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# England and Wales High Court (Administrative Court) Decisions

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**Neutral Citation Number: [2011] EWHC 218 (Admin)**
Case No: CO/4963/2009

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

Royal Courts of Justice
Strand, London, WC2A 2LL
11/02/2011

B e f o r e :

**MR JUSTICE HOLMAN**

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**Between:**

**THE QUEEN on the application of GERALDINE MILNER** — **Claimant**

**- and -**

**SOUTH CENTRAL STRATEGIC HEALTH AUTHORITY** — **Defendants**

**- and -**

**SECRETARY OF STATE FOR HEALTH** — **Interested party**

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**Mr DAVID WOLFE and Ms ELIZABETH PROCHASKA (instructed by Leigh Day & Co) for the claimant**
**Mr JOHN HOWELL QC and Mr JEREMY HYAM (instructed by Capsticks LLP) for the defendants**
**Mr JAMES EADIE QC and Mr DAVID PIEVSKY (instructed by DWP/DH Legal Services) for the interested party**
**Hearing dates: 19th and 20th January 2011**

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**HTML VERSION OF JUDGMENT**

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**Mr Justice Holman:**

**The issue**

1. The adding of fluoride to the public water supply (fluoridation) is highly controversial. Proponents say that it is an effective, and cost effective, way of reducing the incidence of tooth decay, and helps to overcome social inequality between those children who are brought up with good standards of dental hygiene and those who are not. They say that any health or other disbenefits are greatly outweighed by the benefits. Opponents dispute the need for, or cost effectiveness of, fluoridation. They say that known health disbenefits (in particular, the risk of fluorosis or mottling of teeth) outweigh any benefits, and, further, that there may be risks which are not yet fully known, such as increasing the risk of certain cancers. They say that ethically, and as a matter of personal autonomy, it is highly objectionable to add anything to the supply of that most essential of commodities, water, that is not necessary for water purification. If people want to protect their or their children's teeth by the use of fluoride they can do so as a matter of personal choice by the use of fluoride toothpaste or other fluoride products. I stress that the above is the briefest of overviews, to set the context of this case. The full arguments both for and against are far more varied, profound and wide ranging.

2. Currently there is no fluoridation in Scotland, Wales or Northern Ireland. In England, fluoridation does occur in certain areas in the West Midlands, Yorkshire and Tyneside and affects the water supply to about 5 million people. Whether it should extend to other areas is a matter for decision by the relevant Strategic Health Authority. On 26 February 2009, after a process of public consultation, the South Central Strategic Health Authority (the SHA) decided that fluoridation should be introduced in an area in and around Southampton, affecting a population of about 195,000. The claimant, Ms Geraldine Milner, lives within that area. She responded to the consultation. She is opposed to fluoridation. She claims that the SHA reached their decision by a process which was so defective as to be unlawful and that it should be quashed. Although Ms Milner is the sole claimant, it is clear that she reflects the position of a large body of individual and organised local opponents of fluoridation in the Southampton area. A number of these attended the hearing, in a packed courtroom, as well as Ms Milner herself, and I was very grateful for their courteous attention and good humour during a case about which, as I appreciate, they feel very strongly indeed.

3. Mr David Wolfe, on behalf of Ms Milner, stressed, and I wish to stress, that this case is not about the merits of fluoridation, or the strength of the health or any other arguments for or against fluoridation. The case, and this judgment, is concerned solely with, in the words of Mr Wolfe, "the legality of the process" by which the SHA made their decision.

4. The SHA are the sole defendants but in view of some of the issues raised the Secretary of State for Health (the Secretary of State) has been added as an interested party.

**The statutory framework**

5. It is convenient, first, to describe or reproduce in one place the relevant provisions of statute and regulations as they were at all times material to this case and, indeed, still are today.

6. The Water Act 2003 amended the Water Industry Act 1991 (the 1991 Act) and all subsequent references to the 1991 Act are to its amended form. The essential effect of section 87 of the 1991 Act, which it is not necessary to reproduce verbatim, is that if the strategic health authority for a given area requests a water undertaker (i.e. supplier) to increase the fluoride content of the water supplied within a specified area (being an area within the overall area of that SHA), the water undertaker must do so. The decision challenged in this case is a formal decision reached by the SHA on 26 February 2009 to make a request to the relevant water undertaker under section 87. The effect of section 87 is that the water undertaker will be obliged to fluoridate the water in the specified area. The decision has not, however, been implemented pending the outcome of these proceedings.

7. Making a request under section 87(1) of the 1991 Act is one of the "steps" mentioned in subsection 89(2) of that Act. So far as is material, section 89 provides as follows:

"89(1) Before taking any step mentioned in subsection (2) below, a relevant authority [viz the SHA] shall –

(a) consult and ascertain opinion in accordance with regulations made by the appropriate authority [the Secretary of State]; and

(b) comply with the requirements set out in regulations made by the appropriate authority.

(2)…..

(3) Regulations –

(a) under paragraph (a) of subsection (1) above shall include provision about the process which relevant authorities are to follow for the purposes of that paragraph;

(b) under paragraph (b) of that subsection shall include provision about the requirements which must be satisfied (with respect to the outcome of that process or otherwise) before a step mentioned in subsection (2) above may be taken.

(4)…"

8. Section 213(1A) of the 1991 Act has the effect that on the occasion of the first exercise by the Secretary of State of the power to make regulations under section 89, the regulations shall not be made unless a draft has first been laid before, and approved by a resolution of, each House of Parliament. The regulations in point were indeed made on the occasion of the first exercise by the Secretary of State of the power to make them, and were, as Mr James Eadie QC on behalf of the Secretary of State particularly stresses, first approved by an affirmative resolution of each House of Parliament.

9. The relevant regulations are The Water Fluoridation (Consultation) (England) Regulations 2005, SI 2005 No. 921 ("the regulations"). These were approved by resolution of the House of Lords on 8 March 2005 and by the House of Commons on 22 March 2005, and were made by the Secretary of State on 24 March 2005, coming into force on 1 April 2005.

10. The regulations of particular relevance to this case are regulations 3 and 5 which provide as follows:

"**Consultation**

3. (1) In order to consult and ascertain opinion before taking any step concerning fluoridation arrangements that falls within section 89(2) of the Act, a Strategic Health Authority shall –

(a) publish details of the step they propose to take, and the manner in which individuals who would be affected by it and bodies with an interest can make representations regarding the proposal –

(i) in one or more newspapers circulating within the area to which the arrangements relate and

(ii) in other such media accessible within that area as the Authority consider appropriate for the purpose of bringing the proposal to the attention of individuals affected and bodies with an interest;

(b) give notice of the proposal to every local authority whose area falls wholly or partly within the area to which the arrangements relate.

(2) The details published under paragraph (1)(a) shall include –

(a) the nature of the step the Authority propose to take;

(b) the reasons for the proposal;

(c) the area affected by the proposal; and

(d) the period, being a period of not less than 3 months from the date on which the details are first published, within which representations can be made to the Authority.

4. …..

**Outcome of consultation**

5. A Strategic Health Authority shall not proceed with any step regarding fluoridation arrangements that falls within section 89(2) of the Act unless, having regard to the extent of support for the proposal and the cogency of the arguments advanced, the Authority are satisfied that the health arguments in favour of proceeding with the proposal outweigh all arguments against proceeding."

11. Although the "Explanatory Note" printed on the back of the regulations is not part of the regulations, some reliance has been placed upon it and I accordingly reproduce it in part.

"EXPLANATORY NOTE

(This is not part of the Regulations)

These Regulations elaborate on the consultation requirements provided for in section 89 of the [1991 Act] ….

The Regulations provide for the Authority's proposal to be advertised … They also specify the criteria by which the Authority are to determine whether, in the light of representations made to them, they should proceed with the proposal (regulation 5)…."

12. I stress that the Explanatory Note has not been relied upon as an aid to the construction of the regulations themselves, and I myself pay no regard to it as an aid to construction, which would be impermissible when, as here, the regulations themselves do not contain an ambiguity. But Mr John Howell QC, on behalf of the SHA, suggests that the language and content of the Explanatory Note, prepared by the Department of Health itself, is not consistent with the proposition (urged by Mr Wolfe) that the government had a concurrent policy to which the SHA were required to have regard in addition to the matters referred to in regulation 5 itself. Mr Howell stresses the words "They [viz the regulations themselves] also *specify the criteria by which* the Authority are to determine whether they should proceed …" where they appear in the Explanatory Note. He submits that that suggests that the government themselves intended the test and criteria in regulation 5 to be exhaustive and comprehensive.

**GROUND I**

13. The claimant was granted permission to apply for judicial review on ground 1 only of her claim. This is, as now formulated at paragraph 5 of the skeleton argument of Mr Wolfe and Ms Elizabeth Prochaska, that when taking the decision on 26 February 2009 " …. the SHA unlawfully failed to have regard to (let alone act in accordance with other than for a good and stated reason) the applicable government policy (which was that no new fluoridation scheme should be introduced unless it can be shown that the local population is in favour)."

14. The majority of the local population who actually responded to the public consultation were clearly opposed to fluoridation. An independent analysis by the Evidence Centre of the 10,203 responses assessed that 72% were opposed to the proposal and 28% supported it (see TB 2:215 and 216).

Separately, an independent research company, ICM Research, conducted a telephone survey of just over 2,000 residents in the affected area. The "key findings" were that 38% opposed (27% "strongly") the scheme; 32% supported (12% "strongly") the scheme; 19% neither supported nor opposed it; and 10% did not know (see TB 2:308). Of the five local authorities who submitted responses to the consultation, four, including Hampshire County Council, opposed the proposal, although the Southampton City Council (in whose area the bulk of the affected population live) supported it (see TB 2: 232).

15. On any view or interpretation of the above figures, it certainly could not be said that "the local population is in favour". It is not in issue that if there was a government policy at the material time (February 2009) that "no new fluoridation schemes should be introduced unless it can be shown that the local population is in favour" (as Mr Wolfe contends), the SHA did not have regard to it, still less act in accordance with it. If they had done so, they could not have reached the decision that they did.

**Hansard and the evidence of the alleged policy**

16. With the exception of one e-mail dated 26 February 2009 to which I refer in paragraph 38 below, Mr Wolfe relies exclusively on statements made by ministers in both Houses of Parliament as evidencing the existence of the alleged policy. No counsel has suggested (and nor do I) that the regulations, although not easy to construe, contain an ambiguity, and Mr Wolfe does not seek to resort to Hansard as an aid to the construction of regulation 5 itself. But he does say that what is recorded in Hansard evidences the existence of the alleged policy.

17. Mr Wolfe relies in particular on what was said by Lord Warner (then the Parliamentary Under-Secretary of State, Department of Health) in the House of Lords on 9 July 2003, and by Miss Melanie Johnson (then the Parliamentary Under-Secretary of State for Health) in the House of Commons on 23 October 2003 when the 2003 Act was being debated in each House respectively; and on 8 March and 21 March 2005 in each House respectively when the draft regulations which had been laid before each House were being debated before the resolutions approving them as section 213 (1A) of the 1991 Act required.

18. On 9 July 2003, at HL column 300 (TB 4: 86 and 87) Lord Warner said:

> "In fact, the enactment of the amendment may not lead to any new fluoridation schemes – that would depend on what people decided locally – but it would give local communities the choice of having their water supply fluoridated ….
>
> Proposed new section 89 provides for consultations. As I indicated, no new fluoridation scheme would go ahead without the support of the majority of the local population determined by local consultations conducted by strategic health authorities …. we propose to introduce a regulation-making power to cover the detailed requirements."

19. At HL column 359 (TB 4:146) Lord Warner later said:

> "…… The word "referendum" never passed my lips. We shall hold wide discussions on this method of consultation …."

20. On 23 October 2003, at HC column 456 (TB 4:300) Miss Melanie Johnson said:

> "We are not suggesting a referendum …. There is a difficulty in weighing up the responses, but whatever the case, local opinion must be in favour of the proposal. It will not proceed if all the indicators are overwhelmingly against it, as the regulations to be introduced will make absolutely clear. Local opinion must support the measure overall."

21. At HC column 459 (TB 4: 302) Miss Johnson said:

> "Whatever mechanism is used, a clear majority of people should be in favour of fluoridation."

22. Pausing there, the above statements were made in 2003 during the passage of the Bill. The ministers both indicated that the government would consult widely as to the content of the proposed regulations, and they did so. It is thus instructive, and in my view permissible as part of the exercise of determining the final state of any government policy on this topic, to consider that consultation process. This took place during 2004. Paragraph 2 of the Consultation Note stated that "The draft of the Regulations to be laid before Parliament for approval will take account of comments received during this consultation exercise." The *draft* regulations upon which consultation took place (but *not* as later laid before Parliament) contained as *draft* regulation 5:

> "**Outcome of consultation**
>
> 5. A Strategic Health Authority shall not proceed with any step regarding fluoridation arrangements that falls within section 89(2) of the Act unless the representations made by individuals affected and bodies with an interest are predominantly in support of it."

23. Those words closely echo what the ministers had said during the debates upon the Bill in passages quoted above; but are, as is patent, markedly different from regulation 5 in the form that was later laid before Parliament, approved by Parliament, and actually made.

24. Paragraphs 8 – 11 of the consultation note said that the department intended to issue non-binding "guidance" to give advice to SHAs, and paragraph 16 said that "The administrative guidance will advise that SHAs should take account of the weight of representations as well as numbers …. The regulations would provide that an SHA can proceed …. only if the representations …. were predominantly in support of the proposal."

25. However, following, and I presume in the light of the responses to, that consultation, the draft regulations actually laid before Parliament in 2005 were in the form finally made and set out in paragraph 10 above.

26. Those draft regulations were themselves the subject of quite considerable debate in each of the House of Lords (on 8 March 2005) and the House of Commons Third Standing Committee on Delegated Legislation (on 21 March 2005).

27. Lord Warner said at HL column 704 (TB 4: 387):

> "…. it is fundamental to our policy that a strategic health authority should only arrange for its drinking water to be fluoridated where the local population is in favour."

28. At HL column 706 (TB 4: 388 – 389) he said:

> "Turning to Regulation 5, it will not surprise your Lordships that more comments were received on this regulation during our consultation than on any of the others. We remain of the view, though, that decisions on fluoridation should not be undertaken as a result of referendums. However well they were organised, it is unlikely that a majority of the population would vote. There is a strong correlation between tooth decay and social deprivation, and we want SHAs to take account of the views of all people across all social classes. Let me dispel any suggestion, however, that we have diluted our commitment that fluoridation schemes would only be introduced where the local population were in favour. Regulation 5 requires SHAs to take account of the extent of support for their proposals. They must also consider the cogency of the arguments. There is a host of disinformation put around about fluoridation, which is likely to be recycled in consultations …. The SHA needs to scrutinise the responses received and weigh the arguments in favour of proceeding with those against." [my underlining]

29. Pausing there, Mr Wolfe understandably relies on the sentence in that passage which I have underlined. But it must be read in conjunction with the sentences which immediately followed it, also quoted above. In that passage, read as a whole, the minister seeks to dispel any suggestion that the government have diluted their commitment; but at once links that to regulation 5, and appears to suggest that regulation 5 gives effect to the commitment.

30. In winding up the debate, Lord Warner referred to issues which had been raised by Earl Howe on behalf of the opposition, and said at HL column 717 (TB 4: 400):

> "The noble Earl, Lord Howe, raised issues about the strategic health authority being required to show a majority in favour. As I have tried to say, we do not consider a head count alone is the most appropriate way of reaching a decision …. The strategic health authority will have to look at the issues and weigh the responses from interested bodies to ensure that the weight of opinion is in favour. I would argue that that is a demanding requirement."

Pausing there, that passage clearly distinguishes "majority" opinion from "the

weight of opinion".

31. In the House of Commons, at HC column 3 (TB 4: 404) Miss Johnson began by saying, identically to Lord Warner as quoted in paragraph 27 above:

> "…. it is fundamental to our policy that a strategic health authority should arrange for its drinking water to be fluoridated only when the local population is in favour."

32. At HC column 6 (TB 4: 407, 408) she made statements in almost identical terms to those of Lord Warner quoted in paragraph 28 above.

33. When winding up, Miss Johnson said at HC column 20 (TB 4: 423):

> "At the end of the day, the judgment is the strategic health authority's, to be made on the basis set out in regulation 5. The details of the consultation will be carried out in line with what I have said and with the detailed written guidance that we will produce." (my underlining)

34. Mr Wolfe has not relied upon, nor referred to, anything said in Parliament *between* the dates of the above quotations in 2003 and 2005 and the decision under challenge in February 2009. Although both Mr Wolfe and Mr Eadie have referred to certain statements made in Parliament (or in written answer to written questions) by ministers of both the previous and the present governments *since* February 2009, I do not consider that they can possibly impact upon any judgment as to the lawfulness of a decision taken prior to these later statements, and I make no reference to them.

**The Chief Dental Officer's letter of 5 February 2008**

35. In their consultation note on the draft regulations, and in passages by the ministers in March 2005, quoted above, the government had said that the department would issue advisory guidance. On 5 February 2008 the Chief Dental Officer, Mr Barry Cockcroft (who attended the present hearing), issued a letter headed "Fluoridation of Drinking Water", addressed from the Department of Health (now at TB 1: 78-89). (This replaced an earlier letter in materially the same terms first issued by the then CDO, Professor Raman Bedi, in September 2005.) Although addressed to, amongst others, SHA Chief Executives and Directors of Public Health at SHAs, I understand that this document was immediately placed, and remains, on a public website. The cover sheet has a heading "Policy" and describes its purpose as "Best Practice Guidance". Paragraph 1 of the letter refers repeatedly to "guidance". So far as I am aware, no other "guidance" or advice has ever been published by, or on behalf of, the government or the Department of Health, and in my view this document (or its September 2005 predecessor) clearly constitutes the "detailed written guidance" that Miss Johnson had told the House of Commons on 21 March 2005 that the government would produce. At paragraphs 23 – 30 there is a section headed "Conduct of Consultations". At paragraph 28 it states "Given that Consultation Regulations [viz regulation 5] require SHAs to take account of the cogency of the representations and their relevance to the "health arguments", a SHA cannot base its decision solely on a simple count of the representations for or against the proposal ….". At paragraph 44, under the heading "Action", the letter stated: "If the assessment of representations received by the SHA shows that the health arguments in favour of proceeding outweigh all arguments against proceeding with the fluoridation scheme, the SHA should …. [proceed]". I emphasise the word "should" (rather than "may") in that sentence.

36. Nowhere in that detailed letter or guidance did the Chief Dental Officer make any statement to the effect that the SHA should not proceed "unless it can be shown that the local population is in favour."

37. In their public consultation documents and material, the SHA made several references to that letter from the Chief Dental Officer (see TB 1:130; 1:148 (para. 1.2); 1:152 (para. 3.1) and 1:153 (para. 3.3)) in which the SHA made clear that they would adopt the approach described by the Chief Dental Officer in that letter.

38. As well as upon the statements of the ministers in Parliament, Mr Wolfe relies also on an e-mail dated 26 February 2009 (whether coincidentally or not, the date of the decision under challenge) from an official in the Customer Service Centre of the Department of Health to a member of public called Mr D Pemberton which purports to "outline departmental policy" on fluoridation (TB 1: 255 – 258). The e-mail did state that "It is the government's policy that no new fluoridation schemes should be introduced unless it can be shown that the local population is in favour", and immediately referred also to the Chief Dental Officer's letter. I attach no weight or significance to that e-mail since (i) the status and authority of the maker is unclear; and (ii) it is a purely private e-mail to Mr Pemberton which could not have been known to the SHA when they made their decision on the same day.

**The argument in support of ground 1**

39. Although Mr Wolfe much elaborated it during his sustained submissions, his essential argument may be shortly summarised. A public body such as a SHA must apply the law as contained in the statute and any regulations. But if and insofar as the statute and regulations confer a discretion on the body, it must have regard to any relevant government policy when exercising that discretion provided the policy is not inconsistent with the statute or the regulations; and the body should only depart from the policy for good and stated reasons. The policy of the government, submits Mr Wolfe, was that "no new fluoridation scheme should be introduced unless it can be shown that the local population is in favour" and, he submits, that policy is not inconsistent with the statute or the regulations. But the SHA did not have regard to the policy and did not state any reasons for departing from it, even though (as is common ground) it could not be said that the local population was in favour.

40. Mr Howell elaborated no less sustained and sophisticated submissions in answer or defence. So also did Mr Eadie on behalf of the present Secretary of State, whose position is that the SHA correctly applied the regulations and did not act unlawfully as alleged in ground 1.

41. In my view the challenge on ground 1 must fail for each of the following reasons, separately as well as cumulatively. First, it is not clear to me that the final policy of the government at the time the regulations were made and at the time of the decision was in the terms that Mr Wolfe contends. Second, a policy in those terms (if indeed it was their policy) was never communicated by the government to strategic health authorities generally or to this SHA. Third, a policy in the alleged terms is inconsistent with the statute and regulations which, subject to the argument under ground 2, below, the SHA appropriately considered and applied.

**(i) The final state of government policy**

42. It is, of course, perfectly true that in their speeches in Parliament in both 2003 and 2005 each of Lord Warner and Miss Johnson included sentences to the effect that it was their policy that no new fluoridation schemes should be introduced unless the local population was in favour, and at any rate in 2003 that may indeed have been their policy. If it was, it was well reflected in paragraph 16 of the 2004 consultation note and the *draft* of regulation 5 upon which they consulted. If a draft in those terms had been laid before Parliament, approved and then made, there could be no room for argument about the policy or the test. But it was not, and indeed the government deliberately laid a draft in very different terms. A draft test "unless the representations ….. are predominantly in support of it" was replaced by a requirement to have "regard to the extent of support for the proposal". In 2005 both Lord Warner and Miss Johnson stressed that they were not proposing a referendum or "head count alone". Each immediately followed their sentences that they had not diluted their commitment that schemes would only introduced where the local population was in favour, by making reference to regulation 5. They referred to the host of disinformation which is likely to be recycled in consultations and said that, accordingly, the SHA needs to scrutinise the responses and weigh the arguments. In the passage quoted

in paragraph 30 above, Lord Warner expressly rejected issues raised by Earl Howe about "being required to show a majority in favour", stressing, rather, the "weight" of opinion. In the passage quoted in paragraph 33 above, Miss Johnson said in terms that the judgment is the strategic health authority's "to be made on the basis set out in regulation 5", and she immediately referred to the detailed written guidance that the government would produce. That appears to me to negate that a policy existed additional to, or concurrent with, what is contained in regulation 5 and the contents of any detailed written guidance.

43. Further, as I have already explained, the written guidance which the government did produce must have been the Chief Dental Officer's letter (and the predecessor letter of September 2005). That purports to be official guidance and there was no other such written document. Paragraphs 25 – 28 make express reference to regulation 5, with no indication that there is an additional or concurrent government policy as alleged. In paragraph 44, quoted at paragraph 35 above, the Chief Dental Officer said in terms that if the health arguments in favour outweigh all arguments against, the SHA "should" proceed.

44. I wish to make absolutely clear that I do not in any way "question" any part of the relevant proceedings in Parliament, which is forbidden by Article 9 of the Bill of Rights. But insofar as Mr Wolfe alleges the existence of a government policy, the objective state of that policy has to be determined by a wider enquiry and consideration than by focus alone on the sentence or sentences used by the ministers upon which he relies; and for the above reasons I am not persuaded that at the material time (in and before February 2009) there was an objective government policy in the terms that Mr Wolfe (and ground 1) contends.

**(ii) A policy in the alleged terms was never communicated to SHAs**

45. I accept Mr Wolfe's submission that a public body must have regard to relevant published government policy insofar as it is not inconsistent with statute or regulations, and if it is going to depart from the policy (which it may do) it must give its reasons for doing so: see *Gransden & Co Ltd v Secretary of State for the Environment* (1985) 54 P&CR 86 at pages 93 – 94; and *R v North Derbyshire Health Authority ex parte Fisher* (1998) 10 Admin LR 27 at 32 A – B. But no authority has been cited for the proposition that a public body such as the SHA is required or expected to scrutinise Hansard so as to determine the existence and scope of any relevant government policy; the more so when, as here, the SHA did receive a formal "policy" or "best practice guidance" document in September 2005 and February 2008 from the government acting through their Chief Dental Officer. In *R v Monitor ex parte Unison* [2009] EWHC 3221 (Admin), at paragraph 91, Cranston J. (informed perhaps by his experience as a former Member of Parliament) refers to "the danger of resorting to [Hansard] except when it is absolutely required under Pepper v Hart" and gives examples of the reasons why. In my view those dangers are no less real when seeking to determine the state of government policy as when seeking to construe legislation; and it simply is not realistic to suggest that a body such as a SHA must trawl through many pages of speeches in Parliament before exercising a power, the exercise of which appears to be described and prescribed by the regulation.

46. I add that in this case the SHA made crystal clear in their public consultation material how they would approach decision making, including references to both regulation 5 and the Chief Dental Officer's letter; and, so far as I am aware, no, or at any rate no significant consultee (such as the opposed local authorities or Hampshire Against Fluoridation (HAF)) ever suggested during the consultation period or in their responses that there existed a government policy as now alleged to which the SHA should have regard.

47. It is true that on the actual occasion of the Board of the SHA making the decision on 26 February 2009 Mr Stephen Peckham, of HAF, (who also attended the present hearing) did refer briefly to one sentence in the speeches of a minister (see internal pages 10 and 11 of the transcript of the meeting, now at defendants' documents, DD 2: 868 and 869). That was in a short passage in which, incidentally, Mr Peckham mistakenly misquoted regulation 5. (He mistakenly quoted the original draft upon which the government had consulted in 2004, rather than the form in which the regulation was made in 2005.) He said that that point was "underlined" by the minister in Parliament, but he did not assert that it was formal government policy in contradistinction to the letter from the Chief Dental Officer. In any event,

by that stage of the whole consultative and decision making process a much more emphasised, full and evidenced case would have to have been made for the existence of a government policy as now alleged, based on the statements by the ministers now relied upon, than that relatively brief and oratorical reference by Mr Peckham.

48. For these reasons, even if, which I do not accept, there was an uncommunicated government policy in the terms that Mr Wolfe and ground 1 contend, the SHA could not have acted unlawfully or unreasonably in not applying it since they could not have been expected to know it.

**(iii) A policy in the alleged terms is inconsistent with the Act and the regulations**

49. Before taking the step of making a request to the water undertaker, it was the mandatory duty of the SHA under section 89(1) of the 1991 Act (which employs the word "shall") to "(b) comply with the requirements set out in regulations …". By section 89(3)(b) the regulations had to "include provision about the requirements which must be satisfied … before [such] a step …. may be taken." So the SHA were bound to comply with any of the requirements of the regulations, although the language of section 89 alone does not, in my view, preclude the SHA from having also to be taken into account other matters derived from government policy provided that policy was not inconsistent with the regulations.

50. Despite its apparent simplicity, regulation 5 is not, in my view, well drafted and it is not easy to construe.

51. The essential, and necessary, argument of Mr Wolfe is that regulation 5 does not contain exhaustive criteria and an exhaustive test, and that it leaves room for the application also of the alleged additional or concurrent government policy for which he contends.

52. He says, correctly, that the language of the regulation is that the SHA "… shall not proceed … unless …". It does not say "… shall proceed … if …". He accepts that if the regulation had said that the SHA "… shall proceed … if the Authority are satisfied that the health arguments in favour … outweigh all arguments against …" then, if and once the SHA were so satisfied, they would, without further discretion, be obliged to proceed. But, he submits, the language of the regulation as actually made, merely establishes a necessary condition precedent to proceeding, namely that the health arguments in favour outweigh all arguments against. This, he submits, accordingly leaves a residual discretion such that the SHA can have regard to, and (other than for a good and stated reason) should apply, the alleged government policy. He submits, in short, that even if the SHA are satisfied that the health arguments in favour outweigh all arguments against, that is merely a necessary, but not a sufficient, condition which must be satisfied before the SHA proceed. They still have an overall discretion not to take the step, and (except for a good and stated reason) should not do so unless it can be shown that the local population is in favour.

53. Mr Howell and Mr Eadie, on the other hand, submit that the thrust of the regulation is to require the SHA to weigh, or balance, the health arguments in favour of proceeding in one side or pan of the scales, and all arguments against proceeding in the other. If weight is to be given to public opposition, it must be as an "argument" which must be placed in that other side or pan of the scales. But if the SHA then reach the point of being satisfied that the health arguments in favour outweigh all arguments (including the fact of opposition) against, there is then no room to bring back in the fact of opposition alone to trump the health arguments in favour. That, they submit, would be incoherent and irrational and would involve the SHA having to conclude at the same time that majority opposition (a) does not outweigh, and (b) does outweigh, the health arguments in favour.

54. Mr Eadie submitted that, in the context of this regulation read as a whole, there is no material difference between language and a test "… shall not proceed … unless …" and language and a test "… shall proceed if …". The end result is, he submits, the same.

55. It may indeed be that there is, in the result, no material difference, since on the submission of Mr Howell and Mr Eadie the appropriate full weight must be given to the balance of public opinion and support/opposition before deciding whether the health arguments outweigh. Nevertheless their approach does not, in my view, reflect the language of the regulation. There is an obvious difference

between a form of words "… shall not proceed … unless …" and a form "… shall proceed if …", and the language of the regulation is indeed that of a condition precedent. Further, the phrase "having regard to the extent of support for the proposal and the cogency of the arguments advanced" specifies two quite distinct matters. One is the extent of support, which is essentially a matter of fact. The other is cogency, which is a matter of assessment or judgment. When the concluding words of the regulation refer to "all arguments against" that seems to me to refer back more naturally to the "arguments advanced" rather than to the fact of "the extent of support".

56. To that extent I agree with Mr Wolfe. I disagree, however, with his submission that the regulation leaves room for application of the alleged policy. A regulation which expressly requires a SHA to have "regard to the extent of support" is simply not consistent with a policy that a scheme should not be introduced unless it can be shown that the local population is in favour. That is simply to replace the requirement in the regulation to have regard, with a test of the balance (however ascertained) of the opinion of the local population, which is inconsistent with the regulation and which the ministers themselves eschewed (they expressly rejected a head count alone or referendum).

57. For this reason I consider that the regulation as made is not consistent with, and leaves no room for, application of the alleged government policy for which Mr Wolfe, and ground 1, contends.

58. SHAs should not have to grapple with problems of construction of this sophistication. In my view, if they adopt the following approach they will not go wrong.

59. They need to ascertain and make a judgment or assessment as to the cogency of all the arguments (not merely the health arguments) advanced both for and against proceeding with the proposal.

60. They need to weigh very carefully those arguments which are *health* arguments in favour of proceeding against *all* the arguments (not merely any health arguments) against proceeding.

61. If they are not satisfied that the *health* arguments (and none other) in favour outweigh all the arguments against (including any health arguments against, such as fluorosis, or uncertain other health risks, such as cancer; environmental arguments; sociological arguments; arguments as to personal autonomy; and all other arguments advanced in opposition), then that is the end of the matter.

62. If at that stage they are satisfied that the health arguments in favour do outweigh all the arguments against, they then need to have regard to the extent of support for, or opposition to, the proposal, and decide whether, in the light of the extent of support/opposition, the health arguments in favour are still so weighty that they should prevail. Clearly, the greater the weight of opposition to the proposal (as well as the weight of all arguments against proceeding), the greater the weight of the health arguments in favour of proceeding will need to be in order to prevail. That overall judgment has to be made by the SHA, but there is no rule or policy that they can only proceed if the balance of local public opinion is in favour.

63. I have no reason to suppose (subject to the argument in ground 2) that this SHA did not approach the matter broadly in this way.

**Postscript under ground 1**

64. Finally, on this part of the case, I record what Mr James Eadie QC expressly told me on instructions is the position of the present Secretary of State for Health. I stress that this forms absolutely no part of my reasoning or judgment, which is why I record it under the heading "Postscript", for on no possible view could the position of the Secretary of State in 2011, in a government formed in 2010, have any bearing on the lawfulness of a decision reached in 2009. But whatever confusion or uncertainty may exist as to the alleged policy of the previous government in and before 2009, the position of the government today is (I have been told) as follows:

> "The current Secretary of State's position in relation to the exercise of powers conferred on SHAs under legislation set out above, and specifically regulation 5, is in summary as follows:

a. SHAs' decisions must be taken in accordance with regulation 5, applying the factors and approach there set out. The legislation, properly interpreted, represents the law; and no policy can be adopted which is inconsistent with it.

b. As regulation 5 makes clear, majority local support is not a necessary precondition to a request being made. It is a factor to be taken into account by the SHA, and no more than that.

c. For the avoidance of doubt, this government does not purport to advance or espouse a policy inconsistent with the relevant legal analysis set out in (a) and (b) above."

**GROUND 2**

65. Ground 2 is, as now formulated in paragraph 5(2) of Mr Wolfe's and Ms Prochaska's skeleton argument, that "The SHA failed to give effect to the statutory obligation of assessing the cogency of the arguments (including thus the arguments put by respondents to the consultation) for and against compulsory mass fluoridation when making the decision here." The consultation process resulted in over 10,000 responses. These ranged from ticked boxes on a consultation questionnaire; through individual letters expressing (in varying degrees of detail) outright opposition, strong support, or a qualified position, and which included a number of letters from local members of Parliament; to highly developed, lengthy and detailed response submissions from the affected local authorities, Hampshire Against Fluoridation, and others. Many of the more detailed responses and submissions attached, or made reference to, published research and similar material. All these responses and the attached or referenced material were analysed and distilled in a number of reports and papers which were then supplied to the Board members of the SHA who made the actual decision. The argument of Mr Wolfe is, in a sentence, that in that process of analysis and distillation important arguments got lost, or their cogency was not assessed, such that the Board members themselves could not have had regard (as regulation 5 requires) to "the cogency of the arguments advanced" against the proposal, since the Board members did not have all the information necessary to enable them to do so.

66. On 23 July 2009 Mitting J. refused permission to apply on this ground, observing that "In all other respects [viz other than ground 1] the decision-making process was unimpeachable. The second ground of challenge (that the defendants did not have regard to the cogency of the arguments advanced for and against permission) is not reasonably arguable and I refuse permission to apply for judicial review of the decision on that ground."

67. The claimant then renewed her application for permission to apply on ground 2, as well as on ground 1 upon which Mitting J. had granted permission. There has never yet been further consideration of that renewed application for permission, still less has permission been granted. By an order made on paper on 6 June 2010 Davis J. refused an application for a prior oral hearing of the claimant's renewal application on ground 2, and ordered that "… there should be a rolled up hearing, where both points [viz ground 1 and ground 2] can be considered." That order was not a grant of permission on ground 2; and it is, in my view, very important that a practice, on occasions, of ordering a so-called rolled up hearing does not blur the important step of the grant of permission, or the distinction between consideration of permission and substantive consideration of all, or any discrete, grounds at a rolled up hearing.

68. On behalf of the defendants, Mr Howell continues to oppose the grant of permission. The Secretary of State as interested party, and Mr Eadie and Mr David Pievsky on his behalf, take no position at all on ground 2 which is entirely fact and case specific and outside his knowledge.

69. Mr Wolfe has taken an eminently sensible and practical approach to this issue. He does not suggest that individual members of the Board of the SHA (there were 13, 7 of them executive and 6 of them non executive) needed necessarily to read and consider every response to the consultation which contained within it any "argument". He entirely accepts that it was practical and appropriate for an independent firm such as the Evidence Centre to summarise and report on the arguments advanced in the responses. He accepts that some arguments which may have been advanced by some people which were relatively minor or unimportant ones could be excluded from that exercise without compromising the duty of the SHA under regulation 5 to have regard to the cogency of the arguments advanced. But he says that

there were some very major or key arguments which were also not presented to the Board in such a way that they could properly discharge their duty to have regard to their cogency.

70. In paragraphs 145 – 201 of their skeleton argument dated 24 December 2010, Mr Wolfe and Ms Prochaska identified six particular objections and heads of argument which, they submit, were not properly placed before the Board and the cogency of which was not considered by the Board. Without in any way derogating from all six, Mr Wolfe concentrated during his oral submissions on three in particular. First, that the extent of tooth decay in the Southampton area had been overstated and inappropriately based on data purely in relation to five year olds. Objectors argued that if, more appropriately, regard was had to data in relation to twelve year olds, the need for fluoridation was much less ("the need argument"). Second, that the economic benefits of fluoridation had been very seriously overstated. The case put for fluoridation was that the cost of fluoridation was about 32 pence "per tooth saved". Objectors argued that on a correct appreciation of the data the true cost was far higher and, on the argument of HAF, more like £343 per lesion saved (see their response to the consultation now at TB 1: 221). The Hampshire County Council advanced a figure of about £45 per carious lesion avoided (see TB 1: 173, para 5.2), which is markedly less than £343 but still markedly higher than 32 pence ("the cost/benefit argument"). Third, that the risks to the environment from leakages and contamination with artificially fluoridated water (there is some fluoride naturally in all water), which were of concern to many objectors, were never properly considered and evaluated ("the environmental argument").

71. In a document dated 2 October 2008 (now at TB 1: 146), as part of their consultation documents, the SHA described the "Process for evaluating responses to public consultation". It said that "It is important that the public are reassured that there is a robust and auditable process in place to assess responses … all responses to the consultation will be collated and assessed independently by experts at [the Evidence Centre] and a written report presented to the SHA board … responses should be analysed for the cogency of the arguments advanced. The report will be one of the key pieces of information upon which the SHA board will base its decision along with the scientific evidence." Mr Wolfe does not criticise that approach, but submits that it was not in fact carried out.

72. The contract between the SHA and the Evidence Centre cited regulation 5 and continued: "Therefore any independent analysis [viz that contracted for] needs to specifically look at the 'cogency' of the arguments put forward on both sides of the debate." (see now DB 1: 402).

73. In an email to the SHA dated 4 December 2008, now at TB 3: 134 and 135, Dr Debra de Silva of the Evidence Centre said that "5. We now need to consider cogency reviews … To meet the legislation, the Board will need to weigh up the cogency of this evidence. I propose doing the following … and a traffic light system/hierarchy of evidence score summarising the quality of evidence … I estimate 2 – 4 days of cogency reviewing …" At the time, that approach was approved by Mr Nigel Woods of the SHA (see his email at TB 3: 134).

74. On 13 January 2009, however, Mr Woods sent a further important email to Dr de Silva, now at TB 3: 136. This refers to "points for consideration in your report" and continues:

> "Clarity as to how cogency has been assessed … Please note that the compilation report will not make a 'judgment' about cogency. It will set out the arguments and submitted evidence in support of those arguments, plus outline the perceived quality of evidence. It will be up to the Board to use this information to make their decision about cogency. This ensures that an external party is not responsible for decisions about cogency, but is providing the Board with the information required to weigh this up."

On the same day Dr de Silva replied by an email which essentially confirmed that approach (now TB 3: 136).

75. On 25 February 2009 (the day before the decision meeting), in answer to an email from Mr Peckham of HAF, Dr de Silva told him that "It is for the Board to assess the cogency of the arguments … the independent report makes no recommendations or conclusion about cogency." (see emails now at TB 3: 140/141 and 139).

76. There was, thus, a clear shift between the approach originally envisaged in the SHAs' consultation documents and their contract with the Evidence Centre, and what actually happened. Indeed the summary at the outset of the Evidence Centre's final report (now TB 2: 214 at 215) clearly states "The compilation does not judge or weight the responses … The SHA Board is responsible for weighing up the arguments for and against the proposal and for considering the cogency or reasonableness of the views put forward."

77. In her witness statement, now at TB 3: 105, Dr de Silva says at paragraph 25 (TB 3: 110) "We did not judge or weigh the responses but did note the research evidence included in consultation responses and noted the extent to which the evidence cited endorsed different perspectives. We commented on the cogency of responses to this extent in the report, but did not consider the cogency of the whole argument for or against fluoridation, as that was a question for the SHA Board." The report did not employ any "traffic light" system as earlier envisaged.

78. At pages 19 – 24 of their report (now at TB 2: 232 – 237) the Evidence Centre gave a narrative summary of the responses from local authorities, MPs, Peers, PCTs and other organisations including HAF. At page 26 (now TB 2: 239) they listed the "perceived pros and cons" and at page 35 (TB 2: 248) they listed the "main" opposing reasons. Under a banner "Top reasons for opposing …" they included "Toxic chemical with possibility of overdose or spill" and environmental arguments were later summarised at pages 42 and 43 (TB 2: 255 and 256).

79. As well as in the report from the Evidence Centre, the responses were considered by Professor John Newton, who is both a member of the SHA Board and their Director of Public Health. He now says at paragraph 141 of his first witness statement (now at TB 3: 141):

> "It is not the case that the arguments were not properly considered. They were *either* included in evidence placed before the Board *or* were considered by me and my team and deemed to add nothing new to the body of evidence such that they would require to be raised with the Board." (my emphasis)

80. Pausing there, Mr Wolfe submits that that evidences an impermissible filter inserted by Professor Newton and his team between the responses and what was placed before the Board. I cannot accept that such a filter was impermissible and I agree with Mr Howell that the Board as a whole were entitled to rely on one of their members (and officers) to highlight what he considered to be the main arguments.

81. The official within the SHA "in charge of the consultation process" was Mrs Olga Senior. She says in paragraph 63 of her first witness statement, now at TB 3: 49, that "In the run up to the Board meeting on 26 February 2009 and during the whole consultation period, Board members were given the chance to look at consultation responses. They were contained in lever arch files at the SHA headquarters …" She says at paragraph 65 that on the day of the meeting the responses from the "key stakeholders" including Hampshire County Council and HAF were all at the meeting, and she recalls several non executive directors looking through the file with the key responses. She has since asked each of the Board members who were present whether they had read the responses from Hampshire County Council and HAF. She says in her second witness statement, now at TB 3: 142, that of the 11 voting members who were present (the chairman had only a casting vote, which was not required) seven remember reading both responses. Others could not now be certain of the extent to which they read them.

82. In any event, a bundle of documents, now in effect TB 2 from pages 1 – 352 inclusive, was delivered to each Board member in advance of the meeting. This includes the whole Evidence Centre report and other papers, and includes at pages 77 – 80 slides or overheads which were later presented to the meeting by Mr Peckham. The slides include at page 80 "Key Questions. Is there a clear need? Is there a clear health benefit? Is it safe? Is it cost effective? Is it ethical? Are there better alternatives?" It is quite clear from the transcript of the meeting, now at DD 2: 869 and 870, that Mr Peckham did indeed pose, and briefly address, each of his key questions in turn. They include the issues of need and cost/benefit although not environmental issues, but these had been summarised in the Evidence Centre report at pages 42 and 43.

83. The Evidence Centre report and other material, and the oral presentations by Dr de Silva and Mr Gregor Jackson at the meeting on the day of the decision (DD 2: 881 – 894) clearly presented accounts and analysis of the extent of support/opposition. Board members asked questions of each of them, and there can, in my view, be no doubt that at the meeting the Board did, as regulation 5 requires, have regard to the extent of support for the proposal.

84. The actual decision of the Board was taken by a public show of hands. Every member present voted in favour of the proposal, with none against and no abstentions. Although he only had a casting vote, the chairman announced that if he had been required to vote, he, too, would have voted in favour.

85. No reasons were given by the Board for their decision, but no reasons ground of challenge has been advanced. I cannot, of course, say how attentively any individual Board member read the papers and listened to the presentations. But I am quite satisfied that by the time the vote was taken the proposal had been the subject of prolonged and detailed consultation and consideration. The members of the Board had, or had access to, all the important material. The key questions and arguments had clearly been highlighted and identified to them. I have no reason to suppose that their approach did not substantially accord with the approach required by regulation 5 as I have described it in paragraphs 59 - 62 above. For these reasons the challenge under ground 2 fails, and although I have heard sustained argument upon it, I do not consider that it was ever objectively arguable. I refuse the renewed application for permission to apply on ground 2.

**Outcome**

86. It follows that I refuse this claim for judicial review. I appreciate that that will deeply disappoint Ms Milner and the many objectors in the affected area, to whose position I am sympathetic. However it is important to stress that our democratic parliament decided long ago that water can, in certain circumstances, be fluoridated. As I have endeavoured to show, and contrary perhaps to the belief of Ms Milner and others, it is not the law that fluoridation can only occur when a majority of the local population agree. Parliament has firmly entrusted area-specific decision making to the relevant SHA. This SHA have not acted unlawfully and no court can interfere with their decision.

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