



Tribunals Service
Care Standards Tribunal

**A Digest of Cases Heard
by the**

CARE STANDARDS TRIBUNAL

**SERIES TWO
ISSUE 4.**



 **March 2008** 

Introduction

Series 1 comprises cases decided by the Care Standards Tribunal (CST) during 2002-2005. Issue 6 was updated in January 2006 and includes a summary of all of the cases decided by the Tribunal up until that date. It is available on the CST website. As that issue comprised of 81 pages, it was decided to commence a second series of cases containing those decisions promulgated subsequent to January 2006. All cases are published in full on the Care Standards Tribunal website (www.carestandardstribunal.gov.uk) and the British and Irish Legal Information website (www.bailii.org/ew/cases/EWCST). As new cases are published, the cases are added to the categorised and the alphabetical index, both indexes of course being available on the CST website.

The first issue of Series 2 was published in September 2006. Series 2 has been updated (as issue four) to include all cases promulgated during the two year period from January 2006 to the end of December 2007.

As of 3rd January 2006, when the final issue of Series 1 was published, the number of cases filed with the Secretariat stood at 615. At the date of the publication of the first issue of Series 2 (25th September 2006), the number of cases had risen to 786. At the date of the second issue, the number of cases filed stood at 891. As at the date of the introduction to the third issue of Series 2 (October 2007), the number of cases filed was 1128. As at the date of the introduction to this, the fourth issue of Series 2 (March 2008), the number of cases that have been filed is 1269.

**His Honour Judge David Pearl
President, Care Standards Tribunal**

18th March 2008

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A. SCHEDULE 1 CASES

Care Standards Act 2000 s.21

Cancellations: Provider of a Care Home

- (i) Puretruce Health Care Ltd (Holly House 3) v NAW
[2005] 544. EA- W.JP
- (ii) Puretruce Health Care Ltd (Holly House 4) v NAW
[2005] 597. EA-W
- (iii) Puretruce Health Care Ltd (The Beeches) v NAW
[2005] 596. EA-W
[Mr Reddish, Mrs Matthison, Mr Lim]

The three appeals were consolidated, the hearing took place over sixteen days, and the decision extends to some 44 pages. The Tribunal heard oral evidence from 16 witnesses, received a large number of written statements, and were faced with documents amounting to 2,290 pages.

The first appeal concerned an appeal from a decision of a JP made under s. 20(1) of the CSA 2000 to cancel registration in respect of Holly House Nursing Home. The second appeal concerned an appeal against the decision of the Respondent under s.14 (1) (c) of the CSA 2000 to cancel registration in respect of Holly House. The third appeal was an appeal against a decision of the Respondent to cancel registration in respect of The Beeches.

The Tribunal allowed the first appeal. It would seem that the Respondent only applied to the JP for emergency cancellation in respect of the registration of Holly House because Dr Das, on behalf of Puretruce, had refused to accept a proposed compromise in relation to gas installation. Subsequently, Dr Das relented, and the repair work was authorised and completed. As the appeal to the Tribunal under s.21 is a rehearing, and the Tribunal can admit evidence, which relates to events that had occurred subsequent to the JP's decision, the appeal against the decision of the JP was allowed.

The Tribunal dismissed the appeals, however, against the decisions made under the "ordinary" procedure for the cancellation in respect of both Holly House and The Beeches. The Tribunal stated that the Appellant was operating both Homes in breach of many of the regulations in the Care Homes (Wales) Regulations 2002, especially regs. 17 and 19 regarding the records in respect of both service users and staff. The Tribunal noted the absence of a registered manager at The Beeches, concerns over recruitment of staff at The Beeches, the failure to carry on the homes in such manner as was likely to ensure that they would be financially viable, and failures to provide a secure recreational area, assisted baths, or an improved plan for maintenance and repairs in Holly House. So far as Holly House was concerned, the

Tribunal noted that the “last chance” provided by the CST in *Puretruce Health Care (Holly House 2) v NAW* [2004] 317. EA-W (Digest; First series p.28) had not been complied with. The Tribunal concluded that the Applicant had breached the Care Homes (Wales) Regulations 2002 seriously and extensively, and that the persistent breaches proved were more than sufficient to merit the closure of the homes. It was satisfied by the evidence that the changes required to make Holly House and The Beeches satisfactory care homes were beyond the management capabilities of the Appellant company, and that the problems that would be created by closure were not insuperable.

Appeal (i) allowed.

Appeals (ii) and (iii) dismissed.

Mrs Folasade Bamgbala (Sharpness Residential Home) v CSCI [2006] 741.EA

[Mrs Tudur, Mrs Graham, Mrs Williams]

The notice of proposal to cancel Mrs B’s registration relied on the grounds set out s.14 (1) (c) CSA 2000 that the Home is being or has been carried out otherwise than in accordance with the relevant requirements. There were allegations of breaches of Regulations 4, 7, 8, 12, 13, 15, 16, 23 and 37. The cancellation decision was confirmed with regard to all of these matters except for Reg 12. Mrs B appealed against the cancellation, alleging that she had been the victim of racism and a conspiracy against her. In opposing the appeal, the Commission reinstated a breach of Reg 12, by failing to ensure the service users’ privacy and dignity, based on additional evidence which had come to light during the preparation for the appeal. In a detailed analysis of all the evidence, the Tribunal said this about the allegations of racism: “We can...understand her perception that she was being discriminated against because of her colour; we accepted Mrs AB’s evidence of a split within the home between the old guard of local, white staff and the new staff brought in from abroad by Mrs B.” The Tribunal decided that she was not fit because she has refused to accept and acknowledge the breaches identified and failed to take steps to remedy them. The important breaches were the administration of service users’ moneys, the medication and the general management of the home. Most of all, said the Tribunal, she failed to understand the importance of endeavouring to comply with the Regulations to ensure the service users’ welfare. The Tribunal ended its 30 page judgement in this way: “Mrs K gave evidence that she would prefer her mother to die in a fire in a happy home than live in a safe home where she was unhappy. The purpose of the Regulations and NMS is to ensure that service users and their families do not have to make that choice and expect to find both in the home of their choice.”

Appeal Dismissed.

Premium Care Homes Ltd v CSCI
[2006] 838.EA
[Mrs Singleton, Ms Joffe, Dr Ariyanayagam]

The alleged breaches in this case concerned Regulations 7, and 10 of the Care Homes Regulations, and Regs 13, 14, 19, 25 and 26 of the NCSC Registration Regulations. The Tribunal found as a fact that the Appellant was in breach of these regulations. It said that a common theme in the evidence was a lack of transparency and a history of unanswered requests for information. It was this that the Tribunal considered to be its most serious conclusion in this appeal. It made the following observation: “The CSCI cannot carry out the obligations which legislation has placed upon it if registered providers, for whatever reason, fail to provide information that is reasonably requested. It cannot fulfil its function of protecting vulnerable service-users if its attempts to establish the situation prevailing in a Home are persistently frustrated.” The Tribunal concluded that the cancellation of the Company’s registration was a proportionate response in all the circumstances.

Appeal Dismissed.

Girish Chandra and Birbala Chandra v CSCI
[2006] 825.EA; 826. EA [2007] 874. EA; 875. EA
[Mr Askham, Mrs Alford, Mr Flynn]

These combined cases were appeals under s.21 CSA 2000 against two decisions of the Respondent, the first being to adopt proposals to impose conditions upon the registration of the Care Home, and the second against the decisions to adopt the notice of a proposal to cancel registration of both Appellants in respect of the Home. The Respondent brought evidence to show that neither of the Appellants was fit to carry on the business of a care home, and in consequence the establishment was being and had been carried on otherwise than in accordance with Reg 10(1) Care Homes Regs. As a result of an unannounced visit following an anonymous telephone call, the CSCI felt that the home had moved from being one which was poorly managed but where users were not seriously at risk to one which was a seriously failing service with outcomes for its residents becoming more and more negative.

The Tribunal came to the conclusion that since the purchase in 2000, and in particular since the coming into force of the new regulatory regime, there has been little or no evidence of ongoing compliance with the legal and regulatory requirements laid down for the carrying on of a Care Home. The tribunal concluded that neither Appellant was “fit to carry on a care home” and it could not find that it could trust them to run a Care Home in accordance with the Regulations. The Tribunal found the Appellants’ own evidence confused and inconsistent. It said that it had no confidence in the Appellants’ judgement as evidenced by their failure to

resolve the issue of the management of the Care Home: “It is apparent to us that neither of the Appellants have sought to obtain any training on their responsibilities as proprietors”.

The Tribunal went on to consider the issue of the alleged breaches of the Regulations. It decided that there had been repeated ongoing and serious breaches of Regs 8(1), 9(2), 10(1),10(2), 12(1)(5), 18(1), 19(1), 25(1) and Schedule 2. It said that some of the failures were serious health and safety issues and that it was fortunate that no harm was occasioned to service users. The Tribunal gave as examples; the failure to provide an electrical wiring certificate, frayed and dangerous carpets, the failure to protect radiators and pipes, and the failure to deal with the issue of the temperature of hot water in basins. There had been a cavalier approach to the employment of staff without obtaining references or proper CRB or PoVA checks. The Tribunal said: “If we were dealing with the issue purely on the breaches of the regulations and not the question of the fitness of the two appellants we would have considered the fact that the evidence suggested that the six residents are happy with the care that they are currently receiving, as are some of the relatives...We are however satisfied that the continued breach of the Regulations have and continue to put the residents at risk and it would be wrong therefore for us to give any thought to allowing the Home to continue under its present proprietors and management system.”

The Tribunal went on to note with some concern the Respondent’s approach to the presentation of their inspection reports which seemed to involve the first and second page of the Report merely being copied from the previous Report. The Tribunal recommended that the CSCI should give some attention to how initial pages of each Report are presented in the future.

Appeals Dismissed.

NOTE: Subsequent to these decisions, Dr Chandra applied to be registered as the Manager of the Care Home. His application was turned down, and he appealed. The Respondent applied to Strike Out the appeal under Regulation 4A (1) (d). The application was heard as: *Dr Girish Chandra v Commission for Social Care Inspection [2007] 1057.EA* (Mr Wadling).

Mr Wadling struck out the appeal. He said that the appeal had no reasonable prospect of success; the findings of the Tribunal in the previous cases evidencing the fact that the Appellant lacks the skills and qualifications necessary to carry on or manage a care home. He struck out the appeal. The Appellant then sought to have the decision of Mr Wadling set aside on the grounds that he had lodged an appeal to the High Court from the decision of Mr Askham and his colleagues in the earlier cases. This application was dismissed by the President.

Chetin Mehmet Tekman; Samuel Laud Ashitey; George Aryiku
(Bridge House Care Homes Ltd) [Bridge House, Sutton]
[2006] 869. EA; [2007] 987. EA; [2007] 988. EA
(Mr Wadling, Ms Cross, Ms Funnell)

Bridge House is a care home for adults with a mental disorder (excluding learning disability and dementia) first registered in 1998 for a maximum of eleven service users. At the date of the hearing there were eight persons in residence, and registration was subject to a condition that no new admissions may be made until such time as there was a registered manager in post; and other matters. The Respondent's case was that the Appellants have in the past, currently and in the future will continue to fail to comply with the Care Homes Regs. 2001 and with the NMS. The report of the inspection on 11th and 12th February 2003 contained 91 requirements and 5 recommendations including the production of a Statement of Purpose and a Service Users' Guide. Fourteen of the nineteen outstanding requirements arising from the inspection on 26th June 2007 were outstanding from the Inspection of 12th February 2003. In particular, there were allegations, both then and in subsequent visits of breaches to the following Regulations: 4;5;7;8;10; 12(1)(a)(b),(2)(3)(4);13(2)(3)(4)(a)(b)(c),(6);14(1)(2);15(1)(2)(a)(c)(d);16(1)(2);17 (1)(2)(3);18(1)(2)(4);19;20;22;23(2)(4);24(1)(3);25;26; and 37. The Tribunal, over a ten day hearing period, found the Appellants to be in breach of each and every one of the Regulations. The Tribunal concluded: "The responsibility for the breaches lies with the Appellants and their persistent failures to comply with the Regulations and to ignore the assistance and advice offered and provided to them by the Inspectorate. The effect of this attitude is to adversely affect the quality of the care provided to the residents of Bridge House over a period of years."

Appeals Dismissed.

Cancellations: Manager of a Care Home

Gary Partington v Commission for Social Care Inspection
[2005] 492.EA
[Mr Bennett, Ms Graham, Mr Hutchinson]

CSCI alleged breaches of Reg 9(2) (B), Reg 13(1) (B) (2), Reg. 14(1) (A) to (D), Reg. 14(2) (A) to (B), Reg 15(1) and 15(2)(B).

The major reason to cancel registration related to the drug records kept by the Home, particularly from drugs returned. The Commission submitted that the Appellant had dishonestly manufactured certain handwritten sheets. The Tribunal agreed with this submission. It said: "...we do not find his explanation credible...Whilst we have no doubt service users care needs were met as evidenced by many references and the relatively positive inspections, in this aspect we consider Mr Partington failed and the ...records cannot be accepted as accurate

registers of the events described.” The Tribunal concluded that Regulation 9(2) had been breached. It said: “Mr Partington’s failure to maintain adequate drug records and [his] attempt to hide the true position or mislead the Commission is such that it raises severe questions about his integrity and reliability. We find it no longer possible to have confidence in the records he is required to maintain and the information he is required to provide. This is a basic requirement of the Manager of a Care Home and a fundamental part of his responsibility to service users.”

There were allegations also that certain service users had been given invasive treatment without records of consent, and that some service users were admitted out of category. Although not strictly necessary for the decision, the Tribunal did state that the allegations about lack of consent and admission out of category were not substantiated.

Appeal Dismissed.

Applications to register as a Provider of a Care Home

Marjorie Angela Marshall v Commission for Social Care Inspection
[2006] 754.EA
[Mr Hunter, Ms Adolphe, Ms Joffe]

This was an appeal pursuant to s.21 of the CSA 2000 against a decision of CSCI to refuse to register the appellant as a registered provider of a care home. The application form that has to be filled in by an applicant asks an applicant to state any other names by which the applicant has been known. Ms Marshall inserted a dash in the form in response to this question. She answered “no” to the question “Have you ever been convicted of a criminal offence, caution or bound over by any court?” She signed the form that concludes, “I understand that a false declaration may lead to the refusal of my application.” In the “fit person” interview, Ms Marshall was asked if anything had changed from her application form, to which she confirmed that nothing had changed. CSCI then received the CRB disclosure, which showed 4 convictions recorded against a “Miss Angela Wilkinson”. At the appeal hearing, the Appellant said that the form had been completed by her PA and she had not read any of the form prior to signing it. The appeal was dismissed, the Tribunal stating as follows: “The requirement in the Regulations for a person to be of integrity and good character goes to the fact that a registered provider is responsible for the care of vulnerable adults and also needs to be someone that the commission can rely upon to be open with them and to disclose any matters of concern when they arise, particularly in circumstances where there can be considerable gaps between... inspections”.

Appeal Dismissed.

Applications to register as a Manager of a Care Home

Karen Tongue v Commission for Social Care Inspection

[2006] 684.EA

[Ms Rivers, Mr Hutchinson, Mr Wakefield]

The Tribunal applied the following principles:

1. It is for the applicant to prove that he or she is a fit person to manage a care home.
2. Any doubts must be resolved against registration.
3. The requirements of Regulation 9 are mandatory and must be satisfied before registration is granted.
4. The first question that must be asked is: is the applicant of integrity and good character? If not, then he or she is not fit to manage a care home. If the answer is yes, then the second question is whether he or she has the necessary qualifications, skills and experience. If the answer is yes, then the third question is whether he or she is physically and mentally fit to manage a care home.

The Tribunal found that the Appellant had dishonestly claimed to be suffering from a brain tumour. It said that the Appellant benefited from misleading her employers in this way because she gained sympathy and time off with pay. It found that the information about her health provided both to CSCI in her application, and to the Tribunal was unreliable and untruthful. Accordingly, the Tribunal concluded that the Appellant lacked integrity and good character. Accordingly, it was not strictly necessary to consider the other limbs of Regulation 9.

Appeal Dismissed.

Cancellations: Manager of a Children's Home

Moses Williamson v Commission for Social Care Inspection

[2006] 718.EA

[Mr Lindqvist, Mr Jobbins, Mr Coleman]

This case was an appeal from the decision of the CSCI to cancel Mr W's registration on the grounds that he was not a fit person to manage a children's home. The appeal was dismissed for two reasons. First, that documentary evidence of Mr W's qualifications had never been available to the authority, contrary to Reg 8(2) (c) and Sch. 2. Secondly, that Mr W did not have the skills necessary for managing the home (Reg. 8(2) (b) (i)). The Tribunal made no finding that he was not a person of

integrity and good character. Indeed, it was impressed by his long record as a social worker and what appeared his genuine and sincere concerns for vulnerable children. The Tribunal concluded: “whilst obliged to express its profound reservations about his managerial skills, the Tribunal makes no finding which might imply that Mr W should not continue to make a career in social work (in a non-managerial role) with vulnerable young people...”.

Appeal Dismissed.

B. SCHEDULE 2 CASES.

*Children Act 1989 Part XA
(Inserted by Care Standards Act 2000 s 79(1)).*

Registration

CP v OFSTED

[2005] 543.EY

[Mrs Singleton, Mr Allman, Mr Greenacre]

The Appellant submitted an application for registration as a childminder accompanied by the requisite health declaration in which the Appellant drew attention to her history of depression. The Respondent issued a Notice of Decision to refuse registration following an Objections Panel hearing. At the Tribunal hearing, the Tribunal stated that the burden of proof lay with the Appellant to satisfy the Tribunal that she is suitable to be registered as a childminder on a balance of probabilities. The Appellant has suffered from depression and the consultant psychiatrist reported that if the depression recurs and there is no supervision, it may affect the care of children. The consultant told the Tribunal that three of the most famous studies based on research over a period of 15 to 30 years suggest that recurrence rates are between 80% and 100%. He stated that the longer she remained symptom free, the more likely it is that the depression will not recur. He recommended, should she work with children, that she should be supervised for a period of time. The Tribunal found this medical evidence persuasive. Supervision was not feasible, and on assessing the risk, the Tribunal decided that she had failed to show that she is suitable to be registered at the present time.

Appeal Dismissed.

Cancellations

Oluremi Ajibewa v OFSTED

[2005] 539.EY

Women Intercessors (U) Ltd v OFSTED

[2005] 645.EY

[Mr Rowland, Mrs Howell, Dr Lorimer]

There were two appeals before the Tribunal, because OFSTED appeared to have issued certificates of registration for providing childcare to both appellants. OFSTED had issued a notice of intention to cancel Mrs Ajibewa's registration on the grounds that she had ceased to be qualified for registration for providing day

care: (a) she had failed to ensure that every person other than herself looking after children was suitable to look after children under the age of eight, (b) she herself was not suitable to look after children under the age of eight, and (c) she was not complying with the Day Care and Child Minding (National Standards) (England) Regulations 2003. Her objections were dismissed at an Objections Hearing, and the registration in her name was cancelled. Registration in the name of the Company was also cancelled; one additional ground being that it no longer had use of the premises. As Mrs Ajibewa did not seek registration in her own name, the Tribunal dismissed the first appeal and dealt with all the issues raised in it in the context of the second appeal.

The Tribunal dealt with a number of important matters, albeit *obiter*, one of them being the legality of a third period of suspension that had been imposed in this case. The Tribunal stated that the purported extension of the third period of suspension was unlawful. The Tribunal said that there is no general power to suspend a suspension indefinitely, and that a third period of suspension could not in this case fall within the specific provisions as provided for in the Regulations. The Tribunal also said that if OFSTED feel that there are steps that should be carried out to reduce or eliminate a risk to children sufficient to justify suspension, then it should ask for those steps to be carried out, even if that implies “advice”. The Tribunal said: “In practical terms, we consider that the legislation properly applied would work perfectly well if OFSTED were rather more proactive than it has hitherto been prepared to be. Managing a risk while enforcement proceedings are being taken is a proper role for a regulator.”

A second issue considered by the Tribunal related to the lack of premises. The Tribunal agreed with the Respondent that the appeal could not be allowed in the absence of premises. It stated that it was satisfied that a person must have, or expect to have, access to premises in respect of which he or she is registered or applying to be registered. The Tribunal took the opportunity to consider the jurisprudence of the Registered Homes Tribunal, and the cases that had gone on appeal from that Tribunal, of the effect of a registered person ceasing to have use of the premises in respect of which he or she was, or hoped to be, registered. The Tribunal noted that the new legislation allows for resignation of registration. This was not possible under the old legislation. It noted also that the new legislation is no more specific than the old legislation about the effect of a person having no premises, if an application for registration is not abandoned or if registration is not resigned. It said: “If a provider appeals to a Tribunal against a cancellation decision given after he or she has ceased to have access to premises, it seems to us that the Tribunal must, in principle, have the same option as the registration authority had of either cancelling registration on the sole ground that the premises are no longer available or on other grounds. Allowing an appeal would not be an option unless the Tribunal were persuaded that the provider had retained, or could be expected to regain, the premises in question.”

In this case, both parties wished to Tribunal to consider other issues, and the Tribunal thought there to be sound practical reasons for that.

It considered the grounds for OFSTED opposing the appeal in some detail. It looked at the numbers and quality of the staff, and the records kept in respect of members of staff and the related issue about the arrangements for collecting children from schools. It looked also at the daily register, accident records, medication records, and emergency procedures. The Tribunal concluded that the Appellant had produced recently created documents for the hearing and it said that these documents were not contemporaneous records. The Tribunal did not accept all of OFSTED's allegations, but it did accept a considerable number of them. It found there to have been significant breaches of the National Standards.

Appeals Dismissed.

D v OFSTED
[2006] 650.EY
[Mr Robertson, Ms Halstead, Dr Merali]

The Tribunal described this case as a “desperately sad case”. However, the Tribunal heard evidence that the Appellant was diagnosed as suffering from Psychogenic Psychosis; that the onset of this can be sudden and even in patients with insight into their illness it can take them unawares. A Consultant gave evidence that the Appellant in this case had no such insight, and that the onset of illness could place children at serious risk. The Tribunal said, “When childminders are registered, parents have a right to have confidence that the registered person has been fully checked and is safe to care for their children. Our primary duty in considering an appeal is to have clear regard to the purpose of the legislation and that is to protect children.”

Appeal Dismissed.

Sunshine Day Nursery (Woolwich) Ltd v OFSTED
[2006] 732.EY
[Mr Rowland, Mrs Gladwyn, Mrs Trencher]

This was an appeal against the decision of the Respondent dated 7th June 2006 to cancel the Appellant's registration in respect of Sunshine Day Nursery, whose sole director is Mrs N Uddin. The facility was registered on 26th January 2005 to provide full day care for 82 children under the age of five.

The Respondent had received no fewer than 31 complaints from various sources, the first of which showed that child care was being provided before registration. It would seem that the Appellant did not challenge most of these allegations and

accepts that there were grounds for cancelling registration in March 2006 when the notice of intention to cancel was served on the Appellant. The Appellant argued that in response to the notice of intention to cancel that there have been very substantial improvements and that the way in which the nursery is being run as at the date of the hearing should lead to the conclusion that registration should not be cancelled. The focus of the evidence at the hearing therefore was on the events since the service of the cancellation.

The legal issue before the Tribunal was whether the Appellant had ceased to be qualified for registration for providing day care at the nursery (ss 79G(1)(b), 79L(1)(b) and 79M(1)(a) ChA 1989) and that depends on whether every person looking after children at the nursery is suitable to look after children under the age of eight and whether the Appellant is complying with regulations governing the provision of day care (s 79B(4)). Complying with the Regulations involves meeting the NMS (Reg 4(2)(b) Day Care and Child Minding (National Standards) (England) Regs 2003).

To a large extent, the case turned on the capacity of Mrs Uddin's staff to run the nursery rather than on her own capabilities as director of the Appellant company. The Tribunal said that cancellation must be proportionate and there was always a downside to cancellation: "Children lose the good points of a nursery, the parents may be seriously inconvenienced and in some cases may have to leave their employment and the staff lose their jobs. The best should not be allowed to become the enemy of the good. However, we remind ourselves that the National Standards represent minima."

The Tribunal examined all of the evidence and formed the view that it was very much a borderline case. On balance, the Tribunal allowed the appeal although with some hesitation. The Tribunal decided that the staff had made huge strides since April 2006 and should be allowed to continue to do so. "...OFSTED should recognise that, if they stand back for a while, the risk of harm befalling the children is very slight. The balance of advantage for the children is, in our view, in favour of keeping the nursery open." The Tribunal said also that in reaching this conclusion it had not thought it right to ignore the social need for nurseries in Woolwich. It said that whilst it agreed with Counsel for OFSTED that whilst children in deprived areas should not receive substandard care, its decision was made in the expectation that the children in this nursery will receive a proper standard of care. It said "the issue in this case is about the risk of [the children not receiving a proper standard of care]. We are entitled to put in the scales our finding that there will be an unmet need if the nursery closes."

Finally, the Tribunal accepted that there was a possibility that OFSTED will consider again that the nursery is inadequate, and that if that were to happen there would inevitably be another long drawn out cancellation process. The Tribunal said that it is unfortunate that the legislation does not provide that, for cases where there has previously been a decision to cancel registration, there should be a process for

the cancellation of registration that is quicker than the standard one but not as sudden as emergency cancellation.

Appeal allowed.

**John Thorley and Victoria Kathleen Thorley v OFSTED
[2006] 834.EY; [2006] 835.EY
[Ms Tudur, Mrs Graham, Mr Radley]**

The Appellants appealed against the Notice of Decision to Cancel registration. The issues on appeal were

- whether the Appellants had failed to comply with NMS 1-9 and 11-14;
- whether they had failed to comply with the Day Care and Child Minding (National Standards) (England) Regs. 2003 in particular Regs 6A, and 7;
- whether they had ensured that every person looking after children is so suitable;
- whether they had complied with the maximum numbers imposed by OFSTED;
- whether the premises were suitable;
- whether they had properly co-operated with OFSTED;
- whether they were suitable to look after children under 8;
- and if the Appellants had ceased to be qualified for registration for child minding whether the decision to cancel be confirmed or if not should conditions be imposed, varied or cancelled.

The Tribunal considered each of these questions in detail, and reached the conclusion that the decision to cancel the registration of both Mr Thorley and Mrs Thorley be confirmed. The Tribunal considered whether there were any conditions that could be imposed in order to allow the registration to continue, but it could not identify any relevant conditions which were appropriate, because the burden of the high level of continued support and monitoring could not be justified given the very limited progress made in the course of the appeal.

Appeals Dismissed.

Jennifer Duncan v OFSTED
[2007] 986.EY
[Ms Rivers, Ms Tynan, Mr Sarll]

The evidence in this cancellation case concerned the behaviour of Mrs Duncan's son (found in possession of cannabis, and also charged with intent to supply) and her husband (domestic violence allegations and a non-molestation order granted to Mrs Duncan). OFSTED cancelled registration on the basis that she had failed to inform them of significant events relevant to her registration as a child minder and in breach of the statutory obligation to do so. The Tribunal dismissed the appeal and found her unsuitable to be a registered childminder because (a) her inability to provide a safe and stable environment for children in her own home due to the turbulent nature of her private life; (b) her repeated failure to notify OFSTED of significant matters, or to give honest and accurate information about these matters, in breach of her statutory obligation to do so; and (c) her failure to familiarise herself with the requirements of the Regulations or the National Standards, despite her assurances to a previous Tribunal (*Mrs JB v OFSTED [2004] 409.EY*).

The Appellant sought a review of the Tribunal's decision under s 25(1) of the Regulations. The President accepted that it was appropriate to review the decision on the basis that there was an arguable error in the finding as to the burden of proof. At the review hearing, it was agreed by both parties that the burden of proof in appeals against cancellation lies with the Respondent. In appeals against refusal to register, the burden of proof lies with the Appellant. (*Peter Jones v Commission for Social Care Inspection [2004] EWCA Civ 1713*). Having applied the correct burden of proof at the Review hearing, the Tribunal concluded that the burden of proof was amply discharged by the Respondent; and the Tribunal re-affirmed its original findings, together with the decision that the Appellant is unsuitable to be a registered childminder.

Appeal Dismissed.

Imposition of conditions

Janet Jackson v OFSTED
[2006] 817.EY
[Ms Lewis, Ms Chatfield, Mr Winn]

The Appellant in this case appealed against the decision of OFSTED whereby they refused to vary the conditions of her registration. She wished to care for 4 children under 5 years of age without the condition that she needed an assistant. In school holidays she said that she would employ an assistant due to the age range of the children in her care, including her own children. OFSTED's position was that her request was contrary to the National Standards 2.2 (no more than 3 children may be under 5 years of age) and did not come under the "exceptions permitted" by the

National Standards, relating to “continuity of care in certain circumstances approved by OFSTED”. The Tribunal, in a fact specific case, did not accept the rigid interpretation OFSTED had placed on the National Standards, and said that the concept of “continuity of care” could be interpreted with some flexibility. It said: “given the very narrow amount of hours, we are not satisfied that OFSTED have made out their case that the variation should only be granted on condition that an assistant is employed.”

Appeal allowed. The registration dated 18th October is amended to show that until 5 September 2007 the childminder may care for no more than 5 children under 8 years; of these, not more than 4 may be under 5 years, and of these, not more than 1 may be under 1 year at any one time save in school holiday time when an assistant will be present.

Appeal against refusal to waive a disqualification

MM v OFSTED

[2006] 846.EY

[Ms Lewis, Mr Coleman, Ms Prewett]

The Appellant had been the supervisor of a pre-school playgroup for 22 years. Her husband was convicted in 1997 on 13 counts of indecent assault on a female under 16, as well as other convictions. He was disqualified from childminding. Mrs M was also disqualified under Regulation 8 of the Day Care and Childminding (Disqualification)(England) Regulations 2005 as she is living in the same household as her husband who is of course a disqualified person. She applied under Regulation 9 for a waiver of her disqualification. OFSTED refused to waive the disqualification. It had no current concern that Mr M was continuing to offend against children; but OFSTED was concerned that Mrs M had minimised his offending, failed to share the full detail and extent of his offences with the pre-school committee, her daughters and the religious Minister, and thus in not taking her husband’s convictions sufficiently seriously, she was unable to maintain the protection of the children in her care at all times.

The Tribunal decided to allow the appeal subject to attaching very stringent conditions. It said that if Mrs M wished to continue as a pre-school leader she must allow the details of the offences to be known, and that there was no guarantee that this information would be kept confidential by those it is disclosed to. Mrs M would remain disqualified from working with children in all situations except the pre-school.

Appeal Allowed (with conditions).

C. SCHEDULE 4 CASES

Protection of Children Act 1999. PoCA list kept under s 1.

Appeals under s 4(1) (a).

JS v Secretary of State

[2005] 487.PC

[Mr Hunter, Ms Gilhespie, Ms Tynan]

The Appellant was an athletics coach, licensed by UK Athletics. Informal complaints against the Appellant were received in 2002 from a number of young women, including some that he had coached. In October/November 2002, UKA decided to bring a charge of misconduct. The disciplinary panel stated “he has abused his position as a coach to engage in repeated sexual encounters with a 16 year old athlete and a 17 year old athlete under his charge whilst in each instance being involved in a long term relationship with another athlete under his charge and simultaneously sleeping with a third young girl.” Also, that he has been prepared “to video himself having sex with an athlete under his charge without her knowledge, to use it to affect her conduct, and to keep a copy after supposedly handing the video tape over to her.” The panel imposed the sanction of removing his accredited coaching status and preventing his reapplying for such status for ten years. An appeal panel reduced the period of disqualification to seven years. At the appeal panel, he accepted that his behaviour was not appropriate for the athlete/coach relationship. On June 21st 2004, a referral was made by UKA to the Secretary of State, following which he was listed under the PoCA and the PoVA schemes.

On appeal, the Tribunal drew adverse inferences for his failure to attend the adjourned hearing, particularly when it came to disputed facts and the evidence regarding his suitability to work with children and young adults. The Tribunal decided that the Appellant was guilty of misconduct, and that this conduct did in fact harm a child. The Tribunal had concerns regarding the Appellant’s understanding of his misconduct and the affect that this has had on the young athletes in his charge. He appeared to have shown no remorse. It concluded, “The Appellant’s misconduct was of a serious nature, it was not an isolated incident, and he had sought to manipulate children in his care for his own advantage. He has shown no understanding of his action or any real insight into an appropriate coach/athlete relationship and as such we consider that he remains unsuitable to work with children.”

It decided also that he was not suitable to work with vulnerable adults, and dismissed his appeal from being listed on the PoVA list.

Appeals Dismissed.

WC v Secretary of State
[2005] 518.PC
[Mr Oliver, Mrs Williams, Mr Jobbins]

The Appellant in this case had been employed by the Fire and Civil Defence Authority as a fire-fighter and latterly as a Community Fire Safety Officer, a role that brought him into contact with members of the Young Fire-fighters' Association. One of the Young Fire-fighters was a young girl who was 14 at the time of the incident in question. The Appellant allowed himself to become closely involved with this girl. He was dismissed, and was referred to the Secretary of State by the Authority. He was placed on the PoCA list. On appeal (held on the papers) the Tribunal stated that it agreed that the Appellant held a childcare position within the meaning of s 12 of the Act and that it was appropriate for the Authority to refer him to the Secretary of State pursuant to s 2 of that Act. The Tribunal said: "Whilst there is no evidence of direct harm to a child, we are satisfied that taking AH home and keeping her at home overnight without telling anyone where she was or what she was doing in light of their respective positions in the Young Fire-fighters' Association was a gross breach of trust and actions which placed a young person at risk of harm."

Appeal Dismissed.

AG v Secretary of State
[2005] 603.PC;[2006] 604.PVA
[Miss Clarke, Ms Graham, Mr Williams]

The primary listing was the PoCA listing, and the Appellant was as a result confirmed on the PoVA list. The Appellant was the Operations Manager for four registered children's homes owned by SES. During 2003, a number of children were placed in unregistered premises including a caravan and a holiday cottage for periods in excess of 28 days contrary to Reg 3(1)(b)(i) of the Children's Homes Regulations 2002. Three of the eight allegations of misconduct related to the Appellant knowingly or recklessly permitting vulnerable children, placed in the care of SES, to be accommodated in premises, which were neither registered nor suitable for that purpose. The other allegations related to him failing to take adequate disciplinary measures against particular members of staff and allowing unqualified people to be in charge of vulnerable children.

No evidence was submitted by the Respondent in support of the secondary listing under PoVA, and that appeal was allowed. As to the primary listing, the Tribunal decided that omissions on the part of the Appellant did constitute misconduct, which placed a child or children at risk of harm. However, the Tribunal was not satisfied that he was unsuitable to work with children. The Tribunal was of the view that he had made mistakes, that he may not have been an outstanding manager, but that he

had done his best over a period of twenty years to do some good whilst working with children in a care setting and that he did not and does not pose a risk to children.

Appeals Allowed.

EH v Secretary of State [2006] 702.PC; [2006] 703.PVA [Ms Roberts, Mr Harper, Mr Wilson]

The Appellant is a woman in her mid 20's. She has no social work qualifications, but commenced work for New Pathways Children's Services working with a young man with autistic spectrum disorder. From February 2004, she assumed responsibility for VH, an extremely vulnerable 15-year-old girl with severe and enduring mental health problems. In January 2005, VH made a disclosure to a member of staff that she had been abused, and in February, she named that person as the Appellant. In a police interview, VH alleged that the Appellant had kissed her breasts, touched her bottom and vagina, and given her a love bite. In her police interview, the Appellant admitted kissing VH but denied the other allegations. The Appellant sent an explicit text message to VH on the night of 8/9 February 2005.

The Tribunal said that it was not bound to make a finding about the extent of the physical relationship between the Appellant and VH but that it is clear that the intensity of the relationship was strong by the time it came to an end. The Tribunal found further that there was harm to VH as a result, and that she is unsuitable to work with children. As to the PoVA listing, the Tribunal said, "...the public confidence in any service that the Appellant worked for would be undermined and this in itself is a reason why she is unsuitable to work with vulnerable adults."

Appeals Dismissed.

Esther Mwaura v Secretary of State [2006]687. PVA; [2006] 688. PC [Ms Roberts, Ms MacGregor, Mrs Last]

The Appellant in this case had been convicted of six counts of common assault against residents in a care home. At a Directions hearing, the Appellant indicated that she did not seek to challenge her inclusion on the PoVA list, and therefore her appeal in relation to the PoVA listing was dismissed. The hearing was thus confined to her appeal in relation to the PoCA listing. The Tribunal received a copy of the Court's reasons for conviction and the "structured sentencing reasons/pronouncement form" outlining the reasons for the sentence, which was a term of imprisonment of six weeks.

The Tribunal noted the issue of public confidence where a person is confirmed on the PoVA list and consideration is then given to his or her inclusion on the PoCA list. It decided that the continuation of her name on the PoVA list, on the facts of this case, does make her unsuitable to work with children. As to her character witnesses, the Tribunal said, “Her character witnesses were sincere, genuine and loyal. However, their loyalty to her clouded their objectivity and judgement. We do not accept that if these circumstances presented themselves to any one of them in their professional lives that they would give the person a ‘second chance’ in a care role”.

Appeals Dismissed.

PB v Secretary of State [2006] 628. PC [Mr Robertson, Ms Derrick, Dr Treves-Brown]

The Appellant in this case, who was a member of a priestly formation, was referred to the Secretary of State by the child protection committee of a Diocese of the Roman Catholic Church. The Tribunal decided to exclude certain evidence in relation to one of the allegations of misconduct under Reg 14(3) (a) on the basis that in all the circumstances it was unfair to consider it. So far as the other allegations were concerned, they involved disclosures to a superior that he had nocturnal emissions involving children, that he had been troubled by a television programme involving a paedophile Catholic priest, that he had told family members that he found 10 and 11 year old girls attractive, that he had erections in the proximity of children, and a particular incident at a camp when he entered the girls’ bedroom with a water pistol. The Tribunal’s view of the evidence is best reflected in this quotation from the judgement: “This was the first time that the Diocesan authorities had to put their procedures into practice and no doubt because of their inexperience the investigation that was conducted was chaotic, unfocused, lacking forensic rigour and generally unfair. The fact that [the Appellant] continued to engage in it is testament to his desire to be frank and open...The fact that on occasions he has shown some inconsistency...is unsurprising given the effect of the tumour, his terrible memory caused by the tumour and his own struggles with his personal demons...We only heard this case because he sought help in the first place.” The Tribunal decided that the only misconduct that arose was in relation to entering the girls’ room, which it decided was at the least serious end of the scale. The Tribunal decided that this misconduct did not place a child at risk of harm.

Appeal Allowed.

AP v Secretary of State
[2006] 742. PC; [2006] 743. PVA
[Ms Rivers, Ms Hyland, Mr Beeden]

The decision in this case to include the Appellant's name on both the PoCA list (the primary listing) and the PoVA list (the secondary listing) arose out of allegations that he had formed an inappropriate relationship with "S", a child in the care of the County Council between 1st April and 15th May 2004. He had got to know "S" while she was staying at a residential home where he was a care worker. It was submitted that the relationship continued when she moved from there to an independent support unit on 2nd April 2004. She had her 16th birthday on 18th April 2004. It was alleged that during the course of this relationship, the Appellant supplied "S" with alcohol.

This was a case where the complainant "S" did not give evidence. Thus the main concern for the Tribunal was whether the Respondent, on whom lay the burden of proof, had provided sufficiently cogent evidence to discharge this burden to the required standard, bearing in mind the seriousness of the allegations and the fact that the maker of the allegations was not available to be cross-examined or to give oral evidence.

The primary evidence came from VG who said that some time in early May, whilst she was driving "S", "S" had told her that she was having a sexual relationship with someone from the home. VG said that during the course of the car journey, "S" received a call on her mobile which she said was from the Appellant. On 11th August 2004, "S" made a formal police statement alleging a sexual relationship had taken place with the Appellant on a number of occasions. The Tribunal also saw a photograph of the Appellant and "S" together, and a receipt from an off-licence both suggestive that the Appellant had bought alcohol for "S".

The Tribunal did not accept "S"'s allegations that there had been a physical or sexual relationship between them. The Tribunal of course had not heard from "S". There were a number of inconsistencies in her allegations, there was no contemporaneous document, and the Tribunal suspected that she may have lied about an allegation involving previous sexual intercourse in the past.

Notwithstanding this finding, the Tribunal found that the telephone calls and text messages which the Appellant on his own admission made to her were evidence of "some sort" or relationship with "S".

The Tribunal found the allegations that he supplied her with alcohol not proved.

The Tribunal concluded that the Appellant was guilty of misconduct by making a series of telephone calls to "S" on his personal mobile knowing that this was in breach of his professional duty, and concealing this from his employers. It found that this may have harmed her, and in any event placed her at risk of psychological harm. The Tribunal found that as a result of this abuse of trust, he was unsuitable to

work with children; and that the finding it made of dishonesty, of not respecting proper professional boundaries, and of taking advantage of a vulnerable young person, would apply equally to vulnerable adults.

Appeals Dismissed.

HLM v Secretary of State [2006] 766.PC [Ms Roberts, Mrs Lowcock, Mr Black]

The Appellant in this appeal is a young single woman who at the time of the incident in question was only 18. She was working at a nursery. Whilst she was carrying a two year old boy out to play, her supervisor noticed that she was carrying him with her hand between his legs in the groin area. The supervisor showed HLM a more natural and comfortable way to hold a child of that age. Later in the day, the supervisor was informed by HLM that she had had feelings that she wanted to touch children between their legs. Indeed she told the supervisor that “she wanted to suck a boy’s penis.”

She was confirmed on the PoCA listing on 12th October 2006 and she appealed. In her evidence to the Tribunal, she said that the thoughts and her arousal were not under her control. She said that she felt disgusted, disturbed and frightened by them but had never been tempted to act on them. The Appellant was seen by her own GP and a consultant psychiatrist, who said that her thoughts were along the lines of obsessional ruminations. She has been receiving cognitive behavioural therapy from a community psychiatric nurse. The Tribunal heard detailed evidence from a Consultant Forensic Clinical Psychologist.

On all of this evidence, the Tribunal arrived at the following conclusion: while the Appellant’s thoughts were inappropriate and disturbing, they did not amount to misconduct which harmed a child or placed a child at risk of harm, because she did not act on them and she reported them as quickly as she could be expected in her circumstances i.e. that she was young, this was her first job and she was distressed and frightened by her thoughts and other people’s reactions to them. She then sought and has accepted professional help.

Whilst it was not necessary for the Tribunal to make a finding on suitability, it said that at present she is not suitable to work with children and that she acknowledges this herself.

Appeal Allowed.

JMC v Secretary of State
[2006] 664. PC
[Mr Askham, Mr Beeden, Mr Cook]

In 1995/1996, the Appellant was a practising social worker. He was referred to the then “Consultancy Index” in February 1996 as a result of a Child Protection Conference which concluded that the accounts by “S” and “W” (his step-children) relating to allegations of sexual abuse by him on them was true and that the Appellant posed a potential risk to children. He was never charged, cautioned or convicted of any offence.

“S” and “W” had been placed on the Child Protection Register as a result of a report to the Police by their mother in 1989 that she believed that their biological father had sexually assaulted “S”. No prosecution took place. They were removed from the Child Protection Register in 1990.

Both “S” and “W” gave evidence at the hearing of the appeal brought by the Appellant against the decision to place him on the PoCA list. They told the Tribunal that the alleged abuse had had a significant effect on their lives, particularly during their teenage years. The Appellant in his evidence consistently denied all of the allegations of abuse.

The Secretary of State submitted that the task of the Tribunal was to decide which version of events was most likely to have happened; either the version that he had abused his step children or the version where he had not. The Tribunal arrived at the view that the evidence of “S” and “W” as set out in the video recordings in 1995 was entirely credible and consistent. Further, the Tribunal decided that the evidence of “S” and “W” given to the Tribunal was entirely consistent with the evidence they had given on video as children. It was clear to the Tribunal that both “S” and “W” believed that they were abused by the Appellant. The Tribunal identified particular aspects of the evidence presented to them which corroborated the allegations.

The Tribunal concluded that it preferred the evidence submitted on behalf of the Secretary of State and had no difficulty in concluding on a balance of probabilities that the allegations had been made out in respect of the abuse of “S” and “W”. As a result the Appellant had been guilty of misconduct which actually caused serious injury. The issue of unsuitability did not arise, because the Appellant accepted that if the allegations were found to be proven then he would be unsuitable to work with children.

Appeal Dismissed.

Paula Ryde v Secretary of State
[2006] 856.PC; [2006] 857. PVA
[Mr Bennett, Ms Adolphe, Mrs Caporn]

The Appellant worked as a house-parent in a House with up to five unaccompanied asylum seeking children aged 16-18. She accepted that she had sexual intercourse with one of these children (Z), an orphan from Liberia, although she told the Tribunal that it happened only once, that she had very little recollection and that she felt that she was raped. The Tribunal concluded from the evidence that sexual intercourse did take place between the Appellant and Z, and as she had accepted a formal caution from the police it was not open to her to deny it. The Tribunal decided also that intimacy took place more than once, and that it was entirely consensual. The Tribunal said that this constituted misconduct, that it was a severe breach of trust, and that she was unsuitable to work with children and vulnerable adults.

Appeals Dismissed.

Steven Smoller v Secretary of State
[2006] 862. PC; [2006] 863. PVA
[Mr Lindqvist, Mr Flynn, Mr Tomlinson]

Mr Smoller, an American then living in New York, responded in 2004 to a recruitment drive carried out by TTM Recruitment on behalf of Suffolk County Council for social workers. By a letter from the County Council dated 16th December 2004, he was offered a job as a social worker subject to a probationary period of six months. He started work on 4th April 2005 but his work was never a success. There was suspicious activity in Lowestoft at the end of May involving a person answering Mr Smoller's description. Then, on 13th June 2005, a lady complained that she had seen a man masturbating in his car near her flat. Mr Smoller was subsequently charged, elected trial at the Crown Court when the prosecution offered no evidence against him and an acquittal was directed. The Appellant denied any misconduct in Lowestoft, denied also the alleged act of indecency on 13th June 2005, but admitted that he had become dependent on codeine at the end of May 2005 and admitted that he had not told Suffolk County Council about it. The Tribunal found as a fact that the Appellant's dependence on codeine at around the end of May 2005 very probably did affect his performance at work. It said "the conclusion that Mr Smoller's failure to report the dependency was misconduct is inescapable." As to the masturbation matter, the Tribunal said: "Mr Smoller's tactical admissions and denials in respect of the masturbation incident betray an almost cynical disregard for the truth. In the Tribunal's view, in the context of the work of a social worker, that constitutes misconduct, for it is essential that a social worker is frank and honest with his colleagues and superiors about matters which do or could affect their work." The Tribunal went further. It said that it was satisfied that his codeine dependence placed at risk of harm the two children

whom he transported in his care from Felixstowe to Woodbridge and back on 27th May 2005. So far as suitability was concerned, the Tribunal said that his dependence on drugs was sufficient to render him unsuitable to work with children and vulnerable adults.

Appeals Dismissed.

The Appellant sought a review of the Tribunal's decision under Regulation 25, but the Tribunal found no obvious error in the decision, and therefore as there was no reasonable prospect of success, the review application was refused under Regulation 25(3)

Terry Barrett v Secretary of State

[2006] 849.PC

[Mr Robertson, Ms Chatfield, Ms Diamond]

Mr Barrett was initially referred to the non-statutory "Consultancy Index" following a referral from a County Council in 1995. Mr Barrett said that he never received this letter. The Department of Health sent a letter to him on 21st June 2000 to an address in Wales informing him that he had been transferred on to the PoCA list; but this letter was returned "undelivered." On October 25th 2006, the Appellant obtained the results of a CRB check undertaken by his then employers, and this revealed the listing. The Secretary of State then sent a formal letter informing him of his rights of appeal. Mr Barrett worked as a fostering officer in a County Council; he then joined an independent fostering agency; and he and his wife fostered predominantly adolescent children. In 1993, allegations were made against him and five children placed in his care were removed from his care and he ceased fostering. The Secretary of State alleged that he had indecently assaulted a number of young girls, and as a result was guilty of misconduct which harmed a child and was unsuitable to work with children. Mr Barrett denied all of the allegations.

The Tribunal considered the evidence in detail. It said: "We have before us a plethora of documentation detailing these various allegations. We have been concerned about the quality of much of this evidence. Most of it has been heavily edited obscuring names and critically dates of birth. It is very old and mostly second or even third hand hearsay recordings of what children have said to others. We have to be very careful therefore in considering this documentation to ensure that we are able to put sufficient weight on the evidence before making findings."

Applying that test, the Tribunal found as a fact that the allegations made by all four of the girls to be believable and compelling.

Appeal Dismissed.

Applications for leave to appeal under s 4(1)(b) after a refusal to remove a name from the List under s 1(3).

PD v Secretary of State
[2006] 651.PC; [2006] 652.PVA
[Judge Pearl]

The Appellant sought leave to appeal the Secretary of State's decision taken on November 5th 2005 not to remove his name from the PoCA and PoVA lists on the basis that she had failed to consider relevant documentary evidence that she ought to have considered in reaching her decision.

Counsel for the Respondent submitted that when considering leave applications under s 4(1) (b), the President should go beyond adopting a "filter" mechanism as would apply in leave applications, for example, in the Court of Appeal. He submitted that given that the basis for an application under s 1(3) is that the individual should not have been included in the list and given that this is not a question that will be addressed once leave has been given (when s 4(3) is relevant) the President should enter into consideration of ss 2(6)-(7) at the leave stage. Otherwise, it was submitted, an appeal against refusal under s 1(3) would be identical to an appeal against the original listing, and an Appellant could circumvent the time limits by making a request under s 1(3) at any time. Counsel for the Appellant submitted that the application was made on the grounds that, if allowed to proceed to a full hearing, the appeal would have "good prospects of success."

The President agreed with Counsel for the Respondent. "I have decided that...the proper approach to take is not 'good prospects of success' but rather whether the relevant provision of s 2 has been made out". He said: "On the basis of the evidence submitted to the Tribunal that was before the Secretary of State, was she correct in forming the opinion that that organisation reasonably considered the individual to be guilty of misconduct...which harmed a child or placed a child at risk of harm; and that the individual is unsuitable to work with children?"

Having looked at the documentation, the President concluded that there could be no argument but that the Secretary of State was right in concluding that the referring organisation reasonably considered the Appellant to be guilty of misconduct which harmed a child or placed a child at risk of harm, and that she properly reached her decision on unsuitability on the basis of the evidence before her.

Refusal of leave to appeal; application dismissed under Schedule 4 Para 6

Applications for leave to appeal under s 4(2) PoCA to have the issue of the inclusion of the name of a person on to the PoCA list from the provisional list considered by the Tribunal rather than by the Secretary of State

HLM v Secretary of State (provisional listing)
[2006] 766.PC
[Judge Pearl]

Section 4(2) PoCA states that an individual who has been provisionally included for a period of more than nine months in the PoCA list, may with leave of the Tribunal, have the issue of his inclusion in the list determined by the Tribunal instead of by the Secretary of State. The Appellant sought leave in this case. The matter was set down for an oral hearing of the leave application, but prior to this hearing taking place, the Secretary of State confirmed the Appellant on the PoCA list. The Secretary of State therefore argued that now that he had confirmed the Appellant's name on the list, the Tribunal lacks the power to make its own determination under s 4(2).

The issue that had to be considered therefore was the effect on the application under s 4(2) if the Secretary of State confirms the name on the list subsequent to the application for leave being lodged but prior to a decision being made by the President, although after the date for the oral hearing to consider leave has been set down.

The President decided that prior to leave being granted, the Secretary of State retained the power to confirm a person's name on the list. He decided also that the Tribunal has a discretion to grant leave under s 4(2) as soon as the Response (Sch 4 Para 4) to the application for leave has been obtained. The important issue in the case was whether leave should be granted in circumstances where the Secretary of State has confirmed the Applicant on the list. The President agreed with Counsel for the Secretary of State that the fact that confirmation has been made is of itself reason not to grant leave. The President said:

“The Tribunal's normal role is an appeal body applying s 4(1) when hearing appeals from the administrative decision of the Secretary of State. It would be only in the most unusual set of circumstances where it would grant leave under s 4(2) to consider the question whether to include the person's name on the List”.

Application to Strike Out Dismissed.
Application for leave under s 4(2) refused.

Appeals brought under Education
(Prohibition from Teaching or Working with Children)
Regulations 2003 Reg. 12 from Direction given by the Secretary of State
under s 142 Education Act 2002 (list 99).

Education list (Conduct: Powers of the Tribunal)

Alison Jane Homewood v Secretary of State
[2005] 551.PT
[Mrs Tudur, Ms Adolphe, Mrs Last]

On 24th July 2003, the Appellant was convicted upon indictment of cruelty to a person under 16 years contrary to s 1(1) of the Children and Young Persons Act 1933. On 10th June 2005, the Respondent made a Direction that she be prohibited from working with children in schools or FE establishments for a period of 10 years from the making of the Direction. The only ground of appeal was that the Direction had been made 23 months after the conviction, and that in effect that made the ban 12 years instead of 10 years. The Respondent submitted that the Tribunal had no power to order the Secretary of State to backdate the Direction. The Tribunal agreed. It stated that the Tribunal can only vary the content of the Direction and not its basic structure. It said: "...we have concluded that the Appellant is asking the Tribunal to do that which it cannot, namely to change the date on which the decision which is the subject of the appeal was made and consequently the appeal is outside the jurisdiction of the Tribunal."

Appeal Struck Out.

Education list (Conduct)

FH v Secretary of State
[2005] 552.PT
[Mr Reddish, Dr Ariyanayagam, Mr Griffiths]

This was a paper appeal, and the Tribunal heard no oral evidence or submissions but considered all of the witness statements and papers submitted by the parties save for the documents exhibited by the Appellant to her statement and submissions which came into being after 10th June 2005 and which therefore were not available to the Secretary of State when she made her decision.

The Appellant, Miss FH, was employed as Head of English and Media Studies at F School. During the summer term 2003, G was a pupil in the Appellant's Year 11 English class. He was 16 years of age, and due to complete his GCSE exams at the end of that school term and to start A levels at F School in September 2003. On 10th July 2003, the Appellant sent an email to G, which concluded with the words:

“Gagging 4 it!!!! So give in and give it to me. Love you. Love you. Love you.” There were similar emails between the two of them of a similar content. During August 2003, the Appellant and G exchanged emails in which they referred, in explicit terms, to their sexual relationship. The Appellant was suspended from her duties on 3rd September 2003. G returned to F School at the end of the Summer vacation 2003. The Appellant resigned from her position at the School in May 2004. She was listed pursuant to s 142 on 10th June 2005. The letter states: “The Secretary of State has considered the nature and content of the emails exchanged between yourself and the pupil only a short period of time after he had left the school and concludes these suggest there may have been some element of inappropriateness in the relationship prior to the pupil leaving school. She also notes that you were in contact with the pupil between his return to the school in September 2003 and your resignation in May 2004 despite the direction of the school and the wishes of the pupil’s parents...She considers your conduct on this occasion not only fell far below the high standards expected of members of the teaching profession but also constituted an abuse of the position of trust you held as a teacher...”

On appeal, the Tribunal considered the law in some detail. It noted that in appeals under the Education Regulations, the Tribunal is confined to conducting a review of the decision, and it is not empowered to re-hear the case or to determine the primary facts. “It is required, in effect, to decide whether the Secretary of State had sufficient evidence upon which to base a determination that the specified ground relied upon existed and, further, to decide whether the direction was an appropriate or proportionate response in all the circumstances known to the Secretary of State.” It proceeded on the basis that the burden of proof was on the Secretary of State to show that the decision was appropriate, although the Tribunal did query whether this was the correct construction of the relevant provisions. The Tribunal stated that when considering whether a direction is or is not appropriate, it should not proceed on the basis that the restriction was imposed as a penalty for past misconduct, but should decide whether the restriction is an appropriate measure to ensure, so far as possible, that children will be properly protected and that reasonable parents and other interested parties will not have their confidence in the education system diminished in the future.

Applying these principles, the Tribunal determined that the Secretary of State had ample evidence upon which to base her conclusion that the Appellant had engaged in behaviour that involved a breach of trust, a breach of the standards of propriety expected of her profession and an abuse of her professional position. The Tribunal said: “the email sent by the Appellant on 10th July contained an unequivocal invitation to G to put aside his inhibitions and to have sexual intercourse with her. Whether such intercourse had already taken place before that date or did not take place until later was scarcely relevant. That communication to a young man, who was clearly still part of the school community at the time it was made, was itself manifestly improper and plainly constituted misconduct by a teacher.” The Tribunal was satisfied that the direction to the effect that she be excluded completely from employment as a teacher was appropriate and proportionate.

Appeal Dismissed.

Nicholas Dunn v Secretary of State
[2006] 678.PT
[Judge Pearl, Mrs Lowcock, Mr Thompson]

The Respondent in this case was barred from performing work to which s 142 EA 2002 applies on the ground that he is unsuitable to work with children. The effect of the decision to bar a person on the grounds that he is unsuitable means that in addition to being barred from work to which s 142 applies, he is also disqualified from working with children in accordance with s 35(4)(b) Criminal Justice and Court Service Act 2000 (paid or unpaid activity in the public, private, voluntary and volunteering sectors). The bar is more extensive therefore than one where the Direction is made on the grounds relating to a person's misconduct or his health.

At the hearing, the Appellant sought an adjournment, which was refused under Regulation 7(6). The Appellant then absented himself and the Tribunal heard the evidence. The basis for the barring was that the Appellant had formed inappropriate relationships with a 14-year-old female pupil, a 15-year-old female pupil, and that he had failed to include specific information on his CV for two supply agencies. The Tribunal came to the conclusion that his understanding of what it means to be a teacher is nil. The Tribunal concluded that the decision of the Secretary of State to bar him on the grounds of unsuitability was a proportionate one.

Appeal Dismissed.

Kenneth William Males v Secretary of State
[2006] 854.PT
[Ms Singleton, Ms Rabbetts, Mr Braybrook]

On 7th November 1991, the Appellant was convicted of an offence of having sexual intercourse with a girl under the age of 16. The girl in question was his 13 year old step-daughter, and he was sentenced to a term of imprisonment of 12 months suspended for 18 months. In May 2006, an email was sent to the Respondent by his then employers, Metro Coaches to say that they had received an anonymous phone call informing them that the Appellant was a convicted paedophile. The Appellant had been employed as a coach driver for a local school. The Appellant was placed on List 99 on the grounds that he was unsuitable to work with children. On appeal, the Tribunal said that "[It] cannot go behind the conviction in 1991. The offence of intercourse with a girl under the age of 16 is extremely serious per se. When it is committed by a person who is both an adult and a close member of the girl's family it is also a gross breach of trust." It accepted that the Appellant was remorseful and had an unblemished record since 1991 but was not satisfied that that in itself could outweigh the seriousness of the original conviction.

Appeal Dismissed.

Michael O’Hara v Secretary of State
[2006] 858. PT
[Ms Roberts, Mr Beeden, Dr Treves-Brown]

The Respondent’s Response document sets out the following matters taken into consideration when making the direction under section 142:

- his conviction for fraud in Australia,
- his dismissal from a school in Australia for not declaring a conviction,
- the fact that none of this was mentioned when applying for a teaching post in England,
- for claiming a false Teacher’s Reference Number.

The Appellant’s case was that the truth of his birth and identity was not known to him, and that all the allegations made against him arose out of incidents relating to certain “operational activities”.

The Tribunal said that when considering whether a direction is or is not appropriate, it should not proceed on the basis that the restriction was imposed as a penalty for past misconduct, but should decide whether the restriction is an appropriate measure so as to ensure, so far as possible, that children will be properly protected and that reasonable parents and other interested parties will not have their confidence in the education system diminished in the future.

On the facts of the case, the Tribunal decided that while there continued to be doubt about the Appellant’s identity, it found that the man who appeared before them called “Michael O’Hara” was the same man convicted in the Melbourne court. That also, he is the same man who taught in an Australian High School until he was dismissed from that post. And that he was dismissed from that school because of the failure to disclose the Melbourne conviction. The Tribunal went on to state that the CV used in England was misleading and unprofessional, and that in particular he had not attended any teachers training college in the Midlands between 1961–1964. The Tribunal concluded that the Secretary of State had a proper basis for concluding that one of the specified statutory grounds existed for the exercise of the statutory discretion (the Appellant’s misconduct).

Appeal Dismissed.

AW3 v Secretary of State
[2007] 954.PT
[Mrs Singleton, Mr Churchill, Mr Radley]

The Appellant was a class room assistant and a volunteer worker with St. John Ambulance. It would appear that he had been advised about his conduct as early as

2002 and that he had been given specific instructions about contact with a pupil. This advice had been ignored. The Tribunal felt that the “remorse” that he displayed in his oral evidence seemed to be directed largely to the impact of the proceedings on himself. It said that the Appellant had persistently ignored advice, both oral and written, and indeed had ignored written instructions. The Tribunal said that his behaviour had been arrogant and somewhat contemptuous of his employers. It decided that the Appellant, for the most part, had shown a total lack of understanding of the need to maintain professional boundaries when working with children and that, on balance, the Respondent’s decision to bar him had been appropriate in all the circumstances.

Appeal Dismissed.

Addy v Secretary of State

[2007] 1010.PT

[Ms Roberts, Ms McLoughlin, Ms Williams]

The Appellant appealed against a decision barring him from working in any capacity with children as provided by Section 142(4)(b) Education Act 2002 on the grounds that he is unsuitable to work with children. He had commenced tutoring in Maths in 2001. There had been long standing concerns from Police, Social Services, and OFSTED. As far back as in 1988, there had been allegations of sexual assault which he denied; and there was a report from a clinical and forensic psychologist that he posed a threat to prepubescent children, that he had distorted views regarding child sexuality, and that he is a significant risk now and in the future to children. He had not been placed on the PoCA list because of legal reasons relating to the date of the original allegations. The Tribunal noted that s 142 does not apply to employment as a private tutor; but that the restriction on working in a private capacity as a tutor (whether supervised or unsupervised) arises in consequence of the operation of s 35 Criminal Justice and Courts Services Act 2000. Private tutoring is a ‘regulated position’ under that Act. The Tribunal looked at all of the evidence in this case and was satisfied that the Respondent had discharged the burden on him, on a balance of probability, that the Appellant is unsuitable to be employed as a teacher or worker with children or young people or to be a person whose normal duties include caring for, training, supervising or being in sole charge of children.

Appeal Dismissed.

D. SCHEDULE 5 CASES

Appeals under s 86(3) of the Care Standards Act 2000 from decisions taken by the Secretary of State to place a person on the PoVA list.

**Nelson Del Mundo v Secretary of State
[2005] 557.PVA; [2005] 558.PC
[Miss Clarke, Mr Flynn, Mrs Wiggin]**

The Appellant, from the Philippines, worked as a Senior Carer. In the early hours of May 22nd 2004, the Appellant was involved in an incident relating to the movement of R, a man of 20 stone, who had fallen and who was unable to move himself back into his wheelchair. The Appellant initially denied that R had fallen but subsequently admitted that R had fallen and that he and another carer had manoeuvred R by holding his underpants, which he now accepted, was not an appropriate way to move R. Subsequently, the Appellant accepted a Caution for assaulting R. He was then dismissed and Westminster Health Care informed the Respondent of what had taken place. He was subsequently placed on both the PoVA and PoCA lists. On appeal, the Appellant's Counsel submitted that the Appellant was not claiming that his behaviour had been right and that he had accepted that the way he had handled R was wrong. It was submitted on his behalf however that a lack of effective training and his naivety in following others had led the Appellant to make an inappropriate decision about what to do in the circumstances in which R was found when he had slipped out of his wheelchair. It was submitted that the Appellant should have had at least six hours of manual handling training. The Tribunal found as a fact that the Appellant should have been aware of the serious risk of harm in attempting to move a man the size of R by his underpants, and that his actions constituted misconduct. It found also that the Appellant had placed R at risk of harm. The Tribunal was concerned by the inability of the Appellant to recognize the high risk he took in this manoeuvre and his willingness to deny on more than one occasion that R had fallen. The Tribunal did not feel confident that faced with a different set of circumstances which might threaten his employment status that he would not seek to protect his own personal position rather than protect the vulnerable adult.

Appeals Dismissed.

**Mrs P v Secretary of State
[2005] 562.PVA; [2005] 563.PC
[Mr Robertson, Mr Cairns, Mrs Wiggin]**

The Secretary of State withdrew her opposition to the secondary listing, the PoCA appeal and that appeal was allowed.

Mrs P worked as a carer for the elderly. The Respondent alleged that she is guilty of financially exploiting her position with one person in particular, a Miss R, and is accordingly unsuitable to work with vulnerable adults. Miss R told a reviewing officer that she had been exploited by Mrs P, that she had been made to pay for Mrs P and her family to go on holiday twice, had had a carpet and armchairs bought for her at excess price, had handed money over to a Christmas club that was unaccounted for, and had done unnecessary gardening which she had had to pay for. The Tribunal directed that Miss R should not give evidence. The Tribunal accepted that the primary case of the Respondent was based upon admissions, and that in considering the allegations the Tribunal would apply less weight to them where there is no corroboration, as the evidence of Miss R had not been tested.

The Tribunal found that in all the financial transactions that took place there was no element of dishonesty or financial exploitation. It found that Mrs P clearly overstepped the bounds of good practice, and acted unwisely and possibly even recklessly. She allowed herself to become too close to Miss R. The Tribunal said however that the blame for this: “falls squarely on the shoulders of the agency because of their lack of training, supervision or even basic management.”

The Tribunal found Mrs P to be guilty of misconduct, placing Miss R at risk of harm. It did not find her unsuitable. It said: “Having conceded that there is no element of dishonesty involved in this case, it appears to us that the Secretary of State has a difficult task in showing unsuitability. It may be that an individual is so incompetent or negligent in circumstances such as this that renders them unsuitable. Equally if they are intransigent, refuse to accept their shortcomings and are not prepared to be supervised they may also be unsuitable”. This was not the case here.

The Tribunal made an important observation about the value of oral hearings. “The papers produce a damning picture. It was only through seeing and hearing the witnesses that a different picture emerged.”

Appeals Allowed.

Jane Brown v Secretary of State
[2005] 580.PVA; [2005] 581.PC
[Ms Rivers, Ms Funnell, Mrs Gladwin]

The Appellant in this case was included on both the PoVA and PoCA lists following a referral by her employers who had dismissed her from her job as a Senior Care Assistant for sleeping during night shifts. The appeal was determined on the written evidence alone. The Tribunal was concerned that the Appellant had played little part in the proceedings. The Tribunal found as a fact on the basis of the documentation that the Appellant was undertaking a “course of erroneous and incorrect behaviour” by sleeping on waking night duty. It found however that the “risk as there was could not have been a serious one and that insofar as there was a risk the employers must

share responsibility for it.” It did not find her unsuitable to work with vulnerable adults or children.

Appeals Allowed.

Rumen Kalchev v Secretary of State [2005] 589.PVA; [2005] 590.PC [Mr Robertson, Mr Allman, Mr Cairns]

The Appellant is Bulgarian who worked as a Care Assistant. On 3rd August 2004, a roll of undeveloped photographs was taken to a shop with a photographic mini lab for developing. A number of the images when developed caused shock at the shop and the shop manager showed the images to the manager of a particular Care Home, having deduced that the photographs related to residents of a care home. After investigation, the Appellant admitted taking the photographs and he was cautioned by the Police under s 127 of the Mental Health Act 1983. The Tribunal stated that the Caution involved acceptance of the misconduct and that this misconduct involved actual or likely harm. The Tribunal said that in taking the photographs, the Appellant had made a huge error of judgment. The pictures were objectively obscene.

The Tribunal found the Appellant to be dismissive and disingenuous; that he attempted to justify the unjustifiable at every turn. It followed that there must be a danger of repetition, and that he was unsuitable to work with vulnerable people.

Appeals Dismissed.

Kathleen Jackson v Secretary of State [2005] 623.PVA; [2005] 624.PC [Ms Roberts, Mrs Lowcock, Mr Radley]

The Appellant is a Senior Carer. There were allegations that she had force fed residents, put residents to bed early, and allowed members of staff on her shift to leave work early. The Appellant denied doing any of the things that she had been accused of. The Tribunal, on the basis of the evidence that it heard, accepted that the force-feeding had happened in much the way the Respondent’s witnesses had described, and that she had allowed staff to leave work early. As to suitability, the Tribunal said: “We have considerable sympathy with the Appellant because she is a woman who has spent most of her working life in the care sector; she has gone to the trouble to get qualifications and she has achieved senior care status. However, the very fact that she has had this training and was a senior carer and went on to behave the way she did raises questions about her suitability to work with vulnerable adults.”

Appeals Dismissed.

SP v Secretary of State
[2006] 725.PVA; [2006] 726.PC
[Mr Hunter, Ms Reid, Ms Fowler]

The primary listing in this case was the PoVA list, with a secondary listing on the PoCA list. The Appellant worked for a domiciliary agency, responsible for three service users, one of whom could display challenging behaviour which involved hitting and kicking out as well as spitting. There was a particular incident involving this service user spitting at the Appellant, and the Appellant responding inappropriately. This resulted in his dismissal, in a conviction for common assault, and a listing on the PoVA list. He appealed. The Tribunal concluded that although the Appellant disagreed with the facts on which he was convicted, s 86(4) CSA does not allow him to challenge the findings of fact on which he was convicted. The Tribunal was therefore satisfied that the Appellant was guilty of misconduct that harmed or placed at risk of harm a vulnerable adult. The Tribunal considered the mitigating factors; that he had interrupted sleep, that he had inadequate training and poor supervision, and that he had a phobia in relation to being spat at.

The Tribunal was not persuaded by these considerations. It said that it had no confidence that if a similar situation were to arise again, the Appellant would be able to control himself. Accordingly, he was unsuitable to work with vulnerable adults, and also unsuitable to work with children.

Appeals Dismissed.

Noel McNish v Secretary of State
[2006] 646.PVA; [2006] 647.PC
[Miss Roberts, Miss Adolphe, Mr Thompson]

The primary listing in this case was the PoVA list, with a secondary listing on the PoCA list. His application form filled in when he applied for a position with an agency for care workers failed to refer to a series of previous convictions. Subsequently, there was an allegation relating to a possible sexual assault on a service user. His employment was therefore terminated. Subsequently, another allegation came to light. The Appellant denied these two allegations. The Tribunal considered this evidence, and decided on the balance of probabilities that both allegations were proved. So far as the non-disclosure was concerned, the Tribunal said: “such information is required to be disclosed so that the issue of risk can be evaluated by the prospective employer of a person seeking employment in the caring professions.” It decided that he was unsuitable to work with vulnerable adults.

So far as the PoCA list was concerned, the Tribunal noted the issue of public confidence where a person is confirmed on the PoVA list and consideration is then given to their inclusion on the PoCA list. It decided that continuation of his name on the PoVA list does make him unsuitable to work with children.

Appeals Dismissed.

KM v Secretary of State [2006] 675.PVA [Mr Robertson, Ms Chatfield, Ms Funnell]

The Appellant was a support worker. After she resigned, there was a discrepancy found of £95 relating to holiday money. The police were informed and she was formally cautioned. This formed the basis of one aspect of the misconduct relied upon by the Secretary of State. The other matter related to failure to disclose the full list of convictions in the application form.

As to the caution, the Tribunal stated that it could not go behind the caution: “In our view this patently amounts to misconduct which if known to the clients would undoubtedly cause them harm and therefore it follows the action put them at risk of harm.”

As to the failures to disclose, the Tribunal decided that these also amounted to misconduct, but did not accept given the nature of the convictions and the subsequent acceptance of them by the employer that this misconduct caused or placed clients at risk of harm.

The Tribunal then turned to suitability. It said: “The question of suitability is always a balance. On the one side are the factors (outlined above) which are serious. On the other we have heard evidence of [the Appellant’s] exemplary record and her dedication to her clients in circumstances where a lesser person would have given up...In giving evidence her face lit up and she came alive when discussing individual clients. We have little doubt that she was exploited in her employment...The working practices...are quite appalling...The lack of privacy afforded her and the unpaid expectations placed upon her are novel in our experience of dealing with such cases.” It decided that on balance she was not unsuitable to work with vulnerable adults, and that her name should be removed from the list.

Appeal Allowed.

Diane Dixon v Secretary of State [2005] 621. PVA; [2005] 622. PC [Mrs Singleton, Ms Diamond, Mr Jobbins]

The Appellant was placed on both lists on the basis of the following allegation. On the evening of 7th March 2004, ES (a service user) had been found wandering along the corridor. As a result of an argument between ES and the Appellant (a care assistant at the Home) it was alleged that the Appellant struck ES in the face, and

slapped her again and pushed her in the back forcing her to the floor. The Appellant gave a different version of the event, saying that ES struck out at her, that she (the Appellant) raised her hands to block the blow but that in doing so, hit ES on the shoulder and she fell to the floor. She denied grabbing ES by the wrist, slapping her in the face or hitting her in the back.

The Tribunal decided, on balance, to accept the Appellant's version of the events of what happened on that evening with ES. Thus, she was not guilty of misconduct because there was little else she could have done. However, she should have reported the incident which she did not; her failure to report the incident was in the opinion of the Tribunal misconduct which harmed or placed at risk of harm a vulnerable adult.

This did not make her unsuitable to work with vulnerable adults. The Appellant impressed the Tribunal as a person committed to the people in her care and that she was clearly mortified by what she had done. Character evidence had been fulsome in their praise of the Appellant. Accordingly, the Appeals were allowed.

Appeals Allowed.

Angela Pain v Secretary of State

[2006] 636.PVA

[Mr Hunter, Ms Matthison, Mrs Prewett]

The Appellant worked for a domiciliary care service, and was dismissed by them for gross misconduct. On 7th June 2004, she had been charged with two counts of theft. The first count alleged that between 15th February and 17th March 2004 she had stolen money belonging to a Ms RW (a service user) namely £1000. The second count of theft was that she had stolen £10 belonging to the Domiciliary Care Service. She was acquitted of both counts. She was confirmed on the PoVA list on 16th November 2005, and since then has been employed by a Care Home but been confined to kitchen duties.

At the appeal, the Respondent sought to establish that the Appellant had been guilty of misconduct causing harm to vulnerable adults, by being involved in a number of instances of theft from vulnerable adults in her care, amounting to 123 in total. In submissions at the end of the hearing, Counsel for the Respondent sought a finding only in respect of one incident, namely the £10 referred to above.

The Tribunal considered all of the evidence in detail. So far as the £10 referred to above was concerned, the Tribunal said: "...we note that this was a matter on which the Appellant faced criminal prosecution and was acquitted. Taking into account that we need to be satisfied on a lower balance of proof... [we] are not satisfied that the Appellant intended to steal the £10."

Having concluded that the Appellant was not guilty of misconduct which harmed or placed at risk of harm a vulnerable adult, it was not necessary for the Tribunal to consider whether the Appellant was suitable to work with vulnerable adults.

Appeal Allowed.

EK v Secretary of State [2006] 716.PVA; [2006] 717.PC [Ms Goldthorpe, Dr Latimer, Mr Sarll]

The Appellant appealed the two decisions of the Respondent to confirm his name on the PoVA and the PoCA lists dated 29th March 2006. He is now aged 60 years and has practised as a Registered Mental Health Nurse for many years. From 1998, in addition to his substantive NHS post, he took on additional weekend shifts at two nursing homes. In February 2003, he was suspended from duty at one of these Homes as a result of an incident involving bruising to an elderly resident. No further action was taken, and in August 2003 he started work at another Home. In September 2004, he was again suspended from one of the care homes on the basis of a number of drug errors. In October 2004, he was dismissed for gross misconduct on the basis of a number of admissions, the serious breach of confidence arising out of his errors and failures and in the belief that the necessary trust and confidence in a trained nurse was unlikely to be repaired by supervision and training. His substantive post in the NHS continued, and he remained employed in the one of the care homes, until October 2005 when he was suspended whilst an investigation was carried on into allegations that he had breached manual handling requirements.

He was confirmed on the PoVA and the PoCA lists on 29th March 2006, the Secretary of State having concluded that (a) both of his former employers reasonably considered him to be guilty of misconduct in that (i) he had inappropriately administered medication to a service user which was not prescribed for them, administered medication despite being told the service user was not to be given this medication, signing for medication which was not given, and disposing of medication without official record; and (ii) worked in a regulated care position with vulnerable adults whilst being aware that he was already provisionally included on the PoVA list which prevented him from working with vulnerable adults; and (b) he was considered unsuitable to work with vulnerable adults because of the serious nature of the medication errors, his reluctance to highlight these errors had been made, his previous record, and that he continued to both work with and seek additional work with vulnerable adults whilst temporarily prevented from doing so.

On a detailed examination of all of the evidence, the Tribunal found the Appellant guilty of misconduct in relation to (i) above but not in relation to (ii). As to suitability, the Tribunal concluded: “whilst he is undoubtedly extremely contrite and indeed upset about these events, he has done nothing to demonstrate his future suitability to work with vulnerable adults. We are not persuaded that the public

would have the necessary trust and confidence in him as a professional.” Likewise, in relation to children.

The Tribunal made a number of observations in relation to the provisional list. In particular, it recommended that the letter on the provisional listing be clarified to make sure that any recipient should take steps to make sure that they do not work, i.e. do not care for, in any setting involving vulnerable adults (and/or children). The Tribunal suggested that it might be helpful if it was made clear that anyone so listed should inform any relevant employers immediately, and possibly ask to be transferred to non care duties pending the outcome of a listing decision.

Appeals Dismissed.

Sini Joyce v Secretary of State (Preliminary Hearing) **[2006] 813. PVA; [2007] 814. PC** **[Judge Pearl]**

This preliminary hearing considered the remit of the Tribunal when considering “misconduct” under s 82(7). A distinction was drawn between the role of the Secretary of State when confirming a person on the List and the role of the Tribunal when considering an appeal. As to the former, s 82(7) does not oblige the Secretary of State to make any actual findings because her responsibility is limited to forming an opinion that “the provider reasonably considered the worker to be guilty of misconduct.” If so satisfied, it is often only then that the Secretary of State, when preparing for an appeal, discovers further evidence of other alleged misconduct to support a continuation of the opposition to the appeal. Section 86(3), in not defining misconduct by reference to s 82(7), enables the Tribunal to consider evidence not available to the Secretary of State in the exercise of the duty of the Secretary of State to consider whether the provider reasonably considered the worker to be guilty of misconduct.

This interpretation of the law remains the subject of an appeal to the Administrative Court.

Mr Robertson made a similar decision in the context of s2(7) and s s4(3) of the Protection of Children Act 1999 when granting the Secretary of State permission to amend his Grounds of Opposition to the appeal under Regulation 32(2); *JM v Secretary of State [Interim Decision] [2007] 920.PC, 921 PVA.*

JF v Secretary of State
[2005] 591.PVA; [2005] 592.PC
[Mr Wadling, Ms Cross, Ms Rabbetts]

The Secretary of State appealed the decision of the Tribunal in this case, and accordingly there is no summary of the Tribunal decision. The appeal was allowed by consent, and prior to the matter being returned for a hearing *de novo*, the Appellant withdrew her appeal.

DG v Secretary of State
[2006] 824.PVA
[Mr Oliver, Ms Cross, Mr Sarll]

The basis of the listing under the PoVA scheme in this case was that the Appellant was guilty of misconduct causing harm to vulnerable adults in that she pleaded guilty to theft in 2004. The Tribunal said the duty to satisfy the Tribunal as to suitability switches to the Appellant if the Tribunal is satisfied that the person has been guilty of misconduct. She was unable to satisfy the Tribunal. It said: “Although we warmed to her as an individual and some empathy with her, her lack of insight of the effect of her actions on the victim and the failure to understand that her integrity has been affected, do not help us conclude that she is now suitable. Even though she was genuine in saying that she would not do it again, that is not sufficient.” Her appeal was dismissed.

Appeal Dismissed.

Selina Matswairo v Secretary of State
[2007] 937.PVA; [2007] 938.PC
[Mr Lindqvist, Mrs McLoughlin, Ms Harris]

The evidence in this case, as accepted by the Tribunal, was that the Appellant (a night care worker) left a dozen or more vulnerable adults without any supervision for about twenty minutes, whilst she went to a supermarket. The Tribunal said about this one incident: “One incident of misconduct can suffice to give rise to a finding of unsuitability. But such a finding, as a matter of common sense, demands caution because no career is without its low points and few are wholly without any instances at all of human error. The gravity of the misconduct, the circumstances and, in particular, the probability of repetition are crucial factors.” On considering these factors, the Tribunal came to the view that the Appellant was not unsuitable to work with vulnerable adults or with children.

Appeal Allowed.

PHH v Secretary of State
[2006] 876.PVA, [2006] 1132.PC
[Ms Clarke, Mr Flynn, Dr Walsh-Heggie]

The Appellant in this case began working at a residential home in 1986 as a care assistant, subsequently being promoted to a senior care worker. She obtained a number of training qualifications, including NVQ level 3. On 23rd June 2005 there was a verbal disagreement between the owner and the Appellant which centred on whether the Appellant had that morning given prescribed medication to a Mrs F. There was a further disagreement, and the owner told the Appellant to leave the premises. After she left, the staff discovered she had not signed MAR sheets when she had dispensed medicines that morning. The owner reported the Appellant to the CSCI and as a result of a further investigation she was referred to the Secretary of State and subsequently confirmed on both the PoVA and PoCA lists. The Appellant at the hearing acknowledged that she had failed to complete the MAR sheets before she left the home on 23rd June 2005 and she accepted that she should have done so. The Tribunal decided on this issue that although she did not sign the MAR sheet she did verbally notify the other members of staff about what drugs had been administered to the residents. It said “notwithstanding that the failure to sign the MAR sheets immediately could not be regarded as good practice, and in most cases should be regarded as poor practice, the circumstances surrounding the events on June 23rd 2005 and the Appellant’s verbal report to the other staff on duty notifying them of what medicines had been distributed, has led the Tribunal to conclude that this incident should not be treated as misconduct in these specific circumstances.” None of the other matters brought to the attention of the Tribunal by way of opposition to the appeal amounted, in the Tribunal’s view, to misconduct.

Appeals Allowed.

Gavin Rathbone v Secretary of State
[2007] 975. PVA; [2007] 976. PC
[Mr Lindqvist, Mrs Last, Mr Tomlinson]

The Appellant in this case was a care worker who worked as a Senior Care Assistant in a care home for up to 40 elderly and disabled persons. The issues in this case arose out of the procedures for managing medication. It would appear that in September 2003, the Appellant made a mistake in giving medication. He had overlooked an area of the home and failed to give the residents in that area their medicines. The incident resulted ultimately in a spell of refresher training in the administration of medication. In July 2004, a new service user arrived for respite care with a view to permanent residence. It would appear that the Appellant acknowledged that he was reckless when filling in this new service user’s MAR sheet, and the Tribunal concluded that his own account disclosed misconduct. As to suitability, the Tribunal said that the Appellant’s failure to take proper care despite strong warnings, his inability to realise that he had gone wrong, to own up to it, to

accept responsibility and to do his best to put things right and to do better in the future, were serious failings which cast very real doubt on his suitability to work with vulnerable adults or children. They agreed with the submission of the Secretary of State that the evidence showed a lack of insight and understanding and a cavalier and reckless indifference.

Appeals Dismissed.

LLM v Secretary of State [2006] 832. PVA; [2006] 833. PC [Mrs Hughes, Mr Thompson, Mr Winn]

The Appellant was a registered nurse who had worked in a home for 64 beds, the service users mostly needing nursing care and being in varying states of dependency. Several were diabetic. One of these service users fell into a coma whilst the Appellant was on duty. Apparently, the Appellant failed to respond to requests from the care assistants to carry out a blood sugar test. She was suspended and later dismissed on the grounds of gross misconduct. She was struck off by the NMC. The Tribunal said that there was never any question about the Appellant's misconduct in relation to the failure to attend properly to the concerns about this service user's condition. The Appellant had admitted it from the beginning and although she did not give any explanation of her behaviour she clearly regretted what had happened and felt that she had been punished by being struck off the nursing register.

The Tribunal was concerned therefore with suitability. It took the view that there were mitigating factors surrounding the misconduct; in particular that it had happened four years ago, and that she was remorseful and that she had learned from her mistake. The Tribunal said that it was an isolated incident in a nursing career that had spanned 14 years and appeared to have been a one-off incident. The Tribunal found that she was suitable to work as a carer. It said "the risks posed to vulnerable adults at the level of working as a carer are not such as to render her unsuitable for such work."

Appeals Allowed.

SM v Secretary of State [2007] 1006.PVA [Mr Bennett, Ms Gilhespie, Mr Greenacre]

The Appellant was a part-time home carer employed by a MDC. Her employment required that she visited service users' homes to provide a range of personal and domestic support services. She was required in that capacity to attend the home of Mrs JC, who has Multiple Sclerosis. Money was stolen from Mrs JC's home. Some

nine months later the money was found in an envelope delivered to Mrs JC's home with an anonymous note apologising for the theft (of some £240). The note was traced to SM who admitted taking the money. SM accepted a police caution for this incident. She was placed on the PoVA list. The Tribunal found that there was misconduct, that actual harm occurred as a result of the misconduct, and that they were not satisfied that she would act differently in the future should a similar combination of circumstances arise. The Tribunal concluded that she was unsuitable to work with vulnerable adults.

Appeal Dismissed.

AB and RB v Secretary of State

[2007] 946.PVA, 947.PC; [2007] 948.PVA, 949.PC

[Ms Roberts, Mr Jobbins, Mr Wakefield]

The referral by CSCI and subsequent listing in this case arose out of the closure by emergency cancellation order of Silverlands Care Home where the Appellants had been joint proprietors and RB was the manager. There were a series of inspections, some announced and some in response to complaints. The concerns, all nineteen of them, of the inspectors are set out in the decision. As a result of the continuing concerns, CSCI applied for a cancellation order from the Magistrates Court on the grounds that there would be a serious risk to the life, health or wellbeing of service users unless an order was made. The Magistrates Court made an order for cancellation. AB and RB appealed that decision to the CST, but withdrew their appeal shortly before the hearing.

In the current appeal the Tribunal concurred with the findings of the Magistrates Court. It found as a fact that the Appellants had failed to comply with CSCI's immediate requirement notices, to keep proper records, drug charts and staff employment, and that in their treatment of residents they did not liaise appropriately with health care professionals. These findings of fact, amounting to institutional abuse, made findings of misconduct inevitable. The Tribunal went on to find both Appellants unsuitable to work with vulnerable adults and with children.

Appeals Dismissed.

AWL v Secretary of State

[2007] 1080.PVA; [2007] 1081.PC

[Ms Roberts, Ms Reid, Ms Wiggin]

The Appellant, a young man in his 20's, was employed as a support worker. On 7th May 2006, he was engaged on a visit to a beach with seven clients, and two other support workers. One of the clients (a young man with autism who had no speech but could sign and who could make sounds to make his needs known) became

aggressive; pinching, spitting and throwing sand. The Appellant pushed this person gently on the back to encourage him to join the others, but he fell on the ground and he became aggressive. The Appellant and another worker restrained him by holding his wrists. Although calmer, the client continued to flick sand; and the Appellant then flicked sand back at the client. After investigation, the Appellant was cautioned by the police for common assault.

On appeal from confirmation on both lists, the Tribunal were satisfied that the Appellant was guilty of misconduct that harmed or placed at risk of harm a vulnerable adult. The issue that required consideration was suitability. The Tribunal accepted that he was genuinely remorseful about what had happened and he did not seek to play down the potential seriousness of the situation and his responsibility towards the client. The Tribunal noted his previously unblemished record; and positive comments about his work, study and voluntary work. The Tribunal was not satisfied that the Appellant is unsuitable to work with vulnerable adults or children.

Appeals Allowed.

E. SCHEDULE 6 CASES

Appeals under s 68 Care Standards Act from decisions taken by the General Social Care Council

Appeals against refusal of Registration

Good character and conduct: s 58

MM v General Social Care Council

[2006] 649.SW

[Mr Reddish, Ms Halstead, Ms Joffe]

This was an appeal from the Registration Committee of the GSCC who had decided to refuse his application for registration on the basis that he had not satisfied the Committee that he met the criterion set out in s 58 of the 2000 Act with regard to his good character and conduct. The Notice of Decision was sent on 9th December 2005. An undated Appeal Application form was received by the Tribunal on 26th January 2006. The time limit for the initiation of an appeal by the Appellant expired on 9th January 2006, and the Appellant was aware of this. The Tribunal stated that the nominated Chairman has no discretion to extend the time limit for the initiation of the appeal.

Appeal Struck Out.

[NOTE: The time limit for initiating an appeal against a decision of the Council to refuse his application for registration as a social worker under s 58 of that Act is now three months after the applicant has received notice of the decision to refuse his application for registration, instead of 28 days: Protection of Children and Vulnerable Adults and Care Standards Tribunal (Amendment) Regulations 2006 SI 2006/1930 which came into force on 1st October 2006.]

Charmagne Ricketts v General Social Care Council

[2006] 626.SW

[Judge Swift, Dr Low, Dr White]

The Appellant submitted an application for registration as a social worker on three occasions without including full details of her criminal convictions despite the clear and stated need for full and frank disclosure. In consequence, the Registration Committee determined that they were not satisfied that the Appellant had demonstrated good character. On appeal, the Tribunal stated that an applicant for

registration cannot pass the onus of complying with the registration requirements and providing the information that is requested on to any third party including the endorsers of her Application. The Tribunal said that the purpose of the legislation is to introduce control and regulation of social workers in the interests of those who require and use their services together with the interests of the community as a whole. The need for a full and frank disclosure is fundamental to the process of registration. Any doubts must be resolved against registration, and it is upon the applicant to demonstrate that she is a person of good character. The Tribunal concluded: “We are satisfied that the Appellant’s conduct in relation to her Application was reprehensible and relevant to the question whether she discharged the obligation to demonstrate that she was a person of good character. It was open to the Registration Committee to find that material non disclosure occurring in this way on a matter of such significance resulted in a failure to discharge the onus of demonstrating good character and with that conclusion we agree.”

Appeal Dismissed.

**AI v General Social Care Council
[2006] 683.SW
[Miss Lewis, Mrs Howell, Mr Coleman]**

The Appellant submitted an application for registration as a social worker, incorrectly describing an offence of driving a motor vehicle with excess alcohol on 21st March 2002 as a caution. In fact the date of conviction was 21st March 2002, the offence having been committed on 8th January 2001. He was fined £150 with costs of £55 and disqualified for driving for twelve months. His explanation was that his cousin had stolen his driving licence and he had thrown him out of the house, and he had only discovered this when he himself was stopped by the police in 2003. In addition, whilst he had declared a conviction for assault in 1991, it was not clear whether the conviction was for indecent assault and that by his explanation he appeared to deny responsibility for it. The Registration Committee refused his application and he appealed on the ground that the refusal was unfair, biased or discriminatory. The Tribunal did not find his evidence in relation to the driving conviction satisfactory. The fact of the convictions alone was not such as to have prohibited registration; the crux of the case is failure to disclose and to give a transparent and full account.

The Tribunal stated that the Appellant had failed to appreciate that it was up to him to establish his good character by presenting evidence to support what he told the Tribunal in explanation and by giving a full, frank and consistent account of his history.

Appeal Dismissed.

Yvonne Brenda Henry v General Social Care Council

[2006] 778.SW

[Mr Askham, Ms Chatfield, Mrs Howell]

The Appellant in this case has been practising as a Social worker since 2004 and working in the social care field since 1991. Her application to the GSSC for registration was refused because of two specific issues. First, it was suggested that there was evidence that on or about 5th April 2005, the Appellant might have submitted a false reference for a Mr B. Secondly, it was found by the Council that the Appellant, when she applied for a position at the London Borough of Bromley, did not make clear to them that her application for registration had not been determined. These two issues, the Respondent submitted, showed that she had not satisfied them that she was of good character. In addition, the Council maintained that it also evidenced a breach of trust of their Code of Practice because the Appellant had been shown as not being honest and trustworthy.

On the appeal, the Tribunal directed that there be carried out an independent forensic examination of the reference, the subject of the first complaint. The examination concluded that the signature on the reference form from Mr B “was not a normal signature produced by Yvonne Henry” and that there is “strong evidence that Yvonne Henry did not write the questioned reference.” The Tribunal accepted Ms Henry’s evidence on the first matter. As to the second matter, the Tribunal accepted the evidence of Ms Henry that she had repeatedly rung and emailed the Council to ascertain the progress of her application. She had no reason to believe that her situation was any different from many of her colleagues. The Tribunal was satisfied that the Appellant is of good character and should be registered as a social worker.

Appeal Allowed.

De Almeida v General Social Care Council

[2007] 1000.SW

[Mr Bennett, Mrs Lowcock, Mrs Gilhespie]

On 22nd October 2004, the Appellant submitted an application form for registration as a social worker. He disclosed 4 criminal convictions, and two cautions, but no health problems. The Appellant’s doctor in his Report, obtained by consent, disclosed consultations and medication for depression and anxiety around June 2004, and details in the past of self-inflicted lacerated wrists, drug overdose and Alcohol Dependence Syndrome. On 12th January 2007, the Respondent, through the Conduct Manager, issued a Notice of Recommendation for conditional registration. The Notice said that for a period of three years, the Appellant must inform any future employer of his health conditions, and ensure that he co-operates with any employer’s occupational health department and is compliant with any advice they may issue. Subsequently, by a Notice of Decision dated 8th March 2007, the

Registration Committee of the GSCC went further and decided to refuse registration.

The Tribunal took the view that the Appellant was now physically and mentally fit to perform as a social worker, subject to the recommended conditions. The Tribunal did not consider that the Appellant's application or his response to enquiries was such that gave rise to significant doubts about his integrity. Accordingly, the Tribunal allowed the appeal and ordered that the GSCC shall register the Respondent but subject to the conditions as set out above.

Appeal Allowed (subject to conditions).

CT v General Social Care Council
[2007] 1014.SW
[Mr Hunter, Ms Alford, Mrs Caporn]

The Appellant was refused inclusion on the register as a student social worker. The Respondent submitted that the Registration Committee, having been not satisfied as to the Appellant's good character and conduct was obliged to refuse to register her. The Tribunal reached a different conclusion. It considered the three matters that formed the basis of the decision to refuse registration; namely her actions during a fire alert at a home where she was working at the time, her subsequent dismissal, and the failure to disclose that information to the GSCC, the University, and to another employer. The Tribunal said: "The crucial question is the impact...on the Appellant's present character and conduct. We take into account what the Appellant has said and done since her dismissal and since submitting her application form to the GSCC. In particular, she has continued at the University, she has undertaken further fire training and the evidence from the employer is that she is a person who follows procedures. She has good reports from the University, from her tutor, from her placement supervisor and in addition a good character reference from her tutor". The Tribunal was persuaded that she had learnt lessons and developed a greater understanding and insight into the requirements of being a social worker as set out in the Codes of Practice.

Appeal Allowed.

English qualifications: Schedule 1 GSCC (Registration) Rules 2005.

JS v General Social Care Council
[2005] 553.SW
[Mr Reddish, Ms Halstead, Ms Joffe]

The Appellant submitted her application for inclusion on the register of social workers declaring that she held a Probation Certificate of satisfactory completion of

courses recognised by the Advisory Council for probation and aftercare, awarded by the Home Office on 21st March 1974. Her qualification was not listed in Schedule 1 of the GSCC (Registration) Rules 2005. The Registration Committee of the Respondent refused her application for registration stating that the Committee had no power to revise the Schedule and no discretion to allow her application on the basis of the quality and duration of her experience.

The Respondent's Solicitors applied for an order that the appeal be struck out as being outside the jurisdiction of the Tribunal or otherwise misconceived following the decision of the Tribunal in *Blanchard [2005] 436.SW*. The President rejected the strike out application holding that the points raised by the Appellant on the interpretation of the 2005 Rules compared to the 2003 Rules were arguable, that it would not be appropriate to use the strike out provisions in this context, and that a decision on the interpretation of the relevant paragraphs of the Rules should be made by a full Tribunal after hearing full legal argument.

The Tribunal was unable to accept the "ingenious argument" presented on behalf of the Appellant to the effect that the 2005 Rules give the Council discretion to accept qualifications that are not listed in Schedule 1 to the Rules but are materially similar to one or more of the qualifications that are listed in the Schedule. Accordingly, the Tribunal decided that the Appellant does not at present hold a recognised qualification which would enable her name to be included on the statutory register of social workers and neither the Respondent Council nor the Tribunal had any discretion to direct her name be included notwithstanding that lack of qualification. The substantive position remains the same under the 2005 Rules as it was under the 2003 Rules. The only difference is that the Council will now accept different and/or less specific forms of evidence of successful completion of such a course or requirement for training.

Appeal Dismissed.

NOTE: The Appellant appealed to the High Court against the decision of the Care Standards Tribunal. She put forward three grounds of appeal, two of which were pursued. The first ground was that the Tribunal had erred in its construction of Rule 4(10)(c)(ii)(bb) of the 2005 Rules. It was argued that on its true construction, the Rule permitted the registration of persons with qualifications which were similar or equivalent to those set out in Schedule 1. The second ground alleged that if the Tribunal was correct in its reading of the Rule, then this gave rise to a breach of Article 14 of the EConHR. The GSCC applied to strike out the second ground on the basis that that ground had not been put to the Tribunal. That application was successful, but the Appellant sought judicial review contending that Rule 4(10)(c) was contrary to Article 14 when that Article is read in conjunction with Article 2 of the First Protocol. The case came before Jackson J and is reported as *The Queen on the Application of Janet Sivills v General Social Care Council [2007] EWHC 2576* (Admin). He dismissed both appeals. As to the construction point, the Judge said: "Properly construed, the Rules contain a comprehensive list of University

qualifications and training courses in the UK which satisfy the training requirements identified in section 58(2)(a)(ii) of the 2000 Act. Any UK applicant who has not obtained one of those qualifications or completed one of those training courses does not satisfy the training requirements of the Act.” As to the Article 14 judicial review issue, the Judge held that the Appellant’s claim to be registered as a social worker does not fall within the ambit of Article 2 of the First Protocol, and her claim for judicial review failed at the first hurdle.

Tariq Khan v General Social Care Council
[2006] 733.SW
[Miss Lewis, Ms Halstead, Ms Joffe]

This was an application to strike out the Appellant’s appeal against the refusal to register him. When the Appellant applied for registration, he indicated that he held a Diploma in Social Work at the LSE. It was established by the GSCC that he had not been awarded this Diploma. In his evidence to the Tribunal, he admitted that he had not been awarded a Diploma, but he said that he should have been awarded the qualification.

The Tribunal struck out the appeal, as he was not able to fulfil the mandatory requirement for registration as set out in s 58(2) CSA. The Appellant effectively wished to challenge the decision of the LSE not to award him a Diploma. This was not a matter for the Tribunal.

Appeal Struck Out.

Dr Dmitri Guskov v General Social Care Council
[2005] 600.SW
[Judge Pearl, Ms Halstead, Mr Oliver]

The Tribunal in this appeal comprised two legal members and one specialist member, with the express agreement of both parties. In 1994, Dr G commenced an MPhil programme in Social Work and Administration at LSE. By the end of the second semester he was transferred to a PhD programme, and in 1996 he transferred to the School of Community Health and Social Studies at what is now known as Anglia Ruskin University. He was awarded the degree of PhD in social work studies by that University in 2004. His thesis was on “Investigating the paradigms societal response to the AIDS-challenge and projecting an anti-orthodox AIDS social practice in Ukraine: A postmodernist research in action.” His application for registration was turned down because “you do not have one of the qualifications set out in Sch 1.”

Some of the issues in this case related to those that were being litigated in the *JS v GSCC* appeal, which was being argued in the Courts. Accordingly, the appeal in Dr

Guskov's case was stayed pending the resolution of the JS case, until February 2007 when the stay was lifted because the appeal in this case could be heard relatively quickly. There were seven issues in this case.

- (1) Does the Appellant possess one of the qualifications listed in Sch 1. The Tribunal answered this question in the negative. The Tribunal considered the wording of rule 4(10)(c)(ii)(bb) which states that the Council "shall grant an application for registration if the applicant, inter alia, has successfully completed a course or possesses a certificate or similar documentation..." The Tribunal said that the words "or similar documentation" relates to evidence that the applicant may produce "similar to a certificate" to satisfy the Council that the applicant has successfully completed a course as set out in Sch 1. The words do not widen the scope of Sch 1 so as to include other courses not set out in the Schedule.
- (2) The LSE Course. Dr G was not awarded the MPhil because he transferred both the Anglia and on to a PhD course.
- (3) Should the GSCC have referred to case to the Registration Committee? The 2005 Rules came into force on 18th July 2005 so these were the Rules to be applied to Dr G's application. The 2003 Rules required an application to be referred to the Registration Committee (as in the JS case). The 2005 Rules have no transitional arrangements contained within them so as to provide for the way to process an application already lodged. On the day Dr G's application was considered, the only Rules in existence were the 2005 Rules and they do not provide for the matter to be referred to the Registration Committee.
- (4) Is the refusal to recognise Dr G's qualification and experience discriminatory and unlawful? The PhD had no taught element and no practice element in the PhD. There is no discretionary power in the 2005 Rules. The Tribunal rejected this submission.
- (5) Is refusal to recognise contrary to ECHR. The Tribunal considered Article 2 to Protocol 1, and said that the refusal to regard a certain degree as fulfilling the GSCC's criteria was not a breach to the right to education. The GSCC are not preventing Dr G from obtaining a suitable qualification; just determining that his qualification does not fulfil the criterion for registration as a social worker.
- (6) Is the distinction between "academic" and "professional" irrational or unlawful. The Tribunal rejected this argument. It said that social work was a practice based profession and it was for the GSCC to determine what components are required.
- (7) Is the distinction drawn by employers between registered and unregistered social workers unlawful. The Tribunal said that this was not a matter for the Tribunal.

Appeal Dismissed.

RH v General Social Care Council [Preliminary Hearing under Part V to consider a preliminary issue of the interpretation of Schedule 1 of the General Social Care Council (Registration) Rules 2005] [2005] 559.SW [Judge Pearl, Dr Low, Ms Halstead]

The Appellant in this case has a Degree of Bachelor of Arts, a Diploma in Social Study, a Practice Teacher Award and a postgraduate Certificate in Social Work and Welfare: Research and Practice. Her application for registration was refused because these are not qualifications within Schedule 1. The case was linked with the case of JS v GSCC, and was stayed pending the conclusion of the High Court proceedings in JS. On 20th March 2007, the stay was lifted “so as to consider whether the Appellant meets the qualification requirements as set out in Sch 1 in respect of her course’s recognition by the (then) Institute of Almoners.” It was argued for RH that the award of the Diploma in Social Study from the University of Edinburgh in 1960 was recognised by the Institute of Almoners and in consequence she is entitled to be registered as a social worker. It was submitted that the schedule refers to a certificate recognised by the Institute, and the prospectus from the University at that time was submitted to the Tribunal to prove that the certificate was recognised. Counsel for the GSCC submitted that the word “recognised” in the Schedule could make sense only if it is interpreted to mean “recognised as a professional qualification”. The Tribunal accepted this interpretation. It said: “We have no doubt but that the Diploma that Mrs RH obtained was a ‘basic’ course...and was not recognised for professional purposes.”

On the Preliminary Issue before the Tribunal, decision in favour of the Respondent.

Overseas qualifications: s 64(1)(b)

Adebayo Oladipo Bankole v General Social Care Council [2006] 715.SW [Miss Lewis, Ms Halstead, Ms Joffe]

This case considered the requirements of s 64(1) (b), namely qualifications gained outside England and Wales. The sole issue in this case was whether the Appellant had met the qualification criteria contained in s 64(1) (b)(i). The Tribunal agreed with the GSCC that the Appellant’s qualification did not involve him in undergoing many of the key requirements of the Diploma of Social Work, namely he had not undergone a supervised assessed social work placement of significant duration.

Appeal Dismissed.

Maureen Convey v General Social Care Council
[2006] 758.SW
[Mr Rowland, Mrs Howell, Mrs Matthison]

This is another case involving s 64(1) (b). The Appellant in this case holds a Diploma from a College in Canada after a two-year part time course in a child and youth programme. She also relied upon her practical experience in Canada. It would seem that the qualification obtained by the Appellant was not recognised by the Canadian Association of Schools of Social Work, and that it was considered by the UK NARIC to be equivalent to an AVCE/BTEC National Diploma. The Tribunal decided that if the Canadian authorities were not prepared to recognise the Diploma as adequate qualification for registration as a social worker in Canada, it was very difficult to see why the qualification should be recognised as justifying registration in England.

The Tribunal made some important observations relating to the need to make absolutely clear to an Applicant that it was minded not to register.

Appeal Dismissed.

Raminder Parmar v General Social Care Council
[2006] 848.SW
[Mr Wadling, Ms Halstead, Dr Low]

This is a s 64(1) (b) case relating to qualifications gained outside UK. The Appellant in this case is resident in India and obtained her qualifications and experience in that country. The Appellant has an MA in Sociology and is pursuing a PhD relating to working women in urban areas. Her application under s 58 was turned down on the basis that she did not “demonstrate that she has sufficient depth of knowledge or application of skills required of a qualified social worker as she has not trained as a social worker.” (Final IRS Report). The Tribunal agreed with this conclusion after a paper appeal.

Appeal Dismissed.

Michael Voronin v General Social Care Council
[2006] 822. SW
[Mr Hunter, Ms Tynan, Dr Low]

This is another s 64(1) (b) case relating to qualifications gained outside UK, in this case the USA. The IRS concluded “...the applicant has not studied a professional qualification in social work accredited by the Council in Social Work Education in America. He has not provided evidence that he is (or has been) licensed as a social

worker in the USA.” It said “The applicant has over 20 years experience with working with young people; however this is an entirely different professional activity than that of a social worker.” The Tribunal agreed with this opinion.

Appeal Dismissed.

Mr Havard Jonny Moen v General Social Care Council
[2006] 844. SW
[Mrs Tudur, Ms Tynan, Mr Cairns]

Another s 64(1) (b) case, in this case relating to Norway. The Appellant, despite ample opportunities to do so, both prior and during the appeal, has failed to produce evidence that he has satisfactorily completed training equivalent to the DipSW in Norway or elsewhere. In those circumstances, the decision to refuse his registration was correct and should be upheld.

Appeal Dismissed.

Karen Anne McElroy v General Social Care Council
[2007] 872.SW
[Mr Reddish, Mr Cohen, Mrs Gladwin]

In this s 64(1) (b) case, the Appellant holds an Associate Diploma in Social science (Child Care) awarded by the Sydney Institute in 1999 and is a Bachelor of Community Welfare. During her degree course, the Appellant undertook three supervised practical placements in the social care field. She was employed as a Foster Care Caseworker, then as a Child Protection Caseworker. She also successfully completed a “Caseworker Development Course” (entry-level training). On 8th March 2006, she submitted her application for inclusion on the register of social workers declaring that she held a degree in community welfare and setting out, in her personal statement, the “core competences” that she said that she had acquired during her University course and subsequent employment. The IRC (the International recognition Service) referred her application to an external assessor for advice. This turned out to be positive. Despite this, the Manager of the IRC referred the Appellant’s case for a second opinion. This second opinion was negative; expressing the view that the Appellant was not eligible for registration because her qualification was not accredited by the Australian Association of Social Workers or by the other relevant Institute and did not entitle her to practice as a social worker in Australia. Her application was refused and she appealed. The appeal was unsuccessful for the reasons as expressed in the second opinion.

In the course of its decision, the tribunal said that where, as in this case, an applicant has undertaken training which would “match” a substantial part of the training that would have been required for an award of the Diploma in Social Work, the

Respondent should, in accordance with the Act, identify the “shortfall” and impose an additional training requirement accordingly rather than simply inform the applicant that he or she has not met the requirements and must, in effect, start all over again.

Appeal Dismissed.

Evelyn Ogoh v General Social Care Council

[2007] 888.SW

[Mr Bennett, Ms Tynan, Mr Churchill]

In this case, the Appellant submitted details of her completion of a Diploma in Social Work and an LLB from the University of Benin, Nigeria, a Certificate of call to the Nigerian Bar, and social work trainee placements in Benin City. The IRS assessor recommended: “Before registration takes place this candidate should do at least 60 days in a statutory setting to broaden her knowledge and compensate for her lack of experience.” This was the basis for the refusal by the Respondent and the Appellant appealed. Her appeal was unsuccessful, the Tribunal deciding: “From the information provided about Ms Ogoh’s qualifications and experience we are satisfied that she does not fulfil the requirements for registration contained in s 64 of the Act.

This is another case where the Tribunal expressed some concern about letters which had been written by the GSCC and their possible ambiguity. The Tribunal said “We recommend that the GSCC give consideration to the format and wording of such letters. Requirements for registration and the underlying reasons should be clear and relevant to the particular application.”

Appeal Dismissed.

MKN v General Social Care Council

[2006] 774.SW

[Miss Irving, Ms Gilhespie, Ms MacGregor]

The Appellant in this case has a Diploma in Social Work from Botswana, and a BA in Social Sciences from Cape Town. He has a number of short agency placements and had begun work with Barnsley Social Services in November 2003. Both assessors recommended that the Appellant did not meet the requirements of the Diploma in Social Work. The Tribunal confirmed the decision to refuse registration. It said: “Given the UK NARIC report as to the level of the Botswana Diploma in Social Work and the obvious gaps in experience and training identified by the two

independent assessors appointed by the IRS, we are entirely satisfied that the decision to refuse registration is appropriate in the circumstances.”

Appeal Dismissed.

Hilde Bootsmann v General Social Care Council
[2007] 968.SW
[Miss Clarke, Mr Black, Mr Greenacre]

The Appellant in this section 68 case relied on her German qualifications and her training and work experience in Germany. The External Assessor had recommended rejection of the application on the basis that the Appellant had not been able to demonstrate that her stated qualifications, and her experience and training satisfied the core competencies in the Dip SW. The IRS Manager recommended that her application be rejected. The Tribunal reached a similar conclusion, deciding that the Appellant had not demonstrated that she has been trained to a sufficient standard to meet the core competencies required under the Dip SW standard.

Appeal Dismissed.

Christian Kahl v General Social Care Council
[2007] 880.SW
[Mr Oliver, Ms Funnell, Ms Joffe]

The Appellant in this section 68 case had German qualifications. The International Recognition Service sought information from the External Assessor who concluded that the Appellant had not met the requirements as there was a mismatch between his professional activities and those of the DipSW. The Tribunal concurred with this view. It said “We have looked at Mr Kahl’s Diploma Supplement in detail and are satisfied that there is nothing in that to suggest that his degree has the components required to meet the DipSW requirements. The German Culture Ministry had stated that his degree would not entitle him to work as a social worker in Germany.

Mr Khan sought a review of the decision under Regulation 25 on the grounds that there was an “obvious error” in the Decision. The Tribunal considered each of the eight points set out in the Review application. It came to the conclusion that the application for review had no prospect of success and dismissed it.

Appeal Dismissed.

Linnet Ouna v General Social Care Council
[2007] 1008.SW
[Mr Hunter, Dr Ariyanayagam, Dr Low]

In this case, the qualifications submitted by the Appellant included a certificate in social development course awarded by a training centre in Kenya. She had been awarded an MA in International and Child Welfare from the University of East Anglia, Norwich. The Tribunal concluded that whilst the Appellant had undoubtedly undertaken study in social work related areas both in Kenya and in the UK, they had not covered the full breadth of competencies required by the Diploma in Social Work, partly because there had been insufficient depth in the areas taught in Kenya and secondly because it had not involved sufficient assessed social work practice.

Appeal Dismissed.

Siraj-Ulhaq Yousafzai v General Social Care Council
[2007] 1013.SW
[Ms Goldthorpe, Mr Griffiths, Ms Redford]

The Appellant in this case had qualifications from Pakistan, but did not possess the necessary qualifications to practice as a social worker in the UK. He did not satisfy the criteria laid down in s 64(1) (b) of the CSA 2000, and in consequence his appeal from the refusal to register him on the register failed. The Tribunal said that if he wished to register as a social worker in UK, the first step is for him to become enrolled on an approved social work course in order to apply to the GSCC for registration as a student. Once his application to the college or university has been accepted, he has been offered a place on the approved course as a student, and been formally enrolled, he can then fill out the separate application to the GSCC for registration as a student.

Appeal Dismissed.

Gloria Madzi v General Social Care Council
[2007] 995.SW
[Mr Hunter, Mrs Gladwin, Mrs Williams]

The Appellant in this appeal comes from Ghana; and has a Bachelor of Education from University of the Cape Coast. Whilst studying for her degree she participated in a number of placements. She is a member of the Ghana Association of Social Workers. The IRS, advising the GSCC, had concluded that the degree obtained by the Appellant was outside the field of social work and would not prepare the Appellant to undertake work as a qualified social worker in the UK. The GSCC were of the view that membership of the Ghana Association of Social Workers did

not affect the position, because the Association was not a regulatory or accredited body for social work education. Whilst dismissing the appeal, the Tribunal urged the Respondent to look again at what the Appellant needs to do to put herself in a position where she can successfully re-apply for registration. It concluded: “We are of the view that an applicant of high calibre and commitment, as undoubtedly exists in this case, who has a great deal to offer to social work, should be assisted in being able to enter the social work profession.”

Appeal Dismissed.

Appeals against an interim suspension order or a suspension order

YD v General Social Care Council
[2006] 739.SW-SUS
[Mr Oliver, Ms Halstead, Dr White]

This was an appeal under s 68 CSA 2000 against the decision of the Conduct Committee of the GSCC to suspend the Appellant from the register for a period of two years. The first issue before the Tribunal was to determine whether or not the Appellant had committed misconduct, and if it was satisfied that she had, whether the sanction imposed by the GSCC was appropriate. The Tribunal applied the civil standard of proof, following the guidance set down by the House of Lords in *Re H (minors) (Sexual abuse: Standard of Proof)* [1996] AC 563. The factual issue before the Tribunal was whether the Appellant had advertised herself as an escort with an Escort Agency. The Tribunal said that misconduct is about lack of integrity and how an individual is perceived by others. The Tribunal concluded that to advertise oneself as a prostitute does constitute misconduct. On an analysis of the facts, the Tribunal decided that the Conduct Committee of the GSCC was right to reach the conclusion that it did, namely that the Appellant did advertise herself as an escort, and that in so advertising herself, she was guilty of misconduct.

The Tribunal then went on to consider the penalty imposed by the Conduct Committee. It regarded the two-year suspension as entirely proportionate in the circumstances, as it balanced the nature of the misconduct against the professional expertise of the Appellant. It did not regard the penalty as excessive.

Appeal Dismissed.

Frederick Adu-Darko v General Social Care Council
[2006] 663.SW
[Mr Oliver, Ms Harris, Ms Halstead]

This was an appeal against the decision of the Conduct Committee to impose an interim suspension order of six months. The Tribunal adjourned the matter to enable the Respondent to consider new information. Subsequent to considering this new information, the Respondent lifted the ISO. The question for the Tribunal was what procedural step should be taken by it. The Appellant asked the Tribunal to continue with the hearing because “this matter is not completely resolved.” The Respondent suggested that the Appellant should withdraw his appeal, and if he did not do so, the Tribunal should strike out the appeal. The Tribunal agreed with the Respondent. It said; “As soon as the ISO was revoked...there is no matter left for us to determine. In those circumstances, we see we have no alternative but to strike out these proceedings.”

Application to Strike Out Granted.

Christopher Bradford v General Social Care Council
[2006] 792. SW-SUS
[Mr Rowland, Ms Halstead, Dr White]

The Appellant was employed by a County Council as a senior practitioner and approved social worker in adult mental health services. On three occasions in May and June 2005, he had sexual intercourse with a service user. On 1st June 2006, he was sentenced to seventeen months imprisonment, and his appeal against sentence was dismissed by the Court of Appeal. On 16th September 2006, the PPC of the GSCC imposed a six month interim suspension. It is against that decision that the Appellant appealed to the Tribunal.

The Tribunal dismissed the appeal, but stated that it did not accept that “the protection of members of the public” is a term interchangeable with “the public interest.” The tribunal said that Para 6(1)(b) of schedule 1 to the rules makes it clear that “the protection of members of the public” is a narrower concept than “the public interest”. It was said also that “the public interest” also includes maintenance of public confidence in the profession. In addition, it was said by the Tribunal that a social worker may be suspended or removed from the register even though he or she poses no risk to the public because only a person who is of “good character” may be registered in the first place.

In a case such as the present, the Tribunal said that it did not regard it as realistic to think that the Conduct Committee would not consider it necessary for the Appellant at the very least to be suspended for a period greater than the length of time likely to pass before his case to be determined by the Conduct Committee. The interim suspension order was therefore in the public interest. The Tribunal said also that in

this case they were satisfied that there would be a risk to members of the public if the Appellant were to practice as a social worker.

Appeal Dismissed.

XY v General Social Care Council
[2006] 855. SW-SUS
[Judge Pearl, Mrs Gladwin, Ms Joffe]

In this case, the Appellant had written a letter to the GSCC stating that following a six month career break he had decided to leave social work and seek an alternative occupation. He requested that his name be removed from the register. It would appear that a local authority wrote to the GSCC and stated that XY had been the subject of a disciplinary investigation at the time of his resignation and that the conclusion of the investigation was that he would have been dismissed if he had not already resigned. The Tribunal said that there were two relevant grounds for making an ISO; namely protection of members of the public, or otherwise in the public interest. The former was not relevant in this case, given that he does not wish to resume work as a social worker. The Tribunal said that it had to strike a fair and proportionate balance between the interests of the registrant and in the maintenance of confidence in the registrant's profession. The Tribunal said further that it did not think that this is a case where the "public interest" would demand that there be an ISO. The Tribunal did say however that professionals in the position of XY would be expected to inform the registration authority of disciplinary investigations. Failure to do so in this case was a ground for concern, but on the specific facts of this case was not sufficient for the sanction of an ISO.

Appeal Allowed.

Appealed against decision of the Conduct Committee to remove Registration

Evelyn Muthoni Mnene v General Social Care Council
[2007] 1063.SW
[Mr Rowland, Ms Wade, Ms Chatfield]

The Appellant in this case passed a two-year social work course at the Kenya Institute of Administration. Between 6 January 1999 and 18 November 1999 she worked as a care assistant for UK International Nursing Agency; and on 26th April 1999 she started work as a care assistant at St Mary at the Cross Convent, mostly on night duty caring for three elderly nuns. She did not declare this work to the benefits authorities until 2002 when she made disclosure. When she submitted her application for registration in March 2005 with the GSCC, the application contained certain misrepresentations as to her employment, and in particular failed to mention

amongst other matters her employment with the Convent. She did not mention that she had been under investigation for benefit fraud. She was registered in May 2005. Having been registered she failed to mention that she had been provisionally listed on the PoCA and PoVA lists. On 9th January 2006, she pleaded guilty to eight counts of false accounting and two of producing or furnishing false documents or information. These all related to claims for housing benefit and council tax benefit. She was sentenced to nine months imprisonment.

On 14th June 2007, the Appellant, having admitted all the allegations made against her, appeared before the Conduct Committee of the GSCC. The Committee found misconduct proved and made an order for the Appellant's removal from the register of social workers.

That decision was upheld on appeal. The Tribunal decided that a removal order is clearly appropriate and proportionate on the facts of this case, having regard to the seriousness of the misconduct and the public interest in maintaining confidence in social care services. It said: "It is difficult to conceive of circumstances in which a person recently convicted of offences of dishonesty that are so serious as to attract an immediate nine-month prison sentence should not be removed from the register. It is also difficult to conceive of circumstances in which the provision of inaccurate employment histories in connection with applications for such jobs will not merit removal from the register."

The Tribunal raised a number of preliminary matters. It expressed the view that an appeal before a tribunal is by way of a rehearing. All issues are at large, and the Tribunal has the same powers as the Committee. Secondly, it stated that it was of the view that if a Tribunal decides that a removal order shall not have effect, it has no power to substitute another of the sanctions listed in paragraph 25(1) of Schedule 2 to the Conduct Rules. A third matter of importance was what would happen if a Tribunal allowed an appeal against the imposition of a sanction, should it state what alternative sanction should be imposed. That third matter was left for consideration at a later date.

Appeal Dismissed.

F. SCHEDULE 7 CASES

Care Standards Act 2000 s 79H; Child Minding and Day Care (suspension of Registration) (England) Regulations 2003.

MP v OFSTED

[2005] 618.EY-SUS

[Mr Bennett, Ms Graham, Mr Allman]

Both the Appellant and the Respondent in this case accepted that the police were investigating allegations involving injury to a child. There has been multi-agency involvement, initially led by social services and now led by the police. OFSTED will initiate its own investigation but in accordance with the inter-agency protocol, it cannot be undertaken until such time as police indicated it to be appropriate. The Tribunal accepted that a parallel investigation by OFSTED might prejudice police investigations. The Tribunal said that it was neither possible nor appropriate at this stage for the Tribunal to reach any conclusion about the underlying allegation. The Tribunal said that following its conclusion about the gravity of the allegation, the continued appropriateness of the enquiry and the prospect of additional allegations being made, it concluded that there is reasonable cause to believe that continued provision of child minding by MP may expose a child to risk of harm. It accepted that the suspension was properly and lawfully made to allow time for circumstances giving rise to allegations to be investigated and its continuation is appropriate.

Appeal Dismissed.

RT v OFSTED

[2005] 614.EY-SUS; [2006] 640.EY-SUS

[Judge Pearl, Mr Churchill, Mrs Elliot]

The Area Manager of OFSTED stated in evidence that she first became aware of the case involving Mrs RT on 10th November 2005 following a complainant's contact on 2nd November 2005 to OFSTED. This information would seem to have been given by a parent of an ex-minded child to the effect that Mrs RT was being investigated by the Police. OFSTED had had no knowledge of this investigation, so enquiries were made by OFSTED to the Police. The Area Manager stated in evidence that as a result of this on-going police investigation, the failure of Mrs RT to notify OFSTED of this significant event and of the fact that she had been interviewed under caution, and the fact that there was a history of previous complaints, she decided to call a case conference, held over the telephone on 15th November 2005. The Minute of the conference states that the decision was taken to invite Mrs RT to accept a voluntary suspension, and that if she refused to agree to a voluntary suspension, then OFSTED would suspend Mrs RT on a statutory basis.

Mrs RT decided to agree to a voluntary suspension on that afternoon. There was a monitoring visit on 1st December 2005, when Mrs RT told the inspector that she had continued to provide care for children but not on a child-minding basis and that, she was not receiving any payment “as the parents were her good friends and she was doing it out of the goodness of her heart to help.” There was then an emergency case conference on 2nd December 2005 and it was decided to proceed to a statutory suspension because the police investigation was on going, and Mrs RT had failed to notify OFSTED that she was continuing to care for children. The statutory suspension was served that afternoon. The period was extended by notice dated 13th January 2006 for a further six-week period.

At the appeal hearing, Mrs RT said in evidence that she had not told OFSTED that she had been interviewed by the police because she assumed that OFSTED already knew about it. She said in evidence that any recent complaint was motivated by malice, and perhaps because she had obtained a County Court judgement against the complainant for non-payment of fees. She explained that after she accepted the voluntary suspension, she understood that the parents had telephoned OFSTED to ask whether they could leave their children with Mrs RT without payment, and that they were assured that they could do so. She said also that she telephoned OFSTED on 21st November 2005 and was assured that she would not get into trouble by looking after children over 8 or children under 8 without pay. The Tribunal formed the view that Mrs RT on 21st November 2005 and one of the parents, Ms B, on 1st December 2005, were left with the impression after telephoning OFSTED that continuing to care for under 8’s without pay was not a breach in law of either a voluntary suspension or a statutory suspension, but that the implications of continuing to care for children on an unpaid basis was a matter for the childminder and the parent to consider.

The Tribunal decided that the purpose of the suspension in this case, namely to allow time for the Chief Inspector’s belief to be investigated, is clearly satisfied. That fact however is not sufficient to enable OFSTED to impose, or on appeal, the Tribunal to confirm, a period of suspension. Regulation 3(1) must be complied with. The Tribunal did not accept that Regulation 3(1) had been complied with in this case. There was no suggestion that the investigation involved child protection issues. All the evidence pointed to the contrary. The Tribunal said: “Neither the police nor the CPS are any further forward in their enquiries on 25th January 2006 than they would appear to have been in October 2005. We are unable to see how there can be any child protection issues arising out of an enquiry conducted in such a dilatory manner.” Allegations of which the Tribunal was totally unaware were totally inconsistent with the experience of 4 parents from whom the Tribunal heard evidence. As to the failure of Mrs RT to inform OFSTED of the police interview, the Tribunal said that although it may have been sensible for Mrs RT to have informed OFSTED about the interview, the failure to so inform OFSTED in this case falls a long way short of providing a reasonable cause to believe that continued provision of childminding exposes or may expose one or more children to the risk of harm. As to the fact that she failed to inform OFSTED that she was looking after

children without reward, the Tribunal took the view that she was not in breach of her acceptance of a voluntary suspension.

The Tribunal took the opportunity of identifying a number of issues of general concern. First, whilst it accepted that OFSTED does not provide advice or guidance to parents or indeed to child minders, the Tribunal was concerned that clear messages were not provided in this case. The standard letter setting out the basis for voluntary suspension was ambiguous, and the Tribunal said that thought needed to be given to that letter to ensure that there is no room for ambiguity. The Tribunal was not impressed by the involvement of the NCMA and their legal advisers. The Tribunal said: "...Mrs RT was left to fend for herself in the two days of hearings. A way must be found to ensure that Appellants have the benefit of legal representation, and one would hope that the NCMA will address this issue." The Tribunal said also that a letter be written by OFSTED to the child minder to explain the Protocol involving all the agencies and how the matter is to be investigated by the various agencies. It said: "Honesty and transparency are always the more effective responses to genuine concerns; whether these concerns are from child minders or from parents." It said that the Tribunal and the Appellant should be given details from the Police and/or Social Services about the timetable for the investigation. Finally, the Tribunal said that it was troubled by the use made of voluntary suspension.

Appeal Allowed.

AJ v OFSTED

[2006] 693.EY-SUS

[Miss Clarke, Mr Griffiths, Mr Wilson]

The appeal in this case was dealt with on the basis of the papers. It would seem that the police attended the Appellant's house as a result of a telephone call made by the Appellant's daughter, RJ, who alleged that she had been assaulted by the Appellant the previous evening. The Appellant was arrested and released on bail. OFSTED were notified of the Appellant's arrest by a social worker. The Appellant agreed to a voluntary suspension up until 17th January 2006, but did not agree to any further period of voluntary suspension. A statutory suspension was then imposed on March 13th 2006, OFSTED refused to lift this suspension and the Appellant appealed. The Police informed OFSTED that RJ had made a statement stating that she was unwilling to proceed with the allegation that the Appellant had assaulted her and was not willing to attend Court or be a witness. The CPS had decided that no further action be taken against the Appellant.

The Respondent did not consider the matter as closed when the police decided not to continue with their investigation, as the initial allegation that the Appellant had assaulted RJ was sufficiently serious to raise on-going concerns about the Appellant's suitability that the Respondent wished to investigate further. The Tribunal said that whilst the Appellant's frustration at the considerable length of time that had now passed since the original incident in December 2005 was

understandable, the Appellant's continued refusal to even discuss matters with the Respondent was a contributory part of the ongoing delay. The Respondent submitted that it needed to discuss the allegation that had been made and to make an assessment of any potential risk to the children being minded by the Respondent. The Tribunal accepted that this request by the Respondent was reasonable and correct. It said: "There may have been discrepancies and procedural inaccuracies (indeed it referred to the muddled approach to the decision making) by the Respondent following the initial voluntary suspension but these do not negate or extinguish the legitimate concern of the Respondent to investigate the allegations that had been made and their reasonable request to try and conduct an interview with the Appellant to discuss the matter." The Tribunal decided also that the time lapse between the December incident and the issuing of the statutory notice of suspension was not in the circumstances unreasonable.

Appeal Dismissed.

JBS v OFSTED

[2007] 1109.EY-SUS

[Ms Roberts, Mr Braybrook, Ms Gilhespie]

Mr JS, the Appellant's wife, has been a childminder since 1998. The Appellant was registered as a childminder in December 2003. They have run a childminding service since that date and the most recent inspection was good with only minor points of concern being made. They also look after a number of teenage children after school, including LC and LT. On 11th July 2007, as the Appellant took one of the younger children to afternoon nursery, he passed LC and there was an interaction between JBS and LC. The Appellant said that he had taken an exaggerated swipe at LC's bottom but not made contact. LC apparently told her friend that the Appellant had on one occasion put his hand down her jumper and touched her on or near her breast. After a strategy meeting, it was decided to suspend both the Appellant and his wife. Subsequently, the suspension against the wife was lifted subject to a voluntary agreement which included that JBS was not in the house when she child minded. The Appellant in his appeal to the Tribunal said that the allegations were entirely without foundation. The Tribunal dismissed the appeal, saying "We accept that the Respondent is still investigating the situation and whilst this is being done there are grounds to conclude that there is a risk to minded children."

Appeal Dismissed.

G. SCHEDULE 9: s 166 Education Act Appeals

Thomas Francis Academy v Secretary of State

[2007] 939.IS

[Judge Pearl, Mr Braybrook, Ms Wade]

The Tribunal held a Preliminary Hearing in order to provide a Ruling in relation to whether an appeal brought under section 166 of the Education Act 2002 is a “supervisory review” of the Secretary of State’s exercise of discretion or an appeal on the merits. Counsel for the Secretary of State submitted that a section 166 appeal is a “supervisory review” and that in consequence post-decision evidence is neither relevant nor admissible when the Tribunal hears an appeal from a decision taken by the registration authority under section 165 to remove a school from the Register. He submitted that section 166 appeals should be limited in the same way as section 142 cases (list 99). The Tribunal disagreed with this submission. Sections 166 and 167 are clearly designated as “appeal” sections rather than “review” sections. The Tribunal followed the approach of the Tribunal in *C v OFSTED* [2002] 87 EY which was expressly approved by Stanley Burnton J in *OFSTED v Spicer* [2004] EWHC 440 (Admin). The Tribunal said that there can be no justification as a matter of policy for drawing any distinction between the appeal jurisdiction of the Tribunal when enforcement action is taken in respect of a day care provider as against independent schools. A distinction could be made only if there were an express provision in the primary legislation or delegated legislation; and there is no such express provision. Both the Appellant and the Respondent were entitled to rely on post-decision material.

When the matter came to a full hearing, the Appeal was dismissed, and the Tribunal upheld the determination under section 165 to remove the School from the Register; and specified in accordance with s 167(4) that the Registration Authority shall remove the School from the Register on 15th February 2008. The Tribunal was of the view that the School does not meet all of the requirements in respect of the curriculum, the provision of pupils’ welfare, health and safety, the suitability of the proprietor and staff, the premises and accommodation, or the provision of information for parents, carers and others.

The Tribunal made a number of suggestions relating to the application of section 165(3) (b) of the Education Act 2002, dealing with action plans.

Appeal Dismissed.

H. COSTS

The cases that have considered costs during the period under review are:

Dr M Bhatnagar, Dr R Bhatnagar and Dr Randhawa v Commission for Social Care Inspection

[2002] 360.EA; [2002] 361.EA; [2002] 362.EA

[Judge Pearl, Mrs Lowcock, Dr Cochran]

Mr A Bannister and Mrs R Bannister v Commission for Social Care Inspection

[2004] 414.EA-JP; [2004] 415.EA-JP; [2005] 507.EA; [2005] 510.EA

[Mrs Tudur, Ms Adolphe, Mrs Last]

L v Secretary of State (Costs)

[2005]547.PVA; [2005] 548.PC

[Mr Robertson]

SSC v Secretary of State (Costs Decision)

[2006] 638.PC; [2006] 639.PVA

[Judge Swift]

MS v Secretary of State

[2006] 659.PVA; [2006] 660.PC

[Judge Swift]

Martin Joseph McKeon v Secretary of State

[2006] 671.PC

[Judge Pearl]

Lee David Cavill v Secretary of State

[2006] 729.PVA, [2006] 730.PC.

[Mr Oliver]

AR v OFSTED

[2006] 769.EA

[Ms Goldthorpe, Ms Harris, Ms Elliott]

Bhatnagar arose out the successful appeals brought by the three Appellants on behalf of Park Manor Nursing Home from decisions taken by the statutory Regulators to close the home. The Applicants sought an Order for Costs in the initial sum of £452,873.83p. After Directions, the Applicants submitted a Final submission seeking costs to the total amount of £211,749.34p. The Tribunal stated that the costs jurisdiction of the CST is heavily circumscribed, in that it may be awarded only when the Tribunal reaches a view that the paying party has behaved unreasonably in bringing or in the conduct of the proceedings. The Tribunal said that it is always, with the benefit of hindsight, easy to decide that a decision taken in the course of proceedings was the wrong decision. However, a wrong decision does not make it an unreasonable decision. Rather the Tribunal should concentrate on what the position was at the time that the party made a particular decision which it is alleged is now unreasonable, examine that decision and form a view on whether the paying party, at that time, was conducting the proceedings in an unreasonable manner or not.

The Tribunal said that it was entitled to look at the whole history of the matter in forming a view on whether the decision taken by the Respondent in the Summer of 2004 to continue to oppose the fourth appeal was unreasonable. CSCI submitted that the decision to continue its opposition to the appeal was made in “the public interest”, that it was appropriate for the issues to proceed to a full hearing in front of the Tribunal, and that it acted in good faith as part of its regulatory function. Such functions, so it was argued, should outweigh any “litigation risk.”

The Tribunal fully accepted that these are factors that must be taken into account by the Respondent, but that there is an additional factor; namely, the responsibility the Respondent has to providers and users to ensure that its powers are not used unjustifiably.

The Tribunal said that the responsibility to act “fairly” and “reasonably” does not end once the decision to cancel has been made, but extends to any ensuing appellate process. The Tribunal decided that the Respondent should have withdrawn its opposition to appeal number 4, as it had in appeal number 3. Failure so to do was “unreasonable” and the Appellants were therefore entitled to costs that flow from that decision.

The Tribunal then went on to consider how the costs should be assessed. It asked for the Applicants to submit a revised Schedule. The parties were encouraged to see whether an agreement on costs could be reached without the necessity of further costs being incurred. If agreement could not be reached, the Tribunal was told that the Respondent would prefer the Tribunal to assess the costs itself rather than for the costs to be assessed by a District Judge in the County Court (or quite likely, to be referred by him or her to a Costs Master in the High Court). The Tribunal agreed with this approach as the more appropriate approach for the Tribunal to adopt, but that in order to engage in this exercise, the Tribunal must have in its possession the material that a District Judge or Costs Master would require.

In the event, the parties agreed costs in the sum of £84,000; and this agreement was incorporated in the Costs Order dated 1st September 2006.

Bannister was a costs application by the Respondent in the sum of £61,995.25p following a very late withdrawal; namely the last working day before a scheduled fifteen day hearing. The application for costs was made on the basis that the Appellants had conducted the appeals unreasonably in not withdrawing their appeals at an earlier stage. It was submitted that it would have been reasonable for the Appellants to have reviewed the merits of their case to decide whether or not to continue with their appeals within two weeks of receipt of the Respondent's evidence.

Mr and Mrs Bannister were adamant that they had never intended to withdraw the proceedings, believing that they had a good defence to the cancellation proposal. They said that the issue of withdrawal was not suggested to them by their legal advisers until the last minute, when their Solicitor informed them that the insurance company might withdraw its financial backing from the case.

The Tribunal arrived at the view that it was reasonable for the appeal to have been withdrawn on the final working day prior to the commencement of the hearing, after Counsel had shortened the odds on their successfully pursuing the appeal. Accordingly, there was no Order for Costs.

AR, a refusal of registration as a manager of a children's home, was withdrawn on the second day of the projected seven day hearing; and in consequence the Appellant's appeal was dismissed. The Respondent sought costs based on three grounds. The First of these was the Appellant's unreasonable delay in withdrawing his appeal; and the third was the Appellant's unreasonable failure to particularise his case. In dismissing the Respondent's application, the Tribunal said: "However expensive these proceedings are for the regulatory bodies involved, it is important that the principle of access to justice is preserved. Potential litigants with a perfectly legitimate case may well be dissuaded from appealing if there is an increased likelihood of costs orders being made that involve very large sums of money indeed." The Tribunal concluded that the Respondent had not discharged the substantial burden of demonstrating that the Appellant acted so unreasonably in his conduct of the proceedings as to justify making a costs order. The Tribunal said that whilst it believed that the Appellant's conduct of the case fell some way below an acceptable standard, it was not quite enough to overturn the presumption against the making of a costs order and the test of unreasonableness.

All the other cases deal with applications for Costs brought by successful Appellants in PoVA or PoCA appeals after the Respondent had decided to withdraw his opposition to the appeals. In all of the cases, there was No Order for Costs, applying the principles set down in the cases that are set out at **pp 72-76 of the Digest of Cases (First series)**. For example, in **Cavill**, the Chairman said: “Given that the Secretary of State informed the Tribunal at the first opportunity that the Appeal would not be opposed, I conclude that the Secretary of State has NOT been unreasonable in bringing or conducting the proceedings.”

I. PROCEDURAL MATTERS

Strike out appeals: applications made otherwise than in accordance with the provision in the Regulations for initiating that appeal: Reg 4A(2)(a)

David Delanty v Secretary of State
[2006] 681.PVA; [2006] 682.PC
[Mr Hunter]

On the 30th November 2005, the Appellant was informed that his name had been confirmed on the PoVA and the PoCA lists. It was agreed between the parties that the deadline for the receipt of the appeal was 1st March 2006. In fact, on 7th February 2006, the Appellant wrote to the Department of Health stating, “I wish to appeal against your decision...” This was forwarded to the Tribunal as an email attachment, and on 9th February 2006, the Tribunal wrote to the Appellant enclosing the appropriate appeal forms and with a letter stating: “...in order for your appeal to be considered, you must submit your completed form within 3 months of the date of the letter informing you of your inclusion on the list.” The appeal form was received by the Tribunal on 29th March 2006.

The Respondent sought to strike out the appeal on the grounds that it was out of time. The Respondent submitted that the letter dated 7th February 2006 was not a valid appeal.

The Chairman rejected that application. He said that Schedule 5 Para 1(2) simply states that the application “must be received by the secretary...” and it does not invalidate an application simply because it was forwarded by a third party. There were only two items missing, namely his date of birth and his telephone number. The Chairman said that in the circumstances of this case the Appellant should have been requested to supply the items in default.

Although the Chairman was inclined to the view that the letter of 7th February 2006 was a valid appeal, he went on to say that if he were wrong on that then he would exercise his discretion under Reg 35 to extend the time limits so as to bring the appeal lodged on 29th March 2006 within time. He said : “...it might with hindsight have been sensible if the Tribunal secretariat had made it clear in their letter of the 9th February that further information was required from the Appellant to complete his appeal; i.e. his date of birth and telephone number and/or that his appeal was not going to be registered until this information was provided...I am satisfied that he was genuinely confused by the Tribunal ’s letter of the 9th February, as to when all the necessary information to constitute a valid appeal had to be submitted. In those circumstances, it would have been unreasonable to have expected him to have complied with the time limit for lodging the appeals. He considered it unfair in the circumstances of this case not to extend the time limits.

Application to Strike Out Dismissed.

Edmund Attobrah v Secretary of State
[2006] 752.PC; [2006] 753.PVA
[Mr Oliver]

The Secretary of State sent the Appellant two letters dated 30th November 2004 notifying him that the Respondent had decided to confirm his name on both the PoCA and the PoVA lists. Both letters informed the Appellant of the right to appeal to the CST and that the appeal had to be made within three months of the date of the letter. The CST received the appeal forms on 31st July 2006, some sixteen months after the three-month time limit. The Chairman decided that he was entirely satisfied that there were no valid reasons why he should extend the time limit in relation to the PoCA appeal. He said: “The Appellant was told of the right to appeal and the time, in which it had to be made in the notification letter in November 2004, there was no bad faith or misleading by the Secretary of State, the application was not potentially confused and there were no administrative errors.”

So far as the PoVA listing was concerned, the Chairman decided to await the decision of the Court in *Wright v Secretary of State* [2007] EWCA Civ 999 where the Court was being asked to consider whether it is lawful for an individual’s name to be included on the PoVA list when the dismissal took place before the commencement of Part 7 of the CSA on 26th July 2004. The decision of the Court that such an inclusion is lawful was upheld

Application to Strike Out the PoCA appeal granted
Application to Strike Out the PoVA appeal application adjourned pending the conclusion of the *Wright v Secretary of State* litigation in the Courts

Simon Hudson v Secretary of State
[2007] 961.PC
[Mr Bennett]

The Appellant was confirmed on the PoCA list on 22nd January 2003. His appeal was received on 9th March 2007. The Respondent applied for the Appeal to be struck out on the grounds that it was made otherwise than in accordance with the regulations. At the oral hearing, it was accepted by the Secretary of State that Mr Hudson did not receive the original notification of his confirmation and that he first became aware of the listing when he was interviewed by the Police in February 2004. It was clear from the documentation that Mr Hudson instructed his lawyers to pursue an appeal and that they had contacted the Secretary of State for that purpose. Mr Hudson had personal and health difficulties throughout this period, but he was in regular contact with his lawyers. The nominated Chairman said that three years is

substantially beyond any reasonable time extension that could be appropriate and could not now be considered a reasonable or fair extension.

Application to Strike Out the PoCA appeal granted.

Susan Callinan v Secretary of State [2007] 950.PVA [Ms Tudur]

The Appellant was confirmed on the PoVA list on 23rd March 2006, and she did not appeal until 6th March 2007. The Respondent applied for the appeal to be struck out. The Chairman accepted that she had not received the confirmation letter dated 23rd March 2006, but that on her own evidence she became aware of her inclusion on the list on 17th November 2006. The Chairman granted the application to strike out, and stated: “The legislation has imposed a strict regime and timescale for making appeals, and the Tribunal must be cautious in dealing with applications to extend time for appealing. [H]aving been informed of the information on [17th November 2006] I would have expected a reasonable person to take steps to find out more about the situation immediately.” She said that it would be reasonable to expect the appeal to be lodged within three months of the date when the Appellant became aware of the listing.

Application to Strike Out the PoVA appeal granted.

David Arthur v OFSTED [2006] 685.EY [Mr Oliver]

In this application to strike out, the Respondent submitted that the Notice of Decision to cancel the Appellant’s registration was delivered on the morning of 11th March 2006 and therefore the latest date by which the Tribunal could receive an appeal was 8th April 2006. The Appeal Form was received on, and is date stamped, 10th April 2006. The Respondent applied to strike out the appeal, and drew attention to the fact that the power to extend time limits in Regulation 35 expressly excludes the power to extend the time limit in relation to applications to appeal decisions to cancel registration.

The Chairman refused to strike out the appeal. He said: “The Appeal form should have been with the Tribunal by Saturday 8th April 2006. Had it been it could not and would not have been considered or processed until Monday 10th April 2006...The

earliest date therefore that the appeal could have been registered was on Monday 10th April 2006 even if it had been received on 8th April 2006”.

Application to strike out under Regulation 4A(1)(a)(i) dismissed.

He dismissed also the application to strike out under Regulation 4(1)(b).

The Respondent appealed this decision, and in *OFSTED v Care Standards Tribunal [2007] EWHC 341 (Admin)*, Collins J, although seeing the sense in the approach of the Chairman, and taking the view that the Regulation may be regarded as a little over rigid, nonetheless decided that there was no scope for implying any time extension. He overturned the decision and struck out the appeal as being out of time. He said: “...the regulations are clear and there is no injustice, provided a would-be applicant knows what the time limit is, and if he chooses to wait until the last possible moment or beyond it, that is his look-out. Time limits are there to be obeyed and there was nothing in my view unreasonable about this particular regime.”

Application to strike out under Reg 4A(1)(b): application is misconceived

**Kenneth William Males v Secretary of State
[2006] 854.PT
[Mrs Hughes]**

On 7th November 1991, the Appellant was convicted of “an offence of intercourse with a girl under 16”. The girl concerned was his 13 year old step-daughter and related to a single event in August 1990. He was sentenced to 12 months imprisonment suspended for 18 months. He was barred from employment to which s 142 Education act applied on the grounds of his unsuitability to work with children (list 99) and he appealed. The Secretary of State submitted that the appeal be struck out as misconceived. He argued that there was no prospect of the appeal being successful given the nature and seriousness of the conviction at issue. The nominated Chairman dismissed the strike out application, saying “I cannot accept that the existence of a conviction 16 years ago, albeit for is classed as a serious sexual offence, will necessarily render this appeal futile or misconceived. The appeal needs to be considered in greater depth by a Tribunal panel hearing evidence from both parties. They will then be able to assess credibility and enquire in more detail into the Appellant’s present situation and the risks that he poses to the safety and welfare of children if he should continue to work with them...There is always a conflict between the risk to the public and the right of an individual to work and in this case it needs to be explored fully...”

Strike Out application Dismissed.

[Note: Regulation 4A(1)(d) inserted by the Protection of Children and Vulnerable Adults and Care Standards Tribunal (Amendment) Regulations 2007 (which came into force on 2nd July 2007) an appeal can be struck out if “the President or the nominated chairman considers that the appeal or application has no reasonable prospect of success”].

Edward Leonard Slaney v Secretary of State
[2007] 1078.PVA; [2007] 1079.PC
[Mr Oliver]

The reason the Appellant was placed on the lists in this case was because on 27th June 2006 he was convicted of six counts of sexual activity with a female child under 18, who had been fostered by him and his wife. She is a person with diagnosed learning difficulties. He was sentenced to a two and a half years custodial sentence. He is now 68 years of age. Mr Oliver struck out the case; saying that there is nothing in what the Appellant had said in his documents that persuaded him that a panel considering the case at a full hearing would come to any conclusion other than it is the seriousness of the offences that will make it inevitable that he will be found unsuitable to work with children and vulnerable adults.

Application to Strike Out under Reg 4A (1) (b) and 4A (1) (d) Allowed.

H v The Welsh Ministers
[2007] 1027. EA-W
[Mr Oliver]

Upheld on appeal by Davis J in
The Welsh Ministers v The Care Standards Tribunal and H
[2008] EWHC 49 (Admin)

Mrs H unsuccessfully applied for registration as a manager in respect of a particular care home. After she issued her appeal, the owners of the particular care home having withdrawn its offer to employ her as a manager, subsequently appointed another person as manager. The Welsh Ministers sought to strike out the appeal as being misconceived or having no reasonable prospect of success. Mr Oliver refused to strike out the appeal. Mr Oliver followed the decision in *Ajibewa v OFSTED* [2005] 539.EY which had adopted the following approach: “If the parties cannot persuade the tribunal that there is some practical advantage to be gained from considering other issues, the tribunal should cancel registration on the sole grounds of lack of premises. If the parties can persuade the tribunal that there is some practical advantage in giving a decision on other issues, the tribunal should do so.” Mr Oliver decided that the Appellant was someone who intends, or is likely in the

future to wish to make a further application for registration and that there was some practical advantage in hearing the appeal.

Davis J decided that the Deputy President was entitled to exercise his discretion as he did, and that there was no proper basis for interfering with that exercise of discretion. The Judge concluded: "...I am not to be taken as saying that in all appeal cases where the specified establishment has ceased to be available the only correct decision is to decline to strike out. There may well be cases where there has ceased to be a specific establishment available where a strike out of the appeal is appropriate. In the present case,...the Deputy President on the facts identified a practical advantage in allowing the appeal to go to a final hearing. He was entitled so to find."

Application to Strike Out Dismissed.

Third Party Directions

**Re AG [Third Party Directions]
[2005] 603.PC; [2005] 604.PVA
[Judge Pearl]**

In this case, the Social Services Department of a County Council objected to third party directions for disclosure of a Report commissioned by the County Council based primarily on public interest immunity. The Local Authority submitted that the Tribunal was enjoined to balance the competing interests of the Secretary of State who wishes to obtain evidence relevant to the listing of an Appellant against the public interest in maintaining the confidentiality of the witnesses in an investigation. The President rejected this submission. He said that the approach that should be adopted by the CST in these matters should follow as closely as possible the approach taken by the courts. "If the principles are applied to proceedings before the CST it is absolutely clear when balancing competing interests that disclosure will be directed, except in the most compelling of cases. It would be a breach of an Appellant's rights to a fair trial if he were to be denied access to Reports similar to the Report commissioned by the Local Authority in this case. It would also undermine the efforts of the Secretary of State in the preparation of his case, and create particular obstacles in the path of the Tribunal in reaching a fair decision on the merits of the case".

The President stated that safeguards can be put in place. The Report can be disclosed in a redacted form, as was ordered in this case. But the balance between the public interest in protecting confidentiality of the kind sought by the Local Authority in this case and the public interest in the fair administration of justice in proceedings before the Tribunal, will result in Disclosure unless the 3rd party can

show compelling evidence of ‘real damage’ or ‘substantial harm’ to a recognised protected interest.

Application by Local Authority to set aside Order for Disclosure Dismissed.

Decisions under Reg 33(1) to Dismiss Proceedings.

UF v Secretary of State [2007] 881.PC; [2007] 882.PVA [Judge Pearl, Mr Lim, Dr Low]

By letter dated 26th September 2006, the Appellant was confirmed on the PoCA and PoVA lists. She appealed on the appropriate form which was received on 9th January 2007. The appeals were set down for a hearing on 12th June 2007. By letter dated 28th May 2007 received by the Tribunal on 1st June 2007, the Appellant wrote to the Tribunal stating “I want to cancel my appeal...Please can you now cancel my appeal.” The President issued the Decision dated 1st June 2007 in accordance with Regulation 33(1) dismissing the appeal. The Tribunal received a letter from Solicitors dated 4th June 2007 seeking that the appeal be reinstated.

The Respondent submitted that the letter from the Appellant was unambiguous and that in consequence the Order of 1st June 2007 dismissing the proceedings was not capable of being challenged in any way. The Appellant relied on Regs 25(1)(b) and or (c). The Tribunal was unable to accept the Appellant’s arguments. Reg 25(1)(b) has absolutely no application in this case, where there has been no hearing at all. As to Reg 25(1)(c), that provision refers to an “obvious” error. The Tribunal said: “The letter of 28th May 2007 is very clear indeed. It is a withdrawal, and in these circumstances, the President must dismiss the proceedings. This he did.” It was argued also that Reg 33 does not involve a judicial act being administrative in nature, and therefore the administrative “mistake” may be corrected in such a way as to alleviate a perceived injustice. The Tribunal said that reg 33 is clearly a judicial act and is no way an administrative one. Finally, there is in any event no mechanism within Reg 25 for the President’s decision under Reg 33 to be the subject of a Review; because Reg 25 refers to the “Tribunal’s decision.”

The Appellant raised an alternative argument, namely that an application under Reg 35 to allow a new appeal to be filed out of time, relying on Employment Tribunal cases. The Tribunal made clear that the Employment Tribunal Regulations were very different and that no support could be drawn from the approach taken in that area of law. The Tribunal said: “The Care Standards Tribunal deals with issues where it may be thought essential to ensure that there is no ambivalence and where it is essential to know that a withdrawal results in the Appellant’s name being confirmed on the PoCA and/or PoVA lists. In those circumstances, a withdrawal inevitably brings about a dismissal of the appeal and the judicial act of dismissal ensures that there is no ambiguity in the position of the Appellant. To classify a case

as “withdrawn” (as in the case of the Employment Tribunal) may result in a degree of uncertainty and confusion, which would be unfortunate in this area.”

Application to Review decision of 1st June 2007 Dismissed.

Application to grant leave under Reg 35 for new appeals to be filed out of time refused.
