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Worth a second look

A close reading of last week's judgment reveals the scale & gravity of the government's failings in relation to discharging patients to care homes, says John Ford

On 27 April 2022 the Divisional Court (Bean LJ and Garnham J) handed down a judgment that found that the then health secretary had acted unlawfully in failing to consider the position of residents of care homes who risked becoming infected with COVID-19 virus following the discharge of thousands of patients from NHS hospitals. The basis of this was irrationality (see *R (on the application of Gardner and another) v Secretary of State for Health and Social Care and others* [2022] EWHC 967 (Admin)).

Other aspects of the judgment were devoted to claims under Articles 2 and 8 of the European Convention on Human Rights which were dismissed; and the court found no criticism of the decision to create NHS capacity by clearing thousands of patients from hospitals per se. The hearing lasted six days in March 2022 and involved six counsel for the government and four counsel for the claimants. There were over 10,000 pages of documents. The implications of the decision in favour of the claimants have been widely reported.

It may be significant that the former secretary of state has since claimed that he was not provided soon enough with the information about the growing scientific evidence of asymptomatic transmission and infection; and that the court has vindicated his decisions. The judgment does not support this. The public law claim succeeded because there was no evidence that the minister had consulted anyone about how residents in care homes were to be looked after and protected following the discharge of hospital patients, some of whom were infected with the virus.

The evidence

Sir James Eadie QC, acting for defendants 1 (the Secretary of State for Health and Social Care (DHSC sic)) and 3 (Public Health England (PHE)), judgment, para [212]) 'submitted that it could not be sensibly suggested that the Defendants did not take into account the risk to the lives of care home residents in the March Discharge Policy or April Admissions Guidance. That risk was absolutely at the heart of everything the Government did in this area'.

However, the defence did not provide evidence to support this assertion and this fact is central to the ruling about the sufficiency of the evidence:

'[260] In ordinary, less pressured circumstances than those prevailing at the DHSC in March and April 2020 one would expect to see a chain of documents including a written submission to the Secretary of State and either a written response on his behalf or a minute of a meeting containing his decision. It is unsurprising that this usual degree of formality was not always observed. But, as recorded above, the Defendants have disclosed what they say are all the relevant recorded communications (including WhatsApp and text messages) arising from proportionate searches of communications to or from the Secretary of State or the Minister for Social Care during the relevant period. Where there is no record at all of an important issue being raised with the Secretary of State nor of his response we cannot simply assume that everything relevant was taken into consideration. We have to do the best we can with the available material.'

The court was not impressed by the defendants' claims that full consultation had taken place.

On balancing the expert advice the court said: '[261] As we have noted, the Government was obtaining advice not only from the Chief Medical Officer and Chief Scientific Officer and other individuals, but also from specialist expert committees, SAGE, NERVTAG, SPI-M and the UKSCG. Where it is clear that the Secretary of State made a difficult judgment after taking their advice, we shall follow the same course as the Court of Appeal in *Dolan*.'

But according to the evidence submitted in response to the public law challenge the court did not feel constrained to follow Dolan in view of the different considerations in play. In *Dolan* the Court of Appeal had said: '[90] We find it impossible to accept that a court could possibly intervene in this context by way of judicial review on the ground of irrationality. There were powerfully expressed conflicting views about many of the measures taken by the Government and how various balances should be struck. This was quintessentially a matter of political judgement for the Government, which is accountable to Parliament, and is not suited to determination by the courts.'

In the present case there was unanimity among the experts on the need for more information and, from as early as January 2020, a rapidly growing and overwhelming opinion about the risk of asymptomatic transmission.

Criticism of the Admissions Guidance

The ruling states the following regarding the April guidance and questions how it came to

be written in the terms that it was, given the knowledge available at the time:

'[286] On 2 April 2020, a week after the lockdown had been given legal effect (by the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (SI 2020/350)), the Admissions Guidance was published. As noted above, this included the following about new admissions (emphasis in the original): "Some of these patients [admitted from a hospital or from a home setting] may have COVID-19, whether symptomatic or asymptomatic. All of these patients can be safely cared for in a care home if this guidance is followed. If an individual has no COVID-19 symptoms, or has tested positive for COVID-19 but is no longer showing symptoms and has completed their isolation period then care should be provided as normal. … Negative tests are not required prior to transfers/admissions into the care home.'

'[287] It is not clear to us how this document came to be issued in the terms we have quoted. We have seen a draft of the document from PHE indicating that people who were confirmed to have COVID should not be admitted to a COVID-free care home and similarly that patients who did not appear to be suffering from COVID should not be admitted to a care home where there was already an outbreak. But, although there had been growing awareness of the risk of asymptomatic transmission (as shown for example by Sir Patrick Vallance's interview of 13 March and Professor Doyle's evidence to the Select Committee on 26 March), there is no evidence that the Secretary of State or anyone advising him addressed the issue of the risk to care home residents of asymptomatic transmission.'

'[289] Since there is no evidence that this question (quarantine) was considered by the Secretary of State, or that he was asked to consider it, it is not an example of a political judgement on a finely balanced issue. Nor is it a point on which any of the expert committees had advised that no guidance was required. Those drafting the March Discharge Policy and the April Admissions Guidance simply failed to take into account the highly relevant consideration of the risk to elderly and vulnerable residents from asymptomatic transmission.'

The discrepancy between the draft PHE guidance and the final version is concerning. Why was the guidance not issued in its more cautious version? Who was involved in editing the draft and removing the crucial wording? These questions must now be left for the public inquiry to try to answer.

Did the defendants fully comply with their duty of candour?

As reported in para [168] of the judgment counsel for the claimants, Mr Jason Coppel QC, submitted that 'the ability to pursue the claims had been hampered by the refusal of the First and Third Defendants [DHSC & PHE] to identify the advice and materials which were considered by the relevant decision maker, the Secretary of State, in the case of each policy. He was the decision maker and the public law duties fell on him personally to consider relevant considerations, exclude the irrelevant ones and be sufficiently informed. Usually, the court had a record of what the Secretary of State had been told through ministerial submissions, and that would be a good guide as to what was and wasn't considered. While there were some ministerial submissions among the documents in this case, there was no formal submission in relation to the policies in question. Mr Coppel submitted that the materials before the court were simply inadequate and put the court in a particularly difficult position in relation to the public law claims.'

The duty of disclosure including the duty of candour is covered in detail in CPR 31. In addition, the Government Legal Department would be expected to be bound by the procedures outlined in the guidance prepared by the Treasury Solicitor in January 2010. It is not clear whether the Divisional court judges were satisfied by the disclosure statement filed on behalf of the defendants.

By October 2021 the claimant's legal team were not satisfied with the extent of disclosure from the defendants and applications for specific disclosure were made. The judgment summarised the claimant's efforts to obtain fuller disclosure:

'[142] The Claimants applied for an order for cross-examination of the Defendants' witnesses and for extensive specific disclosure. These applications were refused on the papers by Cheema-Grubb J on 5 August 2021. They were renewed to an oral hearing and again refused by Eady J on 27 August 2021. Eady J's refusal to order further disclosure (though not her refusal of an oral cross-examination) was the subject of an application for permission to appeal which was refused by Elisabeth Laing LJ on 22 August 2021.'

Cheema-Grubb J considered that the court was not facing the same hard-edged factual questions as applied in *R (on the application of Al Sweady and others) v The Secretary of State for Defence* [2009] EWHC 2387 (Admin). Laing LJ felt the court faced a much more extensive and self-evidently disproportionate application for disclosure at the hearing and all three judges emphasised that the final hearing date should not be further delayed. This illustrates a disadvantage of complex matters being covered in the administrative court.

Comment

It strains credibility to accept that the defendants gave proper disclosure in this case. Other pandemic litigation has illustrated the willingness of ministers and government officials to strain the rules of procedure in the cause of respect for public safety and also unfortunately for political purposes. The rules governing the duty of candour were carefully constructed as a result of serious misfeasance by soldiers and senior civil servants (see 'Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings', see *bit.ly/3ycaKmO*).

A large legal team represented the government and the NHS but it must be questioned how effectively their involvement assisted in due observance of the rule of law. It might be suggested that the consequences of withholding information were less damaging than the revelations of unlawfulness. It will remain to be seen whether the perspicacity of the Divisional Court judges will have a positive effect on the responsibility taken by ministers and civil servants in future cases where their actions and decisions are scrutinised.

It should be remembered that in this claim the claimants sought only declarations and it will be for the forthcoming wide-ranging public enquiry to establish exactly what happened and make recommendations for future changes (on 15 December 2021 the Rt Hon Baroness Hallett DBE, former Lady Justice of Appeal, was appointed to conduct a public inquiry under the Inquiries Act 2005 to examine the UK's preparedness for and response to the COVID-19 pandemic, and to learn lessons for the future). While it will undoubtedly be of assistance that the High Court has clearly found crucial government policy unlawful the enquiry will need more time than is available in a hard-pressed court if permanent beneficial changes to the way government operates are to be achieved. **NLJ**

John Ford is a director of Sinclairslaw whose team led by Paul Conrathe in the Cardiff and London offices represented Dr Cathy Gardner and Fay Harris in [2022] EWHC 967 (Admin) (*www.sinclairslaw.co.uk*).