29 April 2020

PRESS SUMMARY

R (on the application of Palestine Solidarity Campaign Ltd and another) (Appellants) v Secretary of State for Housing, Communities and Local Government (Respondent)
[2020] UKSC 16
On appeal from [2018] EWCA Civ 1284

JUSTICES: Lady Hale, Lord Wilson, Lord Carnwath, Lady Arden, Lord Sales

BACKGROUND TO THE APPEAL

This appeal concerns the breadth of the ethical investments that the authorities which administer the local government pension scheme ("**the scheme**") are permitted to make. An ethical investment can be defined as one made not, or not entirely, for commercial reasons but in the belief that social, environmental, political or moral considerations make it, or also make it, appropriate. The scheme is an occupational pension scheme under which authorities—in most cases local authorities—in England and Wales administer funds separate from their other resources. An authority makes contributions into its fund for its employees, who also make contributions themselves. The scheme provides defined pension benefits for past and present employees.

The Public Service Pensions Act 2013 ("**the 2013 Act**") empowers the respondent Secretary of State to make regulations providing for the issue of guidance to authorities on the scheme's "administration and management" (section 3 and para 12 of Schedule 3). The Local Government Pension Scheme (Management and Investment of Funds) Regulations 2016 ("**the 2016 Regulations**"), made pursuant to these provisions, require an authority to formulate an investment strategy. This must be in accordance with the guidance and must include the authority's policy on "how social, environmental and corporate governance considerations are taken into account" in its investment decisions (reg. 7).

The appellants brought a claim for judicial review alleging that two passages in the guidance issued in 2016 by the Secretary of State pursuant to that regulation were unlawful. The first passage states that "the Government has made clear that using pension policies to pursue boycotts, divestment and sanctions against foreign nations and UK defence industries are inappropriate, other than where formal legal sanctions, embargoes and restrictions have been put in place by the Government". The second passage states that authorities "[s]hould not pursue policies that are contrary to UK foreign policy or UK defence policy". In the High Court the claim was upheld, and the two passages ruled unlawful, on the basis that the issue of them by the Secretary of State exceeded his powers. The Court of Appeal upheld the Secretary of State's appeal. The appellants now appeal to the Supreme Court.

JUDGMENT

By a majority, the Supreme Court allows the appeal and restores the High Court's order. Lord Wilson gives the main judgment, with which Lady Hale agrees. Lord Carnwath gives a concurring judgment. Lady Arden and Lord Sales give a joint dissenting judgment.

REASONS FOR THE JUDGMENT

Lord Wilson states that, to determine whether the issue of the guidance under challenge was lawful, the court must analyse the scope of the power conferred by Parliament on the Secretary of State.

Pursuant to the decision of the House of Lords in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 ("***Padfield***"), it must do so by construing the words by which the power was conferred on him in their context. From the words in their context Parliament's purpose in conferring the power can be identified, and the purpose can be used to shed light on the power's scope **[1, 20-22]**.

Lord Wilson observes that Schedule 3 to the 2013 Act identifies the matters which, in particular, Parliament had in mind when conferring the power, one of which was "the administration and management of the scheme" **[23]**. The 2016 Regulations, which can be used to interpret the Act, require the investment strategy to include the authority's "policy" on "how" non-financial considerations are taken into account (reg. 7) **[24]**. The guidance adopts two uncontroversial tests for the taking into account of such considerations: does the proposed step involve significant risk of financial detriment to the scheme and is there good reason to think that members would support taking it? These three legal instruments use words (including "administration", "management", "how" considerations are taken into account, and "strategy") which, considered in their context, all point in the same direction: that the Act's policy is to identify procedures, and the strategy, which administrators should adopt in the discharge of their functions **[25-26]**. But in the passages under challenge, "the Secretary of State has insinuated into the guidance something entirely different: … an attempt to enforce the government's foreign and defence policies" by providing that, even when the two tests above have been met, an administrator is prohibited from taking an investment decision if it runs counter to such policies **[27]**.

Lord Wilson suggests that the Secretary of State "was probably emboldened … to exceed his powers" by the misconception that the scheme administrators were part of the machinery of the state and discharge conventional local government functions. This fails to recognise that they have duties which, at a practical level, are similar to those of trustees, and they consider themselves quasi-trustees who should act in their members' best interests. The Secretary of State's claim that contributions to the scheme are ultimately funded by the taxpayer is equally misleading: for the fund represents the contributing employees' money, not public money **[28-30]**. In any event, the Secretary of State's inclusion of the two passages in the guidance exceeded his powers. Power to direct how administrators should approach the making of investment decisions by reference to non-financial considerations does not include power to direct what investments they should not make **[31]**.

Lord Carnwath notes that, while the scope of the guidance is unclear, it appears to have been intended to preclude authorities who are making investment decisions both from engaging in political campaigns and from taking into account considerations in policy areas reserved for the UK government **[36-40]**. But the 2013 Act and the 2016 Regulations required any guidance to respect the primary responsibility of the authorities as quasi-trustees of the fund **[41-42]**. The Secretary of State was not entitled, therefore, to make authorities give effect to his own policies in preference to those which they themselves thought it right to adopt in fulfilment of their fiduciary duties **[43-44]**.

Lady Arden and Lord Sales consider that the purposes of the 2013 Act, which implemented the Hutton report, extend to reflecting the public interest and instituting good governance in the reformed public sector pension schemes **[47, 69-80]**. Guidance as to their management could include establishing the role of the Secretary of State in relation to investment **[49]**. Following consultation, the guidance related only to decisions based on non-financial considerations which are taken to pursue boycotts and disinvestment campaigns against foreign nations **[50-55, 82-5]**. The Secretary of State had serious concerns that these might undermine foreign policy or trade and might lead to racist behaviour. These were matters for government **[53-56]**. The schemes were liable to be identified with the British state **[58, 87-8]**. The power to give guidance is not limited to procedural matters **[62, 86, 89]**. The leading authorities on the *Padfield* principle support the approach taken **[63-68]**.

References in square brackets are to paragraphs in the judgment

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.html