In the High Court of Justice
Queen's Bench Division
Administrative Court
Between

The Queen

On the application of

(1) Professor Stephen Hawking¹
(2) Dr Colin Hutchison
(3) Professor Allyson Pollock
(4) Professor Sue Richards
(5) Dr Graham Winyard

Claimants

-and-

(1) The Secretary of State for Health and Social Care
(2) NHS England

Defendants

Witness Statement of Raj Jethwa

I, Raj Jethwa, c/o the British Medical Association, BMA House, Tavistock Square, London WC1H 9JP, will say as follows:

1. I make this witness statement in support of the Claimants’ claim for judicial review.

¹ Professor Stephen Hawking sadly died on 14 March 2018
2. The facts and matters referred to in this statement are either within my knowledge or are based on information given to me as explained below. Where I refer to documents, these are references to my exhibit “RJ1- 1 to 95”.

3. I am the Director of Policy at the British Medical Association (“the BMA”). The BMA is a voluntary professional association and independent trade union, representing doctors and medical students from all branches of medicine across the UK and supporting them to deliver the highest standards of patient care.

4. Prior to joining the BMA, I worked as Head of Research for the Police Federation of England and Wales, playing a key role in negotiations with the Home Office on the Windsor Review of police pay and conditions, the Hutton Review of public service pensions, and the creation of the College of Policing. I also edited and co-authored “Upholding the Queen’s Peace”, a collection of essays on the future of policing.

5. I joined the BMA in 2013 as Head of the Health Policy and Economic Research Unit. I have also been Head of Public Health and Healthcare, with responsibility for the research, science and public health, workforce and innovation, and health policy units.

6. In my role as Director of Policy, I lead a directorate of approximately 90 members of staff to support the BMA’s policy development activities and national negotiations, providing expert advice and ensuring that the BMA influences key debates and acts as a powerful national voice for the medical profession.

7. The purpose of this statement is to explain the BMA’s approach to “Accountable Care Organisations” (“ACOs”)/“Accountable Care Models”, with a particular focus on its concerns regarding a perceived lack of transparency and clarity regarding the relevant proposals, as well as issues regarding accountability and other potential challenges as to what the proposals might mean for the future of the NHS.

8. I must explain at the outset that: the BMA is supportive of the principle of integrating health and social care services. Indeed, it has called for greater integration and collaboration between different parts of the health service and social care for several years. However, the
BMA does not believe that the Second Defendant’s current proposals for a new ACO contract are a viable means of delivering integrated care for patients in the context of a procurement framework that requires such contracts to be put out to competitive tender. We have several concerns regarding ACOs, including the lack of clarity and accountability surrounding their development, the risk of privatisation they present, whether the Government will provide the level of NHS funding and investment required for them to work, and how they will ensure services are based on a foundation of strong primary care.

9. There are various documents in the public domain which explain the BMA’s position to which I refer below (focussing on potentially relevant parts for the purposes of the present case brought by the Claimants):

**BMA’S POSITION REGARDING ACOs**

10. When the Department of Health and Social Care (as it is now known) put out a limited consultation on potential changes to various regulations connected to the development of the ACO contract in September 2017, my team was tasked with compiling the response. I wrote to the New Care Models Team at the Department on 3 November 2017 [RJ1/1-10]. Here, I set out various concerns about the development of ACOs which we believe require “urgent debate” including [RJ1/1-2]:

> "1. Combining multiple services into one contract risks the potential for non-NHS providers taking over the provision of care for entire health economies, as the contract would be subject to open competition rules. Moreover, a single ten-year contract would force re-procurement each time and create significant uncertainty. The BMA strongly supports the ongoing provision of a publicly funded NHS, and calls for the government to clarify what safeguards will be in place to ensure that ACOs do not enable an increase in the role of independent sector providers in the NHS.

[...]

3. There is a lack of clarity regarding how the implementation of ACOs would affect border areas with Wales and Scotland...

4. There is a lack of clarity regarding how staff would be employed within an ACO...
NHS England and the Department of Health must invite full and proper scrutiny of the current proposals, with maximum transparency. We do not believe that the current consultation process, based on the narrow technical legal aspects of required regulatory changes, properly allows this. Furthermore, it is important to note that ACOs sit outside of the current legislative framework, so accountability still ultimately rests with the [Clinical Commissioning Groups (“CCGs”)] and other statutory bodies. The scale of change that the partially and full integrated ACOs may entail should require that the proposals undergo proper parliamentary scrutiny...

11. In the New Year, the growing concerns within our membership regarding the proposals led to the Chair of the BMA Council, Dr Chaand Nagpaul CBE, to write to the Secretary of State to underline the BMA’s views on some of the key issues. Here, we noted (amongst other things) [RJ1/11-12]:

"...To get away from accusations of secrecy and conspiracy. [the consultation on the proposals] must be transparent; currently, doctors do not believe this is the case.

Our primary concern is that under current competition and procurement rules, the combining of multiple services into one ACO contract will be open to competitive tendering and provide the opportunity for commercial providers to take over the provision of service for an entire health economy. This could potentially create further instability through these contracts being for a fixed term duration, together with the ability for the ACO contract holder to terminate the contract...

...I would value the opportunity to meet with you to discuss in further detail the concerns of BMA members with the process as it currently stands...”

The BMA did not receive a response to this letter.

12. Later that month, on 25 January 2018, the Second Defendant announced its intention to launch a 12-week consultation on contracting arrangements for ACOs:

"The consultation will set out how the contract fits within the NHS as a whole, address how the existing statutory duties of NHS commissioners and providers would be performed under it (including how this would work with existing governance arrangements), and will set out how public accountability and patient choice would be
preserved. Subject to the outcome of the consultation, the two areas at the forefront of using a contract of this sort are Dudley, and Manchester’s proposed local care organisation. Emerging bidders for both proposals are NHS bodies, have the support of local GPs and are not private sector organisations.”

As at the date of this statement, the consultation has not yet been launched. I have seen a NHS England Board Paper dated 29 March 2018 which notes that it will be publishing the ACO draft contract for public consultation in “due course”[RJ1/13-22].

13. In February 2018, the BMA published a Briefing on Accountable Care Organisations [RJ1/23-36]. The intention behind the 14-page document was to set out the BMA’s understanding of the proposals and various terms and definitions (to seek to assist our members in their own understanding) and to underline its concerns regarding the same. Here, we explained (amongst other things):

“[p 6]...The role of CCGs

Under the Health and Social Care Act 2012, CCGs have statutory duties around the commissioning of healthcare services for their local areas, and will be responsible for determining whether or not to commission an ACO, based on its appropriateness for their area. Once established, an ACO will be accountable for the cost and quality of care for its defined population and budget. However, if ACOs are not housed in existing organisational forms...they will have no legislative basis. Regardless of the organisational form, we expect statutory accountability for commissioning care to remain with CCGs and other NHS bodies. CCGs cannot delegate responsibility for their statutory roles, and while there may be minor changes to their governance, major statutory changes are not expected. CCGs will therefore be required to work closely with providers in establishing an ACO, and the ACO itself once delivery of the services is underway. ACOs will also be able to subcontract any of the services that they are contracted to provide. While this will remain subject to approval by commissions, it does increasingly blur the divide between providers and commissioners and raises broader questions regarding the future of CCGs...”

“[p 8]...BMA View
The BMA supports the principle of integration and we have called for greater collaboration and integration across and within health and social care services for several years. However, we do not believe that ACOs and the significant contractual changes they would require, are a necessary or appropriate way of achieving this. Moreover, ACOs and [Integrated Care Systems ("ICSs")], fall outside existing legislation, have not been subject to full public or parliamentary scrutiny, and, in the case of ACOs, present a serious risk of handing area-wide NHS budgets to private providers in the future...Our specific concerns include:

[p 9] Transparency and accountability

There has been insufficient transparency and public scrutiny of the ACO proposals...ICSs and ACOs, like [Sustainability and Transformation Partnerships ("STPs")], also have no legislative basis, raising significant governance issues. It is currently unclear where accountability within each ICS or ACO will rest, as individual CCGs and NHS Trusts remain the principle [sic] statutory bodies within each model. This is especially important in the context of the scale of change that the partially and fully integrated ACOs may entail...

Terminology and transparency

The introduction and development of new models of integrated care has brought with it a raft of new acronyms and terminology, much of which is used interchangeably. As a result, it is increasingly difficult for NHS staff, patients and the public to follow the changes that are happening to their local healthcare system...

Competition and privatisation...

[p 10] The future of general practice...

Cross-border care...

Funding and investment...”

14. Earlier this year, the Health and Social Care Committee resumed an inquiry into Sustainability and Transformation Partnerships (including Accountable Care Systems (“ACSs”)) which had been launched in 2017 but paused because of the snap election. The
BMA submitted written evidence to the Select Committee in January 2018. We advanced various concerns to the Committee including [RJ1/40-41]:

"[11] The BMA is greatly concerned about the lack of information regarding how STPs will be developed into ACSs and how this will be developed into national coverage. Current ACS vanguard plans are public, but as [sic] they only cover a relatively small section of the country and do not give an adequate picture of what national coverage would entail....

[14] The BMA has consistently called for Government and NHS leaders to ensure proper governance frameworks are in place before changing structures, and it is particularly worrying that STPs, ACSs and ACOs all currently sit outside of legislative oversight, so accountability still ultimately rests with CCGs and other statutory bodies.

[15] ...NHS England and the Department [of Health and Social Care] must, therefore, invite full and proper scrutiny of the current proposals, with maximum transparency...

[18] On top of legislative and governance-based concerns, the BMA also believes that there is a fundamental question regarding statutory duties trust boards and organisations will have for hitting performance targets, duties of care and financial accountability..."

15. Our Chair of Council also gave oral evidence before the Committee on 27 February 2018 alongside senior representatives from the Royal College of Nursing and UNISON [RJ1/43-94]. Here, Dr Nagpaul underlined some of the BMA’s key concerns with the proposals:

"[Q120] Chair:...Could I ask how great, in your opinion, is the risk of commercial providers taking over the provision of care for entire healthcare economies, which is one concern set out by those who are concerned by ACOs?

Dr Nagpaul: We have to recognise – we cannot just put aside – the legislative arrangements in England. ACOs first of all are provided, or will be contracted, on a fixed-term contract. That is completely different from the way in which hospitals are contracted – to provide a service for a community..."
Secondly, it is a contract that would fall under current procurement law, which means that any provider, competitively, could run that service. We cannot get around that. Therefore, you open out the provision, wholesale, of a large healthcare economy to a non-NHS provider, and that could be a commercial provider from abroad. That is an inherent problem in the creation of an ACO under current legislation. The fixed-term bit is also a problem because it has within it, as with all commercial contracts, the ability for the provider to walk away. You need not look much further than the recent past when we saw Circle, a commercial organisation, take over and run a hospital – Hinchingbrooke Hospital – only to walk away a year later. You cannot walk away.

[...]

[Q123] Chair: ...do you think we should drop accountable care organisations?

Dr Nagpaul: Yes, I do

[Q124] Chair: And just continue on with systems and partnerships. That was my simple question.

Dr Nagpaul: I really do. I think that putting out contracts for large areas of healthcare that are open for commercial organisations within a 10-year contract will be bad for the NHS.”

16. For all of the above reasons, the BMA decided to submit this evidence in support of the Claimant’s challenge to the proposals.

Statement of Truth

I believe that the facts stated in this witness statement are true.

Signed: ................................

Dated: 9 April 2018