No power to pay, no money to pay

Melissa Shipley considers the relationship between the law, financial considerations, and common sense in *National Aids Trust v NHS England*

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In *National Aids Trust v NHS England* [2016] EWHC 2005 (Admin), there was seemingly only one narrow issue for Mr Justice Green to decide: did NHS England have the power to commission pre-exposure prophylaxis (known as 'PrEP')? However, in an era of ever-increasing budgetary constraint, the financial implications of any decision 'lurked only marginally' below the parties' submissions on this narrow issue.

PrEP is a preventative antiretroviral drug designed to be offered to those at high risk of contracting HIV. Trials have shown that PrEP is highly effective: one found that it has an 86 per cent success rate in preventing HIV when taken by those most at risk. In the US, PrEP was licensed in 2012 and now more than 30,000 people are taking it.

NHS England argued that it had no power to commission PrEP. It made two main submissions. First, pursuant to section 1(1) of the National Health Service Act 2006 (NHSA 2006), NHS England did not dispute that it was under a broad duty to secure improvement in the physical and mental health of the people of England, and in the prevention, diagnosis, and treatment of physical and mental illness.

However, NHS England sought to rely on the exception to this duty at section 1H(2): 'The Board [i.e. NHS England] is subject to the duty under section 1(1) concurrently with the Secretary of State except in relation to the part of the health service that is provided in pursuance of the public health functions of the Secretary of State or local authorities.'

Given this exception, NHS England submitted that the scope of its duty did not include 'public health functions' that were carried out by the secretary of state or local authorities pursuant to their respective statutory powers and duties.

'Public health functions'

Green J rejected this submission. Instead of limiting the scope of NHS England's duty, section 1H(2) could also be interpreted as an exception only to who NHS England would perform its duty concurrently with. This concurrent partner could either be the secretary of state, which was the default position under the NHSA 2006, or local authorities.

Green J preferred this interpretation. While in my view not the most natural