

# Legal update

## Negligence/Human rights

### Jain v Trent Strategic Health Authority

House of Lords: 21 January 2009

On the 29<sup>th</sup> October the House of Lords heard the appeal by the applicant J and deliberated upon whether a duty of care was owed to the proprietor of a private care home by a health authority carrying out inspections under the Registered Homes Act 1984 (RHA) (now the Care Standards Act 2000) when making an application to the Magistrates Court to cancel the registration of that care home. In doing so the House of Lords had to consider whether a public body had any duty of care to a body adversely affected by the exercise of its statutory obligations.

#### The Facts of the Case

In 1998 the Health Authority had inspected J's care home and found it deficient in a number of respects such that its residents were being put at risk. Following the inspection, the Health Authority applied on an *ex parte* basis to the Magistrates Court under s30 of the RHA for an urgent cancellation of J's registration. Consequently, the care home was closed and the residents were removed.

J appealed to the Registered Homes Tribunal. There was no mechanism for the appeal to be expedited and it was not heard for four months, coming before the Tribunal in February 1999. The appeal was successful, the Tribunal found that the Health Authority had made unsubstantiated claims against J in a number of respects and untrue suggestions that J had failed to comply with a number of requirements under the Act. Whilst there was some substance to some of the Health Authority's claims none warranted the immediate closure of the home. Further, there was no justification for the Health Authority's decision to make their application for the cancellation of registration without notice to J. The Tribunal re-instated the registration of J's home but, by then, J's business was not viable. J sued the Health Authority in negligence for his loss.

#### The Judgment

Their Lordships held that an authority making an application to a Magistrates Court under s30 of the RHA or some other application, the effect of which is to cancel a nursing home's registration does not owe a common law duty of care to the nursing home proprietor. The statutory power exercised by an authority in such circumstances is intended to protect the residents of the home and the authority exercising that power owes only a duty of care to the residents of that home.

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If a duty of care were also owed to the proprietors of a nursing home, the authority would face a conflict of interest which would undermine the mischief which the statute was designed to address. This reasoning had been applied previously by the courts in a long line of cases involving both personal injury and economic loss concerning the duties of local authorities for example where parents of children removed from their care on questionable grounds had sued for damages.

Their Lordships also held that the protection of parties to litigation from damage caused to them by the litigation or by orders made in the course of litigation must depend on the control of the litigation by the court in charge of it and the rules and procedures under which it is conducted and not on the imposition of a duty of care between litigants.

The appeal was dismissed. J will have to go to the European Court of Human Rights to obtain any redress.

### **The Human Rights Act 1998**

The House of Lords reluctantly held it had no jurisdiction to provide J with a remedy under the HRA in this case because the HRA was not in force until October 2000, after J's cause of action arose. Nevertheless it noted that Article 1 of the First Protocol of the European Convention on Human Rights: the right to the peaceful enjoyment of possessions and Article 6 of the ECHR: the right to a fair and public hearing could be engaged in cases where the cause of action arose after October 2000. Their Lordships commented that Article 1 is a qualified right which may be interfered with where that interference is reasonable and proportionate and in the public interest. The right can be limited where necessary to safeguard vulnerable people, such as those requiring accommodation and care in a nursing home. Article 6 is relevant where a person has not been given notice of a hearing which may result in him being deprived of his possessions, although their Lordships felt that there would be occasions where an emergency application made without notice to protect vulnerable people in immediate risk of harm would be justified.

Their Lordships commented that applications made to the Magistrates Court under s30 of the RHA were particularly prejudicial to the Article 6 rights of respondents since, unlike *ex parte* applications made to the High Court, the Magistrates could not afford the respondent the right to seek compensation if he had suffered a loss where the Order should not have been made and because the respondent had no recourse to an immediate appeal against the decision. In addition, applicants to the High Court owed the Court a duty to provide full and frank disclosure in relation to the facts and grounds of the application and failure to do so could lead to an immediate discharge of the Order and an Order for indemnity costs being made against the applicant, whereas it was unclear whether such a duty of disclosure existed in relation to an application before the Magistrates. Even if it did, the Magistrates had none of the High Court's powers to impose sanctions upon an applicant in breach of that duty.

### **Post Script**

Lord Scott of Foscote recommended that amendments should be made to the application procedure for cancellation of a nursing home's registration so that such applications could be put on the same footing as applications for injunctions made before the High Court, including a right to a swift appeal. Without such changes he was concerned that human right breaches noted above would occur.

## Comment

This judgment is of significance to both health care and local government bodies for two reasons. Firstly it assists public authorities who have a statutory duty to take executive decisions such as commissioning services and are thereby empowered to supervise and regulate their providers can continue to focus their attention upon the quality and safety of their provider services without fearing that they may be held liable to providers affected by their actions.

There is a warning note though – the advent of the Human Rights Act means that such decisions, which will breach the rights of those adversely affected, are necessary and proportionate. This applies both in terms of the decision itself but also in terms of the opportunity afforded to those affected to make representations against such decisions. Even in the case of ex parte applications the House of Lords has indicated that the authority owes a duty to be transparent about its decision and may have to allow some representation even on short notice. In addition their Lordships advocated that changes to the current procedure should be made.

A similar issue regarding incompatibility of the Care Standards Act shows this in action. In R v Secretary of State for Health ex parte Wright (House of Lords – 21 January 2009) registered nurses were provisionally placed unilaterally on a list preventing them from working as carers of vulnerable adults. The effect of such listing was to deprive the care worker from employment as a care worker or any other form of employment in that field. It took up to nine months for the determination whether the listing should be upheld during which time the workers had not worked and had also had a great stigma attached to them.

The House of Lords held there was no process sufficient under s82(4)(b) Care Standards Act sufficient to balance the needs of the public against the breach of the workers' human rights. Accordingly a declaration of incompatibility was made.

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**581-2/02/09  
Weightmans LLP  
February 2009**

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