



PRESS SUMMARY

R (on the application of Rotherham Metropolitan Borough Council and others) (Appellants) v Secretary of State for Business, Innovation and Skills (Respondent) [2015] UKSC 6
On appeal from [2014] EWCA Civ 1080

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Mance, Lord Clarke, Lord Sumption, Lord Carnwath and Lord Hodge

BACKGROUND TO THE APPEAL

The European Union distributes money from European Structural Funds to Member States in order to promote the “overall harmonious development” of the EU and in particular to reduce “disparities between the levels of development of the various regions and the backwardness of the least favoured regions” (Article 174 TFEU). Funds are allocated in seven-year cycles. The previous two rounds were for 2000-2006 and 2007-2013. The most recent round was for 2014-2020 and took place pursuant to Regulation (EU) 1303/2013 (“the 2013 Regulation”). Regions within Member States are classified based on the relationship between their GDP per head and the EU average, with different categories used in each round. The European Commission notionally allocates funds to Member States according to a formula based on how many regions in each category they have, but there is no formula setting out how allocations are to be made within Member States. That decision is jointly determined under a Partnership Agreement which must be proposed by the Member State and approved by the Commission. In the UK this is the responsibility of the Respondent, the Secretary of State for Business, Innovation and Skills.

In 2000-2006, Merseyside and South Yorkshire were both “Objective 1” regions, corresponding to the current “less developed” category, with a GDP per head less than 75% of the EU average. They received the most generous level of funding under the UK’s Partnership Agreement. In 2007-2013, there were two principal categories, “convergence regions” (with a GDP per head less than 75% of the EU average), and “competitiveness regions” (with a GDP per head greater than 75% of the EU average). However, the EU average GDP per head decreased due to the accession of 10 new Member States. There were carved out of the category of “competitiveness regions” two special categories commonly referred to as “phasing-out” and “phasing-in” regions. Phasing-out regions were regions which would have been convergence regions but moved above the 75% threshold as a result of the reduction of the EU average. Phasing-in regions were regions which moved above the 75% threshold and would have done so in any event. Merseyside and South Yorkshire were both phasing-in regions in 2007-2013. Highlands & Islands was a phasing-out region. In order to ease the transition to the higher category and the consequent reduction of support, both phasing-in and phasing-out regions were eligible for additional support from the Commission on a “transitional and specific basis”. That support tapered down over the course of the seven-year period to the national average level of support for competitiveness regions in 2013. In 2014-2020, Merseyside and South Yorkshire became “transition” regions, with a GDP per head between 75% and 90% of the EU average.

The UK received 5% less money overall for 2014-2020 than it had for 2007-2013. The Secretary of State had to decide how to allocate it. First, he decided that each of the four countries comprising the UK would have its overall funding reduced by 5% compared with the previous period. Northern Ireland, a single region, therefore had its funding cut by 5% altogether. Second, he decided that each

English transition region would receive an allocation per year for 2014-2020 representing an increase of 15.7% on its allocation for 2013, the last year of the previous period. For Merseyside and South Yorkshire, these decisions resulted in a 61% cut in funding altogether compared with the whole of the 2007-2013 period. This was because the new allocations were based on allocations for 2013, and therefore took no account of the transitional funding received in the earlier period. In Scotland, Highland & Islands had its funding cut by 5% altogether. This was the result of a decision made by the Secretary of State in consultation with the Scottish Ministers. The Commission has now approved the Secretary of State's proposals.

The Appellants say that Merseyside and South Yorkshire have unfairly been treated differently from: (i) the non-English transition regions of Northern Ireland and Highland & Islands; and (ii) other English transition regions. Their arguments failed before Stewart J and in the Court of Appeal. They now appeal to the Supreme Court.

JUDGMENTS

The Court dismisses the appeal by a 4-3 majority (Lord Mance, Lord Carnwath and Lady Hale dissenting). Lord Sumption and Lord Neuberger both give reasoned judgments for the majority. Lord Hodge agrees with Lord Sumption and Lord Clarke agrees with both Lord Sumption and Lord Neuberger. Lord Mance and Lord Carnwath give dissenting judgments. Lady Hale agrees with Lord Mance and Lord Carnwath.

REASONS FOR THE JUDGMENTS

The majority judgments

Lord Sumption notes that the allocation made by the Secretary of State is amenable to judicial review, but a court should be cautious about intervening because it: (i) was a discretionary decision of a kind courts have traditionally been reluctant to disturb; (ii) involved particularly delicate questions about the distribution of finite domestic and EU resources, in which the legitimacy of the decision-making process depends to a high degree on ministers' political accountability; and (iii) has been approved by the Commission [21-24]. Lord Neuberger agrees that this is "classic territory" where executive decisions should be afforded a wide margin of discretion, but emphasises that the fact that a matter is one for democratic decision does not remove the need for judicial oversight [61-65]. Lord Sumption holds that the ultimate question for the court is whether there is enough of a relevant difference between Merseyside and South Yorkshire on the one hand and the remaining transition regions on the other to justify any difference in treatment [25-29]. Lord Neuberger analyses the Appellants' objections as comprising two procedural attacks and two outcome attacks [52-60].

As to the first decision, to allocate to each of the UK's four countries 95% of what they had received for the previous period, Lord Sumption says that the Secretary of State did not unjustifiably discriminate. He was entitled to have regard to the constitutional settlement as between the component countries of the United Kingdom; nothing suggested that any country's position had significantly changed since the last allocation; and a decision based on broad qualitative considerations rather than purely GDP per head is consistent with the 2013 Regulation [30-36]. Lord Neuberger agrees that it was procedurally legitimate for the Secretary of State to take into account the increasingly decentralised nature of UK administration and the political realities of devolution [75-78]. The disparities in outcome between Merseyside and South Yorkshire on the one hand and Highland & Islands and Northern Ireland on the other give pause for thought, but, bearing in mind the Secretary of State's margin of discretion and the relevance of factors other than GDP per head, those disparities do not make the decision unlawful [87-99].

As to the second decision, to use 2013 as a baseline for the 2014-2020 allocations for English transition regions, Lord Sumption and Lord Neuberger both point out that the additional funding given to Merseyside and South Yorkshire in the previous period was "transitional and specific" and provided to smooth the passage to their being treated as competitiveness regions, so that basing the 2014-2020 allocations on their average allocations for the whole of 2007-2013 would have continued

the impact of that funding beyond the period envisaged [37-44, 80-83]. For Lord Neuberger, there is force to the point that the use of the 2013 baseline deprives Merseyside and South Yorkshire of the uplift given to other northern regions, but this is outweighed by the discretionary and complex context and the legitimacy of the Secretary of State's goals [84-85]. As a matter of outcome, he notes that other English transition regions received varying amounts unrelated to their GDP per head and that some allocations were less than or comparable to those of Merseyside and South Yorkshire [100-108]. Overall the Secretary of State's approach is less considered and consultative than one would have hoped, but not unlawful [109-111].

The minority judgments

Lord Mance and Lord Carnwath observe that the principle that a greater margin of discretion should be afforded where a decision is complex and judgment-based does not exclude closer review of a decision which is based on irrelevant considerations or fails to treat like cases alike, particularly in light of the informality of the decision-making process and (per Lord Mance) the lack of consultation in this case [142, 167].

Lord Mance explains that the combined effect of the two decisions was that Northern Ireland was guaranteed an allocation based on an assessment of its actual needs over the prior period, Highland & Islands received an allocation based on the average of its receipts as a transition region throughout the prior period, and the other English transition regions received allocations based on previous allocations calculated on the basis of each region's needs, including uplifts for northern regions. Merseyside and South Yorkshire, by contrast, received allocations without any uplift and not referable to any assessment of their actual needs or receipts over the prior period, even though by any measure they still fall well below the competitiveness region average [149-152]. The Secretary of State's decision was unlawful because he took irrelevant considerations into account and treated like cases unlike and unlike cases alike [162]. Lord Carnwath agrees with Lord Mance [166]. He considers it illogical to deny to Merseyside and South Yorkshire the "safety-net" protection given to Highland & Islands on the basis that it would lead to a 22% cut for the other English transition regions [180-186].

References in square brackets are to paragraphs in the judgments

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.shtml>