Standing in public procurement judicial review claims take a tumble (R (Good Law Project Ltd) v Secretary of State for Health and Social Care)

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Public Law analysis: This was one a series of cases in which the Good Law Project ('GLP') sought to challenge the award of contracts awarded by the Department of Health and Social Care ('DHSC') in the midst of the coronavirus (COVID-19) pandemic. In this case, it judicially reviewed DHSC's award of three contracts to Abingdon Health plc ('Abingdon'), a diagnostics company, in respect of the development of antibody lateral flow tests ('LFTs'). GLP argued that the decisions to enter into the contracts were irrational (in a wide array of ways); that there was a real possibility of bias and/or predetermination arising in relation to DHSC's conduct by reason of a number of factors; that DHSC had failed to manage a conflict of interest and that its actions were vitiated by unlawful nationality discrimination/preference. It further maintained that DHSC had breached the principles of equal treatment, transparency, and proportionality and granted unlawful state aid. Mr Justice Waksman dismissed every aspect of GLP's grounds. Further, he found that GLP did not have standing to bring this challenge. Written by Jonathan Lewis, barrister at Henderson Chambers (who has been instructed by DHSC in respect of some claims brought by GLP).

R (on the application of Good Law Project Ltd) v Secretary of State for Health and Social Care [2022] EWHC 2468 (TCC)

What are the practical implications of this case?

This is a colossal judgment running to 551 paragraphs. The majority of it is consists of a meticulous summary of the complex factual background and the arguments that arose out of it. It does not, nor purport to, develop the relevant legal principles to any great degree but provides a summary of the law in this area.

One of the key issues raised by the coronavirus contract judicial review claims is the legal consequences of the Public Contracts Regulations 2015 (PCR 2015), SI 2015/102, reg 32(a)(c) applying. That provision allows contracting authorities to award a contract without advertisement where it is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open or restricted procedures or competitive procedures with negotiation cannot be complied with. Perhaps taking a more restrictive approach than decisions on the issue, Waksman J held that, on the facts of this particular case, where PCR 2015, SI 2015/102, reg 32(2)(c) is found to apply, PCR 2015, SI 2015/102, reg 18 (which requires contracting authorities to treat economic operators equally and without discrimination and act in a transparent and proportionate manner) does not apply at all (at para [306]). His judgment nonetheless proceeds on the basis that it did apply.

Waksman J devoted a significant part of the judgment, albeit after first determining all the other issues, to his consideration of standing (paras [498]–[550]). He found, contrary to some other High Court decisions involving GLP, that it did not have standing to bring this procurement claim. This decision has to be very carefully considered in its context. First, his comments were obiter (acknowledged at para [498]). Second, it is a High Court decision and therefore not binding in other judicial review claims. Third, and in any event, as Waksman J put it, 'the question of standing is acutely case-sensitive' such that the fact that a litigant may have standing in one, 'does not mean automatically that it has standing in another' (at para [526]).

Particularly interesting observations about standing were as follows:

- the standing test is 'multi-faceted' involving consideration of the following factors (at para [501]):
  - (a) the merits of the underlying claims

- (b) the particular legislative or other context of the claim being made
- (c) how, if at all, the claimant might be affected by the unlawfulness alleged (noting here that GLP was not affected any more than any other member of the public (at para [516])
- (d) the gravity of the allegations or findings made
- (e) other possible claimants, and
- (f) the position of the actual claimant

- it is not that the question of merits is always such a powerful factor that if the relevant claims fail, it necessarily follows that there was no standing, as opposed to that question now merely becoming academic (at para [508])
- a putative non-economic operator does have the ability to argue 'gravity', even in the PCR context but this, by itself, it would not be determinative (at para [517])
- too much weight must not be given to the fact that the economic operators involved were unlikely to bring a claim (perhaps because the claim was too speculative or bringing it would be too expensive), 'otherwise one would end up saying that the very fact that economic operators who were potential claimants decided, for whatever reason, not to litigate, would be sufficient to confer standing on someone else who was prepared to' (at para [519])
- the court should concentrate more on the question of the effect on the actual claimant or gravity, than on why the natural claimant did not in fact litigate. That is, unless, the claimant was bringing an 'associational' claim or a 'surrogate' claim on behalf of others who may not be well placed to bring it (at para [523]). However, the question of the absence of claims brought by the 'natural' claimants is not wholly irrelevant
- the mere fact that there is a public interest in the issue to be litigated does not inevitably mean that the actual claimant has standing. An allied point is that the fact that the actual claimant brings the claim sincerely does not itself confer standing (at para [527])
- it does not necessarily follow that because a claimant has been granted a judicial review cost capping order under the Criminal Justice and Court Act 2015, that it has standing (at para [531])
- the fact that the public procurement regime serves important public interests does not in and of itself not confer standing on (here) GLP as opposed to a relevant economic operator (at para [541])
- the fact that GLP had experience in litigating procurement claims only went 'so far' where it has not itself been directly affected and where there is no surrogate or associational claim (at para [541])

What was the background?

In April 2020, DHSC entered into the 'Research Contract' with Abingdon under which it would pay Abingdon £2.5m to develop a reliable antibody LFT (it had purchase many LFTs off-the-shelf only to discover that they were not sufficiently reliable). Abingdon was in practice contracting on behalf of a consortium of other diagnostic companies.

In June 2020, the same parties entered into the 'June Contract' by which DHSC agreed to fund the costs of the purchase of particular required LFT components so as to enable Abingdon to make ten million tests. In August 2020, the same parties entered into the 'August Contract' by which DHSC purchased one million LFTs but with the right to purchase a further nine million.

Waksman J identified the grounds of challenge as follows:

- (irrationality) GP asserted that the decision to enter into the Research Contract was made:
  - (a) in breach of DHSC's own policy/process
  - (b) without sufficient enquiry into available suppliers' capability, etc
  - (c) on the basis of false/incorrect advice, and
  - (d) with regard to, Abingdon's nationality. GLP alleged that the decision to enter into the June Contract was made at a point in time at which DHSC had not conducted any evaluation of the accuracy or reliability of the Abingdon LFTs and that (in effect) the decision to enter into the August Contract was made prematurely

- GLP alleged that there was a real possibility of bias and/or predetermination arising in relation to DHSC's conduct by reason of one or more of nine matters, some of which related to Professor Bell and/or the University of Oxford. It was further alleged DHSC failed to take appropriate measures to effectively prevent, identify and remedy conflicts of interests (and consequently acted in breach of PCR 2015, SI 2015/102, reg 24). Further, GLP alleged that DHSC's actions were vitiated by unlawful nationality discrimination/preference, and/or breach of equal treatment, fairness, and transparency, and/or irrelevant considerations, by reason of its desire to finance and develop the British diagnostics industry
- GLP alleged a breach of principles of equal treatment, transparency, and proportionality in failing to advertise the contracts (even though it conceded that PCR 2015, SI 2015/102, reg 32(2)(a) applied) and in the process by which Abingdon was appointed
- GLP contended that DHSC granted Abingdon state aid by the direct award of the contracts and the alleged provision of support and assistance to Abingdon/the consortium

DHSC denied all of the claims in their entirety. This claim was issued on 4 November 2020.

What did the court decide?

Waksman J considered the evidence in forensic detail (paras [45]–[291]), noting that DHSC had agreed to give 'something akin to standard disclosure (itself somewhat unusual in a conventional JR)' (at para [49]). He rejected GLP's suggestions that DHSC should have called further evidence (at para [53]) and that the allegations of breach of candour (for example, at paras [260], [287]), saying 'all of the debate about phones and records has got quite out of hand' and 'I am not assisted at this stage by allegations which seem to me to suggest that there is some foul play at work in relation to data not now available to the Court' (at para [291]). He rejected various criticisms made of DHSC noting the unique context in which the contracts were awarded (which itself explained a lack of formal documentation) (at para [141]). Waksman J's dismissal of each grounds largely turned on his finding of fact, in particular dismissal of GLP's allegations of dishonesty/making false statements on the part of DHSC's officials (eg at paras [141], [145], [172], [315]).

In respect of the effect of the application of PCR 2015, SI 2015/102, reg 32(2)(c), he relied upon the dicta of O'Farrell and the Court of Appeal in GLP and *Everydoctor v SSHSC and Crisp Websites and others* [2022] EWHC 46 (TCC), making the following observations. Where a direct award to one operator qualifies under PCR 2015, SI 2015/102, reg 32(2)(c), it is difficult to see how any other regulation which presupposes an open or some other competition between a number of economic operators can apply (at para [301]). The entirety of PCR 2015, SI 2015/102, reg 18 presupposes that there is in fact a competition (at para [302]). It does not of course follow that if PCR 2015, SI 2015/102, reg 18 does not apply, 'there is some kind of procurement free-for-all' (at para [303])—some regulations will still apply (eg PCR 2015, SI 2015/102, reg 50, the requirements to publish a contract award notice). Further, if there are grounds that the contract in issue is nonetheless tainted by unlawfulness, such as irrationality, those challenges remain available. The mere application of PCR 2015, SI 2015/102, reg 32(2)(c), does not cast out all of the Regulations—'it all depends on the circumstances of each case including the procurement that is itself now justified as not requiring the usual competition' (at para [304]). Importantly, Waksman J concluded that in respect of this issue 'the overall position at the moment seems to me to be unclear' and that he would hold on the facts of this case that PCR 2015, SI 2015/102, reg 18 'does not apply at all' (at para [306]).

He found that the rationality challenges had to be 'assessed by reference to the constraints imposed by the urgent need to respond as swiftly as possible to the pandemic' (at para [313]) and that DHSC had acted rationally in taking all the actions under challenge (paras [312]–[333]). In respect of the apparent bias challenge, Waksman J noted that while DHSC had conceded that the doctrine applied in this context, he would have found that it was not engaged in these circumstances (at para [339]). He found that there was no apparent bias and that on the facts no conflict of interest arose (at paras [334]–[354]). As to an unlawful preference to engage with a British company, he said '…in these extreme circumstances, I cannot see why a policy which favours a company with a base in the UK (whether incorporated here or not) which had the facility to develop and manufacture some or all of the necessary tests was not plainly justified on the grounds of public health' (at para [361]).

In terms of the breach of equal treatment arguments (ground 2 at para [379]–[406]), Waksman J held that it was not possible to conclude that there was a host of readily available relevant LFT tests 'out

there' from other manufacturers which could have done the job that Abingdon was tasked with and moreover (presumably) without needing to do any development first, and in the same timescale (at para [402]). He dismissed GLP's arguments that Abingdon had been given unlawful state aid in its entirety (para [407]–[497).

Case details:

- Court: King's Bench Division (Technology and Construction Court)
- Judges: Mr Justice Waksman
- Date of judgment: 7 October 2022

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