CO/8095/2006

Neutral Citation Number: [2008] EWHC 855 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Friday, 11th April 2008

B E F O R E:

MR JUSTICE MITTING

– – – – – – –

THE QUEEN ON THE APPLICATION OF A

(Appellant)

−v−

WEST MIDDLESEX UNIVERSITY HOSPITAL NHS TRUST

(Respondent)

Computer−Aided Transcript of the Stenograph Notes of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

Mr Stephen Knafler (instructed by Pierce Glynn, London) appeared on behalf of the Appellant
Ms Elizabeth Laing (instructed by the Treasury Solicitor, London) appeared on behalf of the Respondent

J U D G M E N T
(As Approved by the Court)
Crown Copyright©

1. MR JUSTICE MITTING: The claimant challenges the lawfulness of aspects of the guidance given by the Right Honourable John Hutton, then Minister of State for Health, to National Health Service Trusts effective from 1st April 2004 about the implementation of the National Health Service (Charges to Overseas Visitors) Regulations 1989SI/1989/306 ("the Regulations").

2. The Regulations require charges to be made for NHS services provided to certain individuals who are not ordinarily resident in the United Kingdom which would be provided free of charge to United Kingdom residents. The guidance challenged concerns foreign nationals who have been given temporary admission to the United Kingdom under paragraph 21(1) of Schedule 2 to the Immigration Act 1971: typically, failed asylum−seekers for whom removal directions have not been set, often because they cannot be returned to their home state or territory. Many, perhaps most, are penniless.

3. The Guidance is non−statutory and emphasises: (1) that it is no substitute for the Regulations themselves; (2) that NHS Trusts must make their own decisions on individual cases. Nevertheless, it is important that the guidance is accurate as to the law. NHS Trusts are unlikely to have a detailed knowledge of the complex provisions of immigration and asylum law and policy and it is likely that the guidance will be followed by them. Further, it identifies an IND (now Border and Immigration Authority) helpline and website from which advice can be sought, and the advice given is likely to follow that given in the guidance. If the guidance is wrong, it is likely to affect a significant number of people and it is appropriate that any significant error should be identified by this court.

4. The heart of the guidance challenged is set out in four paragraphs which deal with ordinary residence, and two paragraphs which deal specifically with refugees and asylum−seekers:

> "**Ordinarily resident**
>
> 5 .4. An overseas visitor is defined in the Regulations as a person not ordinarily resident in the UK. 'Ordinarily resident' is not defined in the NHS Act 1977. The concept was considered by the House of Lords and although the case being considered was concerned with the meaning of ordinary residents in the context of the Education Acts the decision is generally recognised as having a wider application. The House of Lords interpretation should, therefore, be used to help decide if a person can be considered ordinarily resident for the purposes of the NHS Act 1977 and the overseas visitors charging Regulations.
>
> 5.5. In order to take the House of Lords judgment into account, when assessing the residence status of a person seeking free NHS services, trusts will need to consider whether they are:
>
> **living lawfully in the United Kingdom voluntarily and for settled purposes as part of the regular order of their life for the time being,**

whether they have an identifiable purpose for their residence here and whether that purpose has a sufficient degree of continuity to be properly described as 'settled'.

5.6 Trusts need to make a judgment as to whether a patient is ordinarily resident in the light of the circumstances of that individual patient. But there are several elements which all need to be satisfied. For example, a person who has the right of abode or who has been given leave to remain and has an identifiable purpose for their visit may not meet the 'settled' criterion if they are only here for a few weeks. Alternatively, someone may be here legally, for several months, but with no identifiable purpose. But it is for the trust to decide whether the criteria are met. There is no minimum period of residence that confers ordinarily resident status. In the past the Department of Health has suggested that someone who has been here for less than 6 months is less likely to meet the 'settled' criterion but it is important to realise that this is only a guidance, not a deadline.

5 .7 The question of ordinarily resident status is the first and most fundamental issue to resolve, because if a patient is classed as ordinarily resident then the charging Regulations do not come into play, even if the patient has only been in the UK for a few days or weeks. The Secretary of State has no powers to charge for NHS treatment someone who is ordinarily resident in the UK.

6.23 **Refugees and asylum seekers** who have made a formal application with the Home Office which has not yet been determined. The refugee is someone who has been granted asylum in this country.

6.24 the fact that the exemption for asylum seekers only lasts until their claim is determined means that trusts should be prepared to check that the application still on−going at intervals if treatment is being provided over a long period. If the claim is finally rejected (including appeals) before the patient has been in the United Kingdom for 12 months, they cannot be charged for a course of treatment they were receiving at the time their status was determined. That remains free of charge until completed. They must, however, be charged for any new course of treatment. If that is routine elective treatment, then payment should be handled in the same way as for anyone else seeking non−urgent treatment, ie payment should be obtained before treatment begins (see para 3.1). Once they have completed 12 months residence they do not become exempt from charges."

5. The claimant's case is that until removal directions are set a failed asylum−seeker is not to be charged for National Health Service services, save to the extent that a person ordinarily resident in the UK could be so charged; and that advice to the contrary, for example and in particular the last sentence of paragraph 6.24 of the guidance, is legally wrong.

6. The claimant's challenge arises out of the refusal of treatment to him for a serious liver complaint based on this guidance but his personal claim has now been resolved by a consent order of 13th October 2006 by which it was agreed that he would be provided with clinically appropriate treatment, leaving only the challenge on general grounds. It is unnecessary to set out his history or personal circumstances in consequence.

7. The statutory framework is to be found in the National Health Service Act and in the Regulations made under it. Section 1 of the National Health Service Act 1997 provides:

> "(1) It is the Secretary of State's duty to continue the promotion in England and Wales of a comprehensive health service designed to secure improvement −
>
> (a) in the physical and mental health of the people of those countries, and
>
> (b) in the prevention, diagnosis and treatment of illness,
>
> and for that purpose to provide or secure the effective provision of services in accordance with this Act.
>
> (2) The services so provided shall be free of charge except in so far as the making and recovery of charges is expressly provided for by or under any enactment, whenever passed."

8. Section 3(1) provides, relevantly:

> "1. It is the Secretary of State's duty to provide throughout England and Wales, to such extent as he considers necessary to meet all reasonable requirements ...
>
> (c) medical ... services."

This is a general duty giving a wide discretion to the Secretary of State (see ex parte Coughlan) [2001] QB 213, paragraphs 22 to 26.

9. Section 121 provides for exceptions to the duty in Section 1(2) to provide services free of charge:

> "Regulations may provide for the making and recovery, in such manner as may be prescribed, of such charges [as the Secretary of State may determine] −

> (a) in respect of such services provided under this Act as may be prescribed, being.
>
> (b) services provided in respect of such persons not ordinarily resident in Great Britain as may be prescribed."

The origin of Section 121 is Section 17 of the National Health Service Amendment Act 1949. It is now reproduced in a differently ordered section to the same effect is Section 175 of the National Health Service Act 2006. Section 175 is one of a number of sections permitting charges to be made in Part 9 of the 2006 Act. All other charging provisions relate to categories of service, for example dental services and prescription drugs, not categories of persons. Sections 121 and 175 only permit charges to be made for services provided to "such persons not ordinarily resident in Great Britain as may be prescribed."

10. The Regulations currently made under Sections 121 and 175 are the National Health Service (Charges to Overseas Visitors) Regulations 1989. Regulation 1 defines overseas visitor as "a person not ordinarily resident in the United Kingdom." Regulation 2(1) imposes a qualified obligation on National Health Service Trusts to recover charges for services from overseas visitors:

> "Where an Authority [or NHS Trust] [or NHS foundation trust][, or a Primary Care Trust] provides an overseas visitor with services forming part of the health service, that Authority [or NHS Trust] [or NHS foundation trust] [or, a Primary Care Trust], having determined, by means of such enquiries as it is satisfied are reasonable in all the circumstances, including the state of health of that overseas visitor, that the case is not one in which these Regulations provide for no charge to be made, shall make and recover from the person liable under Regulation 7 charges for the provision of those services."

11. Regulation 3 exempts from charge certain categories of service, for example those provided at a hospital's accident and emergency department, and for the treatment of dangerous and transmissible diseases listed in Schedule 1 and for one category of overseas visitor, a person who is detained under the Mental Health Act 1973.

12. Regulation 4 exempts from charge a long and varied list of overseas visitors, including, for example, employees of UK−based employers and diplomats. Two are relevant for present purposes:

> "(1) No charge shall be made in respect of any services forming part of the health service provided for an overseas visitor ...

> (b) who has resided lawfully in the United Kingdom for not less than one year immediately preceding the time when the services are provided unless this period of residence followed the grant of leave to enter the United Kingdom for the purpose of undergoing private medical treatment or a determination under Regulation 6A l;] or
>
> (c) who has been accepted as a refugee in the United Kingdom, or who has made a formal application for leave to stay as a refugee in the United Kingdom [which has not yet been determined]."

13. A genuine refugee, whether or not he has yet been granted asylum, may or may not be ordinarily resident in the United Kingdom. He will not be on arrival, but may become so by significant residence. The draftsman can be taken to have included paragraph 4(1)(c) to cater for the refugee who has not yet become ordinarily resident.

14. The question underlying this challenge is what is meant by "ordinarily resident" in Sections 121 and 175. It is rightly common ground that, where the same phrase is used in the Regulations it has the same meaning as in the enabling sections, otherwise the Regulations would be making provision outside the scope of the enabling power. The presumption to that effect in Section 11 of the Interpretation Act 1978 is plainly not displaced.

15. Before considering the determinative question, it is necessary to examine the immigration status of a failed asylum−seeker. Those who seek asylum can do so in two ways: by applying at the port of entry for asylum; or by gaining entry by other means, either legally with leave to enter for another purpose, for example to visit the UK or unlawfully, whether by fraud or simply by entering clandestinely without leave to enter. In either case an immigration officer will give written authority for the temporary admission of the individual under paragraph 21(1) of Schedule 2 to the Immigration Act 1971.

16. By virtue of Section 11 of that Act, a person who is "temporarily admitted or released while liable to detention under the powers conferred by Schedule 2" is determined "for the purposes of this Act" not to enter the United Kingdom. This provision covers a person temporarily admitted at a port of entry under paragraph 21 but not a person who has entered illegally or whose leave to enter has expired or been revoked who has subsequently been granted temporary admission under paragraph 21 (see the analysis by Lloyd Jones J in R on the application of AW v London Borough of Croydon [2005] EWHC 2950 (Admin) paragraph 18. This has practical consequences for someone seeking support under a variety of Acts to which Schedule 3 of the Nationality Immigration and Asylum Act 2000 applies (see paragraphs 6 and 7 which identify the two different classes). The distinction is also maintained by and for the purpose of Section 11 of the Nationality Immigration and Asylum Act 2002, which identifies a person who is "in the United Kingdom in breach of the immigration laws" by reference to a set of conditions set out in subsections 11(2) and (3), which does not include a

person who is granted temporary admission at the port of entry but does include a person granted temporary admission subsequently. But this provision only applies for the purpose of naturalisation under Section 4 and Schedule 1 of the British Nationality Act 1981, and asylum support under Schedule 9 to the Immigration and Asylum Act 1999 (see Section 11(1) of the 2000 Act). None of these provisions affect National Health Service services.

17. Section 33(2) of the Immigration Act 1971 is of potentially more general significance:

> " (2) It is hereby declared that, except as otherwise provided in this Act, a person is not to be treated for the purposes of any provision of this Act as ordinarily resident in the United Kingdom or in any of the Islands at a time when he is there in breach of the immigration laws."

I will return to this when considering the definition of ordinary residence.

18. Ms Laing does not contend that the distinction drawn between asylum seekers who claim asylum at the port of entry and those who do so later is determinative of their status for the purpose of receiving National Health Service services, and accepts that both must be treated in the same way. As she recognises, rightly, to hold otherwise would introduce into the management of National Health Service hospitals a degree of complexity which would, given limited resources, be in practice unworkable.

19. A person whose asylum claim is rejected by the Secretary of State and who does not succeed on appeal against that decision to the Asylum and Immigration Tribunal remains subject to temporary admission under paragraph 21 until removal directions are set. Until then the immigration status of a failed asylum seeker is the same as that of a person whose asylum claim has yet to be determined. Because an important aspect of ordinary residence is or may be that it must be lawful, it is necessary to consider whether a failed asylum seeker is lawfully in the United Kingdom.

20. In relation to a person who claims asylum at the port of entry that question was, in my opinion, authoritatively determined by the House of Lords in Szoma v the Secretary of State for the Department of Work and Pensions [2006] 1AC 564. The issue is whether or not the claimant was "lawfully present" in the United Kingdom for the purposes of paragraph 4 of the schedule to the Social Security Immigration and Asylum (Consequential Amendments) Regulations 2000. The Secretary of State contended that for a person to be lawfully present his presence had to have been positively authorised by a specific grant of leave to enter rather than temporary admission under paragraph 21 (see page 574H paragraph 27). Lord Brown, with whose speech the House agreed, rejected that argument:

> "There is to my mind no possible reason why paragraph 4 should be construed as requiring more by way of positive legal authorisation for someone's presence in the United Kingdom than that they are at large here pursuant to the express written authority of an immigration officer provided for by statute." (paragraph 28, 574H to 575A).

He did so in the light of his analysis of the purpose and effect of Section 11 of the

Immigration Act 1971 in paragraph 25:

> "Even assuming that Section 11's deemed non−entry 'for purposes of this Act' would otherwise be capable of affecting the construction of the 1999 Act and the 2000 Regulations (as legislation in pari materia), it would in my judgment be quite wrong to carry the fiction beyond its originally intended purpose so as to deem a person in fact lawfully here not to be here at all. 'The intention of a deeming provision, in laying down a hypothesis, is that the hypothesis shall be carried as far as necessary to achieve the legislative purpose, but no further' − the effect of the authorities as summarised by Bienion, Statutory Interpretation, 4th ed (2002), section 304, p 815."

Similar considerations must apply to Section 11 of the Nationality Immigration and Asylum Act 2002.

21. It follows that the fact that an asylum−seeker is not deemed to be lawfully here for certain identified statutory purposes does not mean that he is not lawfully here for all purposes. Further, in my opinion if he is "lawfully present" for the purpose of the Regulations considered in Szoma, I can see no good or principled reason why he should not be lawfully in the United Kingdom for the purpose of determining whether or not he is ordinarily resident here.

22. It is common ground that the test for ordinary residence is to be found in the speech of Lord Scarman in R v Barnet London Borough Council ex parte Shah [1983] 2 AC 309. The question was whether five students admitted with time−limited leave to enter for the purpose of study qualified for an award from a local education authority for a first degree course. The qualification was three years' ordinary residence in the United Kingdom. All five had been resident in the United Kingdom for the requisite period but none had the right of abode here. The local education authority had refused to make the award on that ground. Lord Scarman began by observing that "ordinary residence" is not a term of art in English law and that the words should be construed in their statutory context as ordinary words in common usage:

> "Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that 'ordinarily resident' refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration." (343 G−H)

Applying that test, each of the students were ordinarily resident for the relevant purpose. Lord Scarman identified as an "important exception" to that test the lawfulness of his residence:

> "If a man's presence in a particular place or country is unlawful, eg in breach of the immigration laws, he cannot rely on his unlawful residence as constituting ordinary residence (even though in a tax case the Crown may be able to do so) .... There is, indeed, express provision in the Act of

> 1971, section 33(2). But even without this guidance I would conclude that it was wrong in principle that a man could rely on his own unlawful act to secure an advantage which could not have been obtained if he had acted lawfully." (343G to 344B)
>
> "'Immigration status', unless it be that of one who has no right to be here, in which event presence in the United Kingdom is unlawful, means no more than the terms of a person's leave to enter as stamped upon his passport. This may or may not be a guide to a person's intention in establishing a residence in this country: It certainly cannot be the decisive test, as in effect the courts below have treated it." (348D to E)
>
> "The terms of an immigrant student's leave to enter and remain here may or may not throw light on the question: it will, however, be of little weight when put into the balance against the fact of continued residence over the prescribed period − unless the residence is itself a breach of the terms of his leave, in which event his residence, being unlawful, could not be ordinary." (349E)

23. Lord Scarman did not refer to −− and according to the report in the Law Reports was not referred to −− paragraph 21 of Schedule 2 to the 1971 Act. He cannot have been taken to have had in mind the status of someone granted temporary admission under that paragraph, still less of the distinction between such a person and the person subsequently granted temporary admission. He did, however, treat a person's presence in breach of immigration law as disentitling him to rely on his unlawful residence by virtue of Section 33(2) and of the general principle that a man could not profit from his own wrong, and did so for the purpose of deciding whether or not a person was ordinarily resident for the purpose of another statute. It is part of his reasoning and not an obiter dictum. It therefore binds me when considering the position of an asylum seeker who has throughout been in the United Kingdom in breach of immigration law.

24. An asylum seeker who does not claim asylum at the port of entry cannot, therefore, become ordinarily resident for the purposes of Sections 171 and 175 of the National Health Service Act or the Regulations.

25. That leaves the asylum seeker who claims asylum at the port of entry, like the claimant in this case. In his case the application of Lord Scarman's test may well produce the answer that he has become ordinarily resident in the United Kingdom. I do not accept Ms Laing's proposition that because his residence is, in principle precarious, he cannot become ordinarily resident until granted leave to remain. I can see no reason why a person lawfully in the United Kingdom, except for certain specific statutory purposes, should not become ordinarily resident by dint of his voluntary wish to settle, coupled with residence for a significant period. Such a person fulfills Lord Scarman's test. A person whose claim to asylum (which might carry with it a wish to return to his native territory when the threat to him has lessened or gone), has failed, but who refuses to leave voluntary is likely to be determined to remain in the United Kingdom, if he can. Significant residence with that purpose is likely to provide proof of ordinary residence.

26. The conclusion to which my analysis of the two House of Lords' decisions points is one for which neither Ms Laing nor Mr Knafler contend and is plainly unworkable for the reasons which I have identified. Consequently, notwithstanding the binding effect of those two high authorities, I must make a choice between them. I do so on pragmatic grounds, persuasively explained by Hale LJ in R v Wandsworth London Borough Council ex parte O [2000] 1 WLR 2539 (at 2557C to H):

> "I conclude, therefore, that there is no general principle of legality excluding certain people from access to social services, as opposed to specific statutory provisions which may do so. This is scarcely surprising. Local social services authorities are skilled at assessing need and arranging the appropriate services. That is their statutory duty under Section 47 of the Community Care Act 1990. It is also the professional skill of social workers. They are not and never have been professionals in making moral judgments as between particular people with identical needs. They have no particular skills or facilities for assessing whether or not a person is subject to immigration control or has a real choice about whether or not to return to his home country. It is the Secretary of State, with the Immigration and Nationality Directorate, who knows the individual's immigration status, has routine access to the local country information, which might make such judgments possible, and has the power to determine whether or not a person should be allowed to remain here, and to remove him if he should not.
>
> "Further, as Simon Brown LJ has demonstrated, immigration status is a complex matter. To arrive at a definition of those whose presence here was so questionable as to give rise to an assumption of ineligibility for services would be a difficult task. Should it depend upon whether or not a criminal offence is committed (bearing in mind that the offence in question is not a particularly serious one); or upon whether or not the person concerned can currently be removed from the country immediately (which is more complicated still); or upon whether or not the person currently has a permission to be here which does not preclude his resort to such services? Where does the question of choice between staying and returning come into the equation?
>
> "It makes much more sense both in practice and in principle to leave the task of deciding upon need to the provider of health, education or social services, and the task of deciding whether or not a person should be allowed to remain here to take advantage of those services to the immigration authorities. This is subject, of course, to the power of Parliament expressly to limit eligibility to those services where eligibility has previously depended solely upon need."

Hale LJ's words can be applied mutatis mutandis to clinicians and the managers of National Health Service Trusts.

27. Accordingly, and for what I acknowledge to be primarily pragmatic reasons, my choice between the two conflicting authorities falls upon the decision of the House of Lords in Szoma. I therefore declare that insofar as the guidance, in particular the last sentence of paragraph 6.2.4 advises National Health Service Trusts to charge failed asylum−seekers who would otherwise be treated as ordinarily resident, it is unlawful.

28. That conclusion means that it is not necessary for me to determine the remaining issues. But given that it is inevitable that this case will go further, I will briefly set out my conclusions.

29. Under the heading "What Trusts need to do", treatment is divided into three categories:

> "**Immediately necessary treatment** − if the opinion of the clinicians treating the patient is that treatment is immediately necessary then it must not be delayed or withheld while the patient's chargeable status is being established. There is no exemption from charges for 'emergency' treatment (other than that given in an accident and emergency department − see para 6.7(a) but trusts should always provide immediately necessary treatment whether or not the patient has been informed of, or agreed to pay, charges. Not to do so could be in breach of the Human Rights Act 1998. While it is a matter of clinical judgment whether treatment is immediately necessary, this should not be construed simply as meaning that the treatment is clinically appropriate, as there may be some room for discretion about the extent of treatment and the time at which it is given. In some cases allowing the visitor time to return home for treatment rather than incurring NHS charges. When providing immediately necessary treatment clinicians should be asked to complete an advice from Doctors or Dentists form at Appendix 1;
>
> "**Urgent treatment** − where the treatment is, in a clinical opinion, not immediately necessary, but cannot wait until the patient returns home. Patients should be booked in for treatment, but the trust should use the intervening period to establish the patient's chargeable status. Wherever possible, if the patient is chargeable, trusts are strongly advised to seek deposits equivalent to the estimated full cost of treatment in advance of providing any treatment. Any surplus which is paid can be returned to the patient on completion of treatment. When providing urgent treatment clinicians should be asked to complete an advice from Doctors or Dentists form at Appendix 1;
>
> "**Non−urgent treatment** − routine elective treatment which could in fact wait until the patient returned home. The patient's chargeable status should be established as soon as possible after first referral to the hospital. Where the patient is chargeable, the trust should not initiate treatment processes, eg by putting the patient on a waiting list, until a deposit equivalent to the estimated full cost of treatment has been obtained. Any surplus which is paid can be returned to the patient on completion of treatment. This is not refusing to provide treatment, it is

> requiring payment conditions to be met in accordance with the charging Regulations before treatment can commence."

30. In the briefest of summaries, the guidance in effect requires clinicians to treat those whose life would be in danger if it were withheld or who would suffer serious injury. It requires them to defer for a short time the provision of urgent treatment pending a determination on whether or not they could receive such treatment in their home territory, and it requires them not to initiate treatment which is not urgent where the patient is chargeable, until a deposit is paid.

31. That advice is clearly rigorous, but it is not, in my view, unlawful by reason only of its terms. Article 8 of the Convention does not impose on a Convention state the obligation to provide medical treatment at any specific level to persons within its territory (see Tysiac v Poland 5410/03, 20th March 2007, paragraph 107). That statement of principle by the Strasbourg Court finds a clear echo in the decision of the House of Lords in N v Secretary of State for the Home Department [2005] 2 AC 296. By providing treatment to deal with life−threatening emergencies and situations in which serious injury may result if the patient is untreated, the state is fulfilling its minimum obligation under Article 8 and, if it still exists, under the law of common humanity.

32. Mr Knafler submitted that, notwithstanding that that might be so, nevertheless the treatment was discriminatory by reason of the fact that it applied only to those who were not ordinarily resident in the United Kingdom subject to a raft of exemptions which did not include failed asylum seekers. The answer to that proposition is to be found in the observations of Sedley LJ in (Morris) v Westminster City Council [2006] 1 WLR 505 at paragraph 47:

> "The problem is in all significant respects a problem of foreign nationals either coming to this country (benefit tourism) or outstaying their leave to be here (irregular status) in order to take advantage of the priority housing status accorded to homeless families. Measures directed at this, I accept, require no explicit justification, whether because they are an aspect of immigration control or because they are an obviously legitimate response to a manifest problem."

Those words apply mutatis mutandis to the obligation to provide medical services under the National Health Service Acts.

33. Accordingly, and but for my conclusion on the status of failed asylum seekers, I would have concluded that the guidance given was lawful.

34. MR JUSTICE MITTING: Ms Laing, I have indicated I will give permission to appeal. I wonder in the light of two propositions: first, the fact that there appear to be conflicting decisions of the House of Lords; and secondly, that it concerns an underlying question of statutory construction rather than just construction of guidance, whether it is not an appropriate case for a leapfrog certificate.

35. MS LAING: My Lord, the thought had not crossed my mind.

36. MR JUSTICE MITTING: Do you want to reflect upon it?

37. MS LAING: Could I take instructions?

38. MR JUSTICE MITTING: Yes.

39. MS LAING: While I am on my feet could I perhaps mention one point. Your Lordship did hear argument about whether or not there is a discretion to withhold treatment. I think it's implicit in the answer your Lordship gave about that issue that your Lordship has held that there is such a discretion. I wondered when your Lordship receives to the transcript whether you might indicate as much.

40. MR JUSTICE MITTING: I have deliberately confined myself to that which I was required to answer. I was not required to answer that question; it is for another day.

41. MS LAING: All right. I am grateful for that indication. I will take instructions on the point your Lordship has just mentioned. (**Pause**) I hope this will not be awkward, those sitting behind me would like some further time to consider the issue and obviously they need to discuss it with colleagues.

42. MR JUSTICE MITTING: It is entirely reasonable, and what I propose is that I extend the time, if you need it, to consider whether applying for a leapfrog certificate or ordinary permission to appeal to the Court of Appeal until you have received the transcript. I have indicated that I will give you permission to go to the Court of Appeal if that is the appropriate route. If you do not within seven days of receiving the transcript make a written submission that there should be a leapfrog certificate then I will simply give you permission to appeal to the Court of Appeal. If you do make written submission that there should be a leapfrog certificate, unless either of you suggest otherwise I will determine that on the papers.

43. MS LAING: That's extremely helpful I am very grateful to your Lordship. I think your Lordship has already indicated that your Lordship will extend time for putting in any necessary documents.

44. MR JUSTICE MITTING: Yes.

45. MS LAING: To 21 days from receipt of the transcript.

46. MR JUSTICE MITTING: In either event you will have 21 days from the date on which you have the transcript. If you seek a leapfrog certificate it will take your time to 14 days to get in the necessary paperwork, but that shouldn't, I would have thought, impose on unreasonable burden on you.

47. MS LAING: Could I also ask your Lordship in view of the importance of the case to direct that the transcript be expedited.

48. MR JUSTICE MITTING: Yes, we have had this debate before. Last time you asked for it it worked, it did come back quickly.

49. MS LAING: Indeed, yes, and obviously so far as costs are concerned I cannot resist that.

50. MR JUSTICE MITTING: There will be an order that the defendant should pay the claimant's costs to be the subject of detailed assessment if not agreed. Public funding assessment as well?

51. MR KNAFLER: Yes, I am grateful for that. In terms of an order to be made about the application, I tentatively suggest an order providing that the application for judicial review be allowed, and any declaration is made in precisely the terms towards the end of the first part of your Lordship's order.

52. MR JUSTICE MITTING: Yes. Would you please draw up an order by agreement. If you cannot agree I may have to get you back to see what the disagreement is and resolve it myself.

53. MR KNAFLER: We will certainly agree.

54. MR JUSTICE MITTING: I do not anticipate a problem.

55. MS LAING: No.

56. MR KNAFLER: I suppose the only thing we may need to think about is whether we might need permission to cross−appeal on those two short subsidiary points. That might not be respondent notice territory, but can I think about that? Of course I am thinking within that 21−day period.

57. MR JUSTICE MITTING: Would you, like Ms Laing, please, make any submissions you want to on that within seven days of receiving the transcript?

58. MR KNAFLER: Yes.

59. MR JUSTICE MITTING: Thank you both for an interesting tour through this statutory thicket.