



## **Public Interest Advisory Panel reports**

PIAP/07/394 – PIAP08/405

These are the full reports of the PIAP summaries published in Focus 56, dated June 08, and available on the LSC website > CLS > Focus newsletter.

### **Representation at Inquests**

PIAP/07/394

#### **NATURE OF CASE**

Application for funding for an Inquest into the death of the Applicant's son.

#### **REPORT OF THE PANEL**

The Panel expressed surprise at the fact that the Commission had accepted article 2 was engaged in this matter, but had chosen to refuse funding in respect of advocacy services at the inquest into the death of the Applicant's son.

However, the Panel noted that its remit was limited to issues of wider public interest and proceeded to consider the application on that basis alone.

The Panel, whilst feeling great sympathy for the Applicant, was not satisfied, having regard to the risks of Sudden Unexpected Death In Epilepsy ("SUDEP") and the facts of this particular case, that the proceedings had the potential to produce real benefits for individuals other than the Applicant.

In particular the Panel was not persuaded that any recommendations that might emerge from an inquest would materially effect existing medical practices to the benefit of other sufferers.

Conclusion: No Significant Wider Public Interest

### **Tribunals and Enquiries**

PIAP/07/383

#### **NATURE OF CASE**

Claim by applicant against the Law Society and Legal Services Ombudsman for England and Wales asserting that access to the Solicitor's Disciplinary Tribunal should not have to be via the Law Society or Legal Services Ombudsman.

#### **REPORT OF PANEL**

The Panel considered that there was, generally, an arguable issue in terms of access to the Disciplinary Tribunal. However, it was unclear that either of the public bodies involved in this matter would be held to have acted unlawfully and, in the absence of this, that the Court would find on the basis of this case that the complaints and disciplinary system as a whole was so unfair that it must be overturned.

A more fundamental difficulty was that the relief sought by the applicant appeared to be compensation, and the Panel could not see that any cause of action as set out in the grounds for the judicial review claim would benefit a wider client group.

The Panel also expressed concern that the solicitors in this case had not taken more steps to organise the information submitted with the application for funding and clarify the basis on which it was made.

Conclusion: No Significant Wider Public Interest

PIAP/07/391

#### NATURE OF CASE

Claim by Applicant against the Prisons and Probation Ombudsman to bring an action for judicial review in relation to the alleged failure of the Ombudsman to exercise his discretion and award compensation.

#### REPORT OF PANEL

The Panel considered the argument of the solicitors for the Applicant that Ombudsman's decision was irrational based on his failure to offer an award to the Applicant, where the he had found in the Applicant's favour.

The Panel noted that whilst the solicitors for the Applicant assert that the Ombudsman rarely awards compensation in these circumstances, no evidence to support that assertion has been provided.

The Panel noted that in any event the Ombudsman retains discretion to make such awards, and on the facts, did not consider the Ombudsman's decision to refuse compensation could be said to be irrational and did not believe that these proceedings had the potential to produce real benefits to individuals other than the Applicant.

Conclusion: No Significant Wider Public Interest

### **Environmental Challenges**

PIAP/07/393

#### NATURE OF CASE

Claim by Applicant against a Council in respect of an alleged failure to make adequate provision for Gypsy and Traveller caravan sites in its local plan.

#### REPORT OF PANEL

The Panel noted that the record of the Council and its predecessor in failing to make provision for Gypsy and Traveller caravan sites had led solicitors for the Applicant to seek to have the Council's entire local plan quashed, as a means of compelling the Council to defend the proceedings and address the issue of site provision generally.

The Panel considered that the apparent failure of the Council to make provision for Gypsy and Traveller caravan sites, contrary to previous directions issued by the Secretary of State, justified the approach taken by solicitors for the Applicant and was proportionate in the circumstances.

The Panel considered that this case raises issues of significant wider public interest in that it has the potential to produce real benefits for individuals other than the applicant who are similarly affected.

Conclusion: Significant Wider Public Interest

Rating : Significant

### **Other Judicial Review Proceedings**

PIAP/07/384

#### **NATURE OF CASE**

Application for Judicial Review by the applicant against the decision of the Mental Health Review Tribunal (“the MHRT”) to deny the applicant’s solicitors access to the applicant’s medical records, where the medical member of the MHRT was allowed to see the records.

#### **REPORT OF PANEL**

The Panel expressed surprise at the referral of this case, in which the significant wider public interest appeared clear. In relation to the disclosure of documents within MRHT hearings the law had set out a balance between the requirements for fairness and the risks of adversely affecting the welfare of the patient or others, and it was important that this should be maintained and enforced where necessary.

Conclusion: Significant Wider Public Interest

Rating: Significant

### **Multi Party Actions**

PIAP/07/385

#### **NATURE OF CASE**

Claim by applicants against a manufacturer of an anti-convulsant drug under the Consumer Protection Act 1987.

#### **REPORT OF PANEL**

The Panel looked at the issue of public interest afresh. Much has occurred since the panel previously considered this case in 2005. Most significantly the Panel now has to consider public interest in the context of the new decision of the MPA Committee dated 10th May 2007. That decision, under the Funding Code Procedures, is binding on the Commission in relation to prospects of success. The Panel therefore has not sought to substitute its own views on prospects but has proceeded on the assumption that the litigation has borderline prospects.

Since the litigation is not aimed at withdrawing the drug from the market, the main benefit to be derived from the case is potential compensation (at a significant level) for certain classes of client who suffer serious harm from the drug. Most directly, there are 62 confirmed clients within the action group and approximately a further 100 not yet fully investigated. However, the Panel accepted that much larger groups could potentially be affected by the case; in particular:

- There remains potential for further clients to join the litigation prior to any cut off date the court may set
- As potential claimants are not a closed group, future claims could be brought within the UK if the current group is successful, including those with less serious injuries
- As the Product Liability Directive applies across the EU and the case may well turn on its interpretation, the potential pool of beneficiaries extends well beyond the UK. In this regard the Panel considered the information that the Directive has attracted very little interpretation to be particularly helpful and of considerable importance.

Second, the novel legal propositions being advanced in this case could, if successful, have potentially wide ramifications for users of other unsafe standard products, particularly drugs. Future potential claimants under the Consumer Protection Act would be assisted by clarification of the interpretation of the Directive, were the interpretation relied upon by the Claimants in this case accepted in relation to 'standard products'. The possibility of a standard product being 'defective' under the Directive, leading to compensation for injury caused by its side effects, but nevertheless remaining on the market, has potentially huge implications for the future marketing of such products. The Panel also accepted that resolution of the issues arising under the Congenital Disabilities (Civil Liability) Act would itself have implications beyond the current litigation.

The Panel considered further non-financial benefits. The Panel accepted that the litigation might lead to improvements in information and warnings to doctors or patients, and greater caution in prescribing the drug at issue in this case compared to other comparable drugs. It is also accepted that, if the case succeeded, there might well be an increased economic incentive for the manufacturers to address the defect by research and development. The Panel were however less persuaded that benefits such as improved counselling for pregnant women prone to epilepsy were likely to result from the case: though counselling may well be poor at present, in submissions it was mentioned that the National Institute for Health and Clinical Excellence has issued guidance intended to address these deficiencies. Compliance with such guidance is audited and monitored. If, notwithstanding the guidance, adequate counselling is not available at present, it seems inherently unlikely that this deficiency would or could practically be addressed by a drug manufacturer.

The Panel noted that the MPA committee recommended that preliminary issues be tried to resolve the legal issues as to defect, and that the Court would shortly determine whether to structure the case in that way. Although the second form of public interest in this case identified above flows particularly from the legal points that are likely to form part of the preliminary issue, the Panel's view on the extent of public interest in the case was not significantly dependant on whether there would be a trial on the preliminary issues. A preliminary issue approach would no doubt affect any future assessment of merits, likely costs and cost benefit, but those were matters for the SCU or MPA committee.

Conclusion: Significant Wider Public Interest

Rating: High

PIAP/08/400

#### NATURE OF CASE

Claim by applicant to judicially review the imposition of term in an Anti-Social Behaviour Order which prohibits him from wearing a hooded top anywhere in the borough where he lives, regardless of the climate or whether the hood is up or down.

**REPORT OF PANEL**

The majority of the Panel were concerned by the nature of the condition in the Order and the severity of the penalty for breaching it. The majority of the Panel were of the view that there is a highly questionable link between the term of the Order the applicant sought to challenge and the mischief (anti-social behaviour) that it seeks to address.

The entire Panel, having exceptionally conducted their own further investigations into the frequency with which a similar or identical conditions had been imposed, were satisfied that this was far from an isolated case.

The majority of the Panel considered that it was at least arguable that the proportionality of such conditions and the consequences of breaching them were not commensurate and the Panel were satisfied that there was a significant wider public interest in this application being funded.

Conclusion: Significant Wider Public Interest

Rating: Significant

**Other Personal Injury Claims**

PIAP/07/390

**NATURE OF CASE**

Application to defend proceedings issued by the proposed defendant to the personal injury claim, for a declaration that he is not liable for any personal injuries.

**REPORT OF PANEL**

The Panel considered that the Defendant's claim represented a clear abuse of process in seeking to deny the applicant the full limitation period in which to investigate his potential claim for damages.

The Panel considered of great importance that this attempt was resisted. Were the opponent to succeed in its application, the insurance industry as a whole would inevitably quickly become aware of this, and it would be likely that pressure would be brought to bear on potential claimants for personal injury either to waive their rights to make a claim or to agree an early settlement below the proper value of the claim.

Conclusion: Significant Wider Public Interest

Rating : High

PIAP/07/395

**NATURE OF CASE**

Claim by Applicant seeking leave to appeal to the Court of Appeal in respect of a claim for compensation for personal injury and financial losses as a result of abuse suffered as a child.

**REPORT OF PANEL**

The Panel noted that a common feature of historic child abuse claims is the emergence of late onset psychiatric symptoms and that it is awareness of these which generally

trigger the date of knowledge for the purposes of s14 of the Limitation Act 1980 (“the Act”). The Panel further noted that there are now two conflicting Court of Appeal decisions on the application of s14 of the Act in respect of such claims.

The Panel, considered that clarification of the law relating to the nature of the test to be applied in such cases had the potential to produce real benefits for those similarly affected, of which the Panel accepted there were a substantial number.

Conclusion: Significant Wider Public Interest

Rating : Significant

### **Other Proceedings**

PIAP 07/386

#### **NATURE OF CASE**

Proposed appeal to the Court of Appeal against a decision of the Administrative Court in respect of a decision by the West Yorkshire Police to extend detention in custody to seek advice from the CPS on the appropriate charges.

#### **REPORT OF PANEL**

This case had previously been before Panel, under reference PIAP/07/370, when the Panel’s view was that there was no Significant Wider Public Interest.

The Panel noted the change in circumstance since the previous referral that permission to appeal had been granted by the Court of Appeal.

However, the reasons stated in that Order indicated that the permission was based essentially on merits; in fact they expressly stated that the recent amendments to section 37(7) of the Police and Criminal Evidence Act 1984 (‘the Act’), relevant to this application, reduced the importance of the appeal for future cases. Although the Panel could appreciate the desirability of funded representation before the appellate courts that was not of itself a relevant criteria in determining whether a case had significant wider public interest.

It was noted that the guidance issued by the Director of Public Prosecutions under section 37A of the Act had been reissued in February 2007 without amendment, despite being the subject of criticism in the decision at first instance of this case. The Panel did not, however, accept that this was a relevant matter in relation to this appeal; the issue at stake was simply one of whether or not the applicant had been unlawfully detained.

Conclusion: No Significant Wider Public Interest

PIAP 07/387

#### **NATURE OF CASE**

Proposed claim against a Metropolitan Borough Council for negligence and/or breach of statutory duty in respect of alleged failure of the Social Services Department.

#### **REPORT OF PANEL**

The Panel accepted that establishing a duty of care on the part of a social services department on behalf of those in its care would be of significant wider public interest, and noted that the defence had specifically denied the existence of such a duty of care.

However, the Panel considered that the nature of the case was such that the outcome was likely to be very fact specific, and that the case appeared to have serious difficulties on its facts.

In particular, the Panel felt that Independent Social Worker's Report, which would be a key to a successful outcome, was not sufficiently helpful to the case. The report did not support the applicant on a number of important issues and, in any event, did not address the necessary Bolam test.

Whilst the Panel expressed sympathy for the applicant's position, they did not consider that this case had the potential to establish any general principle that would be of wider benefits for other users of social services.

Conclusion: No Significant Wider Public Interest

PIAP/07/389

#### NATURE OF CASE

Claim by a wheelchair user against Her Majesty's Court Service under the Disability Discrimination Act 1995 for damages and a declaration.

#### REPORT OF PANEL

The Panel noted that the applicant had not been prohibited from accessing the magistrates' court to accompany her son, who was the defendant to criminal proceedings, and her complaints related more to incidental matters that appeared to arise from failures in communication.

However, the Panel considered it unacceptable that there should be any such problems relating to access where criminal proceedings were involved.

In relation to the issues arising from this case, on a practical level, the Panel considered that a successful outcome would be likely to lead to the Defendant at least developing an internal protocol for obtaining the full necessary information from those calling the relevant office to enquire about access to the courts.

More generally, while the Defendant had broadly accepted the applicant's version of events, it was not clear that it had admitted liability in principle. The Panel considered that the publicity generated from a successful outcome against such a Defendant would emphasise that the duty to make reasonable adjustments under the Disability Discrimination Act is to be taken seriously in all cases.

Conclusion: Significant Wider Public Interest

Rating : Significant

PIAP/07/392

#### NATURE OF CASE

Claim by applicant against the Foreign and Commonwealth Office for charging and subsequently failing to refund the entry clearance fees charged for applications made for the his relatives. The applicant asserts these were not lawfully charged given the family's circumstances and the Foreign and Commonwealth Office's policy.

REPORT OF PANEL

The Panel accepted there were serious doubts about the legality of the decision and its compatibility with policy.

The Panel noted, however, that no evidence or estimates of the number of other actual or potential applicants similarly affected had been provided and so it was inevitably difficult to know the extent of the public interest in the issue (if any). Such evidence might have been obtained through a Freedom of Information Act request or through practitioners' representative organisations.

Further, in this case, the applicant had already paid the fee in question. The Panel felt this meant that any challenge to the decision to charge or failure to refund would, to a significant extent, turn on the circumstances of the applicant alone. A case of this kind might be more appropriately pursued by a complaint to the Parliamentary Ombudsman through the applicant's Member of Parliament.

Conclusion: No significant wider public interest.

PIAP/07/397

NATURE OF CASE

Claim by two applicants seeking to challenge the enforceability of a credit agreement.

REPORT OF PANEL

The Panel noted the applicants' argument that the mortgage indemnity fee (classed as a charge and contained within the credit agreement) had been misclassified and was in fact part of the credit.

The Panel considered that if that argument were to succeed, it would render like agreements unenforceable. Not only would it benefit other individuals who are similarly affected, but more importantly it would require lenders to provide more transparent information to potential borrowers that would enable them to understand the true cost of the credit being offered

Conclusion: Significant Wider Public Interest

Rating: Significant

PIAP/07/398

NATURE OF CASE

Claim for damages against the Home Office for failing to act promptly to seek and act upon on a recommendation of the applicant's release from prison by the Parole Board. The applicants' claim was based on false imprisonment, breach of Article 5 and negligence. His representatives argued the negligence limb of the claim raised a novel point of law giving rise to a significant wider public interest.

REPORT OF PANEL

The Panel had two concerns.

First, it was not persuaded, on the information available to it, that these facts arose on a regular basis.

The Panel noted that no evidence or estimates of the number of potential applicants similarly affected had been provided. Information of this kind could be sought from either practitioners' representative groups, NGO's with special expertise or by means of a Freedom of Information Act request. In the absence of it, there was no way of knowing whether the problem was a systemic one, or an aberration.

Further, the Panel was highly doubtful that a claim in negligence could succeed on the facts of this case in circumstances where neither false imprisonment nor a breach of Article 5 could be established. If the negligence limb of the claim succeeded in tandem with false imprisonment and/or Article 5, the Panel's view that the damages payable would not be significantly increased and so there would be no additional tangible benefit to the claimant or any others in a similar position.

Conclusion: No significant wider public interest.

PIAP/08/399

#### NATURE OF CASE

Wrongful birth claim by an applicant following a termination and sterilisation procedure at a private clinic where she received NHS funded treatment.

#### REPORT OF PANEL

The Panel noted the apparent difficulties of determining the identity of the appropriate defendant in cases where treatment has been provided outside the strict boundaries of NHS provision, for patients attempting to bring proceedings.

Notwithstanding the extension of the National Health Service (Clinical Negligence Scheme) Regulations 1996 in 2006 to state that any liability of a third party, engaged to perform the functions performed by a Primary Care Trust, shall be treated for the purposes of the Regulations to be the liability of the Primary Care Trust, the Primary Care Trust in this case disputes liability.

The Panel were of the view that clear guidance from the courts on who is the appropriate defendant in such cases had the potential to reduce the costs of identifying the appropriate defendant in individual cases and provide real benefits to other applicants similarly affected.

Conclusion: Significant Wider Public Interest

Rating: High

PIAP/08/401

#### NATURE OF CASE

Claim for damages under the Human Rights Act 1998 by applicant against the Police for failing to take reasonable precautions before the execution of a warrant.

#### REPORT OF PANEL

The Panel noted the similarity of the facts of this particular case with that of the ECHR case of *Keegan v UK* App No 28867/03, which held that the police had a duty to make proper enquiries before applying for a search warrant.

The Panel noted that ordinarily where the law in a particular area is settled, it would be less inclined to consider that an application would have significant wider public interest. However, in this instance, it appears that the domestic Courts have yet to consider the effect of Keegan, and the police authority in question appeared wholly unwilling to offer any justification for its actions at the pre action correspondence stage.

The Panel were of the view that when faced with an apparently intransigent police authority, the rights which should ostensibly be afforded to applicants in similar circumstances to those in Keegan, could effectively be extinguished. Although the applicant's solicitors had provided no statistical information as to the likely number of people affected, the Panel concluded there would be a great many, given the number of search warrants issued annually. They concluded that there was significant wider public interest in funding sufficiently meritorious cases until the law is understood and followed.

Conclusion: Significant Wider Public Interest

Rating: Significant

PIAP/08/402

#### NATURE OF CASE

Appeal to the House of Lords concerning the protection available to persons who are made final offers of accommodation under Part VI of the Housing Act 1996 in discharge of "the main housing duty" under section 193 Housing Act 1996.

#### REPORT OF PANEL

The Panel expressed some reservations about funding this case as the applicant has now secured suitable accommodation and will obtain no apparent personal benefit from the proceedings.

However, the Panel noted that the applicant had already secured suitable accommodation when this matter was considered by the Court of Appeal, presumably on public interest grounds, and that an Independent Funding Adjudicator had found that the prospects of success on appeal to the House of Lords in this case, are good. Further, the Panel were of the view that overturning the decision of the Court of Appeal, which it seems, has reduced the level of protection available to homeless persons seeking secure accommodation, has the potential to provide real benefits to individuals, other than the applicant.

Conclusion: Significant Wider Public Interest:

Rating: High

PIAP/08/403

#### NATURE OF CASE

Judicial Review claim by a child applicant, through her father acting as her litigation friend, against a County Council's decision to implement a policy which means the applicant will be charged for transport, provided by the Council, between her home to a day care facility.

#### REPORT OF PANEL

The Panel were of the view that, when considered in isolation, the underlying proceedings concerning the question of whether the Council can levy a charge on the applicant (where the applicant's income is less than Income Support plus 25%) for the use of a service provided by the Council, have the potential to provide real benefits to other applicant's similarly affected.

However, the Panel considered that, in assessing whether the application meets the merits test, the Regional Office will have to satisfy itself that there is no suitable alternative remedy to judicial review on the facts of this case. Specifically the Panel noted the existence of a statutory complaints procedure under s17 (3) of HASSASSA 1983, which the applicant will need to show should not be followed in this case.

The former consideration, whilst not strictly within the Panels' remit, is relevant in so far as the Panels' Report will be considered by the Commission when it revisits the original application for funding.

Conclusion: Significant Wider Public Interest

Rating: Significant

PIAP/08/404

#### NATURE OF CASE

Judicial Review claim by an applicant against the Secretary of State in respect of monies he says he is owed for work done whilst he was an inmate in prison.

#### REPORT OF PANEL

The Panel noted that District Judge Stamenkovich, in her Judgment dismissing the applicant's civil claim, accepted that the applicant had not been paid whilst other inmates had.

However, the bonus payments claimed by the applicant are discretionary in nature and the Panel was not satisfied on the information before it that the applicant has either a statutory right to claim those payments, or any rights in contract (there ostensibly being no enforceable contract between the applicant and the prison service).

Further, the Panel was not persuaded that this was a regular or widespread occurrence either at the prison in question or in the prison system generally, no evidence having been adduced to support that contention. Indeed the Panel noted that the Applicant complained that he alone had not been paid in full. Nor were the Panel satisfied and that the proceedings have the potential to produce real benefits for individuals other than the applicant.

Conclusion: No Significant Wider Public Interest

PIAP/08/405

#### NATURE OF CASE

Claim for damages pursuant to the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976

#### REPORT OF PANEL

Section 1A of the Fatal Accidents Act 1976, states that a claim for bereavement damages shall only be for the benefit of the husband or wife of the deceased person.

The Panel noted that this case raises the issue of whether a claim for bereavement damages can be brought for the benefit of the claimant, who, while she was a long term cohabitee of the deceased person, was not married to him. Solicitors for the applicant are seeking to bring the claimant within the definition of "wife" for the purposes of section 1A of the Fatal Accidents Act 1976.

The Panel were satisfied that the proceedings had the potential to extend the scope of bereavement damages to unmarried cohabitees and to produce real benefits to individuals other than the applicant, similarly affected.

Conclusion: Significant Wider Public Interest

Rating: Significant