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Our ref SR/001070/DST4/BEESELEY/RYA
Date 18 January 2017

Please ensure that our reference is quoted on all correspondence

Dear Sirs

OUR CLIENT : MRS AMANDA BEESLEY

To

Secretary of State for Health

Claimant

Ms Amanda Beesley

Defendant's reference details

NA

Details of the Claimant's legal advisers

Denise Stephens
Partner
Access Legal

Details of the matter being challenged

The Secretary of State's decision to implement the proposals in the Department of Health's "*Infected Blood: Government Response to Consultation on Reform of Financial and Other Support*".

Details of any Interested Parties

NA

The issue

Background to the scheme

During the 1970s and 1980s, several thousand patients across the UK (mostly, but not always, haemophiliacs) who were treated within the NHS with blood products became infected, due to infection in those products, with HIV and/or hepatitis C. The claimant's husband was one of them. Many have since died as a result of the illnesses they contracted. For those who survived, their lives and those of their families and dependants have been profoundly affected. Lord Winston has described it as the worst treatment disaster in the history of the NHS. In 2009, the Archer Inquiry into Contaminated Blood and Blood Products described the infection of so many patients as "a horrific human tragedy". Similar tragedies occurred in a number of other countries.

The affected community and their families, friends and other supporters have long campaigned for a full public inquiry into the tragedy and its causes, and for much more generous payments to be received by sufferers and their dependants than currently are received. Successive governments have declined to establish a statutory inquiry.

In England and Wales it has never been established that anyone was negligent or at fault. One test case brought by a group of sufferers was compromised in the early 1990s. Since 1988, however, the UK government has voluntarily provided support for people affected by HIV and/or hepatitis C through treatment with NHS-supplied blood or blood products. Early on, survivors were collectively of the view that pursuing proceedings in Court would be an unduly protracted process and that, given their foreshortened life expectancy (particularly at a time when HIV treatments were not as effective as they are today), an earlier resolution was to be preferred. For those who have survived longer than they expected, the payments which they (and/or their bereaved partners) receive has proven not to be adequate to address the loss and damage suffered.

Over the years, there has been criticism from different groups of beneficiaries and their representatives about the way that the current system has been set up and operates. This has been clearly set out in various ways, including the independent inquiry chaired by Lord Archer (February 2009); numerous campaigns; the All Party Parliamentary Group on Haemophilia and Contaminated Blood's Inquiry into the current support for those affected by the contaminated blood scandal in the UK (January 2015); letters to the Department of Health and Ministers, meetings with Ministers; Parliamentary debates and questions.

Bifurcation of Scottish and UK schemes

Until recently, the scheme insofar as it applied to victims infected with HIV was operated as a UK-wide scheme and fully funded by Westminster. The scheme insofar as it applied to victims infected with Hepatitis C was also operated as a UK-wide scheme, but funded by Scotland in relation to those infected in Scotland.

In 2009-2015, at the behest of the Scottish government, Lord Penrose carried out a public inquiry into the relevant events, insofar as they applied to those infected in Scotland.

In January 2015, an All Party Parliamentary Group on Haemophilia noted:

"Given that Scotland was at the time not a devolved administration, with Department of Health policy decided at a UK-wide level, the conclusions of the Penrose Inquiry will have implications for policy across the UK.

(...)

We are currently awaiting the publication of the Penrose Inquiry, a Scottish Public Inquiry into the contaminated blood scandal. Although this Inquiry is limited to Scotland, it is looking into pre-devolution events and therefore it is important that the findings of the Inquiry are properly investigated in relation to possible culpability for the scandal across the UK."

On 25 March 2015, the Penrose Inquiry published its final report. As observed by the All Parliamentary Party Group on Haemophilia, although the Penrose inquiry was technically limited to events in Scotland it is nevertheless inescapably the case that there is a very large degree of factual overlap

between the events the Penrose Inquiry reports as having occurred in Scotland, and those occurring in the rest of the UK.

In response to the Penrose Inquiry, the Scottish Government formed a Review Group to consider and make recommendations as to the future conduct of the HIV and Hepatitis-C compensation schemes in Scotland.

In December 2015, the Scottish Review Group recommended, amongst other things, that:

- Schemes in relation to both those infected with HIV and those infected with Hepatitis C should henceforth be operated by Scottish Government, rather than Westminster;
- The annual payments to sufferers of HIV or stage-2 Hepatitis C should be increased from £15,000 per annum (i.e. the amount currently paid in the rest of the UK) to £27,000 per annum, to reflect full-time gross median income in Scotland;
- Bereaved family members of primary victims should receive an annual pension equivalent to 75% of the primary victims' annual payment.

New proposals in England

In January 2016, the Department of Health carried out a consultation on "*Infected Blood: reform of financial and other support*". There was no mention in the consultation document of the results of the 6-year Penrose Inquiry, or of the recommendations of the Scottish review group.

In July 2016, the Department of Health published its "*Infected Blood: Government Response to Consultation on Reform of Financial and Other Support*". The Response made the following proposals, amongst others:

- Those infected with HIV or stage-2 Hepatitis C would receive £15,500 per annum in 2016/17 and 2017/18, and £18,500 per annum in 2018/19;
- Bereaved family members will receive a one-off £10,000 payment, plus access to a discretionary support scheme.

It is thus the case that those infected in England or Wales with either HIV or second stage Hepatitis C will be significantly worse off than those infected in Scotland, simply by virtue of the country in which they were infected.¹

The Response noted, at paragraph 1.11, that:

"The current support schemes operate on a UK wide basis and our consultation was open to anyone in the UK who wanted to respond to it. The proposals for scheme reform that are described in the consultation document and this government response, principally, are for beneficiaries infected in England. We have also shared the information gathered through our consultation with the governments in Scotland, Wales and Northern Ireland."

Despite the specific mention of the Department of Health sharing its information with other devolved administrations, there was no correlative reference to the Department of Health considering the evidence gathered by other governments.

A main theme in the responses to several of the questions in the consultation was that the Department of Health should mirror the reforms taking place in Scotland (see paragraph 2.4 regarding an alternative scheme structure; paragraph 2.13 regarding the automatic payment of a lump sum when an individual enters the scheme; and paragraph 2.22 regarding support for the bereaved.

¹ Eligibility for the Scottish scheme is set out in section 28 of the Smoking, Health and Social Care (Scotland) Act 2005. Under the legislation, the relevant infected person must have been infected by NHS treatment in Scotland and resident solely or mainly in Scotland at the point they originally claimed (or were resident immediately before) financial support from the relevant UK support scheme.

The only other reference to the Scottish regime is under the heading "Consideration of UK-wide elements", and states:

"4.6 The reformed scheme set out in this document will apply in England only. The Scottish government has already published its policy for scheme reform in Scotland. It will be for ministers in Wales and Northern Ireland to decide how to provide for the beneficiaries within their jurisdictions.

4.7 The Department of Health is working with its colleagues in the Devolved Administrations and the current scheme administrators to ensure that any country specific arrangements for this financial year can be affected [sic] promptly. We will also work together to ensure that country specific arrangements for 2016/17 and beyond transition smoothly."

As such, there is no specific response to the suggestion by consultees that awards made under the scheme mirror those which are available under the Scottish system. There is no indication that, beyond reciting this suggestion by consultees, the amount paid in Scotland was taken into account as a relevant consideration in the Secretary of State's decision-making process at all. Nor, if the Scottish figure was taken into account, is any reasoning given for why a similar sum was not adopted for those falling within the English scheme.

R (on the Application of Andrew Michael March) v The Secretary of State for Health

In *R (on the Application of Andrew Michael March) v The Secretary of State for Health* [2010] EWHC 765 (Admin) per Holman J, Mr March complained about the fact that the Republic of Ireland paid a higher rate of compensation in contaminated blood cases than was available in the UK. Whilst Mr March did not directly seek to argue that the UK rate should automatically match the Irish rate, he did successfully argue that in deciding not to match the Irish rate the UK government had to act in a way which was factually sound and *Wednesbury* reasonable.

Grounds of challenge

In the present case, by remaining silent as to the suggestion that the English scheme make the same provision as the Scottish scheme, the Secretary of State has acted unlawfully in that he has:

- *Ground 1:* Breached his duty under *Tameside MBC v Secretary of State for Education* [1977] AC 1014, by failing to ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly. The right question was whether to accept the consultees' suggestion that the proposals in England and Wales match those in Scotland. There is no evidence in any of his published documentation that the Secretary of State has considered the result of the Penrose Inquiry, the recommendations of the Scottish Review Group, or the regime as it now stands in Scotland, despite the conclusion of the APPG that "the conclusions of the Penrose Inquiry will have implications for policy across the UK". This information is all extremely well-researched, readily available, and highly relevant to the situation of those in the UK. In all the circumstances, it cannot be said that the Secretary of State has taken reasonable steps to acquaint himself with this relevant material.
- *Ground 2:* Failed to take account of a relevant material consideration. The Secretary of State has failed to take account of the current situation in Scotland;
- *Ground 3:* Failed to give adequate or any reasons for his decision. To the extent that the Secretary of State has taken account of these matters, he has given no reasons at all for his decision not to accept the consultees' suggestion that the UK scheme match that which is available in Scotland. In an area which has been the subject of continual campaigning for around 30 years, it is vital that survivors know why the Secretary of State considers that they should not receive the same amount as those infected, in very similar if not identical circumstances, in Scotland.

Details of the action the defendant is expected to take

The Secretary of State is invited either to:

- (1) Give consideration to the question of whether financial support for those eligible for support under the English schemes should match the support available for those eligible under the Scottish schemes, and give his reasons for any decision which he takes on that issue;
- (2) If he has already given consideration to the question above, to give his reasons for the decision that he has taken.

ADR proposals

None

Details of information sought

To the extent that the Secretary of State has already given consideration to the question of whether financial support for those eligible for support under the English schemes should match the support available for those eligible under the Scottish schemes, to provide his reasons for the same.

Details of documents considered relevant and necessary

Any and all documents, not already in the public domain, which evidence the decision-making process of the Secretary of State.

Address for reply and service of court documents

Access Legal (address as above)

Proposed reply date

14 days from the date this letter is received. If this matter cannot be resolved then an application for judicial review will be made.

We confirm that a copy of this letter has been sent to the Complaints Manager for the Department of Health by post and email.

Yours faithfully



ACCESS LEGAL

Please note that to assist us in improving our services we may record or monitor our telephone calls.