Challenging procurement and funding decisions using Judicial Review

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First things first

- Standing
  - Sufficient interest, s. 31(3) Senior Courts Act 1981
- Limitation
  - CPR 54.5(1): Promptly and in any event not more than three months after grounds first arise
  - CPR 54.5(6): If relates to decision governed by PCR 2015, 30 days
- Funding
  - Legal Aid
  - Private rates/CFA
  - Cost Capping Orders
    - Criminal Justice and Courts Act 2015 ss. 88-89
    - CPR 46.17-46.19

Grounds of Challenge

- Public Law Grounds
  - Procedural fairness
  - Irrationality/duty of enquiry
  - Improper purpose
- Equality Act 2010
  - Public Sector Equality Duty s. 149
  - Discrimination/Indirect discrimination
- EU Treaty Principles
  - Non-discrimination and equal treatment
  - Proportionality
  - Transparency
- Public Services (Social Value) Act 2012
- Human Rights Act 1998

Starting a Claim

- Application for permission
- Form N461 and Detailed Statement of Facts and Grounds
- Form N463 and draft order
- Bundle of supporting documents
  - Relevant documents relating to procurement process e.g. consultation documents, IFA, ITT, draft contracts
  - Witness evidence

Interim and Final Relief

- Interim relief
  - Injunction
  - Disclosure
- Final relief
  - Quashing order
  - Mandatory order
  - Prohibiting order
  - Damages

The Law Centres Federation v. The Lord Chancellor [2018] EWHC 1588 (Admin)

Challenge to Lord Chancellor's decision to tender for contracts to deliver the Legal Aid funded Housing Possession Court Duty Scheme ("HPCDS") on the basis of larger scheme areas and price competitive tendering.

What is the HPCDS?

- Legal advice and representation at court on the day of possession proceedings. Not means/merits tested.

- Generally, single provider holds a contract to provide the service in a single court.

- Importance of legal aid and non-legal aid follow-up services.

What were the changes?

- Larger scheme areas
  - Geographical size:
    - E.g. Bedfordshire, Cambridgeshire, N. Hertfordshire and S. Hertfordshire.
  - High financial value:
    - E.g. Bromley and Croydon County Courts combined: scheme area valued at £235,712.00 in tender documents.
- Price competitive tendering
- Consultation exercise
- “Sustainability”

Why were the changes a problem?

- For Law Centres:
  - Logistical difficulties and reliance on agents
  - Greater financial risk
  - Competition
  - Impact of losing contracts
- For Law Centres' clients:
  - Further to travel to get follow-up advice
  - Risk to local provision: Law Centres may be unable to continue to provide services

Arguments

- Irrationality/*Tameside* duty of inquiry
  - Irrational to proceed when there was no evidence of "sustainability" problem or that larger contracts would be more "sustainable"
  - Failure to properly analyse impact of decisions on Law Centres and their clients
- Breach of Public Sector Equality Duty
- Relief

Outcome

- Judgment 22 June 2018:
  - *I am therefore driven to the conclusion that this decision* [that small schemes were not financially viable and larger schemes were] *was one that no reasonable decision-maker could reach on the state of the evidence that the LAA had gathered and in the absence of further inquiry."* [§ 91 & 93]

  - *"In my judgment if, as is the case, there is a real risk that in consequence of the restructuring of scheme areas, clients using the HPCD service will no longer have the same access to the "wrap around" services that are not covered by Legal Aid and which may make all the difference to whether they end up homeless and destitute, that is something that the Ministers should have been made aware of, and should have given due regard…However, in this case, I regret to say that the evidence falls a long way short of demonstrating that any Minister (in person) gave due regard to the equality impact of the proposed changes.."* [§ 104-105]

- Tender quashed. Current providers offered extension of contract from 01 October 2018 to 30 September 2019.