



13 July 2016

PRESS SUMMARY

R (on the application of The Public Law Project) (Appellant) v Lord Chancellor (Respondent)
[2016] UKSC 39

On appeal from: [2015] EWCA Civ 1193

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Mance, Lord Reed, Lord Carnwath, Lord Hughes, Lord Toulson

BACKGROUND TO THE APPEAL

This appeal concerns the legality of attempts by the Lord Chancellor to introduce a residence test for civil legal aid by amending the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”). Part 1 of LASPO came into force on 1 April 2013. It includes section 9, subsection (1) of which provides that civil legal services are to be available to an individual if they are legal services described in Part 1 of Schedule 1, and the Director of Legal Aid Casework has determined that the individual qualifies for the services in accordance with Part 1 of LASPO. Part 1 of Schedule 1 accordingly sets out the services for which civil legal aid is available. Subsection 9(2) permits the Lord Chancellor to (a) “add” to, and (b) “vary or omit” services in Part 1 of the Schedule.

In April 2013, the Ministry of Justice (“MOJ”) issued a paper in which it stated that, subject to certain specific exceptions, the Government would proceed with the introduction of a residence test so that only those who are lawfully resident in the UK (or Crown Dependencies or British Overseas Territories) at the time of the application and have so resided for a continuous period of at least 12 months at any point in the past would be eligible for civil legal aid.

In September 2013, the Lord Chancellor decided to proceed with the proposal and to make regulations to that effect in the form of delegated legislation (“the draft order”), which was put before Parliament on 31 March 2014.

Before the draft order was laid before Parliament, the Public Law Project applied to the High Court for a declaration that the draft order was unlawful on the basis that it was (i) *ultra vires*, i.e. outside the scope of the power granted to the Lord Chancellor by LASPO to bring forward delegated legislation; and (ii) unjustifiably discriminatory in its effect.

The Divisional Court held that the draft order was unlawful on both grounds. Following the decision of the Divisional Court, the Lord Chancellor withdrew the draft order before any debate in the House of Lords could take place. On appeal, the Court of Appeal allowed the Lord Chancellor’s appeal on both grounds, holding that the draft order was *intra vires* and that, while it was discriminatory in its effect, the discrimination could be justified. The Public Law Project now appeal to the Supreme Court on both grounds.

JUDGMENT

Following a hearing at which the Court heard argument on the *ultra vires* issue and indicated that it did not need to hear argument on the discrimination issue, the Supreme Court unanimously allows the

Public Law Project’s appeal on the *ultra vires* issue. Lord Neuberger gives the only judgment, with which the other Justices agree.

REASONS FOR THE JUDGMENT

The Public Law Project contend that the exclusion of a specific group of people from the right to receive legal services on the ground of personal circumstances or characteristics, which have nothing to do with the nature of the issue or services involved or the individual’s need, or ability to pay, for the services, is not within the scope of the power accorded to the Lord Chancellor by section 9(2)(b) of LASPO, and that nothing in section 41 undermines that contention.

That argument is accepted by the Court [30]. In declaring subordinate legislation to be outside the scope of the statutory power pursuant to which it was purportedly made, the Court is upholding the supremacy of Parliament over the Executive [23]. Section 9(2)(b) provides a power to vary or omit services, but the relevant parts of the draft order do not seek to vary or omit services; rather, they seek to reduce the class of individuals who are entitled to receive those services by reference to a personal characteristics or circumstance unrelated to the services (i.e. length of residency) [30].

This interpretation of the wording of section 9(2) is supported by the wider statutory context. Each of the services identified in Part 1 and Part 2 of Schedule 1 is linked to a specific type of legal issue or claim, and has nothing to do with the personal circumstances or characteristics – in particular the geographical residence – of the potential recipient of the services [31].

This conclusion is also supported by contrasting the wording of the two subsections of section 9. Subsection (1) clearly distinguishes between the question of whether the particular services qualify and whether the particular individual qualifies [33]. Section 9(2) is concerned with the services which qualify, and it is section 11 which appears to be concerned with identifying the characteristics or circumstances of individuals who are to qualify for civil legal aid. The criteria that section 11 sets out all relate to the issue involved, the services concerned, or the need of the individual for financial assistance, in contrast to the draft order. This indicates that the draft order is attempting to do something which the legislature never had in mind when enacting section 9 [34].

The Court of Appeal concluded that section 41 could be invoked to defeat the contention that the Lord Chancellor could not make the draft order under section 9. While it is true that section 41(2)(b) permits any order made under section 9(2)(b) to “make provision by reference to... services provided for a particular class of individual”, this cannot extend the power under section 9(2)(b) so as to exclude a whole class of individuals from the scope of Part 1 of LASPO by reference to their residence [36]. Section 41 is clearly intended to grant ancillary powers to those primarily granted under section 9 [36].

Accordingly, the appeal should be allowed on the first, *ultra vires*, issue, and the Court does not have to deal with the discrimination issue [39].

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:

<http://supremecourt.uk/decided-cases/index.html>