JUDICIAL REVIEW AND PATIENT'S RIGHTS

KENT ACQUIRED BRAIN INJURY FORUM (KABIF)

11th June 2008

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I. INTRODUCTION

- **The significance of JR and patients' rights**

- **Political sensitivities and economic constraints**

    The recent case of Linda O'Boyle

    The different types of cases coming forward

- **Purpose of talk:**

    (II) what is JR and when is it appropriate

    (III) JR in the context of patients' rights

    (IV) how to run a JR

II. WHAT IS JUDICIAL REVIEW?

- Judicial Review is the form of procedure to challenge the decision making of public authorities

- It is a claim targeted at challenging a public law decision, omission or a particular policy

- Public and private law decisions: the distinction

- **Hampshire County Council v Graham Beer (T/A Hammer Trout Farm) [2003] EWCA Civ 1056:**

> "It seems to me that the law has now been developed to the point where, unless the source of power clearly provides the answer, the question whether the decision of a body is amenable to judicial review requires a careful consideration of the nature of the power and function that has been exercised to see whether the decision has a **sufficient public element, flavour or character** to bring it within the purview of public law."

- The meaning of a Public Body. A cause for a great deal of litigation but not in the sphere of medical JRs.

- Standing and JR. Now broadly interpreted. Again in the sphere of medical JRs likely to be unproblematic.

- The grounds of challenge:

  Irrationality (a decision which no other decision maker would have reached)

  Procedural unfairness (not following a procedure correctly leading to a flawed decision)

  Considerations **(**failing to take account of relevant ones and taking account of irrelevant ones)

  Legitimate expectations (public bodies breaking or going back on promises)

Ultra Vires (public bodies acting outside of their statutory powers)

Breach of the Human Rights Act 1998 ('HRA') (Articles 2 and 3 of the European Convention on Human Rights – public bodies have a positive obligation to protect the right to life and to prohibit inhuman and degrading treatment).

- The role of the Court in public law cases. Traditional approach – not to scrutinise the merits of a decision or policy and to accord the public body a wide remit. The more modern approach – to scrutinise a decision, especially where fundamental human rights are involved and to consider the proportionality of the decision.

III. JUDICIAL REVIEW AND PATIENT'S RIGHTS

- The two main areas where Judicial Review has been used in the context of Patient's Rights:

(1) Community care concerns and the treatment of patients with long term care needs; and

(2) Decisions concerning specific medical treatments

(1) Community care concerns

Relevant legislation and guidance

- **National Health Service Act 2006**, consolidating act of the earlier and longstanding **National Health Service Act 1977**.

- **S. 1 of the NHS 2006 Act**, Duty to promote the Health Service

(1) The Secretary of State must continue the promotion in England of a comprehensive health service designed to secure improvement—
   (a) in the physical and mental health of the people of England, and
   (b) in the prevention, diagnosis and treatment of illness.
(2) The Secretary of State must for that purpose provide or secure the provision of services in accordance with this Act.
(3) The services so provided must be free of charge except in so far as the making and recovery of charges is expressly provided for by or under any enactment.

- **S. 3(1)** provides a duty upon the Secretary of State to provide certain services to such extent as he considers necessary to meet all reasonable requirements— which include the following:

   (a) hospital accommodation,
   (b) other accommodation for the purpose of any service provided under this Act,
   (c) medical, dental, ophthalmic, nursing and ambulance services,

(d) such other services or facilities for the care of pregnant women, women who are breastfeeding and young children as he considers are appropriate as part of the health service,
(e) such other services or facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as he considers are appropriate as part of the health service,
(f) such other services or facilities as are required for the diagnosis and treatment of illness.

- **Part 3** of the Act now governs the relationship between Local Authorities and the NHS, which has been an area of dispute in the Courts, which we will come to.

- **S. 21 of the National Assistance Act 1948 ('NAA')** provides a statutory duty upon Local Authorities in certain circumstances to provide residential accommodation to those whose need it:

> "(1) Subject to and in accordance with the provisions of this Act, a Local Authority may with approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing –
>
> residential accommodation for persons aged 18 or over who by reason of age, illness, disability or other circumstances are in need of care and attention which is not otherwise available to them…."

- **S. 21(2A) NAA** provides that in determining for the purposes of s. 21(1)(a) whether care and attention are otherwise available to a person, a Local Authority shall disregard so much of the person's resources as may be specified by regulations made.

- **S. 21(4) NAA** allows for the accommodation referred to in s. 21(1)(a) to be provided in premises managed by the Local Authority or another Local Authority.

- **S. 26 NAA** also permits arrangements to be made with voluntary organisations or profit-making organisations for the provision of accommodation.

- **S. 22 NAA**, the general principle is that a person must pay the full costs to the Authority of the accommodation provided for him.

- However a person does not have to pay the full costs of the services, provided he satisfies the Local Authority that he is unable to pay for the care (**National Assistance (Assessment of Resources) Regulations 1992**).

- **S. 29 NAA** promotes welfare arrangements to be made under **s. 2 of the Chronically Sick and Disabled Persons Act 1970.**

    (g) the provision of practical assistance in the home

    (h) and (c) the provision of recreational facilities or access to such facilities

    (e) the provision of assistance for that person in arranging for the carrying out of any works of adaptation in his home or the provision of any additional facilities designed to secure his greater safety, comfort or convenience;

    (f) facilitating the taking of holidays by that person, whether at holiday homes or otherwise and whether provided under arrangements made by the authority or otherwise.

- **S. 47** of the **National Health Service and Community Care Act 1990** and duty to assess a disabled person's needs

- **S. 7(1) of the Local Authority Social Services Act 1970**) a duty to follow guidance issued by the Secretary of State.

- "**Fair Access to Care Services Guidance on Eligibility Criteria for Adult Social Care" (LAC (2002) 13**) contains guidance as to the eligibility for care services provided by local authorities – 4 bands.

- S**. 17 of the Health and Social Services and Social Security Adjudications Act 1983** ("HASSASSAA") confers a discretion to recover for s. 29 services. There is guidance as to the exercise of that discretion.

- **S. 59 of the Health and Social Care Act 2001 ('HSCA')** makes provision for persons assessed as needing community care services by assessment under **s. 47 of the National Health Service and Community Care Act** to receive direct payments from the local authority in order to secure the provision of the relevant services, instead of receiving the services directly from the authority.

(1) Community Care Concerns - ***Relevant cases***

Coughlan

R v North East Devon Health Authority, ex parte Coughlan and (1) Secretary of State for Health and (2) Royal College of Nursing (Interveners) 2000 2 WLR 622.

- JR against Health Authority's decision to close down the purpose built facility, Mardon House, in which she was being looked after.

- Court of Appeal considered the inter-relationship between the NHS and local authorities for providing nursing services.

- Coughlan's needs – Health Authority or Local Authority's responsibility. It mattered because if HA then free care, if LA then chargeable.

- Decision: generally, where the nursing services were merely (i) incidental or ancillary to the provision of the accommodation which a local authority was under a duty to provide and (ii) of a nature which it could be expected that an authority whose primary responsibility was to provide social services, then the Local Authority could be expected to provide those services.

- Court of Appeal held that there had been flawed central and local guidance as to the eligibility for NHS continuing care.

- The Health Authority had made a promise of a home for life. Legitimate expectation raised but unlawfully frustrated.

- Breach of Coughlan's Art. 8 ECHR rights.

- Significance: 1) determining relationship between NHS and Community Care legislation; and 2) the jurisdiction/scope of "legitimate expectation".

Grogan

R (Maureen Grogan) v Bexley NHS Care Trust and (1) South East London Strategic Health Authority and (2) Secretary of State for Health (Interested Parties) [2006] EWHC 44 (Admin).

- Underlying issue who should pay for the cost of the care of the claimant. If provided by NHS then free, if by local authority chargeable and means tested. The claimant had been assessed by the NHS as not eligible for continuing care.

- Judge criticised both Central Government Guidance and Trust's eligibility criteria

- The eligibility criteria failed to spell out the **Primary Health Need Approach**, the test set out in Couglan.

- Bexley had asserted that Ms Grogan's continuing health care needs could not be characterised as complex or intense but it did not say why it had reached that conclusion. The trust had not described the principles it had taken into account in making its determination and had not referred to the test that it had applied to Ms Grogan's case.

- Bexley's decision was set aside.

Sowden, Crofton and Peters

- Spate of cases as to relationship between a tortfeasor and a local authority, where persons have been severely injured in the course of an accident and require care for the rest of their lives. WHO PAYS?

- Not by way of JR but raised public law issues.

- **<u>Louise Sowden (A patient by her litigation friend the Official Solicitor) v Joanne Lodge : David Leonard Drury v Philip Andrew Crookdale (A patient by his litigation friend Deborah Crookdale) (2005) 1 WLR 2129</u>**.

- Common ground that:

  (1) a judge could hold NAA applies as it met a claimant's reasonable requirements and therefore tortfeasor ('T') need not pay future care;

  (2) a joint approach could be taken - NAA plus payments by T;

  (3) a local authority could not recover cost of care under s. 21 from a claimant's damages (the combined effect of the National Assistance (Assessment of Resources) Regulations 1992, National Assistance (Assessment of Resources) (Amendment) Regulations 1998 and the Income Support (General) Regulations 1987).

- **National Assistance Act 1948 (Choice of Accommodation) Directions 1992**. Their effect is that a person can ask for preferred accommodation. A Local Authority is only under a duty if they consider it is suitable and the cost of making arrangements would not require the authority to pay more than they would usually expect to pay having regard to his assessed needs.

- The Court of Appeal held as general principles that:

  I. the correct approach for the Courts was to look at what was reasonable for the claimants needs, the reasonableness of the treatment chosen.

  II. The approach is to compare what a claimant can reasonably require with what a local authority, having regard to uncertainties which almost inevitably are present, are likely to provide in the

discharge of the local authority's duty under s. 21. If it is statutory provision which meets the claimant's reasonable requirements, as assessed by a judge, the tortfeasor does not have to pay for a different regime

III. Where there was a gap between what the reasonable requirement was and s. 21, top up was possible. However, where the gap could not be met, the judge was entitled to hold that s. 21 accommodation was not appropriate and therefore that the tortfeasor should be held liable.

- **Crofton (A Patient suing by his litigation friend John Crofton) National Health Service Litigation Authority (2007) 1 WLR 923**

- Issue on appeal was to what extent damages could be reduced to take account of DIRECT PAYMENTS that would be made by the Council. The claimant/appellant claimed that the Council would not be obliged to and would not make direct payments to the claimant in respect of care costs. This is different to s. 21.

- In respect of determining whether direct payments would have been made: 1) threshold – i.e. where a person has been awarded substantial damages for PI, would a local authority be satisfied that it needed to make welfare arrangements at all; 2) would means testing mean the authority would not need to pay out (because of PI damages), i.e. could it have regard to damages?

- Clear that in relation to **s. 21 NAA**, the regulations and case law held that a capital sum represented by an award of damages for PI is disregarded (reg 21(2) and paragraph 19 of Schedule 4 to the National Assistance (Assessment of

Resources) Regulations 1992. And reg. 22(4) of the same regulations meant income derived from the award was disregarded.

- Although no clear statutory provision, no policy reason why the same should not apply to s. 29 NAA.

- Conclusion - direct payments would be made, despite the award of damages. These payments should be taken into account in the assessment of damages.

- **Chantelle Peters (by her litigation friend Susan Mary Miles) v (1) East Midlands Strategic Health Authority; (2) P Halstead and Nottingham City Council (Part 20 Defendant) [2008] EWHC 778 (QB)**

- Issue: should NCC bear future costs of care under s. 21? Or did the claimant have a right to full compensation from the tortfeasor so that she could have the quality of care that she wished?

- Local Authority argument that the exception for an award of damages for PI needed to be construed restrictively and did not include the cost of future care as opposed to PSLA. But this argument was considered and rejected in **Firth v Ackroyd [2001] PIQRQ27**.

- Local Authority provision was not appropriate in this case as:

  a. placement subject to annual review; and
  b. financial uncertainty

- Double recovery a live concern but could be avoided by relying on goodwill

Gunter

- **Rachel Gunter (by her litigation friend and father Edwin Gunter) v Stafford Western Staffordshire Primary Care Trust [2005] EWHC 1894 (Admin); (2005) 86 BMLR 60.**

- Dispute between the parents and the PCT as to the type of care that claimant should receive. PCT wanted her in residential care. The parents wanted care for her at home.

- Suggestion by parents of a user independent trust. 1st time in relation to a PCT, used by Local Authorities before. UIT considered in **R(A&B) v East Sussex CC and another (No1) [2003] CCLR 177** by Munby J.

- Payments are made to a trust and is a legal entity distinct from parents. Parents are a minority on the board. Company is not profit making and any surplus on winding up must be repaid to the Council.

- Under the NHS Act 1977 powers were wide enough. Deliberately wide powers.

- The claimant granted a declaration to this effect.

(2) Challenging decisions on specific medical treatments

- The traditional approach: deference to the NHS and resource constraints - **R-v-Cambridge Health Authority ex parte B [1995] 1 WLR 898**

- Recent cases concerned with what medical treatment a patient is entitled to. Has the approach of the courts changes?

- **R (on the application of Ann Marie Rogers) v Swindon NHS Primary Healthcare Trust and Secretary of State for Health (Interested Party) (2006) 1 WLR 2649**.

- At the time of the JR, Mrs Rogers was 54. In 2004 she was diagnosed with breast cancer. Her son discovered that there was her type of cancer HER2 positive that could be treated by "Herceptin".

- Resources not an issue. PCT policy in respect of whether to fund herceptin based on the concept of "exceptional circumstances".

- The essential question for the Court of Appeal was whether this policy of "exceptional cases" was rational.

- As no clinical decision in respect of exceptionality could be made the *policy* was deemed as irrational.

- Recent case of **R (on the application of Victoria June Otley) v Barking and Dagenham NHS Primary Care Trust (2007) BMLR 182**.

- Ms Otley had metastatic colorectal cancer. 57 years old. Taking course of chemotherapy with associated drugs. Her sister discovers "Avastin". The PCT refused to fund treatment of this drug.

- The PCT's *policy* towards such cases WAS NOT objectionable.

- However, the Difficult Decisions Panel failed to apply the policy correctly and the decision was quashed:

    (1) irrelevant query by the panel as to the effect of Avastin in the context of a cocktail of drugs
    (2) wrong conclusion that as there were other treatments available to Ms Otley, and therefore by not funding Avastin the PCT would not breach Arts. 2 and 3 ECHR.
    (3) The focus of the Panel had been upon the drug's effect upon short term palliative care and not Ms Otley's long term survival.

- What of the future? More deference but resource constraints will remain.

<u>IV. BRINGING A CLAIM FOR JUDICIAL REVIEW</u>

Is there an alternative?
Identifying your remedy
Timing and delay
Pre-action Protocol
Funding
Issuing proceedings

Is there an alternative/effective means of resolving the dispute?

- **<u>Cowl v. Plymouth City Council [2001] EWCA Civ 1935</u>** the Court stressed the importance of avoiding litigation wherever possible and that before permission will be granted the Claimant must show why making a complaint (internally or to the ombudsman) would not provide an *effective* remedy.

- A community care assessment was alleged to be defective in a number of respects. The Court at first instance found that as the case involved points of law the complaints procedure was not appropriate (and further there had been considerable delay already in the case – the assessment having only been produced post issue).

- The availability of an alternative remedy does not prohibit the Administrative Court granting relief on an application for judicial review where it is not the individual decision that is in issue but the underlying legality of the decision of which the individual decision is a mere result of its application (**<u>R v. Paddington Valuation Officer ex parte Peachey Property Corp Ltd [1966] 1 QB 380 CA</u>**) or where to require the applicant to pursue the alternative remedy would in effect determine the issue against him (**<u>R v. Chief Immigration Officer Gatwick Airport, ex parte Kharrazi [1980] 3 ALL ER 373</u>**).

What is the remedy being sought?

- Being practical, realistic. What do you want to achieve? Is it available?
- Damages: **R v Enfield London Borough Council, ex parte Bernard 2002 EWHC 2282 (Admin)** and **Anufrijeva v London Borough of Southwark**.

Timing and the issue of delay

- Any claim form must be filed (a) promptly; and (b) in any event not later than 3 months after the grounds to make the claim first arose (CPR 54.5). The Court has power to extend the 3 month time limit, but will only do so if there are very good reasons for doing so (CPR 3.1(2)(a)). If an extension of time is sought, an application must be made in the Claim Form setting out the grounds in support of the application (CPR 54.5). The time limit in this rule cannot be extended by agreement between the parties.

- When outside the time limit? In the context of applications for judicial review the courts have considered the expression "good reason" as found in RSC Order 53 r.4.

- The time constraints governing judicial review are not to be applied mechanically and where there is no prejudice to the Defendant and the Claimant has acted sensibly and reasonably, permission to proceed out of time will normally be granted (L.J Woolf in **R v. Commissioner for Local Administration, ex parte Croydon LBC [1989] 1 All ER 1033 at 1046g**).

- The discretion to extend time will be approached sympathetically where the Claimant has in the meantime "*not been sleeping on her rights but has been attempting to canvass them by other legitimate means*", (**R v. University Collage London, ex parte Ursula Riniker [1995] 2 ELR 213, Sedley J at 215**).

The Pre-action Protocol

- Before applying for permission a claimant should normally comply with the pre-action protocol for judicial review.

- The protocol will not be appropriate in urgent case, for example a life and death situation or where the potential claimant would suffer real prejudice. Some pre-action letter is normally appropriate.

- The protocol does not affect the time limit imposed by CPR 54.5(1).

- The protocol letter does not stop the implementation of the decision under challenge. A defendant can be asked to stay a decision if they need time to make a full response.

- The protocol requires the claimant to send a letter before action to the defendant in the format suggested in the protocol. The letter should normally specify:

    - The decision, act or omission which is being challenged, together with a brief summary of the facts and why it is contended to be wrong;

    - The action that the defendant is required to take. This may be a review of the decision. Is any interim remedy being sought?

    - Details of any interested parties (see CPR PD 54.5). An interested party is a person who is likely to be affected by the claim. If a claim relates to proceedings in a court or tribunal, this would be any other party to those proceedings. If in doubt, send a copy of the protocol letter to a potential interested party and invite their views as to whether they would wish to be joined in any proceedings whether as a defendant or as an interested party. It may be appropriate to invite the views of the

defendant as to whether there is anyone who should be joined as an interested party.

- The details of any information sought. This may include a request for a fuller explanation. A public authority should, in the interests of high standard of public administration, assist the court in disclosing, so far as is necessary, such reasons as are adequate to enable the court to determine whether the authority acted lawfully (see **R v Lancashire CC, ex p Huddleston [1986] 2 All ER 941**).

- The details of any documents that are considered relevant and necessary. Specify any document or policy of which disclosure is sought. Why are these relevant? Is there a statutory duty to disclose? Is any fee payable?

- The proposed reply date: Normally 14 days. This will depend upon the circumstance of the individual case.

Funding

- The pre-action protocol letter will normally be funded under "legal help". If Counsel's advice is required, an extension should be sought under "investigative help".

- Review the goals: What outcome does the client seek to achieve from the public authority? Is there an alternative remedy? If so, is this an effective remedy? What can the client achieve from the Court? Is interim relief required? What is the time scale?

- In an emergency, franchise holders can grant themselves emergency funding for legal representation under devolved powers. Code JR004 specifies the relevant limitation: "*limited to an application for permission on the papers (to include, if necessary, an application for interim relief on the papers or orally with the consent of the court*".

- Note, however: (i) It is not appropriate to award emergency funding until the time limit specified in any pre-claim letter has expired and (ii) The costs limit is £2,500.

Issuing Proceedings

- The rules can be found in CPR Part 54 and the accompanying practice direction.

- A claim will require: 1) the relevant forms to be lodged; 2) grounds; and 3) accompanying evidence (witness statements).

  i. N461 – JR Claim Form
  ii. N462 – JR Acknowledgement of Service
  iii. N463 – Application for Urgent Consideration
  iv. 86B – Notice of Renewal for permission
  v. N125 – Certificate of Service
  vi. N244 – Application Notice

- The claimant must file a claim form in the Administrative Court Office. The claim form should provide sufficient information to enable the defendant and interested parties to be able to provide an acknowledgement of service. The claim form should enable a court, which will be dealing with the application for permission on the papers, to identify what the claim is about and whether or not there is an arguable case. Questions of delay, alternative remedies, statutory provisions ousting the jurisdiction of the courts and any issues relating to standing also need to be dealt with. The claimant is under a duty to disclose all material facts. These include all material facts known to the claimant.

- The Claim Form must be accompanied by:

  any written evidence in support of the claim or application to extend time. Any facts asserted in the claim form which are verified by a statement of truth stand as evidence (CPR 8.5(7)).

  a copy of any order or decision in respect of which a quashing order is sought;

  where the claim for judicial review relates to a decision of a court or tribunal, an approved copy of the reasons for reaching that decision;

  any documents upon which the claimant intends to rely;

  copies of any relevant statutory material;

  a list of essential reading (with page references to the passages relied upon). Where only part of a page needs to be read, that part should be indicated, by side-lining or in some other way, but not by highlighting.

  Where it is not possible to file all the above documents, the claimant must indicate which documents have not been filed and the reasons why they are not currently available.

- In order to issue, you must lodge with the Administrative Court the following:

  a fee of £50;

  Two copies of a paginated and indexed bundle containing the relevant documents. Ensure pagination in consecutive page number order throughout the bundle. Also ensure that each page has a page

number on it and provide an index, which lists the description of documents contained in the bundle together with their page reference numbers;

Sufficient additional copies of the claim form for the court to seal so that the claimant can serve them on the defendant and any interested parties.

The sealed copy of the claim form and bundle must be served on the defendant and any interested party within 7 days (CPR 54.7). The Court will not serve the claim (CPR PD 54. 7).

A certificate of service on the defendant must be lodged with the Court within 7 days of service. A failure to do so can lead to the court staff closing the file.

- Useful contact numbers: Administrative Court General Office: 020-7947 6205; 020-7947 7335. Administrative Court List Office: 020-7947 6304; 020-7947 7297.