CO/3229/10

Neutral Citation Number: [2010] EWHC 3702 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 10th December 2010

B e f o r e:

MR JUSTICE BURTON

Between:
THE QUEEN ON THE APPLICATION OF ASSOCIATION FOR INDIVIDUAL AND GROUP PSYCHOTHERAPY & OTHERS

Claimant

v

HEALTH PROFESSIONS COUNCIL

Defendant

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(Official Shorthand Writers to the Court)

Mr D Rose QC & Mr I Steele (instructed by Bindmans) appeared on behalf of the **Claimants**
Mr M Fordham QC & Ms J Boyd (instructed by Bircham Dyson Bell) appeared on behalf of the **Defendant**

J U D G M E N T
(As approved)

1. MR JUSTICE BURTON: This has been the hearing of a renewed application for permission to appeal, after the matter was referred into open court by Beatson J.

2. It is obviously of importance because there are six Claimants in this case representing various aspects of the psychoanalysis and psychotherapy professions, and they are concerned at apparent decisions or recommendations made by the Health Professions Council ("HPC") (the Defendant), which may impact upon Government decisions, if they are taken as amounting to considered recommendations that it is now appropriate for the HPC to be the regulatory body of those Claimant associations.

3. It has become apparent, after extremely able submissions on both sides by counsel, that the delay point, which was specifically what was worrying Beatson J, is not in any way determinative of the outcome of permission, and indeed that, as he suspected, it is interlocked with the merits, as I shall briefly describe.

4. As I propose to grant permission, I am not going to deliver a lengthy judgment, but propose to summarise the position shortly, in the hope that this hearing today has been of assistance to the parties, who have put forward their arguments on both sides, during the course of which a great deal of potential common ground has emerged; although clearly, as I am satisfied, such common ground is insufficient for me to consider anything other than the grant of permission to the Claimants.

5. The Claimants had believed that what was being done by the Defendant was the making of a recommendation to the Secretary of State pursuant to paragraph 3(17) of the Health Professions Order 2001 which states as follows:

> "17 The Council may--
>
> (a) make recommendations to the Secretary of State ... concerning any profession which in its opinion should be regulated pursuant to section 60(1)(b) of the Health Act 1999...
>
> (b) give such guidance as it sees fit for such persons as seem to it to have an interest in such regulation on the criteria to be taken into account in determining a profession should be so regulated."

6. Mr Fordham QC today has made plain, on instructions from his client, and in accord with the pleaded case, as it now is, that the Defendant does not assert that it has made such recommendations. Indeed he has invited me to make by consent, if appropriate, a declaration that there have not been any recommendations by the Defendant to the Secretary of State in accord with paragraph 3(17)(a) and (b) or at all.

7. It is quite plain that, at least until very recently, the Claimants have reasonably believed that that is not what was taking place and that the Defendant was in the process of making a recommendation. They were, in my judgment, entitled so to believe, not least because of two important documents - and I deal now with the question of delay - which are in the bundle. The first is the Claimants' note of a meeting of the College of Psychoanalysts UK with the Defendant on 13th October 2008, at which the Defendant

attended by its Chief Executive, Mr Seale, and its policy officer, Mr Mares. In the course of the note of that meeting, signed, among others, by Dr Leader, who has put in witness statements on behalf of the Claimants, there is a passage which makes it quite clear that, at that stage, on the face of it, the Defendant was considering whether or not there should be a recommendation by it for regulation, and in particular there is a passage which records Mr Leader as emphasising that the Claimants were not against regulation, but they question very seriously whether the form of regulation proposed by the Defendant was suitable for psychoanalysts, and Dr Leader raised the question of whether some other form of regulation might be feasible.

8. It is plain that there was no response to the intent that was not part of what the Defendant was discussing, and indeed on the first page of the note, there is the following statement recorded as being that of the Defendant, proposing:

> "a final package of proposals for submission to Government following proper consultation of the professions concerned. The final proposals might be that the professions concerned should be regulated or that those professions or certain parts of them eg psychoanalysts should not be regulated."

That was said to be the objective to be determined as a result of "the process now begun". That was in October 2008. I say nothing of correspondence between the parties which continued thereafter.

9. Then there is a note taken by the Defendant of a meeting on 25th November 2009, between Mr Seale and the Chairman Elect of the United Kingdom Council for Psychotherapy, Professor Samuels, in which Mr Seale is recorded in the Defendant's note as saying:

> "There were ways in which [the Defendant] could communicate to Government that it had concluded that it should not be the regulator for psychotherapy and counselling."

He referred to paragraph 7.16 of the White Paper, 'Trust, Assurance and Safety - The Regulation of Health Professionals in the 21st Century'. I shall return in a moment to that paragraph.

10. But in those circumstances, it is quite clear that the Claimants were entitled, at that stage, both to believe that what was purporting to occur was the process of formulating a recommendation pursuant to paragraph 3(17), and that it was indeed paragraph 3(17) that was being operated, on the face it, which the Claimants challenge as having led to an inappropriate and inadequate process.

11. The case for the Defendant now put forward is that there was no such recommendation, and no such process, and it does not purport to say that it has used the provisions of paragraph 3(17), notwithstanding its statements to the contrary. In those circumstances, it seems to me entirely clear that no point on delay can be taken, where the Defendant was asserting that it was carrying out a process, and only when the December decision

was made, to which I shall refer, did it become apparent that, on the face of it, it had not done so.

12. There has been no delay in those circumstances in waiting. Indeed the Claimants waited, believing that there was a proper process continuing, until after the decision which led them to believe there had not been such a process.

13. There is no delay point that could be taken in relation to grounds 3 and 4 of the challenge, which only arise upon its becoming apparent to the Claimants, rightly or wrongly, from the December decision, that there had been no reliance upon the Defendant's own guidelines, as formulated pursuant to Regulation 3(17)(b), and/or that the decision was taken before the completion, by the group that had been set up by the Defendant (the PLG), of its deliberations. So much for delay.

14. But Mr Fordham QC has argued forcefully that there is in fact no basis for a cause of action, or any ground for challenge by way of judicial review to the December decision and recommendations, to which I have referred: because, as I have earlier said, he makes it clear that as far as the Defendant is concerned, there has been no recommendation pursuant to paragraph 3(17). He submits that all that has occurred is that, in the light of the paragraph of the White Paper to which I have referred (paragraph 7.16), the Defendant has responded to a Government request to see whether, if the Defendant were concluded to be the appropriate regulatory body, and if it were concluded that there should be regulation pursuant to section 60 of the Health Act 1999, the Defendant would be in a position to take on that role.

15. If that were all that the Defendant had purported to do then, submits Mr Fordham, contrary to Miss Rose's submission, it could not be argued either that they had failed to carry out that process, or that they were ultra vires in doing so, because they would not have been carrying out a function under the paragraph 3(17) and would not have been required to have taken account of the guidelines under paragraph 3(17)(b), which they admit they had not done; and the Defendant would simply have been carrying out a process of pragmatic investigation, at the request of the Government, which would be within the powers of the Council pursuant to paragraph 16 of Schedule 1, Part I to the 2001 order which reads:

> "Subject to any provision made by or under this Order, the Council may do anything which appears to it to be necessary or expedient for the purpose of or in connection with the performance of its functions."

16. As I indicated at the outset of the judgment, this is important because it should not, if the Claimants be right, be believed by the Government that there has been any expression of opinion, or a fortiori any concluded and researched opinion by the Defendant, as to what is called the "whether and who" questions, that is whether there should be regulations and, if so, who should do it. In paragraph 17 of the summary grounds of defence the Defendant has said:

> "The HPC did not address itself to the whether or who questions at all."

It then proceeds rather more controversially:

> "At every stage the limited scope of the issue was made clear in the published documents. For the same reasons, and in line with the ambit of the exercise it had been asked to undertake, the HPC did not apply its guidance or the criteria set out there."

Then it makes a case, which I accept Miss Rose has forcibly demonstrated arguably not to be correct, namely that the criteria would not apply in this sort of case in any event.

17. I have been tempted by Mr Fordham's expressions of sincerity, on behalf of his client, that the Defendant is prepared to go to the lengths of submitting to a declaration that it had not made a recommendation in accordance with paragraph 3(17); but it seems to me that, although that is now on the record, it is an insufficient answer, at any rate arguably, to the Claimants' case, which is to attack the validity of the letter and the decisions contained in two documents namely first, a minute of meeting of 10th December 2009 of the Defendant, and then, more significantly, a letter to the Secretary of State for Health, dated 23rd December 2009.

18. It seems to me that particularly the letter, on its face, goes considerably further than simply recording the results of investigations into mechanics by the LPG, to which I have earlier made reference.

19. If indeed it were to be made clear that no consideration has been given to the 'whether and who' questions, contrary to - without rehearsing them all in this judgment - the face of a number of important documents in the bundle, this letter would need to be reworded and/or replaced: and now is not the time for that kind of redrafting exercise to be carried out, even in fact if I had any offer from Mr Fordham QC, which I do not, of an alternative form of wording for the letter.

20. In those circumstances, although I hope that what has fallen from both sides today leaves every expectation that there will in fact not be a need for a hearing, because both sides, it seems to me, will be able to reach accommodation, as of now I have no doubt at all that this is a case which deserves to go forward, and that the four grounds of challenge should all be given permission to proceed …

21. MR JUSTICE BURTON: May I say, if that were an objective audience I would agree that the advocacy on both sides in this case has been in a very high order and has enabled me to decide the matter in a relatively short time.

22. MISS ROSE: My Lord could I invite your Lordship to consider the question of costs in relation to this hearing. Of course it is relatively unusual to get costs when succeeding on a permission hearing. This was a situation in which Beatson J indicated that the claim was arguable, having considered it on the papers, and we invited the Defendant, in correspondence, only to deal with the delay point, which Beatson J had emphasised, and to concede on arguability. They insisted on bringing this to a full hearing which has occupied your Lordship for the best part of a day, at very considerable expense to

the Claimants. In those circumstances, we submit as a matter of discretion it would be right that we should get our costs of the hearing today.

23. MR FORDHAM: My Lord, we resist that. First, we say that it is not appropriate to give the Claimants costs, even though permission has been resisted, and even though the Claimant had to go to another court to get it. There is good reason for that.

24. MR JUSTICE BURTON: Why did you not concede the case on delay?

25. MR FORDHAM: We took the point on delay because it was connected to the merits and you had to consider the two in the round. I have failed. That is why Miss Rose makes the application, but that is not a reason to make a costs order. That is the first point. The second point is that although the judge did indicate that he would not have refused leave, he did leave it open that it was proper for us to consider the issues in the round. Thirdly, my Lord should at least have in mind, not only have we approached this matter but this hearing, we hope, properly and reasonably and constructively.

26. MR JUSTICE BURTON: Very realistic.

27. MR FORDHAM: But the point that you have identified from our summary grounds in April, in fact was made by my solicitor, in the letter of response on page 94 in tab G, which confirms in writing expressly that no exercise of 'whether and who' had been conducted by us and we have no (inaudible). In all the circumstances, we invite you to take the usual course and make no order as to costs.

28. MR JUSTICE BURTON: Make no order?

29. MR FORDHAM: Costs in the case.

30. MR JUSTICE BURTON: Do you have anything to say?

31. MISS ROSE: No my Lord.

32. MR JUSTICE BURTON: I shall say that one-third of the costs today be the Claimants' in any event and the balance of the costs should be in the case. That would mean therefore that two-thirds of the Claimants' costs be in the case and two-thirds of the Defendant's costs be in case. Have I got that right? One-third of their costs be payable by you in any event. Two-thirds of their costs to be in the case. So far as your costs are concerned, it would be two-thirds of your costs would be in the case.

33. MISS ROSE: Understood.

34. MR JUSTICE BURTON: Thank you. That is on the basis that the delay point which need not have been run and it could have saved some time.