Neutral Citation Number: [2021] EWHC 3048 (Admin)

Case No: CO/5162/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Judgment Date: 12 November 2021

HHJ KAREN WALDEN-SMITH sitting as a Deputy Judge of the High Court

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Between :

THE QUEEN on the application of ALL ABOUT RIGHTS LAW PRACTICE	**Claimant**
- and -	
LORD CHANCELLOR	**Defendant**

- -
- -

R E Nadarajah (Director of the Claimant) for the **Claimant**
Sarah Love (instructed by the Government Legal Department) for the **Defendant**

Hearing dates: 10 November 2021

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Approved Judgment

HHJ KAREN WALDEN-SMITH:

1. At the hearing on 10 November 2021, I determined the Defendant's application for summary judgment against the Claimant's claim for judicial review of the decision of the Legal Aid Agency dated 13 September 2018. These are the written reasons for that determination.

2. I had the benefit of written and oral submissions from Mr Nadarajah on behalf of the Claimant, together with his witness statements, and written and oral submissions from Miss Love on behalf of the Defendant, together with evidence in the form of witness statements from Miss Mychajyslshyn and Mr Flewers. I am grateful to both advocates for their representations.

The Claim

3. The Claimant, All About Rights Law Practice is, or was, a sole-practitioner law-firm specialising in mental health law. Until withdrawal from the legal aid contract on 28 February 2021, the Claimant held a legal aid contract with the Legal Aid Agency (LAA) to provide services in mental health law.

4. By a claim for judicial review dated 13 December 2018, and issued on 21 December 2018, Mr Ranjan Errol Nadarajah, as the sole-practitioner of the Claimant, brought a challenge to the decision of the LAA made on 13 September 2018 to uphold the rating of "Below Competence (4)" given to the Claimant law firm in an independent peer review dated 26 June 2018.

5. The challenge to the LAA decision was made on four grounds:

   (i) the peer review report (both the original report and the final report after submissions) did not take into account the results that the Claimant had obtained in previous contract reviews and audits;

   (ii) the role played by the peer review process in the LAA's system for monitoring standards of service amounted to unlawful abdication of power by the Lord Chancellor;

   (iii) the peer review was inadequately reasoned; and

   (iv) the peer review was vitiated by factual mistakes and errors.

6. Mr Nadarajah applied on 7 March 2019 for the name of the Claimant to be amended to the firm, All About Rights Law Practice. He also applied to amend the grounds and stay the second peer review. On 14 April 2019, Sir Ross Cranston sitting as a High Court Judge ordered the amendment of the Claimant's name, that the application for permission to judicially review the Lord Chancellor be resubmitted as soon as possible after the second peer review, and that the Claimant's application to stay the second peer review be refused. The reasons given by Sir Ross Cranston for his orders included that, while he did not consider the second peer review to be an alternative remedy, he did consider that the results of that second peer review would assist both the judge in considering permission, and the claimant in amending its grounds.

7. There was a second peer review in March 2019 which also resulted in a "Below Competence (4)" rating. That rating was communicated to the Claimant by letter dated 11 July 2019 and was upheld on 10 September 2019. The LAA gave notice to terminate the Claimant's legal aid contract on 10 December 2019. The Claimant applied to the Contract Review Body for a review of the decision to terminate the contract, which review resulted in the quashing of the determination decision and a remittal of the matter to the LAA for a second peer review in June 2021. The Claimant voluntarily withdrew from the legal aid contract for the provision of services on 28 February 2021, and the second peer review was consequently cancelled.

8. The Claimant resubmitted the application for permission to judicially review the Lord Chancellor and on 26 May 2021, Lang J ordered that the Claimant have permission to amend the statement of ground and granted permission for judicial review. Lang J found that the Claimant could not rely upon the documents relating to the second peer review as those post-dated the first peer review, but that the lawfulness of the first peer review had not become academic at that time as it was still being relied upon by the Lord Chancellor.

9. The hearing on 10 November 2021 was listed for the substantive judicial review claim. On 22 October 2021, the Defendant applied for summary judgment pursuant to the provisions of CPR 24.2 on the basis that the claim was wholly academic and that the Claimant had no real prospect of succeeding on his claim, and there was no other compelling reason as to why the claim should be disposed of at trial.

10. I was very mindful of the fact that the application for summary judgment had been made late and, as a consequence, had only been listed for hearing at the commencement of the substantive hearing for judicial review. I was also mindful of the fact that in May 2021 Lang J had expressly found that, at that time, the claim was not an academic one. I raised the issue as to whether the application for summary judgment should even be heard immediately prior to the substantive hearing, given the fact that the parties had both prepared for a substantive hearing and the court had set aside a day for the hearing. The saving of court time and costs was therefore not as significant as it would have been had the application been made earlier.

11. I invited brief submissions on behalf of both the Claimant and the Defendant on that issue and, in the course of making his oral submissions that the court should not consider the summary judgment application, Mr Nadarajah made a number of allegations of misconduct and bad faith on the part of the LAA. Those allegations were made without any apparent factual or logical basis and were rigorously opposed by the Defendant. I made it clear to Mr Nadarajah that he must desist from making serious allegations of misconduct and bad faith without evidence to support such allegations.

12. For the reasons given in the extempore judgment, I determined that it was appropriate to hear the application for summary judgment before any consideration of the substantive application. While the application for summary judgment had only been made a short time before date listed for the substantive hearing, some of the matters relied upon by the Defendant in support of its application had only come to the Defendant's attention shortly before the application and there was good reason for the late application. Further, it is an important principle that judicial reviews are not entertained if they serve no useful purpose. There must be a live issue between the

parties so that there is a need for a final remedy and, while the court has a discretion to determine an academic claim where there is a public interest in doing so (as is explained clearly by the Court of Appeal in *R (L, M, P) v Devon County Council* [2021] EWCA Civ 358), the normal principle is that the court does not decide hypothetical questions. The court is also obliged to have regard to whether the effect of entertaining an academic claim in any particular case may be to encourage or fail to deter academic claims in the future.

> "Even in a case where a claim only becomes academic shortly before it comes to court, by which time most if not all the legal costs may already have been incurred, this [entertaining an academic claim may encourage or fail to deter academic claims in the future] is a factor in my view to be weighed in the balance against the argument that the fact of costs having already been incurred in the instance case is a factor pointing in favour of the court proceeding to adjudicate on the claim." (per Stadlen J: *R (Raw) v London Borough of Lambeth* [2010] EWHC 507 (Admin).

13. In this case, the Defendant had provided a good explanation for the late application and was submitting that the claim was now academic with no other reason to hear the claim. While that was rigorously disputed by the Claimant if, after hearing full submissions on the application, it were determined that the claim was academic with no other good reason to hear the claim, then it was incumbent upon the court to bring the claim to an end in order to deter the continuation of such academic claims. In the all the circumstances of this matter, it was consequently appropriate to hear the application for summary judgment.

<u>The Factual and Legal Background</u>

14. As is set out above, the Claimant was a vehicle for the sole practice of Mr Nadarajah and, until voluntary withdrawal from the contract, the Claimant held a legal aid contract with the LAA.

15. The Defendant has overall responsibility for securing the provision of legal aid pursuant to the provisions of section 1(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), and by section 2(1) of LASPO the Defendant is empowered to make such arrangements as he considers appropriate for the purpose of carrying out his functions under Part 1 of LASPO.

16. Section 3 of LASPO provides that the Defendant *"may set and monitor standards in relation to services made available"* under Part 1 of LASPO and make arrangements for the accreditation of persons providing or wishing to provide such services, which includes arrangements for monitoring and withdrawing accreditation. Section 4 of LASPO contains the provisions for a Director of Legal Aid Casework, who makes decisions on legal aid on individual cases, section 5 contains provisions for delegation including subsection 5(1) which allows the Defendant's functions, including under section 3, *"to be delegated to a person authorised by the Lord Chancellor for that purpose."*

17. The functions under section 3 have been delegated to the LAA, which discharges its obligations by monitoring the standard of service provided by any service provider by: (i) annual reviews of all key aspects of compliance with the standard contract entered into by providers of publicly funded civil legal services pursuant to the standard terms of that contract; (ii) closed file reviews and regular management information reviews; (iii) a requirement for each service provider to have at lone one-full time (or full-time equivalent) supervisor; (iv) a requirement to hold a Lexcel or other specialist quality mark and to inform the LAA about performance after audit; and (iv) peer reviews.

18. The peer review is an integral part of the LAA's provider management, measuring the quality of advice and legal work as a provider, but each method for assessing quality of service is relevant.

19. With respect to the peer review process, 12 files are randomly selected from a file list by a randomisation tool and the files are marked by a peer reviewer against the criteria ranging from 1, for excellence, to 5, for failure in performance. Both "Below Competence (4)" and "Failure in Performance (5)" breach the standard civil contract. The provider has a right to make representations when such a finding is made and those representations are taken into account prior to the peer review report being finalised.

20. Upon a 4 or 5 rating being given, a second peer review is arranged to be carried out by a different peer reviewer on a new random sample of files. If the second peer review also results in either a 4 or 5 rating then it is normal, but not necessary, for the contract to be terminated. There is thereafter an appeal process to the LAA's Contract Review Body. The Claimant was successful in that review process so that the contract was reinstated, but voluntarily withdrew from the contract with the LAA prior to a second peer review taking place.

Application for Summary Judgment

21. The Defendant learnt on 7 October 2021, from an email sent by Mr Nadarajah to the Administrative Court Office and copied to the Defendant, that the Solicitors Regulation Authority ("the SRA") was closing the record for the Claimant on 5 October 2021. By an email dated 4 October 2021, the SRA informed Mr Nadarajah:

> "You have told us ALL ABOUT RIGHTS (AAR) LAW PRACTICE is closing. We will close our record for ALL ABOUT RIGHTS (AAR) LAW PRACTICE on 10/5/2021 12:00:00AM unless you tell us otherwise"

22. While the Defendant suggest that email might mean that the record for the Claimant was being closed on 10 May 2021, it seems much more logical that the date is 5 October 2021 and that the way in which it has been recorded is in the United States date format. That is consistent with it being an email sent on 4 October 2021 and the email expressing what is to happen: "we will close our record".

23. The emails sent to the Administrative Court Office also included an exchange of emails with the SRA in late September with Mr Nadarajah informing the SRA on 29 September 2021 that he wanted to leave his name on the roll if possible, but that he

wished to proceed to close his practice and not engage as a solicitor in practice. The SRA confirmed on 30 September 2021 that he could remain on the roll as a non-practising solicitor if he chose not to renew his practising certificate and engage as a solicitor in practice and, in a later email on the same day, the SRA confirmed that Mr Nadarajah remained on the roll. In the course of submissions before me, Mr Nadarajah contended that he had not in fact closed the firm but that it was "closing". It is unlikely that the firm was in the process of closing rather than being closed on 5 October 2021 given the very clear language of the SRA. There was no evidence provided by Mr Nadarajah which contradicted the position of the SRA, but even if the firm was closing rather than closed it is clear that the Claimant was no longer operating and providing legal services.

24. As a consequence of the Claimant no longer operating as a firm, together with the fact that the Claimant had not had a contract to provide legally aided services in the mental health category of law since 28 February 2021, the Defendant set out in a letter dated 8 October 2021 his view that the claim was now wholly academic. Mr Nadarajah did not respond to the letter from the Defendant.

25. In a skeleton argument dated 13 October 2021, Mr Nadarajah set out three grounds for contending that the claim was not academic: (i) there was wider significance to the claim because it related to services for a vulnerable group in society; (ii) that there were significant flaws in the conduct of the LAA and that he was entitled to compensation; (iii) that the outcome of the first peer review – if left unchallenged – would damage his reputation. I will deal with those matters in due course, but it was clear from the skeleton argument that Mr Nadarajah was not going to withdraw his claim for judicial review. In the circumstances, it was appropriate for the Defendant to make an application for summary judgment pursuant to the provisions of CPR 24.2.

<u>Academic Claim</u>

26. The Defendant had not succeeded before Lang J. in showing that the claim was wholly academic such that permission to bring the judicial review proceedings should not be granted. Her observation was that the Defendant continued to rely upon the findings of the first peer review, so that the issue as to its lawfulness could not be academic. This application for summary judgment does not go behind that finding and is based upon a changed factual situation and, as is set out in *L, M, P,* it is open to the court hearing the substantive judicial review claim to revisit the issue as to whether a claim is academic even when that issue has been considered at permission stage. On the facts of this matter, it is appropriate to revisit the issue.

27. Judicial review must serve a useful purpose. There must be a live issue between the parties that requires a final remedy and, while the Administrative Court reserves a discretion to determine an academic claim, the circumstances in which it will do so are rare.

28. In *L, M, P* the Court of Appeal determined that even if the claim was an academic one, it was one which ought to have been decided. It was, as the Judge at first instance recognised, a short point of statutory construction and one that was important to resolve as there was, at the very least, a high likelihood that the issue would arise again. In setting out the circumstances in which a claim is properly categorised as

academic and where a Judge should address issues even if they are academic. Peter Jackson LJ gave the following guidance:

> "A claim will be academic if the outcome does not directly affect the rights and obligations of the parties. The matter has been put in a number of similar ways in the authorities. In one private law case, *Sun Life Assurance Co of Canada v Jervis* [1944] AC 111, Viscount Simon LC referred to "an academic question, the answer to which cannot affect the respondent in any way", while in another *Ainsbury v Millington* [1987] 1 WLR 279, Lord Bridge described the case as one where "neither party can have any interest at all in the outcome of the appeal." In the public law case of *R v Board of Visitors of Dartmoor Prison, Ex Parte Smith* [1987] QB 106, the applicant was described by this court as "having no interest in the outcome", and similarly in *R v Secretary of State for the Home Department, Ex parte Abdi* [1996] 1 WLR 298, it was said that "the outcome of these appeals will not directly affect the applicants."

29. Peter Jackson LJ also referred to Lord Slynn in *R v Home Secretary ex p Salem* [1999] AC 450 where he referred to cases where *"there is no longer an issue to be decided which will directly affect the rights and obligations of the parties inter se."* In *R (Rusbridger) v Attorney General* [2003] UKHL 38, Lord Hutton referred to "hypothetical questions that do not impact on the parties", the issue being whether there is a live practical question to determine. Reference was made to Lord Justice Clerk Thomson's statement in *McNaughton v McNaughton's Trustees* [1953] SC 387:

> "Our courts have consistently acted on the view that is their function in the ordinary run of contentious litigation to decide only live, practical questions, and that they have no concern with hypothetical, premature or academic questions, nor do they exist to advise litigants as to the policy which they should adopt in the ordering of their affairs. The Courts are neither a debating club nor an advisory bureau. Just what is a live practical question is not always easy to decide and must, in the long run, turn on the circumstances of the particular case."

30. In *R (Brooks) v Islington London Borough Council* [2015] EWHC 2657 (Admin.) Lewis J. (as he then was) described the issue in that case as academic *"in the sense that there is no longer any live issue between parties…"*. In considering whether he should, nonetheless, decide the point of statutory construction, Lewis J. referred to Lord Slynn's decision in *ex p Salem* and while noting that decision dealt with situation in the appellate court, found that similar principles applied to hearings at first instance. Lewis J. identified four reasons in *Brooks* for determining the issue, although it was an academic one: (i) it was an issue of statutory construction; (ii) it was important to both housing authorities and homeless applicants; (iii) if not resolved in the present case it might not otherwise be resolved; (iv) the issue arose against the background of actual, not hypothetical, facts so that it was easier to test possible interpretations.

31. Applying the above guidance to the facts in this case, the first step is to consider if the claim is academic and not a "live practical question". If not an academic claim, then the application for summary judgment would necessarily fail and the substantive hearing for judicial review would proceed. Even if the claim is an academic one, it is necessary to consider whether it is a claim which falls within those type of cases identified by Lord Slynn in *ex p Salem* and Lewis J in *Brooks*, where the court ought to use its discretion to make a determination on an academic point.

32. This case is, in my judgment, the epitome of an academic case. The Claimant is no longer providing the legal services in the mental health field, having voluntarily withdrawn from the legal aid contract in February 2021. The Defendant no longer relies upon the decision (the first peer review) which is being challenged. Further, the evidence available is highly supportive of the Claimant having closed its business entirely. While Mr Nadarajah contends that the Claimant is closing rather than closed, it is clear that the Claimant is no longer active in operating pursuant to a legal aid contract and the challenge to the first peer review is academic, as it has neither practical consequence nor useful purpose. Whether the review is quashed or upheld, it has no impact and the Claimant is not affected by the decision that it seeks to challenge. If the decision were to be quashed it would have no benefit to him.

33. The reasons as to why the Claimant contends that the judicial review claim is not academic or, if academic, why it is a claim that should nonetheless be heard, do not withstand scrutiny.

34. The Claimant first asserts that as the claim concerns services provided to those with mental health issues, it raises important issues *"regarding the nature and scope of evaluation of the provision of legal services to a vulnerable group in society"* and that the challenge will have *"a practical impact on the provision of services and the monitoring thereof by a transparent and robust process."* It is tangential to the issues that the provision of legal services is to a vulnerable group. This is an issue between the Claimant and the Defendant and, in my judgment, the Claimant is raising the issue of the user group being vulnerable as a means to elevate the significance of the challenge. It has no bearing on the issues in this case. The Claimant further refers to there being an interest in preventing other practitioners from being exposed to the *"same defective process"*. There has been no evidence presented by the Claimant to support there being any other similar cases, and consequently no evidence that there is a large number of similar cases in existence, that might justify the resolution of this case even though it is itself academic. This is a fact specific matter which does not require determination now that there is no live practical question. There is an obvious public interest in:

> "the avoidance of wasting valuable court time and the incurring by one or more parties of unnecessary costs normally inherent in the entertaining of academic disputes whose resolution will neither affect the rights and obligations of the parties inter se nor constitute a binding precedent for the future." (per Stadlen J in *Raw).*

35. The Claimant fails to advance any explanation as to why the success or failure of his application for judicial review might affect persons with mental health issues who require the provision of legally-aided services. While it is, of course, correct that

persons with mental health issues are vulnerable and have an interest in the provision of high-quality legal services, there is a multi-layered system of quality and standards assurance applied to the provision of such services. The suggestion that this challenge to the Claimant's first peer review could impact those with mental health issues generally is highly remote.

36. The Claimant contends that there were significant flaws in the conduct of the LAA and that he was entitled to compensation. In doing so he relies upon various events which were subsequent to the first peer review: he alleges that the Defendant delayed in completing the second peer review, that the Defendant terminated the contract after that second peer review, and the Claimant's decision to withdraw from the provision of legal aid services. There was no delay to the second peer review which commenced in March 2019, with the reviewing of files starting in April 2019 (the order of Sir Ross Cranston was 19 April 2019) and the outcome of that second peer review was communicated to the Claimant on 11 July 2019; the second peer review did lead to the contract being terminated, but the contract was reinstated after a successful review; and the decision to withdraw was a matter for the Claimant. If entitled to compensation, the Claimant can seek compensation through the LAA's compensation procedure (as has been explained to him). Judicial review is not the appropriate method for seeking a compensatory award in this matter.

37. Fundamentally, the matters complained about by the Claimant and Mr Nadarajah, are subsequent to the first peer review and cannot bear on the lawfulness of that review. This has already been considered by Lang J who held, in granting permission to bring judicial review proceedings:

> "The Claimant has now filed documents relating to the second peer review and the subsequent review procedure, and wishes to rely upon them in support of his challenge to the first peer review. The Defendant objects to that course, and submits that the challenge to the first peer review cannot be supported by material which post-dates it. In my view, the Defendant is correct on this point."

Judicial review proceedings should not be "rolling" or allowed to "evolve" into a new challenge (see *R (Dolan) v SoS for Health and Social Care* [2020] EWCA Civ 1605). It appears that is what the Claimant is endeavouring to do here. It should not be permitted.

38. Finally, it is alleged that the outcome of the first peer review is damaging to both the Claimant and Mr Nadarajah's reputation. The answer to that concern was provided in correspondence and the statement of Mr Jonathan Flewers. No peer review ratings have been published externally and, if they were to be published, the information is anonymised. Even if there were any publication which could rise to reputational damage, judicial review is not the appropriate vehicle for such a complaint.

39. This claim for judicial review does not fall into that class of cases where there is a good reason in the public interest to hear an academic case. There is no discrete point of statutory construction; the claim does not raise a point of general interest to others; there is not a large number of cases raising similar issues in existence and it is not

anticipated that there will be; and it is not a matter which might otherwise not be resolved.

40. As Peter Jackson LJ set out in *L, M and P:*

> "The Administrative Court has at its disposal a range of doctrines, with discretionary elements, to control access to its scarce resources. They include the doctrine that judicial review will not generally be available where there is a suitable alternative remedy and its approach to timeliness. The discipline of not entertaining academic claims is part of this armoury. It enables the court to avoid hearings in cases in which, although the issue may be arguable, the court's intervention is not required, because the claimant has obtained by one means or another, all the practical relief which the court could give him…"

Conclusion

41. This claim is clearly now academic. It is not relied upon by the Defendant and the decision that is being challenged, the first peer review, is not one that has any impact upon the Claimant. Regardless of whether it would be upheld or quashed on a substantive review, the Claimant is no longer engaged in providing legal aid funded work in the mental health sphere. The evidence is highly supportive of the Claimant having closed its business completely and, even on the account of Mr Nadarajah, the business is in the process of being closed. As the claim is now academic, I have considered with care whether there is another reason for this claim to be heard in any event. This claim does not create any justification for it to be heard in any event. There is no wider public interest. The court has an important duty to manage its own cases and to avoid court time being wasted. That includes deterring the bringing or continuation of academic cases where there is no other public benefit in determining the issue.

42. Consequently, this is a case which should not proceed to a substantive hearing. The Defendant is entitled to summary judgment pursuant to the provisions of CPR 24.2. The Claimant has no real prospect of succeeding on its claim for judicial review and there is no other compelling reason as to why the matter should proceed to a full substantive hearing. Summary judgment against the Claimant is therefore granted.