Judicial Communications Office

9 January 2023

COURT DISMISSES HEALTH WAITING LIST CHALLENGE

Summary of Judgment

Mr Justice Colton, sitting today in the High Court in Belfast, dismissed applications for judicial review alleging breaches of statutory duty by the Department of Health and two Health and Social Care Trusts as a result of the length of time patients are waiting for treatment.

Eileen Wilson and May Kitchen ("the applicants") were both placed on a waiting list by their respective Health and Social Care Trusts following a referral by their general practitioners. Eileen Wilson was referred for a neurology appointment in June 2017 but, for various reasons including delays arising from pressures related to the covid-19 pandemic, waited until May 2022 for an MRI scan and diagnosis. May Kitchen was referred for a cataract operation in July 2019 but was told it would not take place for three to four years because of the waiting lists. Fearful of losing her sight she arranged for her surgery through private health insurance which took place six weeks after her initial appointment. In delivering judgment, the court commented:

> "These applications bring into focus what is widely regarded as a crisis facing the health service in this jurisdiction, namely the length of time patients are waiting for treatment. It does not need recourse to law to establish that such a crisis exists."

The applicants' cases were based on an alleged:

- Breach of statutory duty by the Department of Health ("the Department") and relevant Trusts ("the respondents") by reason of the delay in providing treatment; and
- Unjustifiable interference with their article 8 ECHR rights.

Breach of Statutory Duty

The relevant statutory provisions relied upon by the applicants are set out in paras [11] - [18] of the judgment. The applicants also relied upon a report prepared by Professor Deirdre Heenan which focused on the issue of waiting lists. The court received evidence on behalf of the Department about the processes for the delivery of health care including the elective care framework which, it was stated, will require the commitment of NI Executive Ministers and additional, sustained, recurrent funding.

The legal issue in these cases was whether or not the alleged breaches of duty of the respondents are sufficient to crystalise into an enforceable statutory duty owed to the applicants. The respondents contended that the issues raised by the applicants are "non-justiciable", being questions of a macro-political policy to be determined by the legislature and not the courts. In such circumstances it was argued that the court is constitutionally precluded from engaging in a consideration of such matters. The court considered a number of important cases on this issue in paras [45] – [57]. Relying on these authorities, the applicants contended that:

- Once an assessment of need has been made, a duty of provision arises;

- The post assessment duty is to provide the assessed benefit within a reasonable time; and
- The availability of resources is not a permissible consideration.

The court commented that the statutory duties set out in section 2 of the Health and Social Care (Reform) Act (Northern Ireland) 2009 ("the 2009 Act") ("Department's general duty"), are general duties or "target duties" in the "macro-economic political field". It said that section 2, and other related provisions of the 2009 Act, are replete with "directory language imbuing a high degree of latitude/discretion to the Department". It said the same was true for Article 6 of the Health and Personal Social Services (Northern Ireland) Order 1972 ("the 1972 Order") ("Provision of general health care"). The court considered that the threshold faced by any applicant seeking to rely on a breach of section 2 of the 2009 Act in establishing an enforceable statutory duty actionable by an individual is high:

> "It is clear from [the evidence] … that there had been a series of efforts to provide solutions to the issue of waiting lists in this jurisdiction. The question of waiting times has been identified as a major priority by various Ministers for Health and by the Department itself. What is involved in resolving the problem is a matter of contention. It clearly involves high level political decisions in relation to resources and also in relation to structural reform of the health service. Manifestly, that is not a matter for the courts. … Whether the problems that arise in relation to waiting lists in the health service are caused by resource issues or strategic issues, or a combination of both is not something which can be measured by a legal standard. That is not a judgment which the courts can make."

Counsel for the applicants argued that once they were diagnosed as requiring further treatment there was an enforceable obligation on the respondents to provide the relevant treatment and that resources was not a relevant factor. The court, however, said the question of when the relevant treatment is to be provided manifestly involves considerations of resources, the demand on the Department's budget, and responsibilities to other members of the population:

> "Those assessments cannot be made when the applicants were first assessed by their general practitioners or when, and if, they are subsequently assessed for further medical treatment."

The court considered it could not be established that this was an appropriate example of a case of the extreme circumstances when a court can intervene in dealing with the duties under consideration.

The court then considered what is meant by "reasonable time" in accordance with the case law and by what measure could the court identify this. It questioned how it could determine whether adequate resources or a restructuring or reorganisation of the health service was necessary to deal with the unsatisfactory situation regarding waiting lists. The court considered that any interference in this sphere would plainly be impermissible:

> "The applicants are undoubtedly motivated by, not only their own position, but the general position in relation to waiting lists in this jurisdiction. That is clearly a matter of manifest public concern. A resolution to the issue would be welcomed by all citizens, but particularly those directly involved in the health service including patients and staff alike. It is a matter that needs to be addressed by political leadership and

> decision making. It will also require, undoubtedly, leadership within the relevant department and Trusts. They are the people to make these decisions, not the courts."

The court further contemplated that if it made a declaration or awarded damages in this case it could lead to multiple similar applications:

> "On what basis could the court distinguish these applicants from other members of the public who are currently on waiting lists for treatment by the health service? To do so would, in my view, not be in the public interest. The finite resources available to the respondents should be devoted to taking the necessary steps taken to deal with the question of waiting lists rather than defending expensive litigation in the public law sphere in which the courts are unsuited to make the necessary decisions."

Article 8 ECHR

The court then considered whether the delay in providing medical care may provide grounds for an infringement of article 8 ECHR. It was not persuaded that article 8 adds anything to the court's analysis of the State's obligation to each of the applicants, or indeed, to the public at large:

> "The State provides a system of health care for the benefit of the public and devotes significant resources on an ongoing basis to fund that system. It is the subject of a statutory scheme and political scrutiny and oversight. In exceptional circumstances it may be subject to review by the courts. Any decision that recognised a duty under article 8 ECHR to provide health care within a particular timescale would be a very substantial departure from established authority and not in accordance with the court's analysis of the State's obligations under domestic law."

Conclusion

The applications for judicial review were dismissed.

NOTES TO EDITORS

This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://judiciaryni.uk).

ENDS

If you have any further enquiries about this or other court related matters please contact:

Alison Houston
Judicial Communications Officer
Lady Chief Justice's Office
Royal Courts of Justice
Chichester Street
BELFAST
BT1 3JF

Judicial Communications Office

Telephone: 028 9072 5921
E-mail: Alison.Houston@courtsni.gov.uk