JUDICIARY OF
ENGLAND AND WALES

17 September 2021

QUINCY BELL and MRS A
v.
THE TAVISTOCK AND PORTMAN NHS FOUNDATION TRUST

JUDGMENT SUMMARY

Important note for press and public: this summary forms no part of the court's decision. It is provided so as to assist the press and the public to understand what the court decided.

1. In this case, the Court of Appeal (Lord Burnett Lord Chief Justice, Sir Geoffrey Vos Master of the Rolls, and Lady Justice King) allowed an appeal by the Tavistock and Portman NHS Foundation Trust (Tavistock) against the decision of the Divisional Court (Dame Victoria Sharp, Lewis LJ and Lieven J).

2. Since 1989, Tavistock has operated a Gender Identity Development Service for under-18s suffering from gender dysphoria, which involves a strong desire to be and to be treated as being of the gender other than their natal sex at birth. Gender dysphoria patients suffer significant distress or impairment in function. The treatment of children for gender dysphoria is controversial, and raises medical, moral and ethical issues,

which are the subject of intense debate. That debate can obscure the role of the courts in deciding the specific legal issues raised in the proceedings.

3. If Tavistock is satisfied that it is medically appropriate to do so, it refers patients to paediatric endocrinologists at either University College London Hospitals NHS Foundation Trust ("UCH") or Leeds Teaching Hospitals NHS Trust ("Leeds") for **consideration** of whether they should be prescribed with puberty blockers. Tavistock does not itself prescribe them.

4. In this case, the courts have not been required to determine whether treatment for gender dysphoria is wise or unwise. Such policy decisions are for the National Health Service, the medical profession and its regulators and Government and Parliament. It was not suggested in these proceedings that the use of puberty blockers to treat gender dysphoria was unlawful. It was, however suggested by the claimants that the court's consent should always be obtained before they were prescribed.

5. The claimant, Quincy Bell was treated at age 17 with puberty blockers, and progressed to cross-sex hormones and began surgical intervention to transition from female to male, before regretting embarking on that course. Mrs A is the mother of a child who suffers from gender dysphoria but who has not been referred to Tavistock, whose interest in the proceedings is largely theoretical. The claimants challenged Tavistock's practice of prescribing puberty blockers to under-18s with gender dysphoria, and sought a declaration that Tavistock's practice was unlawful in the absence of an order from the Court determining that the treatment was in the child's best interest.

6. The Divisional Court did **not** hold that the policies or practices of either Tavistock or the NHS Trusts (UCH and Leeds) to whom it referred patients for consideration of treatment with puberty blockers were unlawful, or that the information provided to patients was inadequate to form the basis of informed consent.

7. Instead, the Divisional Court made a declaration as to the relevant information that a child under 16 would have to understand in order to have competence to consent to the administration of puberty blocking drugs. That information was: (i) the immediate consequences of the treatment in physical and psychological terms, (ii) the fact that the vast majority of patients taking puberty blockers go on to take cross-sex hormones and therefore that the patient is on a pathway to much greater medical interventions, (iii) the relationship between taking cross-sex hormones and subsequent surgery, (iv) the fact that cross-sex hormones may well lead to a loss of fertility, (v) the impact of cross-sex hormones on sexual function, (vi) the impact that taking puberty blockers may have on future relationships, (vii) the unknown physical consequences of taking puberty blockers, and (viii) the fact that the evidence base for puberty blockers is as yet highly uncertain.

8. Tavistock appealed this declaration and the guidance that the Divisional Court gave. The guidance was based on the Divisional Court's view that (a) it was highly unlikely that under-13s would ever be competent to give consent to treatment with puberty blockers, and (b) it was very doubtful if 14 and 15-year olds could understand the long-term risks and consequences so as to have sufficient understanding to give consent. In those circumstances, the Divisional Court said that clinicians "may well consider" that it is not appropriate to move to treatment without the involvement of the court. This has understandably been understood by clinicians as suggesting that an application to the

court should be the norm. The Divisional Court also said that an application to the court in respect of 16 and 17-year olds would be appropriate if there were any doubt about the long-term best interests of the patient.

9. The claimants accepted that the only real question before the Court of Appeal was whether the Divisional Court, not having held that Tavistock's policies and practices were unlawful, was right to make the declaration and give the guidance it did.

10. The Court of Appeal allowed Tavistock's appeal.

11. Despite the broad discretionary power of the court to grant declaratory relief or an advisory declaration (which was not sought here), no previous case was cited in which a declaration had been granted in judicial review proceedings where a clear legal challenge had failed. Here, the Divisional Court had refused a declaration that the law required a court order before puberty blockers could be prescribed, and did not hold that the Tavistock's guidance was unlawful in not requiring such a court application to be made.

12. The Court of Appeal decided that the declaration made by the Divisional Court covered areas of disputed fact, expert evidence and medical opinion, which were not suitable for determination in judicial review proceedings. The case of *Gillick v. West Norfolk and Wisbech Health Authority* had decided that it was for doctors, not judges, to decide on the capacity of under-16s to consent to medical treatment. It had been said in *R (Burke) v. General Medical Council* there were great dangers in a court grappling with issues which were divorced from the factual context that required their determination: "the

court should not be used as a general advice centre". The declaration transgressed these principles.

13. In addition, the Divisional Court was not in a position to give guidance that generalised about the capability of persons of different ages to understand what was necessary for them to be competent to consent to the administration of puberty blockers. The guidance would require applications to the court when there was no legal obligation for such an application to be made. It placed patients, parents and clinicians in a difficult position, and should not have been given.

14. The Divisional Court had concluded that Tavistock's policies and practices were not unlawful and rejected the legal criticism of its materials. In those circumstances, the claim for judicial review should have been dismissed.

15. The Court of Appeal recognised the difficulties and complexities associated with the question of whether under 18s were competent to consent to the prescription of puberty blockers, but it was for clinicians to exercise their judgment knowing how important it was for the patient's consent to be properly obtained according to the particular individual circumstances. Clinicians would be alive to the possibility of regulatory or civil action which allows the issue of whether consent has been properly obtained to be tested in individual cases.