

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

BETWEEN:

THE QUEEN
On the application of
LEGAL REMEDY UK

Claimant

- and -

SECRETARY OF STATE FOR HEALTH

Defendant

- (1) THE POSTGRADUATE MEDICAL EDUCATION AND TRAINING BOARD**
- (2) CONFERENCE OF POSTGRADUATE MEDICAL DEANS OF THE UNITED KINGDOM**
- (3) THE BRITISH MEDICAL ASSOCIATION**
- (4) THE NATIONAL ASSOCIATION OF CLINICAL TUTORS**

Interested Parties

**SUMMARY GROUNDS/SKELETON ARGUMENT
ON BEHALF OF THE BRITISH MEDICAL ASSOCIATION**

INTRODUCTION

1. These Summary Grounds are intended to form, in addition, the Skeleton Argument for the British Medical Association (“BMA”), which has been served with these proceedings as an Interested Party.
2. The BMA intends to be represented by counsel at the hearing on 16th and 17th May 2007.

3. At the same time as filing and serving these Summary Grounds, the BMA is lodging two witness statements: a witness statement (with exhibit) from Dr Jo Hilborne, the Chair of the Junior Doctors' Committee ("JDC") of the BMA, and a witness statement from Dr Jonathan Fielden, Chair of the Central Consultants' and Specialists' Committee of the BMA.
4. Both Dr Hilborne and Dr Fielden are members of the Review Group which was set up to address the problems that had been encountered with the MTAS system, and so both participated in the decision-making process that is the subject of challenge in these judicial review proceedings.
5. At the time of drafting these Summary Grounds, the BMA's legal advisers have seen the Claim Form, Grounds, and such supporting evidence on behalf of the Claimant ("RemedyUK") as had been supplied on or before 9th May 2007 (the most recent being the statements of Dr David Leopold and Dr Dewi Pritchard at pages 671-681 of the Bundle)¹.
6. The BMA has also been supplied with the Acknowledgment of Service, Summary Grounds, and witness statement on behalf of PMETB, another Interested Party.
7. At the time of writing, the BMA has not had sight of the Acknowledgment of Service, Summary Grounds or supporting evidence on behalf of the Defendant.
8. The witness statements of Dr Hilborne and Dr Fielden deal in detail with the events which form the background to these proceedings, and explain the reasons for the actions taken by and on behalf of the BMA in relation to the Modified MTAS, the revised arrangements that have been put in place following the recommendations of the Review Group.

¹ Contrary to what is said at paragraph 45 of the Grounds, the BMA did not receive copies of RemedyUK's letters before action.

9. The statements also explain in detail why the BMA considers that the current Review Group proposals, whilst far from ideal, are the “least bad” options currently available to deal with the difficulties with the recruitment of specialist trainees to commence on 1st August 2007. They explain why the BMA respectfully submits that it would neither be desirable nor realistic for the Modified MTAS arrangements to be replaced, at this late stage, with any of the proposed alternatives that are canvassed by RemedyUK in the Claim Form at page 9, and in the Grounds at paragraphs 62(4)(a)-(c) at page 38, paragraphs 64(3) and (4), page 39, and paragraph 89 at page 48.
10. Accordingly, the BMA will respectfully invite the Court to reject this application for judicial review and to decline the relief that RemedyUK is seeking.
11. Since the BMA is not the Defendant in these proceedings, and since it expects the Defendant to deal with the legal arguments that are made by RemedyUK in the Claim Form, these Summary Grounds will not make detailed submissions upon the law.
12. Moreover, as stated above, the case on behalf of the BMA is set out in detail in Dr Hilborne’s and Dr Fielden’s witness statements, and the Court is respectfully referred to those statements for the substance of the points that the BMA wishes to make to the Court.
13. These Summary Grounds will, therefore, not attempt to repeat the points that are made in the statements of Drs Hilborne and Fielden. Instead they will explain why the BMA has decided to participate as an Interested Party, and will then highlight a few points in relation to the nature of the claims made and relief sought by RemedyUK.

THE REASONS WHY THE BMA HAS DECIDED TO PARTICIPATE IN THESE PROCEEDINGS

14. There are four interconnected reasons why the BMA has decided to participate in these proceedings.

The BMA is the principal body that represents the interests of doctors in the UK

15. As Dr Hilborne says at paragraph 4 of her witness statement, the BMA is the sole officially-recognised negotiating body for doctors, and it is the principal body that represents the interests both of junior doctors and of consultants. The BMA is also concerned with the interests of patients who will, in the short or long term, be affected by problems concerning the selection and appointment of trainee specialist doctors.

16. The subject-matter of these proceedings is of great importance to the BMA and its members. This is illustrated by the efforts made (successfully) by the BMA to obtain representation on the Review Group, even though the BMA was not originally invited to participate in the Group (see Hilborne, paras 75-83).

The evidence that the BMA can provide may help the Court to reach its decision in these proceedings

17. The close involvement of the BMA, and in particular of Drs Hilborne and Fielden in various aspects of the history of this matter means that the BMA considers that the Court may be assisted by evidence from these witnesses.

18. This is particularly the case as the BMA approaches this litigation from a non-partisan standpoint, as is illustrated by the following matters.

19. The BMA was not responsible for any of the design and practical weaknesses in the MTAS system (see Hilborne, paras 32-37) and had, indeed, been pressing the Defendant for several years to delay the implementation of the MTAS scheme because of concerns that it had not be sufficiently tested and may not be sufficiently robust (Hilborne, paras 38-40). More recently, at one stage in late March/early April 2007, the BMA representatives on the Review Group

withdrew, because they could not agree with the course of action that looked likely to be proposed (Hilborne, paras 86-92). Accordingly, the BMA has had no vested interest to support the MTAS system.

20. Moreover, when the problems came to light, the BMA and its representatives decided to attempt to co-operate with others (including RemedyUK and the Defendant) to try to find the best possible solution to the difficulties, rather than to stand on the side-lines and criticise (Hilborne, para 10 and Fielden, para 8).

21. The BMA has throughout sought a selection process for specialist training which would result in the right trainees being appointed in the best and fairest way, so as to enable them to train and to treat members of the public. This remains the BMA's objective.

The BMA has a firm and considered view as to whether the Modified MTAS arrangements should continue

22. The original MTAS arrangements, as introduced in January 2007 were fundamentally flawed, specifically in relation to the design of the application form, and the short-listing process, including in particular the scoring system. The defects of the original arrangements are summarised in Dr Hilborne's statement at paragraphs 44-52 and in Dr Fielden's statement at paragraph 14.

23. However, these proceedings are not a challenge to the original MTAS arrangements. They are a challenge to the revised arrangements that have been put in place to try to improve the process in time for appointments to be taken up on 1st August 2007.

24. There are three key points that must be borne in mind in relation to the options facing the Review Panel from when it first met in early March 2007 up to its announcements on 23rd March and 4th April 2007.

25. First, it is important to note that the most serious problems concerned the short-listing process, not the interviews that followed on from the shortlisting. The

main effect of the defects was that some strong candidates were not offered any interviews. Whilst some unsuitable candidates were short-listed, many of those who were short-listed deserved to be. Accordingly, the main problem that needed to be addressed was to deal with those who had unfairly been deprived of the chance to be interviewed. The process had not been uniformly defective across the country or across specialties (Hilborne, paras 50-52).

26. Second, whilst the interview process was by no means perfect (just as the previous localised process for SHO and SpR appointments had not been perfect) it worked tolerably well. On the whole, good candidates were interviewed and were found to be appointable.

27. Third, there was very little time left to complete the selection process (Hilborne, paras 101-104). There was no alternative but to conduct the selection process for specialist trainees in time for them to take up their posts on 1st August 2007. This meant that the Review Group did not have the luxury of deciding upon solutions that would take a long time to implement. Moreover, the Review Group had to take account of the burden that any revised arrangements would impose upon consultants and upon candidates. Consultants would have to juggle their clinical and other duties with their interviewing and selection functions (within a very short time-frame) and candidates would have to take time off work to travel to interviews (see, eg, Fielden, paras 22-26).

28. The Review Group considered a range of options.

29. It decided, in the BMA's view correctly, that it was neither feasible nor desirable to abandon MTAS altogether and to revert to the local selection process for SHOs and SpRs that had previously existed. It was not feasible to make the arrangements in time for August, and it was not desirable, because the old system had encountered difficulties with consistency and with a "lottery" effect caused by offers being made to candidates at times which meant that they had to choose whether to accept the offer before knowing if they had been successful in other applications. In any event, if MTAS was abandoned so close to August 2007, the

result would not be a reversion to the old SHO and SpR selection process, but, in the time available, appointments would in all likelihood be made by Trusts themselves, and there could be no guarantee that the appointments processes would be fair or efficient, or that doctors would receive suitable specialist training in these Trust-grade posts (Hilborne, 102).

30. The Review Group decided to offer a guaranteed interview to all candidates, whether or not they had previously been offered any interviews. This, it is submitted, was the fairest way of addressing the problems with the shortlisting process, because it meant that a strong candidate would have at least one chance to shine at interview.
31. The BMA would have preferred for it to be possible to offer a guaranteed interview to all candidates for each of their four preferences. This has been done in Scotland, Wales and Northern Ireland, where it was possible because the number of training posts was very much smaller than in England. However, for the reasons set out in Dr Hilborne and Dr Fielden's statement, it was not feasible in England to conduct so many interviews within a month or two (they needed to be completed by about 1st June), without causing intolerable strain on consultants and, indeed, upon candidates and their employers, and upon the delivery of patient care (see, eg, Fielden, paras 22-26).
32. A further issue that the Review Group had to decide was how to treat the interviews that had already taken place before Modified MTAS came into being. At this stage, no candidate (except for some of those applying for GP training posts) who has been interviewed knows whether the interview has been successful. The BMA's firm view was that it would be unfair to those doctors who had obtained interviews and been interviewed (about 2/3 of the total number of candidates) if the results of those interviews were disregarded. The inclusion of the outcomes of these interviews would not result in unsuitable doctors being appointed to posts, as consultants have been able to differentiate at interviews as to whether a candidate was appointable or not. Therefore, the inclusion of these

- interviews would only work to the benefit of those who were genuinely and legitimately appointable. The interests of those strong candidates who had, unfairly, failed to be short-listed, would be protected by granting them a guaranteed interview.
33. The BMA has throughout acknowledged that this is not a perfect solution to the problem, but it is the best that is available in all of the circumstances.
34. The BMA felt so strongly about this issue that Dr Hilborne and Dr Fielden withdrew for a time from the Review Group when it looked as if the Group had decided that the earlier interviews would be disregarded.
35. It is submitted that it was reasonable for the Review Group to decide not to treat the appointments as temporary only. This would have led to harsh consequences for those who are successful in this round, as their working and personal lives would have been disrupted shortly after their appointment. Also, the practical reality is that those who were appointed to a temporary post would be at an advantage when competing with those who did not receive any offers.
36. For the above (summary) reasons it is the BMA's firm view that the Modified MTAS system should be permitted to continue as the least bad option in all the circumstances.

The BMA has been criticised in RemedyUK's Grounds and evidence

37. Since the BMA has been criticised in ways which, it is submitted, are unfair and mistaken, the BMA considers it appropriate to respond to the criticisms. The response is set out in detail in paragraphs 117-124 of Dr Hilborne's statement.
38. The criticism takes two forms.
39. First, the BMA has been criticised in respect of the way in which it has represented the interests of junior doctors. For the reasons given by Dr Hilborne, this criticism is wholly misconceived. The JDC of the BMA is a genuinely

representative body for junior doctors. The great majority of junior doctors are BMA members. Non-BMA members can participate in regional JDCs and in the annual junior doctors' conference.

40. The JDC and its officers, particularly Dr Hilborne, have worked very hard on behalf of junior doctors in relation to the problems that have arisen with MTAS. The BMA lobbied hard to obtain a place for Dr Hilborne on the Review Group and she fought the corner of junior doctors, to the extent of walking out of the Review Group for a short time.

41. It is respectfully submitted that the criticisms made by RemedyUK of the BMA's representatives are vague and generalised.

42. The second criticism, which appears only in one statement (that of Dr John Firth, at page 636) is that the BMA, along with other bodies, has been "hopelessly compromised". This appears to be a criticism of the BMA for taking part in the Review Group. As such is it unfair. As Dr Hilborne and Dr Fielden explain, they and the BMA took the view that it was the responsibility of the recognised trade union for doctors in the UK (including applicants and consultants) to work together with the Defendant (and, indeed, with RemedyUK) to seek to find a solution to the problems that had arisen, rather than simply to stand outside and to criticise.

THE CLAIMS SOUGHT AND THE REMEDY SOUGHT

43. It need hardly be said that it is not the function of the Court on an application for judicial review to resolve difficult issues of operational policy affecting the medical profession. The Court should only intervene if the decision of the Review Group, as implemented by the Defendant, is unlawful, for example because it is irrational or an abuse of process.

44. RemedyUK relies upon four legal arguments. As stated above, the BMA will leave it to the Defendant to make detailed submissions in response. However, the following brief submissions will be made.

Legitimate expectation

45. It is respectfully submitted that, as RemedyUK itself contends that the original MTAS arrangements were unlawful, it cannot be the case that RemedyUK and its supporters have a legitimate expectation that the Defendant would give effect to the original, unlawful, arrangements.

46. In any event, the original arrangement was for candidates each to express four preferences, but there was no guarantee that they would be offered any interviews. The Modified MTAS provides for a guaranteed interview which, arguably, is preferable to the uncertain chance of up to four offers of interviews.

47. Still further, RemedyUK is not seeking, as would normally be the case with a claim based upon substantive legitimate expectation, to revert to the former status quo. Rather, RemedyUK is seeking to rely upon substantive legitimate expectation to achieve an outcome which is neither the original MTAS nor the modified MTAS.

Inadequate consultation

48. RemedyUK's main point in relation to consultation appears to be that consultation was inadequate because the Defendant only consulted with the BMA, the Royal Colleges and the other bodies represented on the Review Group when deciding upon the Modified MTAS. The participants in the Review Group are set out at pp 476-7, save that Dr Hilborne is not mentioned.

49. RemedyUK's Grounds contend that the Defendant should have consulted with Affected Doctors (ie all 32,000 applicants under MTAS), and should have consulted more with RemedyUK: see Grounds pp 40-42.
50. It would have been wholly impractical to consult with all Affected Doctors in the time available. Time was of the essence.
51. The BMA is the only recognised representative body for junior doctors and it was entirely appropriate for the consultation to be by way of consultation with the BMA. Dr Hilborne's statement explains the way in which the BMA is organised so as to be genuinely representative of junior doctors (whether BMA members or not).
52. RemedyUK is an unincorporated association with no clear membership structure. It was only founded in November 2006. In any event, the BMA involved RemedyUK, by inviting RemedyUK to attend and make a presentation to JDC on 10th March 2007, and arranging for a meeting on 15th March 2007 at the BMA's Headquarters, at which representatives of RemedyUK and the Defendant were present. This is mentioned at paragraphs 14 and 15 of Dr Shaw's statement (p58).

Defective allocation

53. This is, in substance, an irrationality challenge to the decision not to disregard the interviews that had already taken place (see Grounds, para 77, p45).
54. The BMA submits that the decision to allow the interviews to stand is not irrational. For the reasons given above, and expanded upon in Dr Hilborne's statement, this was the "least bad" alternative in very difficult circumstances. It would have been unfair to very many doctors who had deserved to be short-listed

and then had shone in their interviews if they had been deprived of the benefits of those interviews.

Defective interviews

55. This, again, is an irrationality challenge, based upon the contention that the interviews have varied in their rigour throughout the MTAS system (Grounds para 88, p48).

56. The information obtained by the BMA has suggested that, though there have been real problems with the short-listing process, the same does not apply in relation to the interviews. Though not every interview will have been perfect, the great bulk of interviews appear to have been conducted fairly and to have provided a valid test of the promise and ability of the interviewees. There is relatively little criticism of the interviews themselves in the statements filed on behalf of Remedy UK, and such evidence as exists is anecdotal and is not proof of wide-spread problems.

57. For the reasons summarised above and set out in more detail in the BMA's statements, it was not irrational for the Review Group to decide not to disregard the interviews that had already taken place. Indeed, it would have been unfair if the Group had done so.

The relief sought

58. The relief sought is set out at paragraph 89 of the Grounds, page 48. RemedyUK does not make clear what its preferred alternative outcome is. It is respectfully submitted that the fairest arrangement, in all of the circumstances, is that which has been proposed by the Review Group, and, moreover, that any of the forms of relief asked for would be unfair and have a harmful effect upon third parties,

particularly those good candidates who have already been interviewed, and would, more generally, also be potentially damaging to doctors and to patients.

COSTS

59. The BMA wishes to make clear that whatever the outcome of this application for judicial review, it will not attempt to seek costs from Remedy UK.

CONCLUSION

60. For the above reasons, the Court is respectfully invited to dismiss this application for judicial review.

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