



21 November 2012

PRESS SUMMARY

LOCAL GOVERNMENT BYELAWS (WALES) BILL 2012 - Reference by the Attorney General for England and Wales [2012] UKSC 53

JUSTICES: Lord Neuberger (President), Lord Hope (Deputy President), Lord Clarke, Lord Reed, Lord Carnwath

BACKGROUND TO THE APPEALS

Following a referendum, various provisions of the Government of Wales Act 2006 (“the 2006 Act”) came into force on 5 May 2011. These provisions gave the National Assembly for Wales (“the Assembly”) primary legislative competence in certain areas [5]. If there is an issue as to whether a Bill, or a provision in a Bill, passed by the Assembly exceeds legislative competence, the issue can be referred to the Supreme Court [6].

The Local Government Byelaws (Wales) Bill 2012 (“the Bill”) was the first Bill to be enacted by the Assembly under these new powers. The aim of the Bill is to simplify procedures for making and enforcing local authority byelaws in Wales [7]. Certain provisions of the Bill are intended to remove the need for the confirmation of byelaws by the Welsh Ministers and by the Secretary of State [8]. This need arises by virtue of the Local Government Act 1972 (“the 1972 Act”) and the National Assembly for Wales (Transfer of Functions) Order 1999 (“the 1999 Order”). The effect of section 236(11) of the 1972 Act is that, where a statutory provision giving a local authority the power or duty to make the byelaw either so provides or is silent as to the existence or identity of a confirmatory body or person, before any byelaw made under that provision by a local authority can be effective, the Secretary of State has to confirm the byelaw [16]. Schedule 1 to the 1999 Order provides that the functions of the Secretary of State under section 236(11) of the 1972 Act “shall be exercisable by the Assembly concurrently with the Secretary of State” [20].

The Attorney General referred to the Supreme Court the question whether sections 6 and 9 of the Bill were within the Assembly’s legislative competence [1]. Section 6 of the Bill (through Part 1 of Schedule 1 to the Bill) removes the need for the confirmation of byelaws under certain specific enactments (“the scheduled enactments”) which currently require confirmation under section 236(11) of the 1972 Act. Section 9 would empower the Welsh Ministers to add to the scheduled enactments [8]. The specific issue in relation to sections 6 and 9 was whether either section removed the Secretary of State’s role in confirming (or refusing to confirm) byelaws made under statutory provisions which are (i) scheduled enactments, and (ii) provisions to which section 236(11) applies. If either section removed this role, they would be beyond the legislative competence of the Assembly, unless they were “incidental to, or consequential on” another provision contained in the Bill [46].

JUDGMENT

The Supreme Court unanimously declares that the Assembly had the legislative competence to enact sections 6 and 9 of the Bill. Lord Neuberger gives the leading judgment. Lord Hope gives guidance on some matters of practice regarding the making of such references.

REASONS FOR THE JUDGMENT

Section 6 is within the legislative competence of the Assembly [66],[83]. The removal of the Secretary of State's confirmatory powers in relation to the scheduled enactments would be incidental to, and consequential on, the primary purpose of removing the need for confirmation by the Welsh Ministers of any byelaw made under the scheduled enactments [52],[53]. The primary purpose of the Bill cannot be achieved without that removal [54]. The Secretary of State's confirmatory power is concurrent with that of the Welsh Ministers [55]. It is open to either the Secretary of State or the Assembly to exercise any functions which are exercisable concurrently [37]. Where a function is vested in two Ministers concurrently, either may perform it, acting alone, on any occasion [40]. It is far more sensible and consistent with the purpose of the Welsh Government legislation to conclude that the Assembly and the Secretary of State were each intended to have the power to exercise the concurrent functions, and that it was to be left to their good sense to decide which should exercise a particular function in a particular case [41]. The confirmatory power is only given to the Secretary of State if no other statute (including one passed after the 1972 Act) confers the function on any other body or person, which supports the notion that it is not an important function [56]. The scheduled enactments relate to byelaws in respect of which the Secretary of State is very unlikely ever to exercise his confirmatory power [57].

Section 9 is within the legislative competence of the Assembly [66],[84]. Section 9 has a limited effect, because the jurisdiction of the Assembly is limited to removing, or delegating the power to remove, functions of the Secretary of State where this would be incidental to, or consequential on, the purpose of removing the need for confirmation by the Welsh Ministers of any byelaw made under the scheduled enactments, and the Assembly cannot therefore bestow wider powers than this on the Welsh Ministers [63]. The same conclusion can be arrived at by invoking section 154(2) of the 2006 Act, which provides that a provision of a Bill which could be read in a way as to be outside the Assembly's legislative competence is to be read as narrowly as is required for it to be within that competence [64].

The outcome of this reference is in favour of the Assembly, but it cannot be regarded as a setback in practical terms for the Secretary of State, because the conclusion the Supreme Court has reached as to the effect of section 9 of the Bill is one which reflects the terms on which the Secretary of State was prepared to give consent to section 6 of the Bill [67]. The outcome is also entirely consistent with the general thrust of the extended powers given to the Welsh Ministers by the 2006 Act [68].

Guidance on matters of practice

In terms of the relevant rules and practice direction, the reference should not have been served on the Assembly. Rather, it should have been served on the Counsel General in his capacity as a relevant officer having a potential interest in the proceedings. He can then become a respondent if he notifies the Registrar that he wishes to participate [90],[93]. As no form has been laid down for use in the case of references (as opposed to appeals) involving devolution issues, it is open to the referring law officer or court to adopt whatever style and layout is thought to be most appropriate in the circumstances. The Registrar must however be provided with certain information for administrative purposes [94].

Appearing as a contradictor to a challenge to the legislative competence of a Bill or an Act of the Assembly is not one of the Assembly Commission's functions under the 2006 Act. The appropriate person to represent the public interest in resisting such a challenge is the Counsel General. There may however be cases in which the court will allow the Assembly or the Assembly Commission to participate as an intervener [99],[100].

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