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(subject to editorial corrections)*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

Independent Health and Care Providers (NI) Application [2013] NIQB 29

IN THE MATTER OF AN APPLICATION BY INDEPENDENT HEALTH AND CARE PROVIDERS (NI) FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A DECISION OF THE HEALTH AND SOCIAL CARE BOARD

TREACY J

[1] The applicant is a limited company which represents the interests of a proportion of the health and social care providers in Northern Ireland. The applicant seeks relief in respect of a decision taken by the Health and Social Care Board ("the Board") in setting the "regional rate" for residential care and nursing home placements for the year 2012/13.

[2] The grounds of challenge can be summarized as follows:

(a) Failure to comply with, justify departure from or properly take account of, the terms of Departmental Circular ECCU 1/2010 (the Guidance argument);

(b) Failure to take account of the potential effect of the decision on Article 8 rights (the Convention argument); and

(c) Failure to adequately consult the applicant (the consultation argument)

General Observations

[3] The applicant has placed a large body of material before the Court which appears to relate more to the substantive merits of the respondent's determination that the regional rate set for 2012/13 was, as a matter of fact, fair and affordable. This court must be astute not to allow itself to be drawn into impermissible territory beyond the proper constitutional frontiers of judicial review. Equally however it must not abdicate its responsibility to examine, within the proper scope of judicial review, whether the impugned decision is legally flawed on any of the pleaded grounds.

[4] There is considerable force in the respondent's invitation to the court to examine carefully what role the court can properly discharge in respect of a dispute about fairness and affordability in an area of resource allocation within the context of a reducing budget. This is a complex area of specialized budgetary arrangements taking place in the context of a challenging economic environment and major cutbacks on public spending.

[5] In determining the regional rate the Board is exercising a discretion. The relevant legislation does not require that the regional rate is set annually much less prescribe the method by which it should be done.

[6] Provided the respondent has taken the impugned decision in good faith, rationally, compatibly with the express or implied statutory purpose(s), following a process of sufficient inquiry and in the absence of any other pleaded public law failing, such a decision will be unimpeachable.

[7] Allegations of lack of sufficient inquiry or adequate consultation are not infrequently deployed in judicial review in an attempt to persuade the court to embark on what is, in reality, a thinly disguised but wholly impermissible merits review. Ordinarily in judicial review there should be little scope or necessity for the Court to engage in microscopic examination of the respective merits of competing economic evaluations of a decision involving the allocation of (diminishing) resources.

Statutory Context

[8] The statutory framework regulating the provision of social care services is found principally in the Health and Personal Social Services (NI) Order 1972 ("the 1972 Order") and the Health and Social Care (Reform) Act 2009 ("the 2009 Act").

[9] Article 4 of the 1972 Order has been repealed [Art.33 & Sch.7 2009 Act] and replaced by Article 2(1) of the 2009 Act which provides:

"2—(1) The Department shall promote in Northern Ireland an integrated system of—

(a) health care designed to secure improvement—

(i) in the physical and mental health of people in Northern Ireland, and

(ii) in the prevention, diagnosis and treatment of illness; and

(b) social care designed to secure improvement in the social well-being of people in Northern Ireland.

(2) For the purposes of subsection (1) the Department shall provide, or secure the provision of, health and social care in accordance with this Act and any other statutory provision, whenever passed or made, which relates to health and social care."

[10] The 2009 Act provides the statutory basis for the reform of health and social care services in Northern Ireland, including the abolition of all Health Boards, coupled with the transfer of their functions to the Regional Board. The powers and functions of the Board are set out therein which include commissioning and securing the delivery of health and social care services in a manner which is efficient, co-ordinated and cost effective. In doing so, it acts through Local Commissioning Groups [See eg. section 9(5) of the 2009 Act]. Residential care services are not provided directly to individuals by the Board. Rather it commissions the services through Trusts, which either provide them directly through their own care homes or by purchasing the services in the private sector.

[11] In setting the regional rate, the Board is exercising a function of the Department, on its behalf. (Prior to the 2009/10 financial year, the rate was set by the Department itself). Neither the 1972 Order, nor the 2009 Act prescribe the methods by which residential care should be provided, do not require that a regional rate is set annually, and do not regulate the method by which it should be done.

[12] Thus the respondent contends the statutory framework in Northern Ireland is quite different from the governing legislation and guidance which applies in England & Wales [set out at paragraph 55 of the applicant's skeleton]. The wording of the guidance in England & Wales relating to setting the "*usual cost*" of care, expressly requires the local authority to *"have due regard to the actual costs of providing care and other local factors"*. This process the respondent has argued is entirely different to that applicable in Northern Ireland whereby the Board sets a rate annually "*…on the basis of what is fair and affordable…."*.

The Guidance Argument

[13] As to the contention that there has been any departure from the circular it is important to look at the guidance in its overall context and to scrutinise its terms with care.

> "[87] … HSC Trusts are required to contract for placements at the most competitive rate available for accommodation which it considers suitable for meeting the service user's need. While the regional rate for residential care and nursing home care, **set annually by the HSC Board on the basis of what is fair and affordable**, provides the benchmark for residential care and nursing home placement, HSC Trusts are required to contract for the full costs of the assessed care needs, even where that is not obtainable at the regional rate." [emphasis added]

In the first place it is noteworthy that the circular, by contrast with art 99(2) of the 1972 Order, does *not* require that the regional rate "shall represent the full cost…of providing that accommodation". The applicant however submits that the reference to "fairness" in para 87 of the guidance must "necessarily" be referable to the actual costs of the care providers particularly when read with the requirements of the circular with respect to the provision of quality services and the promotion of a flourishing independent sector. I disagree. If that had been intended it would have been very easy to say so. Moreover, the Board clearly formed the view, and were entitled to do so on the material available based on their knowledge and inquiries, that such objectives could still be met with regional rate set as they had decided.

[14] Critical to the proper interpretation of this guidance is a clear understanding of **the purpose of setting the regional rate**. The respondent's deponent Mr Cummings, at paragraph 4 of his affidavit avers:

> "it [the regional rate] performs two broad functions. First, it represents a province wide

> standard weekly rate at which Trusts will normally expect to be able to purchase care from independent providers. Second, where the care selected by the client costs more than the regional rate and a contribution is made by a third party, it is the threshold which defines the amount to be paid by the Trust and the amount by the Third Party."

[15] The Departmental guidance is *not* addressed to the commercial owners and providers of independent care homes but to the Chief Executives of the HSC Board, the HSC Trusts, the RQIA and the Patient and Client Council. In evaluating the concept of "fairness" and "affordability" I agree with the respondent that the examination must be conducted contextually and, in particular, that the question of affordability must be referenced against the identity of the funding party. Mr McGleenan QC was in my view correct to say that the question "affordable to whom" is of central importance. The funding party is the HSC Board. I accept that the requirement to ensure that expenditure on nursing and residential home care is affordable means, in the context of this circular, affordable to the HSC Board.

[16] Part 3 of the Circular entitled "Charging for Personal Social Services" provides guidance on, *inter alia, c*harging for personal social services where a service user requires residential care or nursing home care, HSC contribution toward the cost of nursing provided in nursing homes, choice of accommodation, third party contributions and placements and contracts.

[17] The central provision relied upon by the applicant, para 87, appears under the heading "Placement and Contracts". This section of the Guidance is directed to HSC Trusts and articulates the nature of the contractual arrangements that those Trusts are required to enter into with independent care providers.

[18] Paragraph 87 informs HSC Trusts that they are required to pay providers the full cost of meeting assessed needs even if that cost is above the regional rate. The respondent says this is a core concept in the integrated provision of health and social services in this jurisdiction (which sets the Northern Ireland system apart from that which applies, for example, in England and Wales); that paragraph 87 is merely descriptive of what the Board does rather than prescriptive as to how the Board must allocate resources and, that it does not purport to circumscribe the discretion of the Board in setting the regional rate much less impose an express *requirement* to set a rate that is fair and affordable - to commercial operators. The respondent argued that the applicant seeks to read it in this way in order to construct the case that there has been a departure from the Guidance. I agree with the respondent's submission that the guidance does not require the

Board to set a rate that is fair from the perspective of commercial care home providers.

[19] The respondent submitted that this construction is reinforced when viewed contextually alongside paragraphs 88 and 89. Paragraph 88 advises the Trusts to contract for the full costs of the placement in the care home not seeking to discount their contractual obligations by reference to any payment that might require to be made by the "service user" pursuant to the Health and Personal Social Services (Assessment of Resources) Regulations (Northern Ireland) 1993.

[20] Paragraph 89 makes provision for a situation where a person seeks to be placed in accommodation more expensive than that which is required for his or her assessed need. Where a choice is made for more expensive contribution (beyond the assessed need) it provides that the Trust's obligation to pay is capped at the regional rate and the additional element is recovered as a "third party payment" or "top up".

[21] Insofar as paragraph 87 does impose obligations upon the Board in setting the rate the extent thereof can only properly be gleaned from consideration of the guidance as a whole. The guidance contains an overarching primary objective of ensuring that quality services are procured and delivered in response to assessed need at a cost that represents best value for money *within available resources.* The respondent submits that any contention it is under a duty to meet the "cost of care" as defined by the applicant fails to recognize this fundamental underpinning principle. This the respondent says is a "fundamental fault line in these proceedings". In my view the respondent is correct that insofar as the guidance imposes any obligation upon the Board it requires only that the Board take account of care costs, alongside other factors, including affordability leaving it to the discretion of the Board to set the rate in such a manner that it is satisfied that it can achieve the overall objective of procuring quality services, to meet assessed need, within available resources. It is clear the Board examined the costs at which it was able to commission care in each of the regions of Northern Ireland as well as the cost and inflationary pressures experienced by providers within both the public and private sectors; it received and considered the contents of the applicant's assessment of costs of providing care services, as described in the PWC report. The decision to increase the rate by 2.5% and not to apply a reduction to reflect efficiency requirements was the product of a conscientious effort to balance these competing demands and significant budgetary constraints.

[22] In the preceding year [2011/12], applying the same guidance, when the regional rate was subjected to a 0% uplift the applicant advanced *no* challenge to the fairness of the rate. But in 2012/13, when the Board has put forward an increment in the regional rate of 2.5% and agreed not to impose efficiency

savings, the applicant contends that there has been an unlawful failure to adhere to the guidance. The respondent with considerable justification queried why a regional rate which reflected no increase in 2011 was not subject to challenge on grounds of fairness when a regional rate in 2012 that insulated care home providers from sector-wide efficiency savings and provided an above-inflation uplift in fees is argued to be so unfair that it will lead to the collapse of independent care provision. Moreover, as Mr Cummings avers at para 37 of his affidavit the percentage *uplift applied in NI compares "extremely favourably" with* that applied in other parts of the UK. At para 38 he states:

> "… these statistics show that annual increases over time within the regional rate for residential and nursing care compare favourably with the overall budgetary pressures faced by the Board. To a large extent, this sector has been protected from the full extent of efficiency savings imposed by central government and which have been applied in other areas of the health and social care budget."

[23] In short para 87 of the guidance does not require the Board to set a regional rate for remuneration of care home providers based on an assessment of the cost, to the home owners, of care provided. In any event costs for providers differ significantly across the entire sector and neither the legislation nor guidance prescribe any particular model when considering costs. I accept the respondent's contention that the terms "fair and affordable" are a description of the resource allocation task delegated to the HSC Board in the context of a finite budget (and for 2011-2014 a reducing budget) to commission these services. Insofar as the guidance might be thought to impose any obligation in setting the regional rate it plainly does not attempt to prescribe the method of calculation or how it must go about this task. The Board took account of a range of factors, including care costs and budgetary constraints, with a view to ensuring the provision of quality services within available resources. This in my view they were plainly entitled to do having regard to the core objective of providing quality care within available resources.

[24] Following thoughtful deliberation and responsive engagement the respondent set a rate it considers to be both an equitable and rational allocation of a limited resource after taking account of all relevant factors and available information. Indeed it appears that the sector concerned in comparison to others has fared rather well providing a rate which is 2.5% higher than that which applied in the previous year.

[25] Notwithstanding that actual cost of care and sustainability do not feature expressly in the guidance but it is plain these factors were considered

by the Board in setting the rate. Indeed this sector was singled out for preferential budgetary treatment since it was insulated from efficiency savings in order to assist in ensuring continuity of services to elderly and vulnerable individuals (Cummings, paragraph 30).

[26] There is no evidence that there is a sustainability problem in the care home sector. Four Seasons Healthcare, who hold an equivalent market share to the ICHP members, have signified themselves content to continue commercial operations in Northern Ireland on the basis of the regional rate. Furthermore, the argument that shortfalls in funding have led to an increase in "failure to comply" notices being issued to homes by the Regulation Quality and Improvement Agency ("RQIA") has been investigated by the Board and found to be groundless.

The Article 8 Argument

[27] I will leave to one side the respondent's contention that the applicant has made no attempt to establish the required victim status pursuant to section 7 of the Human Rights Act 1998 and relatedly the question whether an association of independent care home providers could qualify as a victim pursuant to the Act.

[28] The applicant in support of the article 8 point relies upon *Forest Care Home Limited* [2010] EWHC 3514. The English jurisprudence Mr McGleenan cautioned arises in the very different statutory and administrative arrangements in place for the funding of residential care in that jurisdiction. In *Forest Care Home* the court considered the potential application of article 8 because, on the facts, the impugned decisions could have resulted in the removal of a vulnerable person from their home. No such considerations arise in this application and there is no evidence before the court that the article 8 rights of any person are engaged by the Board's decision (to increase the regional rate by 2.5% for the years 2012/3) and accordingly I reject this ground of challenge.

The Consultation Argument

[29] There is no obligation under statute or the guidance requiring the Board to engage in formal consultation with the applicant prior to setting the regional rate. There is a practice of engagement with the principal actors in the rate setting process. Consultation has normally taken place through a non-statutory group known as the Social Care Joint Forum ("Forum") which consists of representatives of interested parties throughout the industry. Members of the group include Board representatives, representatives from each of the Trusts, from the applicant organisation, from disability groups and from the Four Seasons Group which is the largest residential provider in Northern Ireland. The evidence demonstrates active engagement through the

Forum in respect of the setting of the regional rate for 2010/11 and 2011/12. [see paras 15-18 Cummings affidavit].

[30] From August 2011 the respondent was receiving correspondence from Mr Girvan MLA in respect of the setting of the regional rate. The Board engaged in protracted correspondence with him offering to meet.

[31] At the meeting of the Forum convened on 25th November 2011 the applicant presented a report they had unilaterally commissioned from PWC in respect of the true cost of social care. Mr Cummings noted the report as a "welcome addition" to the procurement and wider debates. Whilst the Board, correctly, did not feel bound to implement its recommendations it is plain that it was subject to consideration by the Board.

[32] On 20th December 2011 the respondent wrote to the Joint Forum participants and invited them, in light of an overall budget increase of only **1%,** to address issues of pay inflation, non-pay cost pressures and efficiency measures. Responses were received from the principal actors in the sector. The financial envelope within which the HSC Board must resource health and social care in Northern Ireland *decreased* for 2012/2013 when inflationary pressures are taken into account. An increase in the regional rate could be achieved at the expense of a reduction in volume (i.e. the Board could enable Trusts to buy fewer residential care home places at a higher price). This approach had been rejected by the providers in 2010/11. [See para 15 Mr Cumming's affidavit].

[33] The respondent agreed to meet with the applicant to discuss the rate on 15th February 2012.

[34] The applicant made further representations to the Board on 2nd March 2112 and sought a meeting to clarify and discuss the detailed points raised. The Board replied by letter of 8th March 2012 responding to some of the points raised in the correspondence and offering to meet with the applicant.

[35] On 16th March 2012 the applicant sought a further meeting and requested speaking rights at the public meeting of the Board scheduled for the end of March 2012. On 23rd March 2012 the request for speaking rights and sight of the Board's proposal on the regional rate was made by the applicant. Both requests were granted. The document outlining the proposed regional rate was tabled for discussion at the Board meeting in March and the applicant was granted and availed of speaking rights at the meeting. The applicant was thus on notice that Mr Cummings, the Director of Finance of the Board, was proposing a 2.5% uplift in tariffs. This had been earlier signified to the applicant on 7th March 2012. He also proposed that a 2.6% minimum efficiency target be not passed on. The paper indicated that the combined effect was to provide an uplift of 5.1%.

[36] On 27th March 2012 the applicant sent an advance submission of the points they wished to make to the Board meeting on 29th March 2012.

[37] On 29th March 2012 the applicant presented a detailed submission to the Board which, inter alia, addresses the issue of consultation:

> "Finally, Board officers have failed to consult properly on the proposal. We learned last Friday that the recommendation to the Board would be a 2.5% increase. We don't expect a formal 12 week public consultation process but at least sufficient time to test proposals with our members in a considered manner."

[38] On 29th March 2012 there was an interim approval of the 2.5% uplift on the regional rate final determination being deferred to allow the Board to consider two issues raised by the applicant namely:

(i) the question of an increase in regulatory criticism of care homes by RQIA which, it was suggested by the applicant, was linked to funding shortfalls;

(ii) the possible effects arising from increases in the state pension from 1st April 2012.

I am quite satisfied from the material presented to the court that both of the issues raised by the applicant were conscientiously explored and inquired into by the Board.

[39] On 26th April 2012 the Board reconvened and considered a detailed paper prepared by Mr Cummings on the proposed regional rate which had been shared with the applicant on the morning of 24th April 2012. The applicant provided a written response and requesting that it be tabled at the Board meeting.

[40] The Board wrote to the Trusts on 30th April outlining the agreed regional rate as approved at the Board meeting of 26th April 2012.

[41] In light of the foregoing I reject the applicant's contention that there has been any failure of consultation. It is clear that the respondent engaged in a meaningful and responsive way not only by meetings, correspondence, the exchange of various papers and speaking rights but also by positively reacting to concerns raised including the conduct of further investigations to confirm or dispel those concerns.

[42] I turn now to the specific allegations of consultation failure, first that there was a failure to provide details of the factors considered by the respondent when setting the regional rate specifically an alleged failure to fully engage with correspondence from Mr Girvan MLA. The MLA is not the applicant and I am satisfied that the Board did engage in ongoing efforts to address his queries. Further the Board offered to meet him to explain but he declined. I accept the respondent's submission that these facts do not support a case that the applicant was not properly consulted. Second, that there was a failure to provide adequate notice of the proposal to increase the rate by 2.5% on 29th March 2012. I reject this contention. The evidence satisfies me there has been active and responsive engagement both in the Forum and beyond from November 2011. The proposed figure of 2.5% had been raised in correspondence of 7th March 2012 and there was no complaint made by the applicant in the written submission to the Board on 29th March 2012 that they were prejudiced in any way by the notice they were afforded of the Board's proposal. Further when the applicant raised issues about the funding arrangements the Board agreed an *interim* outcome pending further investigation of issues raised by the applicant – issues which were investigated and without foundation. Third, there was a failure to consult after reaching an interim decision. I reject this. There is no basis for the claimed expectation of further consultation after the interim decision reached on 29th March 2012. The applicant's paper presented on 29th March 2012 disavowed a requirement for any formal consultation and simply asked for time to discuss the proposals with members. Fourth, that there was inadequate time to consider the paper presented to the Board on 26th April 2012**.** The Board provided the applicant with a copy of the proposal. Board meetings are public events and the applicant had the option of applying for speaking rights. I agree with the respondent that it was given no specific expectation of further consultation. Issues requiring further investigation had been raised, conscientiously investigated after the due inquiry and consideration the Board affirmed the interim decision. I see nothing wrong with this. And finally, that here was a failure to consider the products of the consultation. Even if the respondent was involved in or required to be involved in a formal consultation exercise that would require it to conscientiously consider the "product" of a formal exercise (which it submits is not a legal requirement) I accept that the evidence establishes it did have regard to all material factors put to it by the applicant. This is reflected in the detailed engagement summarised above.

Conclusion

[43] Accordingly for the reasons set out above I reject all the grounds of challenge and dismiss the judicial review.