Neutral Citation: [2024] EWHC 2881 (Admin)

Case No: AC-2023-LON-002779

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

The Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 30 October 2024

Before:
MR JUSTICE MACDONALD

Between:

R
on the application of
A (BY HIS MOTHER AND LITIGATION FRIEND, BK)

Claimant

- and -

NORTH CENTRAL LONDON INTEGRATED CARE BOARD

Defendant

- and -

THE LONDON BOROUGH OF HARINGEY

Interested Party

MR I WISE KC and **MR O PERSEY** (instructed by Miles & Partners) appeared on behalf of Claimant.
MR D LAWSON and **MR J RYLATT** (instructed by Hill Dickinson) appeared on behalf of the Defendant.
MISS L CHEETHAM (instructed by London Borough of Haringey, Legal Department) appeared on behalf of the Interested Party.

JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

MR JUSTICE MACDONALD:

1. On 23 October 2024, I handed down judgment in this matter, the facts of which are set out in detail in that judgment (*R(A) v North London Integrated Care Board* [2024] EWHC 2682 (Admin)). I allowed, in part, the claimant's claim for judicial review.

2. The matter now comes back before the court for a relief hearing to deal with three ancillary issues. Namely, one, the terms of the consequential order which the parties have not been able to agree; two, the claimant's application for permission to appeal to the Court of Appeal; and, three, the question of costs.

3. By my judgment, dated 23 October 2024, I determined that the claimant succeeded on ground 1 of his claim (that the defendant is in ongoing breach of its duty to ensure that the claimant has a lawful healthcare plan). If further determined that the claimant failed on ground 2 of his claim (that the defendant's decision to terminate the then current registered care provider's contract on 9 July 2024 and to proceed to replace them with a new registered care provider on 10 July 2024 was irrational) and on ground 3 of his claim (that the claimant and the claimant's family were entitled to restitution on the grounds of unjust enrichment). With respect to ground 2 of the claimant's claim, I granted permission but held that the ground was not made out. With respect to ground 3, I determined that that ground went to relief and held that the claimant was not entitled to the relief claimed.

4. In terms of relief, having allowed ground 1, I suggested at the conclusion of my judgment that the appropriate order was a mandatory order requiring the defendant to arrange the healthcare plan stipulated in section G of the claimant's EHC plan dated 23 November 2023, subject to a mutually-acceptable registered care provider being identified for the claimant's care package moving forward, albeit, as is apparent from this hearing, I gave the parties opportunity to make submissions on that.

5. The first issue before the court, and which arises for the court's decision, concerns the terms of the order. In particular, there are two issues. First, whether the order should contain a provision refusing the claimant's permission to apply for judicial review in respect of ground 3, and, secondly, what the precise terms of the mandatory order made by the court should be.

6. With respect to the first issue, the judgment made clear that the court considered that what was pleaded as ground 3 was more accurately described as relief consequent upon grounds 1 and/or 2. The court went on to hold that the claimant was not entitled to the relief in question for the reasons set out in the judgment. In circumstances where the court did not treat the issue as a ground of review, but, rather, as a question of remedy, it would be inconsistent to treat it as a ground of review for the purposes of the final order by having the final order deal with permission in that context. In the circumstances, I am satisfied that the order should not state that permission was refused in respect of ground 3.

7. Insofar, however, as the order needs to record the decision made by the court in the judgment, which I consider it does in circumstances where the claimant seeks to appeal

the decision of the court in that regard, the most appropriate means of doing so is for the order to provide that the claimant's claim for restitution on the grounds of unjust enrichment was refused.

8. With respect to the terms of the mandatory order, as set out in the judgment, I considered that a mandatory order was merited requiring the defendant to arrange the healthcare plan stipulated in section G of the claimant's EHC plan dated 23 November 2023, informed by the detailed review assessment process that preceded that EHC plan as set out in the judgment.

9. Further, of course, the defendant remains under a continuing duty to arrange the healthcare plan it agreed should be included in section G of the EHC plan. Whilst it is not doing this, it is in continuing breach of its duty under section 42(3) of the Children and Families Act 2014.

10. Within that context, the parties advanced two competing formulations for the mandatory order. The claimant contends for an order that provides:

> "There is a mandatory order that the defendant shall prepare a healthcare plan as required by section 42(3) of the Children and Families Act 2014 by 4 pm on a specified date and arrange for the provision set out in the said healthcare plan to be provided by a mutually-agreed registered care provider by a specified date".

11. By contrast, the defendant contends for the following formulation of the mandatory order:

> "There is a mandatory order that the defendant shall prepare a healthcare plan as required by section 42(3) of the Children and Families Act 2014 within 28 days of a mutually-acceptable registered care provider being identified for the claimant's care package in the future. A copy of the plan will be provided to each of the claimant's parents".

12. Both formulations are advanced in the context of there currently being no identified care provider for the claimant. A fundamental problem in this case has been the breakdown in the relationship between the claimant's parents and the defendant. This breakdown has meant that there has to date been very little progress towards identifying a care provider to replace Enviva who can provide care arranged and funded by the defendant, as opposed to the current situation in which the parents fund the continuing care of their son.

13. In the circumstances, the claimant contends that his formulation is required to ensure that the defendant delivers the healthcare plan and the services contained in that plan. The defendant contends that its formulation is required to ensure that it is not exposed to the risk of contempt of court should there continue to be difficulties in agreeing a care provider with the parents.

14. It is correct that the judgment goes on to state that the defendant's arrangement of a healthcare plan will be subject to a mutually-acceptable registered care provider being identified for the claimant's care package moving forward. However, this was no more than a statement that reflected the position set out in the judgment. Namely that, whilst the defendant is under a duty to provide the healthcare plan that it agreed should be included in section G, it is ordinarily the care provider who drafts that plan. The observation was not designed to suggest that the relief granted by the court should go beyond that required to address the illegality that the court identified, namely, the failure to provide a healthcare plan.

15. In those circumstances, I am not satisfied that it is right for the mandatory order to extend beyond the provision of the healthcare plan to a mandatory order to arrange for the provisions of care set out in that plan. That result would be to extend the mandatory order beyond the decision the court reached on the extent of the illegality in this case.

16. The defendant remains under a duty to arrange for the provision in the healthcare plan that the court is now ordering it to provide. It is neither necessary nor appropriate for the mandatory order to be extended in the manner contended for by the claimant. Equally, it is, in my judgment, necessary to ensure that the mandatory order the court is going to make is implemented as a matter of some urgency and that the parties are incentivised to ensure that this is done.

17. In the circumstances, I am equally satisfied that it would not be appropriate for the court to make the defendant's compliance with the mandatory order subject to an agreement in relation to the care provider. In the circumstances, the mandatory order shall provide simply as follows:

> "As required, pursuant to its duty under section 42(3) of the Children and Families Act 2014, the defendant shall by 4 pm 28 days from the date of the order arrange the healthcare plan stipulated in section G of the claimant's EHC plan dated 23 November 2023".

18. I turn next to the application for permission to appeal. This is the second issue that comes before the court for determination at this hearing. The claimant advances three grounds of appeal.

19. With respect to ground 2 of the claim for judicial review, the claimant contends that he has a real prospect of successfully demonstrating that, first, the court erred in concluding that the defendant's decision on 9 July 2024 to terminate Enviva's contract and to arrange for Nursing Direct to provide the healthcare provision for the claimant specified in section G of his EHC plan was not unreasonable given the severity of the consequences for the claimant, which included possible death, and, second, that the court erred in failing to address the inadequacies of the Enviva care plan.

20. With respect to ground 3 of the claim for judicial review, the claimant contends that he has a real prospect of successfully demonstrating that the court erred in concluding that the claimant did not have standing to bring the restitution claim in circumstances where

the claimant is the beneficiary of the care and support for which his parents have financial liability and where the claim for restitution arises from the unlawful conduct of the defendant in respect of the claimant's continuing care. In any event, the claimant contends that there is some other compelling reason for the Court of Appeal to hear the appeal as it concerns critically-important care for a severely-disabled child whose life is at risk.

21. The claimant further contends that there is some other compelling reason for the Court of Appeal to hear the appeal in circumstances where the question of whether a claimant in judicial review proceedings has standing to claim restitution on the grounds of unjust enrichment, based on having a sufficient interest in relation to another's financial liability accrued on behalf of the claimant, raises a novel point of law.

22. I am not satisfied that any of the grounds of appeal have a real prospect of success.

23. With respect to ground 1 of the claimant's grounds of appeal, in circumstances where the test for unreasonableness is contextual, ground 2 of the application for judicial review required the court to evaluate the question of reasonableness in the context of the evidence available to the court. The court was ideally placed to decide what weight to accord to the various elements of the evidence when deciding the question of reasonableness. The court's reasoning for concluding that the defendant's decision on 9 July 2024 to terminate Enviva's contract and to arrange for Nursing Direct to provide the healthcare provision for the claimant specified in section G of his EHC plan was within the range of reasonable decisions then open to the defendant, in the circumstances is set out in full in the judgment. Paragraph 91 summarises the factual circumstances in which that test of reasonableness fell to be applied and the court's reasons for reaching the conclusion it did. Within that context, I am not satisfied that the claimant has a real prospect of successfully demonstrating that the court's fact-specific conclusion with respect to ground 2 of the application for judicial review was wrong.

24. With respect to ground 2 of the application for permission to appeal, the court summarised the contents of the Enviva care plan at paragraph 12 of the judgment. In reaching its conclusion that the defendant's decision on 9 July 2024 to terminate Enviva's contract and to arrange for Nursing Direct to provide the healthcare provision for the claimant was within the range of reasonable decisions then open to the defendant in the circumstances, the court expressly factored in at paragraph 91 that, as the claimant has successfully demonstrated under ground 1 of the application for judicial review, an updated care plan from Enviva had not been forthcoming.

25. In the circumstances, it was not necessary for the court also to address the specific contended for deficiencies in the outdated Enviva care plan in order to reach a decision on ground 2 as to whether it was reasonable at that point for the defendant to terminate Enviva's contract and to arrange for Nursing Direct to provide healthcare provision. Within that context, I am likewise not satisfied that the claimant has a real prospect of demonstrating that the court's approach to the determination of ground 2 of the claim for judicial review was wrong.

26. With respect to ground 3, as made clear in the judgment, the decision of the Supreme Court in *Barton v Gwyn Jones* [2023] AC 684 at [77] sets out the four questions that the court must ask itself when faced with a claim for unjust enrichment. The claimant advanced no argument nor relied on any authority to demonstrate that the requirement in *Barton v Gwyn Jones* that any unjust enrichment of the defendant must be at the claimant's expense can be met by a claimant having sufficient interest in another's financial liability accrued on behalf of the claimant.

27. In the circumstances, where it is the claimant's parents and not the claimant who have been paying for the continuing healthcare, it was plainly open to the court to conclude that the claimant could not demonstrate, as is required within the framework set out by the Supreme Court in *Barton v Gwyn Jones*, that any unjust enrichment of the defendant was at the claimant's expense. In the circumstances, I am not satisfied that ground 3 has a real prospect of success.

28. With respect to the contention of the claimant that there is another compelling reason for the Court of Appeal to hear an appeal, I am satisfied that the fact that the case concerns critically-important care for a severely-disabled child whose life is at risk, whilst important, does not amount by itself to a compelling reason, particularly in circumstances where the claimant has succeeded in his claim.

29. With respect to the question of whether there is a compelling reason based on the question of a child's standing to claim remedy of restitution on the grounds of unjust enrichment with respect to the moneys his parents are expending, I do not consider that to be a compelling reason for the appeal to be heard, in particular in circumstances where the point is *obiter* unless the claimant were to succeed in persuading the Court of Appeal to grant permission on ground 2 and to succeed on that ground.

30. Finally, and in any event, I consider that the question of whether there is a compelling reason in relation to this particular matter is better addressed by the Court of Appeal were any further application for permission to be advanced to that court.

31. Accordingly, permission to appeal to the Court of Appeal is refused. It will be very important that any renewed application to the Court of Appeal for permission to appeal is made and dealt with expeditiously, given the severe nature of the claimant's identified needs and the high levels of funds currently being expended by his parents in relation to questions of continuing care.

32. Finally, I turn to the question of costs in relation to the claim for judicial review. Where the court decides in the exercise of its discretion to make an order for costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. Where a party has succeeded on only part of its case, the court will ordinarily require the unsuccessful party to pay the costs only insofar as it relates to the parts of the claim that have been successful. However, once again, the court retains a broad discretion in relation to the question of costs.

33. The claimant submits that costs should follow the event. He further submits that, to succeed on ground 1, the claimant's legal representatives were required to address the

complex factual matrix that underpinned the claim for judicial review and to attend court for the one-day hearing. The claimant further submits that the costs referable to the grounds on which he did not succeed were relatively modest. Within that context, the claimant submits that a costs order in his favour for the defendant to pay 75% of his costs is merited. The claimant seeks an interim payment on account.

34. Within that context, Mr Wise and Mr Persey rely on the decision of Gloster J, as she then was, in *HLB Kidsons v Lloyd's Underwriters* [2007] EWHC 2699 Comm and, in particular, her Ladyship's view that it remains appropriate to give real weight to the overall success of the winning party and that there is no automatic rule requiring reduction of a successful party's costs if the party loses on one or more issues, her Ladyship noting that, in almost every case, even the winner is likely to fail on some issues.

35. The defendant submits that in this case the claimant did not attack one decision on three grounds but, rather, pursued three different distinct challenges to the defendant's approach to the continuing care of the claimant; namely, first the absence of a lawful healthcare plan, second the decision, separate in fact and time, to terminate the contract with Enviva was unlawful on the grounds of irrationality and third that the claimant was entitled to restitution, Within that context, the defendant submits that the claimant succeeded on only ground 1 of his three disparate grounds. The defendant further submits that, by contrast to ground 2, which involved detailed factual analysis of a lengthy period leading to termination of the contract, and ground 3, which was legally complex with few prior authorities, ground 1 was the simplest of the grounds pursued. Finally, the defendant submits that the success of the claimant on ground 1 was narrow in nature.

36. In the foregoing context, Mr Lawson and Mr Rylatt further submit that the defendant was, therefore, successful on two of the three distinct grounds of challenge and should be entitled to the costs of successfully defending those claims. They rely on the contents of CPR rule 44.2(7) and the decision of *Novartis AG* v *Hospira UK Ltd* [2013] EWHC 86 (Pat). In that case, Arnold J, as he then was, summarised the approach to be taken by the court with respect to costs in the current circumstances, noting at paragraph 2 that:

> "The court generally approaches the matter by asking itself three questions: first, who has won; secondly, has the winning party lost on an issue which is suitably circumscribed so as to deprive that party of the costs of that issue; and thirdly, are the circumstances (as it is sometimes put) suitably exceptional to justify the making of a costs order on that issue against the party that has won overall?"

37. Arnold J, as he then was, went on to observe that the words "suitably exceptional" do not impose a specific requirement of exceptionality. The question being, rather, one of whether it is appropriate, in all the circumstances of the individual case, not merely to deprive the winning party of its costs on an issue in relation to which it has lost, but also to require it to pay the other side's costs.

38. In this case, I am satisfied that the claimant is the successful party. The claimant succeeded in his claim in ground 1 and, in that context, I consider the claimant can be said to have won.

39. Further, whilst I recognise that the claimant did not succeed on grounds 2 and 3 of the claim for judicial review, I am not satisfied that it can be said that grounds 2 and 3 can be suitably circumscribed so as to deprive the claimant of the costs of that issue in their entirety or that the circumstances of the case are suitably exceptional to justify the making of a costs order on that issue against the claimant with respect to grounds 2 and 3 of the claim for judicial review.

40. Ground 1 was advanced by the claimant on the basis of both the absence and the adequacy of the health care plan. As such, and as evidenced by the extent of Mr Wise's submissions, ground 1 also required detailed consideration of the contents of the Enviva document. Those submissions were prayed in aid, albeit in shorter form, with respect to ground 2 in circumstances where the absence or the deficiency in the Enviva document also formed an element of the claimant's case on ground 2 that the termination of the Enviva contract was irrational.

41. Whilst characterised as a ground of review, in reality, ground 3 was advanced by the claimant as a remedy and, therefore, required preparing and advancing in detail in circumstances where the submission was that restitution on the grounds of unjust enrichment flowed as a consequence of a claimant succeeding on the other grounds.

42. Against this, whilst I am not satisfied that the claimant lost on issues which are suitably circumscribed so as to deprive him of the costs on that issue, let alone that the circumstances are suitably exceptional to justify the making of a costs order on those issues against the claimant, I am satisfied that justice requires the court to factor in to appropriate degree in the exercise of its discretion on costs that the claimant was not wholly successful in establishing his pleaded case. As Mr Lawson points out, the claimant did not succeed on two out of the three grounds originally pleaded and achieved only one of the range of remedies sought.

43. Doing the best I can, having regard to the competing factors set out above, I consider it just to order that the defendant pay two thirds of the claimant's costs of the claim on a standard basis.

44. Mr Wise further seeks an interim payment with respect to the costs awarded to the claimant. Whilst the court has no detailed figures, I am satisfied that the court does have sufficient information with respect to the legal aid position of the claimant to justify the making of an order for interim payment in the sum of £30,000 to be payable within 21 days of the date of the order.
