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FREE LEGAL ADVICE CENTRES

Challenge to Jury Bias

FLAC takes case on discrimination against deaf jurors

Photo © Jack Storms/www.stormsphoto.com

Michele Storms, Director of the Gates Public Service Law Program, who spoke at the recent FLAC event on Public Interest Law. *See page 8 for details.*

FLAC has been involved in two challenges to jury discrimination recently, one against the exclusion of deaf persons from juries and the other against the age limit for jury service.

Galway mother of two and special needs assistant Joan Clarke, who is profoundly deaf, took a High Court action after she was summoned for jury service and then told she could not sit on a jury because she is deaf. The local court staff in Galway had booked sign language interpreters to enable her to take part in the jury but the Courts Service head office intervened, pointing out that the Juries Act 1976 specifically states that deaf persons are unfit to serve on juries.

In the other case, a 73-year old consultant engineer, who often gives expert evidence in court hearings, issued proceedings challenging the age limit of 70 years for jury service – and 65 years for coroners courts. This meant that he could not sit on a jury in the courts where he regularly gives evidence. The age limit also ignores the major changes in the make-up of the population since the Juries Act was passed in 1976, with a much higher proportion of the population over 65 or 70 and older people experiencing much better health and fitness.

FLAC represented both applicants.

The age discrimination matter was resolved fairly quickly. Age Action Ireland had also been lobbying on this issue, which many older people feel undermines their self-respect and the contribution they can and do make to society.

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Challenge to Jury Bias

[cont'd from front page]

Labour TD Pat Rabbitte raised the question during a Dail debate on the Civil Law (Miscellaneous Provisions) Bill in December 2007 and Fine Gael and Sinn Fein also called for change. And in a rare display of parliamentary unanimity, the then Justice Minister Brian Lenihan agreed to change the law. If only all campaigns for change could succeed as easily.

Ending the ban on deaf jurors has been a tougher proposition. Joan Clarke's case was heard over three days in the High Court at the end of May and judgment has been reserved. Joan was assisted by the local branch of DeafHear in Galway and it was good to see that people from DeafHear in Galway and Dublin turned up in court to show their support for her.

The State defended the ban on deaf jurors on the grounds that sign language interpretation could not convey the inflection and tone of voice of witnesses and, more fundamentally, that having interpreters in the jury room to help the deaf juror would be in breach of common law rules about the secrecy and privacy of the jury's deliberations.

Joan Clarke's legal team argued that sign language interpreters used their own body language and expressions to convey the tone of voice etc. of witnesses and that, as far as the privacy of jury deliberations was concerned, interpreters regularly acted in sensitive and confidential proceedings and were trained to be impartial and not to express their own views or emotions while interpreting.

Joan's lawyers also cited case law from the US where deaf – and blind – persons are entitled to serve on juries in state and federal courts and judges have commented favourably on the experience and the lack of problems it has caused. In the key case of *People v Guzman* in the New York Supreme Court in 1984, the court said:

> The blunt constraint that no deaf person can be qualified to sit as a juror is a passé conclusion which defies and has no connection with reality or common sense... No longer can we lump all deaf persons together and discard them in a faceless silent heap, as in the past, on the assumption that they are all the same – inept and unable to fulfil this requirement of citizenship.

Deaf persons have also served on juries in New Zealand recently and they are entitled to serve in Canada, though not many appear to have done so. Law reform commissions in Australia have recommended change there and Ireland and the UK seem to be the last major Common Law jurisdictions clinging to this discriminatory policy.

FLAC retained Irish Sign Language interpreters for the High Court hearing in Joan Clarke's case so that she could follow the proceedings and all sides learned a lot from the experience.

It is ironic that when most people seek to avoid jury service and court authorities regularly complain about the difficulty in empanelling sufficient jurors, one group of people who are willing and able to perform this vital service are being turned away because of outmoded stereotyped attitudes.

Whatever the outcome of Joan Clarke's case, the issue of respect for deaf people and treating them as full and equal members of society will not go away.

Legal Aid: What a difference a word makes...

- **severe** (adj) – serious, painful, harsh, austere.
- **hardship** (n) – conditions of life that are difficult to endure or something that causes suffering
- **undue** (adj) – to a level which is more than is necessary, acceptable or reasonable.

The last edition of FLAC News (Vol 18, No.1, Page 9) flagged a significant proposed amendment to Section 29 (2) of the Civil Legal Aid Act, 1995 in the Civil Law (Miscellaneous Provisions) Bill, 2006. This amendment was introduced at report stage in the Dáil and only came to FLAC's attention the day before being introduced by the Government. It proposed to introduce a general requirement to satisfy a test of 'severe hardship', where a recipient of civil legal aid wished to seek a waiver or reduction of his/her financial contribution for the service. The severe hardship criterion had up to now only applied where a person was seeking a waiver of the minimum contribution for the service, currently €50.

Government queried on action re civil legal aid

In the debate at report stage, opposition spokespersons on justice raised issues of concern to FLAC about the amendment. The Bill then proceeded to the Seanad where a number of Senators in turn articulated their disquiet about setting a standard as high as 'severe hardship'. FLAC was particularly concerned that if the amendment passed, a new section of the Civil Legal Aid Act would only allow waivers or reductions of contributions to those who could prove "severe hardship".

Further, the debate indicated that the Government believes that this amendment will clear up any existing confusion and will actually widen the circumstances in which a waiver might be granted. FLAC, on the other hand, continues to be concerned that the Legal Aid Board already has power to grant waivers or reductions in the existing legislation and that it was only where a person was seeking a waiver of the absolute minimum contribution that the regulations required a person to demonstrate severe hardship. Thus, it is our view that the amendment narrowed the potential for waivers or reductions.

In addition to submissions to TDs, FLAC expressed its concerns about the effect of the amendment directly to the Legal Aid Board and to officials in the Department of Justice, Equality and Law Reform.

Change to amendment better, if not perfect

Therefore, while still unhappy that the amendment was being introduced at all, FLAC did welcome a change in the most recent formulation of the amendment proposed by the government which now reads that as person must show "undue" hardship before the Board will grant a waiver or reduction of legal aid.

This is an improvement on the first proposal and will hopefully make it easier for recipients of civil legal aid in financial difficulties in the future to seek a reduction or waiver of their contribution. As a benchmark for such future applications, we are encouraged by the statement made by Minister of State, Conor Lenihan, T.D, during the debate in the Seanad, that "the intention is not to set the standard unreasonably high, while still providing that it would not simply apply in all cases, since it might be said that any request for a contribution would involve some hardship to a person on a modest income in so far as it would reduce his or her immediate disposable income."

This acknowledgement that having to make a financial contribution in the first place is a hardship for a person on a modest income is welcome, since it can be said that any person who qualifies for legal aid is on a modest income given the disposable income limit of €18,000.

Civil legal aid not free – heavy burden for many

There is still a widespread perception that civil legal aid is free. In fact, a person in receipt of legal representation has to pay one-quarter of the difference between their disposable income and €11,500, in addition to the minimum contribution of €50. This means that the financial contribution for legal representation could run as high as €1,675 and in a sizeable number of cases is likely to amount to hundreds of euros.

We would agree with the Minister of State that this is a hardship in itself and in view of the difficult financial circumstances of many potential applicants may well be an undue hardship, in particular for those with high levels of personal indebtedness. It should also be pointed out here that the financial contribution for the service must be paid in advance and only exceptionally can a financial contribution be paid by way of instalments.

In the current climate of recession, it is likely that the requirement for many in receipt of legal aid to pay a financial contribution will increase the pressure on families and individuals to make ends meet. Those in receipt of legal representation from the Board should bear in mind that the extent of the financial contribution imposed can be reviewed by the Board upon request. Furthermore, if an applicant is dissatisfied with the initial decision, or the review, he or she may appeal to the Appeals Committee of the Legal Aid Board.

Donegan vs DCC & the Attorney General:

Summary of judgement by Ms Justice Mary Laffoy

On 8 May 2008, the High Court declared that section 62 of the Housing Act 1966 as amended by section 13 of the Housing Act 1970 is incompatible with Article 8 of the European Convention of Human Rights. Ms Justice Mary Laffoy made the judgment in proceedings brought by Anthony Donegan against Dublin City Council and the State over the termination of his tenancy of a council house. The judge will hear submissions as to the precise form of the declaration at a later date.

Section 62 provides that the District Court may grant a local authority a warrant for possession of a house in circumstances including where the tenancy has been terminated by notice to quit. In 2003, Gardai had carried out a search of Mr Donegan's house under the Misuse of Drugs Act. While they found no drugs, they did find some "drugs paraphernalia" in his son's bedroom. The council later began an investigation into alleged anti-social behavior. On 24 October 2004, Mr Donegan was served with a notice to quit. As an alternative to terminating his tenancy, the council gave him the option of taking out an exclusion order against his son, which he declined. The factual dispute in the case lay in that Mr Donegan said his son was a drug addict and not a drug dealer, as claimed by the council.

In her judgment, Ms Justice Laffoy considered a number of European cases, the most important being *Connors* and *Blecic* along with the recent High Court decision in *Leonard* on a Convention challenge to s.62. She cited Article 8:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The main question examined by the court in *Connors vs UK* was whether the interference with the property was "necessary in a democratic society" and said

> *the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory frame work, remained within its margin of appreciation. In particular the court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8 …*

In answering this question, the court found that there had been a breach of Article 8 in *Connors*.

Ms Justice Laffoy also referred to the case of *Blecic v Croatia* where the court dealt specifically with procedural requirements and put forward a test for compatibility:

> *…while Article 8 of the Convention contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and ensure respect of the interests safeguarded by Article 8. The court must therefore determine whether, having regard to the circumstances of the case and notably the importance of the decisions to be taken, the applicant has been involved in the decision-making process, seen as a whole, to a degree, sufficient to provide her with the requisite protection of her interests.*

Following this test, the European court ruled there had been no breach of Article 8 of ECHR by Croatia.

Ms Justice Laffoy stated that the core issue in *Donegan* was substantial, i.e. whether s.62, which prevents an inquiry on the merits by an independent tribunal, is incompatible with Article 8. She also referred to the recent judgment of Ms. Justice Dunne in *Leonard v Dublin City Council & ors.*, where a challenge under Article 8 failed. While *Donegan* and *Leonard* were similar, Ms. Justice Laffoy stated it was where they differed that was crucial, in that *Leonard* challenged s.62 on the procedure before the District Court rather than a factual dispute around the reason for terminating the tenancy and the Council's entitlement to do so.

She made four main points:

- The Council's actions could neither be viewed as a procedural safeguard nor regarded as a process of review of the Council's decision-making process. It was an investigation where the plaintiff's view was elicited.
- It is not the termination of a tenancy that breaches a tenant's rights under Article 8, it is the enforcement of an order for possession. In this case, the main issue was "whether the law provides a means whereby the decision to serve and the service of the notice to quit may be reviewed on the merits in a Convention-compliant manner at any time up to the point of eviction."
- In Ireland, the judicial review system is not a proper procedural safeguard where the tenant's argument (that the Council was not entitled to terminate the tenancy) is based on a dispute as to the facts. The question was, why did public authorities seem to promote judicial review as an answer to the procedural safeguard deficit argument, when it can only be obtained in the High Court?
- If the application of s.62 to the plaintiff's case by the District Court is in breach of the Convention, it is because the law is flawed.

Ms. Justice Laffoy affirmed that *Connor* and *Blecic* affected the outcome of the case and concluded:

1. The house is the plaintiff's home for the purposes of Article 8;
2. There will be an interference with the plaintiff's right to respect for his home under Article 8 if a warrant for possession is obtained by the council in the proceedings pending in the District court under s.62 and that warrant is executed;
3. Under Irish law, applying s.62, there is no defence to the Council's claim for possession and thus the interference will be in accordance with law.;
4. The interference has a legitimate aim, which the Council has asserted as being the requirement of good estate management, including the need to act to tackle anti-social behaviour within its administrative area, and the due discharge by the Council as housing authority of its statutory obligation to provide accommodation for qualifying persons.

However, Ms Justice Laffoy held that the interference in Mr Donegan's case was not necessary in a democratic society. A legal scheme which allowed a public authority to recover possession of a person's home without procedural safeguards could not give proper respect to rights recognised by Article 8 of the Convention. The procedure, which would inevitably result in the eviction of a person from his/her home and which could not be reviewed in accordance with the Convention, could not fulfil the test of fairness previously set by the court in *Connors*:

> *There is no procedural safeguard built in to s.62 under which the plaintiff's contention that he is not in breach of his tenancy agreement can be adjudicated on independently on the merits, nor is there any other means available to him under Irish law by which he can achieve that objective and, if his contention that he is not in breach is correct, stave off eviction from his home.*

The judge found that the law is therefore in breach of Article 8 and granted a declaration of incompatibility.

Best practice in provision of services to asylum seekers

A seminar on 'Best Practice in Provision of Services to Asylum Seekers' took place on 28 May 2008 in the Carmelite Community Centre in Dublin.

The seminar was organised by the Sonas Community of Practice, which is a partnership of representatives from a number of organisations who work with asylum seekers, including the National Consultative Committee on Racism and Interculturalism, the Refugee Legal Service, the Irish Vocational Educational Association (representative body for VECs), the Money Advice and Budgeting Service, Citizens' Information Board, Irish Refugee Council, Integrating Ireland, FLAC, Refugee Information Service and Partas.

The Community of Practice was established in response to recommendations made in a report of the SONAS DP Ireland Ltd Project, which focused on improving services to people living in Direct Provision (DP). One of the recommendations was to commission research on the "Best Practice in the Provision of Services to Asylum Seekers". This was carried out by the Anthropology Department in NUI Maynooth. Following on from this research, the Community of Practice organised the seminar to:

- Highlight current practice in provision of services to asylum seekers
- Identify the challenges in creating best practice in service provision as well as recommendations on same.

Representatives from statutory agencies including the Health Service Executive, DP Service providers, NGOs and individual asylum seekers who travelled from around the country attended the event. FLAC Director Noeline Blackwell chaired the morning session. Saoirse Brady, FLAC Campaigns and Policy Officer, facilitated a workshop on legal issues at the event.

Niall Crowley, CEO of the Equality Authority, discussed the need to introduce the principle of equality in services to asylum seekers. He identified discrimination as a key barrier to accessing services and suggested that in order to meet needs, there must be equality in accommodating diversity.

Thérèse Ruane from Mayo Intercultural Action (MIA) explained MIA's work which includes support and advocacy for asylum seekers as well as education initiatives. She highlighted the need for awareness of and funding for some of the more practical implications of people in Direct Provision accessing services including transport and childcare facilities.

Two residents of the DP system who act as representatives of their respective hostels addressed the seminar. They raised issues relevant to the everyday lives of those living in DP such as language barriers, lack of privacy and the difficulty of trying to supplement their diet as well as buy essential items on €19.10 per week. The two asylum seekers also discussed positive aspects of their time in Ireland and highlighted the value they found in volunteering and becoming active in the community.

Raquel Palacio from ACCEM in Spain gave examples of best practice in Spain and emphasised the high level of cooperation between the State authorities and the non governmental organisations working with asylum seekers and refugees.

Ben Chisanga from the British Refugee Council discussed the British system and referred to the 28-day induction on arrival for all people seeking protection in Britain. He also looked at the importance of community-led organisations.

The afternoon session involved different workshops on topics like legal information, education and training, health, information provision and community development. Recommendations were made by the participants on how the asylum and Direct Provision systems could be improved for the people living in the system who often have to live in unsatisfactory conditions for a number of years while awaiting a decision on their application for protection. Sonas will prioritise these recommendations and raise them with the Department of Justice.

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FLAC delivers presentation on Direct Provision to Combat Poverty Agency

On 10 June, FLAC's Policy and Campaigns Officer Saoirse Brady was the speaker at a lunchtime seminar organised by the Combat Poverty Agency as she is currently researching and writing an updated version of FLAC's 2003 publication Direct Discrimination? The seminar was well attended by representatives of NGOs, academics and state-funded bodies.

The presentation focused on the Direct Provision system and the detrimental effect which the Habitual Residence Condition (HRC) has had on people living in this system as the majority of people are no longer entitled to claim social welfare benefits including the formerly universal Child Benefit. Instead asylum seekers and others living in Direct Provision have to survive on €19.10 per week for an adult or €9.60 per week for a child. They usually get two Exceptional Needs Payments a year to buy clothing. However some people living in Direct Provision are in receipt of a Child Benefit payment as they have been there since before the introduction of the HRC in May 2004 or have received a payment afterwards, but this has usually been granted on appeal and only in a small number of cases. This situation creates inequality between people living within the same system.

The presentation included an overview of the government policies of Direct Provision and Dispersal including their introduction and their current operation. Saoirse discussed the government's rationale behind introducing the HRC and explained the law surrounding the condition. She also noted that the Department of Social and Family Affairs (DSFA) issued new guidelines for Deciding Officers on the HRC on 9 June which update the Department's position on the implementation of the HRC. They specifically refer to the situation of asylum seekers applying for social welfare payments and suggest that no asylum seeker who is still within the process can be deemed habitually resident for the purposes of qualifying for a payment (see article on opposite page - the new guidelines can be viewed at http://welfare.ie/foi/habres.html).

One new development in this area was also brought to light as in a number of recent cases people living in Direct Provision have been granted social welfare payments on appeal but the relevant authorities have refused to pay and have asked for a review of this decision by the Chief Appeals Officer. FLAC and other organisations are concerned at this development as there does not appear to be any justification or statutory provision for this refusal to pay the appellant while awaiting a review of the decision. We suggest that the authorities are obliged to implement the order of the Appeals Officer.

During the seminar, two of the government's anti-poverty and social inclusion policies were examined, Towards 2016 and the National Action Plan for Social Inclusion 2007 – 2016, both of which employ the "lifecycle approach" which is made up of different key life stages. As most of the people living in Direct Provision fall within two of the main categories – Children and People of Working Age – it was felt appropriate to look at the objectives which the government has set in relation to these sections of the population and examine if they are meeting these commitments in relation to the people living in Direct Provision. To view the full presentation, visit http://www.flac.ie/campaigns/current/direct-provision-campaign/.

The presentation was followed by a lively questions and answers session during which a number of issues were highlighted regarding the poverty levels experienced by asylum seekers as well as their restricted access to food, medical facilities and education.

Photo © Lianne Murphy/FLAC

FLAC Campaigns & Policy Officer Saoirse Brady

Fresh research on Direct Provision

FLAC is carrying out research in relation to the direct provision system in Ireland, to update and elaborate on some of the key concerns identified in our 2003 publication, *Direct Discrimination?* (available to read online at http://www.flac.ie/download/pdf/directdiscrimination.pdf)

The new report will examine the system of direct provision in the context of government policy, domestic law and international human rights standards. It will look in particular at the impact of the Habitual Residence Condition on this vulnerable group, especially regarding entitlement to access social welfare payments.

FLAC will assess the direct provision system in a human rights context to determine whether the scheme complies with international standards and norms, with due regard given to economic, social and cultural rights.

New squeeze on asylum seeker benefits

The Department of Social and Family Affairs (DSFA) published new Guidelines on the Habitual Residence Condition for social welfare benefits on 9 June last. The new Guidelines say that no asylum seekers can satisfy the HRC, regardless of how long they have been in Ireland, and so they cannot qualify for benefits other than Direct Provision with its paltry cash payments of €19.10 per week.

DSFA Deciding Officers have generally held that asylum seekers or persons seeking leave to remain in the State do not satisfy the HRC criteria set out in the Social Welfare Acts. But the Social Welfare Acts do not single out asylum seekers as a group for exclusion and this is the first time that it has been officially stated that 'no asylum seeker need apply'.

This may be a response to the fact that Social Welfare Appeals Officers have begun to grant some appeals by asylum seekers or persons seeking leave to remain who have been here for a long time, and the DSFA does not seem too happy about it. The Department has applied for a review of some of these decisions by the Chief Appeals Officer and in some cases it is refusing to pay the benefit in question until the review is completed.

It is not at all clear that the DSFA can, by itself, change the criteria for the HRC which have been laid down in legislation, or where it gets the authority to refuse to pay benefits awarded by Appeals Officers.

FLAC is already representing an asylum seeker who is challenging a refusal by the Health Service Executive to pay a benefit awarded by a HSE Appeals Officer. It is to be hoped that we and other organisations assisting asylum seekers and people seeking leave to remain do not have to go down the same road with the DSFA as well.

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New subscribers are always welcome.

LAB corporate plan – call for submissions

The Legal Aid Board is preparing a new corporate Plan to cover the period from 2009 to 2011.

The Board wishes to invite submissions on the contents of the Plan from interested parties.

The LAB is "responsible for the provision of civil legal aid services to persons of modest means." Its services include a network of full-time and part-time law centres.

Its current corporate plan is available to view on the LAB website at: http://www.legalaidboard.ie

Submissions can be sent in by e-mail to corporateservices @legalaidboard.ie or by post to Corporate Services Unit, Legal Aid Board, 48 North Brunswick street, Dublin 7, to arrive by Friday 25 July 2008.

Photo © Tim Kearney

FLAC's Saoirse Brady & Lianne Murphy campaigning at the GP meeting

Green Party supports CB reform campaign

FLAC welcomes the Green Party's commitment to "immediately increase the asylum seekers' allowance to €60 per week per adult and €35 per child and work towards ending Direct Provision in the long term."

The elected National Executive Committee of the Green Party passed the motion at a recent meeting on 14-15 June to make it official Green Party policy. The motion had been deferred from the Green Party conference which was held earlier this year in Dundalk and was attended by Saoirse Brady and Lianne Murphy from FLAC on behalf of an alliance of NGOs working on the Direct Provision issue.

Public interest law: its

FLAC held a seminar entitled 'Public interest law: its relevance in society today' in the Morrison Hotel, Dublin 1 on Friday 20 June 2008. Almost one hundred people were in attendance at the seminar and presentations were made by four distinguished lawyers all with significant experience in the field of public interest law.

FLAC Director **Noeline Blackwell** introduced the speakers. This was followed by an overview of the seminar by **Professor Walter J Walsh**, a former FLAC volunteer and board member.

Professor Walsh joined the University of Washington law school faculty in 1998, after serving as a visiting professor from 1996. Since the late 1990s, he has organised the William Sampson Fellowship in conjunction with FLAC which organises the Thomas Addis Emmet Fellowship. This involves the participation of law students in a summer internship in a public interest law or human rights organisation based in Washington/Ireland. Professor Walsh described this programme and also discussed the U.S. legal system and constitution in relation to PIL instruments such as *amicus curiae* interventions, comparing the US to other common law jurisdictions.

The first guest speaker was **Sue Donaldson** of Washington Appleseed (WA) who spoke about how her organisation engages *pro bono* attorneys in addressing systematic social inequalities. Sue explained that unlike FLAC, WA does not offer individual consultations and does not undertake high impact litigation. Instead, WA tries to change public policy in a systematic way. It carries out *pro bono* work by engaging attorneys who are not generally active in human rights or public interest law, such as corporate or tax lawyers, enabling them to use their skills in a different area.

For example, WA took corporate lawyers into a distressed area of Seattle for five consecutive weeks to meet people on the ground regarding land trusts. These lawyers then created bankable documents for the trust to buy land and allow low income families to buy houses on this land. Last year the YWCA acquired half of what it needed in Seattle.

Thus WA is aiming to "engage the other half of the Bar" which has been left out of the PIL movement. *Pro bono* work is now one of the criteria – double weighted - for ranking law firms in the US and top firms typically now devote 3-5% of their billable hours to such work. In fact, when corporate councils are deciding which firm to hire, the firm's *pro bono* work is assessed. Thus there is much for Irish law firms and partners to learn in this approach.

Next to speak was **Doug Lasdon**, the Executive Director of the Urban Justice Center (UJC) in New York. He spoke about 'providing legal services to the most marginalised populations.' He established the UJC to address real cases quickly. In his first case, he successfully applied for funding to represent homeless kids in a challenge to NYC law – as a result, aged-out minors discharged from foster care into independent living are now entitled to appropriate accommodation and services when leaving care. UJC's tactics included going into the soup kitchens of New York to assist clients who didn't have a fixed address.

The Center has a twin approach in its work:

1. Direct services involving individual representation and aiding clients to get social welfare or 'public assistance'. This is very difficult to get and harder to keep, requiring constant monitoring and challenges. Some 30,000 people a month have their state assistance terminated in New York.
2. Strategic litigation to change a system (such as in the foster care case above) which benefitted from the *pro bono* assistance of top lawyers; four to five associates and a partner drafting documents. Other cases taken – of which there are many – that have changed state laws include one where homeless married heterosexual couples now have the right to be housed in shelters together (previously they were separated by gender) and one on behalf of prisoners with mental health problems, who were being released at uncivil hours with no medication. This was linked to their re-offending or ending up in hospital, occurences of which have now decreased. Doug emphasised the need for a follow-up compliance strategy for cases, as lapses were frequent.

Another key feature of the UJC's work is its lack of bureaucracy – each project raises its own funds and thus has a vested interest in spending wisely. This reduces oversight and reporting requirements and gives great ownership of the work to staff, making them very result-oriented.

Frank Murphy, Managing Solicitor of Ballymun Community Law Centre then spoke on the topic of 'Regeneration and Access to Justice' in Ballymun.His presentation was poetic and challenging, asking hard questions about access to justice and equality before the law in Irish society (see page 10 for an extract from Frank's speech).

The final speaker was **Michele Storms** of the Gates Public Service Law Scholarship Program. Her presentation was entitled 'Contributing to Law in the Public Interest:The relevance of public interest law in society today'. Michele's talk focused on public interest law advocacy. She singled out poverty as a major barrier to access to justice, citing a 2003 civil legal needs study carried out in Washington State. This revealed that 3 out of 4 low-income people have at least one critical civil legal problem annually, and of these only 12% actually access a lawyer. In many cases people do not recognise they even have a legal problem, and often unresolved legal issues dovetail with other life issues, leading to devastating consequences like homelessness, mental health deterioration, physical abuse and hunger.

Michele outlined several approaches in PIL advocacy which might address such shortcomings such as individual case

relevance in society today

representation, class action litigation, legislative advocacy and reform, community outreach and legal education, and collaboration between public interest lawyers and private practitioners.

She explained that a number of PIL organisations had come together to 'close the justice gap' and provide a blueprint for delivery of civil legal aid to those on low incomes. This is a public-private initiative and is largely funded by IOLTA (Interest on Lawyers Trust Accounts). There is solid co-operation with state law schools and consequently a focus on Clinical Legal Education in the faculties. One of the aims of such programmes is to make public interest law a viable career choice for law graduates,, who otherwise leave law school massively in debt.

The seminar ended with a **Questions and Answers** session. Presentations and papers from the seminar will be posted on the FLAC website shortly. The next public interest law event will be the second annual Dave Ellis Memorial Lecture which will be held in the autumn.

Read more at:
http://www.waappleseed.org
http://www.urbanjustice.org
http://www.bclc.ie
http://www.law.washington.edu/GatesScholar

Photos © Jack Storms/www.stormsphoto.com

Prof Walter Walsh (L) of the University of Washington, Seattle with Doug Lasdon, Executive Director of the Urban Justice Centre, NY at the seminar

Sue Donaldson of Washington Appleseed (L) with the Hon Mrs Justice Catherine McGuinness, who presented this year's Thomas Addis Emmet Fellowship after the seminar (see page 13)

FLAC Council member Róisín Webb (standing) with Betsy Keys Farrell (L) and Aoife Nolan (R)

(L-R) Nora Stack, Law Society Law School, Cork, Frank Murphy, BCLC Managing Solicitor & Kevin Liston, solicitor

Ballymun Community Law Centre :

Frank Murphy is Managing Solicitor of Ballymun Community Law Centre. The following is an extract from his presentation to the recent FLAC seminar on Public Interest Law (see page 8). The full text is available on request from FLAC or BCLC.

Hopefully in the week that's in it and the Quay we are on you will permit me a short meander. I am fortunate that I get to travel in my work the three miles or so back and forth from Ballymun to the Four Courts. It may be only a few miles, but in legal terms the communities are light years apart.

Leaving the Four Courts just down Inns Quay full of solicitors from all over the city and country but none from Ballymun. I exit through the electronic gateway. I use my card to get out. Some cannot leave until the prison guard to whom they are handcuffed so directs and the prison van is ready to take them away.

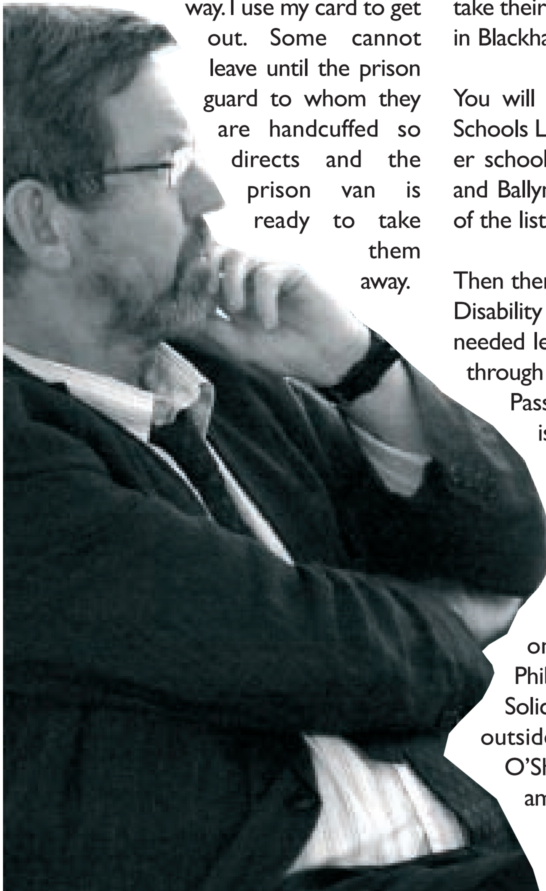

Photo © Jack Storms/www.stormsphoto.com

Across the river the glass citadel shines over the Viking ruins of Wood Quay. Law officers survey the city they convey surrounded by legal offices, law searchers, legal cost accountants and law stationers.

I pass the Bridewell with its courts and cells and the Distillery Building, where the barristers have beautifully extended their Law Library and beyond in Smithfield the Legal Aid Board Law Centre.

The Court in the Richmond is where Ballymun folk have had to travel to their local District Court and they will not see anyone from their community on the bench.

When will we see the Ballymun Judge, I wonder, as I make my way up Constitution Hill, and when will students from Ballymun take their places in the college law schools, in Blackhall and Kings Inns.

You will have seen the Colleges Feeder Schools List 2007 with 5 of the top 6 feeder schools in the Southside golden circle and Ballymun with just 2% at the bottom of the list.

Then there is Coleraine House where the Disability Legal Resource provided much needed legal services until it closed down through lack of resources.

Passing the Registry of Deeds there is no time to stop and search for the Ballymun names registered. Cross the North Circular Road where Sean O'Casey having got a Notice to Quit himself, in the same form as the ones used today, put Dublin tenants on the world stage. Through Phibsboro and Glasnevin, I pass local Solicitor offices with their plaques up outside their doors: O'Ceallaigh, O'Shaughnessy, MacGeehin, Toale, among the printed names.

Along the Royal Canal, Mountjoy Prison reminds me of all those living behind its walls and its graduates and where they might be now. Some of whom no doubt are heading to the Bridewell again on their way back 'home', as Governor Lonergan tells it.

There would have been Traveller halting sites by our canals that provided homes for the nomadic way of life, I think of the ITM Legal Unit, an excellent model for a Law Centre, which again is without a solicitor due to lack of resources.

Ironic then that the O'Connell Monument comes into sight commemorating one of our great lawyers who rode across the country to represent his people many years ago but still for some that long journey remains not only in miles but in the legal divide.

Thankfully we cannot see the Gravediggers Pub or we might be tempted to drop off for a pint!

As we head up the Ballymun Road no legal offices but the Public Library where FLAC lawyers consult on the pavement after the Library closes.

Further along the Civic Offices where LEAP (Legal Education for All Project) to fast-track folk into law held its first meeting. Widely acclaimed, but when it was a question of mainstreaming there were potential students but nobody prepared to take it on despite the pledges that lack of resources would not deprive one of a legal education.

In the shadow of the seven towers named after the 1916 leaders, including Connolly who recognised that every class in Society, from the king to the capitalist, has successively captured political power and, when enthroned in possession, has legalised its own conception of Society.

Pearse Tower, now demolished, was home to thousands over the years. Despite being named after the country's most famous barrister, which tenant ever followed in his footsteps to take a brief in the Law Library down the road?

It is on record that people from areas such as Ballymun make up a higher proportion of the prison population, of which Pearse was also a member, than from the so-called better off communities. It's breaking 'the

Regeneration and Access to Justice

rules'. For Pearse they were the occupiers' rules, but now they are supposed to be 'our rules,' that is said to lead to people being imprisoned in the first place.

McVerry records that a kid broke into a house and stole a young couple's life savings, which they had been putting aside to pay a deposit on a house. The young couple were devastated; their dream of getting out of their unsatisfactory accommodation into a new house was shattered. Of course, what the kid did was wrong and living in poverty does not make it right.

But then McVerry thought of land speculators, who, with the support and encouragement of politicians, made vast profits by doing nothing and in the process shattered many a young couple's dream of buying their own home.

McVerry writes that we condemn the kid, but the land speculator is a respected member of society. One broke the law, the other didn't – but in both cases the young couple ended up in the same plight. Who makes the laws, he asks. Who decides what is right and what is wrong? Certainly not the kid, he answers. (McVerry 2003)

Privileged to work in the long shadows of the Towers makes it easy to see, if not to understand, why it is not the kid.

No private solicitors in Ballymun for 40 years, now just one, a community of 20,000 minutes up the road from the Four Courts. No Legal Aid Law Centre, just FLAC volunteers in Pearse Tower Basement and now in the Library – and there's still a queue.

I would not attempt to offer a history of Ballymun. Somerville-Woodward's is an excellent work and Dermot Bolger's play, *From These Green Heights*, which despite the early promise of the new tenants arriving in 1966, document the problems with construction and design, lack of amenities, the effects of the surrender grant scheme, the last straw closure of the Bank of Ireland in 1984 and the litany continued.

In 1978 alone, 2,425 complaints were made about malfunctioning and faulty lifts according to Somerville-Woodward (2002, p48) but it took twenty years for the tenants to obtain a legal remedy.

In 1998, living alone on the 7th floor of one of the tower blocks, 76 year-old Mrs Heaney and neighbours took legal action when the lifts broke. The Supreme Court found there was a Constitutional easement whereby a person should be entitled to the freedom to come and go from their dwelling (*Heaney and Ors v the Right Honourable Lord Mayor, Aldermen and Burgesses of Dublin*).

When the first tenants arrived into their new homes, the country's consolidated housing legislation was enacted in the Housing Act 1966 – a Housing Act without a right to housing, interpreted by the Supreme Court in *McDonald v Fehily* (1980).

Inequalities in security of tenure are highlighted by Fitzgerald in her consideration of the Housing (Miscellaneous Provisions) Act 1997 pointing out that the "imbalance between landlord and tenant can only reinforce the tenants' perception that they should be grateful to have a place to live in at all; and that they are entirely dependent on the goodwill of their landlord if they want to continue to live in it" (Brooke 2001) (Norris 2005).

The Act provides a speedy procedure for recovery of possession of local authority dwellings which, Kenna writes,

> *were originally developed under Deasy's Act 1860, to provide speedy eviction procedures for caretakers, servants and herdsmen. They have been accepted by the Irish State as the appropriate treatment for public housing tenants in Ireland reflecting the position and status of public housing tenants today.* (2006, p83)

As we sit here now tenants are in Courts around the country without legal representation. The Legal Aid Board chooses to exclude some cases as disputes concerning rights or interests over land. Then the tenant will be told that the judge has no discretion but to grant the warrant for possession!

Obviously tenants from Ballymun had little or no say in these or any laws. Even today we understand that a new Housing Bill is being prepared but there has been no consultation with tenants.

In view of the lack of legal services since its creation one would have to question whether it could be said that people living here have had any access to justice. Despite Josie Airey using the European Court of Human Rights to win the right to effective access to the courts in 1973, Ballymun still remained without legal services (*Airey v Ireland*).

There was no law centre for Ballymun when Civil Legal Aid was inaugurated in 1980 or when the Board introduced suburban centres or when the Civil Legal Aid Act 1995 was passed.

s.5(2) of the 1995 Act states:

> *The Board shall, to such extent and in such manner as it considers appropriate, disseminate, for the benefit of those for whom its services are made available, information in relation to those services and their availability.*

There was no dissemination in Ballymun.

A mother of five children, the Ballymun applicant in *MF v Superintendent, Ballymun Garda Station, Rynne and EHB* (1991) IR 189, Barron J noted, was advised to seek legal aid when her children were taken by social workers and a guard:

> *This was refused to her upon the ground that her case was not sufficiently urgent, an unworthy excuse for refusing her assistance. If as I am sure was the case the lawyers attached to the scheme could not accommodate a further case she should have been told. Fortunately the solicitor she had originally consulted agreed to act for her.*

That solicitor, Pol O Murchu, who does a huge amount of *pro bono* work, instructed Mary Robinson SC and Gerard Durcan and the children's detention was held to be unlawful.

Whether it was the 1908 Act, Child Care Act 1991 or Housing legislation or whatever legislation affects people in disadvantaged areas it can be hard to comprehend the lack of understanding of the realities faced by people living in these areas.

Practical & effective legal aid?

Case studies in injustice

One of the core principles of FLAC is to ensure that disadvantaged people can effectively access legal services. Both the Irish High Court and the European Court of Human Rights have said that legal aid should be available in matters of great importance to an applicant where a failure to grant representation may deny the applicant the right to access her/his rights. In the 1979 *Airey* case, the European Court said, "the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective."

FLAC has recently initiated two sets of High Court proceedings challenging the refusal of Civil Legal Aid.

Case study 1: In October 2006 two sisters applied for Civil Legal Aid to defend a Notice to Quit which was served upon them on the basis that they were the Successor Tenants to their mother's lease on a controlled dwelling (their family home). The Notice to Quit advised them that they would have to end the old lease and commence a new one, which would all have to be determined by the Circuit Court. As such, it was outlined they would need legal representation and they were advised to contact the Legal Aid Board (LAB). The sisters applied but only one sister, who was unemployed at the time, was granted civil legal aid. The LAB found the second sister did not qualify as she was €4 per week over the means test/financial limit. The applicant, who is on low earnings, does in fact support her sister and nephew, but the LAB would not permit a dependant's allowance deduction. For fear of eviction, she went to her local TD, Mr Bertie Ahern, who brought this issue to FLAC's attention.

The applicant, represented by FLAC, appealed this decision to the LAB but the decision was upheld. She then commenced Judicial Review proceedings:

1. The decision to refuse Civil Legal Aid was made without taking into account a dependant allowance which should have been allowed. She argues that the calculation of the applicants' means was incorrect. When asked to clarify why the dependant's allowance was refused, the LAB failed to do so adequately. Regulation 16 (3) of the Civil Legal Aid Regulations, 1996 describes dependant for the purposes of the dependant allowance as "dependent relatives or other persons permanently residing with the applicant, who are supported by the applicant and who do not have available to them independent means of support."
2. The second ground of appeal put forward was that the LAB had the general power under s.29 (2) of the Civil Legal Aid Act 1995 to grant legal aid without regard to a person's financial resources where it would be appropriate to do so. This appeal did not succeed and the LAB was very slow to give reasons for the failure of the appeal on this ground. FLAC is aware that the LAB sought legal opinion on this question.

Case study 2: A single mother of four who is a member of the travelling community was refused civil legal aid to defend High Court eviction proceedings issued against her by her local Council. She along with some 17 other people are notice parties to Nuisance proceedings brought against the Council. Soon after the commencement of the Nuisance proceedings, the Council sought a High Court order directing her and her family to vacate the lands which they occupy. She fulfilled the financial eligibility criteria and so received a civil legal aid certificate to defend the Nuisance proceedings however she was refused legal aid for the eviction proceedings on the basis that it is a right or interest over land. Under s. 28 (9) (a) (ii) of the Civil Legal Aid Act 1995 disputes concerning rights or interests in or over land are excluded from the Civil Legal Aid scheme.

The applicant appealed this refusal, but the decision was upheld. The applicant, represented by FLAC, has begun Judicial Review proceedings in the High Court on the following grounds:

1. The applicant in fact is not claiming a right or interest over the lands owned by the Council but simply wants to be housed according to her traveller status. Local authorities have an obligation to house members of the travelling community according to their culture, and the applicant's rights need to be defended.
2. The applicant deserves representation as the case involves fundamental human rights and involves complicated matters of law, and it is a matter of the utmost personal importance to her as this is her family home where she resides with her four children. Even if it were a right or interest over land, a blanket exclusion of any area of law will deny these deserving people their statutory right of access to justice as guaranteed by the Irish Constitution Art. 40.3.1.

Both cases deal with extremely vulnerable people who are not able to obtain representation elsewhere. One would think that people with issues pertaining to their family home, in particular, are most vulnerable in our society and therefore in need of legal services from the LAB. The current scheme relies heavily on applying a means test. It does not, however, test whether a person can access justice without legal aid.

The paltry resource offered by current standards of civil legal aid excludes many people from participating in law and accessing legal services that are considered the norm for other people in society. This is contrary to the State's own aspiration for social inclusion and moving people out of poverty.

> *It would be a matter of concern if lay litigants were acting on their own behalf, not because they have freely chosen to do so having regard to all their circumstances, but because they were financially precluded from seeking legal assistance.* (Michael McDowell, then Minister for Justice, Equality & Law Reform, April 2007 Dáil Debates)

Thomas Addis Emmet Fellowship award

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Pictured after the Fellowship presentation, L-R at back: Michele Storms, Doug Lasdon, Kelly Mackey, Prof Walter Walsh, Kyle Silk-Eglit, Catherine Hickey, Mrs Justice Catherine McGuinness, Sarah Campbell. In front: Sue Donaldson, Noeline Blackwell, Orla O'Malley, Tobias Damm-Luhr

Thomas Addis Emmet Fellowship Recipient
Kelly Mackey (R) with the Hon. Mrs Justice Catherine McGuinness (centre) and Orla O'Malley (L), runner-up

The 2008 Thomas Addis Emmet Fellowship award was presented to Kelly Mackey, a postgraduate law student at the Dublin Institute of Technology, on Friday 2 June.

Presenting the award was the Hon. Mrs Justice Catherine McGuinness, chief adjudicator of the Fellowship. Kelly is being hosted by Washington Appleseed Center for Law in the Public Interest for the duration of her placement.

Washington Appleseed hosted two previous Thomas Addis Emmet fellows, the 2007 recipient, Claire McHugh, who worked on a project around "Helping Children of Girls in Detention" and the 2006 recipient, Nicola White, who focused on a project on "Expanding Children's Access to Dental Care".

In addition, FLAC was pleased to present a runner-up award to Orla O'Malley.

Also in attendance at the award ceremony was Professor Walter Walsh, Associate Professor of Law at the University of Washington, Seattle, who has co-organised the Fellowship with FLAC since 1999, as well as the William Sampson Fellowship.

The Sampson Fellows are from the University of Washington and are Kyle Silk-Eglit who has been placed with FLAC, Sara Campbell who is with the Ballymun Community Law Centre, and Tobias Damm-Luhr, who is placed with the Law Centre Northern Ireland.

Read more at:

http://www.waappleseed.org
http://www.law.washington.edu
http://www.flac.ie/about/fellowships.html

Civil legal aid in Germany

Many readers of FLAC News are familiar with how civil legal aid operates in Ireland. Stefanie Heinrich is a qualified German lawyer who did a short internship with FLAC as part of her professional course and currently works as an intern with the Irish Refugee Council. In this article, she explains how civil legal aid operates in Germany.

There is no equivalent to the Irish Legal Aid Board in Germany. The decision on an application for legal aid is made by the court hearing the case. An independent decision is required for every instance.

In Germany, a distinction is made between assistance under the Legal Advice Scheme (*Beratungshilfe*) and financial assistance for court costs (*Prozesskostenhilfe*). Legal aid for court cases is granted in particular in civil, administrative, social, employment and tax law court cases – usually in the form of an interest-free loan. In practice, the court fixes monthly instalments to pay back the legal aid received.

Under the Legal Advice Scheme, the application is submitted to the local court where the applicant is resident. Under the scheme, it is possible to contact a chosen lawyer in advance, but the application must then be submitted to the court for approval. Applications for assistance with court costs must be submitted to the court where the proceedings in question are being or will be conducted. The court (not a welfare body) examines the application and decides whether the conditions for giving assistance with court costs are satisfied.

The Legal Advice Scheme Act allows for those on low incomes to receive assistance in the cost of advice and representation outside the courtroom. Those who need it may also receive assistance in conducting court proceedings if they meet criteria. Legal aid (both types) is granted when the applicant's personal and economic circumstances are such that he/she cannot raise the necessary funds and has no other reasonable way of obtaining assistance, such as legal protection insurance or advice from a tenants' association or trade union.

A means test, undertaken by the deciding court, requires the applicant to retain a certain minimum amount of money monthly for him/herself. That sum covers the daily living costs for food and rent as well as other necessary expenses required for adequate living and/or connected to one's occupation. If the applicant's means are below €360 a month (this limit is redefined annually), the applicant is exempt from any repayment.

If a case meets the statutory requirement to be represented by a lawyer, the court will appoint one. This will usually be the lawyer who has been chosen by the applicant and who, in most cases, has put in the application for legal aid.

In addition, the intended exercise of rights must be neither wilful nor malicious. To qualify for assistance with court costs, the case must also have a reasonable chance of success. The court that rules on the application for assistance with court costs must consider, on the basis of the applicant's representation of the facts and the available documentation, whether the legal viewpoint is correct or at least justifiable, and that there is an arguable case. Where these conditions are satisfied, the applicant is entitled to both types of legal aid and incurs no other costs.

A special appeal may be heard against a decision taken by a local court to refuse assistance under the Legal Advice Scheme. Where an application for assistance with court costs has been rejected and where the value in dispute in the main proceedings exceeds €600, the applicant may appeal against the court's decision within one month. Where the value in dispute in the main proceedings does not exceed €600, the appeal is admissible only if the court has rejected the application purely on the grounds of the applicant's personal and financial situation.

As in Ireland, legal aid in general is funded by the State. The most striking difference lies in the fact that a lawyer engaging in legal aid work or acting as a defence counsel appointed by a court is entitled to receive a refund of his fees at a set rate. This has the advantage that lawyers are not in general reluctant to take on legal aid cases, as they can be sure of receiving a refund of their cost and fees. The term "court costs" involves more than just fees and expenditure incurred by the court, it also includes costs incurred in carrying out an action required by the court and costs incurred for a reasonable prosecution or defence.

Where the legally-aided applicant wins a case, the opposing party usually refunds the costs. Approval of assistance with court costs does not automatically cover appeals. The cover ends with the final decision in the case. However, a fresh application may be made for assistance with court costs to cover appeal proceedings. The appeal court examines whether the party is still in need, whether the appeal is wilful or malicious and whether it has a chance of success. If these conditions are satisfied, the party is entitled to assistance with court costs to cover the appeal.

While this system at first may sound less bureaucratic, barriers to justice outside the legal aid scheme still hamper applications. As in most countries, concerns range from a general lack of knowledge by applicants about their legal rights and the prevalent use of technical language within justice systems to a vague 'fear of the unknown'. However, although the question of whether or not to consult a lawyer seems to be primarily one of cost, over one–third of potential clients have little idea about lawyers' fees. It is thus crucial to find ways to surmount this barrier to access to justice.

Volunteer training held in Dublin

Not even a blackout in the Distillery Building could stop the FLAC volunteer training night on 4 June. Thanks to some last minute arrangements and the very helpful staff in the Carmichael Centre on North Brunswick Street, the training went ahead. However, the change of location and the rain kept a few people away on the night.

Ruth Dowling, a legal officer in FLAC, was first to present. She clarified the work of FLAC and the differences between FLAC (Free Legal Advice Centres) and the state-run Legal Aid Board. She then spoke in detail on the different Legal Aid schemes in Ireland covering both civil and criminal aid. She gave a comprehensive overview of the Civil Legal Aid Act 1995, with a detailed look at the provisions of the act and the categories that are excluded from it, such as small claims court cases.

Ruth covered how to advise people on the steps involved when applying for civil legal aid; firstly everyone must complete a means test, when assessed the applicant will receive a notification as to whether it has been granted or refused and the case will be assessed for merit, i.e. whether it is likely to succeed (this does not apply in some areas, such as separation or maintenance proceedings).

The applicant's contribution will then be calculated – the minimum for advice is €10 and the minimum for aid is €50. For full details of this process, please refer to the LAB website at www.legalaidboard.ie or contact the FLAC office for a copy of the presentation.

Our second speaker was Alan Haugh, Head of Legal Affairs in the National Employment Rights Authority (NERA). Alan gave a detailed presentation on NERA's role, resources and services. NERA provides information services to the public on employment rights over the phone, by e-mail and through exhibitions and presentations. NERA also has an inspection services structure. This service performs announced and unannounced inspections on a variety on legislation, for example the Payment of Wages Act 1991. NERA will be put on a statutory footing in the Employment Law Compliance Bill 2008.

Our third speaker was Martina Jackson, a family law barrister and a FLAC volunteer in the specialised family law centre on Meath Street. Martina gave a presentation on access, guardianship and custody, covering the Guardianship of Infants Act 1964 and subsequent amendments. She discussed in detail section 6A of the act, which describes the guardian application process in the District Court and other issues such as passport applications and testamentary guardianship.

Martina gave clear examples of the factors that are considered when application for guardianship is being considered under section 11 of the Act. Martina then explained the custody process under section 18 and also looked at the Family Law Act 1995 and the Domestic Violence Act 1996 in relation to child custody and access.

The final speaker of the night was Kevin Baneham, the legal officer for Threshold and a FLAC volunteer in the Ballyfermot centre. Threshold is a not-for-profit organisation whose aim is to secure a right to housing, particularly for households experiencing the problems of poverty and exclusion (www.threshold.ie).

Kevin outlined Threshold's work as well as their campaigning and advocacy remit. He examined the Residential Tenancies Act 2004 and the Private Residential Tenancies Board (PRTB). He looked at the relevant sections of the act in terms of the issues that arise in FLAC centres including the security of tenure and leases. Kevin also spoke on the complaint procedure with the PRTB and on the rent supplement and rental accommodation scheme.

FLAC's next volunteer training will be in September so any suggestions on topics are welcomed. A big thank you to all the speakers, the Carmichael Centre and to all those who attended.

If anyone would like copies of the training presentations, please contact Sarah Horgan, FLAC Centres Co-ordinator at

volunteers@flac.ie

Photo © Kirsty Watterson

Speaking to FLAC volunteers was Kevin Baneham of Threshold. On the left (seated) is Catherine Hickey, FLAC Director of Funding & Development

Trade unions for prison workers in Argentina: A Public Interest Law issue

Lucas Gilardone is an Argentinian lawyer and a coordinator of the Public Interest Legal Clinic of Cordoba. He interned in FLAC recently on behalf of the Open Society Justice Initiative.

On 10 February last, a Civil Court in Argentina admitted an action by a retired prison employee who had worked for 15 years in female prisons. The action, which was supported by the Cordoba Public Interest Legal Clinic, was an injunction challenging the constitutionality of rules (some dating from the last dictatorship) prohibiting prison workers and police officers from engaging in union activism or forming trade unions in their labour interests.

The plaintiff claimed that prison workers suffered severe mistreatment from their superiors, including degrading and unsafe working conditions, lack of basic provision for emergencies, absurd and abusive orders, and psychological abuse and sexual harassment from superiors (both male and female). Their complaints were met with silence or open hostility, often leading to reprisals in the form of reassignments. Where complaints related to orders that would clearly create turmoil among inmates, staff were deemed 'traitors' for taking the prisoners' side. When they became ill (there is an astonishingly high rate of depression, suicide and stress-related diseases among prison workers) they were denied treatment from the prison's medical service, triggering further, less obvious levels of punishment. The plaintiff even stated that workers sometimes felt themselves more protected by the inmates than by prison service authorities.

Many issues were highlighted, including security, labour, public health, gender and democracy. Workers needed protection, but did not tend to rely on services like the ombudsman. Instead, the idea of forming a trade union blossomed after lengthy discussions with the members of the Legal Aid Clinic.

One problem appeared insurmountable: The Prisons Service Act (Provincial Law No. 8231) prohibited workers from "joining trade unions or carrying out trade union or political activism within the institution". This was enforced by the Disciplinary Regime for Prison Service Personnel, which applies to the Prison Service. This deemed 'gravely insubordinate' activities such as "expressing manifest disobedience of a general order of service" or "addressing a superior regarding a work issue without regard to hierarchical rank " as well as "allowing the introduction, possession or circulation, within the Unit, of subversive publications. Every time they tried to circulate flyers calling for a meeting; if they tried to express their concerns about conflicting orders to the authorities; or if they tried to resort to the higher authorities of the service, they were punished under these rules. Consequently, they could not unite or otherwise try to solve by institutional means the many and serious problems they had. They were workers with no rights at all, which in turn did not encourage them to respect inmates' human rights, as they themselves admit.

These rules contravene Argentina's Constitution, which in Article 14 guarantees the right to form and join trade unions. This right is also upheld by the International Labour Organisation. The right of police officers and prison workers to engage in trade union activism should therefore remain full and plenary.

However, there was reluctance to enforce the rights of security forces workers. The usual argument was twofold: 'what if the union challenges the orders of the superior officers?' and 'what if they go on strike and let criminals run away or leave prison?' The argument that trade unionism poses a risk to authority is clearly a fallacy, since all public servants are linked by the same principles; and the mere presence of a union could in fact circumvent spontaneous and potentially disruptive assemblies by providing a proper complaints procedure.

Three years ago an uprising in the overpopulated jail of San Martin neighbourhood in Cordoba ended with eight people dead. The agitators and perpetrators of the killings were tried. There, inmates and guards were united in criticism of the authorities of that unit for reckless decisions that led to initial unrest and an extremely oppressive regime for inmates and prison workers alike. The guards explained how they were abandoned by their managers, who escaped and saved themselves. They also told how they lacked any kind of preparation to deal with such conflict and how their warnings about the explosive situation of the unit were repeatedly ignored by prison authorities. The Prosecutor in that case alleged that the jail's poor conditions and indifference of authorities towards prison workers were key to understanding why the uprising occurred.

The judge in our case suggested that if they had had a regular trade union, prison workers would have had a better chance to be heard and thus avoid the tragic outcome of years of state neglect of prisons and prison workers. What will happen next? This is not easy to predict: workers have yet to form a trade union, not an easy task in Argentina, considering the traditionally strong influence of Peronist governments over unions. It is also not clear if a union will really reflect the interests of workers, or whether its leaders will engage in cheap bargaining with the government.

Further concerns arise about the reaction of human rights activists and organisations, as both police officers and prison guards are seen (often with good reason) as human rights violators. How to deal with this dual 'victim-abuser' identity that so often defines prison workers? Are human rights defenders prepared to protect the rights of those they view as the 'enemy'? Will they consciously abandon them to their fate, as it has happened before? Does it matter that, when they act abusively, police and guards are just replaying state violence towards the weak?

However, Argentinian jurisprudence has moved a step closer to respecting human rights. Fulfilling rights may create the conditions for a cultural change in this most violent of all state agencies, in which the rights and human dignity of inmates and staff can be respected and protected. However unclear the prospects of this challenge may appear, a new stage has been reached in strengthening the rule of law in transitional democracies and it opens a major new field for public interest law in Argentina.