

PILA Bulletin, 17 December 2009

Season's greetings to Bulletin readers from all at PILA and FLAC. This Bulletin on Public Interest Law is issued by the Public Interest Law Alliance, a project of FLAC.

A new and comprehensive PILA website will be online in the coming months, until then you can find further information about the project at www.pila.ie. For now, the archive of PILA and PILN bulletins can be found at www.flac.ie/publications.

If you wish to have an item included please contact bulletin@pila.ie.

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1. Government loses Welfare Appeals; Changes the Rules

The Chief Social Welfare Appeals Officer recently overturned decisions refusing social welfare benefits to asylum seekers in five cases taken by FLAC. The Chief Appeals Officer firmly rejected claims by the Department of Social and Family Affairs that no-one in the asylum process could satisfy the Habitual Residence Condition for social welfare benefits. Within days the Government slipped an amendment into the emergency Social Welfare Bill following the budget. This now states specifically that no-one who is in the asylum process can satisfy the Habitual Residence Condition. The debate on the Bill was guillotined and the amendment was not even discussed in the Dáil before it was passed.

The Chief Appeals Officer had indicated that people in the asylum process who had been in the country for some time, had developed links here, and who intended to stay here if allowed, could satisfy the Habitual Residence Condition and qualify for benefits and that each case should be assessed on its own merits. The Habitual Residence Condition itself was supposed to apply to everybody, including Irish citizens, though, of course, it was easier for Irish citizens to satisfy it than non-citizens. Now, for the first time the legislation explicitly excludes asylum seekers as a class from qualifying.

FLAC has criticised this move as mean-minded, discriminatory and divisive. FLAC has also suggested that this move by the Government significantly undermines the independence of the Social Welfare Appeals Office, the body established by statute to determine social welfare appeals. Claimants are likely to have less confidence in the appeals process if they know that when appeals decisions do not suit the Government, they will just change the law, said FLAC.

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2. No payouts for prisoners in overcrowded conditions in Ireland, despite recent ECHR ruling

The Department of Justice has said that those imprisoned in overcrowded conditions in Irish jails should not be eligible for compensation payments, despite a ruling by the European Court of Human Rights.

As previously reported in the *PILA Bulletin*, the European Court of Human Rights last month handed down judgments in two cases taken against Poland. In these cases, the Court reiterated that where prison overcrowding reached a certain level, the lack of space in a prison could constitute a breach of the Convention rights.

However, the Department of Justice said the cases were 'particular' to the Polish system and did not apply in Ireland.

Those interested in overcrowding in prisons will no doubt be aware of the case currently before the High Court where a prisoner is suing the state concerning his detention. He claims that the system of 'slopping out' in Portlaoise Prison breaches his human rights under both domestic and ECHR law. In 2008, the UN Human Rights Committee reiterated its call on the State to address the overcrowding and slopping out issues in Irish prisons as a matter of priority.

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3. Developments in the rights of unmarried fathers

Two recent cases have considerably developed the rights of an unmarried father concerning access and guardianship rights to their children. At a domestic level, the Supreme Court handed down a ruling concerning a case involving a homosexual male who had donated his sperm to a lesbian couple. The couple and the male were initially good friends and there was an understanding that the man would play a part in the upbringing of the child, being a type of 'favorite uncle.' In hearing the man's application, the Supreme Court unanimously found that the father should be granted access, but not guardianship rights. The Court ruled that the paramount consideration when hearing guardianship applications, the welfare of

the child, would be best served if the lesbian couple continued to have guardianship. Critically, the child was living with the lesbian couple and was settled in that environment.

It also held that the High Court was not correct in finding that the two women and the child constitute a *de facto* family. Thus, the unit was not to be afforded the family rights under Article 8 of the European Convention on Human Rights as a family in Ireland, and under the Convention, was confined to the traditional interpretation of one based on the marriage of a man and a woman. It was also found that the High Court also erred by directly applying the ECHR jurisprudence to domestic law.

See *McD v. L* (Supreme Court, 10/12/09) for more information at <http://www.courts.ie/Judgments.nsf/bce24a8184816f1580256ef30048ca50/e38386fa6f02e44e80257688003f7a9a?OpenDocument>.

The European Court on Human Rights has meanwhile handed down a ruling in a distinct case which could also have significance for the rights of unmarried fathers in Ireland. The applicant was an unmarried father who had been denied a judicial review of a statutory provision making joint custody dependant on the birth mother's approval. In finding that the applicant's Convention rights had been breached, the Court attached significance to the fact that the applicant and the child's mother had at one stage been living together. Whilst they were never married, they were still to be afforded Article 8 family fights. In dismissing the applicant's application for custody without having regard to the best interest of the child the Respondent State had erred by treating him differently in comparison with the mother and with married fathers.

To read the judgment in *Zaunegger v Germany* in the case (ECtHR, 03/12/09) see <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=40443287&skin=hudoc-en&action=request>

The Law Reform Commission has recently published a consultation paper on Legal Aspects of Family Relationships. Amongst other things, the paper recommends a presumption in favour of granting guardianship rights to unmarried fathers unless the welfare of the child dictates otherwise. This can be downloaded at <http://www.lawreform.ie/publications/CP%20Family%20Relationships.pdf>.

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4. Abortion case continues at the European Court of Human Rights

Three women, known as A,B and C, have brought the Irish State to the European Court of Human Rights (EctHR) alleging that their inability to get an abortion in Ireland jeopardised their health and violated their human rights. They argued that 'Ireland's prohibition on abortion is so strict and inflexible that none of the applicants considered feasible a legal challenge to the Constitutional and criminal law provisions banning abortion in Ireland.'

The Attorney General, Paul Gallagher, last week insisted the State's legal position on abortion had been endorsed in three referenda. Mr Gallagher said the European Convention of Human Rights recognises the diversity of traditions and values of countries which are signatories to the convention. The convention also extended protection of human rights to unborn children.

However, Mr Gallagher said this challenge sought to undermine these fundamental principles of allowing a margin of appreciation for differing moral and ethical norms among signatures to the Convention. Mr Gallagher said the applicants' case was based on "legal and factual propositions which, when analysed, cannot be supported." Judgment in the case is not expected before next spring. The Irish Family Planning Association is providing support to the applicants in this case.

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5. Supreme Court delivers judgment in frozen embryos case

The Supreme Court has unanimously dismissed an appeal brought by a woman who wanted to be implanted with frozen embryos against the wish of her estranged husband. The embryos were created after fertility treatment undertaken by the woman and her husband in early 2002 but their relationship has since deteriorated. Whilst the woman wishes to have another child, the man does not and had withdrawn his consent for the embryos to be implanted. The Court found that the embryos are not the 'unborn' and as such they are not afforded the rights of Article 40.3.3 of the Constitution. The term "unborn", the Court stated, refers to an embryo implanted in the womb.

The Court was vocal in its criticism of the Government's inaction in passing legislation to regulate fertility treatment. Mr Justice Hardiman said: "If the legislature does not address such issues, Ireland may become by default an unregulated environment for practices which may prove controversial or, at least, give rise to a need for regulation." A government spokesman has since said that Minister for Health, Mary Harney, will bring proposals to Government next year to allow for the drafting of legislation to govern assisted human reproduction.

See *Roche v Roche* (Supreme Court, 15/12/09) for more information at <http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/124385381B7E A7738025768D003D25B3?opendocument>

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6. UK: Jewish school found to be guilty of race discrimination

The UK Supreme Court has found a Jewish state comprehensive school in London guilty of race discrimination after not admitting a child to the school as he was not considered to be of Jewish ethnicity. The central objection in the case was that the school broke the Race Relations Act by giving priority for places to children recognised as being Jewish by the Office of the Chief Rabbi ahead of Progressive Jews. While his father is Jewish by birth, his mother is Jewish by conversion. However, her conversion ceremony was conducted by a Progressive rather than an Orthodox synagogue, which is not recognised by the Office of the Chief Rabbi. The 12-year-old boy was refused a place at the school despite regularly attending a synagogue. The court found that the school's admissions policy did discriminate on the grounds of ethnic origin and was unlawful as a result. A minority on the other hand found that the policy is "exclusively a religious requirement and does not depend on ethnic origin". While Liberal Jews hold that faith is about belief rather than ethnic origin, Orthodox Jewish supporters of the school maintain that the Supreme Court's ruling risked infringing their human rights by interfering with the way they have always determined their identity.

The Court had earlier refused to award a protective cost order (PCO) in a preliminary hearing of the case. The plaintiff had the benefit in the proceedings to date of funding from the Legal Services Commission. He sought the benefit of public funding for the substantive hearing of the appeal. But the Legal Services Commission informed him they would not provide further assistance in the absence of a PCO. In declining this order, the Court did order the Legal services Commission to continue funding the case without a PCO.

The substantive judgment in the case may be viewed here: <http://www.bailii.org/uk/cases/UKSC/2009/15.html>

The PCO judgment may be viewed here: [http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKSC/2009/1.html&query=title+\(+JFS+\)&method=boolean](http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKSC/2009/1.html&query=title+(+JFS+)&method=boolean)

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7. UK: 'Manifesto for justice' published by coalition of legal, consumer and campaign groups

In the UK, AdviceUK, the Bar Council, the Institute of Legal Executives, Justice, the Law Centres Federation, the Legal Action Group, the Legal Aid Practitioners Group and Liberty have all joined with each other to publish a 'manifesto of justice.' The manifesto aims to promote three basic principles to politicians: good governance and the rule of law; respect for human rights and civil liberties; and access to justice.

The paper calls for a restoration of confidence in law-making through integrity and transparency of politicians and for the greater separation of parliament and government. The growing amount of criminal offences is questioned, as is the greater reliance on prison as a tool of punishment. Civil justice also needs to be broadened, making it accessible for all. The paper says 'Reducing eligibility may generate costs for other parts of the welfare state far in excess of the original savings being sought.' Respect for human rights should meanwhile be strengthened by a reaffirmation of the presumption of innocence until proven guilty and the minimum rights of those charged with an offence, including the right to choose one's lawyer.

More information is available from the organisation's website. The manifesto may be found at <http://www.adviceuk.org.uk/news-and-campaigns/campaigns/M4J>

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8. UK: Court finds activist's beliefs on climate change akin to religion

A judge in the UK has found that one's views on climate change may be entitled to the same protections as religious beliefs in certain circumstances. The court found that an employment tribunal should hear the a case of man who was fired for refusing to fly his boss' mobile phone over to another country when he had accidentally left it behind. The employee refused, citing concerns about global warming.

In a significant decision, a judge found the employee's views on the environment were so deeply held that they were entitled to the same protection as religious convictions, and

ruled that an employment tribunal should hear his claim that he was sacked because of his beliefs.

The judgment could open the door for people to take their employers to tribunals over their stance on a range of issues, from animal rights to feminism. The court found that, 'a belief in man-made climate change, and the alleged resulting moral imperatives, is capable if genuinely held, of being a philosophical belief for the purpose of the 2003 Religion and Belief Regulations.' Under those regulations it is unlawful to discriminate against a person on the grounds of their religious or philosophical beliefs. The court set out a test to be used when determining if a philosophical belief could be considered as religious discrimination in the context of employment regulations.

To read the judgment, see *Grainger PLC v T Nicholson* UKEAT/219/09; [2009] WLR (D) 315.

In a separate case in that jurisdiction, a police worker who was sacked for claiming psychics should be used to solve crimes has won a landmark ruling that his views on this subject should be considered as a faith. The employee claimed that spirits of deceased could be contacted in order to obtain more information on crime. In finding for the worker, the Court considered spiritualism a religion.

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9. International: Prohibition on death penalty remains in Russia

The Russian Constitutional Court has stated that a ban on the imposition of the death penalty will remain after the suspension on its use expires on 1 January 2010. In 1996, Russia announced a moratorium on using capital punishment in order to join the Council of Europe. Even though the suspension expires next month, the Court found that it would not be legal for the State to impose the death penalty on account of international accords which it had signed.

President Dmitry Medvedev's representative at the Constitutional Court said that the Kremlin was in favour of the gradual abolition of the death penalty. The Russian Court delivered its judgment the same week that the former President of the High Court, Mr Justice Richard Johnston, said that the Irish State should reconsider its constitutional ban on the death penalty

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10. Two papers attached

Included in this week's bulletin are two recent conference papers. The first is by Richard Humphreys SC, Leas Cathaoirleach of Dun Laoghaire/Rathdown Council. It was delivered at a recent Labour Party Equality Conference and it deals with the cuts to the Equality and Human Rights infrastructure.

The second is by Michael Farrell, Senior Solicitor at FLAC. It was delivered to the Equality and Rights Alliance conference last month on the need for independent human rights and equality bodies. It is entitled "Strengthening the Independent Specialist Equality and Human Rights Bodies.

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11. Launch of the Law Reform Commissions Consultation Paper on *Children and the Law*, 22 December 2009

Barry Andrews, TD, Minister for Children will be launching the Law Reform Commission's Consultation Paper on *Children and the Law* on Tuesday 22 December 2009 at 6:30pm the Commission's office on 35 – 39 Shelbourne Road, Ballsbridge, Dublin 4.

RSVP to 01 637 7600 or events@lawreform.ie

The paper will be available on www.lawreform.ie from 2.30 pm on the day of the launch.

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12. LILAC Conference on Legal Education, Warwick, 29-30 January 2010

The tenth annual Learning In Law Annual Law Conference will be hosted by the University of Warwick at the end of January 2010. It is the primary networking event of the UK Centre for Legal Education and will be centred around the concept of *Progress in Learning*. It expects to attract participants from around the world from law schools, professional bodies and vocational training centres.

The conference will mark the 10th anniversary of the Higher Education Academy's subject centre network, taking the opportunity to reflect on developments in legal education over the past ten years and prospects for the future. Professors Roger Burrridge and Abdul Paliwala, UKCLE's founding directors, will be joined by other legal education luminaries as part of the ten year celebration. The keynote address will be given by Aaron Porter, Vice President (Higher Education) at the National Union of Students, and the Law Teacher of the Year will be announced and presented at the conference dinner on 29 January. The conference programme can be downloaded at

<http://www.ukcle.ac.uk/newsevents/lilac/programme.html>. To book your place and for further information see

http://www.ukcle.ac.uk/newsevents/book/contact_details.html?event=650.

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13. Public Legal Education Network conference on Legal Empowerment, 10 February 2010, London

This conference brings together policy makers and practitioners in a day of interactive, thought-provoking debate and discussion. It will explore themes of democratic engagement, social justice, community cohesion and equalities and it will ask how does PLE advance a culture of civil and social justice?

Plenet is a network of organisations and individuals working in the field of public legal education. Plenet provides a space to share information and ideas, to promote good practice in delivering public legal education, and to improve awareness of the need for and value of public legal education. For more information, see www.plenet.org.uk.

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**Public Interest Law Alliance -
A project of FLAC (Free Legal Advice Centres Ltd.)
13 Lower Dorset Street, Dublin 1
Tel: 01-8728048 / 8745690
LoCall: 1890 350 250
Fax: 01-874 5320
Website: www.pila.ie**

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