OUTER HOUSE, COURT OF SESSION

[2021] CSOH 86

P127/21

OPINION OF LORD HARROWER

In the cause

Y

Petitioner

for

JUDICIAL REVIEW of a decision of Healthcare Improvement Scotland

Pursuer: Walker QC, Byrne; Harper MacLeod LLP
Defender: Gardiner; NHS Scotland Central Legal Office

18 August 2021

Introduction

[1] The petitioner is a hospice. The respondent is Healthcare Improvement Scotland, a public body established by section 10A of the National Health Service (Scotland) Act 1978, in order to regulate health care services in Scotland, including independent health care services of the sort provided by the petitioner. The petitioner seeks judicial review of a decision by the respondent said to be contained in a draft report, which the respondent intends to publish or at least make publicly available. The draft report refers to a complaint made against the petitioner. The central issue in this case is whether, as a result of representations made by the respondent at a meeting following that complaint, the petitioner had a

legitimate expectation that the complaint would not be published by the respondent. For reasons given at the end of this opinion, I have acceded to the petitioner's motion to anonymise in this opinion all references to the hospice.

Background

[2] On 20 March 2019, a team of the respondent's inspectors visited the hospice operated by the petitioner ("inspection 1"). The purpose of the visit was to investigate a complaint (the "complaint"). At the end of the visit, the inspectors met with representatives of the petitioner. Minutes of that meeting were produced by the petitioner in these proceedings, and although they had not previously been seen by the respondent, their accuracy was not disputed. The minutes record that the following exchange took place, in which "EM" and "TB" represented the petitioner and respondent respectively:

> "EM: Finally, in terms of when you produce your report and various letters, obviously we have never been through anything like this before so what ends up in the public domain?
>
> TB: At the moment, nothing. We have a Consultation out at the moment and part of this is to, in the future, post complaint investigations and outcomes online. From the responses we have received so far to the consultation, there are no concerns about posting online. We are also fleshing out the review process because in the future complainants and service provider will have the right to a review process. But it will be 1 June before we go live. It would only be the family who would go to the public domain. You will both see identical letters and if there is something factually inaccurate let us know. But we will not be putting anything in the public domain.
>
> EM: Okay. Thank you".

[3] In March 2019 the respondent partially upheld the complaint. It imposed a requirement on the petitioner to involve individuals holding a welfare power of attorney in discussions relating to the care of patients. It also made a number of recommendations relating to room-temperature control, the drawing up of tools for the assessment of pain,

nutrition and pressure ulcers, and the provision of information about the petitioner's complaints policy. The respondent's decision partially upholding the complaint was not published.

[4] Between 31 July 2019 and 1 August 2019, the respondent carried out an unannounced inspection of the petitioner's hospice ("inspection 2"). The inspection investigated action taken by the petitioner to meet the requirement and recommendations issued following inspection 1. The respondent issued the petitioner with a draft report (the 2019 report) which referred to the complaint and noted that the requirement and one of the recommendations had not been met. The 2019 report has not been published pending the outcome of separate judicial review proceedings brought by the petitioner. I was informed that the grounds of review in these other proceedings did not initially include reference to any unfairness on the part of the respondent regarding the legitimate expectation that the petitioner now claims in the present proceedings to have acquired in respect of the complaint or inspection 1. However, a ground reflecting that concern was included by an amendment to the petition.

[5] On 9 December 2020 the respondent carried out a further, announced, inspection of the hospice ("inspection 3"). The purpose of the inspection, as expressed by the respondent in an email sent on 26 November 2020 to the petitioner, was "to make sure the service [was] delivering care safely to patients, in light of the COVID-19 pandemic". On 27 January 2021, the respondent issued to the petitioner its draft report in relation to inspection 3 (the "2021 report"). The 2021 report referred to the complaint and noted that the requirement and all of the recommendations had been met. The 2021 report is the subject of the present judicial review proceedings.

Law and policy relating to complaints

[6] Before turning to the parties' arguments, it is convenient to summarise certain aspects of the law as well as the respondent's policy relating to inspections into complaints about independent health care service providers.

[7] The statutory basis for the respondent lies in section 10A of the National Health Service (Scotland) Act 1978. In terms of the 1978 Act, the respondent must exercise its functions in accordance with certain principles, which include the protection and enhancement of the safety and wellbeing of everyone who uses independent health care services (section 10B). It must "provide information to the public about the availability and quality of independent health care services" (section 10E(1)). The respondent may inspect any independent health care service, with a view to reviewing and evaluating the effectiveness of the provision of the services which are the subject of inspection (section 10J). Where an inspection has been completed, it must then "prepare a report on the matters inspected" (section 10N(1)(a)). It must make reports available on request and publicise them as it considers appropriate (section 10N(3)). It must establish a procedure by which a person, or someone acting on his behalf, "may make complaints (or other representations) in relation to the provision to the person of an independent health care service or about the provision of an independent health care service generally" (section 10Z8).

[8] The respondent's policy in relation to inspections was set out in a document titled, *Independent Healthcare Regulation: Inspection Methodology*. It was published in August 2018. It stated that all inspection reports were published on its website, and that inspections were useful for "people who use or are choosing services", as well as "organisations that use or buy independent healthcare services". "Inspection planning" took place every year, and used intelligence from various sources, including previous inspections and complaints.

During an inspection, the respondent would "confirm requirements and recommendations made at previous inspections … and resulting from complaints". The methodology included a timetable within which draft reports would be finalised to ensure their publication no later than 8 weeks following inspection.

The petitioner's argument

[9] Senior counsel for the petitioner founded on the representations made on behalf of the respondent at the meeting in March 2019, and on the respondent's conduct in not publishing anything regarding the complaint between March 2019 and its 2019 report. Both the express representations and consequential conduct of the respondent separately and cumulatively established a legitimate expectation on the part of the petitioner that any matter concerning the complaint would not be placed in the public domain.

[10] While detrimental reliance was not necessary in order to establish a legitimate expectation, nevertheless there was detrimental reliance in this case. The petitioner's affairs had been disturbed. At the time of inspection 1, the respondent had not instituted any procedure by which the upholding of a complaint or the manner in which it had been dealt with could be challenged by the petitioner. Its only remedy lay in proceedings for judicial review. In reliance on the respondent's representation, the petitioner had lost the chance to bring judicial review proceedings.

[11] There was no good reason to allow the respondent to "resile" from the undertaking. The principle of good administration required the expectation to be preserved. The expectation and its legitimacy had strengthened with the passage of time. The decision to include in the 2021 report the fact of the complaint having been made and upheld was in

defiance of the petitioner's legitimate expectation. There was a clear and unambiguous representation, reliance upon it and detriment.

[12] Separately, senior counsel argued that the scope of inspection 3 giving rise to the 2021 report, as communicated to the petitioner, was to address its performance in the light of the COVID-19 pandemic, and not to follow up on the complaint. To follow up on the complaint in inspection 3 was unfair, irrational and in breach of the petitioner's A1P1 rights.

[13] Senior counsel referred to the following authorities: *Abdi Nadarajah* v *The Secretary of State for the Home Office* [2005] EWCA Civ 1363 at paragraphs 68 and 69; *Save Britain's Heritage* v *Secretary of State for Communities* [2019] 1 WLR 929 at paragraph 36; *Finucane's application for Judicial Review* [2019] HRLR 7, at paragraphs 62-64 and 72; *R* v *North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at [57]; *Asim* v *Secretary of State* [2018] CSIH 41; *Tre Traktörer Aktiebolag* v *Sweden* (1991) 13 EHRR 309; *Bank Mellat* v *Her Majesty's Treasury* [2014] AC 700.

The respondent's argument

[14] In order to found a legitimate expectation, any representation must be clear, unambiguous and devoid of relevant qualification. The question was how, on a fair reading, it would have been reasonably understood by those to whom it was made. The representation was made in the course of an investigation into the complaint. The meeting at which it was made was focussed on the complaint outcome. EM had asked about the family expectations of "outcome" and "sanction". The respondent's representatives had referred to the basis for "upholding or not upholding" a complaint. The immediate context to the representation was provided by a question from EM relating to the respondent's "report and various letters", and what would end up in the public domain. The "report"

referred to the report on whether the complaint would be upheld, and "various letters" referred to letters to the patient's family. The statement – "we will not be putting anything in the public domain" – was plainly a reference to the outcome of the complaint. It could not fairly be read as a "clear, unambiguous" representation "devoid of relevant qualification", that the respondent would avoid putting any reference to the fact that a complaint had been made into the public domain. The 2021 report did not state whether the complaint was upheld or not. It noted a requirement and recommendations. Requirements and recommendations could be made even where a complaint was not upheld.

[15] The reading contended for by the petitioner would have "sat awkwardly" with the respondent's statutory obligations and its own policy. Where the respondent had made requirements and recommendations following a complaint, it was under a statutory duty to follow these up at subsequent inspections, to prepare a report on these inspections, and then to publish the report, or at least to make it available on request.

[16] In any event, TB had prefaced her answer containing the representation with the words, "At the moment, nothing". This referred to the near future. The representation was "relevantly qualified". The respondent's representation could not fairly have been understood as a promise extending into 2021.

[17] Separately, the respondent had already referred to the complaint in its 2019 report. While the petitioner had instituted judicial review proceedings in respect of the 2019 report, the grounds of review did not initially deal with the complaint. By issuing its draft 2019 report, the respondent could not have been clearer regarding its intention to publish. Any expectation the petitioner may have acquired had ceased to be reasonable or legitimate at that moment.

[18] Regarding the petitioner's alternative argument based on the scope of inspection 3, the words in the respondent's email on which the petitioner relied were that, "The purpose of the inspection is to make sure the service is delivering care safely to patients, in light of the COVID-19 pandemic". These words did not limit the inspection's scope to COVID-19. The phrase "in light of COVID-19" made it clear that COVID-19 was the context or backdrop. The petitioner was wrong to read "in light of" as if it meant "in respect of". This was reinforced by the comma separating "[t]he purpose of the inspection is to make sure the service is delivering care safely to patients" from "in light of the COVID-19 pandemic". Any other interpretation would have put the respondent in breach of its own policy, which required it to follow up on complaints at subsequent inspections. In any event, the respondent was addressing the petitioner's concerns expressed in an email regarding logistical matters. One would not have expected such a dramatic restriction in the scope of the inspection to be revealed in this manner.

[19] There was an additional objection raised by counsel, namely, that while the petitioner had identified where the decision under challenge could be found, that is, in the 2021 report, it had failed adequately to identify what that decision actually was.

[20] Counsel referred to the following authorities: *R (Bancoult)* v *Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] AC 453, *per* Lord Hoffman at para 60; *R* v *Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545; *R (Association of British Civilian Internees: Far East Region)* v *Secretary of State for Defence* [2003] QB 1397 *per* Dyson LJ at para. 56).

Decision

[21] I will deal firstly with the respondent's criticism that the petitioner has failed adequately to identify the decision being challenged. As I understand it, by issuing the 2021 report in draft to the petitioner, the respondent had effectively announced its intention to put the contents of that report, including its reference to the complaint, in the public domain. That is the decision under challenge, and there is no substance to this aspect of the respondent's submissions.

[22] That incidental matter aside, I consider that the respondent's submissions are well founded on the central question of whether the petitioner can be said to have acquired a legitimate expectation that the respondent would not publish anything relating to the complaint. In particular, whatever the respondent's representations and conduct relied upon by the petitioner, these require to be understood against the relevant background of law and public policy against which the respondent is obliged to conduct its affairs. The central principle, in accordance with which the respondent must exercise its functions, so far as relevant to this case, is to protect and enhance the safety and wellbeing of all persons who use independent health care services (1978 Act, section 10B). In accordance with that principle, the respondent has a duty to provide information to the public about the quality of independent health care services (section 10E). It has powers of inspection (1978 Act, section 10J). It has an obligation to prepare reports on matters inspected, and, at the very least, to make such reports available for inspection by any person, and to take such steps as it considers appropriate for publicising any report (section 10N(1) and (3)).

[23] Having regard to the respondent's statutory obligations, I would go so far as to doubt whether it was within the respondent's power to make any representation, while still at the inspection stage, that it would not publish its report on the matters being inspected in

March 2019 (inspection 1). At the very least, any such report would have to be made available for inspection by any person at its offices. Arguably, that requirement falls just short of publication, and perhaps also short of being "put in the public domain". However, the respondent is also obliged to consider what steps would be appropriate for publicising any report. In this case, the representation founded upon was made at a meeting held on the very day of the inspection. Not only had no report yet been completed, but, as is apparent from the minutes of that meeting, the respondent's investigation was far from completion. Arguably, therefore, any promise not to put its eventual report on the matters inspected into the public domain would have been premature, and *ultra vires* the respondent's statutory obligation to keep open for consideration whatever publicity that report should ultimately be given. However, counsel for the respondent did not go this far in his submissions, and not having been addressed by parties on whether any legitimate expectation could have been acquired on the basis of an *ultra vires* representation, I do not propose to consider the matter further here.

Clear, unambiguous and devoid of relevant qualification

[24] Rather, the respondent's submission was that, on no fair reading of the minutes, could the respondent reasonably have been understood by the petitioner to have been making a clear, unambiguous representation that was devoid of relevant qualification. I agree. What was said at the meeting in March 2019 must be understood in its proper context, and that included the public policy and statutory duties outlined above, as well as the actual policy on inspections and reports adopted by the respondent. If the legitimate expectation contended for by the petitioner was not actually inconsistent with the respondent's statutory duties, as I have suggested it might have been, then at the very least

it "sat awkwardly" with them, as the respondent argued. No such expectation could ever reasonably have been acquired. In any event, in the context of the discussions that took place, the respondent need only be understood as having promised not to divulge the outcome of their investigation into the complaint; the respondent's representation did not unambiguously extend also to such requirements and recommendations as might be set by the respondent, whether or not the complaint was upheld. Standing the respondent's statutory obligations, and its own policy on inspections, nor could its representation reasonably be given such an expansive interpretation.

[25] Counsel for the respondent had further submitted that the representation was relevantly qualified by the words, "At the moment, nothing". I have some difficulty with his submission that this should be taken to be referring to the "near future", and also with whatever the "near future" might be in this context. However, nor do I consider that it would have been reasonable for the petitioner to interpret the representation as binding the respondent for all time coming. The petitioner would have been aware, at the time the representation was made that further inspections would be possible and indeed likely, inspections at which the respondent would "confirm requirements and recommendations made at previous inspections". At such further inspections, the petitioner's intervening response to the earlier requirement set by the respondent would be a new matter to be inspected and reported upon. The respondent could never reasonably have been understood, either by its representation at the meeting, or by not immediately producing a report following inspection 1, as having promised never to refer to the original requirement when carrying out and reporting on subsequent inspections.

[26] This argument is supported by what actually happened following inspection 1. The respondent carried out a further inspection (inspection 2) between 31 July 2019 and 1 August

2019, and reported on it in its 2019 report. Section 1 of that report was headed up, "Progress since our last inspection". It discussed "what the provider had done to meet the requirement we made after out complaint investigation on 20 March 2019". After restating the requirement – that the petitioner "must ensure that it involves individuals with a welfare power of attorney in discussions relating to the care of patients" - it went on to state, "We saw evidence in patient care records that these discussions took place for some patients. However, it was not always clear from patient care records whether a patient had a welfare power of attorney in place. This requirement is not met (see requirement 3)." Requirement 3 was a new requirement which both restates and expands upon the requirement imposed following inspection 1. It said:

> "Requirement 3 – Timescale: immediate
> The provider must ensure that it involves individuals with a welfare power of attorney in discussions relating to the care of patients. In order to do this, the staff must be clear whether or not a welfare power of attorney has been appointed. Documents relating to capacity and power of attorney must be available in the clinical notes."

It is difficult to see how the respondent could have stated this new requirement, arising out of inspection 2, without referring to the original requirement arising out of inspection 1. This example also lends support to the respondent's submission that it is necessary to distinguish between whether a complaint has been upheld or not, on the one hand, and requirements and recommendations, on the other. The investigation into a complaint looks to the past, whereas requirements and recommendations look to the future; as such, they can develop a life of their own, independent of the complaint that occasioned them, and can – indeed must, according to the respondent's policy – become the subject of further investigation.

[27] Senior counsel for the petitioner relied heavily on that part of the inspection methodology that refers to "follow up inspections" in the context of "upheld complaints", suggesting, as I understood him, that because the 2021 report was occasioned by a "follow up inspection", it should be understood as referring to the complaint as having been upheld, in defiance of the petitioner's legitimate expectation. That submission, in my opinion, tended to read the inspection methodology as if it were a conveyancing document. It is perfectly clear from the respondent's policy, read as a whole, that its inspections, whether labelled as "follow up inspections" or not, would confirm requirements and recommendations made at previous inspections.

The failure to challenge the 2019 report on any ground relating to the legitimate expectation

[28] I would not have sustained the respondent's submission that the petitioner had somehow lost his legitimate expectation by failing initially to include any reference to it in proceedings for judicial review relating to the 2019 report. Counsel for the respondent did not seek to argue this point on the basis of waiver or personal bar. Rather, his argument was premised on overall considerations of the reasonableness of the expectation.

[29] Approaching the matter in this way, I consider that detrimental reliance, though not generally necessary to establish a legitimate expectation, may be relevant when deciding whether it has been lost. Where there has been no detrimental reliance, the continuing legitimacy of the expectation may be precarious, and may conceivably be undermined by a failure to take the point when provided with an opportunity to do so. But where, as here, the petitioner argues that, as a result of the representation, he had lost the opportunity to bring judicial review proceedings in relation to the complaint, then if the petitioner had a legitimate expectation at all – and I am here proceeding on the hypothesis that it did – then

its legitimacy had more or less crystallised as a substantive ground of review as at that point. I do not consider that it became less legitimate or less reasonable an expectation simply because the petitioner failed initially to include it as a ground of review in its challenge to the 2019 report.

[30] In any event, as I was informed, this ground of review has since been included by way of an amendment made on 13 May 2021 in the related judicial review proceedings. It may be that the amendment could have been made at an earlier stage, but I received no submissions on that matter, and I would be reluctant effectively to penalise the petitioner for not doing so, particularly having regard to the disruptions caused by the COVID-19 pandemic.

The alleged purpose of inspection 3

[31] The petitioner's final argument was that it was irrational, unfair and in breach of its A1P1 rights for the respondent to have included the complaint in its inspection 3, and in the subsequent 2021 report. In my opinion, there is no substance to this argument, for the reasons given by the respondent.

Disposal

[32] I shall sustain the respondent's third plea-in-law and refuse the petition. As I noted earlier, the petitioner requested that I anonymise this opinion, in order to protect its position should it wish to reclaim. Clearly, if it reclaims, and is ultimately successful in preventing publication of the 2021 report, then its objective will have been undermined by my having identified the petitioner as having been the subject of a partially upheld complaint.

Exercising the inherent jurisdiction of the court to regulate its own procedure, I have therefore acceded to its request. I shall reserve all questions of expenses.