HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

Claim Nos. CO/3118/2021

CO/2652/2021

Royal Courts of Justice

Tuesday, 2 November 2021

Before:

THE HONOURABLE MRS JUSTICE WHIPPLE DBE

B E T W E E N :

THE QUEEN

on the application of

(1) JULIE PETERS

(2) NICOLA JANE FINDLAY

Claimants

- and -

THE SECRETARY OF STATE FOR

HEALTH AND SOCIAL CARE

JOINT COMMITTEE FOR VACCINATION AND

IMMUNISATION

Defendants

- and -

THE QUEEN

on the application of

DR FAIRBURN

Claimant

- and -

(1) SECRETARY OF STATE FOR HEALTH AND

SOCIAL CARE

(2) JOINT COMMITTEE FOR VACCINATION AND IMMUNISATION

Defendants

JUDGMENT

APPEARANCES

MR E. WILLIAMS QC , MR F. HOAR and MR J. JACKSON (instructed by Jackson Osborne) appeared on behalf of the Claimants (CO/3118/2021)

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MR Y. VANDERMAN (instructed by the Government Legal Department) appeared on behalf of the Defendant.

THE CLAIMANT appeared in person (CO/2652/2021)

MRS JUSTICE WHIPPLE:

1.
This is a renewed application for permission, permission having been refused on the papers by Eady J. It is late in the afternoon, coming up to quarter-to-four. This permission hearing started at 11.30 this morning and I heard submissions until about 3.30 this afternoon. It has, therefore, taken around three hours in total. Given the hour and given the thoroughness of the submissions during the day, I intend now to give a short judgment focusing on the key points. The arguments before me have ranged much more widely and obviously I have read the skeleton arguments, and beyond, in advance, so what I say here should not be taken to be the comprehensive answer to every point raised. I take account of the wider arguments. But I am conscious that an answer on the permission application is needed, quickly.

2.
This challenge is to the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021, which I will call the "2021 Regulations". Specifically, the challenge is to Regulation 5(3)(b) of the 2021 Regulations (the "Regulation"). I do not read that into the transcript in full. But its essence is that it requires a registered person (A) - who runs a regulated activity in a care home "to secure that a person ('B') does not enter the premises used by A unless …" and then in focus, we have sub-Regulation (b),

"B has provided A with evidence that satisfies A that either

(i) B has been vaccinated with the complete course of doses of an authorised vaccine or

(ii) that for clinical reasons B should not be vaccinated with any authorised vaccine."

The effect of that provision is to preclude a worker from working in a care home unless they have been vaccinated or they are exempt on clinical grounds.

3.
The impact of this provision is substantial. There are many workers in care homes at present who are not vaccinated. That is common knowledge. These Regulations are due to come into effect on 11 November 2021. It is part of the claimants' submissions to me that the Regulation will result in significant job losses and could even result in closure of care homes for lack of staff. My job here today is not to comment in any way on the practicability or the desirability of this provision. I am just looking at whether the provision is lawful. I have no regard to its political, social or healthcare merits.

4.
There are two challenges before me and they share common ground. In relation to both, renewal was refused on the papers, but Julian Knowles J ordered both to be listed together for renewal applications.

5.
I deal first with the challenge that has been brought by Julie Peters, a programme director at a care home, and Nicola Jane Findlay, a full-time support work for a residential care home. I turn directly to the five grounds which are argued in their case.

6.
Ground 1 is that the Regulation in question is ultra vires . The 2021 Regulations are made pursuant to powers in sections 20 and 161 of the Health and Social Care Act 2008. Section 20(1) of the 2008 Act imposes an obligation on the Secretary of State to make regulations to secure that services provided in the carrying on of regulated activities cause no avoidable harm to the persons for whom the services are provided. In this instance that is, of course, the residents of the care homes. I have been taken expressly to section 20(5) which is said to be the empowering provision for the 2021 Regulations.

7.
The claimants, in this claim at least, accept that the 2021 Regulations do fall within the scope of the 2008 Act. They argue, however, that s.45E of the Public Health (Control of Disease) Act 1984 is engaged and, when the provisions are read together, s.45E precludes Regulation 5(3)(b). Section 45E provides that Regulations made under s. 45B or s. 45C may not include provision requiring a person to undergo medical treatment. It is argued that the 2021 Regulations also come within s. 45C (specifically, s 45C(1) and (2)).

8.
The claimants say that the effect of the 2021 Regulations is to mandate vaccination and that mandate is precluded by s. 45E. They say that this is a real world understanding and analysis of what occurs or will occur in light of the 2021 Regulations, because care workers will be forced to undergo vaccination to keep their jobs, and that is contrary to the statutory prohibition. They argue that s. 45E has primacy over the 2021 Regulations, on the basis that primary statute prevails over secondary legislation.

9.
I am unable to accept that submission. I do not consider it to be arguable. On its face, s.45E says that no person can be compelled to undergo medical treatment, but that is not, on a proper understanding, the effect of the 2021 Regulations, which do not mandate vaccination. The way they work is that the

individual retains the autonomy to decide whether to be vaccinated or not; the 2021 Regulations impose a consequence, depending on the choice a person makes, and preclude someone who has chosen not to be vaccinated from taking up work in a care home unless they come within an exempted category, which neither of these claimants does. I conclude that this is not a situation where s.45E is even arguably engaged.

10.
Further, and alternatively, I am satisfied that the powers in s.20 and s.161 are specific to the instant case - in other words, the protection of vulnerable people, residents in care homes - and that, even if s. 45E was capable of application to the current situation, the specific should prevail over the general and s. 20 would still permit these Regulations. Section 45E does not have primacy.

11.
Arguments were also advanced before me under the Convention to suggest that any gap that there might be between s.45E (prohibition on mandatory treatment) and the Regulation (prohibition on unvaccinated workers in care homes) could be "bridged" by Article 8 of the European Convention. I reject that proposition as unarguable, as well. This is a tenuous argument. I will come to the Convention shortly, but case law is firmly against the Claimants here. The legislation in question, s.20, is clear on its face, as is the Regulation which has been made pursuant to it, Regulation 5(3)(b). It is not possible to use the Convention to read across s. 45E as the claimants suggest.

12.
I do not consider that the claimants have an arguable case that the Regulations are ultra vires . That is what Eady J decided in this case and that is what Calver J decided in a decision in a different context, but on the same point. I agree with both of them and conclude that ground 1 is bound to fail. I refuse permission on that ground.

13.
I move then to ground 2. By this ground, the claimants argue that the defendant has made insufficient enquiry and has ignored relevant considerations. A number of challenges are made to the way in which the Government went about its gathering and consideration of evidence. I am invited by the defendant to consider this ground alongside ground 5, which is a challenge of irrationality and I do so. It seems to me that grounds 2 and 5 are really the same point: they are a challenge to the choices made by the Government in enacting this piece of secondary legislation.

14.
The core of the argument is that the Government was wrong to introduce the 2021 Regulations, given the state of the science about Covid infections and treatment, and given the alternatives that were available that might have protected people in care homes from COVID-19.

15.
As I say, the argument has been put in a number of different ways. One of the points made by the claimants is that they have not seen any evidence from the Government to support the Government's submissions advanced in their summary grounds and skeleton; but of course the claimants have not seen extensive evidence, we are only at the permission stage. The claimants cannot argue they should get permission just to see whether there is evidence to justify the point of challenge. Rather, I must take a view on whether this ground is arguable based on what is before me now. There is plenty of evidence before me even at this early stage to enable me to do that.

16.

The way in which the claimants put their argument hinged on three central points. The first of those was that the Government had relied on out-of-date statistics when deciding to enact these Regulations and, if the Government had had available to it more up-to-date statistics, it would have recognised that there was an upwards trajectory in the numbers of care home workers who were taking the vaccination and the Government might, faced with that, have stepped back from concluding that there was any need to legislate at all.

17.
The second argument is that the Government should have legislated in the context of individual care homes and required each individual care home to reach a given percentage of vaccinated staff, possibly the 80 per cent that is mentioned in the dual threshold approach, so that any individual workers in that care home who were not vaccinated would not necessarily be barred from work, because they could rely on the effective and high percentage of vaccination amongst their colleagues.

18.
Thirdly, it is said that the Government should have considered natural immunity as an alternative to vaccinated immunity and that those who had a natural immunity should have been exempted from the requirement of vaccinations, in this context, noting that there are a number of other groups of individuals, who are exempted from the Regulation, but who can, nonetheless, enter the care home although not vaccinated.

19.
Standing back, these are challenges to the merits of this piece of legislation and to the way in which the policy was framed. I answer this, first and foremost, by having regard to the purpose for this piece of legislation most clearly expounded in the Explanatory Memorandum, para.42.1 of which says that

“ the purpose of the instrument is to reduce the spread of COVID-19 in care homes, in order to protect care home residents who are vulnerable to COVID-19.”

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20.
The Explanatory Memorandum goes on to set out various other aspects of this legislation and its purpose, including reference to the legislative context at para.6.3, then the policy background at para. 7.1 which refers to advice from SAGE (the Scientific Advisory Group for Emergencies) Social Care Working Group, which has highlighted the vulnerability of people living in care homes and their exposure to COVID-19 infection. There is a reference there to advice from SAGE that a vaccination uptake rate of 80 per cent in staff and 90 per cent in residents in each individual care home setting would be needed to provide a minimum level of protection against outbreaks of COVID-19. This, in argument, we have referred to as the “dual threshold”. The Memorandum states, at the time of its issue, only 65 per cent of care homes were meeting that dual threshold; only 44 per cent of care homes in London.

21.
The legislative choice to require those who work in care homes to be vaccinated was made on the basis of data about COVID-19, as it affects residents of care homes, bearing in mind their vulnerability, and it was based on the scientific advice provided by SAGE. I do not accept that it is arguable that the Government erred in law, by failing to adopt a different strategy or gather different evidence or pay more regard to some of the competing voices in this debate. There is, undoubtedly, a discretion afforded to Government - a broad discretion – to determine policy decisions of this nature.

These are high-level public health policies. The breadth of the Government's discretion was emphasised in cased like Dolan and, indeed, in SC .

22.
Turning then back to the specific points that are made, the Government had before it statistics demonstrating that not all care workers were vaccinated and, of course, that remains the case to date. There was no inadequacy – such as to amount to an error of law - in the type or collection date of data relied on by the Government.

23.
The Government had a legitimate policy choice as to whether the 2021 Regulations should have applied to care homes or individual care workers. But the idea that the 2021 Regulations should have addressed the care home setting rather than the whole cohort of care home workers is very much dependent on the notion of the dual threshold providing adequate protection for vulnerable care home residents, that it is a ceiling in protection; the Government's view is that it is not a ceiling, it is very much a "floor", or minimum form of protection and the Government was striving for greater protection than that floor in implementing the 2021 Regulations. That policy ambition was open to the Government. The claimants cannot succeed in arguing the contrary.

24.
As to natural immunity, there is some evidence before me that those who have had COVID-19 can develop some natural immunity, but the defence proposition is that the evidence is much less clear as to the duration and extent of any immunity than in relation to those who have received vaccines, in other words, the science simply was and is not there to underpin an exemption for those who have natural immunity. Here, too, I am satisfied that this is a matter for Government to decide. It is part and parcel of how Government wishes to frame a policy in order best to protect care home residents.

25.
I conclude that grounds 2 and 5, ultimately, are arguments about political and social choices made by Government and do not raise issues where the court has a legitimate role. I refuse permission for those grounds.

26.
As to ground 3, that is an Article 8 ground, suggesting that the Regulation gives rise to a breach of Article 8. This is answered in large part by the recent case of Vavřička v. Czech Republic: if children can be barred from school because they are not vaccinated, as was the circumstance of that case, it must follow, by analogy, that there is no breach of Article 8 to legislate so that workers, who are not vaccinated, can be prevented from working in care homes. I see no merit in this ground.

27.
There are other aspects to the Article 8 argument. As the defendant says, the whole point of this measure is to protect lives, namely, the lives of elderly residents in care homes. So the measure itself is intended to protect the Article 2 rights of those who are residents in these care homes. That is a very weighty justification for any interference with Article 8 which might be established.

28.
Secondly, I repeat the point that the Government would have a wide margin of discretion in implementing any measure in order to protect care home residents, again bearing in mind the essentially political and social decision at issue, which is based on complex scientific and social evidence.

29.
No argument under Article 8 could succeed in this case. Permission is refused on ground 3.

30.
Ground 4 alleges Article 8 breach in conjunction with Article 14 on the basis that the Regulation indirectly discriminates on grounds of sex and race, noting the higher proportions of women and BAME people who work in the social care sector. Article 14 adds little to the debate. I have already concluded that there is nothing in the Article 8 point. Any discrimination which could be shown to exist, and that in and of itself is a doubtful proposition, would surely be justified in the context of a pandemic and in the context of an urgent need to protect care home residents from COVID-19. Again, the breadth of the discretion afforded to Government in these circumstances is confirmed in many cases decided by the domestic and Strasbourg courts.

31.
I conclude, therefore, that none of the five grounds presented by the claimants in the first case, Peters and Findlay, justifies the grant of permission.

32.
I turn then to the second case that is brought by Dr Fairburn. He advances two grounds which substantially overlap with those in the first case. The first relates to the vires of the 2021 Regulations and I have already addressed many aspects of that in the context of the Peters challenge. Dr Fairburn adds arguments to the effect that s.20 does not authorise these Regulations at all, but I disagree. I have noted the wording of s.20 and it seems to me that the Regulations are squarely within that provision and authorised by it. Further, he argues that s.45E is directly applicable in this case, because this really is a case where medical treatment is being mandated, but that, too, I believe I have already dealt with and I disagree with him. On a plain reading of the statute, that is not what the 2021 Regulations require.

33.
Further, Dr Fairburn argues that the 2021 Regulations are irrational, but I hope that I have already dealt with those arguments dealing with ground 5 of the Peters challenge and having Dolan, para.90 (‘quintessentially a matter of political judgment’), very much in mind .

34.
In addition, issues are raised as to Dr Fairburn’s standing. In light of my decision on permission based on a review of the merits, that matters a bit less, but I would agree with Eady J that Dr Fairburn lacks standing to bring this claim. The key issue is whether he is directly affected by the 2021 Regulations. He, himself, is double vaxxed, so the 2021 Regulations pose no difficulty for him. He, himself, does not work in care homes so he is not, in any event, at risk of being precluded from entry. The effect that these Regulations have on him, as he has explained to me, is in the context of his role as a consultant to the care sector. He gives advice to individual care homes and companies in the care sector; he gives presentations, lectures and so on. So, he says, and I am sure that he is right, he needs to understand the law and ensure he gets it right, in order to be able to advise his clients properly. This is a very indirect effect of the 2021 Regulations. Sure, the Regulations might impact on his business, but he is not someone who is directly affected or impacted by the 2021 Regulations themselves. So, he, in my judgment, lacks standing.

35.
I refuse permission for judicial review in Dr Fairburn’s case as well.

36.
I am extremely grateful to all those who have come to court today. The case has been well presented and well argued on behalf of all the claimants and the defendant. I repeat that this is a short judgment, intended to be a summary of my conclusions very much in the context of an application which had some urgency attached to it.
