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Case No: CO/3360/2007

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2007

Before :

THE HON. MR JUSTICE GOLDRING

Between :

THE QUEEN (on the application of LEGAL REMEDY UK LIMITED)	**Claimant**
- and -	
SECRETARY OF STATE FOR HEALTH	**Defendant**
-and-	
(1) POST GRADUATE MEDICAL AND EDUCATION AND TRAINING BOARD	
(2) CONFERENCE OF POSTGRADUATE MEDICAL DEANS OF THE UNITED KINGDOM	
(3) BRITISH MEDICAL ASSOCIATION	
(4) NATIONAL ASSOCIATION OF CLINICAL TUTORS	
	Interested Parties

Tom de la Mare and Nick De Marco (instructed by **Leigh Day Solicitors**) for the **Claimant**
Jason Coppel and Joanne Clement (instructed by **Seema Barker**) for the **Defendants**
John Cavanagh QC instructed by **Jonathan Waters, BMA Legal Director** for the **BMA**

Hearing dates: 17 May 2007

Judgment Approved by the court for handing down (subject to editorial corrections)

If this Judgment has been emailed to you it is to be treated as 'read-only'.

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Mr Justice Goldring:

Introduction

1. "Modernising Medical Careers ("MMC") was described as a major reform of postgraduate medical training. Among other things, it changed the way junior doctors were to become specialists. As from 1 August 2007 any junior doctor who wishes to become a specialist has to take up a run through training ("RTT") post. It is specialty specific and locally managed. For a junior doctor who does not want or succeed in obtaining an RTT post, but wants some specialist training, there is a fixed term specialist training post ("FTSTA"). That is for one year at a time for, generally, a maximum of two years. Instead of these posts being advertised and made locally by the hospital deaneries, these appointments had to be made through a new centralised web based application system: Medical Training Application Service ("MTAS").

2. There was no pilot for MTAS. On 22 January 2007 it opened for applications. Some 34,000 junior doctors who wished to have specialist training applied. They had, or had mainly, to be in post on 1 August 2007. The introduction of MTAS has resulted in what the British Medical Association ("BMA"), an Interested Party in this application, has rightly described as a dreadful mess. Its extent is still not clear. Although the subject of sustained and understandable criticism, this application for judicial review does not relate directly to the introduction of MTAS. It relates to what was done regarding the dreadful mess. By 6 March 2007 many problems had arisen. The Secretary of State appointed a review body. On 4 April 2007 the review body decided to change MTAS ("modified MTAS"). It is that decision, accepted by the Secretary of State, which the claimant seeks to quash. It primarily alleges it was made without proper consultation, is conspicuously unfair and amounts to an abuse of power.

3. On 15 May 2007, a day before this application was due to begin, the Secretary of State to all intents and purposes abandoned MTAS. Whatever gloss may be put on it, that decision reflects what are very significant failings in the whole web based application system.

4. It is not surprising that many junior doctors feel upset, anger and a real sense of grievance.

The claimant company

5. RemedyUK was formed in November 2006. It is a pressure group of junior doctors. The claimant is a company limited by guarantee which was formed for the purpose of bringing these proceedings. The formation of RemedyUK reflected a loss of confidence by some junior doctors in those who represented them. There was great concern regarding the implementation of the training and employment reforms. Some 10,000 people are registered to receive RemedyUK's communications of which some 7000 are likely to be junior doctors. The rest are consultants or members of the public (for example parents of junior doctors). In March 2007 some 12000 people attended a rally organised by RemedyUK.

The number of training posts involved

6. Precise numbers do not matter. Of the 34,000 applicants an estimated 1500-2000 are not eligible. The number of posts (both RTT and FTSTA) in England, to which this application only relates, has been put variously at between about 18,250 and 23,000.

The nature of the application

7. This application is initially for permission to apply for judicial review, the hearing to follow if granted. I grant permission.

The background to and consultation on MMC

8. Mr. Greenfield, the relevant director in the Department of Health states that MMC was introduced after considerable consultation within the profession and elsewhere. It seems widely, although not universally, to have been supported. Many thought it compared favourably with the old deanery based system which involved sometimes many applications to different deaneries for different jobs. There was a belief by some that there was patronage, discrimination and bias in the old system.

9. Again, taking it broadly, MMC was to reflect the standards of postgraduate medical education as laid down by the Postgraduate Medical Education and Training Board ("PMETB") pursuant to its statutory responsibilities. It is unnecessary to go into any further detail, although PMETB, as an Interested Party, have helpfully set out their responsibilities in their summary grounds. They have played no other part in these proceedings.

10. MTAS was the means by which MMC was to be brought into being. Although there are now many criticisms of MTAS (for example relating to the inadequacies of the application form and its scoring system), this application does not seek to quash the decisions leading to MTAS or how the MTAS system was intended to operate.

How MTAS should have operated

11. Different parts of "Modernising Medical Careers: a new era in medical training," refer to a "fair and transparent" system under which "[p]rogress through each stage of training [was to be] through open and fair competition."

The applicant's guide

12. The applicant's guide was issued on 10 January 2007. As it is put in the foreword, signed by the Chief Medical Officers for England and Wales:

> "The new specialty...[programme is] supported by an online recruitment service. Application will be through...MTAS ~~where you can submit a single electronic application~~..."

13. The application through MTAS was to be to "units of application ["UofA]." They are usually the postgraduate deaneries and are:

> "...responsible for the recruitment and selection process for the specialty..."

14. There is a section dealing with specialty training.

> "In general, you will have the opportunity to make four applications in the following specialty/UofA combinations:
>
> i) up to 2 specialities/specialty groups, each in up to 2 UoAs
>
> ii) 1 specialty/specialty group in up to 4 UoAs
>
> iii) Up to 4 specialties/specialty groups in 1 UoA...
>
> You do not have to use all your choices, but it recommended that you do if at all possible in order to maximise your chances of success. However, you should choose carefully...
>
> You will be required to rank all your choices in strict order of preference. If successful, you will be allocated to your highest choice/UofA/specialty/entry level combination, depending on your interview score and the number of training opportunities available...
>
> ...The UofAs will not be able to see which other UofAs or specialties you have applied to...
>
> ...If you meet the entry criteria...your application will then be considered for shortlisting. Shortlisting is done by a panel of trained selectors, using selection criteria stated in the relevant person specification to score each application. The highest scoring short-listed applicants will be invited to interview, depending upon the number of training opportunities available...
>
> Those applicants invited to interview will be further assessed by a selection panel of trained selectors against selection criteria stated in the relevant person specification. Finally, the interviewed applicants with the highest scores will receive an allocation for a training opportunity...at the specific entry level depending on the number of opportunities available...
>
> If you are not offered a training opportunity in Round 1, you will be invited to re-apply in Round 2...
>
> ...FTSTAs
>
> FTSTAs are fixed term contracts for one year and will only provide training in the early years of specialty training-ST1 and ST2 [mostly]...
>
> You will be able to express...interest in FTSTAs in two ways.
>
> i) apply for FTSTAs only
>
> ii) apply for training programmes and identify...that you would like to be considered for an FTSA if you are not selected..."

15. There are a number of other things mentioned on the application form. Shortlisting is to be scored independently by a minimum of two trained panel members. Among the documents likely to be required for interview are signed verified references where available. Evidence to support what is asserted in the application form should be brought to the interview to support statements made on the application form and to prove the competences there referred to. A collection of evidence ("portfolio") can be used as evidence of having achieved foundation programme competencies (for those applying at Stage 1).

16. The checking of eligibility is called longlisting. A person who is not eligible should not reach the shortlisting stage.

17. As to the interview itself:

> "The minimum standard for a selection interview is 30 minutes of face-to-face selection time...
>
> The selection panel will consist of trained selectors, including specialists in the relevant specialty."

18. Finally:

> "If successful you will be allocated to your highest choice training opportunity..."

19. For those not successful in round 1, a second round is envisaged.

The application form

20. There is a standardised "Person Specification" for each specialty and stage. It sets out the "essential" and "desirable" criteria of each position. The candidate is required to say why he or she has the relevant competencies. There is provision for providing academic and research achievements. It is to be completed on-line.

21. At the bottom of each page it states that the candidate:

> "...[is] expected to provide documentary evidence where appropriate to support responses...given...if [he/she attends]...the interview..."

Shortlisting scoring

22. Up to four points may be awarded for the "examples of behaviours" provided. Perhaps surprisingly, the most that can be awarded for "Relevant Academic and Research Achievements" is two points. Panels could score either "horizontally" or "vertically." The first means that the panel member scores the same question on every application. The second means that the same panel member scores each question on the application.

Interview scoring

23. There is a "structured interview evaluation form." Again, points are awarded for different competencies.

Training

24. There were available training programmes and training documents. How many took part and how helpful they were is a matter of dispute. It seems to me plain from the documents I have that it was envisaged there would be some uniformity in approach by those selecting (see for example "Upskilling (sic) in Selection Workshop and the selection section from the Logistics guide to recruitment, which refers to nationally agreed documentation and selector guidance, the training to be provided by the MMC Programme Board to the deaneries to be "cascaded" to recruiters and trusts).

Selection panels

25. The Logistics guide provides that:

> "Shortlisting and interviews will be conducted by a panel which will include...a lay chair or representation..."

The "RTT Guillotine"

26. Dr. Marks, a consultant at the Royal Free and Royal National Throat Nose and Ear Hospitals, puts it in this way:

> "One consequence of the new...systems is that it will be extremely difficult for those junior doctors who do not join an RTT programme in their first year of application to join at a later stage...most of those who fail...at their first attempt will find it difficult to enter RTT. For this reason it is particularly important that the recruitment process is fair this year."

27. Mr. Greenfield disagrees that it is effectively a "make or break" position. Round 2 is available for those who fail round 1. There will be new RTT posts created. A person can move from a FTSTA. The Secretary of State is preparing measures of support, including some new RTT and FTSTA posts. Moreover, he says, under the old system not everyone obtained a post. It is more obvious now.

28. While, as it seems to me, this may not be a "make or break" situation, the obtaining of an RTT this year for any candidate who wants to specialise is of the highest importance. Some might have such a chance later. Many might not.

How MTAS in fact operated

29. It is agreed there were shortcomings. There is disagreement as to their extent. I can only resolve the issue (insofar as it is necessary that I do) by looking at all the statements and documents. It is helpful to start by considering the appointment of the review group. The fact that the Secretary of State felt it necessary to appoint such a group is some evidence of the extent of the problem.

The appointment of the review group

30. On 28 February 2007 the round 1 interviews began. On 5 March 2007 Dr. Hilborne, chair of the BMA's Junior Doctors Committee ("JDC") wrote to the Secretary of State. She called for the immediate suspension of the recruitment round or the postponement of the introduction of MTAS for a year. On 6 March 2007 the Department of Health issued the following press notice:

> "Following discussion with the medical Royal Colleges and the BMA, the Department...today announced a review into Round One of the...MMC recruitment and selection into specialist training, made through...MTAS.
>
> It is clear there have been a number of problems with MTAS and the process as a whole has created a high degree of insecurity amongst applicants and...more widely in the profession...
>
> The review will be completed by the end of March, so that any changes can be made in time for Round Two...on 28 April...
>
> The terms of reference are to:
>
> - Understand what has worked and not worked to date
> - Identify and promote good practice
> - Recommend action to remedy any weaknesses, taking account of legal and operational constraints
> - Identify specifically what further action or guidance is required:
>   - immediately (or before completion of Round One)
>   - before commencement of Round Two
>   - before any subsequent rounds.
>   - Develop improved arrangements for the support and care of applicants...
>
> ...Any doctors...not granted an interview in [round 1] will have the opportunity to apply for the second round. A large number of jobs will not be filled in the first round. We have stressed to those interviewing in round one that they should not appoint unless they are absolutely satisfied with the calibre of candidates...
>
> ....We will continue to work with [stakeholders] to ensure that trainee doctors are properly supported and fairly treated...
>
> ...Detailed areas to be considered:
>
> - Eligibility criteria...
> - Shortlisting and selection criteria, including scoring and relative weightings

- MTAS functionality...

- Guidance and support for interviewers..."

31. The chairman of the group was Professor Douglas, President of the Royal College of Physicians of Edinburgh. It was said to include Mr. Ribeiro, President of the Royal College of Surgeons of England, Dr. Hulf, President of the Royal College of Anaesthetists, Dr. Demitri, Specialist Registrar in Paediatrics and Clinical Research Fellow, Professor Sheila Hollins, President of the Royal College of Psychiatrists. There were too Mrs. Chapman, Director General of Workforce for the Department of Health, Mr. Greenfield, Professor Crockard, MMC National Director and Mr. Smith, MMC Programme Lead.

32. The BMA was not invited to join the group. Dr. Fielden, chairman of the BMA's Central Consultants and Specialists' Committee ("CCSC") attended the first meeting on 7 March. It required lobbying before the Secretary of State permitted Dr. Hilborne to attend, but only as an observer. In the event she was treated as a full participant and appears to have had considerable influence. Doctor Hilborne and Dr. Demitri were the only junior doctors who participated in the review.

33. On 10 March, three days after it was appointed, the Department issued the following notice:

> "The review...has found there were shortcomings...[it] has recommended immediate steps to strengthen the interview process, which include allowing applicants to bring CVs and portfolios to support their applications...
>
> As a result, some junior doctors who have expressed fears that they have been overlooked in the first round, will be given the opportunity to have their application form reviewed by a trained adviser from a Deanery. Successful candidates will be given an interview...
>
> The...Group decided that the first round...should continue but recommended immediate steps to strengthen the interview process, which have already been communicated to the Deans...These include allowing applicants to provide CVs and portfolios to support their applications.
>
> ...significant changes will be made to improve selection in the second round. This will include changes to the application form and the scoring system. The Department has accepted the need for change and the revised approach will now be tested with junior doctors [and others] before they are introduced.
>
> The...Group has also recommended that further advice and information should be made available as quickly as possible for applicants...[including]
>
> 1. information about competition ratios...
>
> 2. the process and timetable for making applications in the second round...
>
> 3. generic feedback on how applicants can improve their applications in the second round..."

34. On 13 March 2007 the Secretary of State made a written statement to the House. Among other things, she said that a large number of posts would not be filled in the first round.

35. On 16 March 2007 an update was sent by the review panel to candidates. By then the proposals had changed. For the first time (albeit on a limited scale) the possibility of guaranteeing an interview was raised. It said this:

> "The independent review group, examining the selection process for junior doctors, met for the third time and agreed that round one should continue and that changes should be made to strengthen the implementation process at each level...
>
> The...group considered a wide range of evidence and listened carefully to the concerns of the profession and NHS employers...[It] made the following recommendations:
>
> All eligible ST3 and 4 applicants will be guaranteed an interview for their first or second choice of training post...
>
> All applicants at ST1 who have not been short-listed for any interviews will have their application reviewed...where candidates meet the selection criteria they may be offered an interview in Round 1. If not, they will be offered career guidance and support to enter Round 2.
>
> All applicants for ST2 who have not been short-listed for interview will be offered face-to-face review with a trained medical advisor to determine whether they meet the shortlisting criteria. Those who [do]...may be offered an interview in Round 1. Those who are not selected for interview will be offered career guidance and support to enter Round 2...
>
> Deaneries across England have said that they have already interviewed many excellent doctors and that the new system is an improvement on the less structured nature of the old system...
>
> The Group also reviewed data on the numbers of training places and the competition ratios. It recommended that this information on the competition ratios should be made available immediately for candidates on the MTAS website..."

The proposals of 22 March 2007

36. By 22 March 2007 the proposals changed again. A statement was issued:

> "Building on last week's announcement, at a minimum, every long listable applicant who applied through MTAS and meets the eligibility criteria for their relevant specialty will be invited for an interview. Under this guaranteed interview scheme, candidates will be able to choose which of their preferences to be interviewed in light of the geographic specialty-specific and ST level-specific competition ratios which will be available on the MTAS website. We are in discussion about the implications...for the timetable.

> The...system has worked satisfactorily for General Practice and this will continue. In other specialties, there is evidence that the shortlisting process was weak and we will therefore eliminate this part of the process immediately. In contrast, the interview process has been working and therefore the revised approach will ensure that all long listable candidates will be interviewed. The Review Group believes that this new approach is the most equitable and practical solution available. The Group also recognises the enormous effort by consultants, service (sic) and deans that has already taken place to ensure that the interview process has worked. The time and effort required for further interviews is recognised by the service and the time required will be made available. Therefore the first choice interviews that have already taken place should not need to be repeated.
>
> In accordance with the advice already issued, we reiterate that all interviews will be informed by the use of CVs and portfolios and probing questions.
>
> In broad terms, this means that all eligible candidates at every stage of their training, whether or not they have already had interviews or interview offers, will be able to review their stated first choice preference and have the opportunity to select the one for which they want to be interviewed. We will be discussing operational details...We will consult widely...In the meantime, interviews will continue and applicants should attend unless they are confident that this will not be their preferred choice.
>
> No job offers will be made until all these interviews have taken place...
>
> The...Group has recommended the development of a programme of career support for applicants at all stages of the process..."

37. Mr. Coppel, on behalf of the Secretary of State, tells me that at this stage it was anticipated that only one interview would count. In short, it was now being proposed that preferences might be changed in the light of the competition ratios. If an interview in respect of that preference (or the original preference if not changed) had taken place it would stand. The other interviews attended by that candidate would not. Anyone not interviewed would be for his or her first preference (whether or not changed). An applicant's fact sheet reflecting that position was issued next day.

38. Although in the grounds and in his submissions on behalf of the claimant Mr. de la Mare seeks to quash this decision, it was effectively overtaken by the decision of 4 April 2007. It is that decision which forms the essential basis of this application.

The decision: 4 April 2007

39. On 4 April 2007 there was an "official statement" from the panel:

> "We recognise that this has been a challenging time for consultants, junior doctors and the service and have heard and appreciated the deep concerns that they have raised.
>
> Serious consideration has been given to all of the options available, including a full and detailed analysis of pulling out of the current selection process

completely. At the end, it was simply not a credible option. It would be impossible to place the best candidates in post and fulfil the service needs in time for August using the old system of recruitment. We believe we have come up with the best available solution for England.

Examination of the issues by the Review Group indicates that those concerns relate predominantly to the process of the selection itself and not to...[MMC]. These principles are based on national standards, and continue to secure widespread support amongst professional leaders in the Royal Colleges and the BMA.

The...Group has now made its proposals for the way ahead...[They] have recognised that implementation of its recommendations might differ between different specialties and different parts of the UK.

David Nicholson, the NHS Chief Executive, will write to NHS organisations to ask that applicants and consultants be released to support this process. Further interviews will be scheduled throughout May 2007.

The Review Group has agreed the following decisions:

Applicants already shortlisted and offered an interview

a. All interviews offered in the original Round 1 will be honoured and the outcome will count.

b. All applicants will be given an opportunity to revise or reaffirm their order of preference in the light of the competition ratios between 20-23 April.

c. Where applicants have not already been interviewed for their revised first preference, they will be invited for interview for that preference as well.

d. As originally planned, successful applicants will only be offered one post in this round which will be informed by the highest ranked preference for which they have been successfully interviewed.

Applicants not originally shortlisted

a. All applicants will be given the opportunity to revise or reaffirm their order of preference in the light of competition ratios between 20-23 April.

b. Applicants in England will be invited for interview for their affirmed first preference.

c. Successful applicants will only be offered one post...

Applicants who are unsuccessful after their interview in Round 1

a. Applicants who are unsuccessful in the first recruitment round will be able to apply during Round 2.

b. Round 2 will be based on a revised shortlisting and interview process including a structured CV.

We request that consultants continue to support this interview process which aims to appoint the best candidates to the right posts...

Professor...Douglas...said "I am pleased that the colleges and the BMA have agreed a joint way forward which will allow the best applicants to obtain training posts."...

Dr...Fielden [chairman of CCSC] said, "Having heard the major concerns of the profession and considered all available options we have now produced a practical solution deliverable in England..."

Dr...Hilborne, Chair of the BMA's Junior Doctors Committee said: "The last few weeks have been an extremely difficult and stressful time for applicants. We have worked hard to find a practical way forward which treats applicants fairly. We will continue to do so when looking at Round 2, which we all know remains of critical importance to the robustness of the whole process..."

Dr...Demitri, chair of the Academy of the Medical Royal Colleges Trainees Group, said: "The...Trainees Group recognises the difficulties that trainees have experienced through...MTAS...We have negotiated on behalf of trainees through continued representation on the Review Group to maximise choice for applicants applying to MMC. We are satisfied that the...Group has reached a point at which this aim has been achieved without compromising patient safety by overburdening the Service. We support the current recommendations of the Review Group and the forthcoming MMC process."..."

40. The claimant alleges this decision by the review group was conspicuously unfair.

The information before the review group

The "Summary of Evidence from Stakeholders"

41. On 8 March 2007 Professor Crockard, then National Director, Modernising Medical Careers, wrote to many "key stakeholders," asking for a report "with hard evidence" of those aspects of MTAS which had gone well and those which should be "revisited." The responses (and presumably other submissions) were summarised for the review panel in this document. The column titled "Did Well" is notably empty. As to shortlisting and scoring it said this:

> "Opportunity for plagiarism...Candidates talked up their applications...Some questions not discriminatory...Not enough marks for academic achievement...Lack of training...Lack of involvement in setting questions...Would rather see CVs...Consultants did not like white space ~~questions~~...Lack ~~of cross validation between markers~~...No ~~standardisation~~ or quality control...Differences between vertical and horizontal scoring...Late arrival of guidance so had to test locally...Ineligible candidates put forward for interview...Insufficient weighting given to objective measures of performance (e.g. 1st degree, prizes etc.)...Alleged abuse by assessors...Excessive time needed to score...Wide variation of scores...Excellent doctors have not been

> shortlisted...Applications passed...to untrained persons to score due to tight timetable...shortlisters see each others scores on computer...Change the scores of other scorers."

As to the interviews it said this:

> "Some candidates of very poor quality...Some consultants felt they were not allowed to probe candidates enough...Many felt they had better candidates in their department who had not got an interview...No difference in standard of candidates by this system...Inviting applicants to inappropriate interview..."

42. There were some entries under the "Did Well" column regarding interviews:

> "Process went well for most respondents...More structured interview technique has worked well when properly applied...Great support from Deaneries...Some excellent candidates appointed (sic)...New system more objective and a better examination of candidates' ability than in old system."

43. The final general comment, again in the "Did Well" column was:

> "Many deaneries reporting the system is working fine...Most commented on outstanding work of administrative, deanery staff, consultants etc all worked long hours in order to ensure round 1 a success."

Some comments of individual deaneries

West Midlands

44. There were some but not universal problems with interviews. The only ones not completed were in surgery, where the surgeons were so concerned about the situation that they walked out. The surgical consultants wanted an immediate suspension of round one. Feedback from interview panels was that despite concerns it was possible to select some excellent candidates. "The mood is lifting in the consultants who have seen the interview process in action." Professor Field of the West Midlands Deanery concluded by saying:

> "We have debated the situation at length and believe we should proceed with the round one interviews but we must make changes for round two. We do not believe interviewing all applicants for round one is feasible. We do not believe that it would be supported by the service...
>
> ...The shortlisting criteria need reviewing e.g. more marks for academic excellence, more discriminatory questions and better instructions to help assessors give marks is essential..."

Northern Deanery

45. There was criticism about the shortlisting scoring and relative weightings, among other areas. However:

> "We feel we have done a good job in round one and would NOT wish to lose its achievements to a major overhaul selling round two as MUCH better."

North Western Deanery

46. Its response was reasonably optimistic (the surgical specialities apart). Short-listed candidates were described as of generally high quality. Its conclusion was:

> "The North Western Team has worked long hours to deliver a very difficult task. We feel very strongly that it is important for the trainees to continue with round 1. We hope that the review will consider all the effort that has been invested to date by the deaneries [in] delivering an almost impossible task to a standard which is at least as fair as any previous system..."

East of England Deanery

47. It had many complaints regarding both shortlisting and interviewing. It concluded its submission to the review group by stating:

> "At this stage, interview process is just holding up (but threats of non-cooperation by consultants being voiced). Quality of candidates seems very good, but with a choice of four deaneries, such candidates may well choose London..."

Yorkshire Deanery

48. Although there were criticisms, the following "advantages" were noted:

> "Scheduling and organisation of interviews has been an astounding success, largely due to the ability and commitment of HR staff working 12 hour days...
>
> Dedication and commitment of many Consultant staff who feel the trainees must not be let down.
>
> Many other Consultants alienated...
>
> The interview process is more objective and a better examination of the candidate's ability than what went before. Consultants doing interviews are being positively engaged because they can believe in the selection process and know they are seeing some excellent trainees. The down side is that only one in four candidates is likely to accept an offer we make.
>
> Candidate feedback is almost universally positive about the interview experience..."

East Midlands Deanery

49. Its response was on the whole positive. It had not experienced the problems of other deaneries. It was "confident" that the long and shortlisting had been conducted appropriately. Interviews were well under way. They were running smoothly. The interviewers were:

> "...in the main...highly satisfied with the calibre of the shortlisted candidates and those identified as being suitable for appointment...

> We may lose consultant support, in particular, unless some robust challenges are presented to some of the ill-judged and frankly disingenuous comments circulating both from trainees and seniors. Unfortunately the establishment of the review is itself being viewed as confirmation that MTAS was/is in some way fundamentally flawed- which we in East Midlands...do not agree with..."

Wessex Institute

50. It too was on the whole positive (although it suggested the application form needed to be "revisited"). It stated:

> "Our interviews...are working well...Some excellent candidates have already been interviewed."

The Scottish Deanery

51. It stated:

> "a. Initial concerns have not been born out.
>
> c. The more structured interview technique works well when properly applied.
>
> d. The short listing scoring system has been useful.
>
> e. The applicants called to interview have been appropriate.
>
> f. The standard of applicant appointed to posts is not thought to differ from the appointments under the old system.
>
> g. There is significant room for improvement particularly around refining the person specs.
>
> ...Our perception from Scotland is that the system so far is working satisfactorily."

The Welsh deanery

52. It spoke of "clearly" needing to regain and rebuild confidence.

St Mary's Hospital London

53. There is nothing from the London Deanery. However Mr. Touquet, chairman of the medical advisory committee of St. Mary's Hospital Trust sets out what seems to have been the general view in London. He was very critical. He described the system as "unacceptable for the appointment of junior doctors." The application form was flawed. The process of shortlisting was "deeply flawed." The timescales were impossible. If shortlisting were not done on time the London Deanery suggested the candidate would be excluded. Untrained people had to help out. No-one had an overview of the application form as a whole. The same information could be used in different places on the form (if horizontally marked).

> "...outstanding young doctors who have worked hard to gain exceptional qualifications, and who of very high calibre have not been shortlisted...This has lead to a loss of confidence in the system by the consultants...
>
> ...We believe the interviews will not identify whether the right candidates have been called because there is no opportunity to compare them with those who have not been shortlisted...
>
> ...We submit that whilst round 1 may need to be completed for the sake of the trainees, the threshold for appointment must be very high, only appointing clearly outstanding candidates and further that panels must have in front of them the candidate's full Curriculum Vitae..."

Some other comments in the documents before the review group

54. Some documents have been redacted so the author is unknown. Many are highly critical of MTAS. One speaks in terms of the system being flawed and needing fundamental re-design. One (dated 8 March 2007) speaks of:

> "Many stories of the "wrong people" getting shortlisted, impossible to prove but now total loss of trainee and consultant confidence." Even trainees with interviews feel guilty."

55. There are letters or messages from junior doctors (including one from the claimant). They suggest a system which had badly let down junior doctors: one that was worrying, distressing, confusing and had led to a (justifiable) sense of grievance.

Evidence from those who took part in the review

Dr. Hilborne and Dr. Fielden of the BMA

56. Dr. Hilborne participated as a representative of the junior doctors. In that role she had considerable knowledge of the position of junior doctors. She sets out the background of the introduction of MMC. It is not necessary to go into the detail, except to observe that the BMA had profound concerns about the rushed introduction of MTAS, as it saw it. Their calls for delay were, it seems, ignored.

57. She suggests that the Secretary of State was surprised by the number of applicants, because of many more applications from European Union doctors. Given the numbers it was inevitable that there would be doctors who would be disappointed. Almost immediately after the introduction of MTAS there were problems and the BMA had complaints. A BMA survey suggested that by 23 March 2007 about one third of the candidates (11,700 doctors) had not been offered any interviews, about a third had been offered one and about third more than one.

58. In Dr. Hilborne's view, on the basis of information the BMA had, the "root cause" of the problems was shortlisting, not the interview process.

59. Dr. Hilborne describes how the review group came to the decision it did:

> "The discussions within the panel were complex and sometimes difficult. This was inevitable given the variety of interests and perspectives in issue and, further,

> given that it was readily apparent to all from the outset that there was going to be no simple solution...The JDC position, and my own, is that we would have preferred, if it had been possible, for Modified MTAS to offer four guaranteed interviews to each applicant. I think that would have been an equitable solution...However, the inability of the NHS and consultants to deliver this solution, because of the huge number of extra interviews that would have needed meant that we were obliged to take a pragmatic approach in agreeing to the "one extra interview for all" solution."

60. Scotland, Ireland and Wales were unaffected by the review. Because they had fewer applicants each could offer four guaranteed interviews.

61. Dr. Hilborne speaks of the differences between 22 March and 4 April announcements. The announcement of 22 March envisaged only one interview (the first choice) counting. She and Dr. Fielden were of the view that all previous interviews should count. As she puts it:

> "[About two-thirds] of applicants...had been granted an interview...Notwithstanding the deficiencies of the shortlisting process, there was no reason to conclude that (apart perhaps for a small minority) they did not deserve to be interviewed...there was no clear evidence that the outcomes of the interviews that had taken place so far were unreliable: if a candidate had been rated as appointable, then in all likelihood he or she was appointable. If, on the other hand, an applicant was weak and not really have been shortlisted...then in all likelihood he or she would not have been considered appointable after interview...[I]t would be unfair to the great majority...to disregard the interviews that had already taken place. Also it would mean that a very great deal of effort expended by the applicants...would have been wasted...very many deserving applicants [would be deprived] of the fruits of a successful interview...the work of the consultants in conducting...the interviews...would have been wasted...[This] was not the way to redress the unfairness done to those applicants who had not been offered any interviews...I fully accept and deplore the fact that there were some applicants who should have been shortlisted...but in my view the fairest way of dealing with them was to ensure they were interviewed, not penalise those who had already been interviewed [in the "round 1a interviews"].

62. So strongly did the JDC of the BMA feel about this issue that Dr. Hilborne and Dr. Fielden withdrew when it seemed the decision would go against, only re-joining on 4 April when the review group deferred to their view.

63. Dr. Hilborne emphased that the arrangements for round 2 had not been finalised at the time of the decision.

64. Dr. Hilborne describes modified MTAS as the "least bad solution in the circumstances." There were competing interests. Doctors had to be in post by 1 August 2007. The patients otherwise would suffer. She accepts what she describes as a "residual element of unfairness." Those unfairly not shortlisted will only have one interview. However if such a person is better than someone originally ranked top because the competition was worse than it should have been, the guaranteed interview candidate will replace him or her. The two thirds who were interviewed will have the

results counting. They will too have the benefit of a further guaranteed interview (if they want one).

65. Had the interviews been abandoned and MTAS not been modified Dr. Hilborne states there is no certainty a proper or rigorous process would follow. Given the time constraints, the temptation would be for the deaneries to make offers to those then working there. Modified MTAS meant that interviews can be completed by the end of May.

66. As to the alternatives suggested by the claimant in its grounds, Dr. Hilborne says this. There would not have been time to revert to the old system. Moreover, it was not entirely fair. There was scope for inconsistent treatment and worse. Making RTT posts short term would not be fair to those who had benefited from a successful interview. It would lead to great uncertainty. It might result in many doctors having to move after the temporary period had elapsed. Those in temporary posts might well be advantaged when seeking a permanent post.

67. It is not necessary to say more than that Dr. Fielden agrees.

Mr. Greenfield.

68. Mr. Greenfield speaks of the different factors the review group had to take into account. First there were the time constraints. Most of the SHO and SpR posts will be vacant by 1 August 2007. 80% must be filled by then if there is to be continuity of patient care. Second, different applicants had different interests in the way Dr. Hilborne indicated. "It was a matter of judgment as to where the balance should be struck." Third, a very considerable amount of work had been done on the round 1a interviews. There had been some 41,000 interviews each involving up to six consultants. That involved a great "opportunity cost" to the NHS in terms of consultant time. The interviews were widely regarded as well done. Fourth, the confidence of consultants had to be maintained. Many had spent considerable time interviewing. They did not want to see what they had done come to nothing. There were doubts as to whether they could be persuaded to commit further significant time. Fifth, resources were limited, not least in available consultant time. Extending guaranteed interviews to beyond one would have considerable implications for the time consultants had to see patients. Sixth, Scotland, Wales and Ireland would probably continue with the original timetable. They would be in the position of offering posts before England. England would lose out.

69. Mr. Greenfield states that the decision of 4 April represented a careful balance between these various factors. It represented in the review group's view the "most sensible and equitable solution in the difficult situation with which it was now confronted." It sought to mitigate the defects in shortlisting. Mr. Greenfield describes the guaranteed interview as an improvement on the previous arrangements in which no guarantee was offered. It was too, he suggests, an improvement for those who had not been shortlisted for all four of their choices. They could change their preference to the choice for which they had not been shortlisted.

70. Mr. Greenfield says that the review group did not accept the problems with shortlisting were as widespread or serious as the claimant suggests. It seems to me the Summary of Evidence from Stakeholders speaks for itself. He goes on to say that

candidates who were wrongly shortlisted would be rejected at interview. The information about interviews suggested they had gone reasonably well.

71. The review group rejected temporary posts, as Dr. Hilborne makes clear. According to Mr. Greenfield, it would run counter to the legitimate expectations of those junior doctors who had put considerable effort into the recruitment process on the assumption it could lead to an RTT, would amount to a disproportionate response, would have a significant adverse impact on the future stability of trainees (involving some 19,000 training posts being on offer after the temporary period had elapsed), would prolong the anxiety and uncertainty for candidates and would result in the loss of high quality candidates overseas.

72. Professor Douglas essentially agreed with Mr. Greenfield. He said this too:

> "...I believe that the guaranteed first preference interview system benefited many applicants, including many of those who had been shortlisted for less than all four of their preferences...
>
> ...In my view, the Review Group has, through its membership and otherwise, consulted widely across the medical profession and the National Health Service and adopted a response to the problems of the 2007 recruitment process which was sensible and fair in the difficult circumstances with which we were faced. There was no ideal solution."

Other evidence as to how MTAS worked

73. The claimant has submitted many witness statements from many distinguished doctors. I have read each of them. They reveal the sort of problems in the summary of evidence before the review group. They suggest how unsatisfactory the position was in London, the largest UofA (although not solely there). Among other things, there is criticism of the round 1a interviews (see in particular Dr. Marshall, Dr. Leopold, Professor Chilvers and Professor Wilson).

74. As it seems to me, the evidence as a whole suggests fundamentally, that even as envisaged, and apparently the product of wide consultation, the shortlisting process was flawed. The application form was unreliable as a measure of ability. It resulted in able candidates not being shortlisted when they should have been and less able candidates being shortlisted when they should not have been. It may well be too, as the claimant suggests, the more favourable comments on candidates by some of the deaneries may in part reflect the fact that some of the candidates they interviewed have their deanery low down their list of preferences. Mr. de la Mare spoke of false positives. That is not to say that many, possibly very many, candidates who were shortlisted did not deserve to be.

75. It is clear too there were some problems with the round 1a interviews. That is no doubt why the review group as a first step spoke of strengthening them. In her statement to the House of 13 March 2007 the Secretary of State spoke of it having been stressed to those interviewing that they should only appoint if absolutely satisfied of the calibre of candidates. Without going into the detail, the different

pieces of guidance about the use of CVs are not as clear as it could be. Dr. Hilborne states that if round 1a interviews were carried out without using CVs, round 1b should be too.

76. However, having regard to the evidence as a whole the review group was in my view entitled to conclude the interviews worked reasonably well. I shall come to the difficulties of comparing rounds 1a and 1b later.

MTAS software problems

77. Although there is a dispute about the extent of MTAS software problems leading up to modified MTAS, it seems to me of relative unimportance in the context of the case as a whole (albeit to the applicants and the deaneries it was a matter of considerable irritation and no doubt in some individual cases caused unfairness).

Consultation

78. The claimant submits that it could legitimately have expected the Review Group to have consulted it. I now deal with some of the evidence on this topic.

79. Professor Crockard's letter of 8 March 2007 was widely distributed. There were solicited and unsolicited responses. I have dealt already with the make up of the review group. The BMA and the Academy members represented their professional bodies.

80. On 15 March 2006 there was a meeting between Dr. Hilborne and others from the BMA, Clare Chapman (a member of the review group and Director General of Workforce), Professor Marshall, the Deputy Chief Medical Officer and Doctors Shaw and King, representatives of RemedyUK. The meeting lasted about an hour. This was shortly before the protest march. Dr. Shaw says that he and Dr. King were not consulted about the review group's proposals for MTAS. They explained their concerns. They suggested that MTAS should be scrapped. A follow up meeting was suggested by Ms Chapman. It did not take place.

81. On 23 March 2007 there was a telephone conversation between Dr. King and Dr. Evans of RemedyUK and Professor Douglas. Professor Douglas explained the proposal made the previous day. He accepted the situation was not ideal, but suggested the review group was trying to make the best of a bad situation. He had to hang up after 45 minutes. It was not possible to ask him questions. According to Mr. Greenfield, RemedyUK wanted the present recruitment process to be abandoned or for all RTT posts to be temporary.

Events since the decision of 4 April 2007

82. I shall take them shortly.

83. On 26 April 2007 the website was suspended. There had been serious breaches of security. It was supposed to be back online on 30 April 2007. It went back online to a limited extent very recently. It can only be accessed by deaneries. Candidates' liaison with MTAS has to be by telephone.

Re-modified MTAS

84. On 15 May 2007 the Secretary of State made a statement to the House. She stated, among other things, that the review group had agreed that round one offers are to be managed locally by deaneries (and not through MTAS). Subject to the present proceedings, all initial offers would be made by early June. Round 1 would close in "late" June. She stated that:

> "Given the continuing concerns of junior doctors about MTAS, the system will not be used for matching candidates to posts, but will continue for national monitoring...
>
> ...not all training posts will be filled in the current round and there will therefore be substantial opportunities for those who are not successful initially..."

85. The effective abandonment of MTAS would seem to have little to do with the concerns of junior doctors, but be a consequence of significant fresh problems with the system. As I understand it, the algorithm needed to govern the allocation process under MTAS did not work. Fresh software was needed to enable offers to be made. Such software could give rise to security problems.

The legal argument

86. Mr. de la Mare accepts that this claim is unprecedented. It raises novel and difficult issues of law, he suggests. As it seems to me this is an unusual claim. The claimant is seeking to quash a decision affecting some between 18,250 and 23,000 men and women. Of those men and women, who purportedly it represents, a significant proportion, possibly the majority (those who have had round 1a interviews) may want the decision to stand. This is not a case in which an individual or a small group of individuals on the facts relating to them want a decision quashed. It is moreover a decision with profound implications for very many consultants, deanery staff and the operation of the NHS.

87. The grounds put the case in this way.

88. First, MTAS applicants had a legitimate expectation that they would be able to express four preferences. Modified MTAS limits them to one guaranteed interview. That breaches the affected doctors' legitimate expectation. It is so unfair as to amount to an abuse of power.

89. Second, before modifying MTAS in breach of the affected doctors' legitimate expectation, the Secretary of State had a duty to undertake adequate and fair consultation. She breached that duty. That rendered the decision unfair.

90. Third, modified MTAS results in inequality of treatment in the cohort of applicants: the "defective allocation issue."

91. Fourth, the differences in interviewing between round 1a and 1b is an additionally unfair and inconsistent consequence of modified MTAS: the "defective interviews issue."

92. Finally, each of the factors, and their combination, makes modified MTAS so unfair as to amount to an abuse of power.

93. The relief claimed is a quashing order, a declaration that the decision, wholly or partly, is unfair and requires remedy by the defendant. The court should declare that the appointments to RTT must be re-started on the basis of local selection or that RTT posts under modified MTAS be temporary. There is also reference to a further alternative: holding back a proportion of RTT posts for selection based upon a fair procedure in round 2.

94. In argument the emphasis of the case changed. Mr. de la Mare's primary submission was that the decision was an abuse of power: it was conspicuously unfair. Legitimate expectation was part of the context; the Secretary of State's departure from the junior doctors' legitimate expectation rendered the decision the more unfair. The legitimate expectation of junior doctors was that under the MTAS process a candidate would be fairly considered on merit for appointment in four expressed preferences. In the event MTAS did not provide that. Neither, and crucially for this application, did modified MTAS .

95. Once, as Mr. de la Mare submitted, I concluded that modified MTAS was conspicuously unfair, the only matter remaining was relief. At the lowest, such a finding should result in a declaration of unlawfulness. A finding of conspicuous unfairness and the question of relief were separate matters, he submitted.

96. In the well known case of *R v North and East Devon HA, ex parte Coughlan* [2001] QB 213 at 241, Lord Woolf, MR, said this:

> "...the starting point has to be to ask what in the circumstances the member of the public could legitimately expect...Where there is dispute [it] has to be determined by the court. This can involve a detailed examination of the precise terms of the promise or representation...the nature of the statutory or other discretion.
>
> There are at least three possible outcomes. (a) The court may decide the public authority is only required to bear in mind its previous policy or...representation, giving it the weight it thinks right...before deciding to change course. Here the court is confined to reviewing the decision on *Wednesbury* grounds...(b) On the other hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken...the court itself will [then] require *the opportunity for consultation* to be given unless there is an overriding reason to resile from it...(c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive...authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change in policy...

> ...most cases of an enforceable expectation of a substantive benefit (the third category) are likely in the nature of things to be cases where the expectation is confined to one person or a few people, giving the promise or representation the character of a contract."

97. Mr. de la Mare submits this is a category (c) case, albeit not confined as there envisaged. It would be a category (a) case but for the impossibility of compliance.

98. In *Rashid v Secretary of State for the Home Department* [2005] INLR 550, Lord Justice Dyson said this:

> "A useful starting point for the discussion is the statement by the Court of Appeal in *R (Bibi) v London Borough of Newham* [2002] 1 WLR 237.
>
> > "In all legitimate expectation cases...three practical questions arise. The first question is to what has the public authority committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do.
>
> ...It is the second question where the real difficulty lies. As was made clear in...*Coughlan*...where the court considered that a lawful promise...gave rise to a substantive legitimate expectation, the court will, in a proper case, decide whether to frustrate the expectation is so unfair as to be a misuse of the authority's power...
>
> As Laws LJ said in *R v Secretary of State for Education and Employment ex parte Begbie* [2000] WLR 1115...the facts of the case, viewed as always in their statutory context, will steer the court to a more or less intrusive quality of review. In some cases, a change of tack by a public authority, though unfair from the applicant's stance, may involve questions of general policy affecting the public at large: in such cases the judges may not be in a position to adjudicate save on the most bare *Wednesbury* basis, "without themselves donning the garb of policy-maker, which they cannot wear." In other cases, where, for example, there are no wide ranging policy issues, the court many be able to apply a more intrusive form of review to the decision. The more the decision which is challenged lies in the field of pure policy, particularly in relation to issues which the court is ill-equipped to judge, the less likely it is that true abuse of power will be found."

99. Mr. de la Mare principally relied on the "wider principle" referred to in *R v National Lottery Commission, ex parte Camelot Group PLC* [2001] E.M.L.R. 3. At paragraph 61 Richards J said this:

> "In relation to legitimate expectation, Mr. Crow points to the line of authority that it must be founded on a clear and unambiguous representation...Mr. Pannick, however, points to a wider principle, which is not in dispute, that even if the requirements for breach of legitimate expectation are not met, a decision may nonetheless be so unfair as to be an abuse of power and unlawful."

100. Mr. de la Mare submits that the test for conspicuous unfairness as adumbrated by Richards J is independent of *Wednesbury.*

101. It seems to me Mr. de la Mare's essential argument on unfairness can be distilled in the following way.

102. RTT posts are the "gold standard." They last for seven years. They are the means of a junior doctor becoming a specialist. If he or she does not obtain a post this year, it will be very difficult if not impossible ever to obtain one. It is "make or break" for the junior doctor. He or she can legitimately expect that he will be fairly considered for such a post on relative merit for appointment in four expressed preferences.

103. I have expressed my view about that already. On any view, for the junior doctor who wants to become a specialist obtaining an RTT post is very important indeed. In many cases it may well be his or her only chance.

104. Mr. de la Mare submits that when assessing whether the decision of 4 April 2007 was conspicuously unfair, it cannot be looked at in isolation. The context is crucial. Each change to MTAS has to be considered in context. The context of modified MTAS was a system which failed at every stage. There were flaws in the design of the person specification ("useless"). Longlisting, shortlisting (most crucially) and interviewing were seriously flawed. Modified MTAS locked in those flaws. It was devised without consulting the affected doctors. It changed the basic architecture of the scheme and aggravated the unfairness. One unfair scheme was changed into another unfair scheme. In that way it was unlike the normal case of breach of legitimate expectation. Those interviewed in round 1a were selected by an unfair shortlisting system. Modified MTAS relied on those interviews. There is nothing to suggest that those who devised modified MTAS properly understood the degree of unfairness involved. Candidates who should have been interviewed were not. Some who should not have been interviewed were. They included candidates who were ineligible because of problems with longlisting. Those who were interviewed were not as a result assessed on relative merit. A possibly better candidate was unfairly excluded. A candidate who should not have been shortlisted but was made it easier for the others. The competition was less. Such a candidate was unfairly advantaged. The fact a candidate might be assessed by the deanery as appointable is not to the point. The test is not appointability. It is fair competition as between all the candidates for a particular post, including those unfairly not shortlisted. There is no reason why a successful round 1a candidate should continue to receive a benefit to the detriment of a candidate unfairly not shortlisted. It cannot be said (as does Dr. Hilborne) that an appointable candidate interviewed in 1a was deserving of appointment.

105. Being able to change preferences in the light of the competition rations is also unfair. Instead of honouring an expectation of being considered on merit for interview for up to four preferences, the candidate has a new system in which he or she must try and guess the chances of success in the sole interview available in round 1b. Game theory is how Mr. de la Mare termed it. The provision of competition ratios and the permitting of preferences for the guaranteed interview to be changed is unfair to those who originally chose an unpopular specialism in an unpopular UofA. Those with two or more interviews from round 1a have a measurable advantage.

106. It seems to me as a matter of logic that the shortlisting of someone who should not have been shortlisted and omission of someone who should have been does result in those elements of unfairness referred to by Mr. de la Mare. That is not the whole picture. A number, possibly a significant number, of those shortlisted deserved to be. A number, again possibly a significant number, of those not shortlisted were rightly excluded. In some cases the process worked. That was one among a number of difficult problems the review group faced.

107. Mr. de la Mare also submits the round 1a interviews (the reliance upon unfair shortlisting apart) were themselves flawed. They were not carried out well enough. There was confusion about CVs. The way they were carried out was different from round 1b. Round 1a and 1b interviews cannot fairly be compared and meshed together. The panels will be different. The candidates will be of lower quality. Many will not deserve an interview. It will not be possible to "normalise" as between "hawk" and "dove" panels.

108. Mr. de la Mare rejects Mr. Coppel's submission that modified MTAS was the best compromise then available for the reasons spelled out by Mr. Greenfield and Dr. Hilborne. Time pressure is no basis to reject either of his proposed remedies (as to which see below). It cannot be fair or lawful to take into account the interests of those who had interviews on the basis of the deeply flawed shortlisting process. It cannot be right to take into account the work which was done. There is a lot of evidence that many consultants had no confidence in MTAS. Limited resources did not justify modified MTAS. Mr. de la Mare argues that this situation was not brought about by exogenous intervening policy considerations. It was the defendant's fault. It is most unattractive for the defendant to rely upon the defects caused in that way, he submits.

109. Re-modified MTAS aggravates the situation, submits Mr. de la Mare. It is something I should take into account as part of the whole picture when assessing conspicuous unfairness. It might result in many offers from different deaneries at different times. The candidate will have to decide which to accept without knowing which other offers might come his or her way (particularly as deaneries will not know how many places they might have). The one benefit of MTAS was the knowledge that the offers would come in the order of preference. Re-modified MTAS does however have the potential to correct some of the unfairness of modified MTAS. The deaneries could hold open more posts for a fairer round 2. It is a matter upon which there should be consultation.

110. As it seems to me this case is not essentially about re-modified MTAS.

111. Mr. de la Mare accepts that the *Coughlan* problems of categorisation and policy in legitimate expectation arise. However, they only arise, he submits, in the context of

relief. This is not a typical legitimate expectation case. First, the court should ask whether there has been conspicuous unfairness. Second, only in considering relief should it decide on the category into which the legitimate expectation falls. Mr. Coppel submits that the question of categorisation and policy is crucial to the decision as to whether there has been a breach of a legitimate expectation and conspicuous unfairness. For if, as Lord Justice Dyson put it in *Bibi*, there are "issues which the court is ill-equipped to judge, the less likely it is that true abuse of power will be found."

112. On his analysis, Mr. de la Mare accepts that the court must not be drawn into policy issues when granting relief or enforcing the substantive legitimate expectation. A careful and not overly intrusive approach on relief is required.

113. He accepts that a reversion to the old deanery selection is not now possible given the time constraints (although he submits it was when the decision was reached). The first proposed solution is the abandonment of appointments to RTT for this year. That is feasible. There are a number of witnesses who say so. Although there would be budgetary implications they would be modest. He rejects Mr. Greenfield's reasons for rejecting it.

114. The second possible remedy is that only the strongest candidates should be appointed to the RTT posts, holding the rest back as FTSTA posts. A variation on that theme, as I understand it, is for the deaneries to hold RTT posts back under re-modified MTAS for them to be filled in round 2.

115. In short, Mr. de la Mare submits that it is possible for me as a judge to weigh these different options and grant relief in respect of one of them. He submits cogently why Mr. Greenfield and Dr. Hilborne (in her case the variation apart) are wrong in their view as to the practicability and desirability of those courses. For reasons which I shall amplify when considering the nature of the decision of 4 April 2007, I cannot agree. Put simply, as a judge I am not equipped to decide what in truth are issues of policy requiring expertise on the running of the NHS and the training of doctors.

116. That being so, even on Mr. de la Mare's analysis of the law, I cannot grant relief. He submits that in such a case, I should grant a declaration of conspicuous unfairness. Again, I cannot agree. It does not seem to me that in the absence of granting relief I should make a declaration. The justification advanced for doing so is that in such a way applicants' appeals would be assisted, as would their cases before the employment tribunal. That is not a sound basis for granting a declaration. In none of the authorities on legitimate expectation has such a course been adopted. Moreover, what is said in this judgment can be prayed in aid of any applicant appealing or going to an industrial tribunal.

117. In short therefore, even assuming I accept Mr. de la Mare's analysis of the law, I would not grant a declaration of conspicuous unfairness. That aspect of the claimant's case would fail.

Consultation

118. The claimant's case is that the review group was under a duty to consult the affected doctors when modified MTAS was at a formative stage, explaining what it had in

mind. Natural justice required it, given the importance of the reform of MTAS. There was an obligation under the Cabinet Office Consultation Code. Modified MTAS would change or interfere with legitimate expectations. The terms of the press release of 6 March 2007 are relied on too.

119. There was no consultation submits Mr. de la Mare on modified MTAS, either in general or with the claimant. It was not sufficient that the review group had within it BMA or Academy representatives. They do not represent all interested medical professionals. The BMA JDC chairman merely had observer status (unlike Dr. Fielden who was a full member from the beginning). The consultation had to be targeted at those whose expectations were to be reversed. Even if the defendant did not have a duty to consult the affected doctors generally she had the duty to consult RemedyUK. She knew of it and the number of doctors it represented. The review did not invite the claimant to attend although it knew it represented many junior doctors and had been particularly critical of MTAS. It would have been easy to consult. The proposal could have been circulated on the website for example. Professor Crockard's letter of 8 March 2007 did not invite or solicit the claimant's views. Such meetings as there were with the claimant fell well short of consultation.

120. Urgency is not an answer. It had time to consult those it wished. It could have consulted the claimant had it wished to. It limited its consultation to individuals sitting in private.

121. Mr. Cavanagh QC on behalf of the BMA submits that Mr. de la Mare's submissions on consultation are wholly misconceived. The BMA is the only recognised trade union. The fact that all doctors are not members is not to the point. It is democratic. It knows and can take account of its members' views. The fact that some junior doctors disagree with its views does not mean the process of consultation was flawed. Moreover, as is clear from the evidence the BMA did invite RemedyUK to make a presentation to it. It arranged the meeting of 15 March 2007. It was sufficient for the defendant to consult the BMA.

122. I shall refer to some of Mr. Coppel's submissions when setting out my conclusions.

My conclusions

123. First, as I have said, for the reasons I have referred to, an application such as this is unprecedented.

124. Second, it is an application opposed not simply by the Secretary of State but also by the BMA, the doctors' recognised trade union, which itself took part in and agrees with the decision the claimant seeks to quash. The BMA represents many doctors who would be affected by the quashing of the decision.

125. Third, I should spell out the limits of this application. It seeks to quash the decision of the review group. It does not seek to quash the introduction of MMC or the principle of using MTAS or the use of what many might think to be an inadequate application form for shortlisting. Those features are merely part of the context of the application.

126. Fourth, the crucial issue, consultation apart, is whether, having regard to the deficiencies apparent to the review body, and in all the circumstances facing it at the time, modified MTAS was a possible rational solution and not conspicuously unfair. Provided the solution was a rational one and not conspicuously unfair, I cannot quash it. That I might have reached a different solution is not to the point.

127. Fifth, in deciding whether I can interfere on other than *Wednesbury* grounds I must beware "donning the garb of policy-maker." If I conclude the decision of the review body amounted to policy and involved balancing issues which the court is ill-equipped to judge, the less likely it is that it will truly amount to an abuse of power. It seems to me that is what the authorities say. I do not accept the division between conspicuous unfairness and remedy, however well argued by Mr. de la Mare. Such matters as whether the competition should have started again, or whether RTT posts should have been made temporary cannot be ignored in categorising the nature of the decision. They are integral to its characterisation.

128. Sixth, as the various documents promulgated by the review group, concluding with the decision of 4 April 2007 make clear, resolution of the issues was very difficult indeed with far ranging implications for many different people with different, sometimes irreconcilable interests. Matters of expertise and issues of general policy were involved. It affected not merely the 34,000 applicants, but also the consultants who had to implement any changes in the recruitment process, the deanery staff in the different deaneries, future NHS patients who might be prejudiced by further consultant and junior doctor time spent on recruitment and would be prejudiced if the doctors were not in post on 1 August 2007. In short, as well as the interests of the junior doctors, the operational needs of the NHS played an important part. The implications of the decision are very different indeed from those considered in such cases as *Coughlan* and *Bibi*.

129. Seventh, the review body had the expertise needed and which I do not have, as I have said in the context of Mr. de la Mare's submissions on remedy. As Mr. Cavanagh QC put it, policy and practical decisions about the recruitment of junior doctors is far removed from the normal sphere of the court's expertise. I have concluded that the facts of this case must "steer the court to a...less intrusive quality of review of the decision."

130. Eighth, I have said that modified MTAS does have elements of unfairness. That is not the whole picture however. A number of competing and very difficult issues faced the review group as Mr. Greenfield and Dr. Hilborne have said. As Mr. Coppel submits, it was deliberating in exceptionally problematic circumstances. Large numbers of people were complaining about the fundamentals of the recruitment process. Although, as Mr. de la Mare submits, it is unattractive for the defendant to rely as part of her answer to this claim upon the failings of her process, the review group could not, as Mr. Coppel submits, ignore facts. It had to come up with a workable solution. The position, as it seems to me the review group was entitled to conclude was this: The competing interests were irreconcilable. There was no perfect solution. The doctors broadly had to be in post by 1 August 2007. Modified MTAS would permit that. Many round 1a interviews which many trainee doctors had attended and many consultants conducted, had taken place. Shortlisting and, to a degree longlisting were significantly defective which resulted in unfairness. That is not to say that in every case shortlisting was defective. Some doctors who were

shortlisted should have been. In that sense, they deserved to be. Some were rightly rejected. The interviews had worked reasonably well. Poor candidates had been or would be weeded out. Deaneries, as Mr. Coppel emphasised on the basis of instructions directly given to him by a dean angered by Mr. de la Mare's comments on some of the deaneries, would not appoint anyone interviewed of insufficient quality. No interview process was perfect. It had not been in the past. The opportunity cost of interviewing was high. To abandon interviews which had taken place would strain the goodwill of consultants. It would involve more cost. It was impossible to have four guaranteed interviews. Although not ideal, modified MTAS at least gave everyone one interview. That was an improvement for many. Many, possibly a majority, wanted the interviews to stand. In choosing the one guaranteed interview the candidate would be informed by the competition ratios. Deaneries are experienced recruiters. It should be reasonably possible for them to compare round 1a interviews with round 1b. The alternative options were less desirable.

131. In short, although far from ideal, it does seem to me the decision of the review group was within the range of reasonable responses to the very difficult situation it faced.

132. Ninth, I can deal very briefly with legitimate expectation. Consultation apart, it plays a limited role in the claimant's case. The claim in legitimate expectation is unusual. The claimant does not want the defendant to revert to the recruitment process which existed before modified MTAS which would be the normal remedy for such a breach. It accepts that is neither possible nor desirable. For MTAS it submits was flawed. The remedy it seeks is the making of the orders to which I have referred. It is not appropriate to make the orders for the reasons I have given.

133. Moreover, again for the reasons I have given, the review group was entitled to reach the decision it did given the circumstances facing it at the time.

134. Tenth, it does not seem to me the defendant was in breach of any duty to consult. A public body undertaking consultation must do so fairly as required by the circumstances of the case. As Sullivan J said in R on the Application of Greenpeace Limited v Secretary of State for Trade and Industry [2007] EWHC 311:

> "...a conclusion that a consultation exercise was unlawful on the ground of unfairness will be based upon a finding by the court, not merely that something went wrong, but that something went clearly and radically wrong."

135. Here, the review group considering whether to modify MTAS brought with it not only expertise, but representatives of those affected by any change. The Royal Colleges were represented. So too (in the event) was the trade union, represented by the chair of its JDC. Dr. Demitri was chairman of the Academy of the Medical Royal Colleges Trainees Group. There was access to the views of the membership of the Royal Colleges and the BMA. Dr. Crockard's letter of 8 March, albeit not sent to the claimant, was intended to and did reach a wide audience of interested parties. RemedyUK's views were known. It gave a response. There was significant junior doctor input into the review group's analysis. Indeed, so powerful was the influence of the BMA's representative of the junior doctors that the BMA view on previous interviews prevailed. It seems to me consultation with each affected junior doctor was not practicable. It does not seem to me that wider consultation was required in

the circumstances. The defendant was entitled in the urgent and difficult situation she faced at the time to consult in the way she did.

136. Moreover, if consultation was insufficient, there are strong arguments against granting relief under this head, as Mr. Coppel submits. The relief claimed was considered and rejected.

137. Eleventh, I have said I would not have granted the relief sought in any event. I have said too that it would not be appropriate to make a declaration. While not necessary for my decision, it seems to me there may too be reasons of good public administration not to grant the relief sought: see *R v Monopolies and Mergers Commission ex parte Argyll Group* [1986] 2 All E R 257. Thousands of round 1b interviews have now taken place. The round is virtually complete. Offers of jobs are shortly to go out. 80% of posts must be filled by 1 August 2007. Scotland, Wales and Northern Ireland have already made offers. Any delay now, which would be an inevitable if the relief sought were granted, would put the timetable at risk.

138. In the result, for the reasons I have expressed, this application for judicial review is refused.

Some final observations

139. The fact the claimant has failed in what was accepted to be an unprecedented application so far as the law is concerned does not mean that many junior doctors do not have an entirely justifiable sense of grievance. The premature introduction of MTAS has had disastrous consequences. It was a flawed system in the ways I have indicated. This judgment does not mean I agree with the decision of the review group; merely that it was one the review group was entitled to come to. Neither does it mean that individual doctors would not have good grounds to appeal regarding their allocation or that they would not have good cases before an employment tribunal. Quite the contrary could well be the case.

140. The Secretary of State has said (and it was repeated in this application) how sorry she is for the uncertainty and anxiety caused to junior doctors. While I have made clear that it is impossible for me as a judge to decide what the best course to follow is in this very complicated situation, it does seem to me that she might want to bear in mind what she said on 13 March 2007: that a large number of posts will not be filled in the first round: that only candidates in respect of whom the deaneries are absolutely satisfied will be appointed. She said too on 15 May 2007 that round 2 would offer substantial opportunities. Given the concern expressed for the junior doctors, it would be unfortunate if the approach were simply to fill as many posts in round 1 as possible without regard to their views.

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