

Legal Challenge:

The legal challenge concerns

1. The lawfulness of the '*National Framework for NHS Continuing Care and NHS-funded Nursing Care*' (revised in October 2018), issued by the Secretary of State for Health and Social Care
2. The failure on the part of the Secretary of State for Health and Social Care and on the part of NHS England to ensure that there is not an unacceptable risk of unlawful decisions being made by CCG's when making decisions as to eligibility for CHC funding.

The issues:

Issue 1:

The lawfulness of the '*National Framework for NHS Continuing Care and NHS-funded Nursing Care*' (revised in October 2018),

This guidance is issued by the Department of Health and Social Care and is therefore the responsibility of the Secretary of State for Health and Social Care. This 'National Framework' is unlawful in two important respects:

a) It is not consistent with the judgment of the Court of Appeal in the leading case of *R v North and East Devon Health Authority ex parte Coughlan* [2001] QB 213. The Court of Appeal found (at para 118) that applying a lawful approach to her needs, Pamela Coughlan's needs were in a "*wholly different category*" to that which a social services authority could fund and yet it is highly unlikely that she would qualify for CHC funding if assessed under the National Framework. This demonstrates that the bar for eligibility has been placed far too high to ensure that those who should be provided with CHC funding are lawfully assessed and provided with funding from the NHS to meet their needs. Accordingly, in this respect the guidance promulgated in the National Framework is unlawful; and

b) It is internally inconsistent in that both the initial screening process and the Decision Support Tool (DST) are predicated on decisions as to eligibility for Continuing Healthcare (CHC) eligibility being based on the 12 care domains set out in the National Framework (para 136 and Figure 1) whereas para 55 says that an individual has a primary health need (the therefore entitlement to CHC funding) if "*it can be said that the main aspects or majority part of the care they require is focused on addressing and/or preventing health needs*". Whereas CHC funding should be provided where care is provided to a person to prevent a health need arising the assessment process at both the screening and DST stages does not accommodate such CHC needs. In this regard the National Framework is internally inconsistent and/or the screening and DST are unlawful.

Issue 2:

The failure on the part of the Secretary of State for Health and Social Care and on the part of NHS England to ensure that there is not an unacceptable risk of unlawful decisions being made by CCG's when making decisions as to eligibility for CHC funding.

The evidence is overwhelming that consistent and lawful CHC funding decisions are not made. There are three reasons for this:

(1) The significant variation between rates of positive eligibility decisions made by CCG's is startling and cannot be explained by variations in local populations (see paper prepared by Rear Admiral Mathias dated August 2020);

(2) The sharp decline in CHC eligibility since 2015 defies any logical explanation save for a desire to save money which cannot be a lawful reason to deny a person the free NHS care to which they are entitled; and

(3) There is clear evidence that unlawful decisions are routinely made in individual cases. As you will be aware, there is a vast amount of evidence of unlawful decision-making with respect to CHC funding eligibility. This demonstrates that the proposed defendants have failed to ensure that the process for determining eligibility for CHC funding is not tainted by an unacceptable risk, or serious possibility, of unlawfulness and is accordingly unlawful. In this regard the proposed claimant relies on the principles set out by the court in *R(Medical Justice v Secretary of State for the Home Department* [2010] EWHC 1925 (Admin); *R(Refugee Legal Centre) v Secretary of State for the Home Department* [2005] 1 WLR 2219 and *R(Reena Suppiah) v Secretary of State for the Home Department* [2011] EWHC 2 (Admin).

None of the amendments to the National Framework in its latest iteration (October 2018) cure the errors outlined above. Indeed, as the National Framework says at p.3, "*none of the 2018 amendments and clarifications to the National Framework, Practice Guidance, annexes or National Tools are intended to change the eligibility criteria for NHS Continuing Healthcare.*"