

May 2017

PSNC Briefing 031/17: Summary of the Judicial Review judgment

This briefing summarises the judgment in PSNC's Judicial Review Case which was handed down on Thursday 18th May 2017.

Background

Following the imposition of a reduction in community pharmacy funding and other changes on 20th October 2016, PSNC sought permission from the High Court to apply for a Judicial Review in November 2016, on the grounds that it believes the Secretary of State failed to carry out a lawful consultation on the proposals for community pharmacy.

The National Pharmacy Association (NPA) also brought a case against the Secretary of State, focused on arguments that he failed to properly discharge his equality duties.

The PSNC and NPA cases were heard by Mr. Justice Collins in a joint hearing that lasted from Tuesday 21 March to Thursday 23 March. The judgment was published on Thursday 18th May 2017.

Summary of the judgment

The judgment begins with an explanation of the relevant legal points, including explaining the powers of the Secretary of State to change community pharmacy funding by making 'determinations', or decisions. Before making such a determination the Secretary of State must:

- a) Consult a body appearing to him to be representative of the persons to whose remuneration the determination would relate; and
- b) Take into account all matters that are considered relevant by him.

PSNC is that representative body, and the Judge notes that it is for the Secretary of State to decide what is relevant to his decision.

Both PSNC and the NPA were challenging the process by which the decision was made: that the Secretary of State failed properly to consider all relevant matters, amounting to a failure to comply with the overarching requirements.

PSNC argued that the Secretary of State had failed to conduct a lawful consultation on the changes, and that information which was highly material was withheld. This was supported by the Department's failure to disclose a Companies House analysis which purported to show that community pharmacies have an operating margin of 15%. The law requires that a consultation be fair and that the person consulting discloses relevant information to the consultees.

The Judge had to decide whether the Secretary of State had sufficient information to make a lawful decision. The legislation gives the Secretary of State power to decide what is relevant to his decision, so the decision could only be challenged if it were found to be so unreasonable that nobody properly informed could have come to it. The Judge said: "The court can only intervene if persuaded that [The Secretary of State's] failure to take a particular matter into account was unreasonable."

The Judge also considered the Department's various defence arguments. For instance, the Department said that it had introduced a Pharmacy Access Scheme as a safety net.

The Department also, crucially, said that it had not relied on its analysis of operating margin - the analysis which led to the 15% figure. That analysis was disclosed when the imposition was made on 20th October 2016 and cited by the Minister, having previously been withheld from PSNC.

Also important to the Judge's decision was the recognition that the decision to cut pharmacy funding was driven by the wider need for the NHS to make £22bn worth of savings. He said: "The reality is that the approach was clearly governed by the need to make savings which the Government had regarded as necessary."

Addressing PSNC's claim that the Secretary of State should have taken steps to acquire updated economic information, the Judge considered the various estimates by the Department of closures likely to result from the funding cuts, ranging from a few hundred to 2060. He accepted the Department's claim that although it recognised that the cuts were likely to lead to pharmacies closing, this was not a specific intention. He observed that the Chief Pharmaceutical Officer had publicly stated that there were too many pharmacies, and that this was a view held by the Department. The Department's counsel said that there was no realistic possibility that so many pharmacies would close that a sufficient number would not be left to provide the necessary services.

In this context, and noting the costs of any such exercise, the judge did not accept PSNC's argument that the Department should have undertaken a full examination of the impact of its decision, by a Cost of Service inquiry. He suggested that PSNC could have produced figures, and did "not think that it was irrational of the Department to consider that there was no need to try to obtain any more reliable information".

On PSNC's claim that the consultation was unfair, the Judge concluded that although the Department had withheld some information from PSNC and that this was "unjustified", the information withheld had not made any difference to the overall decision and as such the failure to disclose it was not so unfair as to be regarded as unlawful.

In summary, although the judge was very critical of the Department's conduct, he concluded that the question was whether the Secretary of State had obtained sufficient information to make a lawful decision. He concluded that PSNC had failed to reach the very high bar needed to establish that the decision was unlawful. The Judgment concluded: "I have with some regret concluded that I cannot properly quash the decision. It is equally unfortunate that the goodwill which existed between PSNC and the Department has been lost. There is undoubtedly blame to be placed on the Department for failing to provide the analysis leading to 15% and for not producing as soon as it was known that proceedings were contemplated all the material which JH [Jeannette Howe, Department of Health] has now produced."

Criticisms of the consultation process made in the judgment

Although PSNC did not reach the very high bar needed to prove unlawfulness, the judgment contained a number of criticisms of the consultation process leading up to the imposition of cuts to community pharmacy funding. These are set out below.

- 1) The failure to disclose the 15% study or other material during the consultation period

The Judge considered the Department's attempt to evaluate the operating profits of pharmacies. Use was made of Companies House data which led to a figure of 15% profitability. This was not shared with PSNC until it was published in the impact assessment alongside the imposition on 20th October 2016, and cited by the Minister.

PwC analysis has since discredited the analysis, and the Judge concluded of the analysis: "It must be obvious, as the report recognised, that the small number of companies involved and the nature of the available data made this exercise less than satisfactory."

The Judge said it was “far from clear” why the analysis was not disclosed. But he decided that disclosure would not have made any difference to the decision. He said: “Albeit the failure to disclose the information obtained was regrettable and as it seems to me unjustified, it did not in my judgment make any difference to the result.”

The Judge concluded that the failure to disclose was not so unfair as to result in unlawfulness. He said: “I do not doubt that there seems to have been no good reason not to disclose what had been done, but the fact that more could have been done does not produce unlawfulness.”

2) The misleading briefing of the Prime Minister

Throughout the hearing and review, a number of communications between Department of Health officials, ministers and the Prime Minister came to light.

The Judge cited a report to ministers from the Department sent in September 2015 in which officials noted that:

- * The reforms were likely to be received very negatively and require an imposition;
- * There was a strong possibility of media and public backlash;
- * There would be a need to reassure the sector that “increased funding for local pharmacy services in primary care, that is influenced and prioritised locally, and aligned with new care models, is in some way ring fenced”; and
- * There would be a need for careful political handling.

In particular, the Judge noted letters sent to the Prime Minister in August 2016 from the Secretary of State and the Chancellor of the Exchequer, and their statement that £2.8bn is spent dispensing around £7.2bn of drugs.

The Judge said this was not an accurate statement as it failed to have regard for the services beyond dispensing which are provided by pharmacies. He said: “The letter was inaccurate but why that was has not been explained.”

3) The failure to disclose material before the litigation

During the litigation process a great deal of material was disclosed by the Department of Health, The Judge said: “There is undoubtedly blame to be placed on the Department for failing to provide the analysis leading to 15% and for not producing as soon as it was known that proceedings were contemplated all the materials that [it] has now produced.”

Overall the Judge said that it was with some regret that he had reach his conclusion that he could not properly quash the decision to implement cuts to community pharmacy funding.

If you have queries on this PSNC Briefing or you require more information please contact [Zoe Smeaton, Head of Communications and Public Affairs](#).