28 November 2012

PRESS SUMMARY

RM (AP) v The Scottish Ministers [2012] UKSC 58
On appeal from [2011] CSIH 19; [2008] CSOH 123

JUSTICES: Lord Hope (Deputy President), Lady Hale, Lord Wilson, Lord Reed and Lord Carnwath

BACKGROUND TO THE APPEALS

The Appellant is a patient who has been compulsorily detained in Leverndale Hospital, which is not a state hospital, since 1995. He believes he is detained in conditions of excessive security. He believes that his quality of life, his liberty and his prospects for release would be improved were he to be transferred to an open ward.

Section 264 of the Mental Health (Care and Treatment) (Scotland) Act 2003 ('the Act') gives patients who are detained in state hospitals under certain types of order the right to apply to the Mental Health Tribunal for Scotland ('the Tribunal') for a declaration that they are being held in conditions of excessive security. Section 268 of the Act purports to give the same right to such patients who are detained in non-state hospitals. However, it also specifies that, within that class of individuals, only 'qualifying patients' in 'qualifying hospitals' may make an application. Under each section, if the Tribunal makes a declaration, the 'relevant health board' must identify within three months another hospital where the patient can be detained in appropriate conditions of security.

The Act was passed and received Royal Assent in 2003. Section 333(2) of the Act states that the part of the Act containing sections 264 and 268 was to come into force by no later than 1 May 2006. Section 268 of the Act specifies that the terms 'qualifying patient' and 'qualifying hospital' were to be defined in regulations made by the Respondents. Section 273 of the Act specifies the same in relation to the term 'relevant health board'. However, although sections 268 and 273 were brought into force on 6 January 2006 specifically and only for the purpose of allowing regulations to be made under those sections, the Respondents made regulations under section 273 only, which defined 'relevant health board'. Those regulations came into force on 1 May 2006. No regulations defining 'qualifying patient' or 'qualifying hospital' have been made by the Respondents under section 268 to date.

Because the term 'relevant health board' was defined prior to 1 May 2006, the right to apply to the Tribunal for patients detained in state hospitals under section 264 was in effective operation by that date. However, because the terms 'qualifying patient' and 'qualifying hospital' remain undefined, section 268 is not in effective operation. Therefore, the Appellant cannot apply for a declaration from the Tribunal that he is detained in conditions of excessive security.

The Appellant applied for judicial review on the basis that the Respondents' failure to draft and lay regulations under section 268 defining the terms 'qualifying patient' and 'qualifying hospital' was unlawful. The Outer House of the Court of Session refused the Appellant's petition on the basis that there was no duty to lay regulations to give effect to a statute where that statute had not conferred a right on any specific class of persons. The Inner House refused the Appellant's subsequent appeal on broadly similar grounds.

JUDGMENT

The Supreme Court unanimously allows the appeal. The Court finds that the failure by the Scottish Ministers to draft and lay the regulations under section 268 of the 2003 Act before the Scottish Parliament prior to 1 May 2006, and their continued failure to do so, was and is unlawful. Lord Reed gives the judgment of the court.

REASONS FOR THE JUDGMENT

- The Respondents argue that section 268 was 'in force' by 1 May 2006, as required by section 333(2) of the Act, but did not 'operate'. The latter would not occur unless and until they decided to make the necessary regulations, and their failure to do so did not defeat the intention of the Scottish Parliament. There is a valid distinction, they say, between 'coming into force' and 'operating' **[20]**. By contrast, the Appellant argues that the inference to be drawn from section 333(2) is that the part of the Act containing section 268 should be in effective operation by 1 May 2006. This is supported by the fact that there are other sections within the Act in respect of which Parliament had not set any deadline for their coming into force **[21]**.

- The Court notes that the question of when a statutory provision comes into force depends not on when it appears on the statute book following Royal Assent, but on what commencement provision Parliament enacts **[22]**. It is common for a section to come into force on a later date, usually in order to allow for preparation by the officials who are to administer the Act and/or those who will be affected by its practical operation. Parliament may allow Ministers to decide when a section should come into force, or alternatively may specify a particular deadline **[24-25]**.

- Having regard to previous decisions of the Court of Appeal, the distinction between a section coming 'into force', first, in the sense that it forms part of the law of the land and, second, in the sense that it is in effective operation as a matter of objective fact, is in principle a valid one. As such, in a commencement provision such as section 333(2) of the Act, the words 'in force' refer to the former of these two senses**[27-32]**. However, the natural inference that should nonetheless be drawn, unless the contrary intention appears, is that Parliament intended the sections to which such a commencement provision applies also to be in effective operation **[33-37]**.

- In relation to the present case, Parliamentary debate led to the inclusion in the Act of a right of application on the part of detained patients to be transferred to conditions of lower security. Such debate also led, as a result of an amendment, to a commitment being made that such rights would be in force by no later than May 2006 **[38-39]**. The intention of the Scottish Parliament was that the rights of application for which the part of the Act containing section 268 provided should be in effective operation by that date. There was nothing in the Act to support the contention that the Scottish Parliament intended that section 264 should be in effective operation by 1 May 2006 but that section 268 should not; both required the enactment of regulations to give them practical effect **[40]**.

- It is a basic principle of administrative law that a discretionary power must not be used to frustrate the object of the Act of Parliament which conferred that discretion. The Respondents' failure to exercise their power to make the regulations necessary to define 'qualifying patient' and 'qualifying hospital', and therefore to give section 268 of the Act practical effect, thwarted the intention of the Scottish Parliament. That failure therefore was, and is, unlawful **[42-43]**.

- Before the Scottish courts, the Respondents pointed out that the Scottish Parliament did not confer a right of application on an identified class of patients in section 268 in the way that it had in section 264. They argued that this meant they had no duty to make regulations, as there was no right contained in section 268 to which they were duty-bound to give effect **[44]**. However, the Court notes that that proposition is circular; there is no duty to make regulations because no rights have been conferred, but no rights have been conferred because no regulations have been made **[45]**. The fundamental flaw in the argument is that it is too narrow an approach to suggest that an obligation to exercise a discretionary power to make regulations only arises where it is necessary to do so to give effect to a legal right. It may be necessary to exercise such a power to bring about some other result that was intended by Parliament, and in this case that intended result was that the part of the Act containing section 268 should be in effective operation by 1 May 2006 **[46-47]**.

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: www.supremecourt.gov.uk/decided-cases/index.html