CO/ 2426/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

BETWEEN:

THE QUEEN

(on the application of

(1) LONDON CRIMINAL COURTS SOLICITORS ASSOCIATION
(2) CRIMINAL LAW SOLICITORS ASSOCIATION)

Claimants

-and-

LORD CHANCELLOR

Defendant

AMENDED STATEMENT OF FACTS AND GROUNDS

The Claim

1. This claim for judicial review is brought by the Criminal Law Solicitors Association ("**CLSA**") and the London Criminal Courts Solicitors Association ("**LCCSA**") to challenge the most recent decisions of the Lord Chancellor and Secretary of State for Justice ("**the Lord Chancellor**") to "reform" the system of criminal legal aid. The Lord Chancellor's decisions were announced on 27 February 2014 in a document entitled "Transforming Legal Aid – Next Steps: Government Response" ("**the Response**").

2. The relevant decisions were, in particular: (a) to reduce fees for significant categories of criminal legal aid work by 8.75% on average immediately (implemented through a statutory instrument which took effect on 20 March 2014), and a further 8.75% on average in 2015 (to be implemented through new contracts); and (b) to hold tender processes in which legal aid firms could be awarded unlimited numbers of "own client" contracts but only 525 "duty

provider" contracts, whereby they would be able to gain new clients through acting as the duty solicitor in a police station or magistrates' court setting (as compared with approximately 1600 contracts permitting duty work at the present time) ("**the decisions**").

3. The Claimants and their members disagree profoundly with the merits of these decisions and firmly believe that they will lead inexorably to very serious harm to the criminal legal aid system and to the criminal justice system more generally, both of which this country should be proud of and should seek to maintain. However, this Claim is not about the merits of the decisions but rather about the process which was adopted by the Lord Chancellor before taking them.

4. The decisions attracted a common law duty of procedural fairness. That duty was heightened by the context for the decisions and by their likely effects. The decisions not only have serious implications for access to criminal justice in England and Wales, and so for the rule of law, but they also have the avowed intention of bringing about "consolidation" of the market for criminal legal aid services. That is, the Lord Chancellor intends by his decisions to bring about the closure of hundreds of businesses which have been built up through conscientious public service over many years (in order, he says, that the market can sustain lower legal aid fees). The fact that many of the Claimants' members, and many other criminal legal aid solicitors besides, stand to lose their livelihoods as a result of the decisions made the Lord Chancellor's duty of procedural fairness a particularly onerous one.

5. In fact, the process adopted by the Lord Chancellor fell well short of even a "normal" standard of procedural fairness. In particular, the Lord Chancellor based his decisions upon two reports by independent experts, at least one of which was jointly commissioned by the Law Society with the specific intention of providing the evidence base for the decisions. Yet he declined to disclose the two reports before taking his decisions, thereby denying the Claimants and other interested parties any opportunity of commenting upon their contents. When taking the decisions, the Lord Chancellor then ignored the contents of

the one of the reports, by Otterburn and Ling Consulting ("**Otterburn**"), in the face of an express commitment made by him personally that he would adopt the findings of that report and without any attempt to explain why he was not adopting those findings. And he relied extensively upon the contents of the other report, by KPMG, which when eventually published turned out to be based upon highly controversial assumptions which had never before been suggested to consultees.

6. In the case of both reports, the Claimants were denied the opportunity to make pertinent comments on the analysis which they contained, which comments would have been material to the Lord Chancellor's decisions and so would have added significantly to the evidence base which he considered prior to taking the decisions.

7. The Claimants submit that the Lord Chancellor thereby breached his duty of procedural fairness and that the decisions should be quashed as a result.

8. The Claimants sent a pre-action protocol letter to the Lord Chancellor on 7 April 2014. In accordance with the Protocol, a response was requested within 14 days. The Lord Chancellor sought a number of extensions to the deadline for responding to the Claimants' pre-action protocol letter and confirmed that no point would be taken on delay in the issuing of any judicial review claim which arose as a result of the Claimants "very sensibly waiting" to receive the Lord Chancellor's response before deciding to issue proceedings.

9. The Lord Chancellor did not send a response to the pre-action protocol letter until 16 May 2014, less than two weeks before the expiry of the judicial review time limit. Having considered the contents of the Lord Chancellor's response, the Claimants decided to issue proceedings but were unable to complete the preparation of detailed grounds and witness evidence before the expiry of the time limit. Therefore, they decided to issue a claim form with skeleton Grounds, and to apply to amend their Grounds and add witness evidence shortly thereafter. This document constitutes the Claimants' Amended Grounds, and they seek the permission of the Court to adduce them.

Relevant factual background

10. The factual background to the Claim is set out in the witness statement of William Waddington, the chair of the CLSA, on behalf of the Claimants.

11. The macro-economic background to the Government's various measures to reduce spending on legal aid is well-known. However, the relevant background to the most recent decisions includes:

    (1) That rates of pay for criminal legal aid work have not increased since the mid-1990s. Mr Waddington recites an example of a complex affray case which was remunerated at £470 in 1978, and would attract a fee of £258.71 under the current proposals (§9).

    (2) That there has in fact been a succession of reductions in the payments available for criminal legal aid work, including several reductions in recent years the effects of which have yet to be fully felt (Waddington, §10).

    (3) That notwithstanding those cuts, the most serious problem facing criminal legal solicitors is a reduction in the amount of work available, due to falling crime rates and falling rates of prosecutions being commenced by the Crown Prosecution Service (see Otterburn, p. 33).

    These factors have also contributed to the Ministry of Justice significantly *over-estimating* spending on criminal legal aid in 2012/13, by £50m or 5% (see Waddington, §77).

12. As a result of these factors, the profitability of criminal legal aid work is already precarious. Otterburn, the research jointly commissioned by the Lord Chancellor and the Law Society, concluded *inter alia*:

> Margins in crime are very tight, especially in London and the effects of previous reductions in crown court work have yet to be fully felt.

> The survey strongly suggests that the supplier base is not financially robust and is very vulnerable to any destabilising events ..
>
> There are very few firms which can sustain the overall reduction in fees set out in the Next Steps document, which would be very much greater than 17.5% in some parts of the country, particularly in London and the South East but also in rural areas which had higher fees due to higher costs of travel and waiting. (p. 7)

13. The experience of the Claimants' members reflects and supports Otterburn's pessimistic assessment. (see statements – Russell, Bird and Burrough)

14. Mr Waddington explains that the decisions were the culmination of a decision-making process which was in two stages. A first consultation paper, issued in April 2013, proposed a system of Price Competitive Tendering ("PCT") for criminal legal aid services, whereby firms meeting minimum quality standards would be awarded contracts for criminal legal aid work based on who tendered the lowest price to perform the relevant services (see *Transforming Legal Aid: delivering a more credible and efficient system* ("**the first consultation document**"), chapter 4).

15. Following a campaign by the legal profession, the Lord Chancellor accepted that PCT was not an appropriate way of awarding contracts for criminal legal aid work and proposed instead a dual contract model whereby any firm meeting minimum quality standards would be awarded a contract for "own client" work but would have to tender for a limited number of duty provider contracts. Duty work is criminal legal aid advice, litigation (except Very High Cost Cases) and magistrates' court advocacy services delivered to clients who choose the duty provider – the solicitor on call at the relevant police station or magistrates court - at the first point of request. Own Client Work is all those services delivered to clients who choose their own provider at the first point of request (see Waddington, §35).

16. Currently, virtually all criminal legal aid firms do both duty and own client work. Acting as a duty solicitor is an unpredictable source of income, as there is no guarantee as to how much a solicitor will be needed during a duty "slot" or as to whether initial advice at a police station or magistrates' court will lead

to further work on a case. But acting as a duty solicitor is a vital source of clients in the future, as clients met for the first time in the police station or magistrates' court will, if satisfied with the service they have received, return to the firm in the future as "own clients". Own client work meanwhile represents a stable and relatively predictable source of income, at least while the stock of "own clients" can be replenished through duty work. Few if any criminal legal aid firms could survive on duty work, or own client work, alone.

17. The dual contract model was presented by the Lord Chancellor as having been agreed with the Law Society. In fact, Mr Hudson the Chief Executive of the Law Society has denied that the Law Society agreed to the dual contract model: see Waddington, §84. But Mr Waddington recounts that any such agreement had been reached by the Law Society (a) without consulting with the Claimants or other associations representing criminal legal aid solicitors, and (b) against the wishes of criminal practitioners generally and of the Chairs of the Law Society's own Criminal Law and Access to Justice Committees whom the Law Society had agreed would speak for criminal practitioners in its dealings with the Lord Chancellor (Waddington, §§47-52).

18. The dual contract model was proposed in a second consultation paper, issued in September 2013 (*Transforming Legal Aid: Next Steps* ("the second consultation document"), chapter 3). The second consultation document also maintained a proposal which had been made in the first consultation document, that fees for criminal legal aid work be reduced by 17.5% on average. As Mr Waddington explains, and Otterburn pointed out in the passage quoted in §12 above, the actual proposed reduction is very much greater than 17.5% in some areas (see also statement of Bird).

19. The Lord Chancellor has emphasised throughout the two-stage consultation process his belief that the market for criminal legal aid services requires substantial "consolidation". As he put it to the Justice Select Committee: "There are too many organisations out there to sustain the kind of financial challenges we have" (see Waddington, §§ 11). The successive consultation papers and the Response made clear that the Government's aim is change the structure of the market so that there is a smaller number of larger firms, in the

expectation - unevidenced so far as the Claimants are concerned - that larger firms can perform the requisite services at lower cost (Waddington, §§ 11). Whether or not it is the intention of the Lord Chancellor to put large numbers of criminal legal aid firms out of business, that is very likely to be the consequence of his decisions: see statement of Russell and statements

20. A crucial decision for the Lord Chancellor in the second stage consultation was how many duty provider contracts would be awarded in each procurement area. This decision was crucial because it would be a key determinant of the character and workings of the market under a revised criminal legal aid scheme. Given that every firm meeting quality standards could have an own client contract, the number of duty provider contracts would determine the extent of the change from the present system where all firms doing own client work can also do duty work.

21. Also, looked at from the point of view of individual firms, the number of duty contracts would be a key determinant of whether many firms would be able to continue in existence. Without a duty provider contract to replenish their own client base, most criminal firms will be unable to survive more than a year or two , and whilst there will be some limited scope for contract-holders to use delivery partners, the majority of firms which do not win a duty provider contract will not be able to survive.

22. More fundamental still, if the evidence showed that there was serious doubt as to the sustainability of substantially reducing the number of firms doing duty provider work that would call into question the wisdom of the proposed dual contract system.

23. The second consultation document set out four factors which would determine the number of contracts in each procurement area (§3.31):

- "sufficient supply to deal with conflict of interests" (enough providers in an area to cover most, if not all, cases in which a conflict arises);

- "sufficient case volume to allow fixed fee schemes to work" (case volume is needed to ensure a balance between loss making and profit making fixed fee cases);

- "market agility" (extent to which current providers would need to scale up in order to take on increased volumes of work); and

- "sustainable procurement" (the need to ensure the market would be competitive in future tendering rounds).

24. The second consultation paper went on to inform consultees that the governing consideration when applying these factors was that duty provider contracts must be large enough to be sustainable in their own right, that is, without a firm doing other work, including own client criminal legal aid work (§3.32):

> In addition to these factors, our intention is to ensure that the contracts to deliver Duty Provider Work are large enough in volume and value to be sustainable in their own right after the cumulative reduction in fees by 17.5%, so far as is possible. We clearly must ensure that a minimum number of providers continue to operate in each area and that a service is provided to all who need it. We think the best way to do that would be to ensure that Duty Provider Work is sustainable on its own.

25. Such was the significance, and difficulty, of these issues that the Lord Chancellor stated that he would commission, jointly with the Law Society, independent research to provide the supporting evidence for his considerations:

> 3.33 In order to help inform our analysis of sustainability and the final decision on the number of contracts for Duty Provider Work, we intend to jointly commission with the Law Society a further piece of research to get more detailed information for this purpose. ..
>
> 3.34 Therefore, we propose to determine the appropriate number of contracts for Duty Provider work on the basis of the four factors set out above and the outcomes of the further research. We would welcome consultees' views on these factors and whether there are any others that we should consider.

26. In fact, as noted above, two pieces of independent research were jointly commissioned (see §22 of the Response), by Otterburn and by KPMG. The commissioning of KPMG was not publicised by the Lord Chancellor. The Claimants were unaware of it until 25 November 2013 (see Waddington, §72). The Law Society was aware, and appears to have been involved in providing information to KPMG, but had been required by the Lord Chancellor to enter into confidentiality agreements which prevented any details of the KPMG work (and indeed of the Otterburn work) from being shared with the Claimants or any other interested parties.

27. The Lord Chancellor was asked by the Chair of the CLSA to delay the consultation so as to allow firms to consider and comment on the Otterburn research when it had been completed (23 September 2013) , but he refused to do so (8 October 2013): see Waddington, §§54-55. The reason given was that he had set out in the second consultation document the factors which would be considered when taking decisions on sustainability and numbers of duty provider contracts, and invited views on these. Further requests to that effect were made after the fact of the KPMG research became known and were also refused.

28. However, although he would not disclose Otterburn so as to allow for consultees to comment upon its conclusions, the Lord Chancellor did give a personal commitment to follow Otterburn's recommendations, at a roundtable meeting attended by the Claimants amongst others on 13 November 2013 (Waddington, §70).

29. The Otterburn and KPMG reports were published alongside the Response, on 27 February 2014. It transpired that Otterburn had reached a number of conclusions which were highly critical of the proposals set out in the second consultation paper. These included (pp. 7-8):

    (1) Any fee reduction should take place after not before market consolidation;

(2) Few firms could sustain the overall fee reduction of 17.5% on average, which would be very much greater in some parts of the country.

(3) Few firms would be able to invest in the structural changes needed for a larger duty contract and to recruit new fee earners.

(4) The Criminal Justice System areas were not suitable as a basis for duty provider contract procurement areas without amendment.

(5) A different approach to procuring criminal legal aid services should be adopted in rural areas, where the market was already consolidated.

(6) The number of firms which could grow reasonably rapidly was limited, and their ability to grow was restricted by financial constraints.

30. As for the KMPG report, this turned out to contain analysis and modelling which sought to estimate the financial value of duty provider contract which would be required to much such contracts sustainable in urban, rural and London areas, and thereby the number of such contracts which should be tendered. However, the analysis had been premised upon a number of assumptions which had been provided to KPMG by the Ministry of Justice and which were highly contentious. As Mr Waddington explains (§§104-142), KPMG's analysis assumed, for example, that:

(1) Volumes of legal aid work would remain constant (notwithstanding the recent downward trend in volumes).

(2) Firms would give up 50% of their own client work in order to take on duty provider work, and so would carry on doing 50% of that work alongside duty provider work. This was an important change from the position set out in the second consultation document whereby decisions would be taken on the basis that duty provider work would be sustainable in its own right.

(3) Firms were carrying significant levels of latent staff capacity, with the result that they could take on 15% more work without recruiting additional staff.

(4) Firms could take on 20% more staff through organic recruitment (that is, without mergers or other more fundamental change).

(5) Firms could substantially "improve" staff cost efficiency by an average of 20% (that is, for example, a firm with staff costs at 70% of revenue could "improve" that to 56%).

(6) A duty provider contract would be viable if it was capable of producing a profit, no matter how small that profit.

31. These assumptions, which played a crucial role in the out-turn of KPMG's analysis are not only hotly disputed by the Claimants, they are also in most cases inconsistent with the findings of Otterburn (which were provided to KPMG in draft).

32. The KPMG report also highlighted a number of areas where it could not provide sufficiently certain answers and where further work would require to be done (Waddington, §§104-105). These matters included: the capability of incumbent duty provider contract-holders to grow; the likelihood of future procurements attracting out of area providers to enter the market; the scope for staff efficiency improvements given the local market; the proportion of market consolidation achievable; the special position of London; the issues with firms (especially in London) bidding across areas; and non-financial factors.

33. As already noted, the Response itself revealed that the Lord Chancellor decided to press ahead with a 17.5% average fee cut, 8.75% of which would take effect almost immediately, and to press ahead with a dual contract system, with 525 duty provider contracts, as recommended by KPMG. Contrary to the Lord Chancellor's personal commitment, the Response did not adopt Otterburn's conclusions. Indeed, the vast majority of Otterburn's conclusions

were not even acknowledged in the Response and there was no attempt to explain why the Lord Chancellor had seen fit not to adopt those conclusions.

34. The Response confirmed the importance of the Otterburn and KPMG reports to the Lord Chancellor's decisions. For example:

(1) The Response stated that the number of duty contracts being offered had been informed by the independent research jointly commissioned with the Law Society (§9).

(2) The Response set out the five factors which were to be considered in determining the number of duty provider contracts, the fifth being the intention to deliver duty provider contracts which were large enough in volume and value to be sustainable in their own right (§§20-21). The Otterburn and KPMG reports had been commissioned jointly with the Law Society in order to inform consideration of the five factors, assessment of the market, and to assist in determining the number of duty provider contracts to offer (§22).

(3) However, the Response explained that there had been "a key departure" from the factors originally set out in the second consultation document, as it was no longer intended and assumed that duty provider contracts had to be large enough in value to be sustainable in their own right. The Government now proceeded on the basis that providers would wish to retain some of their Own Client Work, and had asked KPMG to model on the basis that providers would give up 50% of their Own Client Work. It was stated that this figure "best represents how providers are most likely to react in the new market" (§27).

(4) The Response confirmed that the independent research provided "an important evidence base" for determining an appropriate range of duty provider contracts to offer in each procurement area (§33).

(5) The Response explained that the Lord Chancellor had "weighed up all of the analysis, the independent research, the consultation responses and

key risks" and had decided to proceed with the model suggested by KPMG whereby 525 duty provider contracts would be offered, alongside an unlimited number of own client contracts (§37).

Relevant legal principles

35. The procedural challenges which the Claimants pursue in these proceedings are inter-related; all of their submissions focus on the treatment by the Lord Chancellor of the Otterburn and KPMG reports.

Duty to disclose relevant evidence to consultees

36. The Claimants rely upon a line of cases which establish a common law duty on the part of a decision-maker to disclose relevant evidence to consultees. This duty is an aspect of the well-known *Gunning* criterion that consultees must be provided sufficient reasons must be provided for particular proposals so as to permit those consulted to give an intelligent consideration and response:

> It is important that any consultee should be aware of the basis on which a proposal put forward for the basis of consultation has been considered and will thereafter be considered by the decision-maker as otherwise the consultee would be unable to give, in Lord Woolf's words in *Coughlan*, either "intelligent consideration" to the proposals or to make an "intelligent response" to it. This requirement means that the person consulted was entitled to be informed or had to be made aware of what criterion would be adopted by the decision-maker and what factors would be considered decisive or of substantial importance by the decision-maker in making his decision at the end of the consultation process. (*R (Capenhurst) v Leicester City Council* (2004) 7 C.C.L. Rep. 557, §46)

37. In *R v Secretary of State for Health ex parte United States Tobacco* [1992] 1 QB 353, the claimant, having received encouragement from the Government, had opened a factory in Scotland (in 1985) to manufacture oral snuff. The Government announced in February 1988 a proposal to make regulations to ban oral snuff on health grounds. The Government had relied upon scientific advice given to it by an independent committee in 1986 and refused to disclose that advice when requested to do so by the claimant, which wanted to make representations about the advice when responding to a public consultation

about the proposal to ban oral snuff. When regulations were made in December 1989, the Divisional Court held that that refusal was unfair and unlawful and quashed the regulations.

38. The Divisional Court noted that "a high degree of fairness and candour" was required of the Secretary of State, *inter alia*, because the banning of oral snuff was likely to be catastrophic for the claimant's business in the UK.

> It is well established that the claims of natural justice are particularly strong where a party is being deprived of a right previously enjoyed, especially if it involves loss of livelihood: see *McInnes v. Onslow-Fane* [1978] 1 W.L.R. 1520 and *Reg. v. Barnsley Metropolitan Borough Council, Ex parte Hook* [1976] 1 W.L.R. 1052 . For these reasons it was important that the Secretary of State, when he eventually decided to propose the Regulations, should give the applicants a full opportunity to know and respond to the material and evaluations which led him to such a striking change of policy. (per Taylor LJ at 370) [emphasis added]

39. There was no sufficient reason for not disclosing the Secretary of State's external scientific advice, which was to be distinguished from internal policy advice given by civil servants:

> One cannot help feeling that the denial of the applicants' request was due to an inbuilt reluctance to give reasons or disclose advice lest it give opponents fuel for argument. One can understand and respect the need for ministers to preserve confidentiality as to the in-house advice they receive on administrative and political issues from their civil service staff. But here, the advice was from a body of independent experts set up to advise the Secretary of State on scientific matters. I can see no ground in logic or reason for declining to show the applicants the text of the advice. In view of the total change of policy the Regulations would bring about and its unique impact on the applicants, fairness demanded that they should be treated with candour. To conceal from them the scientific advice which directly led to the ban was, in my judgment, unfair and unlawful. (per Taylor LJ at 371)
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> In my judgment the advice given by this committee is wholly different from the sort of advice given by civil servants to a minister when considering what decision to take in many cases of a political nature; for example the type of advice given to a minister by his staff in his private office in relation to the overall effects, the pros and cons of a particular course of policy or a particular decision. For example, in this case the Secretary of State may well have been given advice in relation to the effects of a ban on Skoal Bandits so far as unemployment might result in East Kilbride, the effect so far as the revenue from tobacco duty was concerned and the political fall-out from a decision of that kind. That sort of advice is wholly different

> from the technical advice of a technical committee on technical evidence and, in my judgment, bearing in mind the treatment of these applicants from 1984 onwards, it was a matter of both fair dealing and natural justice that during the consultation process the applicants should have been provided with the conclusions and advice given by the C.O.C. The applicants were entitled to expect legitimately fair dealing from the Secretary of State in the circumstances. This the Secretary of State failed to give them during the consultation process. He failed to give them an opportunity of responding to the conclusions and advice of the committee upon which he relied. (per Morland J at 376)

40. In *R (Eisai) v National Institute of Clinical Excellence* [2008] EWCA Civ 438, the claimant sought to challenge guidance issued by NICE which recommended that an anti-Alzheimers drug manufactured by the claimant should be prescribed in a narrower range of circumstances. NICE had based its recommendations on a technical analysis of the cost-effectiveness of the drug and had disclosed to the claimant – to permit representations to be made – the economic model which it would use for that analysis, but only in a non-executable form. The claimant complained that NICE should have disclosed a full-executable model which could be re-run with different assumptions and inputs. The Court of Appeal (Richards LJ, with whom Tuckey and Jacob LJJ agreed) upheld that complaint, notwithstanding that the claimant had been provided with extensive information and was in a position to make an intelligent response to the consultation:

> 49. I accept that Eisai was given a great deal of information and was able to make representations of substance. It knew the assumptions that were being applied and could comment on them. It knew what sensitivity analyses had been run and could make comments on those. It could and did make an intelligent response, as far as it went. In my judgment, however, none of that meets the point that it was limited in what it could do to check and comment on the reliability of the model itself.
>
> 66. The view I have come to is that, notwithstanding NICE's considered position to the contrary (to which in itself I am prepared to give some weight), procedural fairness does require release of the fully executable version of the model. It is true that there is already a remarkable degree of disclosure and of transparency in the consultation process; but that cuts both ways, because it also serves to underline the nature and importance of the exercise being carried out. The refusal to release the fully executable version of the model stands out as the one exception to the principle of openness and transparency that NICE has acknowledged as appropriate in this context. It does place consultees (or at least a sub-set of them, since it is mainly the pharmaceutical companies which are likely to be

> affected by this in practice) at a significant disadvantage in challenging the reliability of the model. In that respect it limits their ability to make an intelligent response on something that is central to the appraisal process. The reasons put forward for refusal to release the fully executable version are in part unsound and are in any event of insufficient weight to justify NICE's position. [emphasis added]

41. Richards LJ referred to the *United States Tobacco* case in §§29-30 of his judgment. There was no universal principle that information coming from an independent expert should be disclosed. That was a relevant factor in favour of disclosure "but it was a combination of factors - including the requirement of a high degree of fairness, the crucial nature of the advice, the lack of good reason for non-disclosure, and the impact on the applicants – which led to what was on the facts a fairly obvious conclusion".

42. Most recently, in *R (Save our Surgery) v Joint Committee of Primary Care Trusts* [2013] EWHC 439 (Admin), the Administrative Court upheld a complaint of lack of procedural fairness in a consultation procedure preceding a decision as to consolidation of paediatric heart surgery centres in the NHS in England. The existing units had been assessed by an expert committee against various criteria and sub-criteria in order to produce an overall score for each unit. The total scores were made public but the defendant refused to disclose the breakdown of the criteria and sub-criteria scores which would have revealed exactly what the expert committee had thought of the quality of the services provided at each unit and so would have permitted more focused representations to be made on quality issues.

43. The Court (HHJ Nicola Davies, as she then was) held that that refusal was unfair and justified quashing the ultimate decision. The sub-scores represented an expert evaluation which was highly relevant to the assessment exercise and their disclosure had been necessary to enable the Leeds unit "to provide a properly focussed and meaningful response" (§§112, 117).

44. The Claimants also rely upon the principle that public bodies must respect legitimate expectations to which their conduct has given rise and must, at the very least, provide affected individuals with an opportunity to make

representations before a different course is taken (see *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, §§68-69, per Laws LJ):

> 68 .. Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public. .. Accordingly a public body's promise or practice as to future conduct may only be denied, and thus the standard I have expressed may only be departed from, in circumstances where to do so is the public body's legal duty, or is otherwise, to use a now familiar vocabulary, a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances.
>
> 69 This approach makes no distinction between procedural and substantive expectations. Nor should it. The dichotomy between procedure and substance has nothing to say about the reach of the duty of good administration. Of course there will be cases where the public body in question justifiably concludes that its statutory duty (it will be statutory in nearly every case) requires it to override an expectation of substantive benefit which it has itself generated. So also there will be cases where a procedural benefit may justifiably be overridden. The difference between the two is not a difference of principle. Statutory duty may perhaps more often dictate the frustration of a substantive expectation. Otherwise the question in either case will be whether denial of the expectation is in the circumstances proportionate to a legitimate aim pursued. Proportionality will be judged, as it is generally to be judged, by the respective force of the competing interests arising in the case. Thus where the representation relied on amounts to an unambiguous promise; where there is detrimental reliance; where the promise is made to an individual or specific group; these are instances where denial of the expectation is likely to be harder to justify as a proportionate measure. They are included in Mr Underwood's list of factors, all of which will be material, where they arise, to the assessment of proportionality. On the other hand where the government decision-maker is concerned to raise wide-ranging or "macro-political" issues of policy, the expectation's enforcement in the courts will encounter a steeper climb. All these considerations, whatever their direction, are pointers not rules. The balance between an individual's fair treatment in particular circumstances, and the vindication of other ends having a proper claim on the public interest (which is the essential dilemma posed by the law of legitimate expectation) is not precisely calculable, its measurement not exact. It is no surprise that, as I ventured to suggest in *Begbie* ,

> "the first and third categories explained in the *Coughlan* case ... are not hermetically sealed". These cases have to be judged in the round.

Grounds of Challenge

45. The Claimants submit that fairness required that the Otterburn and KPMG reports were disclosed to them by the Lord Chancellor, so that they would have an opportunity to make representations about the contents of those reports before the decisions were taken. That is in summary because:

(1) Given that the avowed intention and inevitable effect of the decisions was the consolidation of the market, in other words to bring about the closure of many existing criminal legal aid practices with the consequent loss of livelihood for those concerned, the Lord Chancellor was required to act with a high degree of fairness.

(2) Fair consultation requires that consultees are made aware of the basis on which a proposal has been considered before being put out for consultation, "and will thereafter be considered by the decision-maker" (*Capenhurst*: see §36 above). The Otterburn and KPMG reports were a central part of the body of evidence which the Lord Chancellor would consider when making crucial decisions as to the sustainability of the dual contract approach and the numbers of duty provider contracts. They put the flesh on the bones of the five general factors for consideration which had been set out in the second consultation document.

(3) The KPMG report in fact revealed and built upon what the Lord Chancellor himself described as a "key departure" from the factors set out in the second consultation document. The Claimants were unaware of that key departure until after the decisions had been taken.

(4) The Otterburn report contained valuable information and important findings which would have materially informed and improved the responses to consultation which the Claimants were able to make. The

KPMG report contained analysis which was questionable, being based on hotly disputed assumptions, of which the Claimants were unaware, and which they would have sought to dispute and disprove if given the opportunity. The KPMG report also highlighted areas for further consideration upon which the Claimants would have been able to make a valuable contribution if they had had the opportunity to do so. Therefore, the impact of not disclosing the reports was significant: the Claimants were left in the dark as to important matters on which the Lord Chancellor's decisions were to be based and were unable to give a full and effective response to the second consultation document.

(5) There was no sensible reason why the two reports could not have been disclosed to the Claimants. The Lord Chancellor has contended in his response to the Claimants' Pre-Action Protocol that he was not obliged to disclose the reports (see below) but he has advanced no positive rationale for withholding them. It appears that this was a case, like *United States Tobacco*, where "the de nial of the [Claimants'] request was due to an inbuilt reluctance to give reasons or disclose advice lest it give opponents fuel for argument".

46. That the Lord Chancellor also reneged upon his personal commitment to adopt the conclusions of Otterburn (in favour of adopting KPMG's conclusions) heightens still further the duty of fairness with reference to the disclosure of the reports. On the test set out in §68 of *Nadarajah*, a legitimate expectation was created by that personal commitment: his statement was made directly and in person to representatives of the Claimants amongst others, in circumstances where they were entitled to rely upon it.

47. As already noted, the Claimants do not seek to challenge the merits of the Lord Chancellor's decisions and do not therefore suggest that he was legally required to adopt Otterburn's conclusions in the Response. They do however contend that he was required as a matter of fairness to notify the Claimants if he was no longer regarding himself as bound to follow Otterburn and to give them the opportunity of making representations as to whether or not he should

do so. Of course, such representations could only have been made once Otterburn (and KPMG, which applied some but only some of Otterburn's conclusions) had been disclosed.

The Lord Chancellor's defence

48. The Lord Chancellor has contended in his response to the Claimants' Pre-Action Protocol letter that he did not act unlawfully in deciding not to consult publicly on what he termed "the detail which underlay the complex financial modelling advice provided by KPMG". Three reasons were given. First, it is said that it was "inappropriate" to consult publicly on "a matter so detailed and complex". Second, it is said that consultation was unnecessary because the Ministry of Justice had already publicly consulted on the factors which, in its view, were relevant to contract numbers. Third, it is said that the Government had "worked extensively and collaboratively with the Law Society over the content of the KMPG (and Otterburn) reports and the assumptions which underpinned their conclusions".

49. Underpinning each of those arguments was a general contention, that the Secretary of State had a broad discretion as to what information was consulted upon, because of the broad and complex nature of the proposals, "involving both significant structural change and major economic and public spending aspects". As to that, it is true that the Court will usually give some weight to the views of a decision-maker as to the proper shape and operation of a consultation process (as the Court of Appeal recognised in *Eisai*, §66). Ultimately, however, whether a consultation has been fair or not is a hard-edged question for the Court, rather than being subject to a *Wednesbury*/rationality analysis. Precisely that point is made in one of the authorities cited by the Lord Chancellor in his Pre-Action Protocol Response. In *R (Islington LBC) v Mayor of London* [2013] EWHC 4142 (Admin), §305, Foskett J stated:

> There is undoubtedly an area of discretion on the part of any body embarking on a consultation exercise to determine the ambit of the material to be published and thus the likely area of response. However, it is important to avoid the consequences of the

> potentially self-fulfilling nature that is arguably endemic in leaving to the ultimate decision-maker what should or should not be published: certainly, the court has to decide the issue if called upon to do so, it is not just for the decision-maker. [emphasis added]

50. As to the three specific arguments relied upon by the Lord Chancellor, the argument that the complexity of information represents grounds in itself for withholding it is incorrect in principle (and, with respect, patronising). The *Eisai* case demonstrates that: the fully executable economic model which had not been disclosed was much more complex than the contents of the KPMG report. In fact, the matters set out in that report on which the Claimants would have wished to comment were not particularly complex – in particular, the assumptions on which the model was based, and the further work identified - and their members were particularly well-placed, better placed perhaps than either the Lord Chancellor or KPMG, to understand and comment on those issues. The complexity argument does not apply to Otterburn.

51. The second argument, that disclosure of the two reports was unnecessary because the Lord Chancellor had set out in the second consultation document the factors which would be considered when deciding upon numbers of duty provider contracts. That is incorrect as a matter of fact: the KPMG report revealed "a key departure" from the factors which had been set out in the second consultation document. It is also incorrect in principle, as the authorities demonstrate. It could equally have been said in *Eisai* that the claimant knew, broadly, that NICE would be deciding on the cost-effectiveness of Aricept, and could have made representations accordingly; and in *Save our Surgery* that the Joint Committee would be deciding on the respective merits of paediatric heart surgery units so each unit could make representations as to its own merits. In each case the Court ruled that more detailed information had to be disclosed because of its significance to the ultimate decision. The same applies here.

52. The third argument, that the Lord Chancellor's consultation/engagement with the Law Society could absolve him from providing information to the profession and the public more widely, is also misconceived. The flaws relied upon by the Claimants were in a public consultation, on issues which affect the

public as a whole, and they could not be cured by consultation with, or disclosure to, a single organisation. In any event, the Law Society did not represent, either expressly or impliedly, the Claimants, other specialist legal aid practitioners and other interested parties who required to be consulted about these important decisions.

53. Moreover, it would have been obvious to the Lord Chancellor and those advising him that there were deep divisions between the Law Society and specialist practitioner groups on the issues raised by the two consultation documents, which culminated in a vote of no confidence in the Law Society on 17 December 2013. These divisions, and the dissatisfaction with the Law Society felt by the Claimants and other specialist practitioner groups is explained by Mr Waddington in his statement. The Lord Chancellor could not reasonably have taken the view that the Law Society was speaking for the entire body of those potentially affected by the proposals, or even for a significant proportion of them (and it is not alleged that that is what he in fact thought). The Lord Chancellor does not of course suggest that the Law Society in fact shared with the Claimants or with their individual members what was in, or likely to be in, the Otterburn and KPMG reports. He had taken steps to ensure that that could not happen by requiring the Law Society to sign up to confidentiality agreements.

54. Accordingly, it is submitted that the Lord Chancellor has not come close to advancing a satisfactory explanation for his failure to disclose the Otterburn and KPMG reports.

Conclusions

55. Therefore, the Claimants submit that the linked decisions set out in the Response regarding the fee cut and the system for tendering of duty provider contracts were taken in breach of the common law duty of fairness, were *ultra vires*, and should be quashed. If the Lord Chancellor wishes to proceed with these reforms, he must first conduct a further, full consultation, with full disclosure of the independent advice and analysis on which he intends to rely

when taking his decisions. Since an aspect of the decision to introduce a fee cut with almost immediate effect was a decision to make regulations to that effect, it is anticipated that the Lord Chancellor would proceed to withdraw those regulations if this Claim is successful. If not, those regulations should also be quashed.

JASON COPPEL QC

JOANNE CLEMENT

11KBW
11 King's Bench Walk
Temple
London
EC4Y 7EQ

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