



JUDICIARY OF
ENGLAND AND WALES

R ON THE APPLICATION OF SAVE OUR SURGERY LIMITED

-v-

JOINT COMMITTEE OF PRIMARY CARE TRUSTS

HIGH COURT (ADMINISTRATIVE COURT)

7 MARCH 2013

SUMMARY TO ASSIST THE MEDIA

The High Court (Mrs Nicola Davies) has today allowed a judicial review of the decision of the Joint Committee of Primary Care Trusts (JCPCT) on where specialist paediatric cardiac surgery centres will be located in the future. The Court found there was procedural unfairness towards Leeds General Infirmary due to the failure to disclose the Kennedy Panel sub-scores to them. The Court went on to find that the JCPCT failed to take into account material considerations when reaching its decision.

Introduction

“The claimant seeks to quash the decision of the defendant, the Joint Committee of Primary Care Trusts (the JCPCT) made on 4 July 2012 which identified seven specialist centres in England for the future performance of paediatric cardiac surgery, those centres are to be located in Bristol, Birmingham, Liverpool, Newcastle, Southampton and London (two centres) (“the Decision”). Of twelve options considered in a consultation process the JCPCT decided that Option B, an option excluding Leeds General Infirmary (Leeds) but including the Freeman Hospital (Newcastle) would provide the best quality care.” (para 1)

Factual Background

The factual background to the case is set out in paragraphs 2 - 4.

The Legal Challenge

The nature of this claim is set out in paragraphs 5 – 11.

“The claimant does not challenge the merits of the [JCPCT’s] Decision. The challenge is to the consultation process which preceded the decision and its product, namely the Decision.” (para 6)

Legal Framework

This is set out in paragraphs 12 – 14.

Lawful Consultation

The legal principles for a lawful consultation are discussed in paragraphs 15 – 27.

On this, Mrs Justice Nicola Davies said:

“In considering the authorities cited by the parties I have paid particular attention to and given weight to those which consider a challenge to the consultation process. From the authorities the following principles can be identified:

- 1) The issue for the court is whether the consultation process was “so unfair it was unlawful” – *Devon County Council*;
- 2) Lawful consultation requires that: i) it is undertaken at a time when proposals are still at a formative stage; ii) it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; iii) adequate time must be given for this purpose; iv) the product of the consultation must be conscientiously taken into account when the ultimate decision is taken;
- 3) Disclosure of every submission or all of the advice received is not required. Save for the need for confidentiality, those who have a potential interest in the subject matter should be given an opportunity to deal with adverse information that is credible, relevant and significant to the decision to be made. The degree of significance of the information is a material factor;
- 4) The fact that the information in question comes from an independent expert or from the consultee is relevant but it is a combination of factors including fairness, the crucial nature of the advice, the lack of good reason for non disclosure and the impact upon consultees which are to be considered upon the issue of fairness;
- 5) What fairness requires is dependent on the context of the decision; within that the court will accord weight and respect to the view of the decision-maker;
- 6) If the person making the decision has access to information but chooses not to consider it, that of itself, does not justify non-disclosure; it will be for the court to consider the reason for non-disclosure;
- 7) A consultation process which demonstrates a high degree of disclosure and transparency serves to underline the nature and importance of the exercise being carried out; thus, non-disclosure, even in the context of such a process, can limit the ability of a consultee to make an intelligent response to something that is central to the appraisal process;
- 8) The more intrusive the decision the more likely it is to attract a higher level of procedural fairness;
- 9) If fairness requires the release of information the court should be slow to allow administrative considerations to stand in the way of its release.” (para 27)

Assessment and Consultation Process

The assessment and consultation process and subsequent decision are discussed in paragraphs 28 – 66.

Claimant’s Case – Ground 1: Procedural unfairness

The claimant’s position on Ground 1 is discussed in paragraphs 67 – 78

“In summary the claimant’s position is:

- (i). Without the scores the consultees could not sensibly, intelligently, or meaningfully respond to all that they had to in respect of the total scores and the Kennedy Report;
- (ii). The scores were being used comparatively. It is not the claimant’s case that the JCPCT were not entitled to rely on comparative scorings but if so it is a further reason to

- disclose the sub-scores so as to enable centres to see how they compare and comment upon their comparisons;
- (iii). The more information that is given the more intelligible and meaningful the response. The more productive and more transparent the consultation exercise the more information will be generated and thus improve the quality of the decision making;
 - (iv). During the consultation exercise Leeds requested the sub-scores as did the JHCOH and CHSF subsequently. If Leeds thought the scores were relevant what good reason was there to refuse disclosure. If disclosure were deemed appropriate after the consultation it makes no sense to have withheld the sub-scores prior to the decision making when disclosure could have been meaningful.” (para 67)

Claimant’s Case – Ground 2: Failure by the JCPCT itself to scrutinise or properly take into account the Kennedy sub-scores

The claimant’s position on Ground 1 is discussed in paragraphs 78 – 82.

Defendant’s Case

The defendant’s case on both grounds 1 and 2 is set out in paragraphs 83 – 95.

Conclusion:

In her conclusion, Mrs Justice Nicola Davies said:

“This was a comprehensive consultation, lasting a matter of months and prompting 77,000 responses. Thought and care was given to the consultation process both as to its content and implementation. When considered necessary, independent work or advice was commissioned; professional groupings provided advice when requested. Those responsible for, and involved in, the setting up and implementation of this process aimed to provide one which was informed, detailed and transparent.” (para 103)

She went on to say:

“The question for this Court is: did the duty of fairness require disclosure of the Kennedy Panel’s sub-scores? The sub-scores represented an expert evaluation which translated into a score which was the purpose of the assessment exercise. In my view the following matters are relevant to this question:

- i) The score assumed increasing importance and thus significance in the evaluation process and was ultimately determinative of the difference in the ‘Quality’ score as between Leeds and Newcastle;
- ii) The importance of ‘Quality’ has to be considered against a background in which a) it was identified as an important component by the many respondents to the consultation process; and b) ‘important’ and ‘material differences’ between the centres were said to have been identified by the Kennedy Panel, hence the advice given in October 2011 and recorded in the DMBC;
- iii) The DMBC advised the JCPCT that ‘high quality service’ had the greatest influence on the total score for ‘Quality’ and that ‘quality of service’ should be the most important of the JCPCT’s considerations;
- iv) The Chair of the JCPCT identified ‘two key reasons’ for favouring Option B, the first being B’s higher scoring for ‘Quality’;

- v) This was a consultation process relating to the provision of paediatric cardiac surgical services; a matter of the highest importance to any child requiring such care and his or her family.” (para 112)

“For the reasons identified in paragraphs 112-116 above I am satisfied that fairness did require disclosure of the sub-scores to enable Leeds to provide a properly focussed and meaningful response. The refusal of the JCPCT to a specific request by Leeds for disclosure was, in my view, ill judged. The JCPCT was on notice of the importance of the criteria of ‘Quality’ and within it the use being made of the Kennedy Panel scores. With these considerations in mind, even if the JCPCT chose not to look at the sub-scores, consultees should have been given such an opportunity.” (para 117)

In relation to the claimant’s second ground, Mrs Justice Nicola Davies concluded:

“The sub-scores provided the basis for the consensus score which was ultimately one of the most significant tools in the assessment of ‘Quality’ of the respective centres. The JCPCT knew that one of its observers (Dr Carroll) had raised the issue of scrutiny of the sub-scores, as had consultees. The JCPCT also knew that ‘Quality’ was becoming more significant as the process developed. In my view, and commensurate with their duty to properly scrutinise and assess all relevant evidence, the JCPCT should have considered the sub-scores. The JCPCT’s stance, to the effect: ‘it is appropriate to leave this to the experts’, failed to reflect the significance of the sub-scores in that they provided the basis of what ultimately was the difference of one point in the critical ‘Quality’ scoring as between Leeds and Newcastle. If the JCPCT wished for clarification it could have sought the assistance of the Kennedy Panel. It follows and I so find that the sub-scores were a material consideration. Accordingly I find that the claimant succeeds upon its challenge upon Ground Two.” (para 120)

-ends-

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.