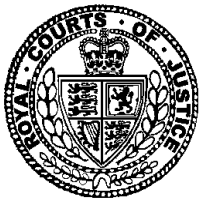

Neutral Citation Number: [2021] EWHC 2946 (Admin)

Case No: CO/2123/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/11/2021

Before:

LORD JUSTICE BEAN
and
MR JUSTICE GARNHAM

- -

Between:

THE QUEEN **(on the application of** **(1) CATHY GARDNER** **(2) FAY HARRIS)**	**Claimants**
- and –	
(1) SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE **(2) NHS COMMISSIONING BOARD (NHS ENGLAND)** **(3) PUBLIC HEALTH ENGLAND**	**Defendants**

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Jason Coppel QC & Joseph Barrett & Raphael Hogarth (instructed by **Sinclairs Law Ltd**) for the **Claimants**
Sir James Eadie QC & Jonathan Auburn QC, Heather Emmerson, Hannah Slarks, Yaaser Vanderman, Charles Bishop (instructed by **Government Legal Department**) for the **1st and 3rd Defendants**
Eleanor Grey QC & Patrick Halliday (instructed by **DAC Beachcroft**) for the **2nd Defendant.**

Hearing dates: 19 & 22 October 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and others, and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 09:30am on 05 November 2021.

Lord Justice Bean :

This is the judgment of the court to which we have both contributed.

1. In this judicial review, the Claimants challenge what they say is the Defendants' failure to protect residents of care homes in England from the risk of serious harm or death from COVID during the first wave of the pandemic between March and June 2020. We were told that more than 20,000 care home residents in England died from COVID during the period concerned. The Claimants are respectively the daughters of Mr Gibson and Mr Harris, two care home residents who died during this period, but the case is not confined to the circumstances of their two deaths. The case is brought by reference both to Articles 2 and 8 of the ECHR and to domestic public law principles such as irrationality. The substantive hearing is to take place over six working days from 14 March 2022.

2. An important issue of principle dividing the parties is the admissibility of expert evidence of opinion. The witness statements filed on behalf of the Claimants include statements by two consultants, Professor Adam Gordon and Professor Anthony Costello, which include expressions of opinion severely critical of the Defendants, as well as a good deal of factual evidence and comments. The context in which we are asked to rule on this topic is an application by the Claimants to adduce a third witness statement of Professor Gordon, consisting almost entirely of opinion evidence. The Defendants resist this and cross-apply to have a substantial number of passages excised from the evidence already filed on behalf of the Claimants, in particular in the second witness statement of Professor Gordon.

3. Evidence of opinion from an expert qualified to give it is admissible in ordinary civil claims with the permission of the court if it is reasonably required to resolve the proceedings, provided that the requirements of CPR 35 and its accompanying practice direction have been followed. But in judicial review claims the courts have been much less willing to admit expert evidence. A recent and authoritative review of the law, with which we agree, is contained in the judgment of the Divisional Court (Leggatt LJ and Carr J) in *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649; [2018] EWHC 2094 (Admin). The Court said:

> "36. The use of expert evidence in judicial review proceedings, as in all civil proceedings, in the High Court is governed by CPR Part 35. CPR 35.1 restricts expert evidence to "that which is reasonably required to resolve the proceedings." It follows from the very nature of a claim for judicial review that expert evidence is seldom reasonably required in order to resolve it. That is because it is not the function of the court in deciding the claim to assess the merits of the decision of which judicial review is sought. The basic constitutional theory on which the jurisdiction rests confines the court to determining whether the decision was a lawful exercise of the relevant public function. To answer that question, it is seldom necessary or appropriate to consider any evidence which goes beyond the material which was before the decision-maker and evidence of the process by which the decision was taken – let alone any expert evidence.

> 37. The classic statement of the extent to which evidence other than evidence of the decision under challenge is admissible in judicial review proceedings is that of Dunn LJ in *R v Secretary of State for the Environment, ex parte Powis* [1981] 1 WLR 584, 595. The categories identified in that case can be summarised as follows:
>
> > a) Evidence showing what material was before or available to the decision-maker;
> >
> > b) Evidence relevant to the determination of a question of fact on which the jurisdiction of the decision-maker depended;
> >
> > c) Evidence relevant in determining whether a proper procedure was followed; and
> >
> > d) Evidence relied on to prove an allegation of bias or other misconduct on the part of the decision-maker.
>
> 38. Although these categories are a useful and well-established list, it would be wrong to treat them as if they were embodied in statute or as necessarily exhaustive. That is particularly so as public law has developed in ways which were not in contemplation when the *Powis* case was decided. In *R (Lynch) v General Dental Council* [2003] EWHC 2987 (Admin); [2004] 1 All ER 1159, Collins J was prepared to allow some extension of the possibility of admitting expert evidence beyond the *Powis* categories in a case where a decision is challenged on the ground of irrationality. The judge accepted that, where an understanding of technical matters is needed to enable the court to understand the reasons relied on in making the decision in the context of a challenge to its rationality, expert evidence may be required to explain such technical matters."

4. We should say at this stage that this is not a case in which the subject matter is so technical as to bring into play the need for explanation of matters which the court could not otherwise understand.

5. For the Claimants, Jason Coppel QC referred us to *Rogers v Hoyle* [2015] QB 265 in which the Court of Appeal held that CPR 35 is not an exclusive code and that the court may admit expert evidence outside that Rule. No doubt that is correct, but *Rogers v Hoyle* was not a judicial review case: it was a Fatal Accidents Act claim arising out of an air accident in which the defendants were seeking to exclude as inadmissible a report of the Department of Transport's Air Accident Investigation Branch (the AAIB). The Court of Appeal, upholding the trial judge, held that the AAIB report was admissible as evidence both of fact and of opinion notwithstanding that the CPR 35 procedure had not been followed, and that the trial judge had been entitled to give it such weight as he thought fit. It would have been extraordinary if they had done otherwise, given that the AAIB was independent of all parties to the investigation and had statutory responsibility for investigating air accidents. The case tells us nothing about the

admissibility of expert evidence of opinion in judicial review claims. Nor does *Mondial Assistance (UK) Ltd v Bridgewater Properties Ltd* [2016] EWHC 3494 (Ch) in which Nugee J held that evidence of opinion of a person qualified to give expert evidence is prima facie admissible *except* where the evidence is in the form of an expert report within the meaning of CPR 35.2(1). The admissibility decision in the present case does not turn on whether the statements of opinion are contained in an expert's report served pursuant to CPR 35 or in a different type of witness statement.

6. Mr Coppel submits that where a witness who is appropriately qualified is giving admissible evidence of fact, he or she can add expressions of opinion. He referred us to the decision of Jackson J in *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* [2008] EWHC 2220 (TCC), after a six-month trial about the construction of Wembley Stadium. One of the many witnesses of fact was a Mr Taylor, an employee of the defendant Cleveland Bridge UK Ltd who, as the judge put it, "like several other witnesses in this case, is a highly qualified and experienced engineer who was involved for many months in the Wembley project". Some of his evidence included expressions of opinion. No application had been made for permission to adduce it under CPR 35.4. However, Jackson J did not exclude it. He said that he would treat Mr Taylor "as a factual witness who (a) is possessed of considerable engineering expertise and (b) has personal knowledge of the roof design and erection engineering decisions which were made in the period February 2004 to October 2005" [666]. Jackson J went on to say:

> "As a matter of practice in the TCC, technical and expert opinions are frequently expressed by factual witnesses in the course of their narrative evidence without objection being taken. Such opinion evidence does not have the same standing as the evidence of independent experts who are called pursuant to CPR Rule 35. However, such evidence is usually valuable and usually leads to considerable saving of costs."

7. Jackson J held at [672] that "in construction litigation an engineer who is giving factual evidence may also proffer (a) statements of opinion which are reasonably related to the facts within his knowledge and (b) relevant comments based upon his own experience."

8. The practice of the TCC described by Jackson J is consistent with the practice of the County Court and the High Court hearing personal injury claims arising out of factory accidents. In such cases it is common for witnesses of fact to express a view that a particular practice was or was not unsafe. The judge, while making the appropriate discount for the fact that the witness is not independent, may have regard to such evidence. If the witness' evidence is contentious the opposing party can cross-examine on it. Similarly, in *DN v LB of Greenwich* [2004] EWCA Civ 1659 the Court of Appeal heard an appeal from a finding by a trial judge that an educational psychologist had been negligent. One of the issues in the appeal concerned the admissibility of opinion evidence given by the psychologist. Brooke LJ said at [26]:

> "Of course a defendant's evidence on matters of this kind may lack the objectivity to be accorded to the evidence of an independent expert, but this consideration goes to the cogency of the evidence, not to its admissibility."

9. But judicial review claims are not treated in the same way, for the reasons given by Leggatt LJ and Carr J in the *Law Society* case. Moreover, except in rare cases such as *R (Al-Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin), cross-examination of witnesses is not permitted in judicial review claims. The Claimants sought an order for cross-examination at an earlier stage of this case but that application was refused.

10. There is no dispute that the Claimants' witnesses are entitled to draw to the Court's attention papers published in the period prior to the decisions which are the subject of this claim arguing, for example, that there was a risk of transmission of COVID by people who had no symptoms of it. The extent and weight of that material is an issue of significance in the case, and the Defendants correctly accept that evidence of opinion is admissible where it forms part of the material before the decision-maker whose decision is under challenge. So, the fact that Professor Costello wrote an article published in the *Guardian* on 15 March 2020 arguing that asymptomatic contacts could be highly infectious, and ought to be tested and isolated, is relevant and admissible, but a statement (whether by Professor Costello or anyone else) arguing now that the failure to do so was negligent is not admissible.

11. Evidence is also admissible to show what has taken place in care homes (which is evidence of fact), as opposed to expressions of view as to what should or should not have happened (which is evidence of opinion).

12. There are also a large number of passages in the evidence of Professors Gordon and Costello which are neither evidence of fact nor evidence of opinion, but more in the nature of argument or comments. The same can be said, though not to the same extent, of some passages in the Defendants' evidence. For example, Mr Surrey, a civil servant in the Department of Health and Social Care, repeatedly describes decisions which were being taken as "appropriate" or "proportionate". This is evidence that he and his colleagues *thought* the decisions were appropriate and proportionate, but not that they *were* appropriate and proportionate.

13. Another example is to be found in the evidence of Professor Susan Hopkins, who has made witness statements on behalf of the Third Defendant. Professor Hopkins was at the material time a Divisional Director in Public Health England and its National Incident Director for the COVID response, as well as being a consultant in infectious diseases, microbiology and healthcare epidemiology at the Royal Free London NHS Trust. She, like Professors Gordon and Costello, is entitled to set out the material which was available to the Defendants when the relevant decisions were made. But when she says, at paragraph 24 of her first witness statement, that "before April 2020 there were reported individual studies and case reports mainly comprising anecdotal evidence but no scientific consensus that any significant amount of pre-symptomatic or asymptomatic transmission was taking place", that is a comment or submission.

14. In *R (The Good Law Project Ltd) v Minister for the Cabinet Office* [2021] EWHC 2091, to which Sir James Eadie QC referred in the skeleton argument for the First and Third Defendants, a witness statement adduced by the claimant contained evidence which it was conceded amounted to expert evidence of opinion. Fraser J held that those paragraphs should be removed. The judge noted that some other paragraphs contained comment rather than evidence, and said:

> "48. … In so far as these other paragraphs contain comment rather than evidence, I do not propose to go through line by line and remove or specify each comment and have it struck through. That exercise has nothing to recommend it, is unnecessary, and it would be disproportionate to do so.
>
> "49. The weight given to the different evidence will be considered by the judge tasked with the substantive judicial review hearing, and that will be done in accordance with the normal approach of the court. Ordinarily, few (if any) judges will be much impressed by witnesses making comments, or telling the court how much expertise they possess in particular fields. … However, the better way to deal with such matters is often for counsel, at the substantive hearing, simply to submit to the court passages where the submission is that little weight ought to be given to specific parts of the evidence of that nature. That is usually a more cost effective and sensible way to proceed than having a full-blown interlocutory battle. There is no risk that the hearing will be prolonged, unduly or at all, by permitting the limited comments included in the statements of [relevant witnesses] presently to remain."

15. It is unfortunate that the evidence so far filed, in particular the 88-page second witness statement of Professor Gordon, contains facts interwoven with comment and expressions of opinion. It would be disproportionate to require the Claimants' evidence to be re-submitted, or to embark on a line-by-line editing process ourselves. We do, however, uphold the objection by all the Defendants to the Claimants' application for permission to adduce a further (third) witness statement of Professor Gordon. Apart from referring briefly to some data from the Office for National Statistics (which, if they are relevant and not already contained in the mass of material before us, can simply be exhibited), this witness statement consists entirely of criticisms of the last round of statements from Professor Hopkins and others. This would, if admitted in evidence, no doubt lead to yet further responses. We agree with Eleanor Grey QC, for the Second Defendants, that the time has come to draw a line. It cannot possibly be said that we are short of material in this case: on the contrary.

16. Mr Coppel referred us to three judicial review cases in which observations were made about the admissibility of expert opinion evidence. These were *R (Elayathamby) v Secretary of State for the Home Department* [2011] EWHC 2182 (Admin) per Sales J at paragraph 59: *Pour v Secretary of State for the Home Department* [2016] EWHC 401 (Admin) per Ouseley J at paragraph 111; and *Khaled v Secretary of State for the Home Department* [2016] EWHC 857 (Admin) per Garnham J at paragraph 12. Each was a case where a judge at first instance was prepared, as an exercise of discretion, to allow expert evidence to be deployed in public law proceedings and to deal with it by reference to the weight that might be attached to it. In each case the exercise of discretion to admit the material turned on the particular facts of the case. In none of those cases was there any discussion of the principles to be applied to the admission of expert evidence in judicial review cases (beyond recitation of the importance of complying with CPR 35) or any suggestion that the requirements of CPR 35 did not apply.

17. We consider that our treatment of the parts of the statements already admitted which take the form of argument – not all of them on the Claimants' side - should not be excessively purist. Where a witness makes a comment which could have formed part of the written or oral argument of the party adducing his or her evidence, the Court will adopt the same approach as Fraser J did in the *Good Law Project* case. But where Professor Gordon or Professor Costello goes beyond comment and expresses the opinion that actions of the Defendants were unreasonable or negligent, such evidence of opinion is inadmissible.

Does the inclusion of the ECHR claims make any difference?

18. Mr Coppel argued that, even if there were grounds for declining to allow the admission of expert opinion as a matter of domestic law, the position was different as regards claims under the ECHR. He said that Art 2 demanded a much closer scrutiny of the facts by the Court than if the only question was rationality. Furthermore, he said that the court was being asked to proceed, at this interlocutory stage, on the Defendants' assumption as to the intensity of review which the court ultimately would find was required. He argued that whether the Claimants were entitled to seek to undermine the substantive reasoning of the Defendants was an issue "hotly in dispute".

19. In response, Sir James Eadie maintained that there are principles of constraint in any judicial review proceeding. Rationality permits the decision maker a range of reasonable responses and there is no different principle applicable for a substantive challenge under the Convention. The Government, he said, is afforded a margin of discretion, and it is only if a governmental decision is outside the reasonable range of responses that a challenge can succeed. That, he said "does not take you to a place that is identical to irrationality, but it takes you very close".

20. We accept Mr Coppel's submission that it would be wrong, at this interlocutory stage, to deny him the material on which to argue his case as to the intensity of review required for an Art 2 challenge. That means that he must be able to refer, not just to the material on which the Defendants say they based their decisions, but to all other material to which, with proper enquiry, they had or could reasonably be expected to have had access. For that purpose, the Claimants can make use of the expert assistance they have available. It also means that Mr Coppel must be permitted to argue that the margin of discretion under the Convention available to a government managing a country's response to the pandemic is much narrower than that afforded by the requirements of rationality. While we say nothing at present as to the strength of the argument, he will be entitled at the substantive hearing to argue that it is enough for him to show simply that the Defendants' decisions were "wrong".

21. Nonetheless, we accept Sir James' submission that there are some "principles of restraint" that delimit the intensity of the Court's review; even on an Art 2 challenge, the Court will allow the state a margin of appreciation. That margin will reflect the material available to the Defendants at the time. We were shown no authority by Mr Coppel to the effect that a court hearing an Art 2 claim such as this is required to admit not only all the evidence and expert opinion that was considered, or could have been considered, at the time of the decisions under challenge but also opinion evidence which postdates those decisions.

22. Were the position otherwise, and we were required to consider opinion evidence on all the issues raised in this case, whether contemporaneous with the decisions under challenge or not, this claim would become entirely unmanageable. It would become, in effect, a public inquiry without oral evidence.

Parliamentary materials

23. The skeleton argument for the Claimants and some of the evidence they produce contains references to observations of a parliamentary committee and some of individual members expressing strong criticism of the Defendants' handling of the pandemic, in particular the fact that patients were discharged from hospitals into care homes. Mr Coppel accepted, however, that opinions of a parliamentary committee or of an individual member of either House, however distinguished, are inadmissible. The law on this subject is conveniently set out in three High Court decisions, *R (Bradley and others) v Secretary of State for Work and Pensions* [2007] EWHC 242 (Admin) at [26]-[35]; *Office of Government Commerce v Information Commissioner* [2010] QB 98, the latter (generally known as the *OGC* case) being endorsed by the Court of Appeal in *Reilly v Secretary of State of Work and Pensions* [2017] QB 657; and *Kimathi and others v Foreign and Commonwealth Office* [2018] 4 WLR 48.

24. The references to the opinions of the Public Accounts Committee are clearly inadmissible, as are the observations of Greg Clark MP and Jeremy Hunt MP. Parliamentary material, including reports of the Joint Committee on Human Rights (JCHR) may also sometimes be referred to when determining whether legislation is compatible with the ECHR (see the judgment of David Richards LJ in *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2021] 4 All ER 445; [2021] EWCA Civ 193), but that exception does not assist the Claimants in the present case.

25. A more nuanced issue is when it is sought to adduce evidence given to a Select Committee. In the *Bradley* case, I refused to allow evidence given by the Ombudsman to a Select Committee to be relied on, accepting the submission of Clive Lewis QC on behalf of the Speaker that to do so would inhibit freedom of speech in Parliament; but noted that it would have been open to the Ombudsman, if she had wished to do so, to put the substance of that evidence into a witness statement or other public document which could have been used in court. That is more problematic where the statement is made by a witness employed by an opposing party. In the *OGC* case Stanley Burnton J said at [64] that "if the evidence given to a committee is uncontentious, i.e. the parties to the appeal before the tribunal agree that it is true and accurate, I see no objection to its being taken into account." In the recent *Heathrow Hub* case ([2020] EWCA Civ 213) the Court of Appeal held (obiter) at [166] that if statements made to Parliament were held admissible and there was a dispute as to their meaning, the courts would be drawn into the territory forbidden by Article 9 of the Bill of Rights: that does not appear to be relevant here.

26. We do not consider that the evidence of witnesses to Select Committees to which Sir James takes objection at paragraph 26 of his skeleton argument of 21 October 2021 should be admitted in evidence, with one possible exception. The state of knowledge of the Defendants during the critical period is an important issue in the case. The Claimants seek to rely on evidence given to the Health and Social Care Select Committee by Professor Doyle of Public Health England on 26 March 2020 that: "we

know that the incubation period ranges between three and five days. For people who are asymptomatic, they may have been asymptomatic for some period before symptoms appeared". There were further exchanges in which Professor Doyle confirmed this.

27. The Defendants seek to exclude this evidence as a matter of principle, relying on Article 9 of the Bill of Rights 1689. We have not been told whether it is accepted that, as at 26 March 2020, PHE were aware that there was an incubation period of 3-5 days during which asymptomatic transmission of Covid could occur. If this is accepted, there is no sensible basis for excluding the evidence. If it is contentious, and this item of evidence is regarded as important, there may have to be limited further argument about it at the substantive hearing.