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R (Gardner and Harris) v Secretary of State for Health and Social Care and others

Decision of the High Court (Lord Justice Bean and Mr Justice Garnham), 27 April 2022

1. About 20,000 residents of care homes in England died of COVID-19 during the first wave of the pandemic in 2020. Two of them were Michael Gibson, father of the first Claimant Dr Cathy Gardner, and Donald Harris, father of the second Claimant, Ms Fay Harris. Mr Gibson died in a care home in Oxfordshire on 3 April 2020, Mr Harris in a care home in Hampshire on 1 May 2020.
2. Dr Gardner and Ms Harris brought a claim for judicial review against the Secretary of State for Health and Social Care, NHS England and Public Health England. They alleged that certain policy documents issued by the Defendants during the relevant period, and the policy decisions recorded in those documents, constituted breaches of their fathers' rights under the European Convention on Human Rights, or alternatively were irrational as a matter of domestic common law. The Claimants did not claim compensation, but sought appropriate declarations by the court.
3. In its judgment the High Court described the case as "an important and legitimate claim". The judges said that they were not conducting an inquest concerning the deaths of Mr Gibson and Mr Harris alone. The Claimants' fathers were put forward as representative of many other residents of care homes who died during the first wave of the pandemic. On the other hand, the case was not a public inquiry but a judicial review. As is usual in judicial reviews, no oral evidence was called.

4. On 15 December 2021 The Rt Hon Baroness Hallett DBE, former Lady Justice of Appeal, was appointed to conduct a public inquiry under the Inquiries Act 2005 to examine the UK's preparedness for and response to the COVID-19 pandemic, and to learn lessons for the future. One of the many topics mentioned in Baroness Hallett's draft terms of reference is "the management of the pandemic in care homes and other care settings, including infection prevention and control, the transfer of residents to or from homes, treatment and care of residents, restrictions on visiting, and changes to inspections". The establishment of her inquiry does not, however, affect the present claim.

5. In their judgment handed down today Lord Justice Bean and Mr Justice Garnham found that the decisions of the Secretary of State for Health and Social Care to make and maintain a series of policies contained in documents issued on 17 and 19 March and 2 April 2020 were unlawful because the drafters of those documents failed to take into account the risk to elderly and vulnerable residents from non-symptomatic transmission, which had been highlighted by (among others) Sir Patrick Vallance in a radio interview as early as 13 March. Non-symptomatic transmission would mean that one elderly patient moved from hospital to a care home could infect other residents before manifesting symptoms, or even without ever manifesting symptoms. The judges found that it was irrational for the DHSC not to have advised until mid-April 2020 that where an asymptomatic patient (other than one who had tested negative for COVID-19) was admitted to a care home, he or she should, so far as practicable, be kept apart from other residents for 14 days.

6. The court dismissed the other aspects of the case brought by the Claimants, including claims under Articles 2 and 8 of the European Convention on Human Rights, and a claim against NHS England (which is legally distinct from the Secretary of State).