

LEGAL AND INVESTIGATIONS

The Legal and Investigations Department carry out a number of functions within NICCY. We deal with legal cases, which we have either taken ourselves or intervened in. We provide advice and support to children and young people through our casework service. We deliver legal education to legal practitioners and legal students. We scope areas which may require investigation and provide reports to the senior management team on trends within casework and an analysis of the areas which we deal with.

Legal Cases

Over the past ten years the legal team have brought legal proceedings in relation to a number of different matters.

In 2004 we brought an application for leave to judicially review the decision of the Minister of State for Criminal Justice to introduce new legislation in respect of Anti Social behaviour orders. The Commissioner was very concerned about the impact of these orders upon children and the lack of consultation with children in advance of the proposed legislation. The Commissioner also believed that the proposed legislation was incompatible with the European Convention on Human Rights (ECHR) and the United Nations Convention on the Rights of the Child (UNCRC).

Unfortunately the court did not agree with the Commissioner and leave was refused. Among the reasons for refusing leave was the fact that to argue incompatibility with European Conventions the Commissioner had to establish that she had “victim status”. The Court held that although the Commissioner is empowered to bring proceedings under our legislation this does not of itself confer upon her a power to bring proceedings to challenge legislation or drafted legislation.

In 2007 we brought an application for leave to judicially review the decisions of the Secretary for State and the minister for State to introduce into law legislation which provided a defence of reasonable chastisement of a child to a charge of assault. We again argued incompatibility with ECHR and UNCRC and once again tried to establish that our unique position as “children’s champion” meant that we had the status necessary to bring the proceedings. Unfortunately the court did not agree and once again we were found not to have victim status and were therefore unable to proceed with the incompatibility arguments. However we did have sufficient standing to continue with the

conventional judicial review grounds we had argued as the test for standing in that regard is “sufficient interest” which we clearly had. In this respect we had argued that the decision was unreasonable and there was a legitimate expectation that the Commissioner would be consulted before a policy decision was taken by the Ministers on the question of physical punishment of children.

The judge went on to take the unusual step of considering matters as though we had established victim status even though we had not.

“Lest I am wrong, in the conclusion I had reached that the applicant is not a victim within the meaning of Section 7 of the Human Rights Act 1998 – which therefore means that I must dismiss this application in so far as it seeks to impugn Article 2 on Convention grounds and reject the case made that it is incompatible with the suggested articles of the Convention – I shall proceed to consider the position as if the applicant had established victim status”.

Unfortunately the judge went on to find against all the arguments that we had raised in the case. The matter was appealed but was not successful.

Once again it had been found that the Commissioner did not have victim status and this led us to a change of direction in respect of our legal cases. We began to concentrate more on our power to intervene in legal cases whilst we sought changes to our legislation to clarify that we were not required to establish victim status to argue breaches of the ECHR and UNCRC.

When NICCY intervene in a case we only do so if we can add value. We have internal criteria which we have to meet before decide to intervene. When we do intervene in a legal case we do so in relation to the issues in the case not on behalf of the individual child concerned. It can be the case that there is more than one child involved in a case and we are here for all children in Northern Ireland.

Interventions

The Legal and Investigations Team have intervened at each level of court in Northern Ireland as well as the UK Supreme Court and the European Court of Human Rights.

In 2008 we intervened in the case of *Re: E* UKHL 66. This case was in respect of the Holy Cross dispute and was brought by a mother and child. The case had been heard in the High Court and was then appealed to the Court of Appeal. As the appeal was unsuccessful the appellant then appealed to the House of Lords. It was at this time we intervened along with the Children's Law Centre. The essence of the appellant's case was that the police had failed to take appropriate steps to discharge their obligation under Article 3 of ECHR to protect the appellant and her daughter against the infliction upon them of inhuman and degrading treatment. It was also claimed that the police had discriminated against them in their handling of the events in which such treatment occurred. We intervened by way of written submissions and Baroness Hale commented on the very helpful written submissions from ourselves and the Children's Law Centre. However, ultimately the appeal was dismissed.

Also in 2008 we intervened in an application for judicial review brought by the Chairman of the Board of Governors of Ballyclare High School. The application concerned two matters, the school dress code and the school disciplinary policy. The applicant was seeking declarations that the adoption and application of the uniform policy and the disciplinary policy were lawful and in particular that they were not discriminatory under the Sex Discrimination (Northern Ireland) Order 1976 and not in breach of obligations under the European Convention of Human Rights, Article 8, the right to respect for private life, Article 10, the right to freedom of expression, Article 14, the right to freedom from discrimination and Article 2 of the first protocol, the right to education.

The case was instigated due to the fact that four boys at the school refused to comply with the uniform policy in relation to the length of hair.

We intervened and referred to the requirements of the United Nations Convention on the Rights of the Child and to Article 12 which provides that the voices of the child and young person should be heard in relation to matters that affect them and that their views be given appropriate weight. We also expressed concern about the schools disciplinary policy and uniform policy being introduced without taking any or proper account of the views of young people who attend the school; the disciplinary policy not allowing the voice of the young

people to be disciplined to be heard and taken into account; the content of the disciplinary policy failing in particular to give clear guidance, for instance on the segregation of pupils. The judge decided that he was satisfied that the dress and appearance code was not unlawful under either the Sex Discrimination (NI) Order 1978 or the European Convention on Human Rights. He went on to state “Such a code must be a living instrument and there must be in place appropriate mechanisms for change and for engaging the voice of the pupil and engaging all the other properly interested voices. The School Council is the vehicle through which these issues should be addressed”.

A further case which we intervened in that year was an application for judicial review of the decision of the Chief Constable to introduce tasers for use in Northern Ireland by the police. The applicant was an eight year old child. She sought an order quashing the decision of the Chief Constable. She further sought an order quashing the decision of the Northern Ireland Policing Board (the Board) that the decision to deploy tasers was an operational matter for the Chief Constable and an order quashing the decision of the Board to support the Chief Constable’s proposal to introduce tasers.

Both ourselves and the Equality Commission intervened in this matter. We again made relevant arguments around the rights of the child in this matter. However ultimately the court held that the child herself could not establish victim status with the judge stating:

“In this case no factual scenario was put forward which raised any material risk that this applicant would be exposed to the possible use of a taser. I do not accept that it can be said that this applicant was directly affected by the decision to deploy and authorise the use of tasers either on a pilot basis or permanently and I conclude, therefore, that she is not a victim for the purpose of the Human Rights Act 1998”.

The judge then went on to dismiss the application stating:

“I consider that the Board had no authority to prevent the Chief Constable from procuring and deploying tasers and that it was not in breach of any duty imposed by the Police (Northern Ireland) Act 2000. I consider that the decision to do so by the Chief Constable did not constitute a breach of any duty imposed by section 75 of the Northern Ireland Act 1998. I find that the applicant is not a victim for the purposes of section 7 of the Human Rights Act 1998 and in any event I do not consider that the procurement and deployment of tasers by the Chief Constable constituted a violation of Article 2 of the Convention.”

In 2010 the Commissioner intervened in a case before the Supreme Court. This matter concerned a child who had been suspended from school. Allegations had been made about the pupil by another pupil and the Principal decided to suspend him on a precautionary basis, pending an investigation by social services. The child was then suspended for a rolling 5 days from February to March and from March to April he was educated off site via home tuition.

The Commissioner was made aware of the case by the pupil's solicitor after it was granted leave to be heard before the Supreme Court. The Commissioner felt that the case raised an important question of principle and sought and was granted leave to intervene in the appeal. Once again NICCY intervened on behalf of the issue in the case and not on behalf of the individual child. This was particularly important in this case as we were aware that there were two children involved in this case whose rights had to be balanced.

The Commissioner was concerned that the case had got to the highest appellate court without any reference to the UNCRC. We submitted a written intervention and argued that the ad hoc arrangements for the precautionary suspensions of pupils failed to have adequate regard to the state party's international obligations with regard to the UNCRC in particular Article 3 (best interests), Article 12 (right to be heard) , Article 28(2) and 29 (right to education and development through education).

The appellant upon seeing our written intervention then adopted the contents of it into their own evidence. The judgement of the Supreme Court was delivered in July 2010, with the lead judgement being given by Sir John Dyson. It was held that precautionary suspensions are illegal, and that it therefore followed that the suspension was unlawful. He stated that he did not consider that there had been a breach of the child's right to education. Lord Phillips, Lord Rodger and Lord Brown also gave judgements and concurred with Sir John Dyson. Lady Hale also gave a judgement and indicated:

"Left to myself, I might have thought that three months out of school in the run up to important public examinations was indeed to deny him effective access to the educational facilities which the state provide for year 12 pupils. He should not have been relegated to eight hours tuition a week for six weeks. The only purpose of finding a violation of his Convention rights would be to pursue a claim for damages which could only succeed if the court were satisfied that an award were necessary to afford him just satisfaction.... I see no point therefore in pressing any doubts to a dissent, but, as a declaration is a discretionary

matter, I would prefer to make no declaration at all on this issue, the appellant having achieved just satisfaction from his declaration on the first”.

This case has now been further appealed to the ECHR and NICCY has been granted leave to intervene at that level. We have drafted a written intervention, which is currently being considered by the UK state party.

In addition NICCY has another intervention before the ECHR. This concerned a child’s right to privacy. The case concerns an alleged interference with the child’s respect of private life as confidential information was released to the media and subsequently published in local newspapers. The case also involves issues surrounding children’s rights in the juvenile justice system. The Commissioner has submitted a written intervention and has drawn the courts attention to a number of articles of the UNCRC, namely Article 3 (best interests), Article 12 (right to be heard), Article 16 (right to privacy) and Article 40 (right to dignity and respect in relation to juvenile justice matters).

The Commissioner has further drawn the Court’s attention to the United Nations adopted Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) 1985 in relation to the facts of the case. We are still awaiting an outcome of this case.

To our knowledge NICCY is the first European Children’s Commissioner to have intervened at the European Court of Human Rights.

Casework

The Legal and Investigations Department deal with enquiries from children, young people, their parents and carers about potential breaches of their rights by relevant authorities. Over the last number of years an average of 650 enquiries are dealt with each year. These enquiries encompass a wide range of issues which include, education, health provision, child protection, social welfare and others. By far the largest area is education and this includes the sub categories of special educational needs, bullying, suspension, expulsion, school transport, school placement, school closures and complaints about teachers. Of these sub categories special educational need is the largest by a considerable margin. Many enquiries are from parents who are having difficulty navigating their way through an extremely complex system on behalf of their child. The Legal and Investigations team recognised that a lack of awareness among parents of the system was

an issue and one of the Legal Officers developed a Special Education Pack which was rolled out at one of our outreach clinics which took place in a school. The response to this pack was very positive with the Principal asking for extra copies and we were then asked to attend another outreach clinic on this topic convened for a number of other schools. Due to the success of the pack we now send this out routinely to parents who approach us in relation to the special educational needs of their child.

The Legal and Investigation department have had a number of large impacts in this area for children and young people who have brought their complaint to us. Some examples of this are:

201200100

A boy with a number of diagnoses was struggling with all aspects of his education at mainstream school. As a result of this, he was bullied by a group of his peers and developed depression as a consequence. He was not in receipt of any educational support within school and the Education and Library Board (ELB) had refused a statutory assessment.

NICCY interceded in the matter and immediately convened a meeting with the relevant authorities. As a result an immediate referral for statutory assessment was made, which resulted in a recommendation for a Statement of Special Educational Needs. The parents were entirely unfamiliar with the SEN process and so were advised and assisted throughout by NICCY. When the draft Statement was produced, NICCY advised the parents and assisted them in making a number of representations regarding the provisions to the ELB, all of which were accepted.

As a result of our intervention, the boy now has a Statement of Special Educational Needs providing the support and intervention he requires. His educational placement was also reassessed and he is now thriving in a Learning Support Unit.

201200068

A boy was being so severely bullied at school that he began to self harm. His parents liaised with the school who attempted to resolve the matter without success. The bullying continued, the boy's self harm escalated and he began to express suicidal thoughts. His education also suffered as he often had to miss school and so his grades fell resulting in a change of class. NICCY facilitated a meeting with the boy, his parents and the school during which a detailed schedule was agreed facilitating the boy's return to school. He also had the opportunity to voice his concerns and experiences, something which he had not had the chance to do previously. NICCY were also able to provide the school with guidance regarding their role, their bullying policy and the implementation of same. The boy returned to school, the bullying ceased which in turn led to an end to the self harming. The boy is now doing extremely well.

201200217

NICCY were contacted by the parents of a boy who suffered from a rare disorder which meant that he required a specialist wheelchair. The boy had been referred for the required wheelchair some 19 months previously but had still not been provided with one and instead was forced to use a wheelchair which did not meet his needs. NICCY liaised with the relevant department within the health trust and were able to arrange for the boy to meet with the professional responsible for the design of his wheelchair. A bespoke wheelchair meeting the boy's needs was provided shortly thereafter.

201100140

A boy in juvenile detention suffered from very serious mental health issues and had attempted suicide on a number of occasions. The boy was shortly due to be released from detention but no transitional arrangements had been made for his care in the community. He also had nowhere to live upon his release. A number of departments and organizations were involved but none had accepted responsibility for his care once he returned to the community. Discharge meetings had taken place but had failed to resolve the matter. The boy was extremely concerned that he would be released with no home, care or support and was fearful of what he may do to himself or others if his condition remained untreated. He felt that the bodies involved were not listening to him or taking his concerns seriously. Therefore his rights to health, liberty, family, survival and development, voice and best interests were infringed.

NICCY met with the boy on several occasions and attended numerous meetings with the organizations involved. They were reminded of the boy's rights and their responsibilities to him. The boy was also able to attend part of these meetings to express his concerns and know they would be taken into account.

As a result of NICCY's intervention, a mental health assessment was arranged for the boy following his release to ensure he would receive the care he required from professionals within community services. Accommodation was also arranged for him as well as a nurse who would administer medication and stay with him for periods of the night. He was also offered a work training programme to help him develop employability skills.

201100199

A young boy was having difficulties in school as a result of his diagnosis of autism and ADHD. There was a request for a statutory assessment which was refused by the Board. NICCY gave advice to the mother regarding this and informed her of her ability to appeal this to a tribunal. The mother sought legal assistance to bring the Tribunal and the Board conceded before the hearing. The statutory assessment was carried out and the Board decided to produce a Notice in Lieu of a Statement. NICCY again advised the mother that she could appeal this decision. Again the mother sought legal assistance to bring this case. The Solicitor subsequently contacted NICCY to explain that in order to present the case properly the family would need a report from an independent educational psychologist who could counter the report of the Board educational psychologist. They requested that NICCY fund the instruction of the independent expert and to pay for her report and her attendance before the Tribunal to give evidence. NICCY agreed to this as it met our criteria for funding. The report was obtained and concluded that Michael required a statement of special educational needs and needed to be placed in a learning support unit within a mainstream school. Using this evidence the family were able to successfully persuade the Tribunal that the boy needed a statement and one was directed. The young boy was subsequently placed in a learning support unit in a mainstream school. His mother contacted us subsequently to ask us for further assistance for him as problem had arisen between him and his peers and his mother felt that the school was not dealing with the issue appropriately. NICCY were able to raise all of the boy's concerns with the school who agreed to work to resolve the issues.

201100260

NICCY assisted a young girl who suffered from a fluctuating illness which caused her to miss a significant amount of Years 11 and 12 at school. As a result of her missing so much school it was agreed that she would not sit her exams at the end of her Year 12 but that she would repeat Year 12 in the next academic year and complete her exams then. However, due to a recurrence of her illness she was unable to start back to school to re-sit Year 12. By this time she was 16. Her parents requested that the Board provide her with home tuition. This was refused by the Board as they had a policy that they only offered home tuition to a pupil who was over 16, and hence over compulsory school age, if they were completing a “post 16” course of study. As this young person was completing GCSE’s this was considered to be a “pre 16” course and therefore the Board felt she was ineligible. NICCY sought and obtained an expert legal opinion from a Barrister who confirmed that the young girl would have a cause of action against the Board. The parents entered into negotiations with the School and the Board on the strength of the legal opinion that NICCY provided and the Board conceded and offered the young person home tuition to allow her to complete her Year 12 studies. NICCY also assisted the parent to bring various complaints about the school and the Education and Library Board which resulted in other matters being resolved.

201100197

NICCY were contacted by the mother of a young boy who was in primary school. He had a diagnosis of autism and had been suspended from school as a result of an incident in the classroom. The school had initially suspended him for 5 days but they were refusing to allow the boy to return to school after the 5 days expired as they indicated that they needed to conduct a risk assessment. The suspension was therefore extended for period of 5 days at a time. During this time NICCY entered into negotiations with the school and attended various meetings with the parents, the school and the Education and Library Board to try to resolve the situation. The law only allows a young person to be suspended for a maximum of 45 days in any one academic year. NICCY were concerned that this deadline was looming so we advised the mother that it would be prudent for her to instruct a solicitor. The Solicitor issued pre-action proceedings and the school conceded and agreed that the boy could be reintegrated. The Solicitor then passed the case back to NICCY to allow us to ensure the implementation of the agreement. There were various difficulties associated with the boy’s reintegration and NICCY assisted the mother in resolving them.