



Welcome to the February 2011 edition of Fife Law News. This newsletter has been sent to you as a supporter of Fife Law Centre.

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## **Right to education challenge against local authority unsuccessful**

### ***A v Essex County Council [2010] UKSC 33***

In this case the claimant, "A", brought a claim for damages against the local authority responsible for his educational needs on the grounds that they had failed to provide him with the minimum education he was entitled to under Article 2 of Protocol 1 of the Convention on Human Rights.



Article 2 of Protocol 1 states that “No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

A, who was attending a local special needs school, suffered from epilepsy which caused him to have up to 15 fits a day. He was also autistic and had significant learning difficulties. As a result of his medical problems his behaviour became more than the school was equipped to handle. In January 2002 he was withdrawn from the school in order for an assessment of his educational needs to be carried out by the local authority.

The assessment and subsequent placement of A in a suitable specialist residential school took eighteen months to finalise. During this period A’s family struggled to cope with the constant care that he needed.

A claimed that his Article 2 Protocol 1 right to education was violated as he was “denied an effective and meaningful” education between January 2002 and July 2003.

The case went before the Supreme Court where it was held that there was no breach of A's human rights as the "right under article 2 of the First Protocol was to effective access without discrimination to the educational facilities which the state provided; that, consequently, a child with special educational needs was only denied that right if he was denied access to whatever educational facilities the state provided".

As there were no alternative education facilities capable of facilitating the extreme medical difficulties of A during this time, the local authority were not in breach of denying him an education.

The policy behind the decision in favour of the local authority was based upon the "scarcity of resources" and the fact that "the claimant was ultimately provided with high quality education at considerable public cost".

To view the case in full please click [here](#)

*A v Essex County Council [2010] UKSC 33*

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## **Failed Asylum Seeker Wins Right to Remain in UK**

***ZH (Tanzania) (F) v Secretary of State for the Home Department 2011 [UKSC] 4***



The Supreme Court has recently ruled that a failed asylum seeker from Tanzania was nevertheless allowed to stay in the UK. The success of ZH's appeal was due to the British citizenship of her children and their right to live in the UK but also to have a relationship with both of their parents under Article 8 of the European Convention on Human Rights (right to respect for private and family life).

The woman, anonymously known as ZH, had two children with a British father who had recently been diagnosed with HIV. Both children were born while ZH's final immigration status had yet to be determined. Moreover, her requests for asylum had been denied several times and it was brought to the attention of the court that ZH had made false claims, including portraying her nationality as Somalian, in her attempts to gain the right to reside in the UK.

In deciding the case the Supreme Court took into consideration in “what circumstances is it permissible to remove or deport a non-citizen parent where the effect will be that a child who is a citizen of the United Kingdom will also have to leave?”. In answering this question the court took factors such as the social and educational implications for the children involved.

The approach of the court challenged the way immigration cases are decided as Baroness Hale stated that “Immigration authorities must be prepared at least to consider hearing directly from a child who wishes to express a view and who is old enough to do so.”

The court acknowledged that “the best interests of the child must be a primary consideration. This means that they must be considered first”. This extends and strengthens the rights of children within UK law and has been welcomed by groups advocating children’s rights such as The Refugee Children’s Rights Project, which commentated that “The court has now set in stone the need to recognise the rights of the child and has sought to address the injustice done to children when immigration control is put before their welfare and needs”.

There are fears however, that the judgement will be abused by asylum seekers who would otherwise have been deported. Reservations, for example, were voiced by the Immigration Minister, who revealed that he was “disappointed” in the ruling.

To view the judgement in full please click [here](#)

*ZH (Tanzania) (F) v Secretary of State for the Home Department 2011 [UKSC] 4*

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## **Flexible working and paternity leave to be extended in April**

### **Employment Law Update**

Further changes to the current employment law regime, which are expected to further enhance flexibility in the workplace, are due to come into force this April.



The first of these, which will come into effect on 3 April 2011, concerns paternity leave. As of 3 April fathers of children due on or after this date will potentially be allowed up to 26 weeks additional paternity leave (APL). The period of APL will depend on how soon the child's mother returns to work *before* using her full statutory maternity leave entitlement. This right to APL will not only apply to employees who are the child's biological father but also those who have been matched for adoption or are the spouse or partner of the mother or adopter (and can therefore apply to members of either sex).

These new provisions significantly extend the current right to paternity leave which allows for 1-2 weeks leave to be taken within 8 weeks of the birth of the child. The change will also provide flexibility to families where, for example, the mother is the higher earner and it may be more economically desirable for her to return to work sooner if use can be made of this new extended right to APL.

Employers will have to give consideration to the potential impact this additional right may have upon their business and will also have to try to ensure that employees entitled to the protection of maternity or paternity provisions are treated fairly and equally so as to avoid any challenges of discrimination.



From 3 April 2011 there will also be a small increase in the statutory rate for maternity, paternity and adoption leave from £124.88 to £128.73 per week.

A further change, which will take effect as of 6 April 2011, concerns the right to request flexible working hours. This will be extended to parents who have children under the age of 18. Currently this right is limited to employees who have children under the age of 17 (18 if the child is disabled) or employees who are carers for adults.

It is understood that plans are in the pipeline to extend the right for flexible working to *all* employees and it is expected that the Government will review its position on this later on in the year.

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## **Racial abuse by third party – employer's actions called into question by employee**

### ***Conteh v Parking Partners Ltd UKEAST/0288/10/SM***

The Claimant in this case was employed as a car park attendant. A dispute arose between the Claimant and a customer of the car park involving a problem with the machine which usually validated tickets but was not working on this occasion. An incident then ensued

which resulted in the Claimant alleging that she was subjected to racial abuse by the customer, who worked for one of the organisations that used the car park in question.



The Claimant reported the incident to her employers. Her employers looked at the CCTV footage showing the incident and tried to put in place procedures that would ensure such incidents did not occur in future. However, the employers decided against speaking to managers in the organisation the customer worked for in case they insisted that the Claimant be removed from her post at the car park.

The Claimant then took her complaint to the Employment Tribunal alleging that the inaction on the part of her employers was racially discriminatory and that her employers' handling of the situation had created an environment which amounted to harassment under the (now repealed) s3A of the Race Relations Act 1976 (now covered by provisions under the new Equality Act 2010).

The Employment Tribunal and later the Employment Appeal Tribunal both came to the conclusion that the employer's actions (or rather inaction) did not constitute racial discrimination or harassment. Both Tribunals were satisfied that the employer would have taken the same steps in such a situation regardless of the employee's race. While the Tribunal was clear in its view that complaints of racial abuse were to be taken seriously as matters of "utmost gravity" in this case the reason for the employer not taking action was not in any way concerned with the employee's race but rather due to the fact that they did not wish to "rock the boat" with the organisation whose employees were customers of the car park. In fact the Tribunal took the view that instead of creating an environment that amounted to harassment the employer had gone some way towards making it better by acting promptly in reducing the extent to which the environment was humiliating and offensive.

The Claimant's claims of direct discrimination on the ground of race and racial harassment were accordingly dismissed.

*Conteh v Parking Partners Ltd UKEAST/0288/10/SM*

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