Neutral Citation Number: [2017] EWHC 2815 (Admin)

Case No: CO/4002/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/11/2017

Before :

LORD JUSTICE IRWIN
MR JUSTICE HADDON-CAVE

- -

Between :

THE QUEEN (ON THE APPLICATION OF A)	**Claimant**
- and -	
THE SECRETARY OF STATE FOR HEALTH	**Defendant**
- and -	
NHS BLOOD AND TRANSPLANT	**Interested Party**

Helen Mountfield QC and Sarah Hannett (instructed by **Deighton Pierce Glynn**) for the **Claimant**
Ivan Hare QC (instructed by **The Government Legal Department**) for the **Defendant**

Hearing date: 27 April 2017

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Approved Judgment

Introduction

1. This is the judgment of the Court to which both of us have contributed.

2. The Claimant is an illegal immigrant unlawfully in England. As such he is not "ordinarily resident" in Great Britain within the meaning of Section 175(2) of the National Health Service Act 2006 ["the 2006 Act"], the provisions governing charges for medical treatment of non-residents. The Claimant has suffered from end stage kidney disease ["ESKD"] from 2005 and is HIV positive. He has undergone regular kidney dialysis and hopes for a kidney transplant.

3. The Defendant issued the NHS Blood and Transplant (Gwaed a Thrawsblaniadau'r GIG) (England) Directions 2005 ["the 2005 Directions"] which govern the allocation of organs for the purposes of transplantation. Candidates for transplantation are divided into two groups, Group 1 and Group 2. Group 1 comprises broadly persons "ordinarily resident in the United Kingdom". Group 2 comprises persons who do not fall within Group 1. Paragraph 4(2) provides that no person in Group 2 shall receive an organ for which there is a clinically suitable person in Group 1. The Claimant, by reference to his immigration status, falls within Group 2. Kidneys suitable for transplantation being in short supply, his claim is that, in practice, he will never be offered a kidney or a kidney of such quality that successful transplantation will follow.

4. The Claimant makes no attack on the underlying policy behind the 2005 Directions and no longer seeks to make a claim pursuant to the European Convention on Human Rights ["ECHR"]. His claim is confined to the submission that the Secretary of State lacked the power under the 2006 Act (and its predecessor) to make or maintain the 2005 Directions.

Factual Background

5. The Claimant is a national of Ghana, born on 15 October 1970. He left Ghana in 2000. In 2003 or 2004 the Claimant entered the United Kingdom illegally and has remained ever since without leave to remain. In 2005, the Claimant was diagnosed as suffering from ESKD and HIV and commenced kidney dialysis and anti-retroviral treatment. In 2006 the Claimant sought leave to remain in the United Kingdom on Human Rights grounds (Articles 3 and 8 of the ECHR). In 2010 his application for leave to remain was refused. In 2015 the Claimant exhausted all of his appeal rights when his appeal was rejected by the Court of Appeal (*GS and Others v SSHD* [2015] 1 WLR 3312) and the Supreme Court refused permission to appeal.

6. On 11 August 2015, the Claimant applied for judicial review of the 2005 Directions. Permission to apply for judicial review was refused on the papers (Whipple J) on 6 October 2015 and refused following oral application (Collins J) on 12 November 2015. The Claimant sought permission to appeal the order of Collins J, solely on *ultra vires* grounds but was refused permission on the papers (Gross LJ) on 6 April 2016. Permission was granted on oral renewal (Gross LJ) on 10 February 2017 and the matter remitted to the Divisional Court.

The Legislation and the 2005 Directions

The 2006 Act

7. The primary duties of the Secretary of State are contained in Section 1 of the 2006 Act:

> "**1 Secretary of State's duty to promote health service**
>
> (1) The Secretary of State must continue the promotion in England of a comprehensive health service designed to secure improvement—
>
> (a) in the physical and mental health of the people of England, and
>
> (b) in the prevention, diagnosis and treatment of physical and mental illness.
>
> (2) For that purpose, the Secretary of State must exercise the functions conferred by this Act so as to secure that services are provided in accordance with this Act.
>
> (3) The Secretary of State retains ministerial responsibility to Parliament for the provision of the health service in England.
>
> (4) The services provided as part of the health service in England must be free of charge except in so far as the making and recovery of charges is expressly provided for by or under any enactment, whenever passed."

8. By Section 17(9) of the Heath and Social Care Act 2012, Parliament inserted paragraph 7C of Schedule 1 to the 2006 Act, making provision for the facilitation of tissue and organ transplant:

> "7C The Secretary of State must for the purposes of the health service make arrangements for—
>
> (a) collecting, screening, analysing, processing and supplying blood or other tissues,
>
> (b) preparing blood components and reagents, and
>
> (c) facilitating tissue and organ transplantation."

9. By Section 28 of the 2006 Act the Secretary of State may establish special bodies for exercising any functions under the Act, any such body to be called a Special Health Authority. The Secretary of State exercised his power under the materially identical predecessor to Section 28 (Section 11 of the National Health Service Act 1977 ["the 1977 Act"]), namely, the NHS Blood and Transplant (Gwaed a Thrawsblaniadau'r GIG) (England) (Establishment and Constitution Order 2005) (SI 2005/2529) ["the 2005 Order"] to create a Special Health Authority known as NHS Blood and

Transplant ["the Interested Party"]. Section 7 of the 2006 Act empowers the Secretary of State to direct a Special Health Authority to exercise a relevant function. By Article 3 of the 2005 Order, the Secretary of State delegated his functions in relation to transplantation to the Interested Party.

10. Under Section 8 of the 2006 Act, the Secretary of State has power to give directions to a Special Health Authority, and thus to the Interested Party. The relevant provisions read:

> "8(1) The Secretary of State may give directions to any of the bodies mentioned in subsection (2) about its exercise of any functions.
>
> (2) The bodies are –
> …
>
> (c) NHS trusts, and
>
> (d) Special Health Authorities.
>
> (3) Nothing in [any] provision made by or under this or any other Act affects the generality of subsection (1)."

11. The Secretary of State relies on Section 8 as the source of the power to give the relevant directions, in combination with Section 272(7) of the 2006 Act which provides:

> "(7) Any power under this Act to make orders, rules, regulations or schemes, and any power to give directions –
>
> (a) may be exercised either in relation to all cases to which the power extends, or in relation to those cases subject to specified exceptions, or in relation to any specified cases or classes of case,
>
> (b) may be exercised so as to make, as respects the cases in relation to which it is exercised—
>
> (i) the full provision to which the power extends or any less provision (whether by way of exception or otherwise),
>
> (ii) the same provision for all cases in relation to which the power is exercised, or different provision for different cases or different classes of case, or different provision as respects the same case or class of case for different purposes of this Act,
>
> (iii) any such provision either unconditionally or subject to any specified condition, and

(c) may, in particular, except where the power is a power to make rules, make different provision for different areas."

12. The Claimant fairly states that the Secretary of State did not always rely on Sections 8 and 272(7) of the 2006 Act as the relevant powers. Nevertheless, that is now the basis of the Secretary of State's analysis.

The 2005 Directions

13. The 2005 Directions were originally made pursuant to powers conferred by Sections 16D(1), 17 and 126(4) of the 1977 Act. The Directions were amended in 2009 and subsequently pursuant to the provisions of the 2006 Act. In their current form the relevant passages within the Directions read as follows:

> "**Functions in relation to the transplantation of organs and tissues**
>
> 3(1) In order to promote or secure the effective transplantation of organs and tissues for the purposes of the health service, the Secretary of State directs NHSBT [The Interested Party]–
>
> (a) to provide an organ and tissue matching and allocation service, having regard to the need to ensure the –
>
> (i) maximum and most effective use of organs and tissues;
>
> (ii) safety of persons and their survival rates; and
>
> (iii) equity and integrity of the organ sharing system;
>
> (b) to maintain a list of persons who are in need of or are considered suitable for an organ or tissue transplant and to determine the criteria for inclusion on such list;
>
> …
>
> **Functions in relation to the allocation of organs for transplantation**
>
> 4(1) Subject to sub-paragraphs (2), (3) and (4) of this paragraph, the allocation of organs for the purposes of transplantation under paragraph 3(1) and sub-paragraph (1), NHSBT shall have regard to guidance issued by the Department of Health on the allocation of organs for the purposes of transplantation which is published before 30th March 2010 and, in order to give effect to that guidance, may allocate organs otherwise than under the Schemes. [NHS Blood and Transplant (England) (Amendment) Directions 2010]

(2) No person in Group 2 shall receive an organ for which there is a clinically suitable person in Group 1.

(3) Group 1 shall comprise –

(a) persons ordinarily resident in the United Kingdom;

(b) persons who are –

(i) members of Her Majesty's United Kingdom Forces serving abroad;

(ii) other Crown servants employed in the right of Her Majesty's Government of the United Kingdom having been recruited in the United Kingdom and who are serving abroad;

(iii) employees, recruited in the United Kingdom, of the British Council or the Commonwealth War Graves Commission and who are employed abroad;

or the spouse, civil partner or any child under the age of nineteen of any person falling within sub-paragraphs (i) to (iii) above; [NHS Blood and Transplant (England) (Amendment) Directions 2005]

(c) persons who are entitled under Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to medical treatment in the United Kingdom;

(d) persons entitled by virtue of a bilateral reciprocal health agreement or the European Convention on Social and Medical Assistance 1954 to medical treatment in the United Kingdom: [NHS Blood and Transplant (England) (Amendment) Directions 2009]

(e) persons ordinarily resident in the Channel Islands. [NHS Blood and Transplant (England) (Amendment) Directions 2009]

(4) Group 2 shall comprise persons who do not come within the categories of persons listed in Group 1."

14. The Claimant does not suggest that the relevant statutory provisions underpinning the 2005 Directions were materially different from the current statutory provisions under which they have been amended and maintained.

The Claimant's Submissions

15. The Claimant makes a sequence of connected submissions summarised as follows:

> "The Claimant contends, when properly construed, sections 8 and 272(7) do not empower the making of the Directions, and that the Defendant's interpretation is:
>
> (i) Contrary to the express words in section 272(7) of the 2006 Act;
>
> (ii) Contrary to the aim and purpose of the 2006 Act as set out in section 1;
>
> (iii) Contrary to the principle of statutory construction that unless the contrary intention appears, law applies to all within the territory;
>
> (iv) Contrary to the principle of statutory construction, *expression unius* (sic), that if legislation contains an express exception or exclusion for situation A, one must assume that situation B is not excepted or excluded in the absence of express provision to that effect; and
>
> (v) Contrary to the principle of legality."

16. The Claimant further emphasises that this is not a case focused on the policy consequences that flow from the Claimant's interpretation on the legislation. This is not a case about the rationality or proportionality of the Defendant's policy; it is simply about the principle of *ultra vires*. If that interpretation is correct, the Claimant submits there is a compelling constitutional reason for the Court to make such a finding, namely upholding the supremacy of Parliament over the executive, see Lord Neuberger in *R (Public Law Project) v Lord Chancellor* [2016] AC 1531 ["*PLP*"] at paragraph 23.

17. The Claimant accepts that he is not "ordinarily resident" in England and Wales as he is not lawfully resident (see *R (Arogundade) v Secretary of State for Business, Innovation and Skills* [2013] EWCA Civ 823).

18. The Claimant has encountered significant complications in relation to access for his kidney dialysis. The evidence suggests that, as someone who has been on dialysis for a decade, the complications are real. The most recent letters from treating doctors (of July and September 2015) confirm that the Claimant does not require a transplant on an urgent basis, and he is surviving reasonably well on dialysis, but that there are "clear limitations for further access". The effect of the 2005 Directions is that, even if dialysis were to cease to be a realistic option, the Claimant will be placed in Group 2 with very limited access to organs for transplantation, so that in all probability there is no practical prospect of transplantation in the UK. Transfer to Group 1 would not guarantee a kidney transplant will be forthcoming, but it would mean that the Claimant would be on an equal footing with those others who are in Group 1, in particular those who are ordinarily resident in the United Kingdom, and access to organs for transplantation would be established simply on clinical need and suitability.

19. The Claimant submits that, subject to special provision for charging, the scheme of the 2006 Act is that a comprehensive health service is designed for all. The phrase "the people of England" in Section 1(1)(a) of the 2006 Act does not operate to confine the obligations of the Secretary of State. The Claimant relies on the specific provisions for Clinical Commissioning Groups ["CCGs"]. Section 1L of the 2006 Act created CCGs, which have the function of arranging for the provision of services for the purposes of the Health Service in England. The duties of CCGs as to commissioning health services are set out at least in part in Section 3 of the 2006 Act, which reads in its relevant parts:

> **"3. Duties of clinical commissioning groups as to commissioning certain health services**
>
> (1) A clinical commissioning group must arrange for the provision of the following to such extent as it considers necessary to meet the reasonable requirements of the persons for whom it has responsibility—
>
> (a) hospital accommodation,
>
> (b) other accommodation for the purpose of any service provided under this Act,
>
> (c) medical, dental, ophthalmic, nursing and ambulance services,
>
> (d) such other services or facilities for the care of pregnant women, women who are breastfeeding and young children [as the group considers] are appropriate as part of the health service,
>
> (e) such other services or facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness [as the group considers] are appropriate as part of the health service,
>
> (f) such other services or facilities as are required for the diagnosis and treatment of illness.
>
> (1A) For the purposes of this section, a clinical commissioning group has responsibility for –
>
> (a) persons who are provided with primary medical services by a member of the group, and
>
> (b) *persons who usually reside in the group's area* and are not provided with primary medical services by a member of any clinical commissioning group." [*emphasis added*]

20. The Claimant emphasises the significance of the phrase "persons who usually reside in the group's area" italicised above as establishing the generality of the scheme of the Act to those resident, not "ordinarily" resident. Section 3(1)(D) of the 2006 Act provides that regulations "may provide" that sub-Section 1A does not apply "in relation to persons of a prescribed description" and thus regulations (as opposed to directions) might legally exempt such persons from the obligations of the CCG. Regulations have been made under Section 3(1)(D) of the 2006 Act. These are the National Health Service (Clinical Commissioning Groups – Disapplication of Responsibility) Regulations 2013 ["the 2013 Regulations"], prescribing the persons in respect of whom a CCG does not have the responsibility in relation to its duty to commission services. There is no exclusion for persons not ordinarily resident in the United Kingdom. Regulation 3 of the 2013 Regulations defines "usual residence" without any reference to immigration status.

21. It follows that there is no general exclusion from the provision of NHS services by CCGs for those not ordinarily resident in the United Kingdom. Once again, that is subject to the power and obligation to charge patients not ordinarily resident, that statutory power being contained in sections 1(4) and 175 of the 2006 Act.

22. The Claimant relies on the fact that nothing in Section 28 of the 2006 Act, which grants the Secretary of State the power to establish a Special Health Authority (such as the Interested Party) empowers a Special Health Authority to differentiate between patients on the ground of their lawful or ordinary residence. Nor is there any such express provision in Section 272(7). The Claimant submits that Section 272 is a procedural provision, setting out how the directions and orders which are permitted to be made by Section 8 are to be made. Section 272, it is said, does not purport to extend the ambit of Section 8. Critically, the Claimant submits that the reference to "specified exceptions" and to "specified cases or classes of case" is to be understood as a reference to those exceptions or cases which are already specified in the 2006 Act or implied by its purposes. Absent such specification, Section 272(7) cannot be used to cut down what would otherwise be the ambit of the 2006 Act.

23. The Claimant rejects any contention that the language of Section 1(1), referring to "the people of England", has the effect of confining the objects of the statute to those lawfully resident or ordinarily resident in England. There is a strong presumption, as set out in *Bennion on Statutory Interpretation,* 6th Edition (2013), Section 129 that "an enactment applies to foreigners … within its territory as it applies to persons … within that territory belonging to it". This formulation was approved by Lord Neuberger in *PLP* (*supra*) at paragraph 34. The existence of the charging provisions in Section 175 of the Act and the express distinction between the groups who may be charged are, says the Claimant, further indications that the duties to provide such services must be to all within England. The Claimant further relies on the principle *expressio unius exclusio alterius*. The fact that there is an express power to exclude groups from the services offered by CCGs, but no such express power in relation to the obligations of special health authorities, should lead to the interpretation that such a power was not implied by Parliament.

24. Finally, the Claimant submits that this case involves fundamental rights at common law: the right not to be submitted to degrading treatment (see *AKJ v Commissioner of Police for the Metropolis* [2013] 1 WLR 2734) and the common law right to life (see *R v Secretary of State for the Home Department ex parte Bugdaycay* [1987] AC 514).

The Defendant's submission that there is an implied power, as the Claimant phrases it, "authorising … directions to exclude people in greatest clinical need from access to a transplant in favour of those with a lesser clinical need" is contrary to the principle that fundamental rights cannot be overridden by general words: see *R (Ingenious Media Holdings PLC) v Commissioners for Her Majesty's Revenue and Customs* [2016] UKSC 54.

The Defendant's Submissions

25. The Defendant begins by emphasising the very general nature of the overall purpose of the 2006 Act as expressed in Section 1. The obligation is to "continue the promotion in England of a comprehensive health service" (Section 1(1)) and the Secretary of State's obligation is to "exercise the functions conferred by this Act so as to secure that services are provided in accordance with this Act" (Section 1(2)).

26. Authoritative guidance on the Secretary of State's duties under Section 1 of the 2006 Act is set out in *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213. In that case, the Court of Appeal was addressing the meaning of Section 1 of the National Health Service Act 1977, which was for all material purposes identical. The Court interpreted Section 1 of the 1977 Act as follows:

> "22. The 1977 Act is a consolidating Act. Section 1(1) places upon the Secretary of State a duty to continue to promote a comprehensive health service. It sets out the target which the Secretary of State should seek to achieve in the following terms:
>
> > "1(1) It is the Secretary of State's duty to continue the promotion in England and Wales of a comprehensive health service designed to secure improvement – (a) in the physical and mental health of the people of those countries, and (b) in the prevention, diagnosis and treatment of illness, and for that purpose to provide or secure the effective provision of services in accordance with this Act."
>
> It will be noted that Section 1(1) does not place a duty on the Secretary of State to provide a comprehensive health service. His duty is "to continue to promote" such a service. In addition the services which he is required to provide have to be provided "in accordance with this Act".
>
> …
>
> 23. It will be observed that the Secretary of State's section 3 duty is subject to two different qualifications. First of all there is the initial qualification that his obligation is limited to providing the services identified to the extent that he considers that they are *necessary* to meet *all reasonable requirements*. In addition, in the case of the facilities referred to in (d) and (e), there is a qualification in that he has to consider whether they are appropriate to be provided "as part of the health service".

> We are not concerned here with this second qualification since nursing services would come under section 3(1)(c).
>
> 24. The first qualification placed on the duty contained in section 3 makes it clear that there is scope for the Secretary of State to exercise a degree of judgment as to the circumstances in which he will provide the services, including nursing services referred to in the section. He does not automatically have to meet *all* nursing requirements. In certain circumstances he can exercise his judgment and legitimately decline to provide nursing services. He need not provide nursing services if he does not consider they are reasonably required or necessary to meet a reasonable requirement.
>
> 25. When exercising his judgment he has to bear in mind the comprehensive service which he is under a duty to promote as set out in section 1. However, as long as he pays due regard to that duty, the fact that the service will not be comprehensive does not mean that he is necessarily contravening either section 1 or section 3. The truth is that, while he has the duty to continue to promote a comprehensive free health service and he must never, in making a decision under section 3, disregard that duty, a comprehensive health service may never, for human, financial and other resource reasons, be achievable. Recent history has demonstrated that the pace of developments as to what is possible by way of medical treatment, coupled with the ever increasing expectations of the public, mean that the resources of the NHS are and are likely to continue, at least in the foreseeable future, to be insufficient to meet demand.
>
> 26. In exercising his judgment the Secretary of State is entitled to take into account the resources available to him and the demands on those resources. In *R v Secretary of State for Social Services and Ors ex parte Hincks* [1980] 1 BMLR 93 the Court of Appeal held that section 3(1) of the 1977 Act does not impose an absolute duty to provide the specified services. The Secretary of State is entitled to have regard to the resources made available to him under current government economic policy."

27. There is, therefore, no direct obligation to provide a "comprehensive health service" to everyone in England. It appears to be uncontroversial that the Secretary of State had the power under Section 28 of the 2006 Act to establish the Interested Party as a Special Health Authority, and the power under Section 7 of the 2006 Act to "direct a Special Health Authority to exercise any functions of the Secretary of State". Equally, it is uncontroversial that the Secretary of State has lawfully delegated the relevant functions to the Interested Party under Article 3 of the 2005 Order, by what is now paragraph 7C.

28. It is further uncontroversial that the Secretary of State may give directions to a Special Health Authority, as he has done to the Interested Party, pursuant to Section 8 of the 2006 Act, that power extending to the exercise by a Special Health Authority "of any functions". The Secretary of State lays emphasis on Section 8(3), and on the breadth of the power to give directions:

> "**Section 8(3)**
>
> Nothing in provision (*sic*) made by or under this or any other Act affects the generality of subsection (1)."

29. The Secretary of State also lays emphasis on the breadth of the power set out under Section 272(7) of the 2006 Act. The Secretary of State submits that the powers under these two sections are substantive, not merely procedural. The Secretary of State is authorised under Section 272(7) to make "different provision for different classes of case". That is precisely what the Secretary of State says he has done in the instant case. The power falls firmly within the *vires* of the 2006 Act.

30. It follows, says the Secretary of State, that there is no duty to provide a comprehensive free health service, or indeed a comprehensive health service: the duty is to promote the same (for the people of England). The Secretary of State emphasises the relevance of resources to the duties of the Secretary of State and the exercise of his powers, whether delegated or not. The relevance of resources is undiminished by the fact that the Secretary of State's duties under Section 3 are now discharged by Clinical Commissioning Groups.

31. This claim no longer contains any kind of challenge to the rationality of the Secretary of State's policy as represented by the Directions of 2005. The Secretary of State in effect submits that the policy formulated here demonstrates why Parliament must be taken to have intended the Secretary of State to have very wide powers and very wide discretion in the provision of health services. Mr Hare QC emphasises that organs for transplant are a uniquely limited resource and one that cannot be expanded by spending additional money. The availability of organs for transplant depends on the willingness of donors, and the allocation of donated organs must take into account the reasonable motivation and expectation of donors. It is established, in the view of the Secretary of State, that the expectation of donors has been and is that they should be allocated first to those lawfully resident in the country. The Secretary of State is further entitled to have regard to the need to discourage "organ tourism". The scope of the Secretary of State's discretion to give directions stipulating "different provision … for different classes of case" (in Section 272(7)) must be read and given effect in this context.

32. The Defendant says that the Claimant's reliance on the maxim *expressio unius exclusio alterius* is inappropriate, when comparing the provision of services and the charging for services provided. This is not a comparison of like with like. The fact that Section 175 of the 2006 Act makes specific provision for charging those "not ordinarily resident" does not carry any implication for the interpretation of Section 272(7) of the 2006 Act. The provision of services and charging for services are discrete.

33. Mr Hare QC also argues that the obligations of CCGs to provide services to "persons who usually reside in the Group's area" (Section 3(1)(A) of the 2006 Act) are also irrelevant. CCGs are local bodies. There are 209 of them in England. It is quite unsurprising that their responsibilities are defined (at least in part) by reference to the geographical area for which they hold responsibility. Their responsibilities carry no implication for the national criteria to be followed when considering prioritisation of organ allocation. CCGs carry no responsibility for making arrangements in relation to the supply of organs for transplantation, the latter being delegated by the Secretary of State to the Interested Party or being held by NHS England, a separate statutory body. When the Secretary of State's functions under Section 3 of the 2006 Act were transferred to CCGs, paragraph 7C of Schedule 1 of the 2006 Act was required to ensure that the Secretary of State continued to have responsibility for facilitating tissue and organ transplantation. This provision is irrelevant to the Secretary of State's discretion and powers under the 2006 Act.

34. The Secretary of State adds that the Claimant's reliance on *PLP* is misplaced. That decision concerned the interpretation of a different statute, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ["LASPO"]. The decision was concerned with the purported exercise of delegated legislative powers to amend primary legislation, contrary to the provisions of Sections 9 and 11 of the LASPO and contrary to guidance issued by the Ministry of Justice itself (*PLP* paragraphs 23-37). The legislative context of the *PLP* case was entirely different and cannot assist in the interpretation of the 2006 Act.

35. For those reasons, Mr Hare QC submits that the 2005 Directions not only represented rational and defensible policy, but their promulgation was clearly within the powers of the Secretary of State.

Matters arising since the hearing

36. Following the conclusion of the hearing before us, and in response to a question from the bench during the hearing, the Defendant filed a "Post Hearing Note on NHS Services". In the Note, the Secretary of State confirms that he has not identified any other example of distinctions being drawn within the NHS between recipients of health care (as opposed to care without charge). The single example of distinction in treatment, other than on grounds of clinical need, is the NHS policy in relation to military veterans ("the Military Covenant"). Veterans are entitled to priority access to hospital, primary or community care for conditions associated with their service in the armed forces. This does not entitle them to priority over those with greater clinical need, but does mean that a veteran will be given priority access to treatment over a non-veteran with the same clinical need. This policy has been in force since November 2007, replacing a policy in rather different terms giving priority in treatment to those in receipt of a war pension. The Military Covenant is, however, a policy and not an exercise of the power in Section 272(7) of the 2006 Act.

37. On 14 June 2017 (after the conclusion of our hearing) the Supreme Court handed down judgment in *R (A and B) v Secretary of State for Health* [2017] UKSC 41. The case concerns the provision by the NHS in England of termination of pregnancy to women resident in Northern Ireland, where access to abortion is very much narrower than in the remainder of the United Kingdom. The decision principally turns on the 2006 Act, and on regulations affecting the provision of services by CCGs, to whom

medical services were devolved in April 2013 by the Health and Social Care Act 2012. As noted above, CCGs have responsibility for the provision of "medical services" to persons registered with a general practitioner in their area, and for persons "usually resident" in the area, if not registered with a GP in another area. Due to a specific disapplication in regulations which does not concern us, women usually resident in Northern Ireland do not fall within the responsibility of a CCG. However, there is a power under Section 3A of the 2006 Act to arrange for services for such Northern Irish women who register temporarily with a GP in the relevant area, and that power is not caught by the disapplication of the duty. The Court noted (paragraph 16) that before the reorganisation in 2012/2013, the Secretary of State already had that power. In neither period has it been exercised to permit Northern Irish women who come to England, and who register temporarily with a GP, to be provided with NHS medical services in the form of a termination of pregnancy. The case concerned the legality of the continuing decision not to exercise that power.

38. It will be evident that a number of different considerations arose in the *R(A and B)* case. There was no dispute about the power in question. The Appellants argued that the decision not to exercise the power turned on an irrelevant consideration (respect for the different devolved administrations in the United Kingdom and the differing criminal laws concerning abortion), and was irrational. The second principal argument was that the decision represented a violation of ECHR Article 14, because it constituted unlawful discrimination, based on the "other status" of the Northern Irish women, and had an important effect on their private lives (Article 8). The majority in the Supreme Court (Lords Wilson, Reed and Hughes) rejected these arguments, and found the decision not to exercise the power to be lawful. Lord Kerr dissented broadly. Baroness Hale also dissented, although on grounds specifically turning on the right of women to autonomy.

39. The Court also divided on the construction of Section 1 of the 2006 Act. The majority read the two parts of subsection 1 together, so that duty encompassed the "promotion in England of a comprehensive health service designed to secure improvement … in the prevention, diagnosis and treatment of physical and mental illness [of the people of England]". Lord Kerr and Lady Hale both rejected that point. However, the majority interpretation is binding on us (or if not part of the *ratio decidendi*, then of the strongest persuasive authority).

40. Lord Wilson considered the meaning of the phrase "of the people of England". He considered in particular the views of Ward LJ in the *R (YA) v Secretary of State for Health* [2009] EWCA Civ 225, [2010] 1 WLR 279, where Ward LJ suggested that the reference is to those who are "part and parcel of the place". Lord Wilson (with the agreement of the others in the majority) said:

> "I agree, and suggest, more simply, that it is to the people who live in England." (paragraph 10)

The Claimant submits in a letter the Supreme Court decision in *R (A and B)* supports its contention, since the Claimant does indeed live in England. I deal below with the case of *R (A and B)*, and with this contention.

Conclusions

41. We agree with the observations of King J, at first instance in *R (A and B)*, that the duty set down in Section 1 of the 2006 Act is a "target duty", and as such gives emphasis and colour to the more specific duties and powers of the Secretary of State under the Act. As Lord Wilson said in *R (A and B)* at paragraph 9 regarding Section 1:

> "It identifies the general objectives by reference to which the Respondent [the Secretary of State for Health] must exercise his functions under the Act. …[H]e must (in the previous version of subsection (2)) provide services in accordance with the Act and (in the current version of it) exercise his function so as to secure that they are so provided."

42. The question of unlawful residence in England did not arise in *R (A and B)*: any Northern Irish woman who travelled to England and registered temporarily with a general practitioner would, of course, do so lawfully. It is, thus, not part of the ratio of the majority in the Supreme Court in *R (A and B)* whether all of the analysis of Ward LJ in *R (YA)* as to lawful residence was correct.

43. The key passage from Ward LJ's judgment in *R (YA)* to which Lord Wilson referred is the following:

> "Here the statute in need of construction is the 2006 NHS Act. As set out at [8] above, the Secretary of State's duty prescribed by section 1 is to continue the promotion in England of a comprehensive health service designed to secure improvement in the health "of the people of England". Note that it is the people *of* England, not the people *in* England, which suggests that the beneficiaries of this free health service are to be those with some link to England so as to be part and parcel of the fabric of the place. It connotes a legitimate connection with the country. The exclusion from this free service of non-residents and the right conferred by section 175 to charge such persons as are not ordinarily resident reinforces this notion of segregation between them and us. This strongly suggests that, as a rule, the benefits were not intended by Parliament to be bestowed on those who ought not to be here." (Paragraph 55)

44. As can be seen, Lord Wilson simplified Ward LJ's interpretation of the phrase "the people of England" to "those living in England". We have found this a little difficult, since the thrust of Ward LJ's judgment is that the people "of" England connotes more than mere, or temporary, or illegal residence. However, the main point is that Lord Wilson's approval of the judgment of Ward LJ itself is explicit. In our view, it follows that in that respect the interpretation of Ward LJ must be taken to be correct. It follows that the intention of Parliament in setting the "target duty" for the Secretary of State must have been to stipulate a focus on promotion of health and provision of services for those who have "a legitimate connection with the country".

45. It is clear that the majority in *R (A and B)* considered that the target duty in Section 1 applied both to the promotion of physical and mental health (Section 1(1)(a)) and the treatment of illness (Section 1 (1)(b)).

46. It is also clear that the Secretary of State has a critical role and a wide discretion as to the allocation of resources. This is hardly in issue, and can be inferred from a number of provisions within the 2006 Act, in particular Section 3 (as emphasised in *R v. North and East Devon Health Authority ex parte Coughlan* (*supra*)). This seems to us of some importance when considering a resource issue, and *a fortiori* when considering such an unusual and scarce resource as the supply of organs for transplantation.

47. We do not accept that the phrase in Section 3(1A) defining the responsibility of CCGs to those who "usually reside in the … area" is definitive as to the powers of the Defendant in this context. The general function of a CCG is set out in Section 1l(2) of the 2006 Act is:

> "arranging for the provision of services for the purposes of the health service in England in accordance with this Act."

That is clearly a more limited function than those of the Defendant. The CCGs are local organisations and the locally focussed definitions of their responsibility under Section 3(1A), including but not exclusively to those who "usually reside" in their area, are wholly unsurprising. As the decision in *R (A and B)* implies, if the Secretary of State were unlawfully to restrict those who received services from the CCGs, in conflict with the responsibilities laid on them in Section 3(1A), then a claim against him would succeed. But we do not see that the relevant definition in Section 3(1A) binds the Secretary of State in respect of services not delivered by the CCGs.

48. We accept Mr Hare QC's argument that the position of a Special Health Authority is distinct. The absence of a disapplication pursuant to the power under Section 3(1D) of one or more of the responsibilities of CCGs, such as arose in *R (A and B)*, seems to me not to the point. The national system of allocation of organs for transplantation is not a service provided by a CCG to anyone, but is the sole responsibility of a Special Health Authority expressly constituted for that purpose.

49. The distinction is underpinned by the facts here. Despite his immigration status, the Claimant has been and is being afforded intensive and no doubt expensive medical treatment on the NHS in the form of regular kidney dialysis. This service is supplied to him as part of the responsibility of the relevant CCG.

50. The power under Section 7 to give directions to a Special Health Authority "about its exercise of any functions" does not appear to us to be limited by its language. No doubt it is limited by the terms of Section 1 of the 2006 Act. To take an unlikely but germane example: if the Secretary of State directed the Interested Party to offer preferential consideration in the supply of organs for transplantation to residents of countries <u>other than</u> England, that would likely be considered *ultra vires*, by reference to Section 1. But it does not seem to us that the power to direct is limited in any other way, subject to the usual issues of rationality, consideration of relevant factors, and so forth. For that reason the absence of a specific provision in Section 28 of, or Schedule 6 to, the 2006 Act to permit the distinction made by the Secretary of State's 2005 Direction does not seem to us determinative.

51. Equally, the provisions for charging those who are not ordinarily resident for NHS services do not seem to us determinative. As Mr Hare QC argues, charging is a discrete issue. We agree with the Claimant that there is no general prohibition "on the use of NHS services by those not ordinarily resident in the United Kingdom". Nor however is there any obligation to treat an individual who is not "ordinarily resident". We agree with Ms Mountfield QC that it is at first blush curious that the definition of an "overseas visitor" in Regulation 2 of the National Health Services (Charges to Overseas Visitors) Regulations 2015 is "a person not ordinarily resident in the United Kingdom". However, that is a very different matter from defining "a person not ordinarily resident" as "an overseas visitor". The Regulation is perfectly consistent with the Claimant's agreed status as not "ordinarily resident" in law, pursuant to Section 39 of the Immigration Act 2014.

52. As we have noted above, the Claimant submits that the legislation, and the Defendant's interpretation of the legislation, override fundamental rights at common law, something that can only be achieved (given the principle of legality) by direct and explicit words. However, in our judgment no fundamental common law right is overridden, by the legislation or by the interpretation of it which we have endorsed. The common law right to life does not entail a right to medical treatment to save life: such a right has never been articulated. If such a common law right existed and bore on the Claimant's case, then the long established authority on the necessary extremity of a Claimant's condition before ECHR Article 3 is breached would have been redundant: see *D v United Kingdom* (1997) 24 EHRR 423 and *N v SSHD* [2005] UKHL 31 [2005] AC 296. There is certainly no authority establishing a common law right to one form of life-saving treatment (dialysis) rather than another (transplant). No question of degrading treatment arises here. In short, there are no fundamental rights at common law which are overridden either by this legislation or the interpretation of the legislation advanced by the Defendant.

53. In the end, the critical point in our judgment is that the power to give directions to NHSBT under Section 8 and Section 272 of the 2006 Act is not limited by any provision other than Section 1 of the Act. We do not accept that the 2005 Direction is in conflict with that "target duty". It is therefore not *ultra vires*. Since there is no longer any human rights challenge to the Directions, and no rationality challenge, we dismiss the claim for judicial review.