

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 09/03/05

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

AN APPLICATION BY PF FOR JUDICIAL REVIEW OF A DECISION BY
THE DEPARTMENT OF HEALTH, SOCIAL SERVICES AND PUBLIC
SAFETY

GIRVAN J

[1] In this judicial review application the applicant PF seeks an order quashing the decision of the Department of Health, Social Services and Public Safety ("the Department") to place her on the Department's Pre-employment Consultancy Services Register ("the PECS Register"). This decision was made on 2 March 2004 and communicated to the applicant on 3 March 2004. The Register was established as a result of the Sheridan Report into abuse of children and young people at Kincora Children's Home. The purpose is to help organisations working with children and adults with learning disabilities to make the right choices when appointing staff and volunteers. It provides information about people whose activities have come to light as a result of a conviction for a relevant offence or as a result of a formal report to the Department which has led to the person being placed on the PECS Register. Such reports arise because a reporting employer has notified the Department that the individual concerned has by his or her behaviour at work put children or vulnerable adults at risk of harm and the reporting employer considers that such behaviour would indicate that the individual concerned would not be suitable for such work in the future.

[2] In the present case Down Lisburn Trust made a report to the Department on 20 March 2003 arising out of an alleged incident involving the applicant and a vulnerable adult with learning difficulties which allegedly occurred on 6 April 2001 and which was allegedly witnessed by a catering assistant. Patrick McGrew, Head of Child Protection Branch within the Child Care Policy Directorate, made the decision to place her on the PECS Register.

[3] The applicant challenges the decision on various grounds contending that the decision was unfairly reached and that it was Wednesbury unreasonable. It is alleged that there was insufficient inquiry and the decision maker misinterpreted the evidence.

[4] Mr Maguire at the outset to the application raised a preliminary issue. He contended that in view of the legislation contained in the Protection of Children and Vulnerable Adults (Northern Ireland) Order 2003 the judicial review application has become academic.

[5] Part III of the 2003 Order deals with the protection of vulnerable adults. In Article 35, which will come into force on 1 April 2005, the Department is required to keep a list of individuals who are considered unsuitable to work with vulnerable adults ("the Statutory Register"). An individual shall not be included in the Statutory Register except in accordance with Part III. The Department may at any time remove an individual from the Statutory Register if it is satisfied that the individual should not have been involved in it. Article 42 provides for a right to appeal against inclusion in the list to a Social Care Tribunal and, with the leave of the Tribunal, against a decision of the Department not to remove him or her from the Statutory Register. The Tribunal must allow an appeal and direct an individual's removal from the Statutory Register if it is not satisfied that the individual was guilty of misconduct which harmed or placed at risk of harm a vulnerable adult and that the individual is unsuitable to work with vulnerable adults.

[6] In the present case it is necessary to consider carefully the effect of Article 41 and the transitional provisions contained in Article 49 of the Order. Under Article 41 where a person is included in the PECS Register immediately before the commencement of Article 35 as a result of a reference made to the Department and any of the conditions set out in Article 36(2) (a) – (c) applies the Department is required to invite observations from the individual and from the referring organisation. It will include the individual in the list under Article 35 if, after considering the information submitted with the reference, the observations and any other relevant information, it considers the individual to be guilty of misconduct which harmed a vulnerable adult and that the individual is unsuitable to work with vulnerable adults. Under Article 49(1), which contains the transitional provisions where an individual has been referred to the Department for inclusion in the PECS Register and the reference has not been determined at the commencement of Article 35 and any of the conditions mentioned at para (2) of that Article was fulfilled in relation to the Register, then Article 35 applies as if the reference had been a reference made by the provider under Article 35(1).

[7] The applicant is on the PECS Register and she falls thus within Article 41(1). Article 41(2) and (3) applies. That provision is in force and the Department has invited observations. She cannot be removed from the Register unless the court quashes the decision to put her on the Register. If it does not quash the decision, come 1 April 2005, the Department must decide if she is to go on the statutory Register. If she is put on the Statutory Register she has a right to appeal the decision. If on the other hand the court were to quash the decision she would not be on the PECS Register pending a determination by the Department of the reference by the Trust in its report submitted to the Department on 20 March 2003. If the decision were quashed then Article 49(1) would come into play. The applicant would be an individual within Article 49(1)(a). The condition in Article 36(1)(b) would be fulfilled and the reference in the meantime would still fall to be determined, bringing the case thus within Article 49(1)(b). The effect would thus be that the reference by the Trust on 20 March 2003 would fall to be treated as a pending reference under Article 36(1). If the Department considers that it may be appropriate to include the worker in the Article 35 Register (and that would inevitably be the view of the Department), pending determination the applicant would be provisionally included in the list under Article 36(4)(b).

[8] It follows from this analysis that even if the decision to include the applicant on the PECS Register were quashed no tangible benefit would accrue to the applicant because the Department would have to decide afresh the Trust's original report which would *ex hypothesi* remain to be determined. In the meantime it would inevitably be the case that the applicant would go onto the provisional list. The Department would then have to decide whether she should go onto the Statutory Register with the applicant having a right of appeal if it so decides. The quashing of the decision would thus gain nothing for the applicant except temporarily in the period between now and 1 April before the provisional listing would become effective. The relief, however, would be illusory and on that basis I am satisfied that the application is academic and no meaningful relief could be granted.