



Camden Academy Appeal Dismissed

The Court of Appeal has dismissed an appeal against the Secretary of State in connection with an academy which is to be set up in Camden.

The appeal was brought by a Camden parent who contended that the Secretary of State had failed to comply with the public procurement regime when approving University College London's (UCL's) expression of interest for the Camden academy.

The decision to dismiss the appeal will be a relief to the Government, academy sponsors and the many local authorities involved in the academy and building schools for the future programmes.

Background

The appeal stems from UCL's expression of interest to act as the sponsor for an academy in the London Borough of Camden. On 21 November 2007 the Authority approved a proposal for a new academy to be built in the Borough. The Authority also approved UCL as the preferred academy sponsor. On 29 February 2008 the Secretary of State approved UCL's formal Expression of Interest for the academy proposal.

Two judicial reviews applications were brought by a Camden parent, Gillian Chandler to challenge the promotion of the academy. Judicial Review One brought against the Authority maintained that an open competition should have been held to decide the type of Secondary School to be built in the area. Judicial Review Two was brought against the Secretary of State challenging the decision to approve UCL's Expression of Interest. Both applications were dismissed by the High Court.

This appeal concerns the challenge against the Secretary of State under Judicial Review Two (Judicial Review One was not appealed by the claimant). The claimant argued that the Secretary of State had failed to comply with the public procurement regime and that a competition should have been held to determine who should act as sponsor to the academy.

The Court of Appeal noted that there were two issues which were to be contested at the appeal:

- Does the public procurement regime apply to the expression of interest by UCL?
- Does the claimant have the required standing to contend that the public procurement regime is applicable?

Does the public procurement regime apply to UCL's expression of interest?

The Court noted that UCL, as an academy sponsor is precluded from gaining a profit from their sponsorship of the Camden academy. To determine whether an organisation which is unable to make a profit could still be subject to the public procurement procedures, the Court considered Directive 2004/18 (the Directive) and the Public Contract Regulations 2006 (The Regulations). The Directive governs the procedures and principles for the award of public contracts by contracting authorities. The Regulations implement the Directive into UK law and must be interpreted so as to be compatible with the Directive.

The Court noted that the Directive defines a public contract as “contracts for pecuniary interest” and defines a “contractor, supplier or service provider” as bodies which offer “on the market” works, products or services. The Regulations contain similar definitions with “an economic operator” defined as a “service provider” and the definition of “service provider” requiring that services are provided “on the market”. The Regulations also state that a “public services contract” require that the contract is “for consideration (whatever the consideration)” – the Court noting that this is to be read as compatible with the Directive ie meaning that the contract must be for pecuniary interest. In consideration of these definitions the Court emphasised that the crucial points to determine were: “Did UCL make an offer on the market to act as a sponsor of the Camden Academy?” and “Will the funding arrangements be for pecuniary interest?”.

“Pecuniary Interest”

When considering “pecuniary interest” the Court considered the case of *Commission v Italy*. In this case the Court of Justice concluded that even if a service provider is a not-for-profit organisation it can still be caught within the public procurement regime, as such organisations can still distort the market if they provide services more cheaply than other service providers. However, in the *Commission v Italy* case the Court of Justice also found that a contract merely for the reimbursement of costs and no remuneration or other benefit is not “for pecuniary interest”. In applying the *Commission v Italy* case the Court considered whether the sponsor was only receiving a reimbursement of costs rather than a pecuniary interest. The Court found that under the pro forma for the academy’s funding agreement it was clear that the academy trust would only receive a reimbursement (providing that proper accounting methods were followed). The Court’s conclusion therefore was that philanthropic arrangements which are made on the basis that no remuneration or benefit is given by the contracting authority to the service provider will not be within the Directive or the Regulations.

Under the “pecuniary interest” point, the claimant also argued that UCL may obtain a reputational benefit from their involvement with the academy programme, however, the Court dismissed that this could be classed as a “pecuniary benefit”. It was also suggested that UCL’s involvement may allow UCL to show a “public benefit” and thus contribute to the retention of its charitable status, however, the Court dismissed this argument as too indirect and remote.

“On the Market”

The Court then moved to determine whether UCL’s offer was “on the market”. The Court’s view was that “on the market” requires “participants in the market to be intending to make a profit from contracting services offered by them”. It was held that in the Camden case, the “on the market” definition could not be met as there was not an intention to make a profit. The Court also noted that if an organisation’s offer to sponsor an academy is an adjunct to its commercial activities in another field, such commercial activities are irrelevant for determining whether the public procurement regime applies to the sponsorship of an academy.

Cross Border Interest

An alternative argument expressed by the claimant, was that a contract for the provision of educational services can potentially be of interest to suppliers established in other member states, and as such must comply with the requirements of transparency and non-discrimination. The Court noted that a contracting authority is not bound to comply with the obligations of the Treaty simply because there is an outside possibility that an economic operator from another member state might be interested. The Court found that there was no interest from suggested potential sponsors from outside the UK in this case and so dismissed this argument.

Does the claimant have the required standing to contend that the public procurement regime is applicable?

The Court noted that it could be possible for an individual who is affected in an identifiable way by a body's non-compliance with the public procurement regime to have sufficient standing to bring a judicial review, even if they are not an "economic operator". The Court stated that this may be the case if an individual could show that performance of the competitive tendering procedure under the Directive "might have led to a different outcome that would have a direct impact on him".

The Court stated that in the Camden case the claimant's challenge was not because of an interest under the public procurement procedure, but because of an opposition of academies, and thus was not using the public procurement regime for its intended purpose. The Court therefore found that the claimant did not have sufficient standing to pursue a judicial review claim.

Closing Remarks

The Court, in its final observation stated that it would be unlikely that arrangements for the provision of services for nil consideration or on reimbursement terms would be of cross border interest and so subject to competitive tendering. The Court considered that philanthropists may be deterred from acting if a competitive tendering or advertising process was to apply, which could be contrary to the public interest.

As a final comment, the Court stated that the issue of whether the provision of expertise in running schools could ever be subject to the public procurement regime had been left open. It was stated that the Education Act 1996, S.482 does not expressly prevent a sponsor being remunerated for their contribution to an academy, and if such a payment was to occur, the reasoning of the judgment may alter.

Conclusion

The dismissal of the appeal will be a relief to the Government, especially as more sponsors are being encouraged to get involved with the academy programme. However, academy opponents will be disappointed that academy sponsors can continue to become involved in the provision of education, without a public consultation over the identity of the sponsor.

TPP Law Limited
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For further information, please contact Graham Burns on
t 020 7620 0888
e graham@tpplaw.co.uk.

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