

Horton HOSC Judicial Review Advice Request

Purpose

1. In September 2019, Oxfordshire Clinical Commissioning Group (OCCG) took a decision to confirm an earlier decision (from 2017) to have a single specialist obstetric unit for Oxfordshire (and its neighbouring areas) at the John Radcliffe Hospital and establish a Midwife Led Unit (MLU) at the Horton General Hospital, for the foreseeable future.
2. Following the OCCG decision, the Horton Joint Health Overview and Scrutiny Committee (HOSC) submitted a referral to the Secretary of State for Health and Social Care on the 2nd of December 2019. The Secretary of State briefly replied on the 15th of September 2020 to say he did not consider the referral to be valid. The Chairman of the Horton HOSC then wrote an additional letter in reply. No response has yet been received.
3. This paper sets out what a Judicial Review is, and the advice received on a potential Judicial Review of the Secretary of State's decision. It makes a recommendation to the Horton HOSC on the next steps.

Judicial review

4. Judicial Review is the procedure by which the courts examine the decisions of public bodies to ensure that they act lawfully and fairly. On the application of a party with sufficient interest in the case, the court conducts a review of the process to assess the validity of the decision. Judicial Review is a remedy of last resort. Although the number of Judicial Review claims has increased in recent years, it can be difficult to bring a successful claim and the court may refuse permission to bring a claim, if an alternative remedy has not been exhausted. A claimant should therefore explore all possible alternatives before applying for Judicial Review.
5. The grounds for Judicial Review are constantly evolving but those which are currently available can be categorised under four heads:

Illegality – arises when a decision maker has either misdirected themselves in law, exercises powers wrongly or acted beyond their powers.

Irrationality- relates to a situation where a decision is so unreasonable, that no reasonable authority could have come to that decision (Wednesbury Unreasonableness).

Procedural unfairness- relates to a situation where a decision maker failed to consult or give reason and or has failed to comply with the principles of natural justice.

Legitimate expectation- A public body may have by its actions or statements or by the requirement to act in a certain way, have given rise to a legitimate expectation.

Making a Judicial Review application

6. The making of a claim for Judicial Review is governed by a Pre-Action Protocol which sets out the process with a view to avoiding unnecessary litigation. It recommends that a good time before making an application, a letter before claim should be sent to the defendant. The correspondence sets out the issues and sets out whether they can be narrowed, or litigation avoided. The defendant will be given 14 days in which to respond. If the claimant is satisfied with the response, the matter is concluded. If the Claimant is not, then proceedings must be issued within 3 months of the of the date upon which the grounds for the claim first arose.

Remedies

7. Judicial Review offers the following remedies:

A Quashing Order that sets aside the decision.

A Mandatory Order requiring the public body to carry out its legal duties.

A Prohibiting Order restraining the public body from acting beyond its legal powers.

Typically, a claimant would seek a quashing order, together with a mandatory order directing the public body to take a decision in accordance with the court's judgement.

Closure of consultant-led maternity services at the Horton General Hospital for the foreseeable future

8. The Minister of State for Health responded on 15th September 2020 to detailed representations made on 2nd December 2019. The Horton HOSC responded by way of correspondence dated 22nd of September 2020 seeking further clarification of the basis upon which the decision-making process undertaken by the Minister of State for Health, the Rt HON Edward Argar MP.
9. The response requested a reconsideration of the initial assessment and a request that the matter be passed to the Independent Reconfiguration Panel for detailed assessment against the Local Authority (Public Health, Health and Wellbeing Board and Health Scrutiny) Regulations 2013. The argument presented are based upon the premise that the Minister of Health had misunderstood the issues at hand and did not take account of the new evidence submitted. A request for a detailed explanation of the decision-making rationale based upon representations to date has been requested. To date, there has been no response to the correspondence of the 22nd September.

10. Having considered the issue of whether the Horton HOSC has the power to issue proceedings by way of Judicial Review against the Secretary of State, the view taken is that it does not have such power because such action is beyond the terms of reference. In order to initiate such action, the Horton HOSC would be required to have in place the agreement of the member authorities, who would in turn need to consider and agree the decision to initiate proceedings. Further to which, as health overview committees derive their powers from Full Council, this is an issue that would need to be considered by Full Council and would be dependent upon Monitoring Officer and Chief Financial Officer advice.
11. The process for bringing a Judicial Review would require the appointment of Queen's Counsel with specialist expertise in public administrative and medical law. A pre-action protocol letter will need to be drafted and served with a view to issuing proceedings within 3 months of the 15th September 2020. The pre-action protocol letter will need to set out the basis of the claim, the reason for bringing the claim and the remedy that is sought.
12. The claim will elaborate upon the various premises set out in the correspondence of the 22nd September, and reiterating that the decision making was flawed because all the evidence was not taken into account, and or, that it was not given sufficient credence, resulting in the decision contained within the correspondence of the 15th September being unreasonable.
13. Council will be required to attain a provisional advice as to the merits of potential claim for Judicial Review. It is anticipated that an initial advice will cost in the region of £6,000. It is difficult to assess the likely cost to be incurred in pursuing the matter with it being recommended that a contingency fund of £80,000 be set aside together with a further allowance of the same, should the case be unsuccessful and we are required to pay costs. This figure may vary depending on the approach adopted by the various parties.

14. Advice on a Judicial Review

Summary

The following advice has been sought from the Head of Legal Services at Oxfordshire County Council.

- a. The prospect of success in the contemplated Judicial Review is considered to be below 30% with there being a significant legal and evidential hurdles in pursuing a claim.
- b. The costs to benefit balance proves unviable with a prospect of success determination being below 30% and estimated total costs to be in the region of £80,000 in bringing a Judicial Review claim. It is anticipated that the Secretary of State's (SofS) costs is likely to be equal to, if not exceed, our cost estimate. In light of the low chance of success, it is highly probable that the SofS will seek to and succeed in recovering their legal costs.

- c. The advent of Covid-19 has placed a significant amount of pressure upon the Administrative Courts system with there being inherent delays across the entire judicial system. It is anticipated that by the time the matter is brought before the Administrative Court for a final hearing, the suggested annual review will shortly after, afford a further opportunity to petition the SofS.

Background to the advice

- a. Following a meeting of the Horton Health Overview and Scrutiny Committee (HHOSC) held on Thursday 19th September 2019, the HHOSC referred the Oxfordshire Clinical Commissioning Group's (OCCG) proposal to close consultant-led maternity services at the Horton General Hospital in Banbury ('the Horton') for the foreseeable future to the SofS for Health. The referral being made pursuant to Regulation 23(9)(a) and (c) of the Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013. On 2nd December 2019, the Chair of Horton HOSC on behalf of the committee and the residents of the Horton Catchment Area, wrote to the SofS for Health and Social Care, the Rt Hon Matt Hancock MP further to a previous referral in August 2017.
- b. The issues relating to obstetric services at the Horton have a long and complex history. In 2006 the then Oxford Radcliffe Hospitals NHS Trust (ORH) proposed moving inpatient paediatric and gynaecology services, consultant-led maternity services and the Special Care Baby Unit from the Horton in Banbury to the John Radcliffe Hospital (JR) in Oxford. It being felt that this was in the interest of people in the North of the county, the matter having been referred to the SofS.
- c. In February 2008, The Independent Reconfiguration Panel (IRP) issued advice to ORH concerning Paediatric Services, Obstetrics, Gynaecology and the Special Care Baby Unit at the Horton together with a set of recommendations. The IRP advised that the Trust and the PCT were to invest in, retain and develop services at the Horton, as it considered the Hospital was to have an important future role in providing local care to people in North Oxfordshire and the surrounding areas. ORH maintained consultant-led maternity services at the Horton supported by a training programme for junior doctors working in obstetrics.
- d. In 2012 post graduate obstetric training accreditation at the Horton was withdrawn due to the low numbers of births at the hospital, which meant limited exposure to complex cases, failures in providing suitable and satisfactory supervision and training, and the difficulties experienced in recruiting sufficient numbers of middle grade doctors. The Trust then developed a Clinical Research Fellow programme to support consultant-led provision, but they reported that national recruitment shortages in obstetric posts led to a reduction in applications which made it unviable. The programme closed in December 2015 and a rotational middle grade rota was created to staff the obstetrics unit.

- e. In September 2016 OJHOSC was informed that ORH, now known as Oxford University Hospitals Foundation Trust (OUHFT) were intending to temporarily close consultant-led maternity services at the Horton from 3rd October 2016, as they were unable to adequately staff the unit in a safe and sustainable manner. Assurances were given by the Trust that they planned to reopen the unit by March 2017 on the strength of an action plan to recruit more consultants. This did not occur with a referral to the SofS being made under Regulation 23(9)(b) of the 2013 Regulations. The IRP subsequently reviewed the matter who were of the view that this no longer constituted a temporary closure.
- f. In March 2017, OJHOSC scrutinised proposals for acute services in the phase 1 Transformation consultation running from 16th January - 9th April 2017 which formed the basis of a formal response to the consultation and recommendations for the OCCG, submitted that month. A series of meeting took place in the intervening months which culminated in a decision by the OCCG Board on 10th August 2017, agreeing a proposal to stop consultant-led maternity services at the Horton, the OJHOSC referring the decision to the SofS under Regulation 23(9)(a) and (c). In March 2018, the SofS wrote to the OJHOSC accepting the advice of the IRP in full and set out 10 broad categories of compliance and further exploration.
- g. The HHOSC commenced work in September 2018, having undertaken a number of regular meetings to explore the issues raised. A decision was taken to refer the matter for consideration by the SofS and the IRP, for the following reasons.
 - i. Regulation 23(9)(a) – consultation on any proposal for a substantial change or development has been inadequate in relation to content, and
 - ii. Regulation 23(9)(c) - the decision is not in the best interests of the health service or local residents.
- h. Extensive and detailed arguments were submitted in relation to both grounds which addressed concern centred around recruitment, finance, assessment criteria, weighting, needs of local people, views and experiences of mothers, travel, access and the implications for the foreseeable future. The arguments presented were detailed, clear and evidenced with the necessary information having been presented in support.

Legal Analysis

- a. The information was presented to the SofS in the form of a letter dated the 2nd December 2019, addressed to the Rt Hon Matt Hancock MP. Following a number of failed attempts to secure a reply, a response having been received by way of a letter dated 15th September 2020 from the Rt Hon Edward Argar MP. It is this letter that forms the subject matter of a subsequent challenge.

b. I considered this response and was asked to add additional comments upon the draft response from the HHOSC Chairman to the SofS. The intention being to place emphasis on the need for elaboration of the basis of the decision together with the evidence taken into account. The SofS has to date not responded to the correspondence of 22nd September 2020. In the absence of a response, I will consider further the letter of 15th September 2020.

c. The decision letter of 15th September states as follows:

“ After careful consideration of the information presented in your letter, in relation to the relevant legislation (the Local Authority (Public Health, Health and Wellbeing Board and Health Scrutiny) Regulations 2013 the SofS has concluded that it does not appear to be a substantial variation or development in the health service since the last referral in 2017.

The consultant-led unit has closed since October 2016 as the unit could not be adequately staffed in a safe and sustainable manner. The decision of the OCCG is to continue the closure and keep it under review annually and maintain a midwife-led unit at the Horton.”

It is worthy of note that the SofS makes clear that careful consideration of information presented was undertaken which informed his conclusion that there did not appear to be a substantial variation or development.

d. In considering the bringing of a claim to review the decision of the SofS, one would need to issue proceedings in the Administrative Courts by way of a Judicial Review claim. It has been suggested in some quarters that the decision of the SofS is subject to Judicial Review. It is important to recognise that this is the most draconian of measures only to be used as a last resort. The grounds upon which a claim may be brought will relate to the decision. The decision being to keep the matter under review in the first instance, distinct from expressing an alternative view, or in the alternative, deciding to refer the matter to the IRP. The decision letter further concludes that the arguments submitted do not constitute a valid referral under the regulations, there not appearing to be a substantial variation or development in the health service since 2017.

e. It is worthy of note at this juncture that the references are subjective and within the realm of the SofS's discretion. The conclusions drawn and the subsequent decision arrived at is based upon the SofS's assessment of the information presented, with the outcome being that they do not fulfil the referral criteria. I re-iterate my concerns as to the subjective nature of the assessment, the failure by the SofS to articulate the thought process and the factors taken into account, further detracting from the ability to bring a claim for Judicial Review. These factors although inconvenient from an assessment perspective do not detract from my opinion that this will prove a high hurdle to overcome and interrogate before the Administrative Courts.

- f. Preliminary considerations in deciding whether the decision was reviewable would be to consider whether account has been taken of all the relevant considerations. Although I cannot account for the actual decision-making process, for the reasons outlined above, I can conclude the arguments submitted in the letter dated 15th September were most detailed, comprehensive and well-articulated. The evidence submitted represented a comprehensive analysis of evidence, data and opinion. Although the SofS does not articulate specific consideration of evidence or the points submitted, reference is made to “*After Careful consideration of the information presented in your letter...*”. I think it likely that a High Court Judge sitting in an Administrative Court will be satisfied that the presentation and reference to “*careful consideration*” will be sufficient to show that the relevant evidence had been taken into account. The argument that the SofS should have articulated their consideration of the evidence is weak with the reference to having “*carefully considered*” being sufficient to undermine a claim for Judicial Review. I note the presiding cases of Tesco Stores Ltd v. Secretary of State for the Environment [1995] 1 WLR 759 and R (Khan) v. Newham London Borough Council [2005] QB 37.
- g. The second consideration is in relation to the rationality argument, i.e. whether the SofS acted rationally in deciding to keep matters under annual review. I note the historical context of the decision-making process at local level, the various facets to the decision-making process with the decision to continue to review annually not being irrational or out of kilter with previous approaches. More information would have been useful to understand how the decision was made and the factors that informed the decision-making process. Regardless, they do not in my opinion undermine the rationality of the decision itself.
- h. A challenge must be based upon an unreasonable decision (Wednesbury Unreasonableness) which is difficult to establish. Despite criticism of the test in R(Daly) v. Secretary of State for the Home Department [2001] 1 AC 532, at 549 (per Lord Cooke of Thorndon) and R (Association of British Civilian Internees: Far East Region) v. Secretary of State for Defence [2003] QB 1397 at 1413 9 per Dyson LJ), the courts are still very reluctant to find a decision was Wednesbury unreasonable. (Bromley London Borough Council v. Greater London Council [1983] 1 AC 768). This is particularly the case where the decision maker is an expert and I would further suggest a government minister, judgement the court would be unwilling to substitute with their own, save for the most exceptional case of blatant unreasonableness R (Great North Eastern Railway Ltd) v. Office of Rail Regulation [2006] EWHC 1942.
- i. The proportionality of the decision-making process is a significant element of the decision itself and again I do not believe that the decision to review annually is disproportionate in the current circumstances. Lord Greene, Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 HL. The concept of proportionality involves a balancing exercise

between the legitimate aims of the state on one hand, and the protection of the individual's rights and interests on the other. The test is whether the means employed to achieve the aim correspond to the importance of the aim, and whether they are necessary to achieve the aim. The decision was made in the midst of a once in a lifetime pandemic with there being unprecedented strains on all aspects of the health and social care framework. In the absence of a vaccine, tectonic pressures on the health system and with no end in sight in the autumn of 2020, I do not believe that it is disproportionate to review on an annual basis. I would in fact argue that the economic impact remains uncertain together with the impact that it will have on population distribution. These are of course arguments to be proposed with it being reasonably foreseeable that a broader view of the health provision landscape being taken into account. In the absence of a response, the position of the SofS is unknown. I would suggest that a carefully crafted explanatory statement further elaborating upon the above heads in support of the letter dated the 15th September would significantly undermine a claim for Judicial Review.

- j. In determining the possibilities of success, I would as a practitioner of public administrative law with experience of Judicial Review, conclude that the chances of success are significantly below 30%. In the absence of an opinion that would estimate chances of success to be in the region of 75% or above, I would strongly advise against the issue of a claim in the Administrative Court for Judicial Review.
- k. I am further cognisant of the cost to benefit ratio with the time for issue a Judicial Review, i.e. 3 months from the decision itself, rapidly running short. I am further mindful of the absence of compliance with the Pre-Action Protocol provisions which will place the Council at significant risk of costs, with there being limited time in which to issue proceedings and comply with the protocol. With the complexity of the issue at hand, the delay in response by the Secretary of State and increased demand with dealing with the Covid-19 pandemic; the legal service (like many other services within the Council), has only now had an opportunity to provide and share the legal opinion on the Judicial Review Path.

Courts and Covid-19

- a. Administrative Court Office publishes guidance on measures for Judicial Review applications for immediate or urgent action, subsequently updated to cover non-urgent claims and actions.ⁱ What is apparent from the new guidance is that some processes, particularly in relation to non-urgent Judicial Review claims, initially may take longer such as the consideration of an application for permission to apply for Judicial Review on the papers and the hearings of non-urgent business which may take longer to come on. It is unclear the likely length of delay, but it is by all indications significant.

Recommendation

15. When the decision was made by Oxfordshire Clinical Commissioning Group on the 26th September 2019, the CCG Board:

- **Confirmed** the decision made in August 2017 to create a single specialist obstetric unit for Oxfordshire (and its neighbouring areas) at the John Radcliffe Hospital and establish a Midwife Led Unit (MLU) at the Horton General Hospital, for the foreseeable future.
- **Noted** that the decision is for the 'foreseeable future' rather than a statement of permanency. This is because OCCG have a framework, agreed by the Oxfordshire Health and Wellbeing Board, that states an ongoing commitment by the CCG and all health & care partners to regularly review population health and care needs and change services as appropriate to meet that need, all co-produced with local stakeholders. This approach will ensure that if population or other factors change significantly then the need for obstetric services can be reviewed.

16. It is the above decision¹ which the Horton Health Overview and Scrutiny Committee referred to the Secretary of State on the 2nd of December 2019.

17. A recommendation is made below, in light of the following factors:

- a) Legal advice provided (and presented in this report) on the likelihood of success of a Judicial Review against the Secretary of State;
- b) Considering it is now 14 months past the OCCG decision which described the decision as one for the 'foreseeable future' and would be subject to review, described as an 'annual' review by the Secretary of State's office letter dated 15th September;
- c) There has been a fundamental shift in significant factors related to the provision of all health and care services from the Covid-19 epidemic.
- d) Despite the impact of Covid-19, this issue remains a significant priority for the residents and patients of north Oxfordshire, south Northamptonshire and south Warwickshire.

18. It is therefore **RECOMMENDED** that the Horton HOSC:

RECOMMEND to the OCCG Board:

- a) That OCCG undertake the review referred to in their decision paper of the 26th September 2019 and as reflected as an annual review by the Secretary of State letter dated the 15th of September 2020.
- b) The review is required to be undertaken as a matter of urgency.

¹ [2019-09-26-Paper-19-54-Maternity-Services.pdf \(oxfordshireccg.nhs.uk\)](https://www.oxfordshireccg.nhs.uk/2019-09-26-Paper-19-54-Maternity-Services.pdf)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/926002/RCJ_Administrative_Court_Information_for_Court_Users.pdf