NGOs experiences to identify good practice and challenges for equality in policy and media work. The “making the most of equality” training in Limerick and Tullamore looks at the regional policy landscape and outline challenges for NGOs while illustrating tools for equality based best practice case studies. It will also provide NGOs the opportunity to identify and share tools for best equality outcomes.

To attend these session, RSVP to Caroline Fitzpatrick at the Equality Authority on (01) 4173341 or email [cfitzpatrick@equality.ie](mailto:cfitzpatrick@equality.ie).

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## **8. Conferences & Events: Older and Bolder to launch submission on National Positive Ageing Strategy, 13 October 2009**

*Older and Bolder* will launch its submission on the National Positive Ageing Strategy (NPAS) on Tuesday October 13 at 2pm. The submission has been prepared in response to a call for submissions on the NPAS issued by the Office for Older People. The author of the submission, Mr. Joe Larragy, Dept. of Applied Social Studies, NUI Maynooth will speak at the launch.

The event will take place in Buswells Hotel, Molesworthy St., Dublin 2. Confirm you attendance to [info@olderandbolder.ie](mailto:info@olderandbolder.ie).

*Older and Bolder* was established when five NGOs came together in late 2006 to campaign for a commitment to the development of a National Strategy on Ageing and Older People. The original five NGOs, joined by three others, decided to continue to work together to secure the implementation of Government's promise to develop a National Positive Ageing Strategy.

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### **9. The Stephen Livingstone Lecture 2009, QUB, 21 October 2009**

The School of Law at Queen's University Belfast (QUB), will host the Stephen Livingstone Lecture 2009 on 21 October at 5.30pm. The theme of the lecture is *A Stock-take: Human Rights and the Agreement – How Far Have We Come?* Chairing the event will be Professor Colin Harvey, Head of the School of Law and the lecture will be delivered by Martin O'Brien, Director of the Reconciliation and Human Rights Programme, The Atlantic Philanthropies.

The venue for the event is Room G07, Peter Froggatt Centre, Queen's University Belfast. For further information contact Michelle Madden, m.madden@qub.ac.uk or call 048 9097 3452. All welcome.

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### **10. UN High Commissioner for Human Rights to speak in Dublin, 21 November 2009**

The UN High Commissioner for Human Rights, Ms. Navanethem Pillay of South Africa will speak at the Annual Human Rights Lecture hosted by the Irish Human Rights Commission and the Law Society of Ireland on 21 November 2009.

The theme of the conference is *Economic Social and Cultural Rights – Making States Accountable*. It will take place in the President's Hall at the Law Society of Ireland, Blackhall Place, Dublin 7 from 9am-3.30pm

To register interest in attending contact: Anthea Moore, Law Society, tel: (01) 6724961 email: A.Moore@lawsociety.ie

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### **11. A Fairer Ireland: Equality and Rights at the Heart of Recovery, a conference hosted by the Equality & Rights Alliance, 24 November 2009**

The Equality and Rights Alliance (ERA) is hosting a major conference on Tuesday 24th of November, in the Radisson Hotel, Golden Lane, Dublin 8.

The conference will outline:

**What** a more robust equality and human rights culture and statutory infrastructure would look like, and the positive difference it will make for people experiencing inequality;

**Why** there is a need for a more robust equality and human rights culture and statutory infrastructure and why it is key to invest in equality in times of economic difficulty;

**How** a more robust infrastructure can be achieved by: an examination of the key findings of research commissioned by ERA; drawing on informed perspectives of participants at the conference; and inviting key Justice and Equality spokespeople from all the political parties to outline their vision for a more robust infrastructure.

Speakers will include Karen Chouhan who was named a Key Visionary by the Joseph Rowntree Charitable Trust in the UK. Places will be limited so early booking is advisable. Contact Rachel@eracampaign.org for more information.

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*PILA Bulletin Issued on 8 October 2009*

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