



Neutral Citation Number: [2023] EWHC 974 (Admin)

Case No: CO/3589/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN LEEDS

Thursday, 27th April 2023

Before:
MR JUSTICE FORDHAM

Between :

THE KING (on the application of CHRISTOPHER RAMAGE)	<u>Claimant</u>
- and -	
NEWCASTLE UPON TYNE HOSPITALS NHS FOUNDATION TRUST	<u>Defendant</u>

The **Claimant** did not appear and was not represented
Sam Karim KC (instructed by Sintons LLP) for the **Respondent**

Hearing date: 27.4.23

Judgment as delivered in open court at the hearing

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced and approved by the Judge, after using voice-recognition software during an ex tempore judgment.

MR JUSTICE FORDHAM :

Introduction

1. Following the transfer by Order of Lavender J (on 13.9.22), of these proceedings, commenced in the King's Bench Division, to the Administrative Court to be dealt with as if commenced by judicial review, the Defendant (on 15.10.22) filed an Acknowledgement of service with Summary Grounds of Resistance, a witness statement and a bundle of documents. The claim was subsequently transferred from the Administrative Court in London to the Administrative Court in Leeds: it relates to a Newcastle-based claimant and a Newcastle-based defendant NHS Trust. Permission for judicial review was refused on the papers (on 1.11.22) by David Pittaway KC sitting as a Deputy High Court Judge. The Claimant made an application (received on 21.11.22) to renew permission for judicial review. That required a brief extension of time, but I would not have shut this claim out on the basis of refusing such an extension, and there has very properly been no suggestion on behalf of the Defendant that that course should be taken.

Communications and this Oral Hearing

2. Communication with the Claimant has been both by post and email and the Claimant has been communicating with the Court from the same hotmail email address. Most recently (on 10.2.23), he filed an application for permission to rely on documents and a Grounds for Judicial Review document setting out in full the basis on which permission for judicial review is being sought. Those documents when filed referred to the permission "hearing" in this Court. The point of the renewal application is that it involves invoking the right which a claimant in judicial review has, to seek consideration of permission at a hearing. The notes for the claimant on the Order of 1.11.22 explained that the requested reconsideration would be "at a hearing in open court". The Court wrote to the Claimant at his home address (on 9.3.23) to tell him that the hearing had been fixed in this Court for today. He was also given information about how to access the Court's Cause List. The time of this hearing was published in today's Cause List as 10:30 and I have been able to reconfirm that fact by accessing the Cause List electronically myself from the courtroom. The Claimant had originally emailed various attachments (on 27.9.22) and the Defendant's solicitors had written to him (on 30.9.22) referring to that email, using the same hotmail email address. I am told, and I accept, that the Defendant's solicitors sent an email (at 14:52 on 24.4.23) to that same email address, referring specifically to today's scheduled oral hearing and attaching a bundle which they had prepared.

Proceeding in the Absence of the Claimant

3. I have gone into all of this because there has been no attendance today by the claimant. The Learned Clerk to the Court has ensured that a tannoy message was made within the public areas of the Court building. The Claimant acts in this case as a litigant in person. The Court is aware from the documents in the case that he has a history of health difficulties which include a diagnosis of autism spectrum disorder (ASD). Mr Karim KC has, rightly, reminded me this morning that it is possible there are reasons why the Claimant may have difficulties relating to the prospect of appearing in a court room. It is obviously right that I have that in mind. It is, however, also right that I have clearly in mind the overriding objective (CPR Part 1), fact that

the Claimant requested the consideration at an oral hearing, and the fact that there has been no application or request from him for this to be a “hybrid” hearing or a fully “remote” hearing, which he could have accessed online or even by telephone.

4. In the circumstances, I am in the following position. I have read all of the documents in case. I have considered all of the materials, including those recently provided and relied on and which the claimant wanted the Court to have for this reconsideration stage. The Defendant, who has provided material and has instructed a solicitor and Leading Counsel to be present in the court room to assist the Court, invites me to proceed today in the Claimant’s absence. Mr Karim KC, very properly, has made clear that he is not inviting the Court to refuse the application for permission for judicial review on the basis of non-attendance or some default by the Claimant. Rather, he is asking me to look at the permission-stage issues of fresh and, having done so, form my own view as to the viability of the judicial review claim. His invitation to refuse permission at this oral hearing is based on points relating to the legal merits and those procedural discretionary bars which are applicable in judicial review. All of this has been set out in the summary grounds of resistance which the Defendant filed (on 15.10.22) and which the Claimant has received and seen.
5. I am entirely satisfied that, having regard to the overriding objective, the interests of justice and the public interest, and given the nature and circumstances of the present case, it is appropriate that I should proceed today and deal with the question of permission for judicial review now, at this oral hearing. I am not prepared to adjourn the matter for it to go off and need to be dealt with in some other way at some future stage. In arriving at that conclusion I have borne in mind the nature and features of the case to which I will now turn.

Background

6. The background to the case was identified in the paper refusal of permission as follows:

The Claimant filed an N244 application notice asking for a hearing to consider granting him an order allowing him to attend Newcastle Hospitals for Treatment. His claim is not particularised but he filed a number of documents and photographs of letters. On 13 September 2022 Mr Justice Lavender ordered that the claim should be treated as an application for permission to apply for judicial review of the Defendant’s decision to issue a ‘Red Card’ notice dated 8 August 2022 for a period of 12 months under paragraph 7.4 of its Policy of Exclusion from Treatment of Violent and Abusive Patients. The Claimant is a 37 year old male diagnosed with ASD, PTSD and other health conditions. [In July 2016], the Claimant’s psychotherapist raised concerns about the Claimant suffering from paranoid psychosis and terminated the sessions with him because he feared for his safety. On 8 August 2022 the Claimant was given a ‘Red Card’ letter by the Defendant which excluded him from secondary care treatment across the Trust until 8 August 2023. The decision stated that the Claimant would not be refused emergency treatment. It did not exclude referral treatment at another local NHS Trust. The decision was based upon the Claimant’s behaviour over a period of 10 years.

7. In the Red Card decision letter the incident is described as an incident:

in the Renal (Lithotripsy) department... During the incident in the department, a confrontation occurred between you and other patients in the Department Waiting Area, following a difficult conversation with one of our Nurse Specialists. We have a zero tolerance approach to violence and aggression and due to the escalation of this incident,

the distress caused to our staff and other patients in the Department, we feel a Red Card from the Trust is now warranted.

8. There are before the Court the contemporaneous documents which record the way in which that decision was arrived at. There is also in the witness statement (of Michael Wright the Deputy Medical Director of the Trust) a chronology with a summary of a sequence of incidents, accompanied by the Trusts incident-recording documentation.

The Claim

9. The nature of the proposed claim for judicial review can be discerned from the various documents which the Claimant has filed with the Court. There are the grounds (dated 24.8.22) which accompanied the Form N244 which was before Lavender J. There is the Notice of Renewal (21.11.22). There is the Judicial Review Grounds document which has been filed (on 10.2.23). Two key points have featured in the case from the start. They are both referable to the Policy of Exclusion from Treatment of Violent and Abusive Patients.
10. The version of that Policy which both parties have put before the Court is version 4.1 dated 11.10.16. Within that Policy are a number of important features. They include at §6 a description of patients who are exempted from the application of the Policy. At sub-paragraphs 1, 2 and 5 §6 says this:

The following patients are exempted from the application of this policy: 1. Patients who, in the expert judgment of the relevant clinician, are not competent to take responsibility for their actions (e.g., an individual who becomes abusive as a result of illness or injury). Patients who are mentally ill or do not have mental capacity are also excluded. 2. Patients who because of condition or disability which impacts on ability to control behaviour, may manifest physical or non-physical behaviour that would normally be deemed as unacceptable... 5. Patients who because of a medical condition may exhibit behaviour that can be perceived by some to be inappropriate (e.g. Tourette's) and therefore need those behaviours to be accommodated on an individual basis.

A second feature is the description of a process which includes verbal warning, formal warning (Yellow Card) and exclusion from treatment (Red Card). There are references to Red Cards as being appropriate where a patient breaches the expected standards of behaviour despite a formal warning (Yellow Card). A third important feature of the Policy is something to which I will need to return.

11. I turn to identify the two key points which have featured in the case from the start. The Claimant has said from the start that the Red Card in this case was a breach of the Policy because he should have been treated as exempted under §6. The Claimant has also made the point from the start that the Red Card was a breach of the Policy because it was not, he says, preceded by a Yellow Card as required. To these two headline points the Claimant has subsequently added reliance on the following: the Equality Act 2010 sections 15 and 20; public law unfairness or unreasonableness; Article 3 ECHR; and bias.
12. One of the points made in the Defendant's Summary Grounds of Resistance – as one of three bases for refusing permission – is that the claim for judicial review is not arguable with a realistic prospect of success. So far as the two key points about breach of the Policy are concerned, the Defendant's position is that the action taken was compatible with the Policy, properly interpreted and understood, and reasonably and

fairly applied; and any departure from the Policy was lawful as being justified for good reason in all the circumstances.

Alternative Remedy

13. Another of the three bases on which permission for judicial review was resisted in the summary grounds was that the Claimant has had, and still has, an alternative remedy. In my judgment, that is my appropriate starting point in the circumstances of this case including the circumstances of today.

14. The position is as follows.

i) When (after 27.9.22) the Defendant became aware that High Court proceedings had been commenced and were being pursued by the Claimant, and that Lavender J had ordered them to be treated as a claim for judicial review, the Defendant promptly raised the alternative remedy point in the Summary Grounds of Resistance (on 15.10.22). Those Summary Grounds clearly identified the relevant legal principles as to judicial review being a “remedy of last resort”, inappropriate when an alternative remedy exists. The point was clearly made that the Claimant has an alternative an adequate remedy by way of the Defendant’s Complaints Procedure. The Defendant’s position in these proceedings was encapsulated in the Summary Grounds as follows:

The Claimant should utilise this complaints procedure. In the absence of the same, the claimant has an adequate alternative remedy. Accordingly, permission should be refused on this ground alone.

ii) The alternative remedy of an appeal by way of the Complaints Procedure and procedure is expressly included within the very Policy on which the Claim places such a strong reliance. The Policy – by way of the third feature to which I said I would return – makes very clear that the patient against whom any Red Card is issued is able to challenge the exclusion via the Defendant’s established complaints procedure. Indeed the Policy requires that the Red Card decision letter should inform the patient of that right. There is a flowchart (in an Appendix to the Policy) of actions which are available, which culminates in the patient’s right to “appeal by the complaints procedure”.

iii) The Red Card decision letter (8.8.22) did refer to the Complaints Procedure, as the Summary Grounds of Resistance point out. The final paragraph of the decision letter reads as follows (emphasis added):

Your medical record will hold an alert to inform the relevant parties that this warning is in place for twelve months, which commences on 08 August 2022 and will end on 08 August 2023. Should you wish to challenge the warning, you should do so via the established complaints procedure and contact the Patient Relations Department. Your grievance will be investigated and you will receive a written response.

iv) As the witness statement of Mr Wright explains, the Complaints Procedure was itself appended to the red card letter. It is also available in the public domain.

- v) The Claimant has himself invoked the Complaints Procedure on very many occasions in the past. I have seen emails from him, headed “formal complaint”, from April 2018, October 2018, January 2019 and November 2021 (by way of example).
 - vi) The Claimant was of course very well aware of the Policy of Exclusion from Treatment of Violent and Abusive Patients. He was relying on it, and claiming that there had been a breach of it.
 - vii) The Complaints Procedure operates on the basis that the patient is entitled within 12 months to pursue a complaint. The Claimant is aware of that too, because that 12 months point arose in relation to previous complaints. There are emails in December 2021 on that subject. The position is not only that there was a Complaints Procedure “appeal” open to the Claimant but that there still is, and will be through the entirety of the 12 months duration of the Red Card, should the Claimant wish to pursue it.
 - viii) I also have in mind that one of the points that the Claimant has made is that had there been a Yellow Card there are points on which he would have wanted to rely on and bring to the attention of decision-makers within the Defendant Trust. The point is that the Complaints Procedure would enable him to rely on any matter that he wished to put forward.
15. What the Court has to consider is the appropriateness of judicial review in circumstances where the Defendant Trust has provided, at least as a next step, the mechanism of an appeal by way of complaint.

The Judicial Review Guide

16. The Administrative Court issues an annual Judicial Review Guide. It is freely available in the public domain. One of its purposes is, transparently and clearly, to explain to all potential claimants – and particularly those who are acting in person (see chapter 4) and who may be disadvantaged in terms of accessing legal textbooks – important points of practice and procedure. The Judicial Review Guide for 2022 was issued in the summer of that year but preceded by a Judicial Review Guide 2021 in similar terms so far as alternative remedy is concerned.
17. The paragraphs in the Judicial Review Guide 2022 on adequate alternative remedy encapsulates the principled position which the Court adopts at §6.3.3:

6.3.3 Adequate alternative remedy. 6.3.3.1 Judicial review is a remedy of last resort. If there is another route by which the decision can be challenged, which provides an adequate remedy for the claimant, that alternative remedy should generally be used before applying for judicial review. 6.3.3.2 Examples of alternative remedies include internal complaints procedures, review mechanisms and appeals (statutory or non-statutory). 6.3.3.3 If the Court finds that the claimant has (or had) an adequate alternative remedy, it will generally refuse permission to apply for judicial review.

Paper Refusal of Permission

18. One of the three points, all of which were accepted by David Pittaway KC in the paper refusal of permission (on 1.11.22) was the alternative remedy point. The Deputy Judge said this:

The claimant should have exercised his right to appeal against the order contained in appendix 3 of the Complaints Procedure.

Discussion

19. In my judgment, in the circumstances of the present case there are particular reasons why the alternative remedy is of significance. There are issues in the present case about the application of §6 of the Policy and any justification for good reason for any departure from the Policy.
- i) There are issues about the application of the Policy so far as concerns proceeding to a straight Red Card, insofar as there was no (or no recent) Yellow Card, and again about justification for good reason for any departure. In my judgment, these sorts of points are entirely apt in the first instance for an informed evaluation within the Defendant Trust's mechanism for appeal under the Complaints Procedure. That is an entirely suitable and appropriate forum for grievances to be raised and considered as a first stage.
 - ii) I also have in mind that, on the papers before the Court, there has – so far as I can see – been no direct engagement by the claimant with the chronology of events or contemporaneous documents or the background of this case.
 - iii) There is also the fact that, although the Claimant's autism had been raised by him and was clearly considered at the time of the Red Card decision, it is said by the Defendant Trust that the ASD diagnosis letter (11.11.19) was put forward by the Claimant only on 27.9.22.
 - iv) Another feature of the case is this. The Claimant through these proceedings has given his own description of the most recent incident which is the subject of the Red Card letter. His explanation includes saying that he been at the hospital for eight hours; that he was very anxious and stressed due to his autism; that he had raised concerns with staff and asked questions; that he was given confusing and conflicting information; and that reasonable adjustments were not made. He says that he did not shout or swear. It is extremely rare that the judicial review Court would embark on a 'fact-finding evaluation', with all evidence, as to contested questions as to what happened in a particular incident. But insofar as there are differences in the way in which the incident is being characterised that is another feature of the case which points clearly towards the Complaints Procedure as being the appropriate recourse, at least as a next step.
20. I say "as a next step" because it is always possible in principle that if the avenue of an alternative remedy proves not to provide a solution that the claim for judicial review could then be made to the Court as a last resort. The Guide speaks of the alternative remedy being "used before applying for judicial review". I have considered the possibility of staying this claim for judicial review but I am quite satisfied that the appropriate course is to dismiss the claim on the basis that the alternative remedy point, raised promptly by the Defendant, is a 'knockout blow'. I have well in mind the practicalities of the current case. The twelve-month Red Card suspension runs to 8 August 2023. After that date that there would only be an exclusion from treatment if there were a fresh decision. Such a fresh adverse decision could itself be the subject of

the Complaints Procedure, which could be pursued promptly. And were there, at that stage, to be an adverse decision which the Claimant considered engages some viable legal point, then he would be able to raise that with this Court for consideration.

21. Conspicuously absent in the documents filed by the Claimant is any response that I have been able to find to the alternative remedy point. There is no explanation, still less a convincing explanation, for why the Complaints Procedure should simply have been ignored. There is no explanation of why that procedure was not invoked when it was raised in the Red Card decision letter (on 8.8.22). Nor when it was raised again in the Summary Grounds of Resistance (on 15.10.22). The Notice of Renewal (21.11.22) and the Judicial Review Grounds document filed subsequently (10.2.23) do not engage with the point. That is notwithstanding that this was an express reason for the refusal of permission for judicial review on the papers (on 1.11.22). It is not addressed anywhere. In my judgment there is no good answer to the point.
22. I will dismiss the claim for permission for judicial review on the grounds of the alternative remedy point.

The Other Points

23. In those circumstances it is not, in my judgment, appropriate – still less necessary – to go further and consider questions relating to whether or not there is any arguable claim. I record, again, that the Defendant’s position is that the claim has no realistic prospect of success in any event and that there has been no arguable breach of any public law standard or duty. The Deputy Judge on the papers accepted that submission. Mr Karim KC, very properly, confirmed that if the Court were satisfied on the alternative remedy point he would not, on behalf the Defendant, seek to press that for the purposes of today, it being simply unnecessary to do so. There was a third point, as I have indicated. It was that the claim for judicial review lacked utility and was academic (see Judicial Review Guide 2022 §6.3.4) in circumstances where the Claimant has “no active clinical care”. It has not been necessary for me to hear submissions from Mr Karim KC on whether, in taking a fresh look, I should arrive at that same further adverse conclusion.

Outcome

24. In the circumstances I have described and for the reasons I have given I will dismiss the application for permission for judicial review. No application for costs was made by the Defendant Trust in the Acknowledgement of Service nor has there been any application for costs made today. There will be no order as to costs.

27.4.23