

CO/3229/10

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

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 10th December 2010

B e f o r e :

MR JUSTICE BURTON

Between:

**THE QUEEN ON THE APPLICATION OF ASSOCIATION FOR INDIVIDUAL AND
GROUP_**

Claimant

v

HEALTH PROFESSIONS COUNCIL_

Defendant

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(Official Shorthand Writers to the Court)

Mr D Rose QC & Mr I Steele (instructed by Bindmans) appeared on behalf of the
Claimant

Mr M Fordham QC & Ms J Boyd (instructed by Bircham Dyson Bell) appeared on behalf
of the **Defendant**

P R O C E E D I N G S

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1. MISS ROSE: I appear with Mr Steele for the claimants and my learned friends, Mr Fordham and Ms Boyd. As your Lordship will have seen this is an application for permission for judicial review which was adjourned to an oral hearing by Beatson J.
2. MR JUSTICE BURTON: I have seen the order.
3. MISS ROSE: Your Lordship will have seen the particular concern of Beatson J was the delay question should be considered at an oral hearing.
4. MR JUSTICE BURTON: He left the merits open as well.
5. MISS ROSE: We sought to obtain agreement from the defendant they would not seek to argue that the claim is unarguable but they have declined to do that.
6. MR JUSTICE BURTON: I see that. It seems clear that their case is that the two are intertwined or at least.
7. MISS ROSE: My case is that the two are intertwined. My case is that because there is in fact a key dispute, factual dispute between the parties about what was actually decided on 13th December 2007, that the question of delay cannot be resolved independently of the question of the merits.
8. MR JUSTICE BURTON: We will have to see whether he shares your view. I suspect that the reason why he wants to preserve the merits is because he says once the merits are understood correctly, you are out of time. So we are going to look at it.
9. It may save matters if I just tell you where I have got to. I have been, as always been very assisted by both of your skeletons. You have four grounds. The first three interrelate with the time point, the fourth does not, as I understand it. The first three are that, they have acted ultra vires 3(17)(a). The second is that they have not acted in accordance with the decision of the December 07, and the third is that they have not complied with their guidelines. The expectation point, if that is what it is, that there would be a final meeting at PLG, plainly it does not arise until they did not have a final meeting.
10. MISS ROSE: It could not arise until the 10th December 2009.
11. MR JUSTICE BURTON: You are not out of time on that.
12. Now what I would be grateful for you to do, if you could, if I can mention what seems to be the stopping points in the light of the arguments between the two of you and make sure that I have understood them. D161, or the starting and starting D161, is where it starts, this is the White Paper the trust, assurance and safety:

"With the exception of the new arrangements for the regulation of pharmacy, the Government [there will not be any new regulators]. Psychologists, psychotherapists and counsellors will be regulated by the Health Professions Council [so they appear to have made up their minds

that is who it would be] following that Council's rigorous process of assessing their regulatory needs and ensuring that its system is capable of accommodating them. This will be the first priority..."

That is February. Then we go to December. We have E10, which is the defendant's agreement that they would commence a proactive process. This is as compared with page 5, their statement that normally they wait for applications to be received:

"Proactive process to investigate and make recommendations on the statutory regulation. They should establish the PLG preceded by 3 months of research and they will be aware of issues of concern to those within the profession not in favour of statutory regulation. At this stage it had not taken any decision as to how these groups should be regulated."

So that is December.

13. Now, you say, as I understand it in answer to the time point, you are not worried about that because they have not gone off the rails at this stage.
14. MISS ROSE: That is right my Lord.
15. MR JUSTICE BURTON: Then we come to forward to E151, if that is right, E151, where it is stated:

"The role of the PLG was to discuss and make recommendations about how psychotherapists and counsellors might be regulated, in light of the conclusions made in the White Paper [which as I understand it include the conclusion that the regulator would be a PC]. Any final decision about regulations is one for the government."

So it is 151. Then we go to 209, which is 10th December 2009, "Conclusions on the proposed statutory regulation of psychotherapists and the counsellors" and this is the--

16. MISS ROSE: This is the paper that is placed before the meeting rather than decision.
17. MR JUSTICE BURTON: The paper before the meeting. Then we get the conclusions.
18. MISS ROSE: The conclusion starts at page 285.
19. MR JUSTICE BURTON: Then we get the conclusion at 293:

"Whilst there was further work to be done in certain areas, the Council were satisfied that the HPC's systems were capable of accommodating..."

Then we get their letter to the government at 305.

20. MISS ROSE: That is correct.

21. MR JUSTICE BURTON: What I would be grateful for you to make sure I understand, at any rate sufficient for arguability and of course the time point, is what went wrong on your case, after I suppose either February or December 2007.
22. MISS ROSE: Yes my Lord.
23. MR JUSTICE BURTON: Have I got the general context?
24. MISS ROSE: Your Lordship has got the general thrust of the chronology actually provided. Can we start with the background to this case, which is the disagreement on the question of whether the HPC in principle is an appropriate regulator for psychotherapists.
25. MR JUSTICE BURTON: Yes. I had understood that that is why I concentrated, as Mr Fordham invited me to do in the skeleton, on appreciating that as far as the White Paper was concerned it was to the HPC.
26. MISS ROSE: I am going to come back to that point. We submit in fact when you read the White Paper in context it is not as simple as that.
27. MR JUSTICE BURTON: Whether in principle it should be the HPC.
28. MISS ROSE: My Lord, that issue is developed in considerable detail in a report known as the Maresfield Report which is at tab F. Now we do not need to go through this in any detail but this is a report that was produced in October of 2009 which explains the principal reasons why a number of groups who are involved in counselling and psychotherapy do not consider that the HPC, which essentially regulating medical professions is not appropriate for these types of therapy.
29. MR JUSTICE BURTON: I have read -- I have forgotten his name -- Mr Lamb, his witness statement.
30. MISS ROSE: Leader. In particular your Lordship will see at pages 10 and 11 under tab F, the explanation.
31. MR JUSTICE BURTON: My file has, in the traditional way, fallen to pieces.
32. MISS ROSE: I am very sorry about that.
33. MR JUSTICE BURTON: If there, as we speak, there happened to be another file I could feed this into I think it will speed matters up. Otherwise I shall be struggling.
34. MISS ROSE: We will see if we can rustle up a ring binder. (Pause) An act of great self sacrifice.
35. MR JUSTICE BURTON: That is very kind. The self sacrifice will be repaid by me not taking quite so long to turn from one page to the other.
36. MISS ROSE: Yes, it is extremely irritating.

37. MR JUSTICE BURTON: Thank you. Where are we going to F?
38. MISS ROSE: Tab F pages 10 to 11. I have just to show to your Lordship to explain some of the background.
39. MR JUSTICE BURTON: Yes certainly. Hang on.
40. MISS ROSE: The top of page 11, top of page 11.
41. MR JUSTICE BURTON: I am going to get rid of all this and then we will move on. Yes, top of page 11 at F.
42. MISS ROSE: In the Maresfield Report.
43. MR JUSTICE BURTON: Yes thank you.
44. MISS ROSE:

"The HPC Standards of Proficiency may be suitable for some health professions, but will change radically the framework of current psychotherapy practice. Many therapists do not see their work as involving set outcomes, or data gathering, or problem solving, or drafting management plans for the health of their patients, or applying possibly unacceptable systems of of classification of 'disease' or 'dysfunction'."

They go on to explain the approaches of different schools of therapy, including between the bullet points that:

"Many clinicians who do not subscribe to the healthcare model see their work as an exploration of the human condition, a journey in the same sense that becoming a Buddhist monk involves of questioning..."

And so on. One sees an explanation -- I wanted to show that to your Lordship, there has with the HPC sometimes been a tendency for it to suggest that these professions are seeking to avoid regulations for discreditable reasons. I simply want to make the point.

45. MR JUSTICE BURTON: Rather the reverse as I understand it.
46. MISS ROSE: There are good strong principles reasons why they do not consider the HPC is the appropriate regulator for the type of the work they do.
47. MR JUSTICE BURTON: Dr Leader wants regulation.
48. MISS ROSE: Yes, not necessarily pursuant to section 60 and not necessarily by the HPC.
49. MR JUSTICE BURTON: No. What I would like just brief help, so I have it in my mind as we go along, why the White Paper did not really not set in stone, but certainly set in stone--

50. MISS ROSE: I am going to come to that in a moment.
51. MR JUSTICE BURTON: -- from the point of view of the defendant.
52. MISS ROSE: I understand that is the view that they now take. In my submission it is not the right reading of the White Paper and indeed was not the view that they took when they originally--
53. MR JUSTICE BURTON: As late as November you have that meeting, when he said it may not be the HPC.
54. MISS ROSE: Indeed my Lord.
55. Before we come to the factual history, which is of course crucial, I do want very briefly to show your Lordship the legislative framework.
56. MR JUSTICE BURTON: Yes please.
57. MISS ROSE: If we go to tab B in this bundle, there is an extract from the Health Act 1999. Section 60 regulation of the Health Care and Associations Professions, page 1.
58. MR JUSTICE BURTON: I have highlighted it, yes.
59. MISS ROSE: So:
- "(1) Her Majesty may by Order in Council make provision...
- (b) regulating any other profession which appears to Her to be concerned (wholly or partly) with the physical or mental health of individuals and to require regulations in pursuance of this section."
60. MR JUSTICE BURTON: Is there another section under which you could be regulated? You said "not necessarily" under 69(1)(b).
61. MISS ROSE: My Lord, I am not aware of the answer to that, as a matter of statutory authority but our submission is that it is not clear that there is even power under section 60 because the two conditions required to be satisfied. First, it is concerned wholly or partly with physical or mental health. Not all of those covered by these organisations will accept that is what they are concerned with. Secondly, of course, the key question which is the focus of this application which is they must require regulation under section 60.
62. So that then leads us to the 2001 Order, which is the order that creates the defendant and establishes its functions. Your Lordship has that at page 11, behind tab B the "Health Profession Order 2001" the ordering council. If we go to page 12, Article 3.
63. MR JUSTICE BURTON: I have it.
64. MISS ROSE: Article 3(1) establishes the Health Professions Council, the defendant in this case. There shall be a corporate known as the Health Professionals Council:

"The principal functions of the Council to establish from time to time standards of education, training, conduct and performance for members of the relevant professions and to ensure the maintenance of those standards."

That term "relevant professions" is defined to at schedule 3 to this Order. Your Lordship has that at page 93.

65. MR JUSTICE BURTON: That I have not looked at.

66. MISS ROSE: The bottom of page 93:

"relevant professions' means arts therapists; [biomedical scientists;] [chiropractors and podiatrists;] clinical scientists; dietitians; ... occupational therapists; [operating department practitioners;] orthoptists; paramedics; physiotherapists; [practitioner psychologist;] prosthetists and orthotists; radiographers; and speech and language therapists;"

Your Lordship will note of course not psychotherapists or councillors. So they are not currently a relevant profession. This is this relevant to vires point, because the position that was taken by the HPC in pre-action correspondence. It is not clear to us whether it still is the position, is that they had the power to act as they did under incidental powers at which we are going to look which give them the power to act incidentally to their functions. The first point to note is that their functions here are in relation to the relevant professions. The relevant professions do not include these professions.

67. We then come to Article 3(3):

"The Council shall have such other functions as are conferred on it by this Order or as may be provided by the Privy Council by order."

So the functions of the Council are exhaustively prescribed by this order or by other orders made by the Privy Council.

68. MR JUSTICE BURTON: I have lost that.

69. MISS ROSE: That is Article 3(3). So Article 3(2) sets out the principal functions which are only in relation to the relevant profession, which do not include these professions and 3(3) exhaustively their functions are those provided by a (inaudible) orders.

70. Then we come to Article 3(12) at the bottom of page 13. This is the power to establish Committees:

"The Council-

(a) may establish such other committees as it considers appropriate in

connection with the discharge of its functions."

That would be the power to establish, for example, the PLG in this case:

"(b) may, in particular, establish professional advisory committees whose function is to advise the Council and its statutory committees ... on matters affecting any relevant professional..."

Then we go to Article 3(17):

"The Council may--

(a) make recommendations to the Secretary of State [and the Scottish Ministers] concerning any profession which in its opinion should be regulated pursuant to section 60(1)(b) of the Health Act 1999..."

71. MR JUSTICE BURTON: That could be a profession which is not presently listed.
72. MISS ROSE: Yes, that is an expressed power, an unusual power for a regulator, an expressed power for a regulator to make a recommendation for the Secretary of State that another profession should be taken under its--
73. MR JUSTICE BURTON: As long as it is a profession that falls within 60(1)(b).
74. MISS ROSE: The precondition is that in the opinion of the HPC, your Lordship sees "in its opinion" that that professional should be regulated pursuant to 60(1)(b). The core submission that we make that in order to exercise that power it is necessary for the HPC to form the opinion that the profession should be regulated. Your Lordship see the two requirements that that entails. Firstly, that it concerned with wholly or partly with physical and mental health. Secondly it requires regulation under section 60.
75. MR JUSTICE BURTON: You are saying it is not a profession, naturally I suppose because you are not regulated. It is not a relevant profession already regulated or falling to be regulated but you could be added but for which purpose. The HPC may make recommendations, if their opinion is that it should be regulated pursuant to section 60(1)(b), ie not if they are simply asked to do it.
76. MISS ROSE: That is the starting point. Then my Lord we submit that 17(a) your Lordship has just been looking at must be read together with 17(b).
77. MR JUSTICE BURTON: Because there is a word "and" is there not?
78. MISS ROSE: Because 17(b):

"The Council may-- make recommendations ...

and

(b) give such guidance as it sees fit, to such persons as seem to it to have an interest in such regulation, on the criteria to be taken into account in

determining whether a profession should be so regulated."

79. MR JUSTICE BURTON: This guidance rather unusually is guidance and criteria not in relation to a profession which is already regulated but it relates to whether, for the considerations as to whether it should be regulated.
80. MISS ROSE: Yes. What it does is give an express power to the HPC to formulate guidance as to the criteria that will be applied in making that decision. As your Lordship knows the HPC has indeed formulated that guidance. It did it following a full public consultation and it did it in 2004. Your Lordship has the guidance at tab C.
81. MR JUSTICE BURTON: There are 8 or 10 categories, page 1.
82. MISS ROSE: Page 1, behind tab C my Lord.
83. MR JUSTICE BURTON: That sets out the 10 headings of the guidelines.
84. MISS ROSE: Yes. My Lord the first point that I want to make about the guidelines is that it has been suggested by the defendant that this guidance and indeed the whole of the regime under Article 3(17) only applies where a profession has asked to be regulated. What is it said these have no application where the HPC itself is deciding the profession to be regulated.
85. Well, the first obvious point that I make is that one simply does not find that in the order. Your Lordship flicks back quickly to Article 3(17), there is simply is not any limitation in relation to the professions that applied to be regulated.
86. MR JUSTICE BURTON: This is your ground?
87. MISS ROSE: This is my ground 1.
88. MR JUSTICE BURTON: The guidance one.
89. MISS ROSE: My Lord I am looking at both--
90. MR JUSTICE BURTON: I understand but your guidance one is ground 3, is it not?
91. MISS ROSE: Yes my Lord. Looking at the guideline point for the moment, they say: this recommendation power does not apply except where a profession applies to be regulated. We say manifestly that is not what the order says. It is a power to make a recommendation and for that purpose to produce guidance giving the criteria to be applied. Then they say the guidance only applies if somebody has made an application. Again, we say there is nothing in the order to say that guidance only applies when there is an application. The guidance is for the purpose of deciding whether or not they are going to make a recommendation. Indeed it is expressed in the guidance itself that guidance does not only apply when a profession has asked to be regulated. If we go to give guidance at tab C. Page 3 of the guidance, bottom of the first column, the top of the first column, your Lordship can see there Article 3(17) is set out. Then it says:

"In line with Article 3(b), this leaflet provides guidance for interested parties on the criteria that the Council will generally apply in deciding whether to recommend the Secretary of State that it should begin regulations profession."

Clearly a general application.

Then at the bottom:

"The Council will generally use a two part assessment as the primary means by which it will decide whether to recommend an occupation for regulation. When notifying its decision to the Secretary of State, the Council will also report on some additional considerations that are explained later on. In the first part of the assessment, it will determine whether it considers a profession is, in principle, eligible to be regulated by the Health Professions Council. [That is the whether in principle question]. This part is designed to ensure that the Council retains a focus on the health, and to a lesser extent the social care, professions. In the second part, it will determine whether, in practice, it should regulate professions that it has determined to be eligible. Normally, the Council will generally apply the criteria in the two parts of the assessment to determine whether or not to recommend a profession for regulation. The Council will make its final decision on whether to recommend an applicant for regulation by a formal vote at a Council meeting."

So we are told a two-stage process, formal vote at a Council meeting. Then this:

"The Council expects that it will generally only assess professions to determine whether to recommend them for regulation if the professions have themselves applied to the Council to be regulated. However, the Council has legal powers to make recommendations even where a profession has not applied, which it could in principle make use of, if it felt this were necessary to protect the public."

92. My Lord, we submit it is simply unsustainable in the light of that for the defendant to say that Article 3(17), or this guidance does not apply to a situation where the applicant's profession -- where there is not a profession applying regulations contrary to the express terms of the guidance itself.
93. MR JUSTICE BURTON: So I have it in my mind, given the aim of today. Ground 3, which is they should have applied their guidance and did not, when does the time run for that one?
94. MISS ROSE: My Lord, we submit it runs from the 10th December, because it is the 10th December that the decision is made by the HPC to make a recommendation, without taking into account any of the criterion in this guidance. It is common ground, my Lord, that they did not. They deny it.

95. MR JUSTICE BURTON: Ground 3 is that one. Can I go back to ground 1 which is your 17A "may make recommendations to the Secretary of State concerning any profession." I get your point that they have to give the guidance "which in its opinion could be regulated". Why is it not the case that by December 09, although it was given to start with that it would be then in the White Paper and they were simply to look into it. By the time they set up their Committee and have done all the work and the consultation or whatever it is they did over the period of 2 years. By December 09, was it not their opinion?
96. MISS ROSE: No my Lord, they do not claim that it was. I am going to come in a moment to how they put their case. This is not a situation where the HPC is saying: well as a matter of fact it was our opinion that the HPC should be regulated. What the HPC's position is that: it was none of our business whether the HPC should regulate these professions or not. We were only obeying orders. They do not even allege that they had formed that opinion. That, we submit, is fatal to their defence.
97. I am going to come to the facts in a moment. I want to establish the--
98. MR JUSTICE BURTON: I understand that.
99. MISS ROSE: They do not say they did follow. Were they to say that they sought such a opinion, our response would be that opinion could not have been fairly or rationally formed.
100. MR JUSTICE BURTON: Only formed by?
101. MISS ROSE: Because they did not take into account the criterion and the guidance.
102. MR JUSTICE BURTON: In any event only formed rational or otherwise by December 09.
103. MISS ROSE: Yes my Lord, because that is the date of the decision.
104. MR JUSTICE BURTON: Before that they were looking at it at the request of the government. I know that is one of your points. Whether they have vires to do that may not matter time wise but for the purposes of time, if eventually after all this work done, they did form that opinion.
105. MISS ROSE: They do say that they did.
106. MR JUSTICE BURTON: Even if they do say.
107. MISS ROSE: We would say it was unfair because it is not irrational.
108. MR JUSTICE BURTON: And it is only December 09, which is what I have to look at.
109. MISS ROSE: So it is not out of time.

110. So my Lord, we have been looking at that column on page 3. We go to the heading part A of the assessment. That sets out, first of all the Council assess whether an occupation is eligible for regulation. Only those occupations involving at least one of the following activities are eligible, invasive procedures, clinical intervention, exercise of judgment unsupervised clinician and so forth. Then the keen part is Part B. This is where we have the criteria. The criteria, your Lordship will remember going back that the question under part B -- to the top paragraph of the second column of page 3 -- the key question is whether in practice it should regulate professions it has determined to be eligible. My submission is going to be, my Lord, that is in fact precisely the exercise which the White Paper invited the HPC to perform, when one looks at the White Paper as the whole.

111. MR JUSTICE BURTON: I cannot find it whether in practice on page 3.

112. MISS ROSE: It is on top of page 3, the second column. So:

"This part is designed to ensure the Council ...

So on. In the second part it will determine whether in practice it should regulate professions it has determined to be eligible. My submission is going to be that is indeed the exercise that the Secretary of State was inviting the HPC to perform in the White Paper and it has failed to perform.

113. Then we come to Part B which sets out the criteria. The criteria the Council will apply in Part B were settled following a public consultation in the summer of 2002. These criteria are themselves the product of public consultation. This is page 4 my Lord.

"The criteria will each have equal weight. Each occupation wishing to be regulated will be required to:

1. Cover a discrete area of activity displaying some homogeneity.
2. Apply a defined body of knowledge.
3. Practise based on evidence of efficacy.
4. Have at least one established profession..."

114. MR JUSTICE BURTON: None of these criteria were considered.

115. MISS ROSE: My Lord, it indeed it is our submission that had they been no rational conclusion could have been reached that it was appropriate for the HPC to regulate these professions because they simply do not fall within this rubric. These are not professions that cover a discrete cover of activity displaying some homogeneity. These are widely divergent different therapies and practices, different philosophies, which does not (inaudible) different overseeing government. There are no common entry criteria or professional standards. It is just simply does not fit the pattern. My Lord, that we say is the starting point which is the provisions in the order and guidance.

116. We then come to the White Paper. The defendants relied very heavily indeed on paragraph 7.16 of the White Paper, which, in my submission, needs to be read in its proper context. The White Paper starts behind tab D at page 73 and the relevant Chapter is Chapter 7, referring to new roles and emerging professions, page 157:

"7.2 Existing professions.

The Government is planning to introduce statutory regulation..."--

117. MR JUSTICE BURTON: Which ground are we on. On ground 2?

118. MISS ROSE: I want to take your Lordship through the chronological developments and I will briefly develop my submissions on each ground.

119. MR JUSTICE BURTON: Yes.

120. MISS ROSE:

"The Government is planning to introduce statutory regulation for applied psychologists, healthcare scientists, psychotherapist and counsellors and other psychological therapists. These are the priorities for the introduction of statutory regulation, because their practice is well established and widespread in the delivery services, and what they do carries significant risk to patients and the public if poorly done."

Then this:

"Further work is needed on these areas and the Government intends to continue with it."

121. So the first point to note from paragraph 7.2 is that this is not a cut and dried statement. The government acknowledges right up front that further work is needed.

122. MR JUSTICE BURTON: The defendant says it has taken 2 years before it reached its decision in December 09 and that is what they were doing.

123. MISS ROSE: It has only been looking at the mechanics in effect. That is the first point. Then my Lord, we come to discussion of emerging professions, and at 7.11 your Lordship sees this:

"Having reached UK-wide agreement to regulate a new role across the UK, it will also be necessary to assess that role's state of readiness for regulation against agreed criteria, such as those used by the Health Professions Council. These would need to be adapted, but would include the following..."

Your Lordship sees there the same criteria we have been looking at.

124. MR JUSTICE BURTON: Is this the government who would apply the criteria?

125. MISS ROSE: No, my Lord, the criteria were developed by the HPC.
126. MR JUSTICE BURTON: I understand that. I see that entirely.
127. MISS ROSE: What we see here is the government, when discussing the appropriate regulation, for new roles is doing so by reference to the HPC's criteria and is appreciating that their relevance is for the assessment of the role's readiness for regulation.
128. MR JUSTICE BURTON: Yes, I mean much of that lies behind Mr Fordham when he submits that you are out of time is his alternative case that you are premature.
129. MISS ROSE: I know, my Lord. It is so often the case one is both too late and too soon and so proved in this case. We submit unlikely result.
130. MR JUSTICE BURTON: He says that there is still time for you to stop the government implementing.
131. MISS ROSE: Of course there is. The purpose of this application, my Lord, is to make it clear to the government that when it makes the decision, on the regulation of professions it should not be taking into account the recommendation made to it by the HPC because that recommendation is itself fundamentally flawed. That is the significance of this application.
132. MR JUSTICE BURTON: It is just I was concerned about 159. It does not in fact say, it may not need to say in the light of 3(17)(b) that the HPC has to apply its own.
133. MISS ROSE: I am still setting the scene. I am going to come on to that in a minute. The point, as I said, at 7.11 that I make is that the government here recognises the criteria applied by the HPC as a bench mark for the assessment of a role's state of readiness for regulation. We then come to 7.16 which is the passage on which my learned friend relies:

"The Government's view is that most new professions should be regulated by the [HPC] which was designed for this purpose and has the most expertise in bringing new professions into statutory regulation and also in regulating a wide range of professions within a common system. Exceptionally, a particular profession may be considered for regulation by another existing statutory regulator, but this will be considered on a case-by-case basis where a particular advantage, outweighed those described above, can be demonstrated. With the exception of the new arrangements for the regulation of pharmacy, the Government will not establish any new statutory regulators. Psychologists, psychotherapist and counsellors will be regulated by the [HPC], following that Council's rigorous process of assessing their regulatory needs and ensuring that its system is capable of accommodating them. This will be the first priority for future regulation."

134. Now, the question is: what is meant by that phrase "the Council's rigorous process of assessing their regulatory needs and ensuring its system is capable of accommodating them"?
135. MR JUSTICE BURTON: If it were not for the word "following" then one would assume they meant that it is the Health Professions Council provided that the Council's rigorous process has satisfied it etc etc. It seems to pre cast in stone the HPC as a regulator.
136. MISS ROSE: We submit that cannot possibly be what is meant by this paragraph. There is always a danger of construing a paragraph in a White Paper as if it were a statute. Standing back for a moment cannot possibly have been the government's intention to say: this will be definitely absolutely regulated by HPC come what may, because if that is what the government is saying here the rest of the sentence simply makes no sense at all. Because when the government refers here to the HPC's rigorous process of assessing the regulatory needs it can only be referring to stage 2 of the guidance that we have just looked at. That is what stage 2 of the guidance is. That is what it is called. The whole purpose of stage 2 of the guidance, save (b) which is looked at is to look at the individual characteristics of a particular profession and to consider whether they are suitable for appropriate, for regulation by the HPC. What the needs of the profession are and what its features are and whether the HPC is capable of accommodating them. That is the whole point of the criteria, on the state being the guidance. We submit that it cannot possibly, when one looks at this realistically have been the intention of the Department of Health to say: you will regulate them come what may, and all we want you to do is make some little decisions about the precise means.
137. MR JUSTICE BURTON: I have crossed out, on the basis of your submissions, I have crossed out the word "following" and substituted for it the word "provided".
138. MISS ROSE: We submit that otherwise it makes no sense. We submit one obtains further support for that construction when you read that together with 7.2 saying more work is needed, and 7.11, expressly referencing the criteria, the HPC's own criteria as a bench mark for assessing the state of readiness of regulation.
139. MR JUSTICE BURTON: Shall we see how things are in the other case.

(Short Adjournment)

140. MR JUSTICE BURTON: Yes?
141. MISS ROSE: So, my Lord, I was just on the point of the proper interpretation of 7.16 and I make the point that read on its own, it only makes sense if it is expecting the HPC to assess the matters that are set out in guidance and that impression is even stronger when read together with 7.2 and 7.11. But my Lord, not only is that clearly we say from the White Paper itself but it is also the understanding of the Department of Health itself, which is responsible for producing the White Paper. We see there if your Lordships goes to tab G, page 6. This is a letter from Ben Bradshaw who is a Minister of State in the Department of Health.

142. MR JUSTICE BURTON: I think it is a was.

143. MISS ROSE: At the material time, so my Lord I agree. He was at the time the Minister of Department of Health to the Member of the Parliament of the leader. He says, the second paragraph on page 6:

"I am sorry to read that Professor Leader feels that previous replies from the Department have not addressed his specific concerns.

In your letter of 1 September, you set out Professor Leader's concerns that psychoanalysis does not claim to be a healthcare profession, and that it is therefore not appropriate to regulate psychoanalysis in the same way as other therapies. Your constituent also claimed that the... (HPC) has not considered this issue."

So the issue clearly is as a matter of principle is it appropriate for psychoanalysis to be regulated by the HPC.

Our view, as set out in the White Paper ... is that most new professionals should be regulated by the HPC, which is designed for this purpose and has the most expertise in bringing new professions into statutory regulation and in regulating a wide range of professions within a common system."

144. MR JUSTICE BURTON: I find it a bit odd to call psychoanalysis "a new profession" but I suppose it means new in the statutory sense.

145. MISS ROSE: Indeed my Lord. "As such, the HPC is the appropriate body to take forward regulation material."

146. Your Lordship will see the broad phrase "take forward". Then in the next paragraph this.

"The HPC issued a call for ideas and a number of representations were received in relation to psychoanalysis. As we have explained previously, the HPC established a professional liaison group (PLG) to consider and make recommendations to the HPC. The PLG consist of lay and registrant members of the HPC, as well as representatives of professional bodies, education and training providers, service providers and service users. We believe that the ["we" there can only mean the Department of Health] PLG is the most appropriate form to discuss and take forward the issues that will arise from proposed regulation, including those raised by Professor Leader."

147. MR JUSTICE BURTON: But does Professor Leader raise the question as to whether it should be the HPC which does it.

148. MISS ROSE: Yes my Lord, that is the paragraph we have just read. If your Lordship goes to the third paragraph:

"... you set out Professor Leader's concerns that psychoanalysis does not going to be a healthcare profession, and that it is therefore not appropriate to regulate..."

149. MR JUSTICE BURTON: I read that. I assume in the letter of 1st September, it was Professor Leader actually said: HPC is not appropriate. That is all I am rising.

150. MISS ROSE: That is the whole point that is being made by Professor Leader.

151. MR JUSTICE BURTON: As there set out, it does not say that, it says psychoanalysis does not claim to be health care.

152. MISS ROSE: That would preclude this regulation.

153. MR JUSTICE BURTON: Have we the letter to 1st September?

154. MISS ROSE: I am not sure we do, perhaps we can obtain it.

155. My Lord, the point that we make it is very clear there that the Minister, in the Department of Health is saying: well the HPC is looking at the question whether in principle, the HPC should be regulating psychoanalysis. If your Lordship wants to know the concern that were being raised by Professor Leader your Lordship has it very clearly in the preceding pages. If you go back to page 3, this is a meeting between Professor Leader and Marc Seale, who is the chief executive of the HPC. This is on 13th October 2008, so this is a shortly before, 3 months before the letter to which we have been looking at.

156. The third paragraph:

"MS said he would outline the process now being undertaken by HPC as the proposed regulator but wished to be clear that the process would be open to all interested groups. He went on to refer to the nine regulators of different professionals now in place in the UK. HPC, however, is unique among those regulators in being required to advise the Secretary of State about new professional groups that might be regulated by HPC. The current process arises out of that requirement."

157. Now pausing there my Lord, we submit Mr Seale, who is the chief executive of the HPC could only have been talking there about Article 3(17) of the order because that is only provision that gives an express power to the HPC to make a recommendation about the regulation of new groups. He is saying specifically there that they are exercising 3(17) power which they now (inaudible) they were exercising.

"Psychologists are the latest professionals to be regulated by HPC and their HPC register is expected to operate with effect from 1st July 2009. There are now between 20 and 30 other groups ... who seek regulation ... and it is within this context that HPC has now turned its attention to counsellors and psychotherapist."

Then going down, below second hole punch, there is the heading "Thresholds for education", and then third paragraph under that heading:

"A final package of proposals for submission to government, following proper consultation of the professions concerned. The final proposals might be that the professions concerned should be regulated or that those professions or certain parts of them eg psychoanalysis, should not regulated."

158. So, the Professor Leader was expressly troubled by the chief executive of the HPC that the product might be a recommendation but the professions or part of them including psychoanalysis might not or should not be regulated.
159. MR JUSTICE BURTON: That was still being said in November 09.
160. MISS ROSE: Indeed my Lord. If we go over the page, my Lord.
161. MR JUSTICE BURTON: (Pause) Yes?
162. MISS ROSE: Page 4 my Lord, opposite the first hole punch. I am showing this to your Lordship because it explains the context of the concerns of Professor Leader were:

"DL [that is Professor Leader] then attempted to inform the representatives of HPC about how their proposals are likely to affect psychoanalysis. For example, does HPC include psychoanalysis within the remit they have given themselves to regulate psychotherapy? The response from MS was vague and clearly they have not yet begun to address this issue. It was very clear that they have little understanding of what psychoanalysis entails. MS did, however, state that, if suitable case be made, it would be possible, in theory, for HPC to recommend specifically to government that psychoanalysis should be excluded from any proposals to regulate psychotherapy."

One sees the same point made again and the second paragraph down there is explanations about analysis not being (inaudible) removal of symptoms, explanations about transference, retroactive training and so on, not against regulation in principle, but questioned very seriously whether the form of regulation proposed by HPC is suitable for psychoanalysis:

"MS asked whether psychoanalysts were regulated statutorily elsewhere in the world. DL told him briefly of the models in Australia, France and the USA. MS paid due attention to all of this and again stated that a recommendation by HPC that psychoanalysis should not be included in any plans to regulate psychotherapy would be one possibility. It was clear, however, that what he was saying in this regard was entirely hypothetical and constituted no specific proposal or undertaking."

Of course that is highly relevant to the question of delay. We say not only was it not clear they were not going to consider whether they should regulate psychoanalysis or

other parts--

163. MR JUSTICE BURTON: But plainly open minded on the face of that.
164. MISS ROSE: There is more than one potential outcome.
165. The point I was just making to your Lordship, our interpretation of the White Paper, we submit is entirely consistent with that put forward by Ben Bradshaw, the Minister in this letter of 8th January 2009, dealing with Mr Leader's concerns, which were concerns in principle about the appropriateness of regulation by the HPC to regulate psychoanalysis and saying: you can put those concerns to the HPC. Not saying: sorry it is too late, we have already made an absolutely firm policy decision that the HPC will regulate psychotherapists including psychoanalysts come what may so there is no point you raising this question now.
166. MR JUSTICE BURTON: What about LPG, was it discussed to the LPG?
167. MISS ROSE: If I could take it in a logical order. We get further confirmation of that from the Department of Health, because we sent a file request, your Lordship finds the freedom of information request at page 39, behind the same tab, tab G 2nd November 2009. This is addressed to the Department of Health. (Pause)
168. So we say:

"My requests under the Freedom of Information Act ... are as follows. I ask that you address each using the remuneration below. Please:

1. confirm that it is currently Department of Health ('DoH') policy that psychotherapists and counsellors will be statutorily regulated by the [HPC] once that Council:

(a) has assessed and reached conclusions upon their regulatory needs;

(b) has positively concluded for itself that there should be statutory regulation and that it should be the regulator;

(c) ensured and positively advised that its regulatory and disciplinary system is capable of accommodating them; and

(d) made recommendations on those matters or otherwise advised Minister accordingly.

(note, if this is not an accurate description of current policy, or if there any further caveats to this policy, please say so and give full details)..."

It is specifically asking the Department what it had intended to lead to the HPC and the reply to that following request is at page 52, 24th November 2009 and the second paragraph:

"As you are aware, the White Paper ... made clear the Government considered the statutory regulations of psychologists..."

169. MR JUSTICE BURTON: Page 53.

170. MISS ROSE: Page 52 my Lord, the letter of 24th November 2009 from the Department of Health, replying to the request. So they refer to White Paper, so that made clear the government considered the statutory regulation of psychologist, psychotherapists and counsellors to be priority and then they say psychologists have been regulated and then they say this:

"The HPC was also asked to consider how the statutory regulations of psychotherapists and counsellors might be achieved and to make recommendations. To progress this work the HPC established a Professional Liaison Group (PLG) to consider and make recommendations to the HPC Council."

Then they say:

"This is the first step in the process. Careful consideration will be given to any proposals made by the HPC and issues arising."

171. MR JUSTICE BURTON: So effectively you are saying that whatever the White Paper may have said, the purpose of this was to decide whether the HPC was an appropriate body to regulate all these disparate groups, some of them allegedly not mental or physical health.

172. MISS ROSE: And make recommendations. Within the structure of the order, 3(17(a) and (b) and using the criteria and assessing regulatory needs and assessing its own capacity (inaudible), it has formulated its own guidance. It is entirely unsurprising that that is what the department should have anticipated that the HPC should do because that was its function. My Lord, that was in respect of the Department of Health.

173. MR JUSTICE BURTON: By November 09 it was clear to you that was not up for grabs.

174. MISS ROSE: I want to follow through from what happens from the HPC end, because our submission is that they start off and some undisclosed point, they just decide it is too controversial and too difficult and completely duck the issue.

175. MR JUSTICE BURTON: Should it be the HPC -- well I suppose, should there be regulation at all?

176. MISS ROSE: The Department clearly thinks that in principle there should be statutory regulations.

177. MR JUSTICE BURTON: Under section 60?

178. MISS ROSE: Query under section 60 even. In principle there should be statutory regulation. But one has referred to the HPC asking the HPC, what is the form of regulation that would meet the regulatory needs of these people and can you accommodate within your systems.
179. MR JUSTICE BURTON: So whatever the words following. You yourself used the word "once" which suggest that once the Council. It suggests the Council is going to be successful in its assessment.
180. MISS ROSE: My Lord that is not surprising. If the government thinks, as it clearly did in 2007, that it would be desirable for the HPC to regulate these professions, it is not surprising that its language was in those terms. There is no doubt when one looks at what is said in the White Paper combined with the statutory scheme, combined with the guidance and combined with its latest statements that it did not (inaudible) the HPC to examine its questions and what it was there to do.
181. MR JUSTICE BURTON: The questions being, or including: should there be regulation at all? If so, should it be by the HPC?
182. MISS ROSE: By reference to their own criteria.
183. Now, we then come to what the HPC thought it was going to do and the starting point is the decision of 13th December. So we go to tab E, page 1. This is the document known as the road map, and this is a document that was prepared by the HPC executive and put to the HPC Council on 13th December 2007 for it to take a decision. They say:

"This paper:

1. Highlights the challenges that will be faced by the [HPC] and other stakeholders if [your Lordship will note "if"] Counsellors and Psychotherapists are to be statutorily regulated."

So clearly not a foregone conclusion:

"2. Seeks the view of the Council on whether the HPC should commence a proactive process to investigate the statutory regulation of Counsellors and Psychotherapists.

3. Recommends that the HPC establish a Counsellors and Psychotherapists (PLG) in July 2008 to review and recommend structure of the register, professional titles"

And so forth.

184. We submit that what is important when one looks at the recommendations there are two distinct recommendations. One is that the HPC. That means the HPC as a whole should conduct a proactive investigation into the regulation of this professions. We submit that is clearly, if one looks at this document by reference to 3(17) and the

second recommendation is that they should appoint the PLG to investigate the particular issues of detail.

185. What my learned friends have sought to do is to treat these two decisions as if they were only one. If the only decision that the HPC was to take was to establish the PLG with its limited remit to consider the mechanics of regulation.

186. MR JUSTICE BURTON: That is what the PLG did consider, the mechanics?

187. MISS ROSE: We say not surprisingly because the PLG was set up to consider detailed questions, like professional standards and exactly how it would work, but the PLG is not the HPC. The PLG was going to report to the HPC and advise it and the first decision that had been taken that the HPC was going to conduct what they thought a proactive investigation into the statutory regulations Council of Psychotherapists. That is from the summary. If you look at the detail, we submit it becomes even clearer. If you go to page 5 of this document, there is a heading "The role of HPC and the possible way forward":

"To date the HPC has waited for applications to be received from Aspirant Groups before it starts the process to make a recommendation to the Secretary of State if they should be regulated using Article 3(17)..."

To date the various groups have been supported by the DH have not reached any agreement."

Just below the second hole punch:

"This means that the HPC has an opportunity to proactively commence work on statutory regulation...."

Now they are not saying: we are completely going to ignore 3(17) and do something wholly outside our power, Lord knows what powers they would be exercising. What they are saying is: in the past we have used 3(17) when we have been asked to but now we have the opportunity to use 3(17) proactively, and ourselves to decide whether to make a recommendation to the Secretary of State. Your Lordship has seen the guidance itself envisaged precisely that as a potential process.

188. MR JUSTICE BURTON: Yes.

189. MISS ROSE: Then go onto the recommendation about the PLG

190. Mr Fordham wants the next sentence.

"The HPC Executive therefore recommends that the HPC establishes a Counsellors and Psychotherapist Liaison Group (PLG) ... to review and recommend..."

And various bullet points. Then the requested decisions. One sees the two. The first, that the HPC commences a proactive process to investigate and make

recommendations. We submit that in context "make recommendations" can only mean pursuant to 3(17) because they have already set out 3(17) on the previous page. The second is to establish the PLG. That is the road map that is provided to the Council.

191. Then over the page we have the decision which is made by the Council. Page 9:

"The Council received a paper from the Executive. [The paper we have been looking at]."

Council noted that the paper:

(i) Highlighted the challenges that would be faced by the HPC and other key stakeholders if Counsellors and Psychotherapist were to be statutorily regulated.

(ii) Sought the view of the Council on whether the HPC should commence a proactive process to investigate the statutory regulation for Counsellors and Psychotherapists..."

The third is a Recommendation of the PLG.

192. MR JUSTICE BURTON: I have just forgotten from his skeleton, it is the very firm understanding that I came out with after reading his skeleton, but am I right in recollection his skeleton makes a virtue of the fact that they were indeed always going to be, in the light of the White Paper, always going to be the regulatory body and never in fact did consider the question.

193. MISS ROSE: Yes, my Lord. If your Lordship takes up Mr Fordham's skeleton argument -- as a matter of fact I think probably the easiest place to see this is summary grounds which we have behind tab H, page 11.

194. MR JUSTICE BURTON: Yes, I did not read those because I had the benefit of the skeletons.

195. MISS ROSE: Paragraph 17 on page 11 is crucial.

196. MR JUSTICE BURTON: Wait a minute I did, I have highlight this, you must have referred to it.

197. MISS ROSE: If your Lordship looks at paragraph 17, page 11, we say this is crucial:

"In the present case it was the 'how' question which the HPC proceeded to consider in a clear, straightforward and transparent manner,... Naturally - and as is common ground - the HPC did not address itself to the 'whether' or 'who' question at all."

In other words whether they should be regulated or by whom.

198. MR JUSTICE BURTON: You say this is the nub of your application and given that you have as late as November 09, statements which led you to believe that they were considering the whether or who, that means on any basis which is all we are really looking at today, you are out of time. Unless he has got a knock out blow on the whether or who.
199. MISS ROSE: Yes. We say it is quite obvious he has not. If we go back my Lord to the decision of 13th December, on page 9.
200. MR JUSTICE BURTON: I have in mind and because it is only consistent with what you have been saying the note of the meeting at page H105, when Mr Seale--
201. MISS ROSE: Absolutely my Lord. This is the dated 20th November. This is the HPC's own note.
202. MR JUSTICE BURTON: It is their own note? It is particularly significant in the light of your submissions, that he is saying that may well could communicate but could not--
203. MISS ROSE: Refers specifically to paragraph--
204. MR JUSTICE BURTON: Exactly.
205. MISS ROSE: We are baffled, with respect, as to the stance that is taken in their summary grounds and skeleton argument, which is inconsistent with the contemporaneous documents.
206. MR JUSTICE BURTON: It may be that they are going to establish at trial, if that is where we get, that they are entitled to have done what they did with the preconceived notion that they would be the regulator. If they are not entitled then you say that the any time you discovered they were definitely not going to consider that, and have now told you they never did consider it, notwithstanding the impression given was December. Possibly now. I do not know whether December makes it clear, does it?
207. MISS ROSE: Can we follow it through?
208. MR JUSTICE BURTON: Why?
209. MISS ROSE: We are still in December 2007, page 9 behind tab E.
210. MR JUSTICE BURTON: Yes.
211. MISS ROSE: At 9.3:

"The Council noted that to date it had waited until an application from an aspirant profession before considering whether that profession should be regulated however in view of the public protection issues by this group, and the recommendations in the White Paper regarding regulation of these groups, consideration needed to be given to a more proactive

approach."

Again we say utterly consistent with our case. Then over the page:

"The Council agreed the following:

(i) The HPC should commence a proactive process to investigate and make recommendations to the Secretary of State on the statutory regulation of Counsellors and psychotherapists.

(ii) that the HPC should establish... (PLG)..."

Then this at 9.6:

"The Council noted that it should be aware of issues of concern to those within the counselling and psychotherapy professions not in favour of statutory regulation. At this stage it had not taken any decision as to how these groups should be regulated and that that the regulation of large groups would have implications for capacity planning within the HPC."

The grammar goes somewhat array at the end of the sentence. In my submission it is perfectly clear that the Council is already aware, in December 2007, that the idea that the HPC will regulate psychotherapists and counsellors is very controversial within these professions, that there are many who opposed to doing it in principle and that they are very clearly stating, and these minutes were publicly available on their website, that they have not made a decision as to how the professions are to be regulated.

212. Yet my learned friend's submission is that our time starts to run from the date of this decision because he says it was so clear, on the face of this decision, that they were not going to consider whether these professions should have been regulated by the HPC. In my submission that is not a possible reading of those documents. It may be that in the fullness of time my learned friend will disclose the material and adduce evidence that establishes that it meant something different.
213. MR JUSTICE BURTON: At the moment it is more likely -- I do not know -- that he will say, as he does, we knows he is going to say: we never did look at whether or whom.
214. MISS ROSE: But the point that I make is that is not the impression that we would give. We were given the exact opposite impression.
215. MR JUSTICE BURTON: Yes, remind me I was just looking back at the other document in which Mr Seale. I have the point about it is one you have shown me not long ago. I have H105.
216. MISS ROSE: The other document my Lord is at G.

217. MR JUSTICE BURTON: If we are going to go forward to trial, it would be I think helpful to have the bundle differently ordered in chronological order rather than dotting around in categories.
218. MISS ROSE: G3 is, this is a note prepared by Mr Leader of his meeting with the Chief Executive of the HPC.
219. MR JUSTICE BURTON: It could be I suppose objected that is your side's not theirs but it is consistent with their note a year later.
220. MISS ROSE: Consistent with their note at later meeting. They said in correspondence, they have not clearly not instructions from Mr Seale, as to whether he agrees it is accurate or not, they have not taken a position on that. Of course at the permission stage, this obviously establishes a prima facie case.
221. MR JUSTICE BURTON: Yes.
222. MISS ROSE: There is also what was said by the Secretary of State in Parliament itself. If your Lordship goes to tab D, page 166.
223. MR JUSTICE BURTON: Have you found that September letter of Mr Leader yet?
224. MISS ROSE: I do not believe we have it here, we can try to and obtain a copy and send it to your Lordship. Page 166, this Hansard from May 2009.
225. MR JUSTICE BURTON: Which tab?
226. MISS ROSE: Tab D.
227. MR JUSTICE BURTON: I do not think there is any point sending to me, I am going to deliver judgment today one way or the other. If you happen to have it available.
228. MISS ROSE: I do not think we have it in court my Lord.
229. MR JUSTICE BURTON: If it is capable of being faxed through to the court, so much the better. Now 166.
230. MISS ROSE: This is an extract from Hansard on 5th May 2009. House of Lords, Baroness Thornton who is a Minister in the Department of Health, and she says at 166 at the bottom of the page:

"Consideration is also being given to the regulation of psychotherapist and counsellors who have descending levels of professional qualification. The Health Professions Council has been working with bodies representing these groups to develop proposals but we are not there yet. Those discussions are continuing but no formal decisions has been made although we understand that the working group is hoping to report to the council ... later this year. Any proposals to regulate psychotherapists and counsellors will be subject to further consultation before legislation is

brought before the House. Given the weight of interventions on this matter by psychotherapists, we anticipate robust discussion and consultation."

Again, we submit that does not suggest that this a Department of Health which has already made a firm and unshakable decision that come what may psychotherapists and counsellors will be regulated by the HPC. On the contrary, she is recognising, as they recognised in correspondence, as the HPC itself recognised, that this was a question, a principal question, highly controversial and which remained to be determined.

231. So my Lord, coming to the business of the PLG itself, behind tab E.
232. MR JUSTICE BURTON: You are going to be showing me a negative here, are you, showing me they did not consider the whether or who?
233. MISS ROSE: No my Lord, I am going to show your Lordship that they considered that the guidance was relevant but it is nonetheless conceded by the defendants that was taken (inaudible).
234. MR JUSTICE BURTON: Right.
235. MISS ROSE: This is the PLG's first meeting, page 81 of the minutes starts of 4th December 2008, and if your Lordship goes to page 86, paragraph 6.10:

"The Group noted that the HPC had a process for deciding whether to regulate a new profession, which examined how a profession met ten criteria, such as whether there was a discrete area of activity.... The Group noted that the Government had already recommended that psychotherapists and counsellors should be subject to statutory regulation, due to level of risk to the public. The Group noted that, due to the recommendation from Government, it was not appropriate to use the new profession process in this instance. However, the Group agreed that it would be useful to ensure that its work addressed the areas indicated in the new profession process."

In other words, they were considering the criteria were relevant.

236. Then:

"The Group agreed that its work should focus on making recommendations on statutory regulation, whilst listening to dissenting and sceptical views."

One submission I make one sees the tension in the minutes of the PLG which has been delegated specifically to consider the nitti-gritti mechanics of regulation, but is constantly having submissions made to it about the principle and does not really know how to deal with the tension between those two roles. Indeed one can see that at page 11.

237. But the key point at 610 is that they recognise that the 10 criterion of guidance are relevant.

238. Then we come to the report of the PLG. This is at E144 -- it is undated. I hope somebody may be able to tell me the exact date, it is some time in 2009, but if somebody could give the exact date that would be wonderful. This is the PLG's report to the HPC Council. Your Lordship sees at page 147, paragraph 1, this document report of the PLG to the Council:

"This document outlines the discussion and recommendations of the PLG in each of the areas within its terms of reference..."

239. An going to page 148--

240. MR JUSTICE BURTON: Did you have people on this at the PLG?

241. MISS ROSE: No my Lord. Page 148, 3.2 "New professions", paragraph 4, your Lordship sees Article 3(17) said that.

242. My Lord my submission it is most remarkable because the defendant's case before your Lordship is that this was never an exercise under Article 3(17) and that it should have been obvious to us, as long as December 2007, that this was not an exercise under 3(17) and yet here is the report of the PLG to the Council of the HPC prominently citing Article 3(17), which on the defendant's case is irrelevant to his activities.

243. They say:

"We have a 'new professions to process' by which we can receive applications... Applications are normally made by professional organisations representing the interests of members..."

Then at 6:

"In most cases, Council would normally expect an application for regulation to be made. However, in some circumstances, the Council may wish to make a recommendation in the absence of an application, where it considers that this would be in the public interest."

So again, contrary to my learned friend's submission that 3(17) does not apply in the present application. In any event the final decision is taken by the government. That is the framework within which they are operating.

244. Then at 3.3, they record the decision to establish the PLG, the number of times it met, its terms and reference. Then at 13:

"The recommendations of the PLG will inform the recommendations of the HPC Council to the Secretary of State and to Ministers in the devolved administrations."

We submit one cannot sensibly read this document as anticipating anything other than recommendations to made by the HPC pursuant to 3(17). Then it is said at 15:

"The PLG will reconvene in November 2009 to consider the responses to the consultation about the standards of proficiency and the threshold level of qualification for entry to the Register."

That is our ground 4, because in fact the HPC Council went ahead and made its recommendation without that meeting going ahead.

245. MR JUSTICE BURTON: That is only mechanics, is it not?
246. MISS ROSE: My Lord, we submit it is actually very significant, because one of the key issues, one of the key problems that the claimants have with the HPC is that the HPC has proficiency standards which are very medically based and simply inappropriate to these kinds of therapy. My Lord, will see the point made more fully in the Marsfield Report and therefore the question whether the HPC was able to develop more flexible and appropriate efficiency levels is critical to the question whether it was at all an appropriate regulatory group.
247. MR JUSTICE BURTON: It is a separate point.
248. MISS ROSE: It is separate point, my Lord and we make--
249. MR JUSTICE BURTON: Even if PLG was--
250. MISS ROSE: They could not rationally decide, even on their own terms, they could not rationally decide they could meet the regulatory needs of these professions when they had not developed them.
251. MR JUSTICE BURTON: Yes it is of course parallel with 3, with your ground 3. No guidelines.
252. MISS ROSE: And no guidelines and key decisions not taken.
253. MR JUSTICE BURTON: No decision on standards of proficiency.
254. MISS ROSE: Standards of proficiency and qualifications which were central.
255. MR JUSTICE BURTON: Those plainly do not have a time element. So I have the point, I am plainly clear about ground 1. Ground 2 is just another way of putting ground 1, is it?
256. MISS ROSE: No my Lord. On ground 2 we say that one looks at the decision of 13th December we looked at. It is clear that the decision that was taken that they would operate the statutory process under 3(17) because that was the provision that was set out in the road map that was given to the Council with the recommendation, they should do a proactive investigation. That was the decision the Council adopted. Then the Council itself now says -- it is their case -- they did not undertake any such

exercise. We say whether they would have had the power in theory or not to undertake the exercise they did without considering these questions in this case they actually made the decision that they would carry out 3(17) process and then at some point, we do not know when or how they abandoned that.

257. MR JUSTICE BURTON: It is another way of putting ground 1. I follow what you are saying. It is all down to never did consider whether and who. Either--

258. MISS ROSE: Either they did not have the power to do that or even if it they did, it was contrary to the decision they have actually made about how they proceed. So they are different points my Lord.

259. MR JUSTICE BURTON: Thank you.

260. MISS ROSE: We go to page 150.

261. MR JUSTICE BURTON: Yes?

262. MISS ROSE: At 18, we are told:

"The HPC will consult on the recommendations of the PLG before finalising its recommendation to the Secretary of State..."

So again, we say clearly 3(17) envisaged. Then at 3.5, paragraph 21:

"In response to the Call for Ideas and at the stakeholder meeting, there was discussion and debate about the principle of statutory regulation and statutory regulation by the HPC.

In particular, some respondents and participants argued that statutory regulations was not necessary and that the HPC was inappropriate as the regulator for psychotherapists and counsellors."

Then they identify some of the issues about the suitability of the HPC and then at 25:

"The PLG agreed that, in making its recommendations, it was important that the views of those with dissenting views or concerns about certain aspects of statutory regulation should be listened to and taken into account."

Again, we asked the question: how is this approach consistent with what they now say was always clear to us, that these points were simply irrelevant? Because on the defendant's case it did not matter that people at the stakeholder meeting and in the consultation had said that the principle of regulation was wrong and the principle of regulation by the HPC was wrong because their case now is that those were simply irrelevant to the HPC deliberations.

263. Again we say clearly inconsistent with their own internal guidelines.

264. MR JUSTICE BURTON: Yes.

265. MISS ROSE: My Lord, we then have the first letter from Bindmans which was sent on 16th October 2009, that is in tab G, page 11. At this stage the claimant's understanding, not surprisingly on the basis of the documentation that your Lordship has seen, the claimant's understanding was that the HPC was conducting an Article 3(17) process. Its concern was that the Article 3(17) process was not being done properly. We see this at page 12, paragraph 5:

"The focus of these concerns can be summarised as an ongoing, unlawful failure on the HPC's part to gather evidence relevant to, consult upon, consider and then properly determine certain questions which it is obliged to address as part of the recommendation making process envisaged by the Health Act 1999 and the Health Professions Order 2001. These questions are about whether the regulations of psychotherapists and counsellors ... is required and, if it is, who should be the regulator."

That was the way that the complaint was made on the 16th October because the complainants were concerned that the 3(17) process should be undertaken but was not being properly done.

266. What then happens is the response of 19th October in which Mr Seale, the chief executive, page 26, third paragraph:

"Your letter seems to have been written on the assumption that HPC is currently consulting on whether to recommend to government that psychotherapists and counsellors should be subject to the statutory regulation. The assumption is incorrect."

Then he cites 7.16 and says:

"That paragraph is a clear policy statement by HM Government that psychologist, psychotherapists and counsellors are to be regulated by the HPC."

267. MR JUSTICE BURTON: This is the first time that paragraph 11 of the summary grounds is stated -- paragraph 17 of the summary grounds is stated.

268. MISS ROSE: The first time. What then follows my Lord is a vigorous period of correspondence between Bindmans and the HPC and then a decision is made on 10th December 2009.

269. MR JUSTICE BURTON: Not before Mr Seale has gone back on that in November 09.

270. MISS ROSE: Yes my Lord. Then the decision is made on 10th December. We need to look at that decision. It is at E211 This is again the paper.

271. MR JUSTICE BURTON: This actually extraordinary page 26, because it is Mr Seale saying: know whether or know who because of paragraph 7.16 and then in the other note which is his own side's minute he says of course we are dealing whether or know because of 7.16.
272. MISS ROSE: Absolutely, and yet their whole case before Lordship today is that this was so clear that we are time-barred. Abundantly clear.
273. MR JUSTICE BURTON: It is one of their cases. The other case is you have not a case.
274. MISS ROSE: We submit this evidence demonstrates they are wrong on both of those submissions. Page 211, this is the paper, provided by the executive to the Council, for the purposes of the meeting of 10th December 2009. This is the paper prepared for the decision that we challenge, tab E.
275. What your Lordship, you remember your Lordship this after correspondence with Bindmans. They know that Bindmans are complaining that they have not considered the in principle questions and they have not taken that properly into account. They say this between the hole punctures:
- "In relation to psychotherapists and counsellors, the HPC agreed on 13 December 2007 to consider the issues identified in the White Paper, which can be summarised as:
1. When the regulatory 'building blocks' which the HPC uses (protect titles, standards of proficiency) can be used to meet the regulatory needs of psychotherapists and counsellors; and
2. Where it can be done in a manner which can be accommodated within the existing regulatory structure and, thus, without detriment to the discharge of HPC's functions in relation to the professions it currently regulates."
- Can I invite your Lordship to keep that page open and go back to the actual decision of 13th December, which is at page 10 in the same tab. Your Lordship will see that the decision of the 13th December 2007, as characterised by the HPC's executive in this Paper in 2009, bears no relation at all to the decision that was actually taken.
276. MR JUSTICE BURTON: Yes.
277. MISS ROSE: What has happened is that it is now being said by the executive, obviously concerned about the prospect of judicial review: well actually we were not understanding a proactive investigation at all into the regulation of psychotherapists and counsellors, all that we were doing was examining whether the regulatory building blocks could be used and whether we could accommodate them.
278. MR JUSTICE BURTON: The word "proactive" is key because it goes back to their point that 3(17)(a) is normally--

279. MISS ROSE: Reactive but not exclusively. That of course is also reflected in the guidelines. What they have done, in my submission, is rewritten history of page 211. That paper is then considered and we have the minutes of the meeting starting at page 285.
280. MR JUSTICE BURTON: Yes.
281. MISS ROSE: The decision at 293, paragraph 10.23:
- "Whilst there was further work to be done in certain areas, [of course we say they were fairly critical and they could not take a rational decision without doing it] the Council were satisfied that the HPC's systems were capable of accommodating and meeting the regulatory needs of psychotherapists and counsellors;
- To instruct the Registrar to inform the Secretary of State of the Council's conclusion."
282. My Lord, we submit even if they are right in relation to the scope of the White Paper, they were not in a position rationally to make the decision at 10.231 because they simply were not in a position to say whether or not the HPC's processes were capable of meeting the regulatory needs of these professions because they had not considered these professions in accordance with their own criteria, and they had not identified or sorted out the key points such as provisionally and the qualifications standards.
283. MR JUSTICE BURTON: They had not had the last with the LPG.
284. MISS ROSE: We say even if they are on vires and they are right on the scope of the investigation, a decision is still irrational.
285. MR JUSTICE BURTON: Ground 3 and 4 do not have a time point?
286. MISS ROSE: No. Then we see the letter that is sent to the Secretary of State, which is at page 305, and they set out the paragraph from the White Paper, and then they say:
- "In relation to psychotherapists and counsellors, the HPC has now undertaken the tasks identified in the White Paper, of assessing regulatory needs and ensuring that HPC's system is capable of accommodating them."
287. MR JUSTICE BURTON: They are clearly positioning themselves in those last four lines to meet Bindmans' point. Government stated in unequivocal terms. That is 7.16, is it not?
288. MISS ROSE: Indeed. My Lord we simply say that is a misreading at 71.6.
289. MR JUSTICE BURTON: Whether it is a misreading, it is certainly a different reading from the one that they put forward themselves.

290. MISS ROSE: Different from the reading of Dr Leader of Department of Health. As your rightly says they are positioning themselves to meet Bindmans' complaints here and they say the focus of our or work has been on the practicalities of such regulations. They are disclaiming any principal decision.
291. I have shown your Lordship already the concessions in the summary grounds. We look very quickly at that again. It is tab 8 page 11, paragraph 17, and looks at the first part of that paragraph. That is where they concede that they did not address themselves to the whether and who question at all.
292. MR JUSTICE BURTON: And they did not apply the guidance.
293. MISS ROSE: They did not apply the guidance and the criteria.
294. That brings me very briefly to my submissions. As to vires, our submission is that the HPC is a creature of the order, and only has the powers bestowed up it under the order. It has no inherent power to make recommendations for the Secretary of State. It only has the power given under 3(17).
295. MR JUSTICE BURTON: There is underlying -- I may be wrong -- the defendant's submission is that: if it has all been a waste of time by them it can be ignored by the government.
296. MISS ROSE: My Lord that is a question of what is the purpose of this application, to which the answer is: the purpose of this application is to make it very clear that the government, when they come to consider the question of regulation that no weight can be placed on the recommendations of the HPC. Normally you would expect the government to place significant weight on the recommendation made by an expert regulator, which has a legislative function to make recommendation.
297. Our submission is that recommendation is hopelessly flawed. They bypass the statutory process. They bypass their guidance. They bypass the relevant criteria and therefore needs to be made clear by declaratory relief that the Secretary of State can attach no weight to the recommendation at all. That is the purpose. That is why we are here.
298. MR JUSTICE BURTON: I suppose -- it is not for today -- but I suppose there could be some measure of agreement, which might resolve the need for proceedings, if they were to agree that nothing they have done could amount to a recommendation under 3.17.
299. MISS ROSE: The department is taking a completely neutral stance in relation to these proceedings. But at the moment, we have tried to reach agreement without any success.
300. MR JUSTICE BURTON: I mean (i) it was not a recommendation under 3.17 (ii) it did not take into account their guidelines; (iii) even in so far as it made a recommendation as to medallity, it had not completed its conclusions. The only justification--

301. MISS ROSE: Were they to concede that their recommendation carried no force we would be content. We have tried to persuade them of that but without success.
302. MR JUSTICE BURTON: Today is not the time. But if this goes forward it seems to me possible that might be capable of resolution. It is rare I think that one could have the kind of agreement at H11 without it leading somewhere.
303. MISS ROSE: So, my Lord, our submission is that the scheme under the order is clear. You read 3(17)(a) and (b) together including the guidance and they bypassed that statutory scheme.
304. MR JUSTICE BURTON: Yes.
305. MISS ROSE: Their response to this is, with respect to them, very unclear. In the summary grounds, in the pre-action correspondence the positive case that was asserted was that they had used the ancillary incidental power under schedule 1 paragraph 16. Your Lordship sees this at tab G.
306. MR JUSTICE BURTON: Yes, I have not looked at that, I have looked at the ancillary power. Yes G46.
307. MISS ROSE: This is just a letter, a letter from the defendant's solicitors of 13th November, page 46:
- "In answer to your question as to the statutory powers under which that work is being undertaken, the work is being conducted by the HPC in pursuance to"--
308. MR JUSTICE BURTON: It may be that is not pursued because it a difficult one.
309. MISS ROSE: It is obviously wrong my Lord.
310. MR JUSTICE BURTON: It is either it is 3(17) or it is not.
311. MISS ROSE: Our submission is it is clearly not 3(17), for the reasons I have given and therefore--
312. MR JUSTICE BURTON: It cannot be ancillary to 3(17).
313. MISS ROSE: It cannot, clearly. That is ground 1 my Lord. Ground 2, the failure to implement the decision of December 2007. Your Lordship has my submission that was a decision to undertake a proactive investigation under 3(17) and they now firmly assert they never did that.
314. The third ground is the failure to take account of the guidance. Again your Lordship has my submission, that it was plainly relevant and they concede that they did not take it into account. Now, one of the oddities again here is that their case on this has been, with respect to them, somewhat inconsistent because in their response to the letter before claim, they indicated that they had taken this material into account.

315. If your Lordship goes to tab G, page 18. This is a letter from my solicitors. Your Lordship sees questions and, question 10 on page 14, is:

"Why consideration has not been given to the capability of the existing requirements for the regulation ... set out in the 2004 guidance with the HPC's..."

316. MR JUSTICE BURTON: They say it has been, do they?

317. MR TALBOT: They say it had been my Lord. If your Lordship goes on to page 101. It is paragraph 30.2. This is the response to this question:

"Consideration has been given to the areas indicated in the new professions process, ie as set out in 2004 guidance."

In response to the letter before claim they said they had taken into account guidance, but now, as your Lordship has seen, paragraph 17 of the summary grounds, they assert that they did not take them into account and indeed they say it was irrelevant. My Lord we submit that is not a basis on which to refuse permission for judicial review.

318. MR JUSTICE BURTON: Yes.

319. MISS ROSE: Finally my Lord has my fourth point about the failure to hold the final meeting with the LPG and the result of that and they lack the crucial input.

320. MR JUSTICE BURTON: You do not complain about the fact they have not, but what you complain about they made a decision.

321. MISS ROSE: They lacked input which on their own case was crucial.

322. MR JUSTICE BURTON: It was essential. They say matters which were essential to the mechanics decision--

323. MISS ROSE: Had not been done.

324. Finally, my Lord in relation to delay your Lordship has the point. We challenge the decisions of the 10th December and 23rd December. Both of those challenges are in time. We were in correspondence with them throughout the period and they actively dissuaded us from issuing proceedings. Your Lordship has this.

325. MR JUSTICE BURTON: I have seen the letter. If what was intended by it is what we are now told, it was not very cleverly written. Let us assume for a moment--

326. MISS ROSE: They accepted that we acted promptly so far.

327. MR JUSTICE BURTON: The way you have just put it is you were dissuaded from issuing proceedings. I suppose it does not get you anywhere because if you had issued proceedings in earlier this year, February/March this year, you would still have been out of time on their case.

328. MISS ROSE: My Lord, it is not that clear what their case is. Part of their case is that we should have issued proceedings within 3 months on 30th December 2007. I should say none of these dates appeared at any time before we got their skeleton argument. The first thing they say is 30th December 2007. Your Lordship has my submission on that, that cannot possibly be right because that decision in fact gives us the opposite impression, that they are going to consider this question.
329. The other thing they say is that we should have challenged within 3 months either the establishment of the terms of reference of the PLG or within 3 months of the PLG making its report to the Council. Again, we submit those cannot possibly be relevant to the decisions because the PLG was simply an advisory group, which had a specific delegated terms of reference.
330. MR JUSTICE BURTON: Paragraph 2, compared with paragraph 1.
331. MISS ROSE: It was not the decision-making body which was the HPC.
332. MR JUSTICE BURTON: When was the LPG decision?
333. MISS ROSE: The LPG report I am told it was July 2009.
334. MR JUSTICE BURTON: That too was out of time come February/March. I am not sure. If it is only discouraging you from issuing proceedings then that letter does not--
335. MISS ROSE: There is also the concession in that letter that we have acted promptly to date, it is expressly stated.
336. MR JUSTICE BURTON: It is not just that. Remind me, it is also the fact, if it went so far as they were not going to take any point, can you remind me.
337. MISS ROSE: It is at tab G, page 85.
338. MR JUSTICE BURTON: Yes.
- "I can confirm that the HPC's view is that you have acted promptly to date..."
339. MISS ROSE: "It would be wrong for the Claimants to issue proceedings..." It is that which is the more significant. To say, give you a pat on the back to acting promptly to date is one thing but "it would be wrong for you to issue proceedings at this stage". Yes, that is plainly discouraging from "issue proceedings". As I say, if you had issued them on 9th January 2010 because they required you do so, you would still be out of time on one of their cases.
340. MISS ROSE: On one of their cases. Your Lordship has my point about how that case is simply unstable. The other point of course about the PLG's report. We looked at that report earlier and the PLG's report itself flags up the fact that respondents to its consultation and attending to its stake holders meetings were opposed in principle and identifies it as an issue to be considered by the HPC.

341. Again, the PLG is not saying that the HPC cannot consider this issue. That report itself refers to Article 3(17). So there cannot possibly be a judicial review. We submit that the suggestion that there has been delay is hopeless. Even if we were wrong about that, we submit this is obviously a good case in which there are good reasons for extending time. Putting the matter at its highest, this is a case in which the defendant gave mixed messages to claimants as to what precisely they were doing; run a number of inconsistent cases as to what powers are being exercised and what the scope of the decisions were that it was taking. In those circumstances it lies ill in its map to criticise us for seeking to clarify the position before issuing proceedings.
342. There is no asserted prejudice to the parties or good administration. The Department of Health is neutral. The only parties who would be prejudice are the claimants who are sitting behind me today.
343. MR JUSTICE BURTON: Two things. There is not a question of a continuing breach here, is there? It is not one of those cases where you can say: even we are out of time, we can start fresh proceedings or there is a--
344. MISS ROSE: The recommendation has been made. I submit it is just impossible to Miss Campbell characterise the delay points because the decision of challenge is made on 10th December.
345. MR JUSTICE BURTON: I am only dealing with your fallback argument. Fifthly, I am looking at his skeleton 5. Fifthly:
"The claimant's argues the claim raises issues of general importance which are significant and not right."
The case arising in specific is all that has happened is you have communicated conclusions and then it is up to the Secretary of State.
346. MISS ROSE: Yes but there is a continuing disadvantage if the Secretary of State takes that recommendation into account when deciding whether to make the HPC the regulator of these professions.
347. MR JUSTICE BURTON: Thank you. Yes?
348. MR FORDHAM: My Lord, can I deal first with the points of claim first?
349. MR JUSTICE BURTON: What I am after, clearly, is a knock out point. If you have not a knock out point, Beatson J has already expressed a view and I have been greatly assisted by Miss Rose's, as usual, powerful submissions. So I really need a knock out point before I can decide it is not arguable. If it is arguable then, at the moment it does seem that the whether and who point remained unresolved, not least in the light, on the face of it, your own chief executive's statements in November 09 on two different occasions. It cannot be said that it was clear until December that you were not considering the whether and who.

350. MR FORDHAM: I have two points. My first knock out point is that the case is unarguable and I will be addressing you briefly on why I say the case is unarguable. My second knock out point is that to the extent that any point is arguable, it is out of time because we (inaudible) about what we were doing.
351. MR JUSTICE BURTON: I am sure those are your two submissions but I am looking for what the points, the knock out points are.
352. MR FORDHAM: I appreciate that.
353. MR JUSTICE BURTON: Clearly if it is unarguable, that is the end of it. If there is delay that is the end of it. What I am putting to you at the moment is, on the face of it, in light of the submissions, you have not identified a knock out point which shows me that the case is unarguable and certainly, if it is not unarguable at the moment it seems to me certainly grounds 3 and 4 date only from December 09, the mechanics points: you should have taken into account the guidance; you should have waited for your own final report on criteria on mechanics. So even on your case 3 and 4 are in time. As to 1 and 2, whether Miss Rose is right to call it "mixed messages", I do not think we can get there. The first time that you made it clear that you were not considering whether and who was December, and therefore they are time. So I am looking for help from you.
354. MR FORDHAM: Certainly, my Lord. The first point is that there is no need to clarify what the letter that is being impugned at E305 does and does not do. There is no need for clarification. It is very clear. We accept that the HPC has not reached a conclusion on the whether question.
355. MR JUSTICE BURTON: Or the who question.
356. MR FORDHAM: Or who. We have focussed on how. That is the first point. Secondly, you can see that we have 305, at tab E, the close correspondence between what the White Paper had said, rigorous process of assessing their regulatory needs. That was the first point, and ensuring that the system is capable of accommodating them. That was the second.
357. There is nothing in the White Paper about us addressing whether or who. The White Paper does refer to whether or who but that is the Secretary of State. It is not cast in stone because the Secretary of State could not lawfully do that. The Secretary of State has to prevent an ordering Council in due course, based on Her Majesty's opinion under the statute that this needs to be regulated. That has a consultation process attached to it. We did not do that. We were not asked to do that.
358. MR JUSTICE BURTON: You said you were asked to do it. You refer to 3(17) several times in the course of the history of the matter of the last 2 years.
359. MR FORDHAM: We were asked to assess regulatory need, the capability of (inaudible). That is my submission. My submission is clear. What we have said corresponds to it. That is the second point from the letter. If you are with me, these are knock out points. If you are not, Miss Rose will get permission.

360. MR JUSTICE BURTON: Irrespective of delay?
361. MR FORDHAM: Subject to delay.
362. MR JUSTICE BURTON: I thought you were accepting, but I misread what you were saying, that if I am not with you that the December, that you were obliged to and were representing yourself as giving a recommendation on whether or who, that that it was not clear that you were not giving that recommendation on that basis until December and therefore there is not a time point.
363. MR FORDHAM: I need to deal with that and address you on December. At the moment I am addressing on the decisions.
364. MR JUSTICE BURTON: Yes.
365. MR FORDHAM: So my Lord has the correspondence clearly, between what is being described and what we then do.
366. The next thing you have clearly from this letter is that what we say is that in the light of the White Paper the focus of our work has been in particular we addressed the tasks, by considering and then the building blocks and the accommodation solved and the PLG and that is the context of the conclusion. While we have it. We are also very clear that because certain standards are under current review -- the top of page 307 -- there is further work to be done and the PLG will reconvene.
367. MR JUSTICE BURTON: Where are you reading that from?
368. MR FORDHAM: Bottom of 306 and the top of 307.
369. MR JUSTICE BURTON: I was on top of 306. Bottom of 306, yes. Thank you. Yes?
370. MR FORDHAM:
- "...further work ... would need to await the outcome of its current review.... The Council agreed to return to the issue..."
- It is the papers my Lord, that there was to be further consideration of that by the PLG. That is clear, that is the question of work in progress.
371. My Lord, I see that you can confidently conclude that the description of "our work has been" -- bottom of 305 -- and "we addressed the tasks ... by considering", is not the rewriting of history at all. What the documents, and I will come to Mr Seale, because you are being asked to accept something very odd which is that having written a letter that is very clear, he then says precisely the opposite. In my submission he has done no such thing. For now can I stick to the document to show what the process was.

372. Far from rewriting history, if you go to December 2007, and you saw the paper and you saw the decision, it was in tab E at page 1 where the paper begins and it goes on all the way to the decision. If you pick it up at page 2.
373. MR JUSTICE BURTON: Tab E at page 2.
374. MR FORDHAM: Tab E at page 2, it starts by saying the government have already said what their position is.
375. MR JUSTICE BURTON: Yes.
376. MR FORDHAM: But these are the key issues they want to see progressed: title; standards of proficiency, standards of education and training. You then get on page 5, having contrasted Article 3(17), you get the IPC is going to proactively commence work, the executive therefore recommends the PLG. They are going to review and recommend and there you, the bullets points: structure of the register; professional titles; standards of proficiency; standards of education and training. That is therefore the decision recommended at page 6, a proactive progress with a PLG reviewing and recommending and look at the list in paragraph 2: structure of the register; professional titles; standard proficiency and so on.
377. MR JUSTICE BURTON: What about decision at paragraph 1 over the page?
378. MR FORDHAM: I am showing you the paper. Then, you see the same link 9.2 on page 9, (ii) and (iii). My Lord it is very clear what the PLG is doing. I need to deal with this point. There is the PLG on the one side and the Council on the other. Look at (iii) in the middle of page 9: "structure of the register, professional titles ..."
379. MR JUSTICE BURTON: This is not the PLG. This is the minutes of the HPC -- yes?
380. MR FORDHAM: I am sorry, I am going too fast.
381. My Lord sees the Council is noting the proactive review (ii) and the PLG's terms of reference, (iii). We have that paragraph in middle of page 1.
382. MR JUSTICE BURTON: Yes certainly.
383. MR FORDHAM: Then you get the decision in December, proactive process.
384. MR JUSTICE BURTON: I do not want to go to December before I fully understand this document. All I am really asking you is this. I quite follow at page 5 where they say: to date we have waited for applications before we start the process to make a recommendation under 3(17). And then further down because of all this, this means the HPC has an opportunity -- splitting the infinitive -- proactively to commence work on to stats. So unusually you pro-actually commence work. Then, over the road, over the page:

"Decision..."

The HPC commences a proactive process to investigate and make recommendations ... on the statutory regulation..."

385. What Miss Rose says is that this plainly means that what they are doing is having quoted 3(17) on the page before, they are using 3(17) proactively rather than responsively.
386. MR FORDHAM: The point I want to make, my Lord, is that they are very clear in December what they are going to do.
387. MR JUSTICE BURTON: They are very clear what the LPG or JPG -- I cannot remember what it is called, Liquid Petroleum Gas. Is it LPG?
388. MISS ROSE: PLG.
389. MR JUSTICE BURTON: I knew I could not have it right. What the PLG is going to do is quite clear, but is not the HPC itself, albeit it is delegating the mechanics to the PLG, is not it taking up the opportunity to proactively commence work on the statutory regulation?
390. MR FORDHAM: Yes, by having a PLG, with particular terms of reference.
391. MR JUSTICE BURTON: What does one mean? "The HPC commences a proactive process" -- page 6 -- "to investigate and make recommendations ... on the statutory regulation of Counsellors"... , "recommendations ... on the statutory regulation". That is not limited.
392. MR FORDHAM: On proactive review was a setting up of a professional liaison group.
393. MR JUSTICE BURTON: That is 2.
394. MR FORDHAM: Reviewing and recommending (inaudible).
395. MR JUSTICE BURTON: That is 2 but it is 1 that I am interested in. Are they not two different decisions?
396. MR FORDHAM: No. They are two different decisions, yes.
397. MR JUSTICE BURTON: One is the proactive process usually to do a proactive 3(17) to make recommendations on the statutory regulation and the 2 is mechanics. The PLG to have mechanics.
398. MR FORDHAM: Two is the mechanics of 1, precisely. One is what we are going to do, and the second is how we are going to do it. That is why again, for example, "the executive therefore recommends" the sentence I read out at the bottom of page 5.
399. MR JUSTICE BURTON: E6 is really the central dispute between the two of you, is it not? One and 2, as to whether 1 and 2 are two separate strands with a proactive 3(17),

leading to recommendations to the Secretary of State on the statutory recollection, with an LPG on the mechanics which you do not -- PLG on the mechanics which you do not even wait for in the end and strand 1 is the recommendation.

400. MR FORDHAM: You have my submission. It is very clear from what the executive therefore recommends that the PLG is the mechanics for the proactive process.
401. MR JUSTICE BURTON: Where is "therefore recommends"?
402. MR FORDHAM: Bottom of page 5, the last paragraph on the page. We did not do anything else. We did not set up another body to look at suitability or whether or not.
403. MR JUSTICE BURTON: You did not.
404. MR FORDHAM: This is what we did. This was clear and what we were doing. So it comes to this. You ask for a knock out and here it comes.
405. MR JUSTICE BURTON: Yes, I am waiting.
406. MR FORDHAM: Miss Rose therefore has to say that you can distinguish between the Council proactively reviewing whether and who, and the expert group, professional liaison group, looking at narrower questions.
407. MR JUSTICE BURTON: Mechanics.
408. MR FORDHAM: Mechanics. She says that the Council, before it somehow much later rewrote history, the Council was proactively looking at whether and who, and that she said is supported by the references to (inaudible) and she gave the Department of Health writing a letter saying, that it was their understanding that the Council was looking at the questions of how. She says how must be whether and who.
409. MR JUSTICE BURTON: Well, I suppose she also referred to the fact that there were at page E150 and 151, references made in the LPG report without reaching any conclusions about them under 3.5 but on the basis they were live.
410. MR FORDHAM: She does not say that the liaison group had a wider remit than those bullet points that I read out. The points I was, gone ahead that is fine. The point I was on, there is no rewriting history because the decision letter faithfully reflects the work that was in fact done under the bullet points that were in fact identified at the time.
411. MR JUSTICE BURTON: Sorry which bullet points?
412. MR FORDHAM: The bullet points I have shown you.
413. MR JUSTICE BURTON: Yes thank you. There is no sign apart from that paragraph which mentioned matters and did not reach any conclusion about that, the LPG ever considered whether and who.

414. MR FORDHAM: They stuck to their task. It was not in the room.
415. If you go back to tab G remembering the freedom of information request, asking those questions about: is it your understanding that the Council is looking at the question of whether and who. They were very clear, so is the answer on page 52.
416. MR JUSTICE BURTON: Just a second. I am very anxious to come to that. I did want to pick up. Can you remind me about bundle E148, where that fits in. This is the PLG in May 09.
417. MR FORDHAM: Yes.
418. MR JUSTICE BURTON: It was 3.2. There is an express reference to 3.17, and the fact that:
- "The Council may-
- (a) make recommendations to the Secretary of State concerning any profession which in its opinion should be regulated..."
- and:
- "...the Council may wish to make a recommendation in the absence of an application, where it considers that this would be in the public interest... the final decision is made about whether a profession should be regulated..."
- Does this not suggest the LPG is indeed dealing with whether and who, at this stage, albeit not a final decision?
419. MR FORDHAM: Because the LPG has terms of the reference that are clear from the start and from which it never did give us. Look at paragraph 11 on the next page. "Terms of reference", I am coming to whether it is lawful because that is my submission very clearly is it is lawful. The professor knows what we did, and this is you can see on concern in this case, it is not that we chose to narrow the work that was done. The work that was done was deliberate. The person doing it was deliberate. It took 2 years. We got the conclusions. We have read the letter. Paragraph 11 there are the bullet points.
420. MR JUSTICE BURTON: Paragraph 3.2, what is the point of that? It is what they might have done but have not done. Is this it?
421. MR FORDHAM: My Lord, yes. They never say that they are addressing the question of whether in their opinion this profession should be regulated.
422. MR JUSTICE BURTON: They are not, plainly the LPG are not, but it suggests that is what the HPC at any rate could do, if not are doing. Any way you were taking me to G which is very important.

423. MR FORDHAM: I wanted to go back to the letter that Miss Rose directed.
424. MR JUSTICE BURTON: Yes certainly.
425. MR FORDHAM: You will remember very straightforward questions are being asked by Mr Halford about whether its the government's position that the Council is addressing, the questions of whether and who.
426. MR JUSTICE BURTON: Which page is this in G?
427. MR FORDHAM: Page 52. You will recall she, Miss Rose, emphasising, saying how, is describing whether and who. Well my Lord, the first thing that the government says is that the government has made clear its decision. That is the second paragraph. Then the HPC was also asked to consider how, not whether, not who, how the statutory regulations might be impinged.
428. MR JUSTICE BURTON: It does not say how the statutory regulation by them of psychotherapists, does it? It says how the statutory regulation might be achieved which could include, could it not, by somebody else?
429. MR FORDHAM: My Lord, the White Paper having referred to those two questions which were not whether and who. They have their view on that. Thank you. It is now saying: will you please visit--
430. MR JUSTICE BURTON: This is not a statute and as Miss Rose has said previously, or reminded me previously, we should not read these things too strictly. You say that I should read this letter as if it said the HPC was also asked to consider how statutory regulations of psychotherapist by it might be achieved. It does not say that, that is what you say it should mean.
431. MR FORDHAM: Yes, that is my submission. It is straightforward that it is not whether it not who and it is how and look at the link. The HPC was asked to consider how "to progress the work HPC established a Professional Liaison Group". So the government knows that the proactive review of the relevant questions is being undertaken by the group. And how is not it some other exercise being done proactively by the Council in some other way. There is not any other process.
432. My Lord I am not going to address on length on all the materials. It is not going to assist you. You can see what we have done. You can see the link not the rewriting of history, the Directive between the work we did and the work we described in the decision letter. Is it lawful?
433. MR JUSTICE BURTON: Hold on, I want to finish Hansard. We have got 166 to 167. That is consistent with your case, is it? I think it is consistent with both cases:

"Consideration is also being given to the regulation of Psychotherapist and Counsellors. The HPC has been working with bodies representing it to develop proposals but we are not there yet."

It is very vague, is it not? It leaves open the possibility that they are looking for a recommendation on whether or who. It does not foreclose that. Equally it does not foreclose your argument either.

434. MR FORDHAM: It does not assist my learned friend at all.

435. MR JUSTICE BURTON: It does not assist you. It assists--

436. MR FORDHAM: I am saying look at the December documents and you will see what we said we would do, and then we then spent 2 years doing it.

437. MR JUSTICE BURTON: What about G3? I think for the purposes of judicial review, we have to ignore the fact that this is their document rather than yours. There has been no affidavit, even from your -- no witness from your side to say this is inaccurate. In any event it is more or less consistent with what your own notes says a year and a bit later. Let us just look at that:

"[Your] unique among those regulators in being required to advise the Secretary of State about the new professional goods that might be regulated by HPC."

Then further down: "The final proposals might be the professions ... should not be regulated." I mean that is a killer, is it not, on your point you were not doing that at all?

438. MR FORDHAM: Will you go back to the decision letter at 307 at tab E. At the top of 306 in tab E you will remember the questions that were being addressed. Let us just look at them:

"whether the regulatory 'building blocks' ... can be used to meet the regulatory needs [of these two]

• whether doing so can be accommodated..."

If you look two paragraphs down you find the word "can" three times -- sorry, two times, regulations "can be accommodated".

439. MR JUSTICE BURTON: Yes. That is all how, I quite agree.

440. MR FORDHAM: The point is this. Suppose the opposite conclusion were reached on those questions. Within your focus you would be saying--

441. MR JUSTICE BURTON: -- we cannot do it.

442. MR FORDHAM: We cannot do it. So how consistent with what you are doing might the answer be "no", if you have a "cannot" instead of a "can" for any of those. Once you understand that you do not have the bizarre suggestion that the same individual is slightly contradicting himself (inaudible).

443. MR JUSTICE BURTON: You may be right about that Mr Fordham, but the word that is used by Mr Seale on this note at page 3 is "cannot be regulated" but "should not be regulated", page 3:

"The final proposals might be that the professions concerned should be regulated, or those professions or certain parts of them should not be regulated."

It is not "cannot" be regulated which is what you are saying now.

444. MR FORDHAM: What I am addressing is whether there is an inconsistency between the narrow and clear focus--

445. MR JUSTICE BURTON: I see that entirely. It is very irritating for you to have the advocate for your clients, to have advocate's point put about rewriting history. It is splendid stuff in the courts, I know it is irritating. But the fact is I am putting to you whether or not there was a rewriting of history, whether or not anybody appreciated what was happening will all come later. On this document alone, you are telling the other side that what you are doing is making possible final proposals -- we have not got there yet -- that the professions should not be regulated. That is, I would have thought completely inconsistent it not being part of your remit or the LPG, the PLG having a clear remit and HPC not turning their mind to it at all.

446. MR FORDHAM: The two matters I propose are very briefly, the first is that, in my submission, it is entirely consistent with the point that I have made. Once you understand that you are asking a can or cannot question.

447. MR JUSTICE BURTON: Cannot mean and should not.

448. MR FORDHAM: It has that (inaudible). That is my first point. My second point is that if you are against me on this document, its relevance goes to delay because it entitles Miss Rose to say that it illustrates that someone could reasonably have thought we were doing something else. She does not get there. If I can show you that in fact we have done the same thing from the start. We have done what we said we would do and it does match the White Paper and it is thought. If you (inaudible) are arguably unlawful, then we are into delay and I have made my submissions on this document and if you are against me on it...

449. MR JUSTICE BURTON: So the fact that you may have misled them goes to delay. Let us just set that aside for the moment. The fact you may have misled them is not relevant you say because, if whatever you say you were not making a recommendation, in accordance with 3.17, and never have made a recommendation in accordance with 3.17 but made something different, subject to the point you are going to make this afternoon, then there is no grounds for complaint, albeit it would not be out of time.

450. MR FORDHAM: What it would have to be a legitimate expectation, based on the promise we do something that we did not do. There is argument like that in this case, it is ground 2. But the argument in this case that is ground 2 is that our December decision was a decision to address whether and who. You have seen those materials.

You will reach your view. But my submission is that it is plain that the December (inaudible) was not a decision.

451. MR JUSTICE BURTON: Is it a concern that the government may treat it as a decision on whether or who?
452. MR FORDHAM: It would be if there was any prospect of that. It is very clear. You can give a judgment today. We have accepted it. The Secretary of State knows we accept it. We have never pretended from start to finish.
453. MR JUSTICE BURTON: All you have done, you say -- whatever you may have been saying, all you have done is done a mechanics of the situation, had not completed that, we have to come to that. Although you--
454. MR FORDHAM: -- what we have done and what we still have got to do.
455. MR JUSTICE BURTON: You tell them you have not completed it in 307.
456. MR FORDHAM: No I have not.
457. MR JUSTICE BURTON: But what about the fact -- we will come to it after lunch, you had not complied with the guidelines.
458. MR FORDHAM: I will come to that as well. The guidelines are there. Whether or not you have an applicant, or doing it on your own initiative, the guidelines are there when you are deciding to consider as a candidate for regulations, a profession and put forward recommendations to the governments. That is what they cover. We say that we were in a particular situation where the government had said, expressed a view on one argument and asked us to deal with other ones.
459. MR JUSTICE BURTON: It seems very odd -- we will come to it after lunch, you apply different guidelines. Let us leave aside guidelines. For the rest of it you say that you were doing a mechanics exercise. You made it clear that the mechanics exercise was incomplete. That is all you have done.
460. MR FORDHAM: All I would need to do. I say "all", it is a big point in the case and if it is arguable then subject to delay.
461. MR JUSTICE BURTON: That is why I said at the beginning of today I had not read this document at that stage. That it seemed to me delay stood of fell.
462. MR FORDHAM: I will come after lunch to the question of whether what I say we have done from the start is lawful or unlawful.
463. MR JUSTICE BURTON: Thank you very much. Five past 2.
- (Luncheon Adjournment)**
464. MR JUSTICE BURTON: Yes?

465. MR FORDHAM: My Lord, I wanted to next on would it have been lawful to look at that question. We say yes, and we say you can reach that conclusion with confidence.
466. The first point is to remember that under the Act the primary decision maker is the Secretary of State, that is to say Her Majesty by ordering Council.
467. MR JUSTICE BURTON: Would it be lawful to do what, to do what you did not do, or do what you you did do?
468. MR FORDHAM: Do what we did do and not address the big question of whether or not.
469. MR JUSTICE BURTON: Right.
470. MR FORDHAM: The primary decision maker is the Secretary of State. That is section 60(1)(b). That is the first point. The second point is that within the statutory scheme there is no precondition that the Council must have approved a profession for regulation. The Secretary of State can simply do it. We can put forward a profession for regulation, rely on initiative or an application. We do not have to, and there is nothing to constrain the Secretary of State. My Lord, to test the vires point, can I invite you to posset this example. The Secretary of State writes to us and says: I have decided that I am going to regulate this profession and it is going to be you that regulates this profession. That is not a final decision because I cannot fetter my discretion, I have to make an order, Her Majesty and Council, it needs a consultation order of statute. That is my plan. I would like your view on one or two points that are quite important to you as the putative regulator. Let us take the example, as test of the point principle. Take for the example the question: could you accommodate this profession without disruption to your every day work? That is quite a good example, because that was part of the White Paper. It is a good example because it demonstrates because it is not Part B of the guidance. You will find: can we accommodate without disruption? As a later aspect of the guidance -- we do not need to turn it up, it is tab C page 6 -- but just for the vires point, there are two possible answers. One answer is we write back and say: no, we cannot help you. We cannot express any view. The only thing we can do under the statutory scheme is to make recommendations by going through the hoops of everything (see Article 3(17)).
471. The other possibility is that we say "yes", we can give a view. We are not giving recommendations under 3(17). We are certainly not giving opinions or asking them on the big questions of whether or who. I submit it is very clear that the second is correct. Why do I so submit?
472. The statutory scheme expressly provides for a general ancillary power. My Lord has seen it. If I can just remind you of it. It is in the order itself.
473. MR JUSTICE BURTON: Page 78.
474. MR FORDHAM: What it says is that:

"The Council can do anything which appears to it to be necessary or

expedient for the purpose of or in connection with the performance of its functions."

We are on the eve of being the regulator on my example, of having the function of regulating this profession and we are being asked to state a view that is relevant to whether we can cope with having this profession on our books or whether it would be too disruptive to the operation of our functions. My submission is that is squarely something that is in connection with the performance of our function. The whole premise is that we are going to be regulator. Therefore there is no straitjacket based on the fact that only if already the order has been made, the die has been cast, can we assist the Secretary of State by stating a view.

475. That is the power. We say plainly that is right, as a matter of natural language. It is right as a matter of common sense. It is right when you consider the consequences otherwise. So the only question is whether Article 3(17) pitches its tent here, to be a comprehensive power for us to talk to the Secretary of State and give our views and it is no such thing. It is a specific provision dealing with a particular situation.
476. My Lord that is the way we put it. That is the provision that we rely on in the letter of response (paragraph 24) in the summary grounds (paragraph 16). The argument we were facing: well no that is displaced because Article 3(17) is a comprehensive power. We say that cannot be right. That is why our skeleton focuses on whether the statutory scheme displaces that common sense conclusion. That is the question of law.
477. MR JUSTICE BURTON: You have not made any recommendations. You have not given any opinions. Your guidance is irrelevant or at any rate not mandatorily required. We can therefore set aside 3(17). Indeed, we can reassure the claimant associations that you have not made any recommendations and you say my judgment can make it plain to the Secretary of State that you have not made any recommendation.
478. MR FORDHAM: We are very, very happy with that.
479. MR JUSTICE BURTON: All you have done, you say, is pursuant to your powers under paragraph 16 of schedule 1, responded to a request and it is in connection with the performance of your functions because it at any rate for the purpose of performance of your functions because it relates, if the Secretary of State decided to allocate to you and/or was permitted to do so and or Her Majesty made an order in Council pursuant there to could you cope and you have said, yes, you can. Is that what PLG did?
480. MR FORDHAM: That is what we have done. The group, with its terms of reference and there is no complaint about this, has faithfully addressed its terms of reference.
481. MR JUSTICE BURTON: Look again at terms of reference. Terms of reference being 16.1, giving some advice, which would be necessary or expedient in connection with the performance of the functions -- yes?
482. MR FORDHAM: I am looking at various places but I am looking at E at page 5, at the bottom of the page.

483. MR JUSTICE BURTON: Just pausing there, in that context, you have told them you have not finished the work, hence the last meeting with the PLG has not yet taken place and have you told them that you have not applied the guidance, have not considered the guidance. Where have you told them that?
484. MR FORDHAM: We were asked that question and--
485. MR JUSTICE BURTON: Have you told the Secretary of State, is the point I am making.
486. MR FORDHAM: That I will need to check. We certainly have not given that fact, because asked that question we have given that answer. My Lord, may I answer it in this way? My Lord is right, that is the submission that I am making to my Lord. The Secretary of State -- you can be confident of this -- the Secretary of State well knows what the PLG was doing.
487. MR JUSTICE BURTON: You were going to show me a page.
488. MR FORDHAM: I was just referring to E, page 5 at the bottom of the page.
489. MR JUSTICE BURTON: Yes.
490. MR FORDHAM: Terms of reference. It was all set up following the decision in December. You will recall in the Freedom of Information Act request the answer that comes back is they are addressing how they set up a PLG.
491. MR JUSTICE BURTON: Where are you referring to?
492. MR FORDHAM: I was referring to the Freedom of Information Act request or response that was in G. We looked at it before lunch.
493. MR JUSTICE BURTON: Page?
494. MR FORDHAM: Fifty-two, yes, thank you. Fifty-two, The middle of the page:

"The HPC was also asked to consider ... progress this work the HPC established a Professional Liaison Group".

495. My Lord, we would be entirely content for a ruling or even a declaration that this is not an Article 3 interpreting recommendation. It is not a view, or opinion on the whether or who. It is not the application of the guidance of Parts (a) and (b) and it is leaves to be reconsidered the standards questions once the review is complete.

496. The Department of Health representative was present at the first PLG meeting, Chapter E page 82:

"The Secretary of State has described the work being done as a partnership between us and the department."

That is tab G, page 10. When the Secretary of State received our letter which was very

clear about what we have done, what basis and what is left over, we get a response saying: this is vital work to me the Secretary of State carry this forward. That is tab E, page 308.

497. MR JUSTICE BURTON: You formed no opinion as to whether HPC is the appropriate regulator.
498. MR FORDHAM: We have not.
499. MR JUSTICE BURTON: All you have done is say whether you can cope or not.
500. MR FORDHAM: We have the two aspects in the White Paper. Of course that is the complaint: you needed to do more. What they are really saying is: you cannot put forward your relevant views on these other matters unless you have first done something else, something that we are not required in the statute to do, we say, something that is no public law duty for us to do. Nobody gave us a duty, we never made a promise.
501. MR JUSTICE BURTON: You said whether you can cope was the second aspect in the White Paper, what was first?
502. MR FORDHAM: If you go back to the decision letter at E, page 305, we have to assess their regulatory needs and ensure that our system was capable of accommodating them: "We assessing", as the letter says at the bottom page, "we assessing their regulatory needs and ensuring its system is capable of accommodating them."
503. MR JUSTICE BURTON: Sorry 305, at the bottom of page.
504. MR FORDHAM: Page 305 in the quoted italics is the White Paper, setting their regulation need is the first thing and assuring the system is capable of accommodating them. Then we say the HPC has now undertaken the tasks of assessing.
505. MR JUSTICE BURTON: Capable of accommodating them, yes.
506. MR FORDHAM: Then we say the focus was on the practicalities and we addressed that by considering. We are very clear what we have done. The bullet points at the top of the next page, "building blocks which we use - protected titles, standards of proficiency" and so and whether they can be accommodated. Protected titles is of interest my Lord because that would be relevant to the question of psychoanalysis, which was the specific point being raised, you will remember, in G at page 4, with Mr Marc Seale.
507. MR JUSTICE BURTON: That is not being medical or mental.
508. MR FORDHAM: What about psychoanalysis? There are issues there about what is the title that you are protecting. This is all about people not being about to hold themselves out as being something. So the Secretary of State gets our letters. Says: thank you very much, that is the work I wanted you to do. Two things are left over -- I have nearly finished, my Lord -- tab H pages 81 to 82, H at 81 to 82. This is

subsequent to the decision letter, in March of this year on page 81, describing the outstanding issues, paragraph 1.2 on which further work may be necessary. The bottom of that page, the ongoing review. So if you look at page 82 at paragraph 2.4, the PLG is going to need to reconvene. They are not there yet. Secondly the Secretary of State most certainly is not there yet because the whole thing is in the Secretary of State's, on the Secretary of State's desk and there is a useful email which you now have exhibited by Mr Halford, I think it is the back, the very back at tab H, 19th March 2010 where they said at 112, they are intended to further work assessing various aspects. Nothing pre outstanding final decision.

509. So, the knock out is this. My Lord can see the proactive review that has in fact been conducted by the PLG, by reference to its terms of reference. Publicly documented meeting in public. That is the task that was undertaken. That was the consideration of how. What knocks out the claim is that there is no statutory duty to do more than that. There is no public law duty to do more than that, and there is no public law duty to hold back a letter until we have done more than that. There is nothing to clarify. I do not need the delay point, but the delay point is that if we were required to doing a different proactive review exercise it is 2 years, more than 2 years too late.
510. MR JUSTICE BURTON: That is where you are in difficulty.
511. MR FORDHAM: You have expressed a view. You have my submission, I am not going to improve it by repeating it. My Lords, that is where we are. That is why I submit that there is a knock out blow. Would you just give me one moment my Lord?
512. Unless you have any questions those are my submissions.
513. MR JUSTICE BURTON: Thank you. So, you win when you lose with Margolis and Ridging. If you lose, I do not think I am paying forth, you pay forth. If you lose this application you get a declaration that they have not carried out a -- whatever it is -- 3(17)(a) and or (b) exercise. They have made no recommendations and they have not taken into account the guidelines. This is on the basis that all they have done is done what the government asked them to do, which was to carry out effectively a feasibility exercise, which did not carry with it any recommendation.
514. MISS ROSE: My Lord I understand the argument that has been put. It falls down in respect to Mr Fordham when one actually looks at the letter that they sent to the Secretary of State. Before I come onto it, can I give your Lordship the letter of 1st September we have managed to look at. If we just turn up the letter at E305, the central submission made by Mr Fordham is that there is no recommendation and no statement of opinion, in this letter and therefore nothing that could cause a problem. He says all that they have done is some logistical exercises and that is understood.
515. MR JUSTICE BURTON: He goes further and says he is there prepared to submit to a declaration that they have not done.
516. MISS ROSE: My Lord, if they are prepared to do that, it looks like I win the entire judicial review rather than losing this application.

517. MR JUSTICE BURTON: No, you would have to abandon other aspects. I think you would achieve your end, which is to neutralise, to strike from the record any recommendation that has been made.

518. MISS ROSE: Of course the whole purpose of this application is precisely that. The slight of hand in the way Mr Fordham puts it in an attempt to salvage something is the way he characterises this letter. Can I show your Lordship what it again actually says. At the top of page 306, on the bottom of 305 he says:

"In relation to psychotherapist and counsellors, the HPC has now undertaken the tasks identified in the White Paper, of assessing their regulatory needs and ensuring that the HPC's system is capable of accommodating them."

519. In his submissions to your Lordship about vires he focussed on the second half, whether the HPC system is capable of accommodating them. He is in a position then to submit to your Lordship that this was really only about logistics, it is just a letter sent from the HPC to the Secretary of State saying: yes, we can handle, and it is not a problem. But there is a problem. The problem is that the first part of the task, the assessing of the regulatory needs. Because when we come over the page, at the top they say they have assessed:

"... whether the regulatory building blocks which we use, protected entitles standards and proficiency etcetera, can be used to meet the regulatory needs of psychotherapists and counsellors."

Pausing there, that is precisely the problem in this case. Because the submission of my clients throughout has been that the regulatory building blocks of the HPC has fundamentally, ill suited because it is not the right sort of profession because it does not cover a single coherent body of knowledge. There is not single professional entry level. All of the different criteria in Part B. When one looks at this bullet point more closely it becomes even more strange, because the second of the building blocks that is referred to here is standards of proficiency. One thing that we know is that the HPC has reached the view that its current standards of proficiency are not appropriate and it has not developed new ones.

520. MR JUSTICE BURTON: I do not know if they have reached that conclusion. They certainly reached the conclusion they have not yet done the work.

521. MISS ROSE: Look at the conclusion, just below the second bullet, there is a reference to the PLG and then look at this:

"The Council considered the outcome of all that work at its meeting on 10th December and concluded..."

So when my learned friend says there is no statement of opinion on recommendation, there is a conclusion, there is a decision that the regulatory needs of psychotherapists and counsellors can be met by the HPC using the regulatory building blocks which it normally uses. The second bit is about accommodation.

522. My Lord, our complaint is that the HPC was in no position, lawfully or rationally to reach that conclusion. Because in order to reach the conclusion that the regulatory needs of these groups could be met by the HPC, it would first, have had to go through the 3(17) process, including the application of its own guidance and criteria. That is why we say the whole of this process is based on a misunderstanding.
523. MR JUSTICE BURTON: Whether the whole of the process is, this letter purports to be a representation that they have done more than they have told has done.
524. MISS ROSE: My Lord, there is an internal tension in our position throughout, because they keep saying we have not considered the "who" question but this is necessarily addressing the who question. Because if you ask the question: can the HPC adequately meet the regulatory needs? You are asking is the HPC the right regulator. They say they have not addressed the question of the HPC being the right regulator and they have not addressed the criteria. The problem--
525. MR JUSTICE BURTON: At the very least that passage is ambiguous, but the page 305 is not less ambiguous, is it not, "assessing their regulatory needs and ensuring the HPC's system is capable of accommodating them", ie--
526. MISS ROSE: It is the assessing the regulatory needs that is the problem. The one thing that the HPC has not done is to assess the regulatory needs of these professions.
527. MR JUSTICE BURTON: I cannot help feeling you have the makings of what you want in what Mr Fordham said, but that there could be the form of agreement, which does more than achieve their declaration from me, but results in the withdrawal of this letter and the substitution of something else to say what in fact they have done.
528. MISS ROSE: It may be that -- I am sure that everybody here is listening to what your Lordship is saying -- in my submission the right way to achieve that is for your Lordship to now grant permission and then the parties to go and have a sensible conversation about what the implications of that decision are.
529. MR JUSTICE BURTON: What it would mean of course is a substantial concession by Mr Fordham, along the lines we have just been discussing, also a concession by you, which you do not yet make and I am waiting to hear what your argument is that if all they did was the building blocks, at the request of the government and the coping mechanism, then that is something that would fall within their powers.
530. MISS ROSE: My Lord we do not conceive that the first part, the meeting the regulatory needs part can be done. That is the fundamental problem here, because what they have done--
531. MR JUSTICE BURTON: If it is--
532. MISS ROSE: If all they have said was, if the situation was simply the government had written a letter to the HPC and said: will your resources be stretched to breaking point if we added psychotherapists to the groups that you regulate? The HPC said we

looked at the number of psychotherapists and our resources can handle it, I would not be standing here now my Lord.

533. The reason that we are here is that the HPC has purported to communicate to the Secretary of State the conclusion that it can meet the regulatory needs of each professions.
534. MR JUSTICE BURTON: I understand what you are saying. All I am putting to you is that if this was cleared away and whether it was some by agreement or declaration or whatever it might be, it made clear there was no recommendation, no conclusion or recommendation that they should be the regulator -- well, first of all, there should be regulations and secondly they should be the regulator and they could satisfy the regulatory needs of your clients because they would be good at it. If that was cleared out of the way and a separate letter was written, it would need you to accept that something less than that, the pragmatic exercise, which at the moment you are saying would still be -- you have been saying, I do not know whether you still are, having heard Mr Fordham's powerful submission on the role of para 16 -- it may be you are simply saying: if that is all you have done, that would fall within para 16 of Schedule 1.
535. MISS ROSE: My Lord, if all they said was: we can handle psychotherapist if you want us to, that would be one thing. The problem is they have gone along way down and that is the problem.
536. MR JUSTICE BURTON: You are not saying that if that all they had done that fall without para 16.
537. MISS ROSE: If all they had done was to consider whether their resources were physically capable of.
538. MR JUSTICE BURTON: Might involve more than resources. I do not know. As long as they stayed short of: we are the appropriate body and we would appropriately--
539. MISS ROSE: The problem is the conclusion that they can meet the regulatory needs.
540. MR JUSTICE BURTON: I am trying to get behind that. Assume that I were with you on that and there was some lesser formulation, whether it amounts to just we can take on more staff if necessary, we have the premises and we have the copying machines. I think if you are going to have a 2-year exercise you must have appreciated it would be more than that. That it does seem to me, that those kinds of questions would fall within Mr Fordham's construction of paragraph 16.
541. MISS ROSE: Of course we thought it was going to be more than that. It was only at the closing stages that we discovered they were saying they were not considering that question. Can I come back to this letter in a little more detail my Lord. Because in relation to further work, at the bottom of 306, they say:

"There were matters on which the Council concluded that further work

needs to be done but which it considered did not affect its overall conclusions."

That again, we say, is completely unsustainable. Because if it is in a position where it is saying, that at the moment the current standards of the proficiency are not appropriate, how is it in a position to say that it will be able to devise currently unknown standards of proficiency which will be able to meet the regulatory needs of these professions. It is simply not in a position to say that not having done that work, it will not affect its conclusion. So the letter, we submit, is fundamentally flawed. We have all heard what your Lordship says. If your Lordship were now to grant permission the parties would go away and one would hope that in the interests of saving public money and common sense, an accommodation might be found. We have tried to reach an accommodation. But my Lord, in submission, the claim is plainly arguable.

542. MR JUSTICE BURTON: The boils have been lanced to an extent today.

543. MISS ROSE: To an extent but not wholly. In my submission--

544. MR JUSTICE BURTON: I see that. All I mean--

545. MISS ROSE: The spin he is putting on this letter it will not bay.

546. MR JUSTICE BURTON: Rather like a mediation: you both sat and listened to the strengths of each others's case.

547. MISS ROSE: My Lord, his delay point is clearly wholly unmeritorious. We submit that the claims are obviously arguable. Can I deal with a couple of the other points that he makes? He seeks to characterise the December 2007 decision as consistent with what he now says was the ambit of the instruction in the White Paper, but he omits to make any submission at all on the key paragraph of that decision. If we go back to tab E, page 5. This is the page in the road map where they set out Article 3(17), so the HPC has an opportunity to proactively commence. He hangs his whole argument on therefore he says because it says "the HPC therefore recommends the establishment of the PLG" there is really one decision here, not two. But my Lord, he ignores a crucial paragraph of the decision, at page 10. It is paragraph 9.6. Now, your Lordship knows we have looked at 9.5 when we see the two limbs of the decision made by Council and then 9.6 they note the issues of concern to those within the Council of psychotherapist professions, not in favour of statutory regulation "at this stage it had not taken any decision as to how this group should be regulated".

548. Now my Lord, in my submission, that paragraph cannot stand with what my learned friend has said there. Because it is an express recognition of the controversy of the concept of statutory regulation by the HPC and a clear statement that no decision had been taken on that.

549. MR JUSTICE BURTON: It significantly had not taken any decision.

550. MISS ROSE: Yes, precisely.

551. MR JUSTICE BURTON: "It", the HPC.

552. MISS ROSE: That paragraph, Mr Fordham made no submissions on it. It cannot stand in his case. It is completely inconsistent. It must be mean that we are right and that original task was indeed to make a recommendation. That also is totally consistent with what the PLG did, because if we back go to the PLG final report, in E148 -- we have looked at this before -- so this the PLG's report to the Council. At 3.2 they set out the terms of 3(17), and my learned friend had no credible explanation as to why they should do that, it was irrelevant (inaudible). Then they make the point about it being proactive. Then, at 13, after they had dealt with their terms of reference, they say:

"The recommendations of the PLG will inform the recommendations of the HPC Council to the Secretary of State and to Ministers in the devolved administration."

Then at the 15:

"The PLG will reconvene to consider ... responses about the standards of proficiency and the threshold level."

Then at 18:

"The HPC will consult on the recommendation of the PLG before finalising its recommendations to the Secretary of State ... and Ministers in the devolved administrations."

Then at 3.5 under the heading "Statutory Regulation", they have identified discussion and debate about the principle of statutory regulation.

553. MR JUSTICE BURTON: Which page is this?

554. MISS ROSE: Page 150, paragraphs 21 and 22. Some respondents and participants argued that statutory regulation was not necessary.

555. MR JUSTICE BURTON: I am conscious of that. Effectively what Mr Fordham says they are simply reciting that there are disputes.

556. MISS ROSE: Then say at 25:

"The PLG agreed that, in making its recommendations, [to the HPC] it was important that the views of those with dissenting views or concerns about certain aspects of statutory regulation should be listened to and taken into account."

557. My Lord, what is clear is that the PLG, with its more limited terms of reference, is now reporting to the Council by reference to 3(17), saying: we expect our input to inform your recommendation under 3(17) and please take note of the in principle objection to regulation by the HPC by sections of this professions.

558. Again, my Lord, wholly inconsistent with my learned friend's case, about what exercise was being undertaken. What he has said today was: the PLG was only looking at the building blocks and that was the whole of the exercise the HPC undertaking and everyone knew that from the start. That is inconsistent with the December 2007 decision and it is inconsistent with the PLG's own report to the HPC Council. That was not the task they were doing.
559. We submit it is inevitable that it was not a task they were doing, because they were not in a position to answer the question: can the HPC meet the regulatory needs of this profession within grappling with that question. It simply could not deal with it. They have not dealt with it. The result is that the recommendation they made to Ministers is, with respect, internally incoherent.
560. He relied heavily on the fuller response as supporting the scope of the PLG's work. That is at G 52.
561. MR JUSTICE BURTON: Yes.
562. MISS ROSE: But, in my submission, it is completely consistent with the course that we have just looked at, which is that the HPC was asked to consider how the statutory regulations of psychotherapist and counsellors might be achieved and to make recommendations to progress this work the HPC established the PLG. That is exactly what it did.
563. MR JUSTICE BURTON: Mr Fordham wants me to insert the words "by it".
564. MISS ROSE: My Lord, with respect we say there is no warrant of that. Bearing in mind also this is a specific response to the request at page 38, 39, which is focusing on the question whether the HPC had positively concluded for itself that there should be statutory regulation and it should be the regulator. Specifically the context in which the statement was being made. They are not saying: no that was a matter that was being determined by the Secretary of State.
565. MR JUSTICE BURTON: Yes. Unless there is anything you want to say I need not trouble you further.
566. MISS ROSE: My Lord I am grateful.

(Judgment Followed)