Landmark Chambers

Learning lessons from cases where IFR decisions have been challenged – successfully and unsuccessfully

Leon Glenister

The bigger picture

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- Daniel Wang, *'From Wednesbury unreasonableness to accountability for reasonableness'* 2017 CLJ 642

- Argues cases on rationing healthcare demonstrate the Court's increasing willingness to scrutinise public law decisions in a move away from pure Wednesbury

- Is this right in the context of IFR?

Groups of challenges

- Rationality
- Convention Rights / Discrimination
- Reliance on NICE position
- Interpretation of IFR policy

Pure rationality challenges

- Incredibly high bar, alongside the repeated acknowledgment by the Court that dividing lines are primarily for health bodies and not the Court.

- **R (C) v Berkshire West PCT** [2011] EWCA Civ 247:

> 35. I understand why the appellant feels aggrieved that the respondent funds the core gender reassignment procedures outlined in the Policy, notwithstanding the absence of evidence of limited clinical effectiveness, but does not also fund breast augmentation surgery for persons like the appellant (given, in particular, that there is no professional consensus on the classification of core and non-core procedures for gender reassignment). But the answer in law to that feeling is that the respondent, in exercising its statutory responsibilities, has to make very difficult choices as to what procedures to fund and not to fund and the choice made in this case is not irrational.

Convention Rights / Discrimination

- It has been seen that establishing these claims has been difficult not least because:
  - There is generally no right to free healthcare under article 8 ECHR
  - The Court defers to health bodies on questions of comparators and justification

Convention Rights / Discrimination: scope of article 8

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R (Condliff) v North Staffordshire PCT [2011] EWCA Civ 910

- Lawful to have policy which does not take account of “social” or “non-clinical” factors.

- Found that the non-provision of free medical treatment in the case did not “bring article 8 into play” (§47-52). And in any event no breach:

> “The [ECtHR] has shown a strong reluctance to entertain complaints of that kind because of the difficult assessments required in the fair administration of a health care system with limited resources…The PCT is entitled to set an IFR policy which reflects what is reasonably considers to be the fairest way of treating such patients”

Convention Rights / Discrimination: scope of article 8

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BUT: is article 8 engaged for article 14?

- *Mathieson v SSWP* [2015] 1 WLR 3250 §15: requirement for article 8 to be "engaged" does not mean interference or breach but simply a link to private life

- ECtHR has in number of cases "assumed" it is engaged, e.g. *Sentges v the Netherlands* 27677/02, *Pentiacova v Moldova* 14462/03

- Possible that a funding decision could "engage" article 8 to give rise to consideration under article 14. See further *R (SHU) v SSHSC* [2019] EWHC 2569 (Admin)

Convention Rights / Discrimination: deference

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R (C) v Berkshire West PCT [2011] EWCA Civ 247

- PCT argued that funding breast augmentation for transgender female would discriminate against a natal female. In response, C argued this was itself unlawful because it was to treat unlike cases alike.

- The Court declined to adjudicate on whether the PCT was entitled to treat these cases alike.

Convention Rights / Discrimination: deference

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R (C) v Berkshire West PCT [2011] EWCA Civ 247

“the court is not appropriately placed to make either clinical or budgetary judgments about publicly funded healthcare: its role is in general limited to keeping decision-making within the law. The claimant's point of view – that she is different from and more needy than a natal woman with a similar problem – matters; but it is a point of view which has to take its place within both legal and clinical criteria. The material legal criteria are that gender and clinical needs are both relevant characteristics. Their aetiology is relevant diagnostically, but what are more critically relevant are the ethical and clinical judgment of the PCT, provided these do not transgress the law.”

Reliance on NICE Guidelines

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R (Rose) v Thanet CCG [2014] EWHC 1182 (Admin)

- Thanet CCG departed from NICE Guideline in its policy on funding.
- There is no duty to comply with NICE Guideline (e.g. if delay or if rationally object to the conclusion)
- However, stated CCG is not entitled to disagree with the NICE evidence base of the effectiveness on the treatment. To that extent, the decision was unlawful.

Reliance on NICE Guidelines

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R (Rose) v Thanet CCG [2014] EWHC 1182 (Admin)

"92. On balance, however, I have concluded that the better view is that there is no material distinction between the present case and ex parte Fisher , at least to this following extent. The Defendant has no compliance obligation as such, but the issue in the instant case is whether CCGs may legitimately disagree with NICE on matters concerning the current state of medical science. NICE's view is that the evidence base supports the effectiveness of oocyte cryopreservation, and the CCG's sole basis for not following the NICE recommendation is that it disagrees. No basis or reasoning on grounds of exceptionality has been put forward. In my judgment the Defendant could have found other reasons for not following the NICE recommendation, but not this one. It follows that the new ART policy is unlawful."

Interpretation of policy

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R (SB) v NHS England [2017] EWHC 2000

- S sought drug where IFR policy required drug to be “clinically effective”
- Various issues with how the decision characterised the evidence
- However, primarily, panel considered “long term benefit” rather than “clinical effectiveness” – the effectiveness being the outcome of reduction in particular blood levels and dietary tolerance.
- Decision quashed.

Interpretation of policy

Landmark Chambers

R (SB) v NHS England [2017] EWHC 2000

"29. The distinction between interpretation and application of a policy is well established in public law. The correct *interpretation* of a policy is a matter for the court. Its *application* , however, is a matter of judgment for the decision-maker. However, that judgment must be formed on the basis of a proper understanding of the evidence available to him, taking into account all relevant factors: a material mistake of fact or law, or a material misunderstanding can lead to an invalid conclusion. Even if the decision is fatally flawed, then irrespective of its own views of the merits the court is not entitled to substitute its own judgment for that of the body charged with making the decision save in those very rare circumstances in which there is only one rational outcome."

Interpretation of policy

Landmark Chambers

R (S) v NHS England [2016] EWHC 1395

- 17 year old girl with narcolepsy had not responded (and potentially deteriorated) following medicine usually prescribed. She sought new drug.

- Policy states that

  "The fact that a patient failed to respond to, or is unable to be provided with, one or more treatments usually provided to a patient with his or her medical condition (either because of another medical condition or because the patient cannot tolerate the side effects of the usual treatment) may be a basis upon which the panel may find that a patient is exceptional." (underlining added)

- S had multiple applications refused.

Interpretation of policy

R (S) v NHS England [2016] EWHC 1395

"34. The key evidence in this case is that of Dr Elphick emphasised in her letter of 18 March 2016. The claimant is not only not responding to the usual treatment but is deteriorating. This shows that she is suffering from a particularly severe form of her condition. Her condition is rare, and her failure to respond to the usual treatment is also rare. But she is in a very rare situation in that she suffers from a particularly rare form of the condition. This aspect is not dealt with in the response of the defendant's panel or screening group. Since exceptional cannot mean unique, it is in my view difficult if not impossible to see that the claimant should not be considered to meet the exceptionality test. If she is not exceptional, who is?...

35. As I have said, I must not substitute my own judgment for that of the panel. But I have not done this since, as I have set out, there were in my view failures by the defendant to have regard to all the matters raised by Dr Elphick and an altogether too restrictive application of exceptionalit"y. The claimant qualified within the IFR policy referred to in paragraph 13 above..."

- Made order that S be treated with drug for 3 month trial period.

What are the lessons to learn

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- Challenging the rationality of a particular decision is very difficult and, on the basis of the law as it stands, Convention rights arguments are also difficult to maintain. However the latter is a developing area of law.

- Those challenges that have been successful are procedural – failure to take into account considerations (**Rose**) and misinterpretation of policy (**S** and **SB**).

- Area for challenges may be involving procedure in considering NHS general duties such as patient choice (section 14V of the 2006 Act), innovation (section 14X), etc.

The bigger picture

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- The Courts have, particularly more recently, not shied away from scrutinising decisions in respect of individual funding requests.

- Cf. **R v Sheffield Health Authority ex p Seale** [1994], a challenge to funding for IVF only until 35, where very "light touch" reasoning: "[the Claimant] relies upon the fact that privately paying patients can secure such treatment until the age of 42. It seems to me that that argument does not meet the central problem here of an authority coping with a finite budget and a myriad of services which it is bound to provide under it. I am, therefore, of the view that there is no arguable case that this decision was irrational, applying the high test that that word imports under the Wednesbury decision."

The bigger picture

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- As to the impact on NHS decision making:

  “a heightened judicial scrutiny has pushed the NHS to ration health care in a way that is along the lines of "accountability for reasonableness" in order to avoid, respond to and comply with judicial review. These changes in the administrative decision-making reflect the fact that the denial of funding for a health intervention will hardly ever be upheld by courts if the decision and the grounds for it are not made public ("publicity"), based on sound evidence and reasonable policy considerations ("relevance") and if the opportunity for adequately challenging the policy or presenting a case for an exception is not given ("challenge").”

  Daniel Wang, *‘From Wednesbury unreasonableness to accountability for reasonableness’* 2017 CLJ 642

Thank you for listening

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