

25 July 2023

PRESS SUMMARY

R (on the application of JJ) v Spectrum Community Health CIC and another [2023] EWCA Civ 885

On appeal from: [\[2022\] EWHC 2440 \(Admin\)](#)

JUDGES: Lord Burnett of Maldon, Lord Chief Justice of England and Wales, Lady Justice King and Lord Justice Lewis

SUBJECT MATTER

In this case the Court of Appeal considered the extent to which patients are entitled to demand, and health care professionals are obliged to give, treatment or care which is not clinically indicated.

BACKGROUND

This was an appeal from a decision made by HHJ Sephton KC sitting as a High Court Judge on 5 October 2022 by which he dismissed JJ's claim for judicial review in respect of Spectrum's refusal to feed him certain foods of his choice and declined to make declarations: (i) that Spectrum's refusal to allow JJ to choose his diet is unlawful; and (ii) that it is lawful for Spectrum's staff to give effect to JJ's food choices.

JJ is quadriplegic and without teeth as a result of a rare genetic condition. He is currently serving a lengthy determinate sentence of imprisonment and is cared for in the Healthcare Wing at HMP Liverpool by the staff of Spectrum, a community interest company which provides NHS-funded healthcare services to prisoners. While his mental capacity is unimpaired, his physical capacity is limited to pushing a button with one finger and he has been bed-bound since 2016, wholly dependent on care staff for his feeding.

As a consequence of JJ's condition, eating food poses a risk of death or serious injury by choking or aspiration. An assessment highlighted the risk and from early June 2021, Spectrum refused direct staff to give JJ any foods which did not fall within a prescribed soft food Level 6 Diet. He particularly wished to be given boiled sweets, biscuits and crisps.

In July 2022, JJ brought a claim for judicial review, contending that Spectrum's refusal to feed him foods of his choice was irrational, discriminatory, in breach of his common law right of autonomy and his right to physical and psychological integrity under Article 8 of the European Convention on Human Rights. The judge dismissed the claim on 30 September 2022.

THE APPEAL

JJ appealed on two grounds:

1. Autonomy: The judge's conclusion that JJ's autonomy could lawfully be overridden by Spectrum was, in the circumstances of JJ's case, not supported by the evidence and was contrary to established authority on the scope and extent of autonomy as a fundamental principle of common law.
2. Article 8 ECHR: The judge erred in concluding that Spectrum's interference with JJ's Article 8 ECHR rights was in accordance with the law and proportionate, and hence justified under Article 8(2) ECHR.

The appeal was heard on 28 June 2023.

The issue of principle for the Court of Appeal was whether a health care professional was required to provide certain foods to a person in their care where the expert assessment was that those foods would expose the person to a high risk of choking and aspiration which might lead to his death or, in other words, whether a patient is entitled to demand medical treatment which is not clinically indicated by a medical professional.

THE JUDGMENT

The Court unanimously dismissed the appeal. In the judgment of Lady Justice King, with which the other members of the Court agree, the following matters are addressed:

The Court observes that the appeal raises no new points of law in relation to both the common law and Article 8 ECHR. Its conclusions on the issues in the case can be summarised as follows:

1. The judge's decision that JJ's autonomy could lawfully be overridden by Spectrum was supported by the evidence:
 - a. The judge did not overstate the risk of harm to JJ and was right to accept the expert evidence that JJ was at 'considerable risk of dying if he is provided with solid foodstuffs'.
 - b. The judge was right to hold that Spectrum could be at risk of prosecution under regulation 22(2) of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 if JJ choked and died having been given foods outside a Level 6 Diet.
2. The judge was right to find that Spectrum were not legally obliged to provide treatment or care sought by JJ which was not clinically indicated. A health care professional cannot be compelled by a patient to provide treatment that is not clinically indicated and therefore not offered: *Montgomery v Lanarkshire Health Board* [2015] AC 1430 at p1463; *R (Burke) v General Medical Council* [2005] EWCA Civ 1003 at [50(v)].

3. Having found that the case fell within Article 8(1) and the right to respect for family and private life, the judge rightly held that Spectrum's conduct was in accordance with the law, for a permitted reason and proportionate. The common law suffices for the purposes of the accordance with the law requirement of Article 8(2): *The Sunday Times v the United Kingdom* (1979) 2 EHRR 245 at [47]. The judge conducted an exemplary and concise proportionality analysis, concluding that the countervailing concerns of Spectrum 'amply justify the defendant's interference with the claimant's right to choose'.

NOTE:

This summary is provided to assist in understanding the Court of Appeal's decision. It does not form part of the reasons for the decision. The full judgment of the Court of Appeal is the only authoritative document. The full judgment can be found at [2023] EWCA Civ 885 and the judgment and a copy of this media summary will be made available at www.judiciary.uk