

PRESS RELEASE

Date: 02 May 2019

For immediate release

Supreme Court denies #Justice4NHS

In a decision that national campaign group 999 Call for the NHS have slated as “completely illogical”, the Supreme Court has denied permission for a final hearing of their legal challenge against a new cost-cutting National Health Service contract that aims to manage demand for health care.

The legal challenge has been supported by thousands of members of the public.

Campaigners say that the contract, which radically changes the way NHS services are paid for, is clearly a means to justify further cuts to services. If implemented, it will have many profoundly damaging effects on the way NHS services are delivered.

Imported from the USA’s health care system, the contract was first known as the Accountable Care Organisation contract. But early in 2018, NHS England rebranded it as the Integrated Care Provider contract.

999 Call for the NHS are now determined to step up their campaign to defend the NHS as a comprehensive service for all.

They point to risks to patient safety and increasingly restricted patient access to many NHS treatments, since NHS England directed local NHS and social care organisations to form Sustainability and Transformation Partnerships that impose cuts-driven, USA-style Accountable Care practices.

Jenny Shepherd, 999 Call for the NHS Secretary, said,

“We’re very disappointed that the Supreme Court has refused us permission to appeal. Thousands of people backed this Judicial Review in order to protect comprehensive universal health care in the NHS.

It’s simple. It costs a specific amount to provide each treatment to each patient. But the Integrated Contract Provider contract ignores this fact by paying a fixed annual amount for a whole range of services for an area’s population.

We know this creates a real risk that there wouldn’t be enough money to cover the costs of providing high quality treatments to all patients who have a clinical need for them.”

She added,

“It’s worse than ironic that the same day the Supreme Court refused our #Justice4NHS application, a big prime provider contract for integrated NHS community services collapsed because apparently it did not provide enough money to run the required services.

This is essentially the same type of contract as the one we've been challenging in our Judicial Review. Surely this collapse is a big red flashing light about the continued use of such contracts.

Ever since we started work on the Judicial Review almost three years ago, we've been warning that it's impossible for such a contract to provide the required services for all patients, based on clinical need."

999 Call for the NHS are surprised and disappointed that the Supreme Court judges ruled that their application did not raise an arguable point of law.

Steven Carne, co-chair of 999 Call for the NHS, said,

"We were given permission to go to the Court of Appeal because Lady Justice Arden had identified that the High Court ruling in April 2018 had not properly considered a key question of statutory construction. This was whether - as NHS England claimed - there is no need for visible prices fixed in advance for each individual treatment episode.

But the Court of Appeal ruling on this question was the same as the High Court ruling. So the High Court hadn't properly considered it, and the Court of Appeal didn't either. We are totally at a loss to understand why the Supreme Court (where Lady Justice Arden now sits) has decided that there is now no clear arguable point of law that needs deciding. It seems completely irrational."

Joanne Land , a founding member of 999 Call said,

"We'd like to thank our fantastic legal team for their hard work over nearly three years. We'd also like to thank the thousands of members of the public who made it possible for us to bring this case to the courts. Without their generous donations via the CrowdJustice website, this Judicial Review would never have happened.

Local campaign groups across the country have been able to draw on information generated by our Judicial Review, to challenge the imposition of cost-cutting Accountable/Integrated Care models in their areas. Now there's more and more disturbing evidence from clinicians and patients that these so-called reforms are damaging the NHS by restricting patients' access to many treatments. Just as we predicted.

We are now redoubling our campaign to protect the #NHS4All."

The campaign group's legal team is Rowan Smith and Anna Dews from the public law team at the law firm Leigh Day, and David Lock QC and Leon Glenister from Landmark Chambers.

FOR MORE INFORMATION please contact Jenny Shepherd
E: 999callfornhs@gmail.com, Mob: 07474 373 774

NOTES FOR EDITORS - See below

NOTES FOR EDITORS

1. The legality or otherwise of the Accountable Care Organisation contract (rebranded by NHS England as the Integrated Care Provider Contract) is a public interest issue. The form of NHS contracts that NHS bodies enter into will have multiple and profound effects on the way NHS services are delivered.

2. NHS contracting is subject to various pieces of legislation. The 999 Call for the NHS Judicial Review centred on contested interpretations of aspects of the 2012 Health and Social Care Act. 999 Call for the NHS doesn't think the 2012 Health and Social Care Act is a good piece of legislation - but it is the law at the moment, and public bodies like NHS England are required to act according to the law.

999 Call for the NHS have campaigned since 2014 to renationalise the NHS by passing the NHS Reinstatement Bill - a private members' bill that removes commissioning and privatisation from the NHS and uses non-contract payment methods, based on needs assessment and proper funding.

3. The 999 Call for the NHS Judicial Review was held in Leeds High Court on 24th April 2018. The Judge ruled against the campaign group, but they gained Permission to Appeal. The Court of Appeal Hearing was scheduled to take place over two days - 20 and 21 November 2018, but the Judges only heard the Appeal for a cursory few hours on the first day allocated to the case.

4. NHS England recently concluded a public engagement on proposed primary legislation for the NHS Long Term Plan, with a focus on Integrated Care Providers. 999 Call for the NHS responded to the engagement with a statement that they do not agree with the proposed changes to primary legislation. They will not lead to a sustainable, rationally and equitably planned and provided comprehensive, universal NHS and social care service. They will merely patch a tattered legislative fabric and impose cost-cutting American models of Accountable Care on our NHS, fragmenting it into local health services.

The campaign group say that the law should be changed to restore the duty of the Secretary of State to provide or secure the provision of a comprehensive, universal NHS that is free at the point of clinical need and fully publicly funded, owned, managed and provided by directly employed NHS staff. These principles should also be extended to the provision of social care and to medical innovation.

The full response by 999 Call for the NHS is here: <https://bit.ly/2vrG3rV>

5. Accountable Care models are already being set up by Sustainability and Transformation Partnerships. These models involve cutting and centralising hospital services, moving hospital services into large scale GP practices and networks with 30-70k patients, and replacing qualified health professionals with voluntary sector workers, volunteers and self-care. Front line NHS staff, patients and their families are warning 999 Call for the NHS that this puts patient safety at risk and drives those who can afford it to go private. [[Patient safety at risk as specialist hospital services move into GP practices](#)]

6. There is no real evidence that Accountable/Integrated Care models have the positive results they are intended to, according to recent reports by the National Audit Office [<https://www.nao.org.uk/report/developing-new-care-models-through-nhs-vanguards/>] and the Nuffield Trust [<https://www.nuffieldtrust.org.uk/news-item/are-patients-benefiting-from-better-integrated-care>]

7. NHS England's new 10 year Long Term Plan aims to accelerate and consolidate these Accountable/Integrated Care models, setting up scores of non-statutory local 'Integrated Care Systems' that lack transparency and public accountability and are open to increased private sector provision of NHS care. A key to these Integrated Care Systems are forced mergers of GP practices covering populations of 30-70,000, causing accessibility problems for many patients and limiting GP consultations to patients with complex health problems.

8. Accountable Care Organisations have been barely reported by national media, and coverage has generally omitted contentious points of public interest such as international corporate influence, the potential for fragmentation across a national health service, or the lack of evidence that the new

Accountable/Integrated care models have delivered the intended positive goals. <https://link.springer.com/article/10.1057/s41285-018-00083-9>

9. Despite this general media blackout, thousands of people have donated to cover the costs of the Judicial Review and Appeal, via CrowdJustice - the leading crowdfunding platform for legal action. <https://www.crowdjustice.com/>.

10. A key reason why 999 Call for the NHS brought the legal challenge to NHS England's new Integrated Care Provider contract is that the cost-cutting payment mechanism would make it impossible for the contract holder to provide a comprehensive health service for all the people in the area covered by the contract. This is what has just happened with East Staffordshire CCG's £270m prime provider contract for commissioning and integrating community services. This fixed-price seven year contract was very similar to the new Integrated Care Provider contract. Awarded to Virgin Care in 2015, the "Improving Lives" contract was judged unworkable by many commentators, due to the "savings" it required. Apparently this has now proven to be the case. Citing a £5m shortfall in funding, in October 2018 Virgin Care handed back all commissioning elements of its £270m prime provider contract. On 30 April 2019, Virgin Care told the Clinical Commissioning Group it intended to terminate the remaining community services bit of the contract, that it was providing. It claimed that the "savings" (spending cuts) required by the fixed budget contract were not achievable and that continuing to meet the local need for community services would require the company to put in a £1m subsidy.

11. There were four Grounds for the Application for Permission to Appeal to the Supreme Court:

i) The Court of Appeal was wrong to conclude that the Accountable Care Organisation contract's fixed annual payment for a whole range of health services for an area's population (the Whole Population Annual Payment) complies with the 2012 Health & Social Care Act section 115(1) requirement, that payment for a service specified within the National Tariff must be made "on the basis of the [national] price ... specified in the national tariff for that service".

The ruling failed to grapple with the problems that a) the Accountable Care Organisation contract doesn't follow the National Tariff rules to fix a price, since there's no price for any individual service; and b) the overall price payable is fixed without any reference to the national price - so it cannot be on the basis of that price.

ii) The Court did not recognise that Whole Population Annual Payment is not a "variation" of the specification relating to a single medical procedure, which is allowed by s116(2) of the 2012 Health & Social Care Act. Instead it substitutes an entirely different type of payment arrangement - replacing one service with another (much larger) package of services. The changes are far more extensive than parliament could have envisaged by a "variation" to an individual service specification.

Plus, this package (or "bundling") of services is not permitted by either the 2012 Act or the rules of the National Tariff. The "bundling" permitted under s117 (1)(b) is for two or more health services which together constitute a form of treatment. A "form of treatment" is limited to services provided to an individual patient.

But NHSE and Monitor claimed a get-out in §356 of the National Tariff:

"The local variation rules are intended to give commissioners and providers an opportunity to innovate in the design and provision of services for patients"

The Court of Appeal did not question the relevance of this claim to the Accountable Care Organisation contract, either in Court or in the ruling.

iii) The Court of Appeal was wrong in not considering the Parliamentary material about the 2012 HSCA. It ruled that this was unnecessary because the legislation was "pellucid" (!!). The judges agreed with NHS England that the 2012 HSCA gives complete freedom to the Commissioner and provider to amend prices as they see fit under section 116(2), so they didn't need to refer to the

Parliamentary materials. But the Court of Appeal interpretation fails to deliver on ministers' assurances to Parliament, that price competition would not be possible because national tariff prices were "fixed" and providers would not be selected on the basis of price.

In addition, the Court of Appeal's conclusions highlight at least the following ambiguities:

- Whether "on the basis of the national price" adds anything to the words "in accordance to the national tariff" in section 115(1).
- The meaning and extent of a "variation" pursuant to section 116(2).

So the ruling should have had recourse to clear and unambiguous statements by Ministers either as an aid to interpretation, or at least to identify the mischief of price competition that the 2012 Act was aimed at.

iv) National Tariff rules mandate that locally agreed prices are to be set by a method where the public have a say on the prices. The ACO Contract proposal to locally "vary" price and specification under section 116(2) is unlawful because the NHSE Guidance on the way to set up an ACO contract mandated a method where the public had no say, since the price was fixed by reference to last year's spend.

Neither the Judge in the High Court ruling nor the Court of Appeal grappled with this contradiction. There is no answer to the challenge that the procedures mandated by NHSE in the ACO Contract failed to comply with the mandated rules in the National Tariff.