Neutral Citation Number: [2023] EWCA Civ 238

Case No: CA-2022-002320

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE DIVISIONAL COURT
Mr Justice Mostyn
[2022] EWHC (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/03/2023

Before :

LORD JUSTICE ARNOLD
LORD JUSTICE DINGEMANS
and
LADY JUSTICE ELISABETH LAING

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Between :

THE KING (on the application of HEXPRESS HEALTHCARE LIMITED)	**Appellant**
- and -	
THE CARE QUALITY COMMISSION	**Respondent**

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- -

Philip Havers KC and Lucy McCann (instructed by **Keystone Law**) for the **Appellant**
Daniel Stilitz KC and Stephanie David (instructed by **Litigation, Prosecutions and Inquests Team, Care Quality Commission**) for the **Respondent**

Hearing date : 16 February 2023

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Approved Judgment

This judgment was handed down remotely at 12 o'clock on 6 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives (see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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Lord Justice Dingemans :

Introduction

1. This is an appeal against the order of Mostyn J dated 25 November 2022. Mostyn J had granted permission to the appellant Hexpress Healthcare Limited ("Hexpress") to apply for judicial review of the decision by the Care Quality Commission ("CQC") to publish a report dated 20 October 2022 ("the report") on one ground which was related to the size of a sample of patient records reviewed by the CQC. Mostyn J had refused Hexpress permission to rely on other grounds of challenge. In this appeal Hexpress submit that there were two other grounds of challenge which were arguable so that permission to apply for judicial review should be granted on those grounds as well. There will be a substantive hearing of the application for judicial review at first instance on 28 March 2023 on the ground for which permission to apply was granted by Mostyn J.

2. The first of the two grounds which are the subject of this appeal relates to the process of independent review of the draft report and involves consideration of a declaration made in *R(SSP Health Ltd) v Care Quality Commission* [2016] EWHC 2086 (Admin); [2016] Med LR 575 ("*SSP Health"*). *SSP Health* has now been the subject of conflicting decisions at first instance. The second of the two grounds relates to the fact that the CQC set out in the report improvements made by Hexpress after the CQC had inspected and sent Hexpress the draft report, but did not take account of those later improvements when rating Hexpress against defined criteria.

3. Both Mr Havers KC on behalf of Hexpress and Mr Stilitz KC on behalf of the CQC asked this Court, if the Court concluded that the grounds were arguable, to retain and determine on a substantive basis the application for judicial review on those grounds, rather than just remit them to be determined on 28 March 2023. This was on the basis that we had heard full argument on the two grounds and because, at least in relation to the first ground, there were conflicting decisions at first instance, which meant that if that ground was remitted to be determined at first instance, it was very likely that there would need to be a further appeal.

4. For the detailed reasons set out below I have concluded that neither of the grounds is arguable and therefore refuse permission to apply for judicial review on these two grounds. As this judgment addresses the conflict between decisions at first instance, permission is granted to cite it in accordance with the terms of the Practice Direction (Citation of Authorities) [2000] 1 WLR 1001.

5. Mostyn J below also refused to grant Hexpress an interim injunction to restrain publication of the report pending the hearing of the substantive application for judicial review. Hexpress sought permission to appeal against that refusal, but when granting permission to appeal in respect of the two grounds, Snowden LJ refused permission to appeal that part of the decision. The report from the CQC was published on 19 January 2023.

Factual background

6. Hexpress provides an online medical service. Patients complete an online set of medical questions. The form is reviewed by a doctor who decides whether to

prescribe medication. If medication is prescribed, the medication is dispensed either by Hexpress' pharmacy and sent by post, or obtained by the patient from a pharmacy chosen by the patient.

7. The CQC has a statutory responsibility, pursuant to the Health and Social Care Act 2008 ("the 2008 Act") for registering and reviewing the providers of health and social care services in England. Those who are registered are referred to as "service providers". The 2008 Act provides powers to the Secretary of State for Health and Social Care ("the Secretary of State") to make regulations. The Secretary of State has made the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 ("the Regulations").

8. The CQC carried out two inspections of Hexpress. Hexpress was rated "good" overall in May 2019. There were, however, four serious incidents involving patients who had bought medicines from Hexpress which were reported to the CQC. Hexpress decided to stop prescribing one medicine, but the CQC was concerned about whether Hexpress' response was sufficient.

9. The CQC carried out a third inspection of Hexpress on 17 May 2022 and the inspection was led by Ms Gwindi on behalf of the CQC. Nine patient records were selected to review. Three of those were unreviewable for technical reasons. Six records were then reviewed, and concerns were raised in relation to five of them.

10. By letter dated 29 June 2022 the CQC sent Hexpress a draft inspection report. This was some 15 pages long. The draft report contained ratings varying from "inadequate", to "requires improvement" up to "good", leading to an overall rating of "requires improvement". In answer to the question "are services safe?" the rating given was "inadequate". Specific matters relied on to justify that rating were set out in the report. Hexpress were also given notice of the CQC's "Factual accuracy check" ("FAC") process.

11. The first ground of appeal which is said on this appeal to be an arguable ground on which to apply for judicial review relates to the FAC process. Under the FAC process, the service provider may, within 10 working days of receipt of the draft report, respond online and tell the CQC where information is factually incorrect and where evidence may be incomplete. The notes about the FAC process state that "the draft report includes evidence collected on the day of inspection. You can also send us information about what action you have taken since the inspection that addresses the concerns we raised with you, or which is included in the draft report. The inspector will consider any further information obtained and determine whether the report should be amended. *Unless there are exceptional circumstances, this new information will not form part of CQC's decision around final judgements or ratings (where appropriate).*" (italics added). The italicised part of this passage forms the basis of what is said to be the second arguable ground on which to apply for judicial review.

12. On 5 July 2022 the CQC issued Hexpress with a warning notice under section 29 of the 2008 Act for an alleged breach of regulation 12. Representations were made on behalf of Hexpress and by letter dated 30 August 2022 the CQC stated that the threshold for the assessed level of risk might not have been reached for serving a warning notice and the warning notice was withdrawn.

13. In the interim, on 14 July 2022 Hexpress sent their FAC comments. These comments ran to 93 pages and 39 appendices. The CQC complained in their Skeleton Argument that this went beyond points of factual accuracy and sought to contest judgments and findings in the draft report on numerous grounds. Ms Gwindi, as the lead inspector of Hexpress, considered the FAC comments submitted by Hexpress and sent amendments made in the light of the comments to another inspection manager at the CQC who was independent of the inspection of Hexpress. That independent inspector reviewed and returned the FAC comments and amended draft with comments to Ms Gwindi on 25 August 2022. Ms Gwindi made further amendments and sent them to the independent inspection manager for a further review on 8 September 2022. The independent inspection manager considered those further amendments and approved them on 16 September 2022. The report was finalised by Ms Gwindi and on 20 October 2022. The CQC sent Hexpress what was said to be the final draft of the report, together with its responses to Hexpress' FAC comments.

14. It was apparent that, even following the FAC process, there remained disputes between the CQC and Hexpress about the wording of the report, details of which were set out in the witness statement of Dr Sarah Donald, clinical lead for Hexpress. Some disputes were in relation to factual matters, for example whether the CQC had asked Hexpress to provide risk registers. Some disputes were about what was the CQC's real complaint. For example, in relation to the prescription of Zyban it was said that the concern related to the failure to warn the patient about the side effects, relying only on the patient information leaflet provided with the medication, rather than the concern about the contents of the patient information leaflet.

The proceedings below

15. On 24 October 2022 Hexpress issued a judicial review claim form and sought an interim injunction to restrain publication of the report. There were originally five grounds of challenge. Limited interim orders were made restraining publication pending an oral hearing. On 15 November 2022 the hearing of the application for permission to apply for judicial review and of the interim injunction took place before Mostyn J.

16. By a written judgment and order dated 25 November 2022 Mostyn J dismissed the application for an interim injunction and granted permission to apply for judicial review on one ground of challenge. This was ground two of the five grounds and was that "the CQC acted disproportionately, and thereby breached s.4(1)(e) of the 2008 Act, by using only six medical records as its sample."

17. The two grounds of challenge which are the subject of this proposed appeal are (as renumbered): (1) "the CQC failed to independently review the FAC response, which was procedurally unfair"; and (2) "the final report contains errors of fact or else gives undue weight to irrelevant factors". In relation to the second ground it is said "specifically the CQC should have taken into consideration additional evidence provided and remedial steps taken by Hexpress since the inspection".

18. Mostyn J addressed the first of the two grounds of challenge in paragraphs 22 to 33 and 67 of his judgment. Mostyn J said that he was not satisfied that the procedure adopted by the CQC was unfair, or in conflict with the judgment given by Andrews J, as she then was, in *SSP Health*. Mostyn J considered *R(Babylon Healthcare Ltd) v*

Care Quality Commission [2017] EWHC 3436 (Admin) ("*Babylon Healthcare")* but said he was unsure of Holgate J's analysis and considered that the process which Holgate J understood Andrews J to have proposed, was "elaborate, and time-consuming" and a "work of supererogation". Mostyn J stated that the process adopted by the CQC following the judgment in *SSP Health* of: sending the draft report to the provider; receiving the service provider's FAC comments; having those FAC comments reviewed by the CQC inspection team; having an independent reviewer consider the FAC comments, and the CQC response to the FAC comments before making a recommendation; before the CQC inspection team produced the final report; was sufficient and consistent with the approach set out in *SSP Health,* albeit not with the interpretation of *SSP Health* adopted in *Babylon Healthcare*.

19. Mostyn J addressed the second of the two grounds of challenge in paragraphs 72 and 73 of his judgment. He found that to the extent that it was said that ill-founded and erroneous conclusions were drawn from a statistically insignificant sample, the complaint was covered by the ground of challenge for which permission had been given. Mostyn J found that otherwise factual errors were dealt with by the FAC process and absent error of law or abuse of power, for which there was no evidence, the factual errors were essentially immune from further challenge.

Publication of the report

20. The report was published on 19 January 2023. Hexpress was sent a copy of the report by letter dated 18 January 2023. Mr Havers drew attention to the fact that, even after the FAC process, and the independent review of the proposed response to the FAC comments, there were still matters which were corrected from the draft sent on 20 October 2022 to the final report as published. This included changes to the wording to make it clearer that the complaints which led to the CQC inspection had not come from the patients directly to the CQC. That said, the ratings were not altered in the published report from the first draft of the report sent on 29 June 2022, and the altered wording did not seem to make a material difference to what a reader of the report would consider about Hexpress' service.

Relevant statutory provisions

21. Section 3(1) of the 2008 Act provides that: "The main objective of the Commission in performing its functions is to protect and promote the health, safety and welfare of people who use health and social care services."

22. Section 4 of the 2008 Act sets out matters to which the Commission must have regard when performing its functions. This includes at (g) "best practice among persons performing functions comparable to those of the Commission (including principles under which regulatory action should be transparent, accountable and consistent)".

23. Section 10(1) of the 2008 Act provides that any person who carries on a regulated activity without being registered commits an offence. Under section 12 of the 2008 Act, the CQC had to grant a service provider's application for registration with respect to a regulated activity, provided all relevant requirements had been satisfied.

24. Section 17 of the 2008 Act provides that the CQC might cancel a service provider's registration on various specified grounds, including on the ground that the regulated activity is being carried on otherwise than in accordance with relevant requirements.

25. Section 20(1) of the 2008 Act provides that the Secretary of State must make regulations imposing requirements that the Secretary of State considers necessary to secure that services provided in the carrying on of regulated activities cause no avoidable harm to the persons to whom the services were provided.

26. Section 26 provides that if the CQC propose to grant an application for registration as a service provider on conditions which are not agreed, or take other defined actions, the CQC has to give the applicant notice in writing of that proposal. Section 27 provides the recipient of such a notice the right to make written representations within 28 days covering any matter which that person wishes to dispute. Thereafter section 28 provides that the CQC has to give notice of the decision.

27. Section 30 provides that the CQC might apply to a Justice of the Peace for an order cancelling a registered person's registration with immediate effect if there was or would be a serious risk to a person's life, health or well-being.

28. Under section 31 the CQC might vary, remove or impose conditions on a registered person's registration or suspend a registered person's registration with immediate effect if it has reasonable cause to believe that unless it does so any person will be exposed to the risk of harm. There is a right of appeal, provided for by section 32 of the 2008 Act, to the First-tier Tribunal against any decision by the CQC under sections 8 to 31 of the 2008 Act, except a decision to issue a warning notice.

29. The CQC must, pursuant to section 46 of the 2008 Act, conduct reviews of regulated activities by service providers, assess their performance, and publish the reports of their assessments.

30. Pursuant to section 60 of the 2008 Act, the CQC may, for the purposes of its regulatory functions, carry out inspections of the carrying on of a regulated activity, and section 61 of the 2008 Act sets out the procedural requirements in relation to inspections carried out under section 60.

31. So far as is relevant section 61 provides:

> "(2) Where an inspection is carried out under section 60 …, the Commission must –
>
> prepare a report of the matters inspected, and without delay send a copy of the report to – (i) the person who carries on the regulated activity in question, and (ii) if a person is registered under that Chapter as a manager in respect of the activity, that person.
>
> (3) The Commission must publish a report prepared under subsection (2)."

32. The 2014 Regulations prescribe various regulated activities and lay down standards in relation to those activities.

Some relevant authorities on procedural fairness

33. Procedural fairness is analysed as a feature of natural justice, see *Hoffman-La Roche v Secretary of State for Trade and Industry* [1975] AC 295 ("*Hoffman-La Roche"*) at page 340C. What fairness in general, and procedural fairness in particular, requires will depend on the circumstances of the particular case. In *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531 at 560 Lord Mustill said that "the standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type … What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects." Lord Reed made a similar point in *R(Osborn) v Parole Board* [2013] UKSC 61; [2014] AC 1115 at paragraph 80 when he said "what fairness requires … depends on the circumstances. As these can vary greatly from one case to another, it is impossible to lay down rules of universal application", before giving some general guidance in relation to proceedings before the Parole Board.

34. What procedural fairness requires for a person who might be the subject of public criticism in a report has been considered over the years, particularly in relation to inquiries and reports. The Royal Commission on Tribunals of Inquiry 1966, chaired by Lord Justice Salmon, was appointed to review the workings of the Tribunals of Inquiry (Evidence) Act 1921. The Royal Commission identified a cardinal principle that a witness to a public inquiry should be informed of any allegations to be made against him and any evidence in support of the allegations. The Commission identified six cardinal principles in all, but some of these were later subjected to criticism on the basis that they were too rooted in adversarial, and not inquisitorial, proceedings. The cardinal principle relating to giving notice of allegations and evidence against a person led to the development of a practice of sending a letter setting out relevant information. These letters became known as "Salmon letters".

35. There then followed cases involving the late Robert Maxwell. These were *In re Pergamon Press* [1971] Ch 388 ("*Pergamon Press"*) and *Maxwell v Department of Trade and Industry* [1974] QB 523 ("*Maxwell v DTI"*). *Pergamon Press* was decided following a refusal by Robert Maxwell and fellow directors to answer questions from the inspectors because they wanted various assurances about their opportunity to make representations, including on relevant passages about them in any draft report, which assurances had not been provided by the inspectors. Lord Denning MR stated that because the report of the inspectors might ruin careers, and lead to criminal or civil proceedings, there was a duty to act fairly (page 399H). Lord Denning MR also said that before the inspectors condemned or criticised a man "they must give him a fair opportunity for correcting or contradicting what is said against him … An outline of the charge will usually suffice". Lord Denning MR rejected submissions that the directors should be entitled to see transcripts of what other witnesses had said or see a draft proposed passage of their report before it was included, see page 400G.

36. The decision in *Maxwell v DTI*, which was an appeal after the trial of the action, was to the same effect. Lawton LJ specifically rejected the proposition that the inspectors had to give the directors an opportunity of "correcting or contradicting the opinion which they were minded to report to the department as to which evidence they thought credible and what inferences they should draw from such evidence".

37. In *Hoffman-La Roche* the main issue on the appeal related to whether a cross undertaking in damages should be required from the Crown on an application for an interim injunction to enforce statutory instruments made following a report of the Monopolies Commission. It was contended that the procedure adopted by the Commission had been unfair. Lord Diplock recorded, at page 368D, that it was the duty of the commissioners in that case "to observe the rules of natural justice in the course of the investigation – which means no more than that they must act fairly by giving to the person whose activities are being investigated a reasonable opportunity to put forward facts and arguments in justification of the conduct of these activities before they reach a conclusion which may affect him adversely".

38. Although the Court of Appeal in both *Pergamon Press* and *Maxwell v DTI* expressed the view that fairness did not require the opportunity for comment on a draft report, the practice of permitting persons who were the subject of criticism to see provisional adverse findings and criticisms, so that they might comment on them, began to develop in some inquiries, and was called "Maxwellisation". The practice adopted varied from inquiry to inquiry. In *Clegg v The Secretary of State for Trade and Industry and others* [2001] EWHC Admin 394 there was reference at paragraph 51 to the process of Maxwellisation then adopted by the DTI. Stanley Burnton J rejected the submission that a person should be provided with details of amended criticisms, if the criticisms had been amended after details of the proposed criticisms had been given to a person, and representations from that person had led to amendments of the criticisms. He said that "if time and resources are devoted to Maxwellisation beyond what is necessary, company enquiries may become so unwieldy, prolonged and expensive that they lose their utility …".

39. The need for investigations and inquiries to be conducted efficiently, as well as fairly, was brought into focus by the delays in the Saville Inquiry which was established in February 1998 and reported in June 2010. The Saville Inquiry had been established under the Tribunals and Inquiries (Evidence) Act 1921, whose procedures were considered to have become overly adversarial. The Inquiries Act 2005 was intended to update the 1921 Act and adopt procedures used in some ad hoc inquiries. The Inquiries Act 2005 was supplemented by the Inquiry Rules 2006. As was discussed in the course of the hearing the issue of warning letters was addressed by rule 13 of the Inquiry Rules 2006. That provided that: "(3) The inquiry panel must not include any explicit or significant criticism of a person in the report, or in any interim report, unless— (a) the chairman has sent that person a warning letter; and (b) the person has been given a reasonable opportunity to respond to the warning letter". It might be noted that the form of the warning letter was not prescribed, and Rule 13 did not impose any requirement to give an opportunity to comment on the text actually adopted after consideration of any representations made in response to the warning letter.

40. The fact that the requirements of procedural fairness are variable and case specific also appears from *R(Shoesmith) v Ofsted* [2011] EWCA Civ 642; [2011] ICR 1195 ("*Shoesmith"*) at paragraph 34. In *Shoesmith* the Court of Appeal considered a joint area review carried out by Ofsted within a limited timeframe following the death of Baby P and held that providing the gist of Ofsted's concerns to the director of children's services had been sufficient to discharge duties of fairness.

41. This brings me to the cases in the Administrative Court which have previously considered reports on service providers produced by the CQC. In *SSP Health* Andrews J identified the issue in that case as being one where "the report proposed to make adverse fact findings that could be demonstrated by objective evidence to be incorrect, misleading or unfair but the regulator refuses to change the draft". The service provider in that case had submitted that the common law duty of fairness required the regulator to reconsider its position by means of a review not provided for by the statutory scheme or the CQC handbook. In that case the CQC had sent a draft report to the service provider. The service provider had responded on the FAC comments template. The CQC had not made some of the changes requested in the FAC comments. This was despite the fact that Andrews J found that factual comments made by the CQC were not accurate. For example, in the draft report the CQC had stated that the service provider did not have a register of patients over 75 years old to help plan care and treatment on the basis that the practice manager had not mentioned the register when interviewed for the purposes of the inspection. The service provider complained that they did have such a register. As was pointed out, the fact that the practice manager had not been aware of the register, did not mean that it did not exist (although the practice manager's lack of knowledge of the register might be thought to raise other concerns).

42. Andrews J addressed what happened if the CQC wrongly refused to change its findings in paragraphs 57 to 60 of the judgment. Andrews J recorded that it was fair that the lead inspector had responsibility for considering whether to make adjustments to the report in the light of comments made in the FAC log but stated that it was not in the interests of either the CQC or the service provider to have the court attempt to resolve disputed factual issues in judicial review proceedings. Andrews J considered that an independent person within the CQC applying common sense and professional expertise "ought to be able to tell fairly swiftly whether there is or is not a legitimate grievance about the lead inspector's failure to correct the report". In paragraph 60 Andrews J concluded that "procedural fairness required the CQC to undertake a review of its response to the proposed factual corrections to the draft report if the claimant so requested". Andrews J also said "there is little point in giving someone an opportunity to make factual corrections, if there is no procedural mechanism for safeguarding against an unfair refusal to make them." Andrews J noted that the review by the independent person in the CQC would not need to delay matters "as it would be of relatively narrow compass, focusing only on the lead inspector's responses to the corrections that were suggested by the claimant at the relevant time".

43. Andrews J dismissed the claim for judicial review as formulated on the amended statement of facts and grounds, but recorded that there had been full argument on a more focused but unpleaded case. In accordance with the findings on that focused case, a declaration was granted to the effect that "there is an obligation on the CQC to carry out an independent review of a decision made in response to comments in the Factual Accuracy Comments log, on a request to do so by the inspected entity, if the ground of complaint is that a fact-finding maintained in the draft report is demonstrably wrong or misleading."

44. There was no appeal by the CQC against the judgment in *SSP Health.* The CQC modified its practice so that, after receipt of the FAC comments, the lead inspector would consider them and make any necessary modifications to the draft report. The

draft report, the FAC comments and the modifications would then be considered by another inspector at the CQC, independent of the investigation. This meant that there was an independent review of the lead inspector's response to the FAC comments in every case, and it was not dependent on a request from the service provider. It also meant, as Mr Havers pointed out on behalf of Hexpress, that the CQC did not have further comments from the service providers on the lead inspector's response to the FAC comments.

45. *Babylon Healthcare* was a case where there was a hearing to determine an application for an interim injunction to restrain publication of a CQC report and whether the claimant should be granted permission to apply for judicial review. The claimant made various criticisms of factual statements made in the draft report, but many of those were rejected. The interim injunction was refused and permission to apply for judicial review was granted only on limited grounds. One of those grounds on which permission to apply was granted related to whether the CQC had implemented what had been said about the approach to be taken to correction of factual errors in *SSP Health*.

46. Holgate J referred in paragraph 27 of the judgment to the decision in *SSP Health* and a witness statement showing changes made to the CQC practices, which were intended to comply with what Andrews J had said in *SSP Health.* At paragraph 82 of the judgment he recorded that the CQC contended that it was sufficient that an independent reviewer should contribute to the document responding to the service provider's comments before that document was issued. The service provider contended that it was necessary to see the response of the inspection team, and the service provider could then ask for an independent review. Holgate J held in paragraph 83 of his judgment, that the service provider's interpretation was what was intended by Andrews J in paragraphs 57 to 60 of her judgment, or at the very least, the service provider's interpretation was arguable. Permission to apply for judicial review was therefore granted on this ground. It does not appear that the claim was determined at a final hearing, suggesting that the CQC and Babylon Healthcare compromised the claim for judicial review.

47. In *R(Ideal Care Homes Ltd) v Care Quality Commission* [2018] EWHC 886 (Admin) Lang J considered whether there should be granted an interim injunction to restrain publication of a report. Lang J addressed the approach in *SSP Health* and said that it was held in that case "that procedural fairness required the defendant to undertake a review of its response to the proposed factual corrections to a draft report if the claimant so requested. The lead inspector was best placed to evaluate any factual comments made by the service provider in the first instance but if complaint was made about the response of the lead inspector then an independent person within the defendant should conduct the [review] as to the lead inspector's response". This was an extempore judgment and I have inserted the word review in square brackets rather than the original word which was "interview" which, it was common ground, must have been a typographical error. It is correct to say that, on one reading of Lang J's judgment, it is implicitly suggested that the service provider should have an opportunity to respond to the lead inspector's response because it is not clear how else would the service provider be in a position to complain about "the response of the lead inspector".

48. As already noted, in this case Mostyn J considered that requiring the CQC to adopt a process of reviewing further comments on a report amended in the light of FAC comments was unnecessary and over elaborate.

Ground one – a fair process

49. In my judgment the process adopted by the CQC of: sending Hexpress the draft report; permitting Hexpress to comment on the draft report through the FAC process; considering those comments through the lead inspector and another inspector independent of the inspection of Hexpress and making the modifications considered appropriate in the light of the FAC comments; before producing the final report; was procedurally fair. Mostyn J was therefore right to refuse Hexpress permission to apply for judicial review relying on this ground. This is for a number of reasons set out below.

50. First, the CQC had complied with the statutory requirements set out in section 61 of the 2008 Act. It might be noted that the 2008 Act did have provisions to ensure fairness in other situations, such as a right of appeal to the FTT or the requirement on the CQC to obtain an order from a Magistrates' Court, but those provisions did not extend to the production of a report. This meant that the duties of procedural fairness for the publication of the report were implied from the common law, and compliance with the 2008 Act alone would not be sufficient to discharge obligations of procedural fairness when dealing with reports critical of a service provider.

51. Secondly, the CQC had provided Hexpress with the opportunity, through the FAC process, of commenting on the draft report, parts of which were critical of Hexpress. Although what procedural fairness requires will always be fact-specific, providing such an opportunity to the person who is likely to be criticised is usually sufficient to satisfy the requirements of procedural fairness, see *Pergamon Press*, *Maxwell v DTI* and *Shoesmith*. Such an approach is consistent with the requirements set out in rule 13 of the Inquiry Rules 2006 and it is not apparent why, in general terms, fairness to service providers should extend beyond that afforded to those who are criticised by public inquiries.

52. Thirdly, *SSP Health*, on which Mr Havers had placed much reliance, was a case where, notwithstanding the FAC process, it was apparent that there were factual issues which should have been resolved in favour of the service provider, which had not been. It was in this context that Andrews J said "procedural fairness required the CQC to undertake a review of its response to the proposed factual corrections to the draft report <u>if the claimant so requested</u>" (underlining added). I accept that although it was not said expressly in that case, it was probably implicit from this that the service provider would have been provided with the amended draft report and would have commented on those amendments. The fact that the requirement to allow service providers an opportunity to comment on the revisions made in the light of the FAC process was implicit and not explicit explains why Holgate J and Mostyn J came to different interpretations of the decision in *SSP Health.* However the implicit requirement to allow service providers an opportunity to comment on revisions involves reading the judgment in *SSP Health* as if it were a statute, and not a case deciding what fairness required in a particular case where changes to a draft report which an independent person (in that case the judge) could see at a glance should have been made, had not been made.

53. It is important to bear in mind that: the judgment in *SSP Health* is not a statute; the requirements of procedural fairness are to achieve fairness; and in this case the

procedures adopted by the CQC ensured fairness by giving Hexpress both fair notice of the proposed findings and a fair opportunity to answer them. It was clear in *SSP Health* that the proposed procedures were confined to the situation in which the existence or otherwise of a particular matter was "easily ascertainable by reference to documents or other objective evidence", see paragraph 45 of the judgment, and that "what fairness requires, in terms of a response to a correction of this nature, will depend very much on the facts and circumstances of the individual case", see paragraph 47. It might also be noted that, perhaps because there was a late change in focus of the case, in *SSP Health* there had been no citation of the judgments in *Pergamon Press, Maxwell v DTI* and *Shoesmith*. Much of the judgment in *SSP Health* was directed to suggesting a common sense way of avoiding the Administrative Court getting involved in resolving factual matters where the true situation was easily ascertainable. That is very different from creating a legal requirement to act in a certain way in order to discharge duties of fairness.

54. It was for the CQC, as the statutory regulator, to decide what processes to undertake to discharge its duties of procedural fairness, and the CQC reviewed its processes in the light of the decision in *SSP Health*. The CQC has adopted a process of reviewing the FAC comments first by the lead inspector before having that review considered by an inspector independent of the inspection. That process should ensure that any demonstrably wrong or misleading statement is corrected. In my judgment the process undertaken by the CQC in this case was fair.

55. The fact that some changes were made to the report after the final draft had been sent to Hexpress and before publication, as part of discussions between the CQC and Hexpress as the litigation was progressing, does not show that the procedure adopted up to that point was unfair. None of the changes that were made were changes which were significant in the sense of being relevant to the ratings applied by the CQC to Hexpress.

56. I would therefore refuse Hexpress permission to apply for judicial review on the first ground.

Ground two

57. The main complaint in relation to ground two is that the CQC acted irrationally in failing to take account of improvements which had been made by Hexpress after it had received the draft report in judging the level of service. Mr Havers submitted that the CQC had incorporated the fact of these improvements into the final draft as published, and therefore it was irrational and unfair not to incorporate those improvements into the rating applied by the CQC to Hexpress' services. Mr Stilitz on behalf of the CQC pointed out that the CQC's statutory duty was to "prepare a report on matters inspected" pursuant to section 61(2)(a) of the 2008 Act, not of improvements made after the inspection and that the CQC, who as a specialist regulator should be shown a high degree of deference for its judgments and findings, was entitled to take the approach that it did.

58. In my judgment the CQC was acting lawfully in rating Hexpress on the service that it was providing at the date of the inspection. Mr Stilitz is right that this approach of taking the date of the inspection for making the ratings is consistent with the statutory scheme, although I do not think that the wording of the statute would prevent the

CQC from adopting a later date to make ratings, if it chose to do so. The point is that it was for the CQC, as the statutory regulator, to choose the date on which to rate Hexpress, unless such a choice was irrational in the sense that no reasonable regulator would choose that date.

59. Although Mr Havers is right to identify that in this case the CQC was able to report the improvements that Hexpress had made to its service following the inspection, this did not mean that it became irrational to choose the date of the inspection for making the ratings. This is because it allowed consistency for all service providers, including those who did not take advantage of the FAC process. Further it ensured that the CQC could work towards producing a fair report as at a particular date. If the CQC was under a duty to report on any improvement whenever it occurred, and then make a new rating on the basis of that improvement, there would be a real risk that the report would never be finalised. Those with the worst ratings would have the strongest incentives to delay the process by claiming to have made relevant improvements which needed to be considered and rated. The approach taken by the CQC was rational and therefore lawful. Mostyn J was right to find that this ground for seeking judicial review was not arguable.

Conclusion

60. For the detailed reasons set out above I would dismiss the appeal. This means that Hexpress may pursue its claim for judicial review against the CQC only on the ground for which permission to apply was granted by Mostyn J. I am very grateful to Mr Havers and Mr Stilitz, and their respective legal teams, for their helpful written and oral submissions.

Lady Justice Elisabeth Laing

61. I agree.

Lord Justice Arnold

62. I also agree.