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flac News

FREE LEGAL ADVICE CENTRES

Substantial revision of legal aid means test: A lot done, more to do?

Photo © Derek Speirs

Indian human rights activist and lawyer Colin Gonsalves visited FLAC in Dublin in September and gave two information sessions on public interest law and litigation in India: see page 10.

They were a long time coming but, finally, the new civil legal aid regulations were unveiled on Friday, 1 September. Given that the means test has not been revised since 2002 (having been introduced in 1996), anything but substantial changes in the disposable income limits and the allowances would have been a major disappointment.

Nonetheless, FLAC welcomes the changes, many of which were suggested in its 2005 report on civil legal aid in Ireland, *Access to Justice: A Right or a Privilege?*

A synopsis of the principal changes in the means test is as follows:

- The disposable income limit to qualify for the service has risen from €13,000 to €18,000, an increase of 38% and an acknowledgement that the previous limit was hopelessly outdated, excluding many deserving applicants over recent years.

- There have been a number of increases in the allowances that applicants are allowed to set against their net income before arriving at disposable income. These include a substantial increase in the allowance for actual childcare expenses to pursue employment from €1100 per child to €6000 per child, increases in the allowance for a spouse from €1900 to €3500 and for each child dependant from €1100 to €1600.

- The allowance for accommodation costs has gone up from €4900 to €8000, a substantial increase on paper but

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Mothers receive child benefit even if residence application not decided

The dilemma of families where an application for residence had not been decided on arose in some cases investigated by FLAC over the past number of months and has enabled us to make a further clarification which should assist a wider number of families.

In these cases, a child's mother was refused benefit on the basis that her residence application had not been decided, but the child's father would have had no difficulty proving residence within the meaning of the Habitual Residence Condition (HRC). On our request for review, the decisions to refuse benefit to the mother were reversed and benefit and arrears were paid to those women.

FLAC is pleased to learn that the Department of Social and Family affairs has now made a decision that in all cases where one parent is fully resident for the purposes of the HRC, Child Benefit will be paid to the mother based on the "family unit concept". We are also told that cases refused in the past are currently being reviewed. This decision needs to be publicised widely.

Readers who are aware of such cases should alert people who have been refused to seek an immediate review, as they may now receive Child Benefit plus any arrears due to them.

Also: See article on pages 12, 13 and 14 on Child Benefit and the Habitual Residence Condition.

Statutory Ombudsman for Financial Services available to consumers

A statutory Ombudsman for Financial Services has now been in operation and receiving complaints from 'eligible consumers' since 1 April 2005. An eligible consumer includes not just personal customers but also charities, clubs, trusts and partnerships. It also includes limited companies provided their turnover does not exceed €3 million annually.

Complaints may be made in relation to the conduct of any 'regulated financial service provider' and this definition includes a wide variety of entities such as credit institutions, insurance companies, credit unions, moneylenders, hire purchase companies, stockbrokers and insurance, credit and mortgage intermediaries. Such complaints may concern the provision of a financial service, an offer to provide such a service or a failure or refusal to provide a service.

Where a complaint is upheld, the Ombudsman has the power to direct that a specific action be taken by the service provider and may award compensation to the claimant up to a maximum of €250,000.

In general, if you are unhappy with the way that a financial service provider has dealt with you, you will be required to exhaust their internal complaints procedure first. The Ombudsman's website (www.financialombudsman.ie) provides comprehensive details on the procedures that a complainant needs to follow to pursue their grievance. The Ombudsman's office may also be contacted at 1890 88 20 90 or 01-6620899 or by e-mail at enquiries@financialombudsman.ie

The Case for Legal Recognition of Same-Sex Marriage in Ireland

On 3 October this year, Drs Katherine Zappone and Ann Louise Gilligan will arrive at the High Court to present their case for legal recognition of their existing Canadian marriage, usually called the KAL Case. If their case is successful and civil marriage is recognised, Ireland will join the Netherlands, Belgium, Canada, Spain, the US State of Massachusetts and South Africa (from the end of 2006) as jurisdictions in which same sex couples can enjoy true equality in society.

Drs Zappone and Gilligan will seek various remedies before the High Court. In particular, they will seek a declaration that, in failing both to recognise their Canadian marriage and to apply tax law provisions for married couples to them as a married couple, the State and the Revenue Commissioners have acted unlawfully, in breach of their constitutional rights to equality, to marriage, to property rights and family rights[1] and in breach of their rights to privacy, marriage and non-discrimination under the European Convention on Human Rights.[2]

Beyond the direct needs of the plaintiffs, however, this case is about fairness and equality for all members of this society – its fundamental emphasis is on respect for the rights of all to share their lives in an atmosphere of social and economic stability.

In recent years there has been enormous change in family structures in Ireland; the numbers of those cohabiting have increased dramatically. In 1996, cohabiting couples made up 4% of all family units (31,300), but by 2002 this figure had more than doubled, to just over 8% of all family units – a total of 77,600 couples. While still small in relative terms, the number of same-sex cohabiting couples has also increased very considerably from 150 to 1,300 since 1996.[3]

Photo © KAL Initiative

Dr Katharine Zappone (left) and Dr Ann Louise Gilligan, pictured at the Summer Ball held to raise funds for their case on 7 June 2006.

The number of children living with cohabiting rather than married parents has increased from 23,000 children in 1996 to 51,700 children in 2002. The percentage of births outside marriage now stands at just over 31%, that is, almost one-third of births, compared with just over one-quarter (25.3%) in 1996.

Despite these immense social changes, the marital family remains the only officially recognised unit in Irish law. In the 1937 Constitution, the family is recognised in Art. 41 as the 'natural primary and fundamental unit group of society.' But this has been interpreted to mean the family based on marriage only. Single parent families and co-habiting same-sex or heterosexual couples are excluded from this definition.

Ultimately, cohabiting couples continue to be treated as strangers in the eyes of the law – their citizenship, property and inheritance rights, tax status or medical records, for example, do not reflect their true life situation. For same-sex couples the discrimination runs even deeper, where adoptive rights or visiting rights are disregarded and where, critically, there is no option to change their status from 'single' to 'married'. The option is always open to heterosexual couples.

This constitutional discrimination has been reinforced with the recommendations of the All-Party Oireachtas Committee on the Constitution. It took the view[4] that an amendment to extend the definition of the family would "cause deep and long-lasting division." Instead, the Committee proposed to deal with the diversity of family forms through a number of other constitutional changes and legislative proposals, including, critically, civil partnership or a presumptive scheme for cohabiting heterosexual couples and civil partnership legislation for same-sex couples.

Contrary to this view, however, the Ontario Court of Appeals in the landmark case *Halpern v Canada*[5,6] replied to an intervener organisation's

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The Case for Legal Recognition of Same-Sex Marriage in Ireland

(continued from page 3)

argument that civil marriage required a constitutional amendment by stating:

> the … constitutional amendment argument is without merit for two reasons. First, whether same-sex couples can marry is a matter of capacity. There can be no issue, nor was the contrary argued before us that Parliament has authority to make laws regarding the capacity to marry … Second, to freeze the definition of marriage to whatever meaning it had in 1867 is contrary to this country's jurisprudence of progressive constitutional interpretation.

Ireland's 1937 interpretation of the family could also be considered out of step with today's reality.

While civil partnership might allow same sex couples a broad range of marriage-like privileges, it does not confer equality of status and equality of rights on all Irish citizens. As outlined in the brief of the amici curiae prepared for the Massachusetts Supreme Judicial Court:[7]

> A civil union is not the same as civil marriage, just as the United Kingdom's granting the vote to women in 1918, but only at the age of 30, was not the same as the existing right of men to vote at the age of 21.

The only way the State can promote and protect the rights and responsibilities of all its citizens in financial, familial and societal terms is to institute a mechanism for a partnership of full equivalence to marriage, that is, 'civil marriage'.

Notes

1 Bunreacht na hÉireann (1937) Articles 40.1, 40.3.1, 40.3.2., 41.1, 41.3.1, and 43.
2 European Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 ETS 5, Articles 8, 12 and 14.
3 Tax Strategy Report 03/19.
4 All Party Oireachtas Committee on the Constitution 10th Progress Report on the Family (January 2006)
5 *Halpern v Canada* [2003] OJ No 2268
6 In this case, the Ontario Court of Appeal found that the common law definition of marriage, which defined marriage as between one man and one woman violated the Canadian Charter of Rights and Freedoms.
7 This brief was prepared by 15 human rights organisations and 21 law professors.

For more information on how you can support the KAL Case, visit the website at www.kalcase.org

FLAC seminar

Throughout May and June FLAC organised three seminars and a roundtable discussion on ***Public Interest Law and Litigation in Ireland*** (PILL). The events were a follow-up to the conference on PILL in October 2005 and were intended to provoke discussion around the topic as well as invite contributions from lawyers, NGOs and activists.

The first seminar was entitled ***Procedural Obstacles to PILL*** and was held on 12 May at the Royal Dublin Hotel. This seminar identified existing obstacles and suggested ways of overcoming them. Barrister Colm MacEochaidh spoke about public interest challenges brought through the courts by way of judicial review proceedings to challenge decisions of the state or its agencies. He identified the two major barriers to public interest law and litigation as the applicant's locus standi and the likelihood of costs being awarded against the litigant.

Brian Kennelly, an Irish barrister practising in the UK, also spoke about the formidable barrier that costs present to the public interest litigant, where the 'loser' in a case may be responsible for the legal costs of the 'winner'. He identified the emergence of protective costs orders in the UK, which impose a cap on costs, as a method of combating this barrier to bringing a public interest case.

Raymond Byrne, Director of Research at the Law Reform Commission, discussed the Commission's recent report on Multi-Party Litigation, which had examined, among other things, how best to deal with cases where common areas of interest were identified between many litigants. The Commission recommended that class actions, wherein applicants can 'opt-in' to an action and share costs, be added as a mechanism to further public interest law and litigation in the Irish courts.

The next seminar dealt with ***How Public Interest Law and Litigation can address the needs of NGOs*** and took place at the Royal Dublin on 31 May. This looked at the experience of some NGOs who work with vulnerable and disadvantaged groups in using PILL. Claire Hamilton BL talked about the work of the Irish Penal Reform Trust on law reform and public interest litigation. The IPRT recently commenced a legal challenge to the State on its failure to uphold its constitutional obligation to provide psychiatric treatment to prisoners in Dublin's Mountjoy Prison.

Conrad Haley travelled from the UK to speak about his organisation, the Public Law Project. PLP provides a resource for those for whom access to law is most difficult as well as for organisations working with and for such individuals. He stressed the role of strategic and campaigning

series on Public Interest Law

test cases and the importance of protective costs orders.

Deirdre Carroll of Inclusion Ireland described the changing face of the disability movement in Ireland from a medical/ charity-based model to a human rights-based approach, noting the publication of the report of the Commission of the Status of People with Disabilities in 1996. Deirdre gave examples of injustices that can happen when there is a lack of legislative protection in place and no inspectorate.

Structures for Public Interest Law and Litigation in Ireland was the title of the third seminar, which took place on 16 June in Croke Park. The seminar focused on structures, resources and supports facilitating public interest law in other jurisdictions and considered how such structures might be adapted for use in Ireland.

Deputy Director of the Law Centre Northern Ireland Maura McCallion described the LCNI, which provides a 'second-tier' service by representing and advising on cases identified by organisations dealing with the public and requiring specialist knowledge. It works in five areas: social security, immigration, community care, mental health and employment and operates a strategic litigation policy.

Dr Joshua Castellino of the Irish Centre for Human Rights, Galway, spoke about remedies which human rights law could offer to protect vulnerable groups. Drawing on experience in India, he noted that public interest litigation is an effective vehicle for active societies. He concluded that the problem with trying to solve the issues of equality using politics is that there is an uneven access to politics and that protection can sometimes be more easily sought from the courts as regards economic, social and cultural rights.

Professor Andrea Durbach of the University of New South Wales listed the advantages of PILL identified in Australia, including the capacity to develop, clarify and reform the law and practice and the acceptance by the court of public interest law procedures such as *amicus curiae*. She also spoke about organisation she helped found, the Public Interest Law Clearing House. Owned by law firms, PILCH facilitates the representation of clients in public interest law cases.

Irish solicitor John Costello discussed the need to educate young lawyers and law students in the philosophy of law and to consider their obligations to public service. He reminded those present that there were many ways to advance the public interest other than litigation and that alternative dispute resolution should be promoted. He noted initiatives worth examining, such as a formal *pro bono* charity.

Brian Kennelly BL (left) and Colm MacEochaidh BL who spoke on obstacles to PILL during the first seminar on 12 May

Attendees at the second seminar on how NGOs can use PILL in their work, Royal Dublin Hotel, 31 May

Claire Hamilton, Chair of the Irish Penal Reform Trust, addressing the second seminar on 31 May

Roundtable on Public Interest

The series of seminars held in May and June (see pages 4 and 5) culminated in the Roundtable discussion on Public Interest Law and Litigation in Ireland on 30 June at the Royal Hospital Kilmainham. It provided an opportunity for delegates to contribute their ideas around PILL and help in the formulation of a PILL strategy in Ireland. The event was well attended and attracted a wide variety of attendees from both the NGO and legal communities.

The morning session of the event showcased a number of speakers providing examples of PILL in other jurisdictions, as well as strategies for implementing PILL in Ireland. The afternoon session featured four roundtable discussions of various aspects of PILL.

South African lawyer and filmmaker Odette Geldenhuys spoke on the history of public interest law in South Africa in both the apartheid and post-apartheid regimes. She also spoke about the gravitation toward *pro bono* work in South Africa and the pilot clearing house (probono.org.za) that she is involved in setting up in Johannesburg.

Professor Andrea Durbach recalled her experience as a public interest lawyer, both in South Africa, where she used public interest law to chip away at the apartheid state, and later in Australia. She spoke of Australia's enthusiasm for human rights, social welfare and other issues in the early 1990s when she arrived there in contrast with the current administration's hostility to such issues. She said it is the duty of lawyers to act as "both a sword and a shield" when working in the public interest.

Dave Ellis of Community Legal Resource then presented a preliminary position paper on a strategy for Public Interest Law in Ireland. It calls for an independent, transparent process focused on the four strands of law reform, legal education, community legal education and public interest litigation. The structures need to use both existing and new resources effectively and be sustainable, accountable and flexible.

Director of the Center for Law in the Public Interest Robert Garcia spoke about his experiences with the Urban Park Movement in Los Angeles. He spoke of a major victory in the Cornfield Case Study, which preserved a 32-acre green space in downtown Los Angeles, a city which is notoriously 'park-poor'. He said that CLIPI's successes depended on multiple strategies, including community empowerment and coalition-building, strategic media campaigning, multidisciplinary research and analysis and legal and policy advocacy outside the courts. Litigation was a last resort.

After the speakers' presentations, delegates participated in one of four workshops: PILL & Education, PILL & Law Reform, PILL & Litigation or PILL & Empowering Communities.

Professor Gerry Whyte of Trinity College Law School chaired the workshop on PILL and Education. The seminar considered four main issues: the role of universities, the role of the professional law schools, clinical legal education, and community legal education. Points discussed included the Law Society's introduction of a course in PILL to its training programme, the progress of the clinical legal programme in UCC and the need to highlight public interest law in the university sector.

The workshop on PILL and Law Reform was chaired by Davin Roche of Comhairle. The participants considered the different contexts of law reform, such as constitutional reform, technical legislative reform,

Speakers at the PILL Roundtable Prof Andrea Durbach (left) and Odette Geldenhuys

FLAC Senior Policy Researcher Paul Joyce (left) with Fidelma Joyce, Combat Poverty Agency Policy Liaison Officer & Anne Colley, Chairperson, Legal Aid Board

Photos © Derek Speirs

Law refocuses agenda for change

Members of Community Legal Resource pictured from left: Dave Ellis, Orlagh O'Farrell and Roisin Webb BL

FLAC Director General Noeline Blackwell (left) with Law Society President Michael Irvine, Jean Pierre Eyanga of Integrating Ireland and Prof Andrea Durbach

and the challenges of implementing such changes. Additionally, emphasis fell on the organisations' need for expert resource people around a PILL strategy, specialising in the areas of legal and campaigning resources.

Catherine Cosgrave of the Immigrant Council of Ireland chaired the workshop on PILL and Litigation. The group highlighted the Bar Council's Voluntary Assistance Scheme for the NGO community. The barristers adopt a three-pronged approach through litigation, advocacy and developing relationships with the NGO community to become aware of pertinent issues. Other topics discussed included the current Legal Aid framework and the issues of costs and time.

The final discussion centred on PILL and Empowering Communities. Chair Judy Walsh of UCD's Equality Studies Centre identified the key themes as being a lack of legal knowledge and training among the activists and organisations. Additionally, there was the idea that legal expertise tended to be focused in Dublin, as is legal training. The desire to make education more accessible, perhaps through distance education, was raised. Additionally, the group discussed the fragmentation of government services in public interest areas.

If you are interested in PILL issues in Ireland and wish to be kept informed about news and events, sign up to the PILL Network by e-mailing us at piln@flac.ie

Participants at the Roundtable in the Great Hall, Royal Hospital Kilmainham

Event speakers (L-R): Robert Garcia of CLIPI, South African lawyer Odette Geldenhuys, Dave Ellis of CLR, Prof Andrea Durbach & Chair, Roger Smith of JUSTICE

Cautious welcome for proposed abolition of Refugee Appeals Tribunal

Recent reports on the introduction of the proposed Immigration, Residence and Protection Bill suggest that one reform it will introduce is the abolition of the Refugee Appeals Tribunal. The RAT has been the subject of harsh criticism, particularly regarding its lack of transparency, failure to publish decisions and concerns over the varying recognition rates of individual Tribunal members. Arguably, however, a number of recent reforms have resulted in an improvement in the Tribunal's functioning.

Of particular controversy in recent years was the RAT's refusal to publish decisions. Protecting the privacy of asylum seekers, who may have come from particularly dangerous and unstable conditions, was the overriding reason behind this policy. Those in favour of publication argued that it would allow for greater transparency in the decision-making process. The measure resulted in obvious difficulties, for example, a lack of awareness among legal practitioners of how asylum law was applied in Ireland, as well as a lack of consistency in the approach of different Tribunal members to certain issues before them. On this latter issue, those arguing in favour of publication pointed to serious anomalies, such as the lack of consistent interpretation among members of common concepts, with an objective assessment often being substituted with the member's own subjective view.

Publication, it was argued, would also bring greater transparency regarding the significant divergence in recognition rates (or rates of granting asylum) of individual members. Consistently low recognition rates by certain members of the Tribunal have been a matter of concern, particularly to those working within the system, such as solicitors from the Refugee Legal Service. The growing numbers of applicants seeking judicial review has been attributed in part to a reluctance on the part of solicitors to proceed with hearings on discovering that particular Tribunal members will be hearing the appeal. Instead of seeking an adjournment, a common tactic used by lawyers but not possible when appealing to the RAT, solicitors may often decide that the appeal is a 'hopeless case', and will seek to issue judicial review proceedings at the earliest opportunity.

The well publicised institution of judicial review proceedings against one particular member, James Nicholson, on the basis of bias, stemmed from a concern among lawyers that he had granted asylum on two occasions out of a total of more than 400 hearings. This estimate however, was based on a survey of solicitors from the Refugee Legal Service following a refusal by the RAT to accede to a request to publish statistics on decisions by Nicholson.

A recent decision of the Supreme Court however, has helped alleviate the lack of transparency. It found that an obligation exists on the RAT to provide appellants with access to all relevant previous decisions. This has gone some way to improving the RAT's functioning.

According to reports on the new Bill's provisions, the RAT is to be replaced by a one-stop system which will consider both asylum and humanitarian leave to remain applications. Arguably, such an approach is to be welcomed. Significant improvements in the asylum system over the past few years have not been matched by the 'leave to remain' procedure. Considered as a form of subsidiary protection, leave to remain is granted in circumstances where an applicant does not fit within the strict definition of 'refugee', but where other compelling, often humanitarian reasons may exist for allowing her/him to remain. Once an application for asylum has been unsuccessful, the applicant will be sent a letter from the Minister notifying him/her of the intention to deport, but which gives the applicant an option to apply for leave to remain, setting out the reasons why he/she should not be deported.

Low asylum recognition rates by the RAT result in a significant proportion of asylum seekers ultimately making an application for leave to remain. However, the process contains many inadequacies. Firstly, it is entirely discretionary on the part of the Justice Minister whether or not to grant an application. While the factors considered when making a decision are outlined under section 3 of

the Immigration Act 1999 and include matters such as the age of the person and his/her duration of residence in the State as well as family and domestic circumstances, an applicant is given no information on what has been taken into account in finally deciding on the application. In this regard, the system lacks any element of transparency.

Of particular practical concern to applicants is the length of time which it can take for an application to be processed, currently averaging between three and four years. This presents huge difficulties for the applicant, who is unable to work, study or contribute to society in any meaningful way during this time. He/she is forced to live in a state of limbo for a considerable period, with no guarantee that permission to remain will ultimately be granted. Arguably, the State loses out also, as it is necessary to maintain an applicant for a number of years, however meagrely, draining resources which could be used elsewhere.

Thus the introduction of a 'one-stop' system which will consider both asylum and subsidiary protection is a welcome reform. The lack of jurisdiction on the part of the RAT to adjudicate on leave to remain issues has perhaps hampered its effectiveness. In a recent decision by the RAT, the Tribunal member found that while the applicant did not fit within the asylum definition, he did have a strong case for leave to remain. The member's lack of jurisdiction to grant this protection, however, resulted in the applicant being forced to submit a separate application for leave to remain and to endure the substantial waiting period which this entails, with no guarantee that the application would ultimately be granted.

Recent reforms have undoubtedly seen an improvement in the functioning of the RAT, particularly in relation to increased transparency. However, its proposed abolition and replacement with a decision-making system which considers not just asylum, but also subsidiary protection, is to be welcomed. The measure recognises an obligation to consider not just issues of asylum, but also of subsidiary protection in a more transparent and effective way.

While this may not be the overriding motivation behind the introduction of the new system, it will be a welcome consequence of it, provided that it is more transparent; there are clear criteria for granting leave to remain; and the new Tribunal sets out clearly the reasons for its decisions. It will be important as well that the new body is clearly independent and is seen to be so.

The William Sampson Comparative Public Interest Law Fellowship is awarded annually to law students from the University of Washington, Seattle. It gives them the opportunity to come to Ireland to work with FLAC and other organisations on public interest law issues. This year's recipients were (from left) Elisabeth Ahlquist (who was placed with the Irish Centre for Human Rights, NUI Galway), Rebecca Huffman (Northside Community Law Centre), Cecilia Boudreau (FLAC); Patrice Kent (Law Centre NI) and Jill Monnin (Irish Centre for Human Rights, NUI Galway).

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Renowned Indian human rights

While he is now known internationally and in his native India as a public interest lawyer and human rights activist, Colin Gonsalves actually started his working life with a degree in technology. He soon concluded, however, that he needed legal training to accomplish the work that he thought important to achieve social justice. Thus he began night studies which culminated in his qualification as a lawyer. Today he is a widely respected Senior Counsel of the Indian Supreme Court and the executive director of the Human Rights Law Network, an organisation with a presence in many Indian states.

Thanks to the good offices of the Irish Centre for Human Rights at NUI Galway and Dr Joshua Castellino in particular, FLAC was able to benefit from Colin Gonsalves' time when he came to Ireland to speak to students from the Masters Programme in Human Rights at the Centre recently. As a result, Colin spoke at two meetings in Dublin where he addressed issues about the use of law in the public interest, focusing on the use of law in the community and the concept of strategic litigation. The meetings also gave those present an opportunity to comment on the study being undertaken currently by Community Legal Resource on the development of public interest law and litigation in Ireland.

The Human Rights Law Network of India started in 1989 as an informal group of lawyers and social activists with Colin Gonsalves as a core member. At the start, the network provided day-to-day legal aid for people living in poverty. It worked in an environment where NGOs were teaching rights but 'access to justice' work, where practical results were obtained from the legal system, was hardly ever carried out. Before long, Gonsalves and his colleagues concluded that legal aid on its own, while essential, did not create sufficient impact on society as a whole. So

Colin Gonsalves, Senior Advocate of the Indian Supreme Court speaking in the Royal Dublin Hotel, with FLAC Director General Noeline Blackwell in the background

Pictured L to R: Moya de Paor, Northside Community Law Centre; Catherine Hickey, FLAC; Ercus Stewart SC; Ritika Vaderaa; and Colin Gonsalves

Olive Moore of Amnesty International Irish Section during the Q & A session with Colin Gonsalves and CLR in the Royal Dublin Hotel

Photos © Derek Speirs

lawyer & activist visits Dublin

while the network continues to provide pro bono legal services to those with little or no access to the justice system, it also undertakes public interest litigation, advocacy, legal awareness programmes and investigations into violations.

Winner of the 2004 International Human Rights Award of the American Bar Association in public recognition of his contribution to the area of human rights, Gonsalves has pioneered the use of public interest law in the Indian Supreme Court and has litigated across the spectrum of human rights (see box on the right). Some of his cases are particularly seminal. In response to a petition filed by the Human Rights Law Network in 2001 on behalf of the People's Union for Civil Liberties, the Supreme Court in New Delhi has made a number of orders which have resulted in court orders to implement various food security schemes including the right of children to a lunchtime meal, as part of the right to life. This complex litigation continues and is carried into various strands of Indian law and campaigns by many groups.

The network values its social activists as highly as its lawyers and collaborates with social movements, human rights organisations and grass-roots development groups to enforce the rights of children, dalits, people with disabilities, farmers, HIV positive people, the homeless, indigenous peoples, prisoners, refugees, religious and sexual minorities, women, and workers, among others.

Details of Gonsalves' talks for FLAC were circulated through the Public Interest Law Network. For information on future events on public interest law, please e-mail the Network at piln@flac.ie

For more information, see the website of the Human Rights Law Network (www.hrln.org) and HRLN's journal, *Combat Law* (www.combatlaw.org)

The Development of Public Interest Law in India

The development of public interest law in India can be traced to events arising during the mid-1970s, when a political scandal resulted in the declaration of a state of National emergency and the subsequent suspension of all fundamental rights. The failure of the Supreme Court to confirm the illegality of suspending the right to habeas corpus resulted in a loss of faith by a majority of the people in the efficacy of the court. The early 1980s saw the development of public interest law, as a method used by the court in attempting to restore confidence in its functioning.

Access to Justice:
In considering methods of improving access to the courts for the poor and illiterate, some novel reforms were introduced, many through the actions of the HRLN, including:

- An **expansion of the definition of *locus standi***: any person may take a case on behalf of the population, in the public interest;
- The **process of taking a case was eased and simplified**: an applicant is not required to gather and submit substantial evidence. Instead, this has become the court's responsibility, assisted by appointed Commissioners;
- Expansion of **epistolary jurisdiction**: an individual can simply submit a postcard to the Court alleging a complaint and this may be treated as a public interest petition;
- Innovative interpretation of **international law**: an International convention which increases rights to the people need not be be transposed in order for its provisions to be relied upon. However, any convention which reduces or takes away fundamental rights must be transposed into national law.

Some PILL cases in Indian courts

Refugee rights
India is not a signatory to the 1951 Convention Relating to the Status of Refugees and there is no reference to refugees under the Constitution. However, the right to life is recognised under the Constitution and the courts have extended this right to any individual on the territory of India. In this way, as asylum seekers are protected under the Constitution, they cannot be returned to their country of origin under the principle of *non-refoulement*.

Protection for women against sexual harassment
No legislation has been enacted which protects women against sexual harassment. However, when considering the issue, the Supreme Court looked to the provisions of CEDAW which provide that women cannot be discriminated against. By expansion, this was held to include sexual harassment in the workplace. The Supreme Court then drew up guidelines against sexual harassment using Art. 21.

Right to food
Due to widespread poverty in India, death by starvation is common. In a case before the Supreme Court, it was submitted that an obligation exists on Government to feed people. The government argued that it had insufficient resources to feed everyone. In a landmark decision, the court rejected this reasoning, holding that "when it comes to an enforcement of fundamental rights, we will never entertain an argument that the government has no funds". Following orders of the court a number of schemes were introduced, including the midday meal and the work for food programmes.

Housing rights
Housing rights are not contained in the Constitution but the Supreme Court has incorporated them as part of the right to life.

Gay rights
Progress has been made following the establishment of the first legal journal on Gay and Lesbian rights. A constitutional battle is currently taking place for the repeal of article 377, which outlaws "sexual activity which is against the natural order".

Child benefit and child rights

When Ireland's record is examined by the UN Committee on the Rights of the Child in Geneva, in September 2006, the Committee will scrutinise how the Irish State has respected and ensured the human rights of each child within Ireland without discrimination. Within this examination, the fact that some children born and living in Ireland do not receive Child Benefit will come up for discussion. Because of the imposition of the so-called habitual residence condition (HRC), the social welfare benefits to which children are entitled are not applied equally to all children, but depend on their parents' residency status.

According to a report prepared by the Children's Rights Alliance in advance of the UN Committee's examination:

> the denial of Child Benefit to asylum-seeker families has reduced their weekly income by at least 40%, and possibly as much as 70%, depending on the number of children and whether the family unit includes one or two parents. As a result, families have a wholly inadequate income to cover basic day-to-day expenses not met under the direct provision system (basic food and accommodation). The only option open to families is to apply under the Supplementary Welfare Allowance system for

'exceptional needs payments' to cover necessities such as clothing, over-the-counter medicines and supplementary food. It is at the discretion of the Community Welfare Officer whether assistance will be granted.

In 1996, when Ireland made its first report to the UN Committee on the Rights of the Child, the State was able to say that "Child Benefit is universal and generally paid to the mother or primary carer". In its current report, the Irish Government says that "current government policy is that Child Benefit is the main instrument through which support is provided to parents with children. One of the main benefits of this approach is that all recipients are treated equally". It goes on to qualify that general statement by the statement that "to qualify for Child Benefit, the applicant must satisfy a habitual residency condition."

On the page oppposite readers will find a guide to the circumstances in which Child Benefit will or will not be paid following the introduction of the HRC in May 2004. Since its introduction, there has been considerable confusion and uncertainty about who should or should not receive child benefit. This confusion arose in part from the complexity of European Union (EU) law underlying the condition, the way that this law was applied unevenly by deciding officers, gaps in government information provision and the fact that the scheme had to be substantially changed because of EU Commission unease with the initial application of the scheme to workers covered by EU law.

With other concerned organisations, FLAC has been working to clarify the law and practice on HRC since it was introduced. FLAC expects that its new *Guide on Child Benefit* will clarify how and when this condition applies to Child Benefit. It will also highlight the fact that a number of children living in the State can be without the benefit of this payment, sometimes for the many years that it takes to determine an asylum claim or for the Department of Justice, Equality & Law Reform to decide on an application to remain in the State.

In launching the Combat Poverty Agency annual report in August 2006, Minister Séamus Brennan said that "poverty, particularly child poverty, has no place in twenty-first century Ireland." Child benefit is

recognised by his Department and his Government as one of the steps which will guard against child poverty. The application of the Condition has introduced an inequality among children residing in the State and increased their risk of poverty.

There is a general obligation expressed in Article 2 of the UN Convention on the Rights of the Child to respect and ensure the rights of children (including the right to benefit from social security under article 26 of the Convention) without discrimination, inter alia, on grounds of nationality. In addition, there are obligations on the State to guarantee that children who are refugees or asylum seekers shall "receive appropriate protection and humanitarian assistance" to ensure the realisation of their rights under the Convention and other international human rights instruments. Even though that Convention has not been incorporated into the domestic law of the State, the State still carries the obligation to comply with its terms and to ensure that – in the words of the Convention – the rights of the child are the "primary consideration". Ireland's current system excludes most, but not all children of asylum seekers from Child Benefit.

The equal treatment of children, the removal of economic discrimination between them and the recognition of the need to put the best interests of the child at the heart of government policy by restoring Child Benefit as a universal payment would be a useful step in genuinely addressing child poverty and protecting child rights.

Glossary and Notes

The **Habitual Residence Condition** was introduced on 1 May 2004 as a qualifying requirement for all social assistance payments and Child Benefit. It is presumed until the contrary is shown that an applicant is not habitually resident if they are living in the State or the common travel area for less than two years. According to the DSFA, the onus is always on the applicant to provide sufficient evidence that they are habitually resident in the State. In determining whether a person is habitually resident, five factors set down by the European Court of Justice are also to be considered: length and continuity of residence in Ireland; length and purpose of absence from Ireland; nature and pattern of the employment; applicant's main centre of interest and future intentions.

(See www.welfare.ie/foi/habres.html#G)

The **Common Travel Area** consists of Ireland, the United Kingdom of Great Britain and Northern Ireland, the Channel Islands and the Isle of Man.

European Economic Area (EEA) countries are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, UK, Republic of Cyprus (Cyprus South), Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic and Slovenia. Although Switzerland is not a member of the EEA, the EU Agreement applies.

Non-EEA nationals also known as "third country nationals", require a work permit to take up employment in Ireland.

Also: See article on page 2 on clarification of child benefit rules

Child Benefit & Habitual Residence Condition

Non-EEA nationals

- This payment is available to all non-EEA nationals who are employed or self-employed in Ireland and are subject to Irish PRSI. They are required to satisfy the HRC, unless they have resided and worked in another EEA country.
- Non-EEA national workers will have to be resident in the State with their children to get Child Benefit.
- If workers lose their jobs, they will be paid the benefit for the duration of the work permit.
- If a child's father has satisfied HRC requirements, but its mother has not, the payment will be awarded to the mother "based on the family unit concept".
- According to the Department of Social and Family Affairs, refugees and persons granted leave to remain in the State as the parents of Irish-born children will satisfy the HRC provided that they have lived continuously in the State since being granted refugee status or leave to remain and therefore can avail of Child Benefit from the time of recognition or permission to remain. They will be required to submit documentation issued by the Department of Justice Equality and Law Reform and a certificate of registration from the Garda National Immigration Bureau. If they have not lived continuously in the State since recognised as refugees or given or leave to remain, their claims will be decided having regard to the five factors set down by the European Court of Justice relating to centre of interest.
- The legal guardian of an Irish-born child with Irish citizenship whose parents have been deported can make a claim on behalf of the child, but the claimant must him/herself satisfy the HRC even though the child is a citizen.
- Asylum seekers and persons seeking leave to remain in the State on humanitarian grounds are not entitled to Child Benefit.
- Asylum seekers who were recipients of Child Benefit before 1 May 2004 and who are still receiving the payment are not required to satisfy the HRC in respect of that child or on claims made for additional children born on or after 1 May 2004.
- In all cases, applicants are required to provide either a certificate of registration or other legal documentation as evidence that they are legally resident in Ireland before the payment will be made.

EEA nationals

- EEA nationals who are employed or self-employed in Ireland and are subject to the PRSI system do not have to satisfy the HRC and therefore can avail of child benefit right after obtaining a job.
- EEA nationals who were employed but are now unemployed and in receipt of unemployment benefit do not have to satisfy the HRC for Child Benefit.
- The spouse of an EEA worker, where the worker is employed or self-employed in Ireland and subject to the PRSI system, can be awarded the payment of Child Benefit.
- EEA workers are able to access Child Benefit even if their children are not resident in the State.
- EEA nationals who have not worked in Ireland, but are actively looking for work here ("first jobseekers") cannot access child benefit unless they satisfy the HRC.

Focus on FLAC staff:

Catherine Hickey,

Director of Funding & Development

Catherine Hickey has been working with FLAC since February 2000. She was Executive Director for five years working with FLAC Council to increase resources to enable the organisation deliver on its mission and strategy. In April 2005 she moved to the new post of Director of Funding and Development where her current work centres on securing funding for FLAC, project and event management and forward planning. Together with the team at FLAC, Catherine organised a conference, 'Public Interest Law: the Reality and the Potential' in October 2005 as well as a follow-up series of seminars and Roundtable on Public Interest Law and Litigation in 2006.

Catherine believes that FLAC's volunteers are a key and unique resource providing first-stop legal advice at FLAC centres and delivering one of FLAC's main aims: increasing access to justice.

She would like to see civil legal aid being made available in all areas of civil law which can affect people in their day-to-day lives. Through FLAC centres we meet many people who have a grievance for which they need legal advice and/or representation, but would not have the resources to engage a solicitor, e.g. employment issues, landlord and tenant issues, consumer and housing problems and other areas of law currently outside the scope of legal aid provision. Catherine believes we need to continue campaigning for equal access to justice for all.

Catherine has a B. Soc. Science Degree and a MBS Degree in Organisational Behaviour and Development from University College Dublin. She holds a Barrister-at-Law Degree from the Honourable Society of King's Inns and was called to the Bar in 1997.

Catherine has worked in management in the NGO sector for 16 years. She was Director of Muscular Dystrophy Ireland from 1990 to 2000. She was a Board member of the Disability Federation of Ireland from 1992 to 2000 serving as Chairperson from 1998 to 2000. A founder member of the Center for Independent Living in 1992, Catherine has been involved in disability rights campaigns for many years. She was also on the Board of Carmichael Centre from 1992-1999, serving as Chairperson in 1993-1994.

Catherine is a Director of The Wheel and chairs the sub-group on Membership and Services. She has been active on the Management Committee/Board of Ballymun Community Law Centre since 2000 and is currently Vice-Chairperson of the Law Centre.

Catherine believes in the power of NGOs and of the community and voluntary sector to change society. She believes that the sector gives leadership in educating people about their rights and in enabling access to the legal system to address rights.

Substantial revision of legal aid means test: A lot done, more to do?

(from front page)

arguably some way short of meeting the actual cost of many mortgages or private rentals in Ireland in 2006.

- The value of the applicant's family home is to be completely disregarded as capital both for the purposes of qualifying for the service and in terms of assessing an eligible person's capital contribution, whether it is the subject matter of the legal dispute in question or not. This alteration removes the anomaly whereby those on low incomes owning their own home outright or with substantial equity in it, either failed to qualify for the service or had to pay a substantial contribution for it, as a result of spiralling property price inflation.

- The minimum contribution for legal **advice** has gone up from €6 to €10 and the maximum contribution from €100 to €150. The minimum contribution for legal **aid** has increased from €35 to €50. The threshold for payment of the minimum contribution in both cases has risen from €8,300 to €11,500 and this will mean that a greater number of people on very low incomes will pay the minimum.

- The maximum income contribution for the service will now be €50, plus one-quarter of the difference between €11,500 and disposable income (up to the new limit of €18,000). This is the same formula, albeit with adjusted income limits, that applied in the previous regulations. Conceivably, a person qualifying on the maximum disposable income limit of €18,000 may, therefore, have to make an income contribution of €1675.

- As well as removing the family home from the equation, some adjustments have been made in the thresholds for calculating an eligible person's capital contribution. The exempted amount has increased from €3200 to €4000. Now 2.5% of the difference between €4000 and €54,000 must be paid (as opposed to 2.5% of the difference between €3200 and €79,500). Any amount over €54,000 must be paid at the rate of 5% (as opposed to 10% of the amount over €79,500).

  Any person with disposable capital of over €320,000 will not qualify and this figure is unchanged, although the value of the family home is no longer included. Normal household goods or the value of any tools of the applicant's trade will not be assessed as capital resources. Finally, it appears that the particular rules of assessment in relation to farmland have been removed and that it will now be treated the same as other capital resources. It is possible that this may impact adversely on farmers in relation to applications and contributions.

In terms of omissions, it is notable that amounts for routine costs such as travel to and from work expenses and the cost of servicing credit agreements have not been restored as allowances for the purpose of the means test. This is disappointing, given the large distances which many people have to travel to and from work and the predominance of credit in Ireland at present.

It must also be stressed that the new regulations concentrate in their entirety on the means test and do not address the exclusion of many areas of law from the scope of the scheme which remains family law-dominated, despite the existence of substantial unmet legal need in other areas.

In his press release, Minister McDowell's claims the revised regulations 'are further evidence of my commitment to the delivery of an accessible and fair civil legal aid system' and that 'I have increased funding for the scheme in recent years and the Board has made excellent use of these resources in order to tackle waiting lists'. No mention is made of the *O'Donoghue* case in the High Court in 2004, which established a right to timely legal aid and gave rise to the necessity to reduce the waiting lists in the first place. Nevertheless, credit is due for the resources that were ultimately provided to comply with suggested waiting time for legal aid outlined in that decision. However, there is a conspicuous absence of a commitment in the Minister's press release guaranteeing further resources to meet the increased number of applicants who will now qualify for civil legal aid under the revised means test.

It is imperative that the waiting lists, now at 'manageable' levels, do not become the sacrificial lamb for a more realistic assessment of means.