NORTHERN IRELAND HUMAN RIGHTS COMMISSION

HUMAN RIGHTS ACT 1998
IN NORTHERN IRELAND COURTS

December 2004 – September 2005

Please note: the Northern Ireland Human Rights Commission does not accept responsibility for the accuracy of the reporting of these cases.

Article 2

Police Service of Northern Ireland v McCaughey & Anor [2005] NICA 1 (14 January 2005)

This is an appeal from the judgment of Weatherup J in which he held that the Chief Constable of the PSNI was under a continuing duty by virtue of section 8 of the Coroner's Act (Northern Ireland) 1959 and Article 2 of the European Convention on Human Rights (ECHR) to furnish to the coroner conducting an inquest into the deaths of Martin McCaughey and Desmond Grew certain documents generated by the police investigation into their deaths.

The judicial review centred on the disclosure to the coroner of three sets of documents in the possession of the police. The first of these was a copy of the police report prepared for the Director of Public Prosecutions (DPP). The second was the direction given by the DPP that there was to be no prosecution. The third set of documents sought was unredacted copies of intelligence reports gathered by the police. The coroner had already received redacted copies of these statements from the police.

In his judgment of 20 January 2004 Weatherup J held that the first document should be provided to the coroner. He concluded that section 8 of the 1959 Act and Article 2 ECHR required that it be disclosed as there was no confidentiality attaching to it and it was potentially relevant to the inquest. The learned judge considered that disclosure of such a document would not deter a police officer

from being frank in the report or a member of the public from assisting police investigations. The judge refused the application in relation to the direction of no prosecution on the basis that this amounted to an attempt to discover the reasons that no prosecution had been directed. Since, *per* the decision in *Re Jordan's Application* [2003] NICA 54, the DPP did not have to give reasons for a decision not to prosecute where the decision was taken before the coming into force of the Human Rights Act 1998, and the decision not to prosecute in this case was made in 1993, this document did not require to be disclosed.

In relation to the third document, Weatherup J held that, as with the police report, there was a duty to disclose the unredacted copies of intelligence reports under section 8 and Article 2. He was influenced to this conclusion by the consideration that the coroner believed that the unredacted reports were potentially relevant. The judge held that the failure to hold an Article 2 compliant investigation into the deaths of the deceased from the time that the Human Rights Act came into force constituted a violation of the procedural requirement of that Article that a state sponsored effective inquiry into the deaths be undertaken promptly.

Judgment – The *McKerr* decision (*McKerr (Northern Ireland), Re* [2004] UKHL 12) was considered by the Court of Appeal in *Re Jordan's application* [2004] NICA 30. In an obiter passage Girvan J distinguished *McKerr* on the basis that it dealt with a case where an inquest had not commenced. In *Jordan* the inquest had started but had been adjourned a number of times, principally to await the outcome of judicial review applications. The effect of Girvan J's judgment was to declare that Mr Jordan was entitled to have the inquest into the death of his son conducted in compliance with Article 2, notwithstanding that the death occurred before 2 October 2000. This was to be achieved by requiring the Coroners Act to be interpreted in a manner that complied with the Convention. The flaw in this approach is that section 3 only applies where Convention rights are in play. Neither the appellant in *Jordan* nor the respondents in the present appeal have access to Convention rights in the domestic setting because of the non-retrospective effect of HRA. Section 3 is not triggered unless compatibility with Convention rights is in issue. It was not in issue here, nor was it in *Jordan*, because the deaths involved occurred before the Act came into force. This much is clear not only from the passage from the opinion of Lord Nicholls in *McKerr* but also from the opinions of other members of the Appellate Committee. Lord Hoffmann put it bluntly, "Either the Act applies to deaths before 2 October 2000 or it does not". He held that it did not.

The Court was satisfied that section 3 of the 1998 Act does not apply in the present circumstances. There was therefore no

obligation to hold an Article 2 compliant investigation into the deaths of the deceased. The appeal was allowed and the application for judicial review dismissed.

Committee on the Administration of Justice & Anor, Re An Application for Judicial Review [2005] NIQB 25 (18 March 2005)

The Committee on the Administration of Justice (CAJ) is an independent non-governmental organisation. On 15 March 1999, Rosemary Nelson, a well-known solicitor and a member of the executive committee of CAJ, was murdered when a bomb that had been attached to her car exploded. Following her murder CAJ lodged a complaint with the Police Ombudsman's office concerning the failure of the Royal Ulster Constabulary (the RUC) to properly investigate threats made against Mrs Nelson before she was murdered. In the course of her investigation into the complaint the Police Ombudsman provided certain information to CAJ about the progress of her inquiries. This prompted a request from CAJ that she disclose to them certain material relevant to the investigation into Ms Nelson's murder. CAJ also asked the Chief Constable to provide certain material. Both the Ombudsman and the Chief Constable refused to provide the material sought. By these judicial review proceedings the applicants challenge that refusal.

Judgment – The first argument to be addressed is the claim of the applicants to be entitled to rely on the ECHR. Underpinning all the various formulations advanced on behalf of the applicants must be the proposition that they are directly affected by the asserted violation of Article 2. An applicant may claim to be an indirect victim, for example when he or she is a close relative (such as a spouse or parent) of the affected person but a colleague or friend does not come within such a category and absent any direct effect on such a colleague or friend, victim status is not established. It is clear that no direct effect either on CAJ or its staff has been established and it is therefore not entitled to rely on an asserted violation of Article 2 of ECHR for the purpose of these proceedings.

Even if it was open to the applicants to rely on Article 2, the Court stated that it would not have found that the respondents' decision to withhold the material that was sought constituted a violation of the provision. To rely on Article 2 to advance their claim to be entitled to see the requested documents the applicants would have had to show that the investigation by the Ombudsman was not sufficiently thorough to achieve these aims. They have not done so. The Ombudsman's office was prepared to go to significant lengths to involve the applicants at all material stages of the investigation; they have been open to suggestion and comment and have met

representatives of CAJ on a number of occasions. This approach betokens a willingness to listen and to reassure. Judged objectively, this constitutes "proper procedures for ensuring the accountability of agents of the state".

None of the applicants' claims were made out. The application for judicial review was dismissed.

McCallion & Ors, Re Application for Judicial Review [2005] NICA 21 (29 April 2005)

Anne Marie McCallion and Lorraine McColgan appeal from the judgment of Weatherup J as a result of which he dismissed their applications for judicial review of the decisions made by the Secretary of State for Northern Ireland on 27 May 2003. He had decided to refuse to award compensation to them in the exercise of his discretion given under Article 10(2) of the Criminal Injuries (Compensation) (Northern Ireland) Order 1988 (the 1988 Order). The Secretary of State appeals from the judgment of Weatherup J as a result of which he ordered that the decision made by the Secretary of State on 27 May 2003 in respect of Anne McNeill be quashed. He had decided to refuse to award compensation to her in the exercise of his discretion under Article 10(2) of the 1988 Order. The appeals are linked and have been heard together.

The grounds of appeal on human rights grounds set out by Mrs McCallion and Mrs McColgan are that the trial judge erred in holding that:1) the decisions do not amount to a breach of the UN Convention on the Rights of the Child; 2) the UN Convention on the Rights of the Child does not give rise to any legitimate expectation in relation to the payment of compensation in such cases; (3) in so deciding, the Secretary of State had not acted in a manner that was contrary to Article 14 ECHR read with Article 2 ECHR and therefore in breach of section 6 of the Human Rights Act 1998. It was submitted on behalf of Mrs McCallion and Mrs McColgan and Mrs McNeill they had a legitimate expectation that the Secretary of State would take it into account in reaching his decision under Article 10(2).

Judgment – There is an arguable case that the United Kingdom is in breach of Article 2.2 of the Convention under international law. But it is unnecessary to decide this. Article 5(9) of the 1988 Order states that no compensation shall be paid to, or in respect of, a criminal jury to, any person – (a) who has been a member of an unlawful association at any time whatsoever, or is such a member; or (b) who has been engaged in the commission, preparation or instigation of acts of terrorism at any time whatsoever, or is so

engaged. Parliament has expressly excluded a widow and her children from being paid compensation in respect of a criminal injury resulting in the death of a person described in Article 5(9). The discretion vested in the Secretary of State under Article 10(2) does not require the Secretary of State to take account of Article 2 or Article 3 of the Convention, having regard to Article 5(9) of the 1988 Order.

There was no obligation on the Secretary of State to have regard to the UN Convention because it was ratified by the United Kingdom but not incorporated in domestic law. Parliament, by Article 5(9) of the 1988 Order, expressly deprived dependent children of the right to compensation in respect of a criminal injury leading to the death of a parent who has been a member of an unlawful association or engaged in acts of terrorism. Legislation is now in place which ensures that "the sins of the deceased victim are not visited upon his or her family". But the 1988 Order governed the decisions in respect of Mrs McCallion, Mrs McColgan and Mrs McNeill.

Anderson, Re An Application For Judicial Review [2005] NIQB 61 (21 September 2005)

The applicant is a prisoner at HMP Maghaberry and seeks Judicial Review of a decision of the Secretary of State for Northern Ireland made on 26 October 2004 refusing his petition requesting a transfer to separated accommodation for loyalist prisoners at Bush House, HMP Maghaberry. On 17 November 2003 the applicant applied to be transferred to separated conditions and on 10 January 2004 he withdrew his application. On 12 February 2004 the applicant made a further application to be transferred to separated conditions but there were no cell spaces in the separated loyalist wings and the application was not processed. The application was revived on 2 April 2004 and the applicant was interviewed by Prison staff. In the application forms and at interview the applicant did not claim affiliation with a paramilitary organisation nor did he claim that he was under threat in his prison accommodation in Erne House. The Governor did not consider that the applicant was perceived to be a member or supporter of a paramilitary organisation nor that his conviction for murder had been sectarian. Information available to the Governor from the police did not provide any paramilitary trace for the applicant. Information available to the Governor from the prison security department did not indicate any paramilitary affiliation. The Governor decided that the applicant did not meet the criterion that an applicant is or is perceived to be a member or supporter of a paramilitary organisation and the application for transfer to separate conditions was not recommended. This recommendation was forwarded to a deputy Director of Operations at the Northern Ireland Prison Service who agreed that the

applicant did not satisfy the criterion of paramilitary affiliation and on 7 April 2004 refused the application.

The applicant then petitioned the Secretary of State on 14 April 2004 and addressed all the criteria set out in the Compact and stated that he was a supporter of a specified paramilitary organisation. The Governor again recommended refusal of the application on the basis of an absence of paramilitary affiliation and a deputy Director of Operations at the Northern Ireland Prison Service accepted that recommendation. On 18 May 2004 the applicant's request for a transfer to separated conditions was refused.

On 7 November 2004 the applicant reported threats from Republican prisoners whom he did not wish to name. Further to a risk assessment it was recommended that he be returned to Erne House and monitored closely. A further risk assessment was carried out on 16 February 2005 when it was recommended that the applicant remain in Erne House and be closely monitored.

The applicant's grounds for Judicial Review included that the Secretary of State failed to take reasonable measures to protect his right to life under Article 2 ECHR.

Judgment – The Court is satisfied that the decision not to transfer the applicant to separated conditions in Bush House is not a breach of Article 2 ECHR. If there is a real and immediate risk to the applicant the respondent will undertake appropriate measures and if that requires removal from Erne House the applicant will be transferred to the vulnerable prisoners unit or other appropriate placement. A real and immediate risk that was judged to exist would not assist this applicant in securing a transfer to separated conditions.

Article 6

McQuade, R v [2005] NICA 2 (12 January 2005)

This is an application by Thomas Ian McQuade for leave to appeal against his conviction for murder. He was found guilty by majority verdict (11 - 1) on 1 April 2003 after a trial. On 28 April 2003 he was sentenced to life imprisonment and it was ordered that the minimum period of imprisonment for the purposes of Article 11 of the Life Sentences (NI) Order 2001 should be eleven years.

At the trial the defence advanced on behalf of the applicant was that he should be found not guilty of murder but should be found guilty

of manslaughter on the grounds of diminished responsibility, as defined in the Criminal Justice Act (Northern Ireland) 1966.

On the application for leave to appeal against conviction, the applicant raised the question of the compatibility of section 5 of the 1966 Act with Article 6 of the ECHR.

In the course of the hearing of the application the Court gave leave to the applicant to raise a further ground that had not been included in the original notice of application. This issue had not been raised at the trial. It was to the effect that the trial judge should not have directed the jury that the psychological insult suffered by the applicant as a result of the assaults by the deceased would not qualify as an injury that would bring any consequent abnormality of mind within section 5 of the 1966 Act.

Judgment – The Court concluded that it is proportionate that a defendant who seeks to avail of a defence under section 5 of the 1966 Act should be fixed with the legal burden of establishing that he suffers from mental abnormality as defined in the legislation. The Court reached this conclusion principally because of what it perceived to be the practical difficulties in the way of requiring the prosecution to prove that a defendant who raises the issue of mental abnormality does not suffer from that condition.

The compatibility of section 2 of the Homicide Act 1957 with Article 6 (2) ECHR was considered by the European Commission on Human Rights in *Robinson v United Kingdom* (Application No 20858/92). In that case the applicant complained that the obligation on the defence to prove diminished responsibility constituted a violation of Article 6 (2).

Since the judge's charge expressly withdrew from the jury consideration of whether a psychological injury suffered by the applicant might be sufficient to amount to mental abnormality for the purposes of sections 1 and 5 of the 1966 Act and since this was a matter that ought to have been left to the jury, the verdict cannot be regarded as safe. The Court therefore granted the application for leave to appeal, allow the appeal and quash the verdict on the charge of murder. Plainly no assessment has been made as to whether the psychological injury that the applicant suffered did in fact amount to an abnormality of mind sufficient to justify a verdict of manslaughter. In those circumstances it is clear that a retrial of the applicant should take place.

Walsh v Director of the Assets Recovery Agency [2005] NICA 6 (26 January 05)

This is an appeal from the decision of Coghlin J whereby he held that an application made by the Director of the Assets Recovery Agency (the agency) under Part 5 of the Proceeds of Crime Act 2002 (PoCA) for the recovery of assets from Cecil Walsh were civil proceedings and did not engage Article 6 (2) ECHR.

The central question arising in the appeal is whether the agency should be required to establish that the appellant was engaged in unlawful conduct to the criminal standard *i.e.* beyond reasonable doubt.

Judgment – The Court considered that it would be open to the agency to adduce evidence that the appellant had no legal means of obtaining the assets without necessarily linking the claim to particular crimes. The purpose of the recovery action is to obtain from the appellant what, it is claimed, he should not have – property that has been acquired by the proceeds of crime. It is not designed to punish him beyond that or to establish his guilt of a precise offence. All the available indicators point strongly to this case being classified in the national law as a form of civil proceeding. The appellant is not charged with a crime. Although it must be shown that he was guilty of unlawful conduct in the sense that he has acted contrary to the criminal law, this is not for the purpose of making him amenable as he would be if he had been convicted of crime. He is not liable to imprisonment or fine if the recovery action succeeds. There is no indictment and no verdict. The primary purpose of the legislation is restitutionary rather than penal.

If recovery proceedings could only be taken on proof beyond reasonable doubt that the person from whom recovery was sought had benefited from crime, the efficacy of the system would be substantially compromised. In this context it is relevant that significant safeguards are in place to ensure that innocent persons are not penalised by the recovery procedures. Quite apart from the provisions of section 266 (3), (4) and (6) and sections 281 and 282, the appellant is entitled to the protection afforded by article 6 (1) ECHR.

The appellant cannot be deprived of assets unless it is established to the requisite standard that these were obtained by unlawful conduct, specifically conduct that was contrary to the criminal law of Northern Ireland. The proceedings by which the agency will seek to establish that proposition will be subject to the requirements of Article 6 (1) ECHR.

Even if the proceedings in this case are to be regarded as imposing a penalty on the appellant, this is not sufficient to require them to be classified as criminal for the purposes of Article 6. The predominant character of recovery action is that of civil proceedings. The primary purpose is to recover proceeds of crime; it is not to punish the appellant in the sense normally entailed in a criminal sanction.

None of the arguments advanced on behalf of the appellant has been made out. The appeal must be dismissed. It follows that the application for a declaration of incompatibility must likewise be dismissed.

Department for Social Development v MacGeagh [2005] NICA 28(1) (9 June 2005)

This is an appeal by way of case stated from a decision of a Tribunal of Child Support Commissioners of 5 April 2004. The appeal concerns the operation of the Child Support (Northern Ireland) Order 1991 and associated regulations. The first respondent (non resident parent) claims that regulation 9(3)(b) of the Child Support Departure Direction and Consequential Amendments Regulations (NI) 1996 (No 541) is incompatible with his rights under the ECHR, in particular, Articles 6 and 14 and Article 1 of the First Protocol. The respondents are divorced and live apart. They have two children who live mostly with their mother. The first respondent pays child maintenance in respect of each of the children. The issue that arises in this appeal is how the maintenance payments should be assessed.

Assessment of payment of child maintenance by a non-resident parent is based on a standard formula set out in Schedule 1 to the 1991 Order. Once an assessment has been made it is open to either parent to seek what are called 'departure directions'. These apply to future maintenance assessments and provide that the standard formula for assessment is to be departed from in the terms set out in the directions. Directions may only be obtained in circumstances (referred to in the regulations as 'cases') prescribed in the regulations. They are authorised only where a case for them has been made out and it is concluded that it would be just and equitable to sanction the departure.

The Scheme contains two main classes of departure. The first is in relation to 'special expenses', that is where it is asserted that the standard assessment formula does not take sufficiently into account special expenses of the parent in question.

The second class encompasses 'additional cases' where the argument is that the standard formula requires adjustment because, for example, a parent is not making full use of available income or assets or has unreasonably high outgoings.

The first respondent sought departure directions in respect of matters falling within both classes. His claim in relation to 'special expenses' was accepted. This resulted in a new assessment being made which departed from the standard formula contained in Schedule 1. In his 'additional cases' claim the first respondent sought departure directions in relation to four matters. These were:

> "1. that the mother had assets capable of producing higher income;
> 2. that the mother's lifestyle was inconsistent with the declared income;
> 3. that the mother had unreasonably high housing costs;
> 4. that the mother's housing costs could be paid by her present partner."

The Department for Social Development refused the first respondent's application and he appealed their decision to an appeal tribunal under article 22 (2) of the 1991 Order. The tribunal dismissed the appeal. It decided that, since all the departure directions which the first respondent had sought fell within Regulations 23 to 29 of the 1996 Regulations, there was a legal bar to making the directions in the form of regulation 9 (3) (b). Article 25 (1) provides that any person who is aggrieved by a decision of an appeal tribunal may appeal to a Child Support Commissioner on a question of law and the first respondent appealed the appeal tribunal's decision. The Chief Commissioner directed, in accordance with paragraph 2(1) of Schedule 4 to the 1991 Order, that the application be dealt with by a Tribunal of Commissioners as it appeared to him that the application involved a question of law of special difficulty. The Tribunal of Child Support Commissioners found that the appeal tribunal had misinterpreted regulation (9) (3) (b) and remitted the matter to be re-heard by a differently constituted tribunal. The Department has appealed to Court against that decision.

The questions posed by the Tribunal of Commissioners in the case stated are: -

> "1. Were we correct to invoke section 3 of the Human Rights Act 1998 to interpret Regulation 9(3)(b) of the Child Support Departure Direction and Consequential Amendment Regulations (NI) 1996 without holding, as a matter of law, that there was incompatibility between the said Regulations

and article 1 of the First Protocol or any other Convention right?;

"2. Were we correct to hold that the words 'in payment' in Regulation 9(3)(b) of the Child Support Departure Direction and Consequential Amendment Regulations (NI) 1996, pursuant to section 3 of the Human Rights Act 1998, should be interpreted as meaning 'not unlawfully in payment'?;

"3. Were we correct to ascribe to the Child Support authorities the role of determining whether working families' tax credit was not unlawfully in payment?"

Judgment - The Commissioners appear to have concluded that Article 1 of the First Protocol was engaged by regulation 9 (3) (b). The view that Article 1 of the First Protocol would be engaged by the arrangements made under the Child Support legislation was not shared by the majority in the Court of Appeal in *Secretary of State for Work and Pensions v M* [2004] EWCA Civ 1343. In that case although the factual context was distinctly different and although the court did not feel it necessary to express a final view on whether the child support scheme engaged Article 1 of the First Protocol, useful observations on this issue were made, particularly by Sedley LJ. At paragraphs 52/3 he said:

"52. I also find it unnecessary to decide whether article 1 Protocol 1 is engaged. But unless it can be said that this article covers anything done by the state which costs the individual money, I have some difficulty in seeing how the child support scheme comes within its ambit."

Properly understood, the child support scheme is not the taking away from an individual what is rightfully his; it is the enforcement of a legal and moral duty on the part of a parent to maintain his offspring. The underpinning purpose of Article 1 of the First Protocol, is the restraint of expropriation by the state or its agents of personal possessions for public purposes. It is not designed to protect individuals who are required by the law to discharge personal responsibilities. The first respondent's rights under Article 1 of the First Protocol have not been engaged by the statutory requirement to make child maintenance payments.

If the Child Support Agency had to investigate every claim made by an absent parent that the parent with care was not lawfully in receipt of benefits, one can readily envisage that this would throw an enormous logistical burden on the agency that it is not equipped to discharge. Such an obligation would have the potential to frustrate the effective operation of the scheme. The means that have been adopted in the present case are that the absent parent

should not be permitted to apply for departure directions where the parent in care is in receipt of benefits. Given the absent parent's ability to activate an investigation into any possible fraud on the part of the parent with care, this is no more than is required to fulfil the objective of the legislation.

To be applicable Article 6 ECHR requires that the 'civil rights and obligations' of the party asserting a breach should be identified since, according to its text, the Article applies 'in the determination' of an individual's 'civil rights and obligations'. What is the civil right that the first respondent can assert in order to claim the protection. It is suggested that the only right that could be claimed is a right to dispute the second respondent's benefit entitlement in a child support forum. This appears to be the correct formulation of the only feasible claim under Article 6. In domestic law a parent with care no longer has a right to require an absent parent to make periodical payments for the maintenance of their child. That right has been ceded to the Secretary of State in England and the Department in this jurisdiction. Absent such a right Article 6 is simply not engaged. It follows that it would not be open to the second respondent to assert an Article 6 violation in relation to her husband's failure or refusal to make child support payments ordered under the legislation. *A fortiori* he has no substantive right to dispute his wife's benefit entitlement and Article 6 is not engaged in relation to his claim to be entitled to do so.

The Commissioners erred in deciding that they should have recourse to section 3 of the Human Rights Act 1998 without first addressing the question whether the 1996 Regulations were incompatible with a Convention right. They erred in holding that the words 'in payment' in Regulation 9 (3) (b) should be interpreted as meaning 'not unlawfully in payment' and therefore in ascribing to the Child Support authorities the role of determining whether working families' tax credit was not unlawfully in payment.

The answer to each of the questions posed in the case can be stated as 'No', therefore, and allow the appeal. It follows that the decision of the Appeal Tribunal will be restored and that the first respondent will be required to make the assessed child support maintenance payments.

McLoughlin, Re An Application for Judicial Review [2005] NIQB 50 (13 June 2005)

This is an application for judicial review of a decision of the Chairman of a Fair Employment Tribunal refusing to order disclosure

to the applicant by the Police Service for Northern Ireland and the Northern Ireland Office of unredacted security documents.

Judgment - It is necessary for the applicant to establish that the unredacted documents are relevant to the applicant's discrimination claims before the Tribunal. The applicant contends that Article 6 ECHR requires such disclosure to enable him to assess the relevance of the documents and not to have one party submitting documents to the Tribunal which are withheld from another party.

In so far as the applicant relies on Article 6 ECHR this does not entitle him access to documents that are not relevant to the issues in the proceedings. In any event there is no absolute right to documents that are relevant to the proceedings as there may be a public interest in non disclosure of certain relevant documents in a particular case. Jasper v UK [2000] 30 EHRR 441 and Fitt v UK [2000] 480 deal with competing public and private interests in criminal proceedings where relevant documents may be withheld.

There is substance in the further complaint that the Chairman has had sight of documents not disclosed to the applicant. However it has not been established that the Chairman will hear the applicant's discrimination claim and it is common in Courts and Tribunals for a substantive hearing to be conducted by a different Judge or Chairman if there would otherwise be prejudice to a fair hearing.

The Chairman was correct in his ruling that the unredacted documents are not relevant to the issues arising in the discrimination proceedings before the Fair Employment Tribunal. The application for judicial review is dismissed.

Article 8

Murphy, Re Application for Judicial Review [2004] NIQB 85 20 December 2004 (Article 8 and Article 2)

This is an application for Judicial Review of a decision of the Department of the Environment for Northern Ireland granting O2 UK Ltd (formerly BT Cellnet) planning permission to erect three O2 equipment cabinets and three flagpoles concealing three mobile phone antennas at a location adjacent to the applicant's home. The applicant is the eldest of four children living with their parents.

One of the applicant’s grounds for judicial review was failure to take into account the Human Rights Act. She alleged a failure to act in compliance with Article 8 and Article 2 of the ECHR.

Judgment - In *Re Stewart's Application* [2003] NI 149 Carswell LCJ in the Court of Appeal stated that Article 8 may be engaged if a person is particularly badly affected by a development carried out in consequence of a planning decision made by the State. It is necessary to carry out a proper balancing exercise of the respective public and private interests engaged in order to satisfy the requirement to act proportionately. This type of balancing is an inherent part of the planning process in which the determining authorities carry out a scrutiny of the effect which the proposal will have on other persons and weigh that against the public interest in permitting appropriate development of property to proceed. In the vast majority of cases this will suffice to satisfy the requirements of Article 8 bearing in mind that the authorities are entitled to the benefit of the "discretionary area of judgment".

It is doubtful if the applicant can be said to be "particularly badly affected" by the proposed development in the present case so as to engage Article 8. However on the assumption that Article 8 is engaged there is no breach of the applicant's right to respect for private and family life. As stated by Carswell LCJ in *Re Stewart's Application* the type of balancing exercise that is required to satisfy Article 8 it is an inherent part of the planning process in which the planning authorities balance public and private interests.

To the extent that the applicant has a particular genuine concern on health grounds this may more readily be an instance where the applicant's right to respect for private and family life is engaged. In that event it would be necessary for the planning authorities to act proportionality in relation to the applicant's particular concern on health grounds. The planning authorities have taken into account the genuine concerns that arise in respect of health issues and have addressed that concern in an appropriate and proportionate manner.

Further the applicant contends that the respondent has acted in breach of the Article 2 right to life. The right to life imposes upon the State a positive obligation to protect life which requires the authorities to "do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge". Osman v United Kingdom [1998] 29 EHRR 245. The obligation arises where there is a real and immediate risk to life. There is no evidence in the present case that there is any real and immediate risk to life. Article 2 is not engaged.

McConway v Northern Ireland Prison Service [2004] NICA 44 (12 December 2004)

This is an appeal from the order of Kerr J (as he was then) that applications for judicial review against the Northern Ireland Prison Service and the Chief Constable of the Police Service for Northern Ireland which were, ultimately, conjoined be dismissed.

The impugned decision of the Prison Service was not to provide the appellant with security clearance to provide counselling services to prison officers. Three decisions made on behalf of the Chief Constable were challenged. The first was a decision to generate and maintain private and confidential information about the appellant. The second was a decision to inform the Prison Service that the appellant was a security risk. The third was to refuse access to the information.

Judgment - The appellant knew that her contractual rights with her employer were subject to a security vetting which she did not pass. In the circumstance the Prison Service could not have been required to do more than they did. They asked the police to double-check their information and, apart from one individual, they had the material given to them evaluated by another official who had not previously been associated with the case. They could not have been expected to divulge the material which they had been given in confidence and, when the police gave permission to release the material at a later stage, they did so promptly.

The Prison Service did not get the redacted Special Branch record. They received unredacted information which, when informed that they could so, they passed onto the appellant. Nor could it be argued, realistically, that they should have allowed her to make representations before they reached their decision. When the Prison Service made the decision which is the subject of challenge, they knew the gist of the allegations against the appellant but they were given that information in confidence. Article 8 ECHR did not apply to the decision of the Prison Service but it would be protected by Article 8.2 if it applied.

The police were entitled to make a record of the information about the appellant and to open a file on her. This was not an infringement of her Article 8 rights and the decisions of the police were made in December 1986, June 1999 and on or about 3 October 2000. The two former decisions were made before the Human Rights Act came into force and the last played no significant part in the presentation of the appellant's case. No ruling is made as to whether her Article 8 rights were affected by the last decision.

Shannon, Re An Application for Judicial Review [2005] NIQB 5 (14 January 05)

This is an application for leave to apply for judicial review, the applicant challenging a decision of the Secretary of State to uphold on appeal the decision of the Chief Constable revoking the applicant's firearm certificate. In reaching this decision the Secretary of State took into consideration confidential information held by the Chief Constable that the applicant associated with members of the PIRA".

Judgment - It is clear from *Re Charmers Brown* that the right to hold a firearm certificate is not an incident of an applicant's private life protected by Article 8. Nor is the prevention of the engagement in a sport or hobby a deprivation of a possession the purposes of Article 1 Protocol 1 (see also *RC v UK Application No. 37664 – 97*). The applicant has failed to persuade the Court that there are any special or peculiar circumstances in the present case to suggest that either Article is permanently engaged.

The revocation of the certificate does result in the firearm and ammunition being no longer capable of use by the applicant but he is not deprived of the asset of which he can dispose by way of sale.

Further in *Re Charmers Brown* the Court of Appeal held that Article 6 is not engaged in relation to decisions on the grant of firearm certificates. Even if Article 6 were engaged the court concluded that the right to judicial review is sufficient to satisfy the requirements of the Article.

On the issue of fairness the applicant was informed of the gist of the case against him in relation to the proposed revocation and had the opportunity to make representations. The police report to the Secretary of State was not disclosed to the applicant. The NIO stated that it was unable to provide a copy of the report and suggested that the applicant contact the police. Notwithstanding that invitation the applicant did not pursue the disclosure of the report from the police.

Swift, Re an Application for Judicial Review [2005] NIQB 1 (07 January 2005)

In this judicial review application the applicant, a sentenced prisoner, challenges a decision by the Prison Service refusing him home leave to attend his daughter's First Holy Communion. The applicant was sentenced to 13 years imprisonment on 31 May 2002 for possession of explosives with intent to endanger life.
The Prison Service set out the reasons why the Secretary of State refused the application. It was decided that, while acknowledging the family reasons given for the applicant wishing to attend the

communion, it did not consider that the event was of such exceptional importance that it warranted automatically temporary release from the prison.

Judgment - When examining the risks attached to any period of release the overriding consideration of the Prison Service was for the safety of the public and it was necessary to carry out a risk assessment. The applicant's main thrust was an attack on the risk assessment and the manner in which it was carried out without the applicant having an opportunity to comment on it or make representations about it. The respondent did not accept that the risk assessment was the predominant feature on which it refused the application. The applicant was a sentenced prisoner who after due process had been convicted. His freedom was restricted as a necessary consequence of his conviction and for the purposes of Article 8 ECHR the interests of public safety and the prevention of crime were features of relevance in the context of his application for temporary release. Rule 27 affords to the Prison Service a wide discretion to relax the imposition of the prison lifestyle. The Prison Service is entitled to consider the desirability of maintaining a uniform regime within the prison. It has to examine and in this case did examine the merits of the case individually and in context. Due recognition must be given to the margin of appreciation of the prison authority in reaching its conclusion.

In the circumstances the applicant has not made out a case to quash the decision refusing him temporary home leave in the circumstances and the application is dismissed.

AR v Homefirst Community Trust [2005] NICA 8 (16 February 2005)

J was born on 9 December 2003. He is the fourth child born to Mrs R. Her eldest child is in long term foster care. Her other children have been adopted by the same family and live together. J has now been placed with this family and lives with his brother and sister as part of the same family unit. Mrs R has had long standing problems with alcohol. The father of Mrs R's three youngest children is Mr R. He also has had a pronounced alcohol problem. These difficulties eventually led to the children being taken into care. When it became known to the social services that Mrs R was pregnant with J, a child protection case conference was held at which it was decided that the baby's name should be placed on the child protection register. On the day after the baby was born the Trust applied for an emergency protection order. Within a few days of his birth J was removed from the care of his mother. He has not returned to her care since that time.

At the time that the matter came before the Family Proceedings Court the Trust was aware that Mrs R was being treated by a consultant psychiatrist and that she was under the care of the community psychiatric nurse. These professionals had most frequent contact with Mrs R but instead of turning to them for advice, the Trust decided to engage a consultant psychiatrist who had not previously met Mrs R to advise after examination. If the Family Proceedings Court had been aware of the views of the consultant psychiatrist and the community psychiatric nurse who had most frequent contact with Mrs R and in particular of the optimism that they shared that Mrs R, despite what had gone before, would be able to give J proper care, it might well have refused the interim care order. As it was, the court was not made aware of the views of these two professionals and it made an interim order placing the child in the care of the Trust. The Trust had indicated to the court that it did not intend to make any residential assessment of the mother's ability to care for the child and it proposed that contact between the child and the mother should be limited to one and a half hours per week. The court was dissatisfied with this proposal and ordered that contact with the mother should take place four times per week.

The case was transferred to the High Court and set down for a preliminary hearing on 26 February 2004 in relation to the issues of residential assessment and contact. No order was made then but the court indicated that the Trust should think again about how the future care of the child might be handled. The case was adjourned until 22 April 2004 and again adjourned until 21 June. The judge gave judgment on 5 July 2004. Three issues were at stake on the hearing of the application: - first, the trust's application for a care order (this was opposed by the mother); second, the mother's application that there should be a residential assessment; and, finally, her application for contact. The court granted the application for the care order. No order was made for a residential assessment. The issue of contact was not dealt with at the time. After the judgment had been delivered the Trust reduced the level of contact. Mrs R was dissatisfied with this and she duly applied for enlarged contact pending the hearing of this appeal. The judge ordered that contact between mother and child should take place fortnightly. Mrs R appeals against the judge's ruling on all three issues.

Judgment – The Court is convinced that the Trust was not sufficiently alive to Mrs R' rights under the ECHR. In all the great volume of written material generated by the Trust in this case the Court is unable to find a single reference to Article 8. If the Trust had addressed the issue of Mrs R's Convention rights there would surely have been some mention of this in the papers. The Court is driven to the conclusion that the Trust did not consider the question of the Mrs R's Article 8 rights at any stage. The Trust has suggested

that the exercise that it had engaged in duplicated the procedure that would have been followed if it had recognised that Mrs R's Article 8 rights were in play. The Court does not accept that argument.

Where a decision maker has failed to recognise that the Convention rights of those affected by the decision taken are engaged, it will be difficult to establish that there has not been an infringement of those rights. As the Court recently said in *Re Jennifer Connor's application* [2004] NICA 45, such cases will be confined to those where no outcome other than the course decided upon could be contemplated. Plainly this is not such a case.

The Trust had decided at a very early stage that J's long term interests lay in being placed for adoption and that they have resolutely adhered to that plan throughout. They did not at any stage consider Mrs R' convention rights. This should have been pre-eminent in the Trust's approach to the case. Had it been, it is likely that an entirely different course would have been followed.

Mrs R's Article 8 rights required that her child should not be taken from her unless every feasible alternative was thoroughly explored and rejected for good reason. This clearly did not happen.

The guardian ad litem also failed to have regard to Mrs R's convention rights. While, of course, the primary focus of the guardian ad litem's concern must have been J's welfare, she should also have been conscious that a recommendation by her that J should be removed from his mother's care might violate her Article 8 rights. These were either not considered at all by her or she failed to give them sufficient weight.

It is accepted however that the Trust and the guardian ad litem from entirely worthy motives. At all times they have been concerned to ensure that the best decision for J's future was taken. Unfortunately, they fell into error because, plainly, they were unaware of the requirements of the Convention in relation to Mrs R and, because they failed to appreciate that, while the welfare of the child was a matter of paramount importance, it was not the only factor that had to be taken into account.

Mrs R's convention rights were infringed and the care order should not have been made. It does not follow, however, that the order of the learned judge should be reversed.

KR, (a minor), Re An Application For Judicial Review [2005] NIQB 17 (09 March 2005)

This is an application for Judicial Review of the decisions of the management of Hugomont Children's Home, Ballymena, operated by Praxis Care Group, and Northern Health and Social Services Board and Homefirst Community Health and Social Services Trust, concerning the respite care afforded to the applicant at Hugomont. She has a rare chromosome abnormality with the result that she is severely disabled in learning, autistic and epileptic with no cognitive language skills and totally dependant on her carers for all her personal needs. She requires anti-convulsant medication of types and dosages that are liable to change, as well as other medication and homeopathic remedies. She resides with her parents and for some years occasional respite care was available with another family. Her medical advisors accord to her parents a discretion as to the medication administered to the applicant when she is at home and in family respite care. The opportunity arose for respite care at Hugomont. In essence the applicant's parents object to the Praxis policy for the administration of medication to the applicant at Hugomont. The policy provides that medication should be recorded on a sheet known as a "kardex", with each medication signed by the prescribing GP and further that a prescription label for the medication should be provided by the pharmacist. The parents, who are familiar with the changes that occur in the applicant's condition and who determine the variations in her medication when she is at home or in family respite care, propose that they may determine variations in her medication while she is in the Home, without the need for a GP signature or a new pharmacy label with every variation. The applicant's parents' objections are based on the Praxis policy being contrary to the principle of parental consent to treatment of a child and in any event that the changes required in the applicant's medication would require repeated certifications by the GP and repeated alterations of the pharmacy labels such as to render the policy unnecessary, impractical and inconvenient to parents, doctors and pharmacists.

Judgment - The applicant contends that the Praxis policy disregards the principle of parental consent. The Court is unable to accept that characterisation of the position. This is not a dispute about parental consent but about parental prescription. Hugomont, the Trust and the Board recognise the principle of parental consent (although it had not been set out in the guidelines). None of them was proposing to administer medication without the consent of the parents. However, what each required was medical authority for the administration of medication. It was assumed in each case that parental authority was present. Indeed the parents' objection was not to the administration of particular medication but to the requirement for confirmation of medical approval. The applicant contends that the Praxis policy involves an interference with parental consent to treatment and thereby amounts to a breach of the right to respect for private and family life under Article 8 ECHR.

If the present case involved medical treatment without parental consent then Article 8 would be engaged. However, in view of the finding that parental consent is not the issue in the present dispute, Article 8 is not engaged on the basis of interference with parental consent.

The applicant has not established any of the grounds for Judicial Review and the application is dismissed.

W and M, Re [2005] NIFam 2 (10 March 2005)

The Trust made a proposal to the local Adoption Panel that the children in this case should be adopted. That adoption panel met in June 2003 and recommended that adoption was in the children's best interests. As is the conventional approach the parents were not invited to the Adoption Panel and were not invited to make representations to it.

The first time any written indication was given to the parents that the decision had been taken to confirm the recommendation of the Adoption Panel, was by way of letter of 21 January 2004 i.e. in excess of seven months from the date when the decision had been taken.

Judgment - In *AR and Homefirst Community Trust* (2005) NICA 8 the Court of Appeal addressed the issue of Article 8 in the context of care order proceedings. The court adopted the approach of the House of Lords in *Re S (minors) (care order implementation of care plan)*: *Re W (minors) (care order: adequacy of care plan)* (2002) 1 FLR per Lord Nicholls at paragraph 99:

> "Although Article 8 contains no explicit procedural requirements, the decision-making process leading to a care order must be fair and such as to afford due respect to the interests safeguarded by Article 8."

The Court considers that this applies equally to an application under Article 18 of the Adoption Order (Northern Ireland) 1987 where a Trust seeks to free a child for adoption.

The swiftness with which Social Services acted in this case evinced a wholly unacceptable approach to the grave nature of the Order and reflected an attitude of merely rubber stamping the Adoption Panel's recommendations without appropriate involvement of the parents in that decision-making process. The failure to recognise the importance of writing "as soon as possible" after making such a decision to the parents is again indicative of the all too casual approach adopted in this instance to compliance with the Regulations.

These breaches, set against the background where the parents had not been invited to a LAC within six months of the LAC of January 2003, constitute a clear infringement of the respondents' Article 8 rights. Not only was there an absence of any reference to their Article 8 rights, but there was a chilling absence of even lip service to such rights at a very senior level in this Trust. The Court is assured that new procedures and practices have been adopted which will ensure in future that the decision-makers will invite parents to meet with them or to make written submission to them prior to the decision being made and that compliance with the legislation will be more rigorously enforced. Whilst that is laudable, however late, it does nonetheless not avail the Trust in this instance.

There has been a breach of the Article 8 rights of these parents. Freeing a child to be adopted is one of the most draconian remedies known to the law and must never be entertained lightly by any public authority or decision-making body. Whilst it is necessary to look at the decision-making process as a whole, in this instance the views of these parents were completely ignored at what was a crucial stage, namely the decision to implement the recommendation of the Adoption Panel.

Counsel for the Trust submits that the welfare of the children and their rights to family life must overarch the rights of these parents. The Court cannot accept this analysis where there has been no recognition, either express or implied, of the Convention rights of those affected by the decision particularly where the decision appears to have been taken within an extraordinarily short time of the Panel recommendation being received. On the face of it there is no evidence that any plausible consideration was given to the possibility of counter arguments by the parents before the decision was taken. Trusts must recognise that even at the eleventh hour, both parents must be afforded the opportunity to rethink their approach and articulate their Article 8 rights perhaps in a manner that was not hitherto contemplated.

Whilst the Court recognises its obligation to treat the welfare of these children as the most important consideration, nonetheless that is not the only factor to be taken into account and the Article 8 rights of these parents also have to be considered. The Court has therefore come to the conclusion in this case that in view of these infringements, the Trust’s application must be refused.

In relation to the argument that the absence of the right to make representations to the Adoption Panel prior to its recommendation under the Adoption Agency's Regulations constitutes a breach of Convention rights under Article 6 and Article 8 in *R v Wokingham District Council ex parte J* (1999) 2 FLR 1136 a similar application

was made in England before the introduction of the Human Rights Act 1998, and Collins J concluded that whilst it was desirable that an Adoption Panel should allow short written representations from parents, such an approach was not essential to the fairness of the entire adoption procedure. This was because the panel was not deciding final questions affecting the mother's rights. It was merely making a recommendation that the court be given the opportunity to decide such final questions. Where a decision was only one step in a sequence of measures which might, but would not necessarily, culminate in final decisions affecting the parties rights and duties there may be no obligation to hear representations. Fairness required that the mother had the opportunity to present her case before a final decision was made, but that would happen in the course of the adoption proceedings. Notwithstanding the fact that this case was decided prior to the introduction of the Human Rights Act 1998, the reasoning still holds good. There is clear authority for the proposition that the guarantees in Article 6(1) applied to the determination of civil rights and obligations if they are directly decisive of private law rights. Public law matters are not excluded from being "civil rights and obligations" if they are directly decisive of private law rights. The recommendations of an Adoption Panel are not decisive, they being purely recommendations. Whilst it may be desirable that an Adoption Panel should allow representations from parents in some form, that does not mean that there is a breach of the ECHR or a failure to measure up to the standards of fairness if it fails to do so.

Landlords Association for Northern Ireland, Re An Application for Judicial Review [2005] NIQB 22 (14 March 2005)

In this case what is subject to the judicial review challenge is part of a Scheme introduced by the Northern Ireland Housing Executive ("the Executive") which is designed to regulate the duties of landlords of houses in multiple occupation ("HMOs") to deal with anti-social behaviour of tenants and their guests. The application has raised a number of issues including the issue of the compatibility of the impugned provisions of the Scheme with the Convention.

Judgment - the Scheme is ultra vires since it seeks to impose obligations on private landlords and HMO managers in respect of guests. The Scheme as a whole is not compatible with Article 1 Protocol 1 ECHR.

Conway v Kelly & Anor[2005] NIQB 29 (12 April 2005)

The plaintiff was born in January 1965. In February 2002 she issued a writ against the defendants alleging assault, battery and trespass to the person by the first defendant (a hospital employee) while acting as the servant and agent of the second defendant (a hospital). Her claim is that she developed a post-traumatic stress disorder as a result of the conduct of the first defendant. The conduct is alleged to have taken place at her home. She had attended hospital earlier in the evening of February 1999 with a friend. The first defendant ascertained her address and called at her home later that evening where he behaved in a way that was inappropriate.

A psychiatric report on the plaintiff was compiled and the defendants sought disclosure of it. The plaintiff's position was that, given the delicate nature of this case and in particular given the first defendant is the alleged perpetrator of a sexual assault on her, she has a right to privacy regarding medical matters. The plaintiff was prepared to release the psychiatric report on the strict condition it is for sight by legal advisers only and not for the direct sight of the first defendant. The first defendant's solicitors declined to accept that position and sought an order requiring the plaintiff to disclose her medical evidence.

Judgment – The Court has been given the psychiatric report and, among other things, it deals with a highly confidential aspect of the plaintiff's earlier medical history as well the events of the now alleged incident and of her reactions to it. The plaintiff invited the Court to consider Articles 3 and 8 ECHR. If the Court concluded that there was an interference with either of those rights she contended that "the legitimate aim of a fair trial is not secured by disclosure of the details of the incidents which created the plaintiff's vulnerability to the first defendant".

Reference was made to leading authorities on the Article 3 point including *Keenan v The United Kingdom* [2001] 33 EHRR 913, *Quitty v The United Kingdom* [2002] 35 EHRR 1 and *Price v The United Kingdom* [2001] 34 EHRR 1285. The issue here is not whether the first defendant's original conduct amounted to an interference with Article 3 but whether the disclosure of a medical report setting out a painful episode in the plaintiff's past could amount to torture or inhuman or degrading treatment. It seems that it would be a distortion of language to so hold and that submission is rejected.

On the sounder ground of Article 8 ECHR, the disclosure of a highly confidential aspect of earlier history, even if it is known to some people already to some degree, is something that would constitute an interference with one's right to private life. The information is confidential. The plaintiff is prepared to share it with the defendants'

legal and medical advisors but not with the first defendant himself. The first defendant is known to her. He operates in the same overall field of health care. She is apprehensive that he would share this information in a mischievous way with other persons. The Court does not conclude that he would do anything of the kind but there is an interference here with a right to privacy. The Court is reinforced in that view by *Bensaid v The United Kingdom* [2001] 30 EHRR 205 where the court held that mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. See also *R (Razgar) v Secretary of State for the Home Department* [2004] 3 All ER 821.

In relation to Article 8 (2) the question that the Court must ask itself is whether the disclosure of this medical report to the first defendant personally is "necessary" for the protection of the first defendant's rights and freedoms i.e. under Article 6 ECHR. The Court concludes that it is not necessary for such disclosure to be made at this time. A fair trial is not compromised by the disclosure being limited to the legal and medical advisers of the defendants at this stage.

The aspect of the matter which troubles the plaintiff is such an intrinsic part of the psychiatrist's conclusions that "an editing exercise would not be useful or practicable in this instance.

TP (a minor), Re An Application For Judicial Review [2005] NIQB 64 (29 September 2005)

This is an application for judicial review of decisions of the Youth Justice Agency that the applicant, while on remand at the Juvenile Justice Centre for Northern Ireland at Rathgael, be detained in an area of the Centre known as the Intensive Support Unit (ISU) from 13 January 2004 to 4 June 2004.

Judgment - Enhanced supervision has the potential to constitute the infringements complained of by the applicant, namely undue intrusion on privacy and the development and fulfilment of personality and the establishment and development of relationships.

Article 8 will be engaged when there is enhanced supervision of such a degree or for such duration that it represents a significant increase in the restrictions imposed beyond the ordinary and reasonable requirements for supervision in the Centre. The impact of those increased restrictions must be assessed by the Centre under Article 8, and if they fail to make such an assessment the Court that is called upon to review the decision of the Centre will find the increased restrictions to be unjustified, unless the Court concludes that the Centre would inevitably have concluded that the

action was justified. The approach to Article 8 will be informed by international obligations that include the best interests of the child being a primary consideration, absence of arbitrary or unlawful interference with privacy and promotion of the child's dignity and worth. The impact of Article 8 will also be assessed on the basis that the Centre has parental responsibility for the child.

The Court does not accept that in transferring the applicant to the ISU the legal basis of his detention changed. He remained in detention on foot of the order of the Court. Nor did it accept that a new element of arbitrariness was introduced into the detention. At any time the applicant had the right to apply to the Court to have the lawfulness of his detention determined. If the applicant is correct that his placement in the ISU constituted unlawful detention then an application for habeas corpus would have secured his release. The applicant did not make such an application. The Juvenile Justice Centre Rules cannot prevent such an application being made.

The Court made two declarations.

1. The failures to advise the applicant and his parent about Procedure No JJC 9 "Complaints and Representation" and also to give them access to written copies of the same, represented breaches of Rule 44(2) of the Juvenile Justice Centre Rules (Northern Ireland) 1999.

2. The actions of the Juvenile Justice Centre in relation to the ongoing threat from the applicant were not demonstrated to be such as to render the continued detention of the applicant in the Intensive Support Unit a proportionate response for the purposes of the applicant's right to respect for private life under Article 8 of the European Convention on Human Rights.

Article 10

Casey and HMP Maghaberry, Re [2005] NIQB 31 (13 April 2005)

The applicant is a prisoner who seeks judicial review of Sub-paragraph (c) of Paragraph 4.8 of the Prison Service Standing Orders is in breach of his rights under Article 10 and Article 14 of the ECHR.

Regarding craft works produced by prisoners, Sub-paragraph (c) reads:

c) the use of any language other than English will be restricted to a simple readily understood inscription. Items which contravene this provision may not be allowed out of the prison

The Prison Service accepted the provision interfered with the applicant's Article 10 rights but contended that it was justified under Article 10(2).

Judgment – The Prison Service must establish that the interference with the applicant's freedom of expression to the extent that it exists is necessary for one of these purposes under Article 10 (2). It does not seem that they have established that it is so necessary. The object of avoiding the conveyance of information which might be conducive to disorder or crime does not require this particular form of words in the policy or this distinction. The present wording does unnecessarily interfere with the lawful rights of the applicant.

Article 1 Protocol 1

In the matter of an application by Caroline Chambers for leave to apply for judicial review 8 April 2005

The applicant, a serving officer in the Police Service of Northern Ireland, ("the PSNI") seeks an order of certiorari to quash a decision of the PSNI dated 21 October 2004 confirmed by letter of 22 November 2004 that she was not to be promoted to the rank of sergeant effective on 1 November 2004. She also seeks an order of mandamus requiring the PSNI to reconsider her case in accordance with the law together with a declaration that the decision was unlawful, ultra vires, disproportionate and in breach of Article 1 Protocol 1 of the Convention.

The applicant's case proceeded on the basis that the office of constable was a "possession" for the purposes of Article 1 Protocol 1. The PSNI had interfered with (i) the peaceful enjoyment of the applicant's office as constable; and/or (ii) the applicant's promotion to the rank of sergeant; and/or (iii) if it is the policy of PSNI to deny promotion to officers subject to disciplinary/criminal charges, the PSNI was operating a scheme to control the use of property.

Judgment - Describing the post of constable as an office does not of itself mean that Article 1 Protocol 1 is engaged or relevant. For the purpose of possessions under Article 1 Protocol 1 the term "possession" will have a Convention meaning. As Lord Hobhouse pointed out in *Aston Cantlow PCC v Wallbank* [2003] 3 All ER 1213 the term applies to all property and is the equivalent of "assets". Where economic rights are attached to an office Article 1 Protocol 1

may become engaged but that will come about when some economic rights such as payment of salary or pension rights are at stake. In any event the possibility of acquiring a possession in the future is unlikely to constitute a proprietary right protected by Article 1 Protocol 1 being a possession only when it has been earned or an enforceable claim to it exists.

In this case the applicant has no entitlement as such to be promoted. The information that she was going to be promoted was corrected before her promotion took effect. In any event she failed to state that she was being prosecuted. The information given by the applicant was objectively misleading even if the applicant can be acquitted of knowingly misleading PSNI. In the result the applicant has not been deprived of any Article 1 Protocol 1 possession or economic right.

Misbehavin' Ltd, Re An Application for Judicial Review [2005] NICA 35 (15 September 2005)

This is an appeal from the decision of Weatherup J of 24 September 2004 whereby he dismissed the appellant's application for judicial review of Belfast City Council's refusal to grant the appellant's application for a sex establishment licence.

The two principal grounds of appeal were (1) that the council was guilty of procedural unfairness in admitting the late objections and in failing to afford the appellant a fair hearing in the determination of its application; and (2) that the council had failed to recognise that, by its decision to refuse the licence, it had interfered with the appellant's rights under Article 1 of the First Protocol and Article 10 of the Convention. Having failed to recognise that such interference had occurred, the council had neglected to examine whether it was justified.

Judgment – The Court rejects the appellant's claim that there is no legislative basis for accepting late objections. However, in order to entertain late objections, the council was required to exercise a discretion and that it failed to do so. On that account the decision to refuse the sex establishment licence must be quashed. The Court also concluded that the appellant's rights under Article 10 of ECHR and Article 1 of the First Protocol to the Convention were engaged and that the council failed to conduct the necessary balancing exercise in order to determine whether interference with those rights could be justified. The circumstances of the case are not such as would enable the conclusion to be reached that, if the council had considered the matter properly, it is inevitable that the application would have been rejected.

The appeal must therefore be allowed and an order of certiorari in favour of the appellant, quashing the decision of the council, will be made.

Article 2 Protocol 1

JN (a minor) v SEELB (South Eastern Education and Library Board) [2005] NIQB 46 (03 June 2005)

The applicant was born on 28 April 1999. He suffers from an autistic spectrum disorder. His parents contacted the Respondent in 2003 to have a Statement of Special Educational Needs drawn up in respect of him. In September 2003 he started to attend the diagnostic unit of Longstone School. His parents were subsequently advised by an educational psychologist retained by them that the applicant would benefit from a school specialising in working with children with autistic spectrum disorders. No such provision is available in the Respondent Board's area. The parents decided on 17 February 2004 to remove the applicant from Longstone and commence a home-based applied behaviour analysis (ABA) programme.
The Board prepared proposed Statements on 18 November 2003 and 10 March 2004. Neither satisfied the parents who by this stage were keen to obtain funding for a home-based ABA programme. A further proposed Statement was prepared on 17 August 2004 and was accompanied by a letter from the Board indicating that it did not fund home-based ABA programmes. On 6 October 2004 the applicant launched judicial review proceedings in respect of that decision.

Judgment – The Board accepted that at the time it prepared the proposed Statement on 17 August 2004 there was a failure to give individualised consideration to the request for a funded home based ABA programme. A new Statement has been or is being prepared which will provide for such a programme. The only issue that now arises is whether a declaration should be made in respect of the unlawful approach to the proposed Statement in August 2004.

The statutory scheme in the Education (Northern Ireland) Order 1996 makes it clear that parents have a right of representation in respect of assessment and a right of appeal in respect of the Statement. But what is in issue here is not just the place at which the educational provision is to be delivered but the nature of that provision. The determination made in the Statement accordingly establishes the content of the educational provision which the State considers it appropriate to supply for the child. It must follow that any unlawful conduct by a public authority in the determination of that provision is capable of giving rise to a breach of the right to education in Article 2 of the First Protocol.

In those circumstances the minor has established a sufficient interest in this case. This is an appropriate case in which to declare that the proposed Statement dated 17 August 2004 made by the Respondent in respect of the applicant was unlawful on the ground that in making the proposed Statement the Respondent failed to give individualised consideration to the provision of a funded home-based ABA programme for him.

Fallon-McGuigan v McGuigan [2005] NIQB 60 (09 September 2005)

The minor applicant was born on 11 May 1993. In May 2000 he was assessed by an educational psychologist who found his full scale IQ was 127 placing him in the top 5% of the population. His reading, comprehension and spelling, however, was found to be in the lowest quartile and he was diagnosed as suffering from dyslexia
In the autumn of 2003 he sat the transfer procedure tests and was notified on 6 February 2004 that he had obtained a B1 grade.
It was his desire to transfer to Aquinas Grammar School. His elder brother already attended the school. Like all grammar schools in Northern Ireland the school is obliged to admit pupils strictly in the order of the Transfer Grade which they obtain subject to special circumstances. On 25 February 2004 the applicant's parents lodged a special circumstances claim along with the Transfer Form
The special circumstances claim was considered by the Principal of the school by way of delegation from the Board of Governors who concluded that he should not adjust the Grade because the educational evidence was inconclusive. The school was oversubscribed with Grade A candidates that year and as a result the applicant did not succeed in getting a place at the school.

On 27 August 2004 the Court of Appeal granted the applicant leave to apply for judicial review of the model criteria promulgated by the Board on the basis that the requirement imposed on the applicant to produce evidence to support his application for special circumstances arguably constituted unequal treatment contrary to Article 14 of the European Convention on Human Rights in respect of the applicant's right to education.

Judgment – the applicant submitted that the imposition on him of the burden of establishing special circumstances in connection with his disability was discriminatory contrary to Article 14 of the Convention when read in conjunction with Article 2 of Protocol 1 dealing with the right to education. He contended that the transfer test procedure had as its objective the identification of those who could demonstrate academic potential but that the form of the test made no allowance for those who because of their disability were unable to properly display their potential in the examination. It was

clear that the model criteria for special circumstances imposed an onus on the applicant to discharge the presumption created by his Grade B1 in the examination. The respondent relied on the limited scope of Article 2 of Protocol1 and that the applicant had been successful in achieving entry into another grammar school and accordingly his right to education was unimpaired. In any event the respondent contended that the facts of the present case did not fall within the ambit of the substantive Convention right and that no disadvantage in respect of an appropriate comparator could be established.

It is clear that the statutory purpose of the relevant provision is to ensure that places are offered to students broadly in accordance with the potential demonstrated in the examinations. It is also clear that the reference to medical or other problems is intended to allow for those candidates whose performance in the examinations may not have properly reflected their potential to be considered prior to the application of the academic criterion at the end of the provision. The effect of the relevant provision is to impose on Boards of Governors an obligation to consider such problems where they are supported by evidence of a medical or other nature in order to ensure that the statutory purpose is fulfilled.

The statutory obligation on the Board of Governors of the school to consider all medical and other appropriate evidence in the applicant's special circumstances claim was not discharged in the circumstances and a declaration will be made that the applicant was not upgraded to a Grade A in his transfer test because of the unlawful determination of his special circumstances application.

This declaration is particularly appropriate because the transfer test is now the only public examination in which a student's academic potential is judged competitively against other students in his age group.

The cohort of people with which this case is concerned are disabled children. As a matter of statutory policy they are to have their academic potential recognised in the transfer procedure. This case suggests that the process for doing so needs to be urgently examined to ensure that this vulnerable group are not further disadvantaged.