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CO/10435/2007

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

THE ADMINISTRATIVE COURT

CO/10408/2007

Royal Courts of Justice

Strand

London WC2A 2LL

Tuesday, 17 June 2008

**B e f o r e:**

**MR JUSTICE CRANSTON**

**Between:**

**THE QUEEN ON THE APPLICATION OF B**

**Claimant**

v

**NATIONAL INSTITUTE FOR HEALTH AND CLINICAL EXCELLENCE**

**Defendant**

and

**THE QUEEN ON THE APPLICATION OF FRASER**

**Claimant**

v

**NATIONAL INSTITUTE FOR HEALTH AND CLINICAL EXCELLENCE**

**Claimant**

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(Official Shorthand Writers to the Court)

**Mr M Westgate** (instructed by Saunders, London EC1A 4HG) appeared on behalf of the **Claimant, B**

**Mr Y Hyam** (instructed by Leigh Day, London EC1M 4LB) appeared on behalf of the **Claimant, Fraser**

**Mr T Child** (Solicitor Advocate) (instructed by NICE) appeared on behalf of the **Defendant**

J U D G M E N T

(As approved)

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1. MR JUSTICE CRANSTON: There is no doubt that ME is a debilitating condition and many of us will know of people who either have the condition, or who know of other people who have the condition. From their statements the two claimants in this case have suffered a great deal. However, I have indicated that I am very sceptical about the way the claim is put. This is not a court of science or a court of medicine, but a court of law. Although in some cases courts have to assess expert evidence from, for example, doctors and come to a conclusion of fact, it is quite different from the very general context of trying to identify the way forward for a condition like ME. In my view, the courts are not in a position to enter into the ring and to decide these issues.
2. The claim is put on the basis, of course, of what are said to be legally arguable points. It is said, for example, that the procedure has been flawed and therefore the Defendant's approach is irrational. It is said, in particular, that the outcome of random controlled tests have been somehow privileged. It is said that there has been a failure to consider the cause of ME. It is said that it is irrational not to accept the WHO classification. In general I am afraid that I have difficulty in seeing how these arguments will succeed. The claim is also put on the basis of Article 8. To my mind, Article 8 has nothing to do with this.
3. However, Mr Hyam has identified some very limited points which are arguable. He has pointed, for example, to the lack of balance in the composition of the group drawing up the guidelines. He has also identified the proscription on anti-viral agents. The latter may well simply be a matter of clinical judgment. Given that there is this obvious divide between the biomedical and psychosomatic approaches to ME, given the great public interest, given the fact that the procedures of NICE have not been judicially examined in the past, and given these limited points I have mentioned it seems to me that this case ought to go forward for a full hearing.
4. However, the arguments have to become more focused and more structured. I acknowledge that there is going to be a resultant expenditure by NICE, who would be, in their view no doubt, much better spending this money on other things. But it seems to me that the case should go forward, even though I have expressed my scepticism about the eventual chances of success.
5. That being the case, I think we need to consider how that is going to happen and we also need to consider the point of the stay in the B case.
6. MR JUSTICE CRANSTON: Can you just give estimates in terms of how long you think this is going to be?
7. MR HYAM: I have been trying to persuade you all along that it is legal, rather than getting too bogged down in scientific dispute. I would retain a day. I do not know what evidence NICE will want to put in. I will cautiously say a day.

8. MR JUSTICE CRANSTON: Once you say a day and a half it becomes more difficult, I think. Mr Child, what do you think?
9. MR CHILD: My present view is that it will be more like three days, but your Lordship, if I may say so, makes a helpful point in terms of more focus on the claim. If the claim becomes more focused it will, no doubt, be possible to deal with it in a shorter time, but at the moment I envisage substantial evidence being lodged on behalf of NICE, and I would not be confident that it would be completed within two days.
10. MR JUSTICE CRANSTON: How can we go about the directions? First of all, can I ask Mr Westgate what is going to happen to B? We hear this case and then we hear your case.
11. MR HYAM: The reality is that the B case will stand or fall on the outcome of this case
12. MR JUSTICE CRANSTON: It is on all fours is it?
13. MR HYAM: The only point I make is we have named Mr B as an interested party in our case because we have a duty to the Commissioners that B's advisers do not waste public resources. Certainly if this matter is going for the full hearing I do not know what the position of B will be or B's adviser will take. The possibility is open for them to appear as an interested party in the substantive hearing.
14. May I briefly indicate the sort of directions I have in mind? Clearly the defendant will have to serve any submissions he will have to serve. I am hoping we will not have to serve much evidence in response. Fairly ordinary directions might be capable of being put together. This matter is not going to be heard before the vacation. We are looking at the hearing in the autumn. That does give a bit of leeway. We would urge the court to put the matter in the list once the vacation is over, because clearly for the claimants who suffer from the condition they are inhibited, to a certain degree, in what treatment they can obtain from the NHS as a result of the guidance. There is a degree of urgency in that sense.
15. MR JUSTICE CRANSTON: How long will it take for you to put your evidence in, Mr Child?
16. MR CHILD: I was hoping I would get 35 days. That was originally the timetable, I think, proposed by my learned friend's instructing solicitors.
17. MR JUSTICE CRANSTON: Were there some draft directions?
18. MR CHILD: They became overtaken by events when this permission was heard, rather than proceeding to a rolled-up hearing.
19. MR JUSTICE CRANSTON: Thirty five days?
20. MR CHILD: Could I make a plea that if there is to be some greater focus added to the claimant's case, that that should be done before we prepare our evidence? That might well mean that we can be more less (?) with the evidence, which would be in everyone's interest?

21. MR JUSTICE CRANSTON: Mr Hyam, how are we going to focus this a bit more.
22. MR HYAM: A short document ought to be produced by me identifying the core issues to be determined at the substantive hearing. I cannot promise to do more than that. The sooner that is done, the better -- provided in seven days -- and say we are seeking to challenge the illegality. That should give the focus. The purpose of that document is to say to NICE, "You do not need to spend a lot of time trawling up scientific evidence because this is not a debate about the scientific right or wrong. It is about a process". If I do that in seven days the defendant has 35 days then to put in any evidence it wants to respond to the judicial review claim.
23. MR JUSTICE CRANSTON: You then respond within?
24. MR HYAM: I am going to say 21 days. I would have said 14 days because it will effectively be the vacation. That will mean what I am asking for is the first available date in the new term after the vacation. We will need a time estimate of two days.
25. MR JUSTICE CRANSTON: Anything more?
26. MR HYAM: I do not think anything more from me.
27. MR JUSTICE CRANSTON: Will you rely on the same skeleton?
28. MR HYAM: I think if it is refocused, then I will probably revise a skeleton to do that.
29. MR JUSTICE CRANSTON: How many days before the hearing for the skeletons.
30. MR HYAM: Fourteen and then seven--
31. MR JUSTICE CRANSTON: If you got the skeletons in that would be quite an achievement. We do not usually get them that quickly.
32. MR JUSTICE CRANSTON: Could you have a word with Mr Child and put this in writing as directions?
33. MR HYAM: I do not think we need it, but I am going to ask for legal aid taxation of our case. Your associate has more experience and is telling me I do not need it.
34. MR JUSTICE CRANSTON: If you need it you can have it. Mr Westgate, you are waiting until the outcome of this one.
35. MR HYAM: The order I seek on my application is that it be stayed until the outcome of the Fraser matter. That application is opposed by the defendant. They say that permission should be dealt with and refused today. The inspiration for my application is the order of Stanley Burton J made on 21 (?) April, where he suggested in paragraph 2 of that--
36. MR JUSTICE CRANSTON: Let us hear Mr Child. I know you said that earlier.

37. MR CHILD: The submission that I make is based on paragraph 2 of my skeleton. This is the point of delay. No claim form proper --
38. MR JUSTICE CRANSTON: I think we will stay it for the time being.