

Care Homes Briefing

Solicitors

Number 60

The Decision in *Wright* and Operation of the POVA List

The Court of Appeal has recently made an important decision in respect of the administration of the Protection of Vulnerable Adults (POVA) list. The claimants in the case of *Wright*¹ were care workers provisionally included on the POVA list following references from their former employers. They were successful in their contention that, prior to provisional inclusion on the list, care workers referred to the Secretary of State should have the opportunity to make representations and that the system operating prior to *Wright* requires amendment.

The recent hearing was an appeal by the Secretary of State, who maintains the POVA list, against the initial decision of the High Court in November 2006, which found for the care workers. The Court of Appeal was required to consider the difficult balance to be struck between the rights of care workers and the protection of those vulnerable individuals in their care. The Court heard that approximately 900,000 care workers fall within the scope of the POVA scheme and that there are currently around 200 referrals per month. The decision of the Court should ensure a fairer procedure for the administration of the list in the future.

The POVA list

The Care Standards Act 2000 provides for references to be made to the Secretary of State by those providing care for vulnerable adults in respect of care workers who have been dismissed, suspended or moved to non-care posts as

a result of misconduct that harmed or placed at risk a vulnerable adult.

The Secretary of State is then required to register those care workers provisionally on the POVA list if, on the evidence submitted with the reference, she is satisfied that it might be appropriate. A decision is subsequently made, following representations from both the care worker and organisation that made the referral, as to whether the provisional listing should be upheld.

Between July 2004 and September 2006 around one quarter of referred care workers were provisionally listed by the Secretary of State. Any individual registered on the POVA list will be unable to obtain employment caring for vulnerable adults as to do so would be unlawful.

The decision in *Wright*

As a result of their inclusion on the POVA list, the claimant nurses were unable to obtain employment and suffered consequential financial hardship. They sought judicial review of the Secretary of State's decision to list them provisionally claiming that the statutory scheme infringed their human rights to a fair trial and to respect for private and family life.

The High Court initially found for the claimants and ruled that the necessity for the Secretary of State to provisionally add individuals to the list before giving them the opportunity to make any submissions was

¹ *R (the application of Wright and others) v Secretary of State for Health and another* [2007] All ER (D) 361 (Oct)

incompatible with the claimants' human rights. The Secretary of State appealed.

The Court of Appeal allowed the appeal and held that the statutory scheme did not contravene care workers' rights, but that the wording of the Act required an alternative interpretation and therefore the administration of the list required modification. The Court stated that, in the future, the Secretary of State must give care workers the right to make representations before the provisional listing decision unless she reasonably considers that the resultant delay would place a vulnerable adult at risk of harm.

The Implications of the Decision

Care workers will now have the opportunity to make representations to the Secretary of State before they are

provisionally placed on the list and subject to a compulsory ban. This is a welcome change as the previous regime exposed workers to a high degree of vulnerability from referrals resulting from mistaken, malicious or otherwise spurious complaints against them. The practical administration of the scheme will now need to be reviewed by the Secretary of State and altered so that in the future it is compliant with the decision in *Wright*.

It will be of some comfort to care workers to know that before they are provisionally listed and are then inevitably unable to obtain employment in the field in which they are trained they will at least have the opportunity, in all but the most serious and urgent cases, to put their side of the story across.

James Atkins
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November 2007

Government Announces New Regulator

The government formally announced in the Queen's speech on 6th November the creation of a new regulator, the Care Quality Commission. The regulator will be established via the proposed Health & Social Care Bill and will have powers to regulate health and social services provision. The aim is to create a single inspectorate to regulate the NHS, private clinics, social care services and mental health establishments with the aim of driving up the standard of healthcare and social services.

The Mental Capacity Act 2005-Plugging the Bournemouth Gap

The Dept of Health have announced that the Deprivation of Liberty Safeguards will be implemented on 1 April 2009. Guidance on this, which is aimed at Directors of Adult Social Services and Chief Executives of NHS Trusts, has just been published inviting local Mental Capacity Act implementation networks to include work on this issue and its implementation.

The Dept guidance is available at:

<http://www.dh.gov.uk/en/Policyandguidance/SocialCare/Deliveringadultsocialcare/MentalCapacity/MentalCapacityAct2005/index.htm>