

R (on the application of National Aids Trust) v NHS England, Local Government Association and Secretary of State for Health **Summary**

This important judgment from the Court of Appeal finds that the National Health Service Commissioning Board (NHS England) has the power to commission PrEP (pre-exposure prophylaxis).

The judicial review challenge was brought by the National Aids Trust (NAT) against NHS England's decision that it did not have power to commission PrEP. The Local Government Association (LGA) was a party to the proceedings before the High Court and the Court of Appeal and argued successfully on behalf of its members that the power to commission PrEP lay with NHS England. The LGA argued that not only was NHS England's legal analysis of its responsibilities wrong but that in practical terms, local authorities did not have the financial resources to pay for PrEP and if local authorities were responsible, there would be fragmented national provision (because some local authorities might commission but others would not). The Court of Appeal upheld the arguments of NAT and the LGA that the responsibility for PrEP commissioning lay with NHS England. The judgment was not about whether NHS England will or should commission PrEP but whether it has the power to do so.

The background and NHS England's position

NHS England had initially accepted that the commissioning of PrEP was within its power. However, in April 2016 NHS England changed its mind and published a press release announcing for the first time that local authorities were responsible for HIV prevention services.

NHS England contended that the 2006 Act (in section 1H(2)) contained an exception to the general duty imposed on NHS England to deliver a comprehensive health service which excluded the commissioning by NHS England of services provided pursuant to "public health functions" of either the Secretary of State or local authorities. NHS England said that PrEP, being essentially a preventative treatment, would, if commissioned, be a service provided pursuant to "public health functions" which was the remit of local authorities under the 2006 Act and associated regulations.

The oddity of NHS England's position was that it is otherwise charged with providing the full range of specialist HIV services. It also commissions PEP (post-exposure prophylaxis) and accepts that it has the power to do so. PEP is prescribed to individuals who have had an identified recent event exposing them to the risk of HIV infection. PrEP, on the other hand, is prescribed to those individuals identified as being at high risk of such exposure events. Both PrEP and PEP involve the administration of anti-retroviral (ARV) drugs that inhibit dissemination of the virus from cell to cell in the body.

The decision of Green J

At first instance Mr Justice Green held that NHS England's interpretation of its powers was wrong in law. He considered that if the exception in the 2006 Act operated so as to deprive NHS England of all powers related to public health functions, then the responsibility of NHS England would almost disappear. He adopted an interpretation of the exception in section 1H(2) of the 2006 Act which limited its scope but found, in any event, that the National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibility and Standing Rules) Regulations 2012 ("the 2012 Regulations") conferred power on NHS England to commission PrEP. He further held that the power to commission PrEP could be derived from the wide general power that NHS England has under section 2 of the 2006 Act to do anything which is calculated to facilitate or is conducive or incidental to the discharge of its functions.

The decision of the Court of Appeal

Lord Justices Longmore and Underhill and Lady Justice King dismissed NHS England's appeal. Lord Justice Longmore gave the leading judgment. None of the judges followed Green J's interpretation of the exception contained in section 1H(2) of the 2006 Act. They all accepted that there was a limit placed on NHS England's powers by the exception and that it could not commission PrEP if that was pursuant to a "public health function". However, the 2006 Act did not provide a comprehensive definition of "public health function" and it was correct to have regard to regulations made under the 2006 Act to ascertain the ambit of the exception. There was no clear dividing line based on prevention v. treatment/cure. The duty on NHS England under the 2012 Regulations to provide "adult specialist services for patients infected with HIV" included preventative treatments for HIV. Longmore LJ held that: "*the whole thrust of the regulations is that local authorities are not to be responsible for HIV patients but rather that NHS England is to be responsible for them*" (para. 38). All three members of the court concluded that it was the clear intention of the 2012 Regulations that the responsibility for commissioning highly specialised services in relation to HIV was to be at national level by NHS England, so as to avoid fragmentation in responsibility (paras. 39, 55, 69). Longmore LJ and King LJ also accepted the alternative submission that NHS England had the power pursuant to s.2 of the 2006 Act to commission PrEP (paras. 43-45, 70).

It follows from the judgment that:

- Specialist HIV services fall to be commissioned at national level by NHS England;
- That includes treatments such as PrEP with a preventative aim.

Jenni Richards QC and Nicola Greaney of 39 Essex chambers were instructed by Monica Blades-Chase of the Local Government Association.