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

CO/3001/2021

Neutral Citation Number: [2022] EWHC 87 (Admin)

IN THE MATTER OF AN APPLICATION FOR PERMISSION TO APPLY FOR JUDICIAL REVIEW
AND IN THE MATTER OF AN APPLICATION FOR NON-PARTY DISCLOSURE MADE ON 13TH OCTOBER 2021

The Royal Courts of Justice
Thursday, 13 January 2022

Before:

THE HONOURABLE MR JUSTICE SWIFT

BETWEEN

THE QUEEN

on the application of
(1) AB and
(2) CD,
(children by their mother and litigation friend EF)

Claimants/Applicants

- and –

SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE

Defendant

- and –

THE JOINT COMMITTEE FOR VACCINATION AND IMMUNOLOGY

Interested Party

- and –

THE OFFICE FOR NATIONAL STATISTICS

Respondent to the Disclosure Application

DR F. HOAR (instructed by Jackson Osborne) appeared on behalf of the Claimants/Applicants.
MISS H. EMMERSON (instructed by CTLD) appeared on behalf of the Respondent to this Application.
THE INTERESTED PARTY was not present and was not represented.
THE DEFENDANT was not present and was not represented.

J U D G M E N T

MR JUSTICE SWIFT

A. Introduction

1. This application was made by Application Notice filed on 13 October 2021 by the Claimants, AB and CD, pursuant to CPR 31.17, for an order for disclosure against the Office for National Statistics ("the ONS"). The ONS is not a party to the litigation in which the Application Notice was filed. The Defendant to that claim is the Secretary of State for Health and Social Care.

2. The draft order filed with the Application Notice seeks an order for disclosure of

> "… the following information about each child or young adult who has died on or after 1 May 2021 to date, obtained from documents under their custody or control:
>
> (1) age;
> (2) sex;
> (3) whether the child or young person had dose one of a COVID-19 vaccine (and whether Moderna or Pfizer);
>
> (4) whether the child or young person had dose two of a COVID-19 vaccine (and whether Moderna or Pfizer);
> (5) the number of days death followed dose one (dose two not being administered);
>
> (6) the number of days death followed dose two.
>
> And the data shall be provided without disclosing the names and/or dates of birth of the children and young adults concerned. … "

Mr Hoar, for the Claimants, has also submitted that, in the alternative to the items listed in the draft order at 5 and 6, those matters might be limited to deaths within 7 and 28 days of the date each dose of the vaccine was administered.

3. The ONS opposes the application and has filed a skeleton argument and witness statement made by Dr Vahe Nafilyan, dated 10 January 2022. Dr Nafilyan is a senior statistician at the ONS. No point is taken that the application is a request for information rather than a request for documents. The ONS accepts that it holds the information requested, to the extent that it concerns deaths on or after 1 May 2021 that had been registered. (If the death, although occurring on or after 1 May 2021, has not for any reason been registered, information relating to it is not held by the ONS.)

4. The proceedings brought by AB and CD against the Secretary of State for Health and Social care were commenced on 1 September 2021. Permission to apply for judicial review was refused on the papers by an order made on 20 October 2021. The judicial review claim, as filed, challenged five decisions taken on various dates on or after 2 December 2020. Three of the five decisions challenged were decisions to authorise the use of specific COVID vaccines on children of various ages, spanning the range 12 to 18 years. One of the other decisions challenged was a decision of 4 August 2021 to offer the Pfizer vaccine to children of 16 and 17 years of age. Three grounds of challenge, variously, were pleaded against the five decisions. By an amended pleading dated 24 September 2021, the Claimants expanded the number of decisions challenged. For present purposes, the significant addition was a challenge to a decision made on 13 September 2021 to permit the Pfizer vaccine to be offered to children aged between 12 and 15 years old.

5. Jay J refused permission to apply for judicial review on all grounds, including the grounds and decisions referred to in the amended pleading.

6. On 22 October 2021, the Claimants renewed their application for permission to apply for judicial review. The renewed application is made only in respect of two decisions, first, the decision of 4 August 2021 to offer the Pfizer vaccine to children who are 16 and 17 years old and, secondly, the decision of 13 September 2021 to offer the same vaccine to those between 12 and 15 years old. The application under CPR 31.17 is an adjunct to the renewed application for permission to apply for judicial review. That renewed application was originally listed for hearing today, but that has now been put back to allow this application to be heard and decided first.

B. Decision

(1) Applications for disclosure against non-parties, generally.

7. On any application for disclosure as between the parties to a judicial review claim, the question to be considered is whether disclosure of the documents requested is necessary for the fair determination of the issues in the case. This is the approach of the House of Lords in *Tweed v. Parades Commission* [2007] 1 AC 650.

8. So far as concerns an application in judicial review proceedings for disclosure against a person who is not party to the claim, it is important to have in mind that CPR 31.17 is formulated, primarily, with Part 7 claims in mind. The criterion at 31.17(3)(a), which is that the documents on which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings, reflects the approach to standard disclosure formulated at CPR 31.6, an approach which is not the one applied in Part 54 claims. The other criterion, at 31.17(3)(b), does refer to necessity – that disclosure must be necessary in order to dispose fairly of the claim or to save costs. As applied in to an application for disclosure against a non-party the context of a Part 7 claim, this additional criterion is clearly intended to limit the possibility of such disclosure orders.

9. I do not consider that criterion (a) can have any independent application when the application for disclosure is made in the context of Part 54 proceedings. Giving it any independent application would establish an approach to disclosure against non-parties that was more generous than the approach taken as between the parties themselves. Where an application for non-party disclosure is made in proceedings governed by Part 54, it must be established as a minimum requirement that disclosure of the documents or information requested is necessary for the fair determination of the issues in the case. That is the minimum required consistent with the decision of the House of Lords in *Tweed*.

10. In addition, the court must, as identified in the case law under CPR 31.17, retain a further discretion whether or not to order disclosure: a discretion that must be exercised having well in mind that orders for disclosure against non-parties are exceptional orders. The possibility of an order for disclosure against a non-party brings with it the necessity for the court to consider whether there might be any further reason relevant to the position or circumstances of the non-party or relevant to the information that is itself sought, which might provide a bar to the application for disclosure.

11. There is one other general point to make, this time a purely pragmatic matter. The purpose of an application for judicial review, generally described, is to challenge a public law decision taken by a public authority decision-maker. Given that, and given also the grounds of challenge commonly available in judicial review proceedings (regardless of whether the

challenge is made at common law or under the provisions of the Human Rights Act), most if not all of which focus on matters the decision-maker either should or should not do, it is likely to be a rare case indeed where documents relevant to any issue necessary in order to determine the legality of the decision challenged are held by a non-party rather than either the actual decision maker or, possibly I suppose, a person who is an interested party to the claim.

(2) The present case

12. In the judicial review proceedings between the Claimants and the Secretary of State, the two decisions that remain are under challenge are challenged on the following grounds. *First*, each decision is irrational; that there was no basis for a conclusion that benefit to children of either age group from the vaccine outweighed the potential risk to those children from the vaccine; that there was no sufficient evidential basis for the Secretary of State to reach any such conclusion; and/or it was irrelevant for the Secretary of State to take into account that vaccinating children in each age group might prevent the risk of transmission of Covid to others. *Secondly*, so far as concerns the September 2021 decision, it is contended that it was irrational for the Secretary of State not to accept the original opinion of the Joint Committee on Vaccines and Immunisation; that the Secretary of State should not have taken into account information provided by the Chief Medical Officers; and that it was wrong for the Secretary of State to take into account that vaccines might reduce the risk of disruption to matters such as a child's education.

13. In submissions for the Claimants in support of their application for disclosure, Mr Hoar relied in particular on the contention that the Secretary of State failed properly to inform himself before taking each decision (pleaded as "Ground 3" in the Amended Statement of Facts and Grounds, I will refer to it as the "lack of adequate inquiry" ground). Mr Hoar's submission to me was that the Secretary of State did not properly inform himself as to whether there was any relevant link between the administration of the Covid vaccination to children after 1 May 2021, and an increase in the death rate in the same period, in particular the death rate among males aged between 15 and 18. This particular point is not referred to in the Claimants' pleaded case; the pleaded case contains only a general assertion that the Secretary of State's decisions were not properly informed. To the extent that the specific submission made to me today is one the Claimants wish to pursue in the judicial review proceedings, it would need to be properly formulated and properly the subject of an amendment, so that the Secretary of State has proper notice of the matter. Miss Emmerson, who appears for the ONS, emphasises that the success of any application under CPR 31.17 must be determined by reference to the pleaded case rather than to a case that might in future be pleaded by way of amendment. There is real force in that submission, but I am conscious that, if I dismiss this application now, on that basis alone, it might inevitably prompt an application to amend and then a further repeat CPR 31.17 application. Therefore, I will consider the application the Claimants now make on the premise that the Claimants are pursuing the lack of proper enquiry ground I have described, even though, as I have said, that ground is not yet on the face of the pleadings.

14. I am not satisfied that disclosure of the information that is now sought from the ONS is necessary for the fair determination either of the issues presently pleaded within the Amended Statement of Facts and Grounds, or the additional matter that has been heralded as one that is to be pleaded. The information requested, so far as it post-dates each decision under challenge, is not relevant to the legality of that decision. It was not material available to the Secretary of State to take account of; it was not material that could have been made available to him regardless of such further steps as he may have taken.

15. So far as the information requested pre-dates each decision under challenge, disclosure is not required for the purposes of the lack of adequate inquiry ground. The information already available to the Claimants in their evidence for this application, and in the ONS response to

it, is sufficient to raise the lack of adequate inquiry point. Moreover, the Claimants' factual contention, which is a key premise of the judicial review claim – that vaccination increases the risk of myocarditis in children in the relevant groups – is itself a key part of any assertion that the Secretary of State failed properly to inform himself before taking either of the decisions challenged. To that extent, there is already ample evidence in these proceedings on which the Claimants rely, they say making clear the existence of the link between vaccination and increased risk of myocarditis.

16. In any event, regardless of how the particular evidential premise of the lack of adequate inquiry ground of challenge may be formulated, once raised it can be put forward sufficiently and appropriately on the basis of the evidence that is already in the case. Once raised, the challenge will then be resolved by the court taking account of the Secretary of State's response. It is possible to anticipate that a response to a pleaded case that insufficient enquiry had been made before a relevant decision had been taken, could take any of a number of forms. How that response is formulated in this case will be a matter for the Secretary of State. The question would be whether it was open to the Secretary of State, lawfully and consistently with the Claimants' pleaded cases at common law and Convention rights, to proceed to reach his decision without further investigation.

17. The contention to the contrary, that the court must see information of this type in order to resolve the Claimants' challenge, rests on mischaracterisation of the nature of an application for judicial review and the court's function when deciding such a claim. The mischaracterisation assumes the proceedings to be something in the form of a general enquiry into the merits of the Secretary of State's decisions. Judicial review concerns only the legal merits of a decision. If the challenge is to whether the decision was correct, the court's function is not to decide the factual merits or to adjudicate on which expert opinions are to be preferred, only to decide whether the conclusion reached was one that was legally permissible. Where the legality of a decision is challenged on the ground that before the decision was taken further or different information should have been obtained and considered, the general rule is that the court assesses only whether the approach taken by the decision-maker was a legally permissible approach. The court does not dictate the single possible course of action by which the decision-maker should have approached his task.

18. Once this misapprehension is revealed, it is clear that the information sought is not necessary for the fair determination of the questions of law raised by the case pleaded, either in the amended statement of facts and grounds, alone, or including the additional ground of challenge to which I referred earlier. Based on the information already available in the proceedings, the Claimants will (subject to amendment) contend that the Secretary of State either was or ought to have been on notice of matters that required further inquiry before the decision was taken. The Secretary of State will explain his position in response. The information now sought by the Claimants by this disclosure application is not necessary for the legality of the matter to be determined. The legal issues on an application for judicial review are much more limited than the scope of any general enquiry into the factual or scientific merits of the Secretary of State's decision.

19. I also accept Dr Nafilyan's evidence as to the reliability of the information sought, in terms of whether it is capable of being probative, whether directly or by inference, of the existence of any link between the administration of vaccines and of a risk to health of those in the relevant age groups (see his witness statement at paragraphs 35 and 46). Quite separate from the reasons I have already given by reference to the nature of the issues in the judicial review claim, Dr Nafilyan's evidence in this regard provides a further and sufficient basis for the conclusion that disclosure of the information sought is not necessary for the fair resolution of the underlying judicial review claim.

20. Given those conclusions, it is not necessary for me to consider the further point raised by Dr Nafilyan as to the risk that disclosure of the data sought by the Application Notice might put at risk disclosure of the identity of one or more of the data subjects. Suffice it to say that this is a legitimate concern, certainly one that is capable of going to the court's residual discretion to refuse disclosure, regardless of any conclusion as to whether disclosure is necessary for the fair determination of the issues in the case.

21. Be that as it may, the Claimants' application under CPR 31.17 is refused for the reasons I have given.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.