

August 2018

PSNC Briefing 044/18: Summary of the Judicial Review Appeal judgment

This briefing summarises the judgment in PSNC's Judicial Review Appeal Case which was handed down on Thursday 23rd August 2018.

Background

PSNC and the National Pharmacy Association (NPA) both brought Judicial Reviews of the Secretary of State's decision to impose a reduction in community pharmacy funding and other changes in 2016. [Following an unsuccessful outcome at the High Court](#), both PSNC and the NPA decided to appeal the decision and the cases were reviewed at the end of May 2018.

The Appeal was heard by three Court of Appeal Judges – Lord Justice Irwin, Lord Justice Hickinbottom and Sir Jack Beatson – and their judgment was published on Thursday 23rd August.

PSNC Grounds

PSNC brought the Appeal on six grounds, namely that High Court Judge Mr Justice Collins:

1. Ought to have concluded that the Secretary of State could not rationally have made the decision on the basis of the information obtained.
2. Wrongly concluded that the Secretary of State did not rely on an erroneous estimate of an average pharmacist's operating profit margin of 15%.
3. Erred in his assessment of the significance of the failure to disclose and consult on that supposed operating profit margin.
4. Erred in concluding that this non-disclosure did not render the consultation process unlawful and reached a conclusion inconsistent with his own findings in that respect.
5. Wrongly discounted and failed to consider a letter addressing the proposed 15% margin on the basis that the 15% margin had not been relied on.
6. Ought to have concluded that the Secretary of State had unlawfully misused the relevant statutory provisions for the payment of pharmacists to achieve a "fundamental restructuring" of the community pharmacy system without resorting to an amendment of the primary statute.

Details of the judgment on PSNC's case

The Appeal Court's judgment begins by summarising the legal test for deciding whether or not the Secretary of State could rationally have made his decision on the basis of the information obtained, namely:

- whether the duty of sufficient enquiry was met can only be challenged on the basis of whether it was so unreasonable that no reasonable person acting reasonably could have made it;
- it is for the decision-maker and not the Court to conclude what is relevant; and
- it is for the decision-maker to decide upon the manner and intensity of enquiry to be undertaken.

The Judges also confirmed that PSNC was not challenging the Government's decision that efficiency savings had to be made in the funding of pharmaceutical services, but rather the means by which those savings were achieved.

PSNC argued that changes to pharmacy remuneration had to be considered in the context of the Secretary of State's overarching duty to "*secure ... continuous improvement*" in the quality of NHS services. In order to fulfil that duty, the Secretary of State is obliged, PSNC argued, to obtain reliable and cogent information as to how the market would respond to proposed cuts, the economic viability of pharmacies and the likely level of closures. By limiting his enquiries to an informal secret conversation with an 'industry insider' and consideration of a set of yearly accounts for 52 pharmacies (out of approximately 11,600) obtained from Companies House, the Secretary of State had failed in that duty.

The Secretary of State said that it was rational to conclude that it was not realistically possible to reach reliable conclusions on the impact on pharmacy numbers or distribution and that there was no reliance on the information obtained from the industry insider and Companies House in determining policy. It was also argued that the Pharmacy Access Scheme (PhAS) was put in place to ensure a reasonable distribution of, and access to, community pharmacies.

The Court of Appeal Judges reasoned that even if it had been possible for the Secretary of State to conduct further analysis, the venture would be futile as the cost of doing so outweighed any possible benefit. The Judges have therefore agreed with the analysis and conclusion made by the High Court, stating that the Secretary of State was entitled to conclude that no more certainty or even confidence was achievable as to the number of closures which would result from the proposals.

The judgment also states that whilst it was regrettable that the process was not more open as to any assumed profit margin, since such margin was not treated as a critical point in the decision, this point could not render the process unfair. However, the judgment states that it is unfortunate that the Minister made reference to the assumed 15% profit margins when answering questions in Parliament at the time of his announcement.

Upon reflection of the High Court decision that the consultation was lawful, the Judges have stated that they do not challenge that conclusion. They go on to say that PSNC was closely involved in the process and made detailed representations, some of which were adopted.

Additionally, PSNC argued that there was a settled intention on the part of the Secretary of State to reduce the number of community pharmacies and that it was unlawful to achieve that end through pricing alterations.

The Judges found that the evidence did not bear out a positive intention to reduce the number of community pharmacies. Whilst a reduction in the number of pharmacies was regarded by the Department and Ministers as desirable, the changes were made to implement the required savings that were dictated by the Government. Although PSNC submitted that a decision-maker must be deemed to intend the inevitable consequences of his action, this does not mean that the action is for an improper purpose even if the changes have the effect of closing some pharmacies.

In agreement with the High Court judgment, the Judges have maintained that even if a reduction in the numbers was expected and was thought desirable in general terms, there was no principle of law which could mean that alteration in a publicly funded pricing mechanism such as the Drug Tariff, otherwise justified as a means of achieving legitimate savings, is rendered unlawful by such anticipated consequences.

The NPA's case

In regard to the NPA, the Judges noted that, in addition to supporting the case of the PSNC, it argued that the Secretary of State breached his obligation to have regard to the need to reduce inequalities between the people of England with respect to the benefits they can obtain from the NHS.

The Court of Appeal judged that the Secretary of State did not breach this duty and the case was therefore dismissed. The judgment states that the Secretary of State was entitled to proceed on the basis that the correct balance between competing policies would be met by maintaining reasonable access in all areas while not having any significant detrimental effect on the pharmacy services provided in less affluent areas, where these inequalities are currently higher. The Judges also decided that a focus on the fulfilment of NHS prescriptions did not mean that the Secretary of State had failed to take into account the other services provided by community pharmacies.

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