CASE STUDY: LAW CENTRE FOR NORTHERN IRELAND

LITIGATION IN RESPECT OF RESETTLEMENT INTO THE COMMUNITY (MUCKAMORE ABBEY)

ANGELA MATTHEWS[1] 2015

BACKGROUND

The Law Centre (NI) is a not-for-profit agency that works to advance social welfare rights in Northern Ireland. The centre promotes social justice and provides specialist legal support to organisations and disadvantaged individuals, delivering legal services in community care, employment, immigration, social security and mental health as well as providing advice, training, information, communications, publications and policy development.

Muckamore Abbey is a hospital in Northern Ireland that provides inpatient, assessment and treatment facilities for people with *'severe learning disabilities and mental health needs, forensic needs or challenging behaviour'.* In around 2010, the Law Centre was approached by members of a user group of patients resident in Muckamore Abbey Hospital concerned that some voluntary patients had been living in the hospital for more than decade with no apparent attempts to resettle them in the community or review their situation.

The mental health, legal and policy units in the Law Centre worked together closely on this issue along with other non-governmental organisations (NGOs) in Northern Ireland. The activism of the user group, support of the law centre advice and commitments by the Northern Ireland government to resettle all long-stay patients in the community all contributed to a growing momentum in favour of change.

In around 2010, the Law Centre, working together with the Muckamore Abbey Hospital user group Tell It Like It Is (TILIS), identified a number of potential test cases to bring forward strategic litigation on this issue. One of these was the case of Mr E, a resident of Muckamore Abbey since 1997 and a voluntary patient since 2000. Mr E had made a request to be resettled in the community in 2009, and at the time proceedings were brought this request had not been granted.

POLICY AND LEGISLATION

The legal arguments in support of a right for patients to be assessed and resettled in the community were based on a series of government papers and publications dating from 1978. The documents relied upon included:

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- **A 1997 government strategy that stated that provision should be made to ensure that no one remains in hospital unduly on completion of their treatment through lack of alternative community care;**
- **A 2004 regional strategy that contained a commitment that by 2010 all people with learning disabilities living in long-stay hospitals should be able to relocate to appropriate and supportive community accommodation;**
- **A 2005 report that proposed that by June 2011 all people living in a learning-disability hospital should be relocated to the community; and**
- **The Programme for Government of the Northern Ireland Executive 2008-2011 that stated that by 2013 anyone with a learning disability is promptly and suitably treated in the community and no one remains unnecessarily in hospital.**

These papers and strategies were relied upon to assert that there was a legitimate expectation that patient's needs would be assessed and reviewed and that if a community placement was appropriate that it would be provided. An argument was forwarded that at the time a patient's status changed to that of a voluntary patient, there was a duty on the health trust to review their needs and consider community resettlement.

Article 8 of the European Convention of Human Rights (ECHR) provides for a right to respect for private and family life, home and correspondence without interference save as is in accordance with the law and necessary in a democratic society and was relied upon in support of a right to resettlement along with Article 14 of the ECHR, which prohibits discrimination on the grounds of disability.

STRATEGIC IMPORTANCE OF THE ISSUE

The personal importance of the issue for patients was rehearsed in the evidence given in the case. Living in a hospital setting, patients enjoyed very limited access to personal space, were reliant on routines imposed upon them by the trust and had limited opportunity to develop personal relationships.

While the Application for a Judicial Review of the failure to resettle Mr E was specific to the facts of his case, it reflected the broad issues faced by a number of other patients detained under mental health legislation. The strategic significance of the case was highlighted by the fact that other judicial review applications brought forward by the Law Centre NI were placed on hold pending the judgement in Mr E's case.

PRIOR TO THE LITIGATION

The Law Centre had a long history of activism in relation to social justice issues and a track record of working with other NGOs in doing so. Through its policy work, it has significant experience of engaging with the trust and other public authorities and policy engagement with government.

While there were other patients in the same position as Mr E, his case was brought forward as a test case due to the length of time he had spent in hospital. Mr E was capable of giving instructions, was eligible for publicly funded legal representation, and would not therefore be at risk of having to pay the costs of the health authorities in the event that the litigation was unsuccessful. At an early stage, it was alleged that Mr E was not entitled to legal aid, due to unspent social security benefits but this determination was successfully appealed.

Proceedings were issued in 2011 by way of a judicial review of the assessment and resettlement of Mr E into the community. The proceedings, known as JR 47 were heard by Mr Justice McCloskey in the Northern Ireland High Court and the Law Centre acted as Mr E's solicitor and a barrister was instructed on Mr E's behalf.

THE LITIGATION AND JUDGEMENTS

At the date of the commencement of the litigation, at the age of 48, Mr E continued to reside at Muckamore Abbey Hospital, more than 11 years after his resettlement in the community was first theoretically possible.

On behalf of Mr E it was argued that when his status was converted to that of voluntary patient, a statutory obligation to assess his needs arose and that the trust had failed to discharge that duty. It was further argued that there was a positive duty on the trust pursuant to Article 8 of the European Convention on Human Rights to provide Mr E with a home in the community; that Mr E was the victim of discriminatory practice and that Mr E had a legitimate expectation that he would be resettled in the community. All grounds of Mr E's application were resisted by the Respondent, who argued that Mr E had not established a need to be resettled and that, in any event, and that the Respondent were entitled to take into account resources in making decisions about resettlement.

In the course of the litigation, the court permitted a written intervention by the Mental Disability Advocacy Centre, an international human rights organisation with expertise in intellectual and psycho-social disabilities. The written submission referenced Article 19 of the United Nations' Convention on the Rights of Persons with Disabilities, which provides that *'persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement'.*

Disappointingly, Mr E's application was dismissed on all grounds by Judgement of Mr Justice McCloskey in May 2011. He held that there was no duty to assess, and assessment was a discretionary matter for relevant authorities. At the end of the litigation, the health trust had made an offer to resettle Mr E in the community, but the dismissal of his application meant that no right of assessment or resettlement would be extended to any other patients.

Despite the fact that his personal case had been resolved, Mr E appealed the decision of Mr Justice McCloskey and was granted legal aid to bring the appeal. The appeal was based on a number of factors including the existence of guidance that was helpful to the Applicant's case that had not been put before the trial judge. Whilst the guidance does not have legal status it suggested that there was a duty on authorities to assess the care needs of any person appearing to be in need of community care services and that the authorities must decide, in light of the assessment, whether they should provide or arrange for the provision of any services.

The Northern Ireland Court of Appeal heard the appeal in June 2012. On the basis that the appeal relied on matters that had not been considered in the original application, the appeal was granted and the matter referred back to Mr Justice McCloskey to determine Mr E's Application in light of the new guidance for fresh consideration. At this stage, some amendments were made to the application to take account of the new guidance and to reflect the position that, having been resettled, Mr E was no longer seeking any personal relief but a judgement on behalf of the other potential beneficiaries of community care.

On the second hearing before Mr Justice McCloskey in 2013, with the benefit of the previously unpleaded guidance, Mr E's application was successful. The Judge held that there was an implied duty to assess under Article 15 of the Health and Personal Social Services (NI) Order 1972 and to develop a care plan and that the outcome of such assessment in Mr E's case gave rise to a duty which the Respondent failed to discharge.

The Judge further held that the delay (of almost five years in Mr E's case) between the decision to resettle and when resettlement took place was so excessive as to be unlawful. Mr Justice McCloskey explicitly considered whether it was appropriate to grant declaratory relief, given the purely strategic nature of the litigation, stating:

> *'this litigation has, in essence, been converted into abstract public interest proceedings … gave some consideration to whether it was appropriate to grant declaratory relief in the circumstances'.*

Determining that declaratory relief was appropriate, Mr Justice McCloskey made a declaration that there was an implied duty to assess and that where an assessment has been carried out that there is a duty to provide the assessed social care benefit within a reasonable period of time.

The ultimate outcome of JR 47 was therefore an emphatic victory for Mr E and a clear judgement which encompassed the scope of all voluntarily accommodated patients wishing to be resettled in the community.

FOLLOW UP

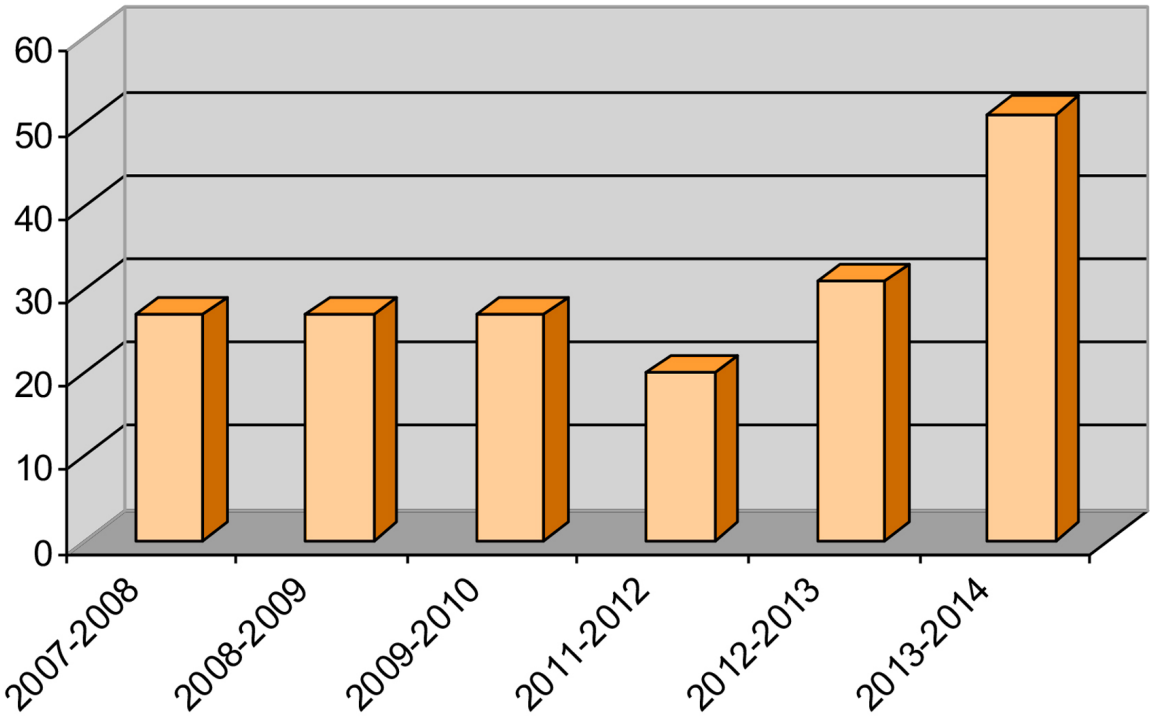
The Law Centre engaged in a significant amount of follow-up on foot of the judgement in JR 47. In the first instance, there was significant engagement with other patients whose litigation had been held pending the outcome of JR 47 and many of these patients were resettled in the community in the immediate aftermath of the judgement.

The Law Centre participated in a round-table event with the Older People's Commissioner in Northern Ireland to discuss and promote awareness of the judgement. Information sessions relating to the judgement were held in Muckamore Abbey Hospital and the Law Centre engaged with media and press outlets to publicise the judgement and its effect. An article was published on the litigation in 'The Writ', the magazine of the Law Society of Northern Ireland and letters with copies of the judgement were issued to the Chief Executives of all health trusts in Northern Ireland. Of particular importance was the follow-up engagement with the user group and the development of accessible literature to ensure that the import of the judgement was communicated to the individuals most affected by it.

OUTCOME / STRATEGIC IMPACT

The unequivocal terms of the judgement resulted in immediate relief for those long-stay residents that had pending applications with the result that they were resettled in community placements. Figures provided by the Law Centre and represented in the graph below illustrate that by the year 2013-2014; there was almost a 100 per cent increase in residents being resettled in the community than had previously been the case before the litigation, demonstrating a significant and immediate impact of the judgement.

RE-SETTLEMENTS IN COMMUNITY PLACEMENT BY YEAR



Source – Law Centre for Northern Ireland (figures for 2007-2010 are average figures for the entire period)

Five further pending cases were settled immediately on the back of the successful litigation and further negotiation resulted in all cases being settled. The Northern Ireland Government also published a new government commitment that by March 2015 all people in long-stay hospital would not have the hospital as a permanent address, would be promptly and suitably treated in the community and that no one will remain unnecessarily in hospital. While it is not believed that this target has yet been achieved, the Law Centre believe that substantial progress has been made.

REFLECTIONS

JR 47 was ultimately resoundingly successful in litigation terms but only because there was the ability to bring an appeal of the original unsuccessful judgement. In that respect, the case amply demonstrates the importance of resourcing strategic litigation to its conclusion in the appellate courts.

One of the clear lessons that arises from this (and other strategic litigation) is that the identity of the party bringing the litigation and the costs protection issue is critical in bringing public interest litigation. As Mr E received legal aid he was not at risk of having to pay the costs of the other litigants if his application was unsuccessful, which was initially the case. In common with other strategic litigation, Mr E's case could not and would not have been brought without Mr E being protected from the effect of an adverse costs judgement against him.

Mr E's application showcases effectively that the ability to bring litigation is an extremely important tool in securing social change, even where sophisticated policy advocacy has already been brought to bear on the subject. The ability to bring and sustain a legal challenge resulted in an outcome that may never have been achieved through policy advocacy alone. It is also important to recognise that the policy and casework function of the Law Centre was fundamental to the identification of the issue and the development of the litigation.

The impact of the litigation was maximised because the Law Centre was able to bring a range of strengths and expertise by combining mental health, policy and legal specialist knowledge and worked in partnership with other key NGOs, TILIS and MENCAP. While litigation is always risky, the vulnerability of the litigant in this case (and the other patients affected by the issue) was of particular concern in relation to the emotional impact of the litigation, management of expectations and balancing a situation where clients were reliant on the staff of the Respondent for the provision of their care. There was therefore a need for long-term support to be put in place beyond the lifespan of the litigation and the Law Centre were able to provide this due to their specialist knowledge and experience of working with vulnerable clients.

While some public interest litigation follows a planned model, with the issue clearly identified and defined, selection of the most appropriate test cases and clients and the development of a clear litigation strategy, JR 47 was litigation that was brought as a response to an emergent issue. The Law Centre suggest that the full extent of the public interest point in the litigation was not fully realised until after the litigation had commenced.

The involvement of an international human rights organisation in the form of the Mental Disability Advocacy Centre served to underline the strategic importance of the litigation and emphasise the relevance of international human rights instruments to Mr E's case. The link with the Mental Disability Advocacy Centre also led to further collaboration in respect of lobbying for the introduction of a single, rights-based Bill on mental health and capacity in Northern Ireland.

FURTHER INFORMATION

Between 2004 and 2014, The Atlantic Philanthropies provided funding to organisations in the Republic of Ireland and Northern Ireland to use the law to secure social change. To read a summary report about the lessons Atlantic grantees learned in doing this work, **click here.**