Standing Room Only?

Further standing setbacks for the Good Law Project as High Court dismisses antibody testing JR

***R (Good Law Project) v Secretary of State for Health and Social Care (Abingdon Health PLC Interested Party)* [2022] EWHC 2468**

(TCC)

Imogen Proud, Barrister, Monckton Chambers

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Philip Moser KC, Ewan West and Khatija Hafesji represented the successful Department of Health and Social Care.

Ligia Osepciu and Clíodhna Kelleher represented Abingdon Health PLC, the Interested Party.

The judgment is available here.

References are to paragraphs of the High Court's judgment.

Overview

On 7 October 2022, the High Court (Waksman J) handed down judgment in the judicial review challenge brought by the Good Law Project ("**GLP**") to decisions of the Department of Health and Social Care ("**DHSC**") to enter into three Covid-related contracts with Abingdon Health PLC ("**Abingdon**") for Covid antibody testing.

The Court dismissed GLP's claim in its entirety and went on to find that GLP lacked standing to bring such claims.

This is a juggernaut of a judgment, running to 551 paragraphs, covering rationality, apparent bias, equal treatment and transparency, State aid and allegations of foul play in JR.

In order to remain bite-size, this case note will focus on how the High Court approached standing, and the implications for standing in other public law and procurement litigation.

The Facts

In 2020, in response to the Covid-19 pandemic, DHSC entered into public contracts with Abingdon to develop and potentially supply a lateral flow test which could be used by people at home to identify Covid-19 antibodies. It was thought at the time that if a link could be shown between the presence of antibodies and immunity to Covid-19, such tests could support the return to normal life. (As matters transpired, such a link was not found.)

The factual background in the judgment is extensive, running from **[57]** to **[286]** and will prove a feast to those with an appetite for 'Pandemic history'.

GLP brought the following grounds of judicial review:

1. rationality;
2. apparent bias, conflict of interest, unlawful nationality preference
3. breach of the equal treatment and transparency obligations
4. unlawful State aid.

Each of the four grounds was dismissed. For a summary of the reasons why, see this case news.

Standing

Standing is considered at **[498]** – **[532]**.

The High Court turned to standing *after* dismissing each of the grounds, but Waksman J did comment that, to his mind, there would seem to be reasons why it would be sensible to deal with standing issues at the permission stage **[503]**.

Standing was academic given the dismissal of the grounds **[498]**, but the Courts are presently showing themselves willing – even eager – to engage with this issue, even when obiter.

Having set out the "sufficient interest" test from s31(3) of the Senior Courts Act 1981 **[500]**, Waksman J summarised the relevant principles from the case law **[501]**, explaining that the question of "sufficient interest" involves (at least) consideration of the following factors:

(1) The merits of the underlying claims;

(2) The particular legislative or other context of the claim being made;

(3) How, if at all, the claimant might be affected by the unlawfulness alleged;

(4) The gravity of the allegations or findings made;

(5) Other possible claimants;

(6) The position of the actual claimant.

There is no suggestion in the judgment that these factors are specific to the procurement context. Indeed, the fact that the procurement context was specifically considered within factor (2) suggests the most natural reading is that these factors apply across the full spectrum of public law challenges.

In relation to merits, Waksman J acknowledged that case law (eg *World Development Movement Limited v SSFCA* [1995] WLR 386) established that the merits are "*an important, if not dominant, factor when considering standing*" **[506]**. However, the Judge expressed some doubt that a lack of standing would always follow from a lack of merit **[508]**.

The particular legal context of this claim was a challenge under the Public Contracts Regulations 2015 ("**PCR**"). GLP accepted that in this context the obvious and natural claimants would be economic operators **[509]**. Waksman J emphasised that it was not the case that a person other than an economic operator could never have standing, citing the obiter comments in *Chandler v SSCSF* [2009] EWCA Civ 1011. In *Wylde v Waverly BC* [2017] PTSR 1245 Dove J applied the test of whether the non-economic operator could "*show that performance of the competitive tendering procedure … might have led to a different outcome that would have had a direct impact on him*" **[514]**.

Waksman J considered that, in relation to "effect on the claimant", little more needed to be said other than it was clearly relevant. GLP was not affected any more than any other member of the public (as distinct from an affected economic operator) **[516]**.

In relation to "gravity", Waksman J did not want to exclude the possibility that a non-economic operator could establish this factor was present. In *GLP v SSHSC* [2021] EWHC 346, Chamberlain J gave weight to the fact that the alleged breaches related to contracts worth billions of pounds **[518]**.

When considering "other possible claimants", it is important in the procurement context not to "take too far" the question of whether there were economic operators who could theoretically bring a claim, but for whatever reason had not done so. The mere fact that economic operators had chosen not to litigate may be relevant but could not be decisive. Instead, the Court should focus on the effect on the actual claimant, or upon "gravity" **[523]**.

In relation to the position of the Claimant, this was to be considered in the context of the case of a whole, but it is well-established that where claimants are mere "busybodies" or have an ulterior motive that can be sufficient to disqualify them **[525]**.

By way of "other points", the High Court noted:

- Standing is "acutely case-sensitive" and having standing in one claim will not automatically confer it in another **[526]**.

- The mere fact that there is public interest in the matter cannot suffice. Nor can bringing a claim sincerely **[527]**.

- Recent cases have "questioned" GLP's standing **[528] – [529]**, including:

    - *GLP v Minister for the Cabinet Office and Public First Ltd* [2022] EWCA Civ 21 ("***Public First***"), in which the Court of Appeal stated that although it had not been appealed, "*the question of standing for complete strangers to the procurement process with no commercial interest both under the Regulations and on public law grounds is a question ripe for review when it next arises*";

    - *GLP v Prime Minister and another* [2022] EWHC 298 (Admin) where it was found GLP did not have standing in a JR outside the procurement context;

    - *GLP v Pharmaceuticals Direct* [2022] EWCA Civ 355, in which the Court of Appeal repeated that the standing question was "ripe for review"

- It does not follow from the grant of a costs-capping order ("CCO") that standing is conferred, despite it being part of the CCO test that the claim be public interest proceedings **[530]**

Applying the above principles to the fact of the present case, the High Court held that GLP, a stranger with no commercial interest, lacked standing in relation to each of the grounds considered in turn: it was not affected in any tangible way by the award of the public contracts **[533]**; the alleged breach was not 'grave' **[536]**; very limited weight was to be attached to GLP's 'experience and expertise' in procurement litigation **[541]**; and it was not decisive that no economic operator had brought a claim **[539]**.

Comment

• This judgment adds to the seemingly ever-growing family of cases, many brought by GLP, in which the long standing permissive trend in relation to standing in JR is not automatically being followed.

• Waksman J commented that, whilst the case law does not always support this approach, it struck him as sensible to deal with standing at the outset (ie permission stage) since it goes to jurisdiction **[503]**. That may be a helpful dictum for defendants pleading Summary Grounds. At that stage, as the merits have not been determined, some other of Waksman J's factors determining standing may need to be conclusive of the question instead.

• The issue of standing was only challenged by DHSC by way of an amendment after the Court of Appeal gave judgment in *Public First*. No doubt defendants will be bolstered by this judgment to raise standing issues from the outset, where possible.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.

Monckton
Chambers 1 & 2
Raymond Buildings
Gray's Inn
London, WC1R 5NR

Tel: +44 (0)20 7405 7211
Fax: +44 (0)20 7405 2084
Email: chambers@monckton.com
www.monckton.com