

NHS ENGLAND – BOARD PAPER

Title: Judicial Review and other legal challenges 2018 – Outcomes Report
Lead Director: Katherine Ibbotson, Director of Governance and Legal
Purpose of Paper: A brief outline of the key judicial review challenges relevant to NHS England since April 2018
Patient and Public Involvement: How have you involved patients and the public in this work? Not relevant – this is a factual report of the outcome of proceedings
The Board invited to: Note the outcomes reported

Key Judicial Review and other legal challenge outcomes 2018

Purpose

1. NHS England is subject to a significant number of judicial review and other legal challenges each year. In addition, we are invited to intervene or become interested parties in challenges brought against other public bodies. In some of these cases we do not actively participate but maintain a watching brief to ensure that appropriate lessons can be learnt. Not all matters proceed to trial.
2. The report provides a short overview of key cases which proceeded to trial in 2018.
3. In addition, we are sometimes asked to intervene, or are named as interested parties, in proceedings. Although we have not formally intervened in any other proceedings this year, we have maintained a watching brief on a number of significant matters with potentially repercussive implications for NHS England and/or the wider system.

Key Judicial Review and other legal decisions in 2019

Homeopathy Judicial Review: British Homeopathic Association v NHS England

Result – NHS England ‘win’

4. In July 2017, NHS England launched a consultation on its proposals for guidance to CCGs on items which should not be routinely prescribed in primary care, including homeopathic treatments. The Board made a decision to include homeopathy in the guidance in November 2017.
5. In two judicial review challenges, heard together in a rolled-up hearing in May 2018, the British Homeopathic Association (BHA) challenged the lawfulness and rationality of the proposal to include homeopathy in the guidance; the effect of which was that homeopathy would no longer be routinely prescribed.
6. At the hearing, NHS England’s consultation and approach to making the final decision to include homeopathy in the guidance were scrutinised.
7. NHS England’s approach to its defence was to robustly stand by its consultation and decision and to avoid being side-tracked by the volume and detail of allegations and evidence submitted by the BHA. This approach was vindicated by the judgment, in NHS England’s favour with costs awarded in NHS England’s favour. The BHA did not appeal the judgment.
8. The judgment reiterated the need to ensure that consultations are clearly articulated, sufficiently comprehensible to allow an effective response and widely accessible (including via paper and online routes). In terms of predetermination and bias on the final decision, the judge was clear that NHS England is entitled to have a preferred view on a matter being consulted upon. Any such view should be caveated to make it clear that this view may change in the light of the consultation responses.

ICP Contract Judicial Review: Hutchinson, Pollock and Hawking v DHSC and NHS England

Result – NHS England ‘win’

9. NHS England undertook a 12-week consultation on the proposed contracting arrangements for ICPs from 3 August-26 October 2018. Around 3,800 written responses were received, along with feedback from stakeholder events in four locations across England.
10. A decision to make the ICP Contract available for use in 2019 was announced in the NHS Long Term Plan. A full response to the consultation will be published shortly.
11. The Claimants challenged a decision of NHS England and the Secretary of State for Health and Social Care to promulgate a new model for the provision of health and social care in England under the ICP Contract.
12. Following the hearing in May 2018, the claim was dismissed in the High Court in a judgment handed down in July. In rejecting the Claimants' arguments, the Court held that:
13. The ICP policy is not *ultra vires*:
 - The Court found that the ICP model was lawful and that the integration of health and social care via a single provider of care where that provider has a substantial degree of autonomy over health care choices and resource allocation is within the statutory powers of a CCG; does not represent the unlawful delegation to ICPs of non-delegable functions or preclude CCGs from fulfilling their statutory functions; and, is not contrary to the 'commissioner-provider split' under the 2006 Act.
14. Neither Defendant had breached requirements of transparency and good administration in developing the ICP policy:
 - Contrary to the Claimants' assertions, the Court held that the principle was not yet engaged since the consultation exercise on the policy was, at the time the claim was brought, pending. Until the duty is engaged, a public authority has a wide leeway to develop proposals in private or in public without that process becoming justiciable.
15. The Claimant did not appeal the judgment.
16. We were able to recover some costs from the Claimant as a result of Cost Capping Orders put in place by the Court.

ICP Contract: Shepherd (999 Call for NHS) v NHS England

Result – NHS England ‘win’

17. In December 2017, the Claimant challenged the lawfulness of the main method of payment for health services under the draft ACO (now known as ICP) Contract, the Whole Population Annual Payment (WPAP).

18. The case was heard in April 2018 and was dismissed. The Judge found that the current legislation affords various flexibilities regarding how resources can be made available to enable medical procedures to be performed and how services can be 'bundled' together and that the WPAP is a permitted payment scheme under the 2012 Act.
19. The Claimant appealed this decision to the Court of Appeal on multiple grounds.
20. The Court of Appeal comprehensively rejected the Appellant's arguments relating to all grounds of appeal describing the Appellant's arguments as 'misconceived and without merit', agreeing with the Judge of first instance that 'the WPAP payment mechanism under the draft ICP Contract may lawfully be promulgated and used under the flexible statutory scheme laid down by the 2012 Act, which allows for a variety of variations of prices and specifications', helpfully confirming the wide flexibility of the existing legislation.
21. The Claimant filed an application for permission to appeal with the Supreme Court on 16 January 2019. Counsel's advice is that the Supreme Court is unlikely to grant permission to appeal given the clarity of both previous judgments, although this remains a possibility.
22. Again, we have been able to recover some costs from the Claimant as a result of Cost Capping Orders put in place by the Courts.
23. Whilst defending these claims has been resource-intensive (for both the policy and legal teams) and costly, they have provided confirmation of the sound legal basis for the development of the new ICP contract and WPAP. They also provide wider confirmation of the legality of other block contract arrangements and of the construction of Acts and Tariff rules, which supports the delivery of new and innovative service and payment models.

Avastin Judicial Review: Bayer/Novartis v 12 CCGs

Result – NHS England 'win'

24. The manufacturers of two products licensed for the treatment of Wet Acute Macular Degeneration (Wet AMD) challenged the lawfulness of a policy published by 12 CCGs promoting the use by clinicians of an unlicensed treatment (bevacizumab) which was proven to be clinically and cost effective. There is a significant price differential between the licensed products and bevacizumab with the potential for considerable savings for the CCGs arising from change of prescribing behaviours, where clinically appropriate.
25. NHS England was named as an interested party and made limited submissions to assist the Court in understanding the role of NHS England and our position.
26. Judgment was given in favour of the CCGs with the Court determining that the policy adopted by the CCGs was lawful. The Court also upheld clinicians' discretion to determine which medicines to prescribe and to have regard to price.

Hep C Procurement Challenge: AbbVie UK Limited v NHS England

Result – NHS England ‘win’

27. AbbVie UK Limited (AbbVie) issued proceedings against NHS England challenging the procurement process run to commission Hepatitis C drugs, in what was a novel, complex and innovative procurement process. This is the largest procurement of drugs ever undertaken by NHS England with a value of £950 Million over 5 years. The procurement was designed to maximise competition and encourage the drug manufacturers to develop initiatives to identify individuals with Hepatitis C with the aim of eliminating the disease in England and Wales 5 years ahead of World Health Organisation targets.
28. AbbVie challenged the procurement process stating aspects of the procurement process unfairly prejudiced them resulting in unequal treatment, which they contended was unlawful.
29. The hearing took place over a period of 4 days in November and judgment was handed down on 18 January in favour of NHS England.
30. In an extremely robust and comprehensive judgment, the Judge found that:
 - a. the procurement process did not breach NHS England’s duty of equal treatment and was lawful.
 - b. even if the procurement had involved unequal treatment this would have been objectively justified for the many reasons provided by NHS England. These included the objective of eliminating the Hepatitis C Virus within England and Wales and the legitimate aim of encouraging investment by the drug manufacturers in elimination solutions.
31. Submissions on costs are to be made later and we would expect to recover a significant proportion of the costs incurred in defending this claim.