

Sixty second summary

Supreme Court judgment on LGPS boycotts

On 29 April, the Supreme Court handed down its judgment on whether or not it was within the powers of the Secretary of State for MHCLG to use statutory guidance in order to prohibit LGPS funds from investing in ways that are contrary to UK foreign policy or UK defence policy.

In this 60 second summary we consider the significance of the ruling.

Background

In September 2016 the Secretary of State issued guidance on preparing and maintaining an Investment Strategy Statement. The guidance contained new stipulations designed to prohibit LGPS funds from pursuing boycotts, divestment and sanctions against foreign nations and UK defence industries.

In June 2017, the Palestine Solidarity Campaign challenged this aspect of the guidance in a [judicial review case](#) which found that the Secretary of State had exceeded his powers. The references to divestment were then removed from the next version of the guidance. However, MHCLG successfully [appealed](#) the Administrative Court's decision at a hearing in May 2018.

It was through this circuitous route that, in November 2019, the case appeared before the UK Supreme Court for a definitive judgment.

The Supreme Court's findings

By a margin of 3 to 2, the Court upheld the appeal, reinstating the High Court's original view that it was unlawful for the Secretary of State to use statutory guidance to prohibit certain LGPS investments in this way.

In reaching this decision, Lord Wilson relied on the principle established in *Padfield*², which maintains that where a minister has been granted powers of direction under an act of Parliament that power may only be used to promote the policy objectives of the original legislation. In this case the Secretary of State's powers to issue guidance on the "administration and management of the scheme" are contained within the Public Service Pensions Act 2013 and the powers specific to the formulation of an Investment Strategy Statement are contained within The Local Government Pension Scheme (Management and Investment of Funds) Regulations 2016. In the view of the Court it was not the intention of Parliament that these powers should be used to determine the specific assets which LGPS funds may, or in this case may not, hold. Rather the guidance was just that; a guide to the principles that LGPS funds should consider when setting their own investment strategy and any direction contained within it should be relevant only to that principle.

Statutory guidance cannot be used for purposes which were not within the remit of the original act.

¹ [R \(on the application of Palestine Solidarity Campaign Ltd and another\) \(Appellants\) v Secretary of State for Housing, Communities and Local Government \(Respondent\)](#)

² *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997

In effect, the Secretary of State was using his powers to issue statutory guidance in a way that promoted a non-pension relevant policy matter. If it is Government policy that LGPS funds be prevented from disinvesting in particular industries or countries, then that matter should be explicitly legislated for in Parliament.

Is this significant?

In one sense the judgment changes very little. In fact, given that the offending paragraphs concerning divestment and boycotts against foreign nations and UK defence industries have been removed from the current version of guidance, it could be argued there is no change.

However, the judgment does provide some clarity in what was a contested area and will allow an LGPS fund to make a conscious decision not to invest in UK defence or a specific foreign country providing the decision is subject to the principles of the Law Commission report which are reiterated in the Guidance. Namely, the decision to disinvest must not involve significant risk of financial detriment to the scheme and the fund should have good reason to think that scheme members would support their decision.

However, there are some other aspects of the judgment, aside from its primary purpose, that are of interest.

The first of these concerns the nature of statutory guidance. In future, it would appear that guidance issued by MHCLG will need to ensure that it does not stray beyond the parameters that Parliament envisaged in the enabling act. This might have an impact on how MHCLG use statutory guidance in future when dealing with matters such as investment pooling.

Another part of the guidance that has drawn comment is contained within paragraph 30, where Lord Wilson states “The fund represents their [Scheme members]’ money. With respect to Mr Milford [representing the Secretary of State], it is not public money.”

It’s easy to see why such a comment has caught people’s attention. On the face of it the judge seems to be imputing a trust-like responsibility onto those responsible for managing LGPS funds. However, the comment needs to be taken in context. In this section of the judgment Lord Wilson is suggesting why he thinks that the Secretary of State applied the law incorrectly i.e. what it was that the Secretary of State misunderstood that led him to overstep his legal powers. But this is really nothing more than an aside. It doesn’t matter in terms of the significance of the judgment why the Secretary of State got it wrong, simply that he did.

There has long been discussion over whether administering authorities owe any fiduciary obligations and if so to whom. This is a complex matter on which the Scheme Advisory Board has previously sought counsel’s opinion. However, in this case, it was not the matter on which the Supreme Court was being asked to rule and so we should be wary of inferring too much from Lord Wilson’s comments. If that had been the matter in question then the Justices would have had to consider all of the relevant arguments for and against the various positions, for example what if anything is the duty to taxpayers, what is the nature of statutory schemes as opposed to trust law and who ultimately steps in if a fund is unable to pay its pensioners. Views on this matter impact many governance and funding decisions.

Conclusion

While this judgment may finally draw a line under the legal wrangling, the saga of divestment in the LGPS looks set to continue. In reaching its decision the Court reiterated the principle that powers granted to ministers to issue directions must only be used in the furtherance of the policy intention of the original legislation. While there has been some comment about the significance of Lord Wilson’s comments around the ownership of LGPS funds, caution should be taken to consider these comments in context.