Challenging government healthcare guidance (and the lack thereof) in the pandemic

By Emma Cave

Summary: As the pandemic progressed, local and national health policies were forced to adapt. Some guidance was hastily revised and crowdfunded campaigns for judicial review led to amendment. In other contexts, such as critical care and DNACPR policies, the claim was that national guidance was absent and sorely needed. This blog considers the role of judicial review in challenging the government's approach to ethics guidance.

Though the government was given latitude and support from the public in its response to the unprecedented challenges of the pandemic, there have been numerous complaints of failings. Some have led to challenges to the lawfulness of public body decisions through judicial review (JR), or threats of JR later abandoned in light of subsequent policy change. JR can be used to challenge unlawful decisions, acts and failures to act by a public authority. According to Tomlinson et al, who tracked JRs in the first wave, health and social care was the biggest category of pandemic-related cases.

Many legal challenges rely on crowdfunding: in May 2021 CrowdJustice listed several covid-related public interest campaigns including challenges of procurement decisions, an allegation that the government should have acted earlier to save lives, and another that granted permission for JR in November 2020 to hold the government to account for care home deaths.

One of the forms of ethical advice in the pandemic is national advice to guide healthcare professionals making difficult treatment decisions. Where the guidance is considered insufficient and contrary to the public interest, judicial review is one way to challenge the government.

Challenging policy

Challenging health policy is a risky enterprise. A failed JR can result in considerable costs and can even cement a policy and enhance reliance on it. The *Gillick* test to determine if children are competent to make treatment decisions without parental involvement is named after Victoria Gillick who had challenged that very policy in court.

The Tracey family met with more success. In R (Tracey) v Cambridge University Hospitals NHS Foundation Trust & Anor [2014] the Court of Appeal changed the way in which 'do not attempt cardiopulmonary resuscitation' (DNACPR) notices should be discussed with patients and others. After two failed attempts to wean Mrs Janet Tracey off artificial ventilation, she and her family were distressed to learn that a DNACPR notice had been applied. The notice was lifted, and Mrs Tracey later died. Her family brought a JR seeking a declaration that her rights under article 8 of the European Convention on Human Rights (ECHR) had been breached. The Court held that there should be a presumption of involvement of the patient. Guidelines were subsequently amended.

JR was threatened in the pandemic when NICE guidance on admission for critical care in March 2021 had potential to discriminate against people with disabilities. Whereas the usual process of consulting on guidance would take around 2 years, this guidance was put together in 'just over a week'. NICE updated their guidance in light of the concerns.

Patients weren't the only ones to threaten JR. A judicial review of guidance on PPE claiming it exposed healthcare workers to risk was dropped when changes were made, though the government denied that the changes flowed from the threat of litigation. The Good Law Project is calling for a public inquiry.

Challenging the absence of national guidance

JR can also be used to challenge a gap in national guidance, but the unlawfulness of failures to act can be difficult to demonstrate. In 2014, Janet Tracey's family were unsuccessful in a second limb to their case: they sought a declaration that the Secretary of State had failed in his duty to Mrs Tracey by not publishing clear national guidance on DNACPR notices. The Court said that local policies were sufficient and did not breach article 8:

> 84. … to hold that Article 8 requires the formulation of a unified policy at national level, rather than having individual policies at local level, is unwarranted and would represent an unjustified intrusion into government healthcare policy.

Ironically, the court found that the litigation itself made a national policy unnecessary. It had 'concentrated minds' [87] and policies would develop accordingly.

But reliance on local guidance did not prove resilient. In the first wave of the pandemic, Janet Tracey's daughter, Kate Masters, launched a fresh challenge following media reports of blanket DNACPR notices being applied without consultation. In September 2021, the Joint Committee on Human Rights said that the blanket imposition of DNACPR notices had been widespread and that it was unlawful:

> The Court of Appeal has previously held that there is no legal requirement for the Government to implement a national DNACPR policy. However, the evidence suggests that the absence of such a policy has, in the context of the pandemic, led to systematic violation of the rights of patients under Articles 2 and 8 ECHR. The systematic nature of this violation means that it is now arguable that the Government is under such an obligation. (para 8)

National guidance was promised.

National guidance on critical care

The Joint Committee further argued that guidance on critical care for adults with COVID-19 was insufficient to protect people – particularly the elderly and disabled – from discrimination (para 9) concluding:

> The Government must ensure both that clear national and local policies are in place to govern prioritisation of healthcare provision during a pandemic, and that those policies do not discriminate unlawfully.

This followed calls for guidance from lawyers (and here) and academics (and here) which culminated in a legal challenge. Whilst a draft national guideline was developed in the first wave, it was not released.

In March 2021 permission to bring a JR was refused in an oral application. To my knowledge there is no transcript of the case, but Wilkinson and Pugh report that three arguments were rejected. One was that there is a requirement under the Civil Contingencies Act 2004 to maintain rationing plans; another was that a failure to promulgate a policy violated article 8; and a third that it was irrational not to have such a national policy.

Swift J held that the Act did not extend to these facts; that local procedures precluded breach of article 8; and that a national policy would bring problems as well as solutions. The threshold for demonstrating irrationality is high and the judge opined that a national policy would be no panacea. Transparency, trust, understanding and legal certainty were balanced with the controversy national guidance would bring, its inflexibility and the potential for it to lead to mistakes.

Conclusion

Judicial review is not an appeal mechanism, but a check on the lawfulness of a public body's actions. In general, there is less emphasis in JR proceedings on the merits of a particular decision than on how it was reached.

Challenges to governmental decisions to avoid the controversy of producing national guidance in favour of local policies have failed and would likely continue to do so unless the absence of guidance could be shown to systematically breach human rights or reach the high threshold for irrationality.

But success is not necessarily predicated on the case coming to court. Public interest in the matter, demonstrated by contributions to crowdfunding, can influence policy change.