relation to HIV which included preventative medicine. He concluded that the 2012 Regulations were not revoked or altered by the 2013 Regulations.

Budgetary considerations

While expressly stating that he had not taken into account any financial ramifications when interpreting the legislation, Green J said that it was an argument that 'lurked only marginally' below the submissions of the parties.

It is not difficult to see why. From a human perspective, the case for preventative medicine is compelling: anyone who can be prevented from suffering from a disease or illness should be. On top of this, the economic case for preventative medicine in an era of increasingly tight health budgets is persuasive. It is estimated that it costs around £360,000 to treat a person with HIV over the course of their lifetime. The claimant's case, borne out by the various trials of PrEP that have taken place all over the world, was that PrEP could significantly reduce the number of people contracting HIV and, consequently, the massive cost accruing to the NHS on a daily basis.

Financial considerations were also deployed to support the parties' submissions as to who could pay for PrEP. NHS England submitted that PrEP, along with any other preventative medicine in the field of sexually transmitted diseases, was the responsibility of local authorities. The local authorities disagreed. As well as saying that NHS England was wrong in law, they further submitted that the consequences if NHS England was correct were illogical and inefficient. The local authorities would bear the costs of commissioning PrEP, but the savings, namely the costs of providing lifetime care for those with HIV, would accrue to NHS England. This did not make budgetary sense. Even leaving this aside, the local authorities stated that they had no money to pay for PrEP.

Green J summed up this dilemma: 'No one doubts that preventative medicine makes powerful sense. But one governmental body says it has no power to provide the service and the local authorities say that they have no money. The Claimant is caught between the two and the potential victims of this disagreement are those who will contract HIV/AIDS but who would not were the preventative policy to be fully implemented.'

From a common-sense perspective, Green J's conclusion therefore instinctively feels like the right outcome: NHS England, the body that could pay for PrEP, has been told it has the power to do so. However, NHS England has indicated its intention to appeal the judgment and some aspects of the legal reasoning are, in my view, open to question. For instance, in the 2012 Regulations, NHS England is under a duty to arrange, to the extent that it considers necessary, adult specialist services for patients 'infected' with HIV. Green J concluded that this conferred jurisdiction on NHS England to commission treatments for HIV on a preventative basis. This seems a very wide interpretation of the Regulations which, on a literal reading, refer to those already infected with HIV.

Even if the appeal is unsuccessful, the issue to be determined was only whether NHS England had the power to commission PrEP, not whether it should do so. If NHS England is ultimately found to have the power to commission PrEP, financial considerations will be of central importance again as NHS England decides how best to achieve its target duties to make use of scarce financial resources.

In clinical trials, PrEP has been proven to be highly effective. Despite this first instance decision, it may be some time before the issue of whether NHS England has the power to commission PrEP is finally determined and, if so, whether or not it will do so.