



JUDICIARY OF
ENGLAND AND WALES

R (on the application of the London Borough of Lewisham and Save Lewisham Hospital Campaign Limited) v Secretary of State for Health and the TSA for South London Hospitals NHS Trust

High Court (Administrative Court)

31 July 2013

SUMMARY TO ASSIST THE MEDIA- THIS IS NOT THE JUDGMENT

The High Court (Mr Justice Silber) has today quashed recommendations made by a Trust Special Administrator and a subsequent decision by the Health Secretary to reduce services offered at University Hospital in Lewisham.

1. There are few issues, which prompt as much vociferous protest as attempts to reduce the services at a hospital, which is highly regarded and which is much used by those who live in its neighbourhood. One such hospital is University Hospital in Lewisham. This case arises because the Secretary of State for Health has decided to reduce the services provided at that hospital.
2. In these applications, Lewisham Council and an organisation entitled Save Lewisham Hospital Campaign Limited are seeking to quash the recommendation of the Trust Special Administrator (“TSA”) that the services offered at University Hospital Lewisham should be substantially reduced and a subsequent decision of the Secretary of State also to reduce those services offered at that hospital.
3. This case concerns what happened on the first occasion on which a totally new special procedure entitled “The Unsustainable Providers Regime” has been used. As its name shows, it was intended to deal with failing NHS organisations, was used. South London Healthcare Trust was a very badly performing trust. In the 12 months to March 2012, it reported a deficit of £65 million making it the most financially challenged Trust in the NHS and it was forecast to have an accumulated deficit of £196 million for the five years from 2012/2013 to 2016/2017. The Secretary of State appointed a TSA to the South London Healthcare Trust which meant that the Chair and its directors of the South London Healthcare Trust board were then suspended from office and the TSA then took control.
4. The South London Healthcare Trust had three main hospitals, which were the Queen Elizabeth Hospital in Woolwich, Princess Royal University Hospital and Queen Mary’s Hospital in Sidcup. It is important to emphasise that the University Hospital at Lewisham was not in the area of South London Healthcare Trust. Instead it was in a completely different healthcare trust which was the Lewisham Healthcare NHS Trust which, unlike the South London Healthcare Trust was not a failing NHS entity and no TSA had been, or indeed has been, appointed in relation to it. So the TSA for the South London Healthcare Trust was not

concerned with the affairs of the University Hospital at Lewisham or indeed the Lewisham Healthcare NHS Trust.

5. Under the "The Unsustainable Providers Regime" the TSA is required to provide to the Secretary of State and to publish a draft report stating the action which the TSA recommended the Secretary of State should take, and these are important words, "*in relation to the trust*".
6. The TSA for the South London Healthcare Trust made recommendations in his draft report of 24 October 2012. Those which are being challenged on the present application are first, that the Lewisham University Hospital should no longer provide emergency care for critically ill patients who did not need to be admitted to hospital, second, that it should lose its obstetrician-led maternity unit, and third, it should acquire an elective centre for non-complex inpatient procedures such as hip implants.
7. There was then further consultation and in his final report produced on 8 January 2013, the TSA recommended that the South London Healthcare Trust should be dissolved and that Queen Mary's Hospital should become part of Lewisham Healthcare Trust. Those decisions, which were also in the draft report, have not been challenged as there were clear statutory provisions supporting and underpinning the right of the Secretary of State to make those decisions.
8. There were also recommendations of the TSA in his final report which relate to the reduction of the services to be provided at Lewisham Hospital and it is those which are being challenged on these applications.
9. The Secretary of State then had to decide what action to take in relation to these recommendations and he observed that he was aware of the sense of unfairness in Lewisham where people felt that their much respected and admired hospital had been caught up in the financial problems of its neighbours. The Secretary of State therefore asked the NHS Medical Director Sir Bruce Keogh to review the TSA's recommendations. As a result of Sir Bruce's recommendations, the Secretary of State changed the recommendations in some respects in his Decision which is the main subject of the challenge on these applications.
10. I must stress that the issues raised on these applications do not relate in any way to the merits of arguments for and against the reduction of the services at Lewisham Hospital. Instead, my tasks are to decide first whether the TSA had the legal authority to make the recommendations which he did reducing the services at Lewisham Hospital, which was not in the area of the South London Healthcare Trust; and second whether the Secretary of State had legal authority to make the Decision which he did reducing the services offered at Lewisham Hospital.
11. Many arguments were put forward by counsel for the parties explaining why the TSA and the Secretary of State had or did not have legal authority to make respectively their recommendations and decision.
12. The main challenge was that the TSA and the Secretary of State were only entitled to make recommendations and a decision in the words of Chapter 5 A of Part 2 of the National Health Services Act 2006 "*in relation to the Trust*". Lewisham Council and the Campaign Group contended that this meant that the services offered by Lewisham Hospital could not be the

subject of the TSA's recommendations or a decision of the Secretary of State bearing in mind that Lewisham Hospital was not in the NHS Trust over which the TSA had been appointed, but instead it was in a completely different NHS Trust. In other words, the case of Lewisham Council and the Campaign Group was that the TSA and the Secretary of State could only make recommendations and decisions in relation to hospitals in South London Healthcare Trust, but not in relation to hospitals outside that Trust's area.

13. The TSA and the Secretary of State disagreed and their case was that they were respectively entitled to make recommendations and a decision which were consequences of their decision to dissolve the South London Healthcare Trust and to move Queen Mary's Hospital in Woolwich to the Lewisham Trust. So the case of the TSA and the Secretary of State is that they had authority to make recommendations and a Decision relating to the services at Lewisham Hospital including reducing them.
14. The answer to this dispute depended on an analysis of the provisions in the statute and the statutory guidance. I concluded that the case for the Claimants was correct and so the TSA and the Secretary of State were not respectively entitled to make recommendations and a decision reducing services at Lewisham Hospital because it was not a hospital over which a TSA had been appointed but in a totally different trust. In the words of the statute, the recommendations of the TSA and the decision of the Secretary of State reducing services at Lewisham Hospital were not made in the words of the Act "*in relation to the Trust*", which was the South London Healthcare Trust. My reasons are set out in more detail in paragraphs 76 to 94 of my judgment. So the effect of my decision is that the recommendations and the decision of TSA and the Secretary of State respectively relating to the services to be offered at Lewisham Hospital must be quashed.
15. There is an additional reason why the recommendations and a decision of TSA and the Secretary of State relating to the services to be offered at Lewisham Hospital must be quashed. The recommendations and a decision of the TSA and the Secretary of State had to have regard to or to ensure "*support from GP Commissioners*". There was much documentation issued by the Department of Health which indicated that it was important that "*local commissioners*" should give their views and that the lead commissioners should be GP Consortia where the majority of the patients would be most affected by the proposed service changes.
16. So far as Lewisham Hospital is concerned, there is no doubt that the majority of the patients who would be most affected by the proposed service changes would have been in Lewisham, because that is where the vast majority of the patients came from who went to the University Hospital in Lewisham. It was quite clear that the Lewisham GP Commissioners did not give support to the proposals; on the contrary, they strongly opposed them although those GP Commissioners in a number of surrounding but different areas were happy with them. I considered that it was the absence of support from the local GP Commissioners which constituted an additional reason why the decision of the Secretary of State cannot stand.
17. I should finally mention an additional point made by the Secretary of State which was even if the decision which he made under the regime with the TSA was unlawful as beyond his powers, he can still justify the decision by relying on his other powers. In the judgment I considered, but rejected, that argument. In consequence, the recommendations of the TSA have to be quashed, as has the decision of the Secretary of State.

18. Bearing in mind that this was the first occasion in which the TSA regime has been considered by the Courts, I granted the Secretary of State and the TSA permission to appeal.