

R (Good Law Project) v Minister for the Cabinet Office [2022] EWCA Civ 21

04 February 2022

Standing at the precipice of the Covid-19 pandemic and nationwide lockdown, the Government identified the need for public consensus on Covid-19 specific issues, subsequently enlisting the services of Public First in February 2020 to undertake this work under a £550,000 six-month long contract. The contract was procured under Regulation 32(c) of the Public Contract Regulations 2015 ("PCR 2015"), which permits a departure from the usual rules on procurement *"insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for open or restricted procedures or competitive procedures with negotiation cannot be complied with"*. Concern arose when it came to light that the founders of Public First had previously worked for Michael Gove MP and were personal friends of Dominic Cummings.

High Court Appeal

In June 2021, the Good Law Project ("GLP") brought a Judicial Review before O'Farrell J to challenge the legality of the contract awarded to Public First on three grounds:

- There was no basis for making a direct award under Regulation 32(C) to Public First, as it was not 'strictly necessary' to do so;
- The award of six months was disproportionate and should have been restricted to the short-term needs of the Government pending a competitive process; and
- The contract gave rise to apparent bias contrary to principles of public law in that the fair minded and informed observer would conclude that there was a real possibility of bias.

O'Farrell J dismissed the first two of GLP's submissions, however upheld that the award of the contract could give rise to apparent bias. The ultimate decision held that the mere existence of the personal relationship between the Cabinet Office and Public First did not give rise to apparent bias, however the existence of it may be perceived to compromise impartiality and independence. As such, it is a duty of those involved to ensure there was a clear record of the objective criteria used to select Public First over other agencies which could be used to alleviate any suspicions of favourable treatment. You can read the High Court judgment [here](#).

Court of Appeal

The Minister for the Cabinet Office appealed this decision to the Court of Appeal, which was heard on 18 January 2022. The appeal was brought on three grounds:

- Challenging the High Court's conclusion that, although the relationship itself did not give rise to apparent bias, the failure to keep a clear record of the objective criteria used and the failure to undertake some form of comparative procurement did amount to apparent bias;
- The concept of apparent bias at common law was irrelevant in these circumstances because Regulation 24 PCR 2015 provides a complete code under the Regulations for this purpose; and
- If, as O'Farrell J found, this was a situation of extreme urgency under Regulation 32 which dispensed the need for an open procurement exercise, the rules relating to bias (either at common law or Regulation 24 PCR 2015) had no further application in this case.

The minister conceded to their second submission above that, at least for the purposes of this appeal, it does not matter whether apparent bias is considered at common law or under Regulation 24 PCR 2015.

GLP brought a cross appeal to challenge the High Court in its assessment of 'strict necessity'. Engaging Public First under the contract was not 'strictly necessary' for the purposes of Regulation 32(c). GLP submitted that: (i) there were alternative suppliers under contract with the Government that would have been suitable to use; (ii) the duration of the contract could not be justified; and (iii) the scope of the contract was too broad.

The Court of Appeal dismissed each of GLP's submissions above. They held that it would be incorrect to find that, in a situation of extreme urgency, the authority could only contract with existing suppliers irrespective of their judgement. In dismissing GLP's submission on the length of the contract, the Court of Appeal determined that this submission benefited from hindsight, and that at the time it would not have been possible to say a six month contract was more than strictly necessary. They also drew attention to the fact the Minister had initially proposed the contract be nine months in length, indicating that the duration had been actively considered. The Court of Appeal acknowledges GLP's question of scope- Public First did continue to carry out works in June and July of 2020 that was unrelated to Covid-19. The High Court initially found this complaint to be a question of contract performance rather than a procurement decision, and the Court of Appeal agreed.

The final matter to be considered is the finding of apparent bias on the part of the minister in the failure to take steps to allay suspicions of bias. In discussing the common law test for apparent bias, the Judge noted that *"the fair minded and informed observer is someone who reserves judgment until both sides of any argument are apparent, is not unduly sensitive or suspicious, and is not to be confused with the person raising the complaint. The observer considers the evidence carefully, having particular regard to the specific factual circumstances, taking a balanced approach"*.

Court of Appeal's analysis

The Court found tension between O'Farrell J's findings that the Minister was entitled to rely on Regulation 32(c), whilst also being required to consider other research agencies and keep a clear record of the objective criteria used. Regulation 32(c) allowed the Minister to proceed without competition, which effectively nullified the allegation of an obligation to carry out any form of obligation.

Left to consider was the relationship between Public First and the Cabinet, and whether this in and of itself gave rise to apparent bias. O'Farrell J had already determined that this did not, and the finding of apparent bias was supported only by the *"breach on the part of the Minister of an unspecified obligation to carry out a process that involved a formally documented consideration of other research agencies... which gave rise to apparent bias"*. The Court of Appeal found that, as the procedure used to procure Public First did not require consideration of other agencies, the question of identifying and evaluating the capacity of other tenderers did not arise at all. The Court was *"unable to accept that ... the impartial and informed observer would, in effect, require the creation of a common law "procurement regime-light" in the absence of which... there was a real possibility of bias"*.

The Court allowed the Cabinet Office's appeal and dismissed GLP's cross-appeal. You can read the full judgment [here](#).

Conclusion

This judgment also contained several comments on the High Court's handling of the case:

- The Court of Appeal queried the standing of GLP as a party with no commercial interest. Although this was not a point of consideration for the purposes of this appeal, the Court did note that this was *"an unprecedented outcome"* and will be a *"question ripe for review when it next arises"*.
- Whilst not a consideration for the appeal, the Court did raise doubts over the applicability of the common law principles of apparent bias, however proceeded on the assumption that this was correct as it was not an issue for consideration.
- Finally, the Court noted that there *"are real problems in the approach to the evidence"* in O'Farrell J's decision. Two parties gave witness statements on behalf of the Cabinet Office which were dismissed. The witness statements gave reasons as to the failure to consider other providers. Whilst the Court of Appeal acknowledges that decision-makers cannot refute allegations of bias simply by asserting that none existed when the decision was made, the fair-minded and informed observer would have needed to know why the decision to contract with Public First and not others was taken.

The Court of Appeal took a strict approach to the challenge with particular recognition of the challenges arising with the pandemic. GLP has already released a submission to appeal to the Supreme Court the challenge the Court of Appeal's overturning of the finding of apparent bias and the finding that the contract awarded was *"strictly necessary"*. You can read their submission [here](#).

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