IN THE HIGH COURT OF JUSTICE **CO/ 303/2021**
ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR
JUDICIAL REVIEW

BETWEEN

THE QUEEN
on the application of
PHILIP MATHIAS

Claimant

-v-

THE SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE
and
NHS ENGLAND

Defendants

CLAIMANT'S RESPONSE TO DEFENDANTS' SUMMARY GROUNDS

Introduction

1. The Defendants' 'Summary Grounds', at 23 and 38 pages respectively, cannot sensibly be described as summary. They are neither "*as concise as possible*"[1] nor have they been prepared having regard to the requirement to not incur "*substantial expense*" found in the Practice Note of Carnwath LJ in *R(Ewing) v Office of Deputy Prime Minister* [2005] EWCA Civ 1583; [2006] 1 WLR 1269[2]. The rules anticipate "*an outline of the grounds of defence*" not substantial

[1] Administrative Court Judicial Review Guide 2020, para 7.3.1.1
[2] See note in White Book at CPR 54.8.2. Also note that the edict not to incur '*substantial expense*' has not been complied with in this case, D1's schedule of costs being for £9,404 and D2's costs being £22,987.50.

documents of the sort the Defendants have provided under the guise of 'summary grounds' (see Ewing at [43] and the Bowman Report cited by Carnwath LJ at [15]). In their prolix so-called 'summary grounds' the Defendants raise many issues that fairness demands the Claimant has an opportunity to respond to. The Court is accordingly invited to carefully consider this document when deciding whether to grant permission.

2. The Defendants' focus is primarily on procedural issues which the Claimant ('C') address firstly before responding to the cursory consideration the Defendants ('D1' and 'D2') give to the substantive issues.

Procedural Issues

3. The following procedural issues are raised by the Defendants:
    a) Standing
    b) Time
    c) Admissibility of Evidence/Parliamentary Privilege
    d) Alternative Remedy

Standing

4. C puts his case on standing succinctly in his Grounds at [6] (Bundle at A10) where he demonstrates that he falls squarely within the parameters set out by the House of Lords in the leading case on this issue, ('the IRC case'). D1 says, at [5] that C does not have standing, a personal interest in CHC not being sufficient. D1 also says the claim is nothing to do with his mother's circumstances nor is he representative of another person or group. Neither of these points demonstrate that C does not have standing and are contrary to the approach approved by Lord Diplock in the IRC case. The points made by D1 at [6] are also misconceived. Alternative remedy (dealt with below) is irrelevant to standing and D1 is unable to point to anyone who is "*obviously better placed*" to bring this challenge. Indeed, it is difficult to see who would be "better placed" to bring this claim than C.

5. D2 says at [55] that C lacks standing because "*the merits of the claim are weak*". The *McCourt case* at [31] – [32] which is cited as authority for the proposition

that merits are relevant to standing says no such thing. The submission is misleading.

6. Neither D1 not D2 provide any cogent reason to rebut C's assertion that he has standing to bring this claim[3].

Time.

7. C recognises that insofar as he challenges the lawfulness of the DST he requires an extension of time, see C's Grounds at [12] (Bundle at A12). D1 sets out at [9] C's involvement in CHC issues to support its proposition that C is 'out of time'. It is of course not controversial that C brings his claim more than three months after the promulgation of the DST in March 2018. It says nothing about whether the Court should extend time to bring this claim. D1 then goes on at [10] to say that "*there is obvious and serious prejudice is a challenge to the DST is permitted so long out of time*", the prejudice said to be that tens of thousands of decisions have been taken in the ensuing period. It is not however contended that D1 will be prejudiced by the passage of time in the sense that it will not be able to defend this claim due to the elapse of time. The fact that if this claim is successful it may have retrospective implications is not a good reason not to extend time, especially when the concern of C (and the Court) is to uphold the rule of law. If D1 was correct then it is impossible to see when a claimant could bring a systemic challenge to what is said to be an unlawful policy or practice of a public body.

8. In fact, the delay in bringing this claim has been due to C's efforts to address his concerns by other means. After a long battle with his local CCG over payment for his mother's care C (a) wrote to the Secretary of State in March 2019 (b) in May 2019 engaged the Metropolitan Police Commissioner (c) engaged with a colleague over a petition calling for a public inquiry into what he describes as the CHS scandal which was refused in May 2019 (d) corresponded with the EHRC in July 2019 (e) in December 2019 wrote to the

[3] The approach contended for by C is consistent with that of Chamberlain J in his judgment of 18 February 2021 in *R(Good Law Project and others) v The Secretary of State for Health and Social Care* [2021] EWHC 345 (Admin) at paras [104] – [108].

Prime Minister and (f) in August 2020 published a booklet setting out his research on CHC funding supporting his ongoing concerns and (f) in October 2020 engaged solicitors to write pre-action correspondence and then had to raise sufficient funds before issuing proceedings in January 2021[4]. It is clear that C sought to exhaust every possible avenue before issuing these proceedings, a factor that should weigh heavily in his favour in his application for an extension of time.

9. Contrary to the Assertion of D2 that there is no evidence whatsoever to support C's application for an extension of time it is clear from paras 7-10 of his witness statement that he had made extensive efforts to resolve this matter before issuing proceedings.

10. Given the public interest in this matter, the efforts made by C prior to issuing proceedings and the lack of any prejudice to either D1 or D2 the Court is invited to make the order sought to extend time for C to bring this claim.

Admissibility of Evidence/Parliamentary Privilege

11. D1 makes the assertion at [40] that the evidence before the Public Accounts Committee relied on by C "*is subject to Parliamentary privilege and cannot properly be relied on in these proceedings*". It relies on the *Information Commissioner case* at paras 48 and 58-59 to support that proposition. The paragraphs relied on are set out as an appendix to this document for ease of reference. In the *Information Commissioner case* Stanley Burnton J makes clear that the admissibility of Parliamentary materials depends on the purpose for which they are being used. There is no general rule that such materials are inadmissible as is implied by D1.

12. The underlying principle with respect to Parliamentary privilege is found in Article 9 of the Bill of Rights with which Stanley Burnton J was concerned in the Information Commissioner case. Although D1 does not rely on Article 9, D2 does, see [66]-[70]. Despite D2 saying at [70] that "*the privilege afforded by*

[4] See witness statement of Philip Mathias (Bundle at B1).

Article 9 to evidence provided to Parliament is well-established" it does not actually confront the words of Article 9.

13. Article 9 of the Bill of Rights says, *"… The freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament*". The simple point here to emphasise is that C does not in these proceedings seek to "*impeach or question*" anything said or debated in Parliament. He merely relies on the evidence before, and the findings of, the Parliamentary Committee.

14. This issue was considered recently by the Court of Appeal in *R(Project for the Registration of Children and British Citizens and another) v Secretary of State for the Home Department* [2021] EWCA Civ 193, 18 February 2021. The question in that case was whether the Secretary of State could rely on Parliamentary materials to show that she, in fixing a fee for a child to register as a British citizen, had proper regard to the need to safeguard and promote the welfare of children as required by s.55 of the Borders, Citizenship and Immigration Act 1999. The Court of Appeal unanimously decided that she could not because, as David Richards LJ said at [108],

> *"…. The court was required to assess, by references and issues raised by members of both Houses and by reference to the answers and statements given and made by ministers, whether the Secretary of State had in the course of debates performed her duty. In my judgment, it was a use which was prohibited by Article 9 and by the general principles of parliamentary privilege and did not fall into any of the recognised exemptions. …."*

15. The 'recognised exceptions' referred to David Richards LJ are those set out by the Court of Appeal in *R(Heathrow Hub) v Secretary of State for Transport* [2020] EWCA Civ 13 at [158]. It is notable that both Defendants have chosen to rely on a first instance judgment from 2008 (the *Information Commissioner case*) rather than the Court of Appeal judgment given in 2020 on this issue.

16. Whilst it can readily be seen that the Parliamentary materials sought to be relied on in the British Citizens case "*impeached or questioned*" what was said in Parliament the same cannot be said here. C merely relies on the facts as provided to and found by the Committee. Accordingly, the Defendants' contention that these materials are inadmissible is misconceived.

Alternative Remedy

17. D1 says at [6] that "*a person aggrieved by a particular decision in respect of eligibility for CHC (after exhausting the existing alternative remedies including internal review, complaint to NHS England and if necessary the Health Service Ombudsman) apply for permission to claim judicial review if the decision is unlawful*". Although that submission is made in the context of standing it nevertheless suggests that alternative remedies to judicial review are available for persons aggrieved about CHC decisions. Whilst that may be correct it is irrelevant here as C does not challenge an individual CHC decision. There is no alternative to judicial review for his challenge to the DST and the systemic unlawfulness of the CHC decision-making. This is made clear in C's Grounds at para [60].

Substantive Issues

18. C raises two substantive issues in his claim. Firstly, he claims that the DST is (a) routinely not informed adequately or at all by the multi-disciplinary assessments required by law in order to make properly informed decisions and (b) provides a 'scoring system' that is irrational. As NHS England has "*the function of arranging for the provision of services*" pursuant to s.1H of the NHS Act (Grounds para [13]) it, D2, is responsible for the CHC decision-making and is accordingly the appropriate defendant with respect to issue (a). This is made clear at para [47] of C's Grounds. As the DST is issued by the Secretary of State he is responsible for ensuring that such guidance is lawful. Accordingly, he, D1, is the appropriate defendant with respect to issue (b).

19. The second issue raised by C is that there is an unacceptable risk of unlawfulness in the decision-making for CHC funding. Given the concurrent functions of both defendants under s.1 and s1H of the NHS Act 2006 to provide

a comprehensive health service and ensure that services provided as part of the health service are provided free of charge, except where expressly provided for, (see C's Grounds at para [13]) both D1 and D2 are responsible for CHC funding decisions being made in a lawful manner. Accordingly, both D1 and D2 are defendants with respect to this second issue.

20. C makes crystal clear in his Grounds the issues with respect which defendant is challenged, see C's Grounds at paras [47] and [59].

21. At para [13] of C's Grounds he sets out the respective statutory roles of the Secretary of State and NHS England. At para [3] of D2's Summary Grounds it sets out the same provisions and then says at para [4], "*the Claimant nowhere engages with that scheme*". D2 is obviously wrong.

22. At para [14] of C's Grounds he refers to s.1H of the NHS Act and the creation of CCG's and then goes on to detail the relevant provisions concerning CCG's in the 2012 Regulations. At para [5(1)] of D2's Summary Grounds it refers to the 2012 Regulations and then says, "*the Claimant wholly fails to engage with that scheme.*" Again, D2 is obviously wrong.

23. Those drafting D2's 'Summary Grounds' have therefore either not read C's Grounds properly or have misled the Court. Their failure to properly read C's Grounds is why they apparently do not understand the case against them. At para [51], they say, *"so far as NHSE understands the Claimant's Grounds ….*". That may explain why D2 is under the misconception that it is not the correct defendant because CCGs make CHC decisions, see D2's Summary Grounds at para [57]. However, at para [7] of C's Grounds he says, "*Given that the central role that the DST has in the decision-making process it would be pointless to challenge individual decisions of CCGs as the systemic problem lies with the DST and the lack of proper oversight by the Defendants to ensure that lawful decisions are made*".

24. A further concern arises from the para [82] of D2's 'Summary Grounds' where it says, "*The Claimant's presentation of supposed variation data on CHC eligibility rates in different CCG area fails to recognise that the figures the*

Claimant have used include Fast Track CHC". At para [56] of C's Grounds he says, "*a further issue of concern for the Claimant is the declining numbers of people found to be eligible for standard (as opposed to 'fast-track') CHC funding since 2015*" (emphasis added). This is based on the figures he analyses and presents at PM3, particularly at B28 and B29 where C specifically deals with standard and fast track decisions using data from the Spinal Injuries Association. He clearly 'recognises' the fast-track CHC process and so we see that once more D2's submissions are misleading and wrong. D2 goes on in its para [82] to say that C "*compares apples with pears*" but the reasons he gives for this have nothing whatsoever to do with the fast-track procedure.

25. D1's 'Summary Grounds' are however drafted in a more temperate and considered manner. With respect to the challenge against him he says, in summary:

a) Ground 1 - the lawfulness of the DST

- It is denied that DST decisions are not properly informed or that there is a 'tick-box' exercise, 'Summary Grounds' at paras [39]-[40]. A C makes clear at para [47] of his Grounds (see para [18] above] this aspect of claim does not concern the Secretary of State,
- The rationality of the DST is addressed at paras [41] – [45] of D2's Summary Grounds where he makes 4 points. None of these points answer the challenges set out in C's Grounds on this issue in his Grounds at paras [34] – [46] which are not repeated here. The 4 points made by D1 are:
    i. The features of the DST complained of have been in place since 2007 and have been consulted on. This is irrelevant to the reasons why C says the DST is irrational;
    ii. The National Framework says that the DST is intended to be used a tool to support assessment. That may be so but it is apparent that the DST is 'crucial' in deciding whether a person is eligible for CHC funding, see eg judgment of Mostyn J in the JP case, C's Grounds at paras [37]-[38];

iii. Any needs not captured by the domains can be captured using the 12th care domain. This says nothing about the rationality of the care domains proscribed in the DST. A general catch-all cannot make rational the otherwise irrational scheme;

iv. It is said that the purpose of the DST is not to identify needs that will 'automatically' entitle someone to CHC. This fails to recognise that the DST itself contains a presumption that certain scores will give rise to a primary health need which will in turn give rise to entitlement to CHC funding, see paras [31] and [32] of DST set out in C's Grounds at para [20]. This was understood by Mostyn J to mean in the context of a children's case which has a very similar process, "*if a child scores one severe mark or three high marks her or she will be designated as "eligible" for continuing care,*" (C's Grounds at [38]).

- D1 not having any cogent response to C's claim on this issue it is appropriate for permission to be granted.

b) Ground 2 – the unacceptable risk of unlawful DST decisions.

- D1 deals with issue at paras [47] – [64] of his 'Summary Grounds'.
- He says that C has failed to identify what is inherently wrong with the CHC decision-making system. However, C makes clear in his Grounds and evidence the inherent problems with the system which are arbitrary and unfair decision-making. This is particularly clear from para [4] of his witness statement and the August 2020 booklet that he produced and exhibits at PM/2, (Bundle B13) which the Court is referred to.
- D1 then says that the evidence relied on falls short of establishing a system risk of illegality. It is perhaps not surprising that he would take that view, but the evidence is overwhelming that there is a worryingly high incidence of unlawful decisions. Not only is this apparent from C's August 2020 booklet, we also see it

evidenced in the reports of the Public Accounts Committee, the National Audit Office and the other bodies referred to at para [50] of C's Grounds.

- The apparently sanguine approach of D1 is surprising given the widespread public concern about this issue. By way of example D1 says at para [63] of its Grounds that a decrease in the number of persons assessed to be eligible does not begin to show that assessments are systemically unlawful. It may not of itself show systemic unlawfulness, but it does indicate that unlawful decisions are routinely being made in circumstances where there is an increasingly elderly population who obviously have greater healthcare needs. The fact that there are more elderly people and less people being found to be eligible for CHC funding strongly suggests a systemic problem in this decision-making.
- The copious evidence of unlawful and poor decision-making with respect to CHC funding demonstrates a real unacceptable risk of systemic unlawfulness. D1 has not begun to counter this copious evidence with any explanation as to why so many CHC funding decisions are wrongly made. C contends that the point is therefore strongly arguable, and permission should be granted on this issue also.

26. For the reasons given above it is appropriate to grant permission against D1, the Secretary of State, on both Grounds.

27. With respect to the challenge against D2 it says, in summary:

a) <u>Ground 1 - the lawfulness of the operation of the DST</u>

- D2's point here appears to be that the evidence on which C relies upon is inadmissible as it is contrary to Article 9 of the Bill of Rights. For the reasons outlined above this is misconceived.
- Given the plethora of admissible evidence to support C's case this point is plainly arguable and permission should be granted.

b) Ground 2 - – the unacceptable risk of unlawful DST decisions.

- D2 says, at [75] of its 'Summary Grounds' that "*the systemic breach line of authority, including those authorities cited by the Claimant are concerned with an unacceptable risk of the procedure adopted within the scheme. It is not concerned with substantive outcomes from that scheme …"*. This fails to recognise that procedural unlawfulness may, and often does lead to unlawful outcomes. For example, in the *Suppiah* case (cited by C at para [31] of his Grounds), an unlawful procedure could lead to unlawful detention of refugees. Similarly, here, an unlawful procedure for determining eligibility for CHC funding may lead to an unlawful denial of CHC funding.
- D2 says at [81] of his 'Summary Grounds' that the basis for this challenge is "*the degree of variation in eligibility rates between some CCGs*". That however ignores the findings of the Public Accounts Committee, the Audit Commission and others who have found high levels of unlawful decision-making in CHC eligibility decisions. The National Audit Office found that "*There is significant variation between CCGs in both the number and proportion of people assessed as eligible for CHC and there are limited assurance processes in place to ensure that eligibility decisions are consistent, both between and within CCGs*", (cited in C's August 2020 paper at B15). The evidence is clear, wrong decisions are not 'aberrant' but are widespread. The variation in eligibility rates is a symptom of that widespread making of unlawful decisions.
- D2 asserts at para [84] of its 'Summary Grounds' with no evidential support that "*the overall numbers of cases assessed as eligible for CHC have increased each year since 2011*". This is contrary to the careful and documented research of C. NHSE guidance on how CHC Activity levels should be recorded by CCGs says, *"All Activity refers to the numbers of cases. In the case of Snapshot Activity this will always translate into numbers*

of people. For Cumulative Activity it's possible for more than one case for the same individual to be included." D2 makes no attempt to contest C's analysis and graphs in his witness statement PM3 paras 2 to 11, (Bundle pages B23-B26) which use Snapshot data (which translates into the number of people). These graphs show unequivocally a marked reduction in CHC eligibility numbers since 2015, both in absolute numbers and the numbers per 50,000 of population, when eligibility numbers had previously been rising. Accordingly, the assertion made by D2 at para [84] of its 'Summary Grounds' is wrong.

- The fundamental problem D2 faces is that it can only claim that there is no evidence of widespread unlawful decision-making if it can hide the evidence of the same by its ill-conceived submission that it is inadmissible. The Public Accounts Committee found that "*NHS England is not adequately carrying out its responsibility to ensure CCGs are complying with the legal requirement to provide CHC to those who are eligible*" (cited in C's August 2020 paper at B15).
- Given the weight of evidence of wide-spread unlawful decision-making presented by C there is clearly a strongly arguable case of an unacceptable risk of unlawfulness. As such permission should be granted.

28. For the reasons given above it is appropriate to grant permission against D2, NHS England, on both Grounds.

Cost Capping Order.

29. At para [12] of his witness statement (Bundle at B5) C says, "*It is clearly in the public interest for this legal challenge to proceed but without this cost capping order, I would be forced to withdraw*". D2 responds at para [88] of its 'Summary Grounds' that "*the Court should not accept the bare assertion that he would withdraw the proceedings if a CCO were refused …*". **The suggestion that C, a retired Rear Admiral, is lying to the Court is both unfounded and preposterous. D2 is invited to either explain why C should not be**

believed or withdraw its suggestion that he is not telling the Court the truth, ie lying. The fact is that if the Court does not make a costs capping order C will be driven to withdraw his claim. His evidence is unequivocal.

30. D2 says the court should refuse to make a CCO because the requirements for such an order are not met, D2's 'Summary Grounds' at para [86]. The reasons it gives are:

    i. Although D2 accepts that compliance with the CHC scheme is of general public importance it says that these proceedings are not an appropriate means of resolving it, para [87]. Given that the grant of permission is a pre-condition of there being a CCO this is an arid point. The implication of what D2 says is of course that if permission is granted the Court is content that the application is an appropriate means of addressing this matter of general public importance and therefore this limb of the test for a CCO is met;

    ii. The second reason for not granting a CCO is that D2 does not believe C when he says that he would withdraw the claim if a CCO is not made. This spurious claim has no credibility, see para [29] above;

    iii. The third reason is that apparently there are other, unnamed charitable and advocacy organisations who would be more appropriately placed to bring such a claim, para [89]. As D2 does not (because it cannot) name any other person or body who is better placed than C to bring this claim this point is nonsensical. In any event C is very well placed to bring this claim given his experience and research;

    iv. Fourthly D2 contends that the £10,000 costs cap "*is neither fair not proportionate*", para [90]. This of course is not a reason why the requirements for a CCO are not met but goes to the sums included in such an order. True it is that C has raised money by Crowdfunding but that is nowhere near enough to pay both his costs and those of the defendants. As Ousley J said in the *Beety case* (cited at para [73(iv)] of the Claimant's Grounds, it would not be fair for public law solicitors, who already face funding difficulties to be expected to work pro bono. Neither defendant addresses this important point made by Ousley J. D2 then goes on to say that it was the choice of C to bring a claim against two

defendants and so a single cap would be "*manifestly disproportionate*". C would obviously much rather have been able to bring this claim against one defendant but the structure of the NHS since the 2012 reforms means that if he is to bring this claim then the defendants must be those public bodies with the responsibilities for the unlawfulness alleged. C had no choice but to make this claim against two defendants. Given that the purpose of CCOs is to protect appropriate claimants and ensure that matters of public interest are properly litigated a single CCO is entirely appropriate. To suggest that it is "manifestly unwarranted" is uncalled for hyperbole.

v. The last point made by D2 is that s.89(1)(d) requires consideration of whether C's legal representatives are acting free of charge, para [91]. That is correct but acting free of charge is not a necessary condition nor is it, as Ousley J made clear in the *Beety case*, a reasonable expectation for public law solicitors. It is notable that neither defendant comments on the *Beety case*.

31. D1, unlike D2, does not cast aspersions about C's truthfulness. He is right not to do so. He nevertheless makes a number of points in relation to the application for a CCO in paras [68] – [70] of his 'Summary Grounds'. At para [68] he makes the surprising submission that these are not '*public interest proceedings'*. This is patently incorrect; these are quintessentially public law proceedings. The Ombudsman is not able to resolve these important matters of law.

32. It is correct that it cannot be known whether anyone subscribing to C's Crowdfunding page has a private interest in this matter. C has no idea who contributes to the fund. All he can see is that it creeps up by small sums from time to time[5]. D1 is unable to point to anyone who has contributed who has a private interest in this matter. D1 then says that he does not accept that C is

[5] C says that at the time he made his statement over 1400 individual donors had contributed to his Crowdfunding appeal, see witness statement of Philip Mathias at para [9], (Bundle at page B4)

an appropriate person to bring this challenge because he does not have standing. For the reasons given above he is wrong on this.

33. Neither D1 not D2 has given any good reason why a CCO should not be made in this case or why a CCO in the terms sought should not be made.

IAN WISE QC
Monckton Chambers
24 February 2021

Office of Government Commerce v Information Commissioner (Attorney General intervening)

Positive/Neutral Judicial Consideration

Court

Queen's Bench Division (Administrative Court)

Judgment Date

11 April 2008

Report Citation

[2008] EWHC 774 (Admin)

[2010] Q.B. 98

ICLR

Administrative Court
Stanley Burnton J
2008 March 3, 4, 5; April 11

….

48. In my judgment, the irrelevance of an opinion expressed by a parliamentary select committee to an issue that falls to be determined by the *116 courts arises from the nature of the judicial process, the independence of the judiciary and of its decisions, and the respect that the legislative and judicial branches of government owe to each other.

….

58. In addition, in my judgment, there is substance in Mr Chamberlain's further submission, summarised at para 23(b)(i) above. If a party to proceedings before a court (or the Information Tribunal) seeks to rely on an opinion expressed by a select committee, the other party, if it wishes to contend for a different result, must either contend that the opinion of the committee was wrong (and give reasons why), thereby at the very least risking a breach of parliamentary privilege, if not committing an actual breach, or, because of the risk of that breach, accept that opinion notwithstanding that it would not otherwise wish to do so. This would be unfair to that party. It indicates that a party to litigation should not seek to rely on the opinion of a parliamentary

committee, since it puts the other party at an unfair disadvantage and, if the other party does dispute the correctness of the opinion of the committee, would put the tribunal in the position of committing a breach of parliamentary privilege if it were to accept that the parliamentary committee's opinion was wrong. As Lord Woolf MR said in *Hamilton v Al Fayed [1999] 1 WLR 1569* , 1586 g , the courts cannot and must not pass judgment on any parliamentary proceedings.

59. If it is wrong for a party to rely on the opinion of a parliamentary committee, it must be equally wrong for the tribunal itself to seek to rely on it, since it places the party seeking to persuade the tribunal to adopt an opinion different from that of the select committee in the same unfair position as where it is raised by the opposing party. Furthermore, if the tribunal either rejects or approves the opinion of the select committee it thereby passes judgment on it. To put the same point differently, in raising the possibility of its reliance on the opinion of the select committee, the tribunal potentially made it the subject of submission as to its correctness and of inference, which would be a breach of parliamentary privilege. This is, in my judgment, the kind of submission or inference, to use the words of section 16(3) of the Parliamentary Privileges Act 1987 , which is prohibited.

….