

Judicial Communications Office

26 February 2021

COURT REFUSES APPLICATION FOR JUDICIAL REVIEW OF TRUST'S APPROACH TO COVID-19

Summary of Judgment

Mr Justice Colton today refused an application for a judicial review of the way a Trust assessed the needs of two severely disabled adults, "J" and "L", in response to the Covid-19 pandemic. The issue before the court was whether or not the relevant Trust ("the Trust") had acted unlawfully by failing to provide the level of social care described in the assessment of needs of J and L.

J and L live at home with their parents. The application was brought by their mother ("the applicant") who is their main carer. Their needs have been assessed by the Trust on a number of occasions with the most recent being an assessment on 23 April 2018 and a review on 17 July 2019. Arising from that review their assessed needs are:

- Day care on five days a week including transport to and from the location;
- Domiciliary care every Friday;
- Overnight respite care to support the applicant annually or as and when required.

As a result of the Covid-19 public health crisis, the Trust ceased providing day care on 23 March 2020. On 27 March, domiciliary care ceased. While day care has now resumed, it is on four days per week and not five. Domiciliary care has been restored to the pre-Covid assessed level and transport has resumed. Respite care ceased on 27 March but emergency respite has been provided in the interim.

The Legal Context

Section 2 of the Chronically Sick and Disabled Persons (NI) Act 1978 ("the 1978 Act") provides for the Department of Health to provide a number of services to persons who qualify under section 1. Mr Justice Colton said there was no dispute that J and L fall within this category. Section 2 imposes a duty on the Department to provide the care which has been assessed however it was agreed at the outset by the parties that this case would proceed against the Trust only.

In paragraphs [15] to [21] of his judgment, the judge outlined previous judicial analysis of section 2 of the 1978 Act or its equivalent in England and Wales. He said that although the specific context of each case differs, the ratio which emerges is that the duties imposed require three specific tasks that must be undertaken when considering meeting the needs of a disabled person:

- What are the needs of the person (the "diagnosis" or first stage);
- Whether in order to meet those needs is it necessary to make arrangements to provide any services (the "prescription" or second stage); and
- If so, what is the nature and extent of the services (the "provision" or third stage).

Financial or resource considerations can only lawfully be taken into account in the earlier stages of the process and not at the third stage. If on reaching the third stage a duty, enforceable at the suit of

Judicial Communications Office

the chronically sick or disabled person concerned, crystallises. In the first two stages a Trust has to balance the severity of the applicant's disabling condition against the cost of those arrangements and the availability of resources. At the third stage the duty is absolute and a Trust cannot escape its duty to make arrangements to meet the need by saying that they do not have the money. Mr Justice Colton said he would proceed on the basis that this is settled law.

Are the needs assessed within the scope of section 2?

In order to establish a breach of section 2 the applicant must establish that the provision which she seeks to enforce comes within its scope. Mr Justice Colton said there was no dispute that day care (including transport) and domiciliary care are embraced by section 2. The provision of overnight respite care with transport was more problematic as it was for the carers rather than for the recipient of the care. The judge said that looking at the particular circumstances of this case it would unduly stretch the plain meaning of the words in section 2 to suggest that the respite breaks could be considered "holidays" or the provision of "recreation facilities" outside the home:

"It seems to me that this service is primarily for the benefit of the carer. However, it plainly does have a benefit for J and L as in effect it replaces the care provided by the carers to meet their needs in circumstances where it is recognised that the carers are entitled to respite in relation to the provision of the service."

Mr Justice Colton commented, however, that the fact that the respite care in question does not come within the scope of section 2 is not the end of the matter. He said the court is not precluded from holding that the Trust is under a duty in law to provide this service by virtue of its obligations under section 2(1)(b) of the Health and Social Services (Reform) Act (NI) 2009 and Article 15 of the Health and Personal Services (NI) Order 1972. The judge said that in making the assessment in each individual case, the authority can properly take into account factors such as available resources, the demand on its budget, the particular circumstances of the individual concerned and their family, including their resources, the availability of facilities and its responsibilities to other members of the population. Thus, factors of this kind can properly influence the assessment to be made in the individual case and in this regard the Department is invested with a discretion. However, when the assessment has been made the discretion is then supplanted by a duty.

Consideration

Paragraphs [29] to [55] provide a chronology of what has occurred in relation to the provision of care since the initial cessation of services on 27 March 2020. Mr Justice Colton said that any fair analysis of the factual background leads to the conclusion that there was a significant level of contact and support offered and provided by the Trust to the applicant during this period.

The applicant's case was that J and L's needs have not changed since they were last assessed in July 2019. The resources available to the Trust arising from the restrictions imposed by the Covid-19 pandemic have changed but the Trust has not engaged in any review or reassessment of J and L's needs to as to set the clock back to stages 1 and 2 of the three stage process. It was claimed that the Trust had instead taken into account resource issues in the third stage which is impermissible and illegal. Unlike the equivalent care provisions in England and Wales, section 2 has not been amended by the Covid-19 legislation to allow for time easements to care duties imposed on authorities. The applicant contended, therefore, that the absolute duty remained extant.

Judicial Communications Office

The Trust countered that, properly analysed, reviews/reassessments of J and L were conducted in April, May, June, July, October, November and December 2020 and that provision was made for their needs in accordance with those reviews/reassessments which were required as a result of the Covid-19 pandemic. The Trust argued that J and L's needs clearly changed during the pandemic and that the provision of services post March 2020 must incorporate the "need" to protect them from the risk of Covid-19 infection. That is why the day care facility originally closed and is not only available for use in a reduced capacity. The Trust argued that even if the needs have not changed it still is permitted to review and change the arrangements which are necessary for the services it makes in order to provide for those needs.

Mr Justice Colton said that, in his view, it would be completely artificial and unrealistic to say that services deemed to be necessary to meet the needs of J and L prior to the Covid-19 pandemic could not be lawfully reviewed or reassessed in light of the changes designed to deal with the public health emergency from March 2020 onwards: "The assessment of J and L's needs cannot be considered in a vacuum".

In considering the context for the purported reviews/reassessments, Mr Justice Colton referred to the emergency legislation that was introduced in the form of the Health Protection (Coronavirus) Regulations (NI) 2020 which imposed severe restrictions across all aspects of life. He said the regulations were designed to protect the public health during an unprecedented health crisis and this affected the manner in which the Trust was able to provide services to service users and their families. On 13 March 2020, the Trust wrote to its service users setting out the potential implications of the regulations. This stated that "we will only take a decision to reduce or stand down all, or parts of our services, if either the risk of cross-infection or staff sickness requires us to do so". Mr Justice Colton said this set the context for the subsequent reviews/reassessments and alternative arrangements made for J and L. Construing the reviews/reassessments carried out by the social work staff the judge said this should be done in a practical way, against the factual background in which they are written and with the aim of seeking to deliver the substance of their true meaning.

Mr Justice Colton said that adopting that approach, it seemed that the reviews carried out by the Trust could properly be interpreted as applying to stage two of the three stages. He said this finding does not give a "blank cheque" to the Trust but simply means that the consequences of the pandemic were matters for proper consideration by the Trust in assessing the arrangements necessary to meet the needs of J and L while the restrictions imposed as a result of the pandemic were in play. The judge commented that the decisions of the Trust remain subject to the scrutiny of the court which will carry out that scrutiny conscious of the rights of the applicant on behalf of J and L:

"In my view it is clear that throughout the relevant period the Trust made strenuous efforts to meet the needs of J and L within the context of the unavoidable restrictions. It is suggested that they did not take any account of the applicant's wishes but this simply does not stand up to scrutiny. All the reviews expressly record the views of the applicant. It is also clear from the regular and ongoing contact between the Trust and the applicant as set out in the chronology that there was extensive and real engagement. The records reveal that the applicant's view is and was that care should be restored to the pre-March 2020 level. Throughout the relevant period the Trust has sought to reinstate the full extent of the services provided to J and L prior to the pandemic restrictions. It was however compelled to do so in a way that ensured the facilities were provided in a safe way so as to prevent the risk of infection, particularly

Judicial Communications Office

to vulnerable persons such as [J and L]. This required significant adaptations to the facilities.”

Mr Justice Colton said the consequences of the pandemic had required a review of the eligibility criteria for day care placements which set out a four phase resumption plan between 6 July and 19 October 2020. The review also indicated that where there remains a level of unmet need in relation to day care placements, the Trust will continue to seek and agree with service users and carers the provision of alternative person centred supports. The judge said the increase in day care allocation was clearly subject to ongoing review taking account of all relevant infection control and social distancing requirements. He noted that the safety of service users, families and staff were required to be taken into account by the Trust in ensuring all infection control requirements were met within the day care services which were provided to J and L and others:

“It is clear to me from the papers that through its strenuous efforts the [Trust] conscientiously carried out their statutory obligations to assess and meet the needs of J and L under section 2. In my view they were entitled to take into consideration in assessing those needs the consequences of the Covid-19 pandemic. Their particular application to [J and L] could in no sense be considered unreasonable in the Wednesbury sense.”

Mr Justice Colton said he fully accepted and understood the distress and frustration of the applicant throughout this extremely difficult period and had no difficulty in accepting that the changes to the care provided to J and L caused them significant upset. He said the applicant has been a determined and committed advocate for them and she clearly has their best interests at heart: “However, this does not mean that the [Trust] has acted unlawfully in the arrangements it made for the provision of care to J and L since March 2020”.

In assessing the obligations of the Trust the judge said that a further relevant consideration was the impossibility of the continued provision of the arrangements assessed as needed prior to the Covid-19 pandemic. He did not consider that it could be reasonably argued that the Trust was not obliged to close down the day care centre when the pandemic struck. He said this was necessary to ensure that it could be opened safely:

“Put simply, it was impossible for the Trust to provide five day care to J and L at this facility. Thus, in assessing the obligations of the [Trust] under section 2 the court is entitled to allow a period of time to the [Trust] to comply with its obligations either by reopening the facility in a safe manner or providing reasonable alternatives. What is a reasonable time and what are reasonable alternatives will depend on the circumstances of the case. Whether the obligation of the [Trust] is assessed on the basis of an “absolute duty” or a duty subject to Wednesbury review I consider the reasonable period for the [Trust] for compliance has not elapsed and that reasonable alternatives have been provided. This is because these assessments must be made in the context of the restrictions arising from the Covid-19 pandemic.”

Conclusion

Mr Justice Colton concluded that there has been no breach of the Trust’s duty to J and L under section 2 of the 1978 Act and that the arrangements necessary to meet their needs were lawfully reassessed. He said that reassessment was necessary because of the difficulties that arose as a result

Judicial Communications Office

of the restrictions imposed to deal with the Covid-19 pandemic. The resultant change in the circumstances were a relevant factor to be considered by the Trust in complying with its section 2 obligations to J and L. The judge said that on the evidence in this case the reassessments and reviews were fairly and lawfully applied to J and L. He also said the relevant circumstances resulted in changed criteria which were necessary and were fairly applied to J and L. In relation to provision outside the scope of section 2, the judge again considered that the reassessment and subsequent provision carried out was both lawful and reasonable. He commented, however, that these conclusions do not give a “blank cheque” to the Trust who remains under an ongoing duty to make the necessary arrangements to meet J and L’s needs. The application for judicial review was therefore refused.

NOTES TO EDITORS

1. 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
Lord Chief Justice’s Office
Royal Courts of Justice
Chichester Street
BELFAST
BT1 3JF

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