

### *R (on the application of Alexander Thomas Condliff) v North Staffordshire PCT: The Court of Appeal gives its verdict on Individual Funding Request policies and social factors*

North Staffordshire PCT, represented by Mills & Reeve and counsel, David Lock QC, has successfully resisted an appeal against the High Court decision of His Honour Judge Waksman QC. The Court of Appeal upheld the lawfulness of the PCT's IFR policy, which excludes non-clinical factors from the evaluation of exceptionality. Judgment was handed down on 27 July 2011.

#### Key points from the decision:

- A prohibition on the consideration of non-clinical "social" factors, in determining exceptionality under an IFR policy, does not engage the patient's rights to a private and family life under Article 8 of the European Convention on Human Rights. Alternatively, if Article 8 was engaged, there were legitimate equality reasons for the PCT to adopt the policy that it did and its decision was well within the margin of appreciation or discretion properly open to it.
- Article 8 not being engaged, there was no breach of Mr Condliff's consequent Article 6 right to reasons for violating his Article 8 rights. Alternatively, there had been a fair determination of his Article 8 rights through the process of judicial review at first instance, in which the judge had considered that the social factors exclusion was the result of a fair balancing exercise.

#### Facts

Mr Condliff is a 62-year-old former police officer living in Stoke on Trent, within the catchment area of North Staffordshire Primary Care Trust (the PCT). He developed diabetes as a result of congenital problems. After ultimately finding a satisfactory mode of insulin delivery (which had been previously precluded by a severe needle phobia), he developed a voracious appetite and began to gain weight as a result of overeating. His weight continued to increase until he became morbidly obese, with a body mass index in the region of 43 kg/m<sup>2</sup>. He has an extensive range of co-morbidities including hypertension, obstructive sleep apnoea and renal impairment. After trying, unsuccessfully, to lose weight through diet and other conservative interventions, Mr Condliff's consultants advised that laparoscopic gastric bypass (a type of bariatric surgery) provided the best chance of improvement to his health.

Under the PCT's policy, Mr Condliff was not eligible for bariatric surgery as his BMI was less than 50. His GP therefore made an application for exceptional funding under the PCT's Individual Funding Request (IFR) policy. The application was rejected by the IFR Panel on 11 March 2010, on the basis that the evidence failed to establish that Mr Condliff was exceptional, in the sense of being significantly different from others with the same clinical condition at the same stage of progression (the cohort) and likely to gain significantly more benefit from the surgery. Rather, he was representative of a group of individuals with a BMI between 40 and 50 with a range of co-morbidities for whom the surgery might be appropriate; a group for whom the PCT had decided, in its annual prioritisation round, not to fund surgery.

In September 2010, Mr Condliff's GP wrote again to the PCT, asking them to reconsider the application for funding in light of the deterioration in his health over the intervening six months. This letter explained that Mr Condliff now attended surgery in a wheelchair, so had further lost his independence, and was no longer able to enjoy his previous interests of attending church or playing the guitar.

The PCT's Public Health Physician reviewed the information provided in this letter and concluded that it did not constitute fresh evidence to warrant the case going back before an IFR Panel. Rather, it indicated that the patient's overall clinical condition had deteriorated in a way that was consistent with his co-morbidities and, if he was unable to lose weight by means other than bariatric surgery, sadly foreseeable. This decision was communicated by a letter from the PCT dated 13 October 2010. It is this decision that was the subject of challenge in the proceedings that followed.

Mr Condliff's application for judicial review of the PCT's decision was decisively rejected by the High Court in April 2011(see our briefing on this judgment [here](#)). It is that judgment, in favour of the PCT, against which Mr Condliff appealed.

## The heads of challenge

By the time the case reached the Court of Appeal, the challenges to the PCT's decision-making had reduced to just two. The appellant argued that the judge at first instance had erred in law:

- in failing to hold that the PCT's IFR policy, in excluding purely social non-clinical factors from the evaluation of an applicant's claim to be exceptional, breached his rights to a private and family life under Article 8; and
- in failing to hold that the PCT had breached his Article 6 rights by failing to provide reasons for its adverse determination of his Article 8 rights.

This briefing focuses on the first challenge, under Article 8.

## The IFR policy

Paragraph 4.2.5 of the PCT's IFR policy states that:

"Social factors (for example, but not limited to, age, gender, ethnicity, employment status, parental status, marital status, religious/cultural factors) will not be taken into account in determining whether exceptionality has been established."

Further guidance on exceptionality was available at Appendix 1 of the PCT's policy.

## Article 8

Article 8 provides that:

- 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

## The judgment of the Court of Appeal

The principal judgment was delivered by Lord Justice Toulson. Lord Justice Maurice Kay and Lady Justice Hallett agreed with him.

His Lordship acknowledged that the question of precisely how the criteria should be set for determining exceptionality had been a difficult one for PCTs generally, given the ethical and practical questions inherent in deciding, as between patient groups competing for scarce resources, which circumstances should be taken into account.

In this regard, his Lordship quoted extensively and with approval from *Priority setting: managing individual funding requests* (NHS Confederation 2008, accessible [here](#)) authored by Dr Daphne Austin, a noted public health consultant, who suggests that, whatever the benefits of favouring one group (eg, employed patients) over another (eg, the retired), the higher and overriding principle is that the NHS should treat people equally who have equal need.

The issue at stake here was whether Article 8 made it unlawful for a PCT to adopt an IFR policy under which the question of exceptionality was determined solely by reference to clinical factors.

## The appellant's arguments

For the appellant, Richard Clayton QC argued that:

- the European Court of Human Rights (ECtHR) has taken an expansive view of the meaning of “private and family life” and the scope of Article 8;
- the decision of the PCT not to fund bariatric surgery for his client had a direct and immediate negative impact upon his family and private life; and
- the withholding of funding for such surgery was therefore an interference with his private and family life which required to be justified under Article 8(2) so as not to be a breach of the “negative obligation” imposed by Article 8.

In the alternative, he argued that if the withholding of treatment was not properly to be categorised as an interference with the appellant's private and family life, Article 8 – wearing its “positive” hat – required the PCT actually to uphold and support the individual's right to a private and family life.

While the State has a wide margin of appreciation in reaching decisions about the allocation of healthcare resources for which there are competing demands, Mr Clayton argued, there can be no justification for a blanket refusal to take account of the impact upon an individual's private life of a decision to withhold funding.

## The view of the court

In reiterating the distinction between clinical factors (ie, the physical and psychological effects of a patient's condition) and purely social factors and circumstances, his Lordship confirmed that HHJ Waksman had been correct to observe that social (or non-clinical) factors and Article 8 factors are not synonymous.

Having reviewed the appellant's arguments, his Lordship acknowledged that the state of the appellant's health was undoubtedly having a serious adverse effect on his private and family life in the most basic ways. However, harsh as it may seem, this did not mean that the application of the IFR policy involved a lack of respect for his private and family life.

The PCT's policy of allocating scarce medical resources on the basis of a comparative assessment of clinical need was intentionally non-discriminatory. For the PCT to perform its statutory function, of using limited resources for the provision of healthcare services, by allocating resources strictly according to assessment of clinical need was, his Lordship said, "to do no more than to apply the resources for the purpose for which they are provided without giving preferential treatment to one patient over another on non-medical grounds."

The appellant's argument, the court said, was premised on the notion that PCTs owe a positive duty under Article 8 to favour some patients over others with the same medical condition ie, to discriminate positively in favour of the former, on the basis of social factors. That was not, the court found, supported by the authorities cited.

The court observed that Strasbourg has said on many occasions that Article 8 is directed primarily at prohibiting interference with an individual's private and family life. The court also noted: "There is no universal yardstick for determining the scope of a state's positive obligation under Article 8". The ECtHR, his Lordship said, has been particularly wary of attempts to establish a positive obligation in the area of the provision of state benefits and, in particular, medical treatment because questions about how much money should be allocated by the state on competing areas of public expenditure, and how the sums allocated to each area should be applied, are essentially matters which lie within the political domain.

Quoting favourably from the first instance judgment, where the judge said:

"Article 8 cannot be considered applicable each time an individual's everyday life is disrupted, but only in exceptional cases ... [R]egard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole ..."

his Lordship concluded that Article 8 cannot be properly relied upon as giving rise to a positive duty to take into account welfare considerations wider than the comparative medical conditions and medical needs of different patients. He made the following helpful points:

"The PCT has grappled with the difficult ethical and practical questions involved in setting its IFR policy. In arriving at that policy the PCT has struck what it considers to be a fair balance between the interests of individuals and the community (for example, whether patients who are carers should have priority over others) and a fair balance between different patients with similar health conditions. The case illustrates the balancing exercise referred to in [the ECtHR jurisprudence] and I do not see that it makes a difference that the exercise was carried out when deciding its IFR policy. If there is to be fair and equal treatment, there has to be a policy as to what it should be ..."

"In my judgment the Strasbourg jurisprudence not only does not support, but runs counter to, the proposition that it was unlawful for the PCT to adopt a policy that IFRs should be considered and determined exclusively by reference to clinical factors."

"Nothing in the authorities ... leads me to conclude that the policy of the PCT, properly understood, is to be regarded as showing a lack of respect for Mr Condliff's private and family life so as to bring Article 8 into play. If, however, Article 8 is applicable, there were legitimate equality reasons for the PCT to adopt the policy that it did and its decision was well within the area of discretion or margin of appreciation properly open to it."

## Conclusion

PCTs may wish to review their IFR policies if they currently provide for consideration of social factors.

## The road well travelled?

We understand that the Mr Condliff is seeking leave to appeal to the Supreme Court. We will keep readers updated.



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