



Press Summary

8 March 2023

R (on the application of VIP Communications Ltd (In Liquidation)) (Respondent) v Secretary of State for the Home Department (Appellant)

[2023] UKSC 10

On appeal from: [2022] EWCA Civ 1564

Justices: Lord Reed (President), Lord Lloyd-Jones, Lord Sales, Lord Stephens, Lord Richards

Background to the Appeal

This appeal raises an issue of statutory construction. It arises in the context of a type of equipment known as commercial multi-user GSM (Global Systems for Mobile Communications) gateway apparatus (“**COMUGs**”). GSM gateways are telecommunications equipment containing one or more SIM cards, as used in mobile phones. They enable phone calls and text messages from landlines to be routed directly on to mobile networks, taking advantage of lower mobile call charges. When a call is routed through a GSM gateway, the only data transmitted over the network is the number and location of the SIM card in the GSM gateway. It does not transmit information such as the identity of the calling party and (in the case of a mobile phone) the user’s location, as would ordinarily be the case without a GSM gateway.

Under section 8(4) of the Wireless Telegraphy Act 2006 (the “**WTA 2006**”), the Office of Communications (“**Ofcom**”) is under a duty to make regulations exempting the installation and use of certain wireless telegraphy equipment from the requirement for a license under section 8(1) of the same Act, if satisfied that the conditions in section 8(5) are met as respects the use of that type of equipment. Under section 5(2) of the Communications Act 2003 (the “**CA 2003**”), Ofcom is under a duty to carry out its functions in accordance with directions given by the Secretary of State on very limited grounds, which include the interests of national security and public safety.

Following a public consultation, Ofcom published a notice in July 2017 stating its intention to make regulations under section 8 of the WTA 2006 exempting COMUGs from the licensing requirements of section 8(1). In response, the Secretary of State for the Home Department issued a direction that COMUGs should not be exempted by Ofcom (the “**Direction**”). The

Direction, challenged in these proceedings, was given on the basis of serious national security and public safety concerns.

The High Court held that the Secretary of State had no power under section 5 to direct Ofcom *not* to comply with its duty under section 8(4) of the WTA 2006 to make regulations (exemption regulations) if Ofcom was satisfied that the conditions in section 8(5) were met. The Direction was therefore *ultra vires* (i.e. outside the Secretary of State's power). The Court of Appeal agreed, dismissing the appeal. The appellant now appeals to the Supreme Court.

Judgment

The Supreme Court unanimously allows the appeal. Lord Richards gives the only judgment, with which the other Justices agree.

Reasons for the Judgment

Under the legislation governing the installation and use of wireless telegraphy in force between 1904 and 2003, the Government had sole responsibility. Most of the Government's functions and powers under the legislation were transferred to Ofcom by the CA 2003, implementing the EU Directives known as the Common Regulatory Framework.

After setting out the complex legislation scheme [17]-[32], the court noted that it was obvious that the use of wireless telegraphy could give rise to national security concerns. National security, along with the other matters listed in section 5(3) of the CA 2003, are core functions of the Government, for which it is democratically accountable. A regulator, like Ofcom, is in no sense equipped to have responsibility for such matters [33].

It was beyond argument that Parliament's purpose in enacting section 5 was that, notwithstanding the extensive changes made to the regime for the control of wireless telegraphy, the Government should continue to be responsible for national security and the other matters listed in section 5(3) of the CA 2003 [39]. This continued division of responsibility was consistent with the Common Regulatory Framework [35]-[38].

Provisions such as section 5 of the CA 2003 and section 8 of the WTA 2006 are to be construed as if contained within a single statute, given they are dealing with a single system of regulation concerning wireless telegraphy [40]. In circumstances where the legislation has carefully divided responsibility between the Government and the regulator, reserving to the former powers only in respect of matters of vital national interest which are peculiarly within the competence of the Government, the court noted that it would be very surprising if those powers did not apply so as to prevent the making of an exemption regulation where, in the reasonable and proportionate judgment of the Government, the regulation would prejudice those interests [43].

This was reflected in the language of section 5(2) of the CA 2003. The drafter was not directing the language at any particular function, but was choosing words which could cover the whole field of those functions. Ofcom is as much carrying out one of its functions when, following a direction by the Secretary of State, it does *not* make exemption regulations as when it *does* make exemption regulations under section 8 of the WTA 2006 [49].

The court did not accept the existence, relied upon by the Court of Appeal as the principal basis for its decision, of a general principle of statutory construction that a statutory power to give a direction does not extend to a direction not to comply with a statutory duty arising

under that or another statute, in the absence of clear words to that effect [53], [62]. It will be relevant to the assessment of rival interpretations of a provision that, on one view, it would permit a direction to be given that has the effect of precluding the performance of what would otherwise be a statutory duty, but that is no more than one of the factors which will need to be considered in arriving at the proper construction of the provision [62].

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: [Decided cases - The Supreme Court](#)