IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2021] EWHC 478 (Admin)

No. CO/4187/2020

Royal Courts of Justice

Wednesday, 24 February 2021

Before:

MR JUSTICE SWIFT

B E T W E E N :

THE QUEEN
on the application of
(1) HEATHER THOMSON
(by her litigation friend, VICKY THOMSON)
(2) VICKY THOMSON-CARR — Claimants

- and -

(1) SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE
(2) NATIONAL HEALTH SERVICE COMMISSIONING BOARD — Defendants

- and -

(1) NHS IPSWICH AND EAST SUFFOLK CLINICAL COMMISSIONING GROUP
(2) THE NATIONAL INSTITUTE FOR HEALTH AND CARE EXCELLENCE
(3) INTENSIVE CARE SOCIETY
(4) FACULTY OF INTENSIVE CARE MEDICINE
(5) MEDICAL DEFENCE UNION
(6) MEDICAL PROTECTION SOCIETY

Interested Parties

_____

J U D G M E N T

A P P E A R A N C E S

MR V. SACHDEVA QC, MR B. TANKEL and MS S. DAVID (instructed by Irwin Mitchell LLP) appeared on behalf of the Claimants.

MS J. SMYTH (instructed by the Government Legal Department) appeared on behalf of the First Defendant.

MR J. MOFFETT QC and MR L. DAVIDSON (instructed by DAC Beachcroft LLP) appeared on behalf of the Second Defendant.

MS K. GOLLOP QC appeared on behalf of the Third Interested Party in an observational capacity.

MR A. RUCK KEENE appeared on behalf of the Fourth Interested Party in an observational capacity.

THE FIRST, SECOND, FIFTH AND SIXTH INTERESTED PARTIES did not appear and were not represented.

(Transcript prepared from a Microsoft TEAMS recording)

MR JUSTICE SWIFT:

1 This is a renewed application for permission to apply for judicial review. The claim was issued on 16 November 2020, and contends that the Defendants (the Secretary of State for Health and Social Care, and the National Health Service Commissioning Board – more commonly referred to as "NHS England") have acted unlawfully by failing to devise a policy setting out the priorities that should govern and/or guide decisions taken by doctors and other NHS clinicians in the event that demand for critical care treatment and services in a hospital exceeds supply and those doctors have to decide how resources that are available should be allocated as between patients. Although the prompt for this claim is the strain placed on NHS resources during the Covid-19 pandemic, the policy the Claimant contends should exist would govern access for all patients in need of critical care treatment, not just those in need because of Covid-19. In the course of his submissions this afternoon for the Claimant, Mr Sachdeva QC has explained that the policy required by law would be in the nature of a decision-making tool (say, a check-list or flow-chart) that would structure the way decisions are taken by medical professionals working in NHS hospitals.

2 The Claimant submits that the failure to adopt such a policy is a breach of the obligation arising under section 2 of the Civil Contingencies Act 2004 ("the 2004 Act") to "maintain plans" on certain matters; that separately to that, the absence of such a policy is in breach of her Convention rights under article 8; and, separately from that, that in any event the failure to have such a policy is irrational.

A. An obligation under the 2004 Act?

3 The material parts of the 2004 Act are section 2(1)(c) and (d), and section 2(2). Section 2(1)(c) and (d) require a relevant person (which, for this purpose, includes both the Secretary of State and NHS England) to:

> "… (c) maintain plans for the purpose of ensuring, so far as is reasonably practicable, that if an emergency occurs the person or body is able to continue to perform his or its functions, [and]
>
> (d) maintain plans for the purpose of ensuring that if an emergency occurs or is likely to occur the person or body is able to perform his or its functions so far as necessary or desirable for the purpose of—
>
> (i) preventing the emergency,
>
> (ii) reducing, controlling or mitigating its effects, or
>
> (iii) taking other action in connection with it.
>
> … "

Section 2(2)(a) and (b) of the 2004 Act, respectively, limit the scope of application of the section 2(1) duty by reference to the relevant persons' functions (i.e., its powers and duties), and by reference to an assessment of the necessity for the plan concerned.

> "(2) In relation to a person or body listed in Part 1 … of Schedule 1 a duty in subsection (1) applies in relation to an emergency only if—
>
> (a) the emergency would be likely seriously to obstruct the person or body in the performance of his or its functions, or
>
> (b) it is likely that the person or body—

(i) would consider it necessary or desirable to take action to prevent the emergency, to reduce, control or mitigate its effects or otherwise in connection with it, and
(ii) would be unable to take that action without changing the deployment of resources or acquiring additional resources."

NHS England is listed in Part 1 of Schedule 1; the Secretary of State is also so listed "insofar as [his] functions include responding to emergencies by virtue of … functions under section 2A of the National Health Service Act 2006".

4 I do not consider it is arguable that section 2(1) of the 2004 Act gives rise to any obligation, either on the Secretary of State or NHS England to formulate the plan the Claimant wants.

5 There is no dispute that a pandemic is within the notion of "emergency" (defined at section 1 of the 2004 Act). The Secretary of State's first submission is that section 2(1) of the 2004 Act is directed towards "business continuity management"; that is to say, ensuring that the public authority concerned can continue to perform its functions in the event of the emergency. Thus, the purpose of the obligation is to ensure that the person or body concerned is suitably prepared to act in the event that an emergency arises, and the obligation itself concerns planning for an emergency rather than responding to an emergency which presently exists.

6 I accept this characterisation of the section 2(1) obligation. Very similar points are made by NHS England between paragraphs 53 and 55 and at paragraph 57 of its Summary Grounds of Defence. I accept those submissions too. All these matters figure in the reasons given by Mr Justice Jay when he considered this matter on paper and refused permission on this ground. The short point, from all those submissions and from the conclusions of Jay J, is that the Claimant's submission that an obligation now arises under section 2 of the 2004 Act to formulate and publish a decision-making tool of the sort that she says is required, does not sit easily with the purpose of section 2, as enacted.

7 There are two further problems for the Claimant's case arising from section 2(2) of the 2004 Act. *First*, the scope of any obligation arising under section 2(1) is limited by reference to the functions of the relevant person. No obligation can arise under section 2(1) to maintain a plan save to the extent that the plan is needed to address the risk that a possible future emergency would obstruct the performance of functions (section 2(2)(a)). *Second*, whether any obligation arises will depend on assessment of whether the relevant person ought to consider such a plan "necessary or desirable" to prevent the emergency or mitigate its effects, and could not prevent/mitigate the emergency without "changing the deployment of resources" (see section 2(2)(b)).

8 As to the first point (section 2(2)(a) of the 2004 Act), what functions either of the Secretary of State or NHS England, are functions that might engage the obligation under section 2(1) of the 2004 Act? As against the Secretary of State, the Claimant relies on the obligation under section 2A of the National Health Service Act 2006 ("the 2006 Act"). That section requires the Secretary of State to take such steps as considered appropriate for the purposes of protecting the public in England from disease or other dangers to health. A non-exhaustive list of the steps that can be taken is then set out at section 2A(2) of the 2006 Act. That duty is directed towards public health measures. It does not naturally include an obligation of the sort that the Claimant contends for in this case; that is to say, to publish a policy guiding the exercise of clinical judgment on the allocation of critical care treatment from case to case in every NHS hospital. As against NHS England, the Claimant points to section 1(1) of the 2006 Act (which is a function of NHS England by reason of section 1H(1) of the 2006 Act), and also section 252A of the 2006 Act. The latter concerns the obligations of NHS England vis-

à-vis clinical commissioning groups in terms of preparing for emergencies. It has nothing relevant to say so far as concerns the policy the Claimant contends must be made by NHS England. Section 1(1) of the 2006 Act is the obligation to continue to promote a comprehensive health service. I cannot see that this function could give rise to an obligation to formulate and apply a policy of the sort the Claimant contends for in this case.

9 It follows that I agree with the points made at paragraph 30 of the Secretary of State's Summary Grounds of Defence and the similar points made in NHS England's Summary Grounds at paragraphs 56 and 60. There is a mis-match between the relevant functions of each Defendant and the nature/substance of the plan that the Claimant says either/both should make. The functions of neither Defendant extend to directing decisions at the clinical level as to how resources should be allocated from case to case. For this reason it is not arguable that any relevant obligation arises through this route.

10 As to the second point, the conclusion above on the scope of each Defendant's functions also rules out any arguable case that the obligation to maintain the plan the Claimant wants could arise via section 2(2)(b).

11 For all these reasons, I do not consider that Ground 1 is an arguable ground of challenge; no duty arises under section 2 of the 2004 Act.

B. Article 8

12 The Claimant's submissions rely heavily on the reasoning of the Court of Appeal in *R (Tracey) v Cambridge University Hospitals NHS Foundation Trust & ors* [2015] QB 543. The challenge in that case concerned, primarily, the practice and the procedures followed by an NHS Trust when taking decisions which would mean that a patient requiring resuscitation would not be resuscitated. The court accepted, so far as concerned the Trust, that such a decision (a "do not resuscitate" decision) affected the article 8(1) rights of the patient and thus obliged the Trust when taking any such decision, to involve the patient. The court accepted that article 8(2) required that any derogation from that position (i.e., any decision to apply a "do not resuscitate" notice without the involvement of the patient) be taken in accordance with a valid policy so that it was properly structured and the interference with the patient's article 8 rights met the "in accordance with the law" requirement under article 8(2).

13 The case also included a claim against the Secretary of State. The complaint was that the Secretary of State had failed to publish a national policy on decisions to issue do not resuscitate notices. At paragraph 84 of his judgment, Lord Dyson concluded that the absence of any mandatory national policy was not in breach of article 8. The Secretary of State's position on that issue had been to encourage each NHS Trust to develop its own policy. Lord Dyson concluded that approach entailed no breach of article 8 because encouraging development of local policies, would not necessarily entail any systematic violation of patients' rights.

14 So far as there is any read-over from *Tracey* to the circumstances of the present case, I consider it is only from the conclusions stated by Lord Dyson at paragraph 84 and not from the conclusions stated earlier in that judgment as to the practices of the individual NHS Trust.

15 In this case the absence of the decision-making tool that the Claimant contends for means that were there to be a shortage of critical care facilities, decisions on how and to whom to allocate available resources would be taken locally, within each relevant NHS hospital. I can see no sustainable basis on which it can be said that that approach gives rise to any systematic breach of article 8 rights, whether by the Secretary of State or by NHS England (who for the purpose of this ground of challenge are in materially the same position). Mr Sachdeva QC submits

that there would be a breach because decisions taken at a local level will necessarily not meet the "in accordance with law" standard. I disagree. Any decision taken locally would be taken by an appropriate clinician who would act in accordance with relevant professional and clinical norms. There is no basis on which decisions taken in this way could be characterised as arbitrary or in any other way contrary to any requirement arising under article 8. Since that is so, I cannot see that it is arguable that any positive obligation arises under article 8 requiring either the Secretary of State or NHS England to have in place the decision-making tool that the Claimant contends for in these proceedings.

C. Rationality

16 In principle each Defendant could, as a matter of discretion or choice decide to adopt a policy covering the ground identified by the Claimant. However, it is not arguable that it is irrational for either Defendant to decide not to exercise that power in that way.

17 For the reasons already given neither Defendant is subject to any freestanding obligation to have any such policy, and the absence of such a policy does not put either Defendant in breach of any Convention right. Thus, as a matter of law, each Defendant is free to choose either to formulate a policy like the one the Claimant contends for, or not. The merits of adopting such a policy are disputed. The competing positions on this matter are adequately summarised in two documents prepared for this hearing. On the one hand, there is the Skeleton Argument prepared by the Intensive Care Society, one of the interested parties in the claim. Paragraph 7 of that document says this:

> "The ICS considers that a single, publicly available, professional guidance document that is nationally endorsed by Government and the NHS, and used across the country, would fulfil an important purpose. It would promote public understanding and trust at a time of national anxiety. And it would ensure fairness and equality, in accordance with the core principles and values of the NHS. The ICS considers that if appropriately endorsed the ICS guidance has the potential to be such a document."

The counterpoint to this is at paragraph 2 of the Summary Grounds of Defence filed by NHS England. Those Grounds seek to characterise the policy that the Claimant advocates for as a form of rationing scheme. Whether or not that is a fair characterisation is not to the point. It is, however, clear that the policy that the Claimant contends for would seek to guide decisions on how finite and very important resources were allocated between patients. The point made by NHS England is that such decisions would be:

> "… highly controversial, fraught with difficulty and would risk causing distress to individuals who felt they would be excluded or disadvantaged by it. Such a scheme would risk giving rise to inappropriate decisions in individual cases. Further, and importantly, such a scheme would be contrary to the fundamental principle that it is for individual clinicians to make treatment decisions based on the particular circumstances before them, including the presentation of the patients and the range of treatment options available."

18 These then are the two competing positions; neither position is (as a matter of law) either obviously right or obviously wrong. I do not consider it is possible, even arguably, to characterise as irrational, decisions by the Defendants not to formulate the policy the Claimant says should exist. Whether such a policy should exist is a matter of practical/professional evaluation. It is not a matter on which the law (or any manageable legal standard) could plausibly dictate the outcome the Claimant contends for.

D. Conclusion

19 For these reasons the Claimant's case is not properly arguable; this renewed application for permission to apply for judicial review is refused.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital

This transcript has been approved by the Judge.