

# Permission granted in judicial review challenge to antibody test procurement (Good Law Project v Secretary of State for Health and Social Care (Defendant) and Abingdon Health (Interested Party))

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**Local Government analysis:** In this *ex tempore* judgment Mr Justice Waksman considered a renewed application for permission to bring judicial review of a decision by the Secretary of State for Health and Social Care to award contracts to Abingdon Health (the Interested Party) for development, manufacture, and purchase of lateral flow antibody tests. The underlying claim is one of a series of cases brought by the public interest group the 'Good Law Project' to challenge contracts awarded by the government at the height of the coronavirus (COVID-19) pandemic using the truncated procedure under regulation 32 of the Public Contract Regulations 2015 (PCR 2015). The litigation has attracted substantial public attention, in particular in relation to allegations of bias and financial interest. Permission has been granted on four grounds which will proceed to be determined a substantive hearing. Written by Siân McGibbon, barrister at 4-5 Gray's Inn Square.

*In the Matter of Good Law Project Ltd v Secretary of State for Health and Social Care and Abingdon Health Ltd* [2021] EWHC 844 (TCC)

## What are the practical implications of this case?

The judgment of Waksman J reflects a relatively sympathetic view of the unique challenges which the government faced in the early months of the coronavirus pandemic. The judge recalls the uncertainty of that period and cautions against 'looking back with hindsight' to take an overly critical view of decisions made at the time. Thus, the court accepted that the urgency which justified reliance on PCR 2015, [SI 2015/102, reg 32](#) was in the circumstances maintained from April 2020 through to August 2020, taking into account that at the time no effective antibody test had yet been developed and the procurement process necessarily had to be undertaken in stages.

However, in granting permission the judgment makes repeated reference to the lack of material produced by the defendant to justify its decision-making process. The judge accepted that there may be a justification for State aid but held that, given the defendant's failure to positively advance any such justification, the case on this ground was arguable. Similarly, he was not prepared to accept the defendant's suggestion that there was no choice of alternative contractor in the absence of evidence that this was in fact the basis on which the awards had been made. There may well be answers to these points which were not fully advanced before Waksman J; the direction the case takes at trial will depend to a large extent on the positive case and the evidence in support which the defendant advances now that permission has been granted.

## What was the background?

The claimant sought permission to judicially review the decision by the defendant to award two contracts to for development, manufacture, and purchase of antibody tests to Abingdon Health plc (AH) in June 2020 and August 2020.

The contracts were subject to the PCR 2015 regime and were awarded following the truncated procedure established by PCR 2015, [SI 2015/102, reg 32\(2\)\(c\)](#). Use of this procedure is limited to cases of strict necessity in which the standard procedure cannot be complied with 'for reasons of extreme urgency' which have been brought about by circumstances 'unforeseeable by' and not 'attributable to' the contracting authority.

Permission on a single ground, breach of the duties of equal treatment and transparency, had already been granted on the papers by Mrs Justice O'Farrell on 3 March 2021. The claimant sought to renew the remaining grounds that:

- the legislative pre-conditions for reliance on PCR 2015, [SI 2015/102, reg 32\(2\)\(c\)](#) were not satisfied (ground 1)
- the awards were 'disproportionate' (ground 3)
- the awards were made in breach of the *Tameside* duty of enquiry and/or were irrational (ground 5)
- the awards were vitiated by one or more of national preference, discrimination, existing relationships or financial interests between government and AH, and apparent bias/predetermination (ground 6)
- the awards gave rise to unlawful state aid in favour of AH (ground 7)

### What did the court decide?

Permission was refused on ground 1. The claimant had argued that the conditions of PCR 2015, [SI 2015/102, reg 32\(2\)\(c\)](#) were not satisfied because the need to procure antibody tests had been obvious from April 2020 and so by June 2020 was not urgent, alternatively that any urgency had been brought about by the defendant's own delay and so was 'attributable to the contracting authority'. The judge rejected this, recalling the uncertainty of that time and cautioning against overreliance on hindsight in criticising decisions made under the challenging and uncertain circumstances of the early months of the pandemic.

The judge also refused permission on ground 3. Although he accepted in principle that the requirement for 'strict necessity' entailed some proportionality between the value of a contract awarded under PCR 2015, [SI 2015/102, reg 32](#) and the 'urgency' relied on to justify the use of that procedure, he noted that the decision maker should be afforded a 'margin of appreciation' in this respect.

However, the judge overturned the decision of O'Farrell J to grant permission on grounds 5–7. In particular, in allowing ground 6 he accepted that there was an arguable case of apparent bias arising from the role of a professor who was 'on both sides of the contract'. In doing so he reaffirmed well-established the distinction between actual and apparent bias, noting that there was no need for the claimant to suggest that there was 'some nefarious conspiracy' but that it was sufficient to establish a risk that a fair-minded observer might consider the decision was biased.

### Case details:

- Court: Technology and Construction Court, Queen's Bench Division, High Court of Justice
- Judge: Mr Justice Waksman
- Date of judgment: 29 March 2021

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