30 October 2013

PRESS SUMMARY

R (on the application of Reilly and another) (Respondents) v Secretary of State for Work and Pensions (Appellant) [2013] UKSC 68
On appeal from [2013] EWCA Civ 95

JUSTICES: Lord Neuberger (President), Lord Mance, Lord Clarke, Lord Sumption, and Lord Toulson.

BACKGROUND TO THE APPEALS

These appeals concern the legality of the Secretary of State's Employment, Skills and Enterprise Scheme ("ESES"), which was designed to assist claimants of job-seeker's allowance ("JSA") to obtain employment or self-employment. The Jobseeker's Act 1995 ("the 1995 Act") provides for JSA to be paid to certain categories of unemployed persons. Section 17A of the 1995 Act provided that the Secretary of State could make regulations requiring JSA claimants in "prescribed circumstances" to participate in work or work-related schemes of a "prescribed description" for a "prescribed period". By section 35, "prescribed" means "specified in or determined in accordance with regulations".

Purportedly acting under s. 17A of the 1995 Act, the Secretary of State made the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011 ("the 2011 Regulations:"). These set up the ESES, defined by Regulation 2 as a scheme under s. 17A to assist JSA claimants to obtain employment, which could include work-related activity. By Regulation 3, the Secretary of State could select a JSA claimant for participation in the Scheme. Regulations 4 provided that such a claimant was required to participate once the Secretary of State had provided a notice in writing specifying (among other things) details of what participation involved, and Regulations 4-8 provided that failing to participate without good cause would lead to "benefits sanctions".

A number of "work for your benefit" programmes were created under ESES including the "sector-based work academy scheme" ("SBWA scheme"), a short-term scheme aimed at clearly employable individuals, and the Community Action Programme ("CAP") aimed at the very long-term unemployed. The first Respondent unwillingly participated for four weeks in the SBWA scheme having been informed, wrongly, that her participation was mandatory. She received no written notice. The second Respondent was selected to participate in the CAP. He was informed orally that he would be required to work for 30 hours/week for 26 weeks or until he found employment. He repeatedly refused to participate, and was subject to benefits sanctions with the effect that he received no JSA for 6 months.

The Respondents brought judicial review claims. They argued that (i) the 2011 Regulations are unlawful, since they did not fulfil the requirements of section 17A of the 1995 Act in "prescribing" the programmes, the circumstances by which individuals are selected, or the period of participation ("lawfulness"), (ii) the Respondents did not receive the information required by Regulation 4 of the 2011 Regulations ("notification"), (iii) the Government was required to have a published policy setting out the details of the relevant schemes ("publication"), and (iv) that the first Respondent had been subject to forced or compulsory labour contrary to Article 4 ECHR ("forced labour").

The High Court found for the Respondents on ground (ii) only: the Secretary of State had accepted that the first Respondent's notice did not satisfy Regulation 4, and the Court held that the second Respondent's notice also failed to comply. The Court of Appeal upheld the High Court's decision on ground (ii), but also allowed the appeal on ground (i), and thereby quashed the 2011 Regulations. The Secretary of State appeals to the Supreme Court against the Court of Appeal's decision on grounds (i) and (ii). The Respondents cross-appeal against the Court of Appeal's decision on grounds (iii) and (iv).

Following the Court of Appeal's decision, the Government passed the Jobseeker's Allowance (Schemes for Assisting Persons to Obtain Employment) Regulations 2013 ("the 2013 Regulations) and the Jobseeker's (Back to Work Schemes) Act 2013 ("the 2013 Act"). The effect of these was retrospectively to validate the 2011 Regulations and to set out fuller details of seven schemes, including the SBWA scheme and the successors of the CAP, pursuant to s. 17A of the 1995 Act.

JUDGMENT

Lord Neuberger and Lord Toulson give the unanimous judgment of the Court. On ground (i) lawfulness, the Supreme Court dismisses the Secretary of State's appeal, holding that the 2011 Regulations are invalid, since they did not contain a sufficiently detailed "prescribed description" of the SBWA or CAP schemes. On ground (ii) notification, the Court dismisses the Secretary of State's appeal, holding that the notice given to the second Respondent was insufficiently detailed. On ground (iii) publication, the Supreme Court holds that the Secretary of State had failed to provide sufficient information about the schemes to the Respondents. On ground, (iv) forced labour, the Court dismisses the Respondents' cross-appeal: the Regulations do not constitute forced or compulsory labour. Given the existence of the 2013 Act and 2013 Regulations, however, the appropriate form of the order would require submissions from counsel.

REASONS FOR THE JUDGMENT

- (i) Lawfulness: The SBWA and CAP are schemes falling within the 2011 Regulations. However, Regulation 2 contains no "prescribed description" of the ESES, SBWA scheme or CAP **[45]**. Even taking into account the need for flexibility in the detail of schemes, where a statute allows the making of regulations with a significant impact on peoples' lives, the need for legal certainty is of crucial importance **[46-47]**. To be meaningful, the prescribed description must add something to what is said in the 1995 Act, and the description of ESES in the 2011 Regulations added nothing to the words of s. 17A **[48-50]**. Therefore the 2011 Regulations were unlawful. However, the "prescribed circumstances" were sufficiently set out in Regulations 3 and 4 together, given the obvious need for flexibility **[51]**. Likewise, it was legitimate for the "prescribed period" to be an open-ended one **[52]**.

- (ii) Notification: The notice served on the second Respondent simply informed him that he had to perform "any activities" requested by the private company operating the CAP, without any indication of the nature of the likely tasks, hours or places of work. This was insufficient to satisfy Regulation 4(2)(c), which required that the notice give the second Respondent "details of what [the second Respondent] is required to do by way of participation in the Scheme" **[54-55]**. However, the letter was sufficiently detailed with regard to the consequences of failure to participate: while there might have been imperfections, the second Respondent was not significantly prejudiced or misled **[56-57]**.

- (iii) Publication: The Regulations invoked a statutory power which involved a requirement to work on pain of loss of benefits. Therefore fairness required that the claimants should have sufficient information about the scheme to be able to make freely informed representations before a decision was made **[64-66]**, which the Secretary of State failed to do **[67-73, 76]**.

- (iv) Forced labour: Article 4 ECHR requires that "no one shall be required to perform forced or compulsory labour". However, this does not include work forming part of "normal civic obligations". The latter provision delimits the ambit of the former **[78, 81-82]**. Therefore it was wrong to say that any work done under threat of penalty constituted forced labour unless it was required by lawfully imposed civic obligations **[79-80]**. JSA is a benefit for work-seekers, and the 2011 Regulations impose a condition on that benefit directly linked to its purpose. This comes nowhere close to the type of exploitative conduct at which article 4 is aimed **[83, 90]**. The fact that, as a matter of domestic law, the first Respondent's notice was unlawful made no difference **[91]**.

References in square brackets are to paragraphs in the judgment