

Legal update

Direct Payments NOT available for the provision of Healthcare Services

The NHS has for many years maintained that the National Health Service Act 2006 (“the Act”), does not enable it to make direct cash payments to patients and a recent High Court decision has very helpfully clarified and confirmed that position. In the case of *R (on the application of Steven Harrison and Valerie Garnham) v Secretary of State for Health (Defendant) and Wakefield PCT, Wakefield Metropolitan District Council, Islington PCT, Islington London Borough Council (Interested Parties) [2009] EWHC 574* the claimants sought to challenge the decisions of their respective PCTs not to make direct payments in respect of their health care on grounds that (1) the policy adopted by the Secretary of State was unlawful as it was based on an erroneous interpretation of the Act and (2) the policy infringed their Article 8 and 14 rights under the European Convention of Human Rights (“ECHR”).

Mr Harrison’s need for a night time carer was assessed following a community care assessment as being a health need for which he sought direct cash payments from his PCT as did Mrs Garnham, following a deterioration in her condition to enable her to continue with the purchase of her care package. In both cases, the relevant PCTs advised that they were unable to accede to those requests as the *NHS Continuing Care Healthcare and NHS-funded Nursing Care Framework Guidance (2007)* did not permit the making of direct cash payments to individuals receiving healthcare services under the Act.

The Court held:

1. Whilst the term *services* is not defined in the Act, for section 1(3) of the Act to have any meaning, the word had to mean the provision of medical services and healthcare services;
2. Medical services have historically been provided directly to the patient and not by means of cash payments and a direct payment could not be a service – to make it one had not been Parliament’s intention and the ability to make such payments was not necessary for the Secretary of State to discharge or carry out his duties under the Act;
3. For a claim to fall within the ambit of the ECHR right it must be very closely connected to it and a remote link will not suffice – here the difference with and without the benefit of cash payments to the claimants was not so substantial as to constitute a very close connection; and
4. There was a significant difference between those receiving community care services and those receiving healthcare services.

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It remains open to PCTs to enter into direct employment arrangements with carers and to consider the setting up of Independent User Trust (following the *Gunter* case). Each case will need to be considered on its own facts.

However, the Health Bill, currently before Parliament, seeks to make provision for direct payments to be made to individuals (via PCTs). The Bill needs to complete its passage through Parliament and become law before this will take effect. In the meantime pilot schemes for personal health budgets are expected to be announced shortly.

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