Neutral Citation Number: [2013] EWCA Civ 66

Case No: B3/2012/2138/2141

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE FOSKETT
[2012] EWHC 2292 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/02/2013

Before :

LORD JUSTICE PILL
LADY JUSTICE BLACK
and
SIR STANLEY BURNTON

- -

Between :

The Queen on the application of Caitlin Reilly and Jamieson Wilson	**Appellants**
- and -	
The Secretary of State for Work and Pensions	**Respondent**

- -
- -

Ms Nathalie Lieven QC and Mr Tom Hickman (instructed by **Public Interest Lawyers**) for the **Appellants**
Mr Paul Nicholls QC (instructed by **DWP Legal Services**) for the **Respondent**

Hearing dates: 19/20 December 2012

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Approved Judgment

Lord Justice Pill :

1. This is an appeal by Ms Caitlin Reilly ("Miss Reilly") and Mr Jamieson Wilson ("Mr Wilson") against a decision of Foskett J delivered in the Administrative Court on 6 August 2012. Foskett J granted them permission to apply for judicial review and held that there had been a breach of regulation 4(2) of the Jobseeker's Allowance (Employment, Skills and Enterprise Scheme) Regulations 2011/917 ("the 2011 Regulations"). The applications were dismissed on other grounds. The judge granted permission to appeal on those grounds.

2. The appellants challenged the lawfulness of the 2011 Regulations made by the Secretary of State for Work and Pensions ("the Secretary of State") under section 17A and other sections of the Jobseekers Act 1995 ("the 1995 Act"). The long title of the 1995 Act states that it is an Act to provide, among other things, for "a jobseeker's allowance and to make other provision to promote the employment of the unemployed". Pursuant to the 1995 Act, the Jobseeker's Allowance Regulations 1996 (1996 No. 207) ("the 1996 Regulations") came into force on 7 October 1996 and made detailed provision, in Part II, for the circumstances in which the allowance was to be paid, including requirements as to availability for employment, actively seeking employment, and a Jobseeker's Agreement. Other conditions of entitlement were specified in Part III and sanctions, that is consequences of non-compliance, in Part V. There were subsequently many amendments to and additions to the 1996 Regulations by further statutory instruments.

3. The Jobseeker's Agreement is a fundamental part of the procedure under the 1995 Act, provision for it being made in section 1(2) and its purpose and effect in section 10. Miss Reilly's Jobseeker's Agreement states that she is looking for a job in the following work types: "museum curator, exhibition guide, retail assistant." She was "open to ideas within reason". She acknowledged her obligation to do everything she could do to find work and to improve her chances of finding work. In Mr Wilson's agreement work types were: "production work, warehouse work, assembly work". It was stated that he was "likely to need some support and direction".

The Statute

4. Section 1 of the 1995 Act, as amended, provides, in so far as is material:

> "1. (1) An allowance, to be known as a jobseeker's allowance, shall be payable in accordance with the provisions of this Act.
>
> (2) Subject to the provisions of this Act, a claimant is entitled to a jobseeker's allowance if he -
>
> (a) is available for employment;
>
> (b) has entered into a jobseeker's agreement which remains in force;
>
> (c) is actively seeking employment;
>
> (d) satisfies the conditions set out in section 2;

(e) is not engaged in remunerative work;

(f) does not have limited capability for work;

(g) is not receiving relevant education;

(h) is under pensionable age; and

(i) is in Great Britain."

Section 2 specifies contribution based conditions and need not be set out for present purposes.

5. Section 17A was added to the 1995 Act by the Welfare Reform Act 2009, Section 1(2). Section 17B, headed "Section 17A: Supplemental", was added at the same time. Section 17A provides, in so far as is material:

> "17A Schemes for assisting persons to obtain employment: 'work for your benefit' schemes etc.
>
> (1) Regulations may make provision for or in connection with imposing on claimants in prescribed circumstances a requirement to participate in schemes of any prescribed description that are designed to assist them to obtain employment.
>
> (2) Regulations under this section may, in particular, require participants to undertake work, or work-related activity, during any prescribed period with a view to improving their prospects of obtaining employment.
>
> (3) In subsection (2) 'work-related activity', in relation to any person, means activity which makes it more likely that the person will obtain or remain in work or be able to do so.
>
> (4) Regulations under this section may not require a person to participate in a scheme unless the person would (apart from the regulations) be required to meet the jobseeking conditions.
>
> (5) Regulations under this section may, in particular, make provision -
>
> (a) for notifying participants of the requirement to participate in a scheme within subsection (1);
>
> (b) for securing that participants are not required to meet the jobseeking conditions or are not required to meet such of those conditions as are specified in the regulations;
>
> (c) for suspending any jobseeker's agreement to which a person is a party for any period during which the person is a participant;

> (d) for securing that the appropriate consequence follows if a participant has failed to comply with the regulations and it is not shown, within a prescribed period, that the participant had good cause for the failure;
>
> (e) prescribing matters which are, or are not, to be taken into account in determining whether a participant has good cause for any failure to comply with the regulations;
>
> (f) prescribing circumstances in which a participant is, or is not, to be regarded as having good cause for any failure to comply with the regulations.
>
> (6) In the case of a jobseeker's allowance other than a joint-claim jobseeker's allowance, the appropriate consequence for the purposes of subsection (5)(d) is that the allowance is not payable for such period (of at least one week but not more than 26 weeks) as may be prescribed."

6. Section 17B provides, in so far as is material:

> "(1) For the purposes of, or in connection with, any scheme within section 17A(1) the Secretary of State may -
>
> (a) make arrangements (whether or not with other persons) for the provision of facilities;
>
> (b) provide support (by whatever means) for arrangements made by other persons for the provision of facilities;
>
> (c) make payments (by way of fees, grants, loans or otherwise) to persons undertaking the provision of facilities under arrangements within paragraph (a) or (b);
>
> (d) make payments (by way of grants, loans or otherwise) to persons participating in the scheme;
>
> (e) make payments in respect of incidental expenses."

7. Section 35, the interpretation section in the 1995 Act, provides that "prescribed" (except in regulations not material in this appeal) means "specified in or determined in accordance with regulations".

8. Section 36 provides that any power under the Act to make regulations or orders, except under sections not material for present purposes, shall be exercised by statutory instrument. Sub-section 4 provides:

> "Any such power includes power–
>
> (a) to make such incidental, supplemental, consequential or transitional provision as appears to the Secretary of State . . . to be expedient; and

> (b) to provide for a person to exercise a discretion in dealing with any matter."

The cited provisions in sections 35 and 36 predate section 17A.

9. When specifying circumstances in which a Jobseeker's Allowance is not payable, the circumstances include, under section 19(5):

> "(5) The circumstances referred to in subsections (1) and (2) are that the claimant -
>
> (a) has, without good cause, refused or failed to carry out any jobseeker's direction which was reasonable, having regard to his circumstances;
>
> (b) has, without good cause -
>
> (i) neglected to avail himself of a reasonable opportunity of a place on a training scheme or employment programme;
>
> (ii) after a place on such a scheme or programme has been notified to him by an employment officer as vacant or about to become vacant, refused or failed to apply for it or to accept it when offered to him;
>
> (iii) given up a place on such a scheme or programme; or
>
> (iv) failed to attend such a scheme or programme on which he has been given a place."

The 2011 Regulations

10. The 2011 Regulations had been duly laid before Parliament and came into force on 20 May 2011. The interpretation regulation in the Regulations, regulation 2, provides that "the Scheme" means "the Employment, Skills and Enterprise Scheme" and also provides:

> "The Employment, Skills and Enterprise Scheme" means a scheme within section 17A (schemes for assisting persons to obtain employment: "work for your benefit" schemes etc.) of the Act known by that name and provided pursuant to arrangements made by the Secretary of State that is designed to assist claimants to obtain employment or self-employment, and which may include for any individual work-related activity (including work experience or job search."

11. Part 2 of the 2011 Regulations is headed "Selection and Participation in the Employment, Skills and Enterprise Scheme". Regulation 3 provides:

> "The Secretary of State may select a claimant for participation in the Scheme."

Regulation 4 provides:

> "(1) Subject to regulation 5, a claimant ("C") selected under regulation 3 is required to participate in the Scheme where the Secretary of State gives C a notice in writing complying with paragraph (2).
>
> (2) The notice must specify -
>
> (a) that C is required to participate in the Scheme;
>
> (b) the day on which C's participation will start;
>
> (c) details of what C is required to do by way of participation in the Scheme;
>
> (d) that the requirement to participate in the Scheme will continue until C is given notice by the Secretary of State that C's participation is no longer required, or C's award of jobseeker's allowance terminates, whichever is earlier;
>
> (e) information about the consequences of failing to participate in the Scheme.
>
> (3) Any changes made to the requirements mentioned in paragraph (2)(c) after the date on which C's participation starts must be notified to C in writing."

Regulation 5 specifies circumstances in which requirement to participate in the Scheme is suspended or ceases to apply.

12. Sanctions are set out in Part 3 of the Regulations. Regulation 6 provides:

> "A claimant who fails to comply with any requirement notified under regulation 4 is to be regarded as having failed to participate in the Scheme."

Regulation 7 provides an opportunity for a claimant who fails to participate in the Scheme to show good cause for that failure. Consequences of failure to participate in the Scheme are set out in Regulation 8:

> "(1) Where the Secretary of State determines that a claimant ("C") has failed to participate in the Scheme, and C has not shown good cause for the failure in accordance with regulation 7, the appropriate consequence for the purpose of section 17A of the Act is as follows.
>
> (2) In the case of a jobseeker's allowance other than a joint-claim allowance, the appropriate consequence is that C's allowance is not payable for the period specified in paragraphs (4) to (7) ('the specified period').

> . . .
>
> (4) The period is 2 weeks in a case which does not fall within paragraph (5), (6) or (7).
>
> (5) The period is 4 weeks where -
>
> (a) on a previous occasion the Secretary of State determined that C's jobseeker's allowance was not payable or was payable at a lower rate because C failed without good cause to participate in the Scheme ('the first determination'), and
>
> (b) a subsequent determination is made no more than 12 months after the date on which C's jobseeker's allowance was not payable or was payable at a lower rate following the first determination.
>
> (6) Subject to paragraph (7), the period is 26 weeks where -
>
> (a) on two or more previous occasions the Secretary of State determined that C's jobseeker's allowance was not payable or was payable at a lower rate because C failed without good cause to participate in the Scheme, and
>
> (b) a subsequent determination is made no more than 12 months after the date on which C's jobseeker's allowance was not payable or was payable at a lower rate following the most recent previous determination.
>
> (7) Where paragraph (6) applies but the Secretary of State is satisfied that C has re-complied in accordance with paragraph (8), the period is either -
>
> (a) 4 weeks, or
>
> (b) 4 weeks plus a period which ends with the last day of the benefit week in which C re-complies,
>
> whichever is longer."

For the Secretary of State, Mr Nicholls QC accepted that application of the prescribed procedure could lead to non-payment of Jobseeker's Allowance for an indefinite period of time.

The issues

13. The dispute arose because, as will appear, neither appellant was prepared to do certain work proposed by the Secretary of State under the 1995 Act. In both cases, sanctions were threatened under Part 3 of the 2011 Regulations. Sanctions are not now in issue, in Miss Reilly's case by way of admission and in Mr Wilson's case. By the judge's finding that "there could be no question of sanctions being validly imposed if no proper notice [under Regulation 4(2)] of the sanction consequences was given". It has

been indicated that further sanctions will not be enforced in relation to the breaches alleged in these cases. The judge declined to make a declaration in Miss Reilly's case that requiring the claimant to undertake the work in question was unlawful.

14. Because sanctions will not in any event be applied, the issues in these particular cases may be said to have become academic. However, because of the important issues which arise, in particular as to the lawfulness of the 2011 Regulations, the parties sought to proceed with the appeal and the court agreed that it was appropriate to do so.

Jobseeker's Allowance

15. In March 2012, 1.61 million people were in receipt of Jobseeker's Allowance, that was 4.9% of the workforce. Of those, 357,000 had been in receipt of the Allowance for more than 12 months. Of the 1.61 million, 480,000 were aged from 18 to 24 and 55,000 of those had been in receipt of the Allowance for more than 12 months. Forecast expenditure for Jobseeker's Allowance in the year 2011/12 was £4.9 billion. Subject to retirement age, there is no limit upon the period of time during which the Allowance may be claimed. The Allowance is paid at a rate of about £70 per week.

16. In submissions, and in the written evidence of Mr Walsh, Deputy Director of the Labour Market Intervention Strategy Division in the Department for Work and Pensions ("DWP"), stress is placed on the need for flexibility in seeking to get people back to work. There must be a variety of support programmes tailored to specific sets of circumstances and which recognise the different categories of unemployed persons and the needs of such persons, it was submitted. The ability to "customise" employment and skills support to particular groups of claimants, without having to lay fresh regulations, enables the Department to react to a changing labour market and the demands of those employers who cooperate, it was submitted.

17. A variety of programmes has been devised, purportedly under the Regulations, and the programmes are described by Mr Walsh. These include what are known as the Jobcentre Plus offer, the Get Britain Working measures, the Work Programme and the Support for the Long Term Unemployed Trailblazer. The programme in issue in the case of Miss Reilly, is the sector-based work academy ("sbwa"). That scheme is intended for those who would benefit from a short period of work-focused training and work-experience placement linked to a genuine job vacancy. In the case of Mr Wilson, the programme is the Community Action Programme ("CAP"), a programme for the very long-term unemployed and a part of the Trailblazer programme.

The facts

18. The judge's findings of fact about the circumstances of the two appellants are not challenged. Miss Reilly was a graduate in geology whose ambition was to work in the museum sector. In November 2010, she was assigned to a paid work experience placement at a museum in Birmingham and was paid the minimum wage during that placement, funded by a Government scheme. When it ended, she continued to work voluntarily at the museum with a view to gaining experience. Having claimed Jobseeker's Allowance ("JSA"), her Jobcentre Plus adviser told her of an "opportunity" to attend an open day in Birmingham at which retail jobs would be available. Retail was one of the areas set out in her Jobseeker's Agreement.

19. In view of the admitted breach of regulation 4, subsequent events need not be set out in great detail. Miss Reilly attended the open day having been told by her adviser that if she accepted the position on offer she would undergo a week's training followed by a guaranteed job interview. After the open day, she was told that she was considered suitable for training which was then said to be for a 6 week period. She expressed concern about the length of the training period which meant she could not continue to do her voluntary work at the museum. When Miss Reilly told her adviser of that, the adviser said that participation in the scheme was "mandatory" and Miss Reilly risked loss of JSA if she did not participate.

20. Miss Reilly began to work for 5 hours a day, 5 days a week and it became apparent that she would be working instead of training. She received no pay. She had expected to be shown how to undertake a variety of tasks in a retail environment but no such training materialised. The breach of regulation 4 is admitted on the basis that Miss Reilly should not have been told that it was mandatory for her to participate in the sbwa programme, though once she had agreed to embark on the training element it became mandatory. Had she not been misinformed, she would not have participated in the programme.

21. Mr Wilson acquired a Heavy Goods Vehicle (HGV) licence and worked as an HGV driver from 1994 to 2008. He was laid off in 2008 and, at about the same time, his self-esteem was damaged by the breakdown of his marriage.

22. In November 2011, Mr Wilson was required to participate in CAP. This is a trial scheme for the very long-term unemployed and provides up to 6 months work experience. It is intended to provide additional provider-led job-search support designed to assist the unemployed to find a job. It is said that, for the long-term unemployed, six months regular work will revive the work habit. It will provide "the opportunity to gain sustained experience of a working environment".

23. Beyond benefits to which they are entitled, including JSA, participants receive no additional wage. Orally and in writing, Mr Wilson was told that a refusal to participate could result in the loss of JSA. His placement was due to begin on 28 November 2011 and was to be with an organisation that collects disused furniture, renovates it and distributes it to needy people. These details were never set out in writing. He was told that he would be required to work for 30 hours a week for 26 weeks or until he found employment.

24. Mr Wilson told the provider's representative that he was "not prepared to work for free, particularly for such a long period of time." He had a fundamental objection to doing so. He said that he felt very strongly about CAP believing that requiring people to work for six months without pay was particularly unfair. If he had been offered a training course "that could lead to some concrete benefit" he would jump at the chance. The work had not been arranged by looking at his own needs.

25. Mr Wilson was not told what work he would be doing beyond carrying out the provider's instructions. An arrangement providing for 6 months work without wages (save the Jobseeker's Allowance) requires specification and notification, it was submitted. That is required in fairness to the individual and to the provider and to ensure that there is focus on the statutory intention of assistance in obtaining employment.

26. It was also claimed on Mr Wilson's behalf that the notice given to him under Regulation 4(2) was inadequate. The Secretary of State relies on a letter dated 16 November 2011. It is headed "Support for the very long-term unemployed". It is stated that "the community action programme will involve doing up to six months of near full-time work experience, with some additional weekly job search support". Under the heading "frequently asked questions" it is stated, amongst other things:

> "Can I refuse to take part?
>
> No. You must take part to keep getting Jobseeker's Allowance
>
> What happens if I refuse to take part?
>
> If you refuse to take part, you may lose your benefit.
>
> How long will I be expected to participate in this trial?
>
> The trial will last for six months."

The judgment

27. The decisions of the Secretary of State were challenged on four grounds. The first is that the Scheme named in the 2011 Regulations is beyond the powers of section 17A(1) of the 1995 Act or, as the Secretary of State puts the appellants' claim, the Regulations pursuant to which the scheme applying to the appellants were established did not comply with the requirements of the Act. The second ground is that the Regulations could not be enforced in the absence of a published policy in relation to them. The third ground, on which the appellants, as already stated, have succeeded, Mr Wilson in part, was that the notices to them required by Regulation 4(2) were inadequate. The fourth ground, put as an independent ground and also in support of the other grounds, is that the Regulations conflict with article 4(2) of the European Convention on Human Rights which provides, subject to exceptions, that:

> "No one shall be required to perform forced or compulsory labour."

28. Considering ground 1, the judge stated, at paragraph 40, that the description given in regulation 2 was "adequate, albeit only just adequate" to comply with section 17A. At paragraph 49, the judge added:

> "My conclusion, albeit with some hesitation, is that the Regulations do just comply with the requirements of section 17A."

29. The judge would not have quashed the Regulations or scheme on ground 2. Considering what information must be made available to claimants to whom a work placement is offered, Foskett J stated, at paragraph 66 that:

> "that the provision publicly of closely particularised details of each scheme or programme within the overall scheme would be impracticable."

However, he added that:

> "it seems to me to be consistent with all the established principles of fairness and openness . . . that the parameters in which the individual has a choice should be made clear before the choice is made. . . . If there is a true choice about participating in a programme, then it is not really a question of making representations . . . but simply of having the opportunity to make an informed choice about whether to become engaged in the programme at all."

30. As to ground 3, Foskett J held that in Mr Wilson's case, as in the case of Miss Reilly, the requirements of regulation 4 were not met. He held that there was insufficient information about sanctions in the letters sent by the Secretary of State, to Mr Wilson, for reasons given at paragraph 119 of his judgment.

31. Foskett J held, at paragraph 119, that the initial letter to Mr Wilson dated 16 November 2011 did not meet the Regulation 4 obligation. The judge stated:

> "I do not think it is fair, sufficient or accurate to tell someone who could only at that stage be sanctioned for 2 weeks that he or she could be sanctioned for 'up to 26 weeks'. The letter should spell out that, having failed without good cause to participate in the CAP on one occasion, the sanction if a sanction was applied would be one of 2 weeks' loss of benefit and that thereafter the period would increase with further separate failures to participate. I emphasise the underlined words because the words used in the letter received by Mr Wilson were that his benefits 'may be stopped', perhaps conveying the impression that sanctions are not necessarily automatic. However, it seems to me that the clear intention of the Regulations is that the sanctions are mandatory. This conclusion is derived from the words in Regulation 8(1) which state that 'the appropriate consequence for the purpose of section 17A of the Act is as follows' . . . once it has been decided that no good cause for the failure to participate in the scheme has been demonstrated. If that is the correct interpretation of the Regulations (and I do not think Mr Nicholls has suggested to the contrary and neither does Mr Walsh's second witness statement), then the letter ought, in my view, to be more explicit in this respect. (I might add also that the passage in the letter dealing with the appeal process, whilst arguably accurate as it stands, might be made more clear and open given what has been said by the Department concerning the wide ambit of the appeal process: see paragraph 155 below.)"

32. The judge repeated, at paragraph 126, "that the information given concerning sanctions is unclear and opaque." The letter of 16 November "did not fairly set out the information that should have been provided . . . stating that the period of loss

would be 26 weeks might persuade someone who otherwise might wish to register a protest not to do so" (paragraph 144).

33. The judge summarised his conclusions, in relation to both appellants, in paragraph 186:

> "[Miss Reilly's] original complaint arose from what she was wrongly told was a compulsory placement on a scheme that (a) impeded her voluntary efforts to maintain and advance her primary career ambition and (b) having embarked upon it, from her perspective, did not offer any worthwhile experience on an alternative career path. It is not difficult to sympathise with her position from that point of view. Mr Wilson had more fundamental objections to a compulsory unpaid scheme (which indeed it was in his case) which, from his perspective, was not tailored to his own needs and would impede his continuing efforts to find employment, but again there is no suggestion in his case that he would not take suitable employment if he could find it."

34. In the following paragraph, the judge commented that, at the material time, the Scheme was in its infancy and that steps may since have been taken "to improve the content of some of the standard letters concerning potential sanctions."

35. The judge found no breach of article 4.

Description

36. Section 17A of the 1995 Act contemplates regulations which make provision for schemes of a prescribed description and which impose on claimants for Jobseeker's Allowance a requirement to participate in such schemes. It contemplates regulations requiring participants to undertake work or work-related activity with a view to improving their prospects of obtaining employment. Regulations may also secure that the appropriate consequence follows if a participant has failed to comply with the regulations.

37. Following the addition of section 17A to the 1995 Act, the approach adopted by the Secretary of State in the 2011 Regulations, was to specify a single scheme, the Employment, Skills and Enterprise Scheme, and to empower the Secretary of State to make arrangements under that scheme designed to assist claimants. Under that umbrella, a series of arrangements, or sub-schemes, has been announced by the Secretary of State. That has been done in order to achieve the complete flexibility sought by the Secretary of State in the administration of the Act. Exercising that power, the Secretary of State has issued detailed guidance and particulars of the guidance for sbwa and CAP are in evidence. In relation to sbwa, an overview of the scheme is available on the Direct Gov website. The scheme is to be administered by Jobcentre Plus in accordance with the guidance. The main way in which information about the scheme is provided to claimants, Mr Walsh said, is through personal meetings with the Jobcentre Plus adviser prior to a referral. It is said that is not possible to be too prescriptive about the information provided as sector-based work academy schemes vary from employer to employer.

38. As to CAP, the provider guidance runs to almost 100 pages and the document is on the DWP website. The main way in which information about CAP is conveyed to claimants, Mr Walsh said, is through discussions and correspondence between Jobcentre Plus staff and the claimant (prior to referral) and the provider and the claimant (following a referral). It is claimed that there is evidence demonstrating that interventions such as CAP, which involve mandatory activity, improve outcomes, including for the long-term unemployed. CAP is still at the trial stage and participation is decided by random allocation, said to be the most reliable way of determining whether a cause and effect relationship exists between different elements of the trial.

Submissions

39. For the appellants, Miss Lieven QC submitted that Parliament intended to retain oversight of arrangements made under the 1995 Act by requiring, in section 37, draft regulations made under, or by virtue of, any provision of the Act (subject to exceptions) to be laid before Parliament. The 2011 Regulations do not comply with the requirements of section 17A of the 1995 Act, it was submitted. First, the imposition of requirements to participate can be imposed on claimants only "in prescribed circumstances". Secondly, the requirement can be imposed only in relation to schemes "of any prescribed description". Thirdly, the regulations may require participants to work only "during any prescribed period".

40. No schemes are described in the regulations, Miss Lieven submitted, still less schemes with a prescribed description. What the Secretary of State has done in the Regulations is simply to name a scheme, "Employment, Skills and Enterprise Scheme". Beyond repeating the heading to section 17A, the Regulations provide merely that the scheme named in the Regulations is a scheme of a prescribed description within the meaning of section 17A. That amounts to a claim, submitted Miss Lieven, that a prescribed scheme is anything the Secretary of State says it is. The Secretary of State then claims to be free to make any arrangement he sees fit. Far from a scheme or schemes of a prescribed description being specified in the 2011 Regulations, the Secretary of State can make arrangements administratively for schemes of any description. Parliamentary oversight, or "Parliamentary control", the heading to section 37 of the 1995 Act, is defeated.

41. Similarly, it was submitted, "circumstances" are not prescribed in the regulations and neither is a "period" during which participants are required to undertake work. Regulation 4 provides only for a starting date for participation and circumstances in which the requirement to participate ceases to apply. Those requirements do not amount to a prescribed period, it was submitted. The lack of specificity under all three heads may satisfy the Secretary of State's wish to be flexible but is outside the powers of the Act. By way of contrast, the requirements in section 17A(5)(e) and (f) as to "prescribing matters" and "prescribing circumstances" have received detailed attention in regulations 6-8. The consequences of failure to participate in the scheme are specified in detail in regulation 8 of the 2011 Regulations.

42. For the Secretary of State, Mr Nicholls QC relied on the need to preserve flexibility already considered. He submitted that the Secretary of State is permitted to formulate by regulation a single scheme which preserves his ability to arrange and keep in place different programmes. The Scheme is sufficiently prescribed when read with the

power conferred on the Secretary of State by section 19B(1)(a) to make arrangements for the provision of facilities, it was submitted.

43. Mr Nicholls accepted that "prescribed" is a strong word and is used three times in the first two sub-sections of section 17A. However, section 17A contemplates that the Secretary of State may do a range of things by way of making arrangements. That is clear from section 17B, which by its heading is said to be supplemental to section 17A, and empowers the Secretary of State to make arrangements for the provision of facilities (which include services) for the purposes of or in connection with any scheme under section 17A(1). The statute contemplates it being left to the Secretary of State to make arrangements, it was submitted.

44. Mr Nicholls drew attention to the power under section 36 of the 1995 Act to make regulations which includes a power to provide for a person to exercise a discretion in dealing with any matter. Section 17A does not, however, confer on the Secretary of State a discretion beyond the powers conferred by the Act. It begs the question whether the Scheme is within section 17A(1).

45. Mr Nicholls placed particular reliance on that part of the definition of "prescribed" in section 35 which includes not merely what is "specified" in regulations but what is "determined in accordance with" regulations. It was submitted that the detailed arrangements made by the Secretary of State, and specified in the guidance already mentioned, were made "in accordance with the regulations". Read with the varied and detailed arrangements made, there was a "prescribed description" of the Scheme. Miss Lieven's counter-argument on this point was confined to a bald assertion that the words "in accordance with" add nothing.

46. Miss Lieven submitted that ground 2 relies on basic administrative law concepts. If a scheme with significant sanctions is to be introduced, it is important that people liable to be subject to the sanctions are aware of the circumstances in which they will be applied. The criteria by which persons can consider their rights and duties should be made known. That was not sufficiently done in this case, it was submitted, either by a general notification of the arrangements or notification specific to the appellants.

47. Quite apart from the statutory requirement for prescription, schemes to be implemented should be available to the public for scrutiny, it was submitted, though Miss Lieven accepted that some flexibility may be required when dealing with individual cases. Secondly, before a claimant commits himself to participating in a scheme, its full implications should be made known to him. For the Secretary of State, Mr Nicholls submitted that sufficient information on each of the arrangement in operation was made known to the public. The Secretary of State was not required to have a policy for schemes, save for the policy required by the statute. It was valuable and inevitable that individual arrangements be tailored to meet the needs of the claimant and the provider. Regulation 4 had to be complied with but there needed also to be discussion between the claimant and DWP staff.

Discussion

48. A policy of imposing requirements on persons receiving a substantial weekly sum, potentially payable for life, is readily understandable. Equally, the means sought to achieve that end are understandable; claimants should be required to participate in

arrangements which may improve their prospects of obtaining remunerative employment. Provided schemes "are designed to assist [claimants] to obtain employment" and to "[improve] their prospects of obtaining employment", both expressions appearing in section 17A, sanctions for failing to participate are understandable. Whether a particular arrangement meets those statutory requirements in section 17A is susceptible to challenge by judicial review, but that stage has not been reached. The issue is whether the Scheme named in the Regulations satisfies the requirements for specificity in section 17A by way of being "prescribed".

49. I readily appreciate the need for flexibility in devising arrangements which will achieve the statutory purpose of improving prospects of obtaining employment. The needs of jobseekers will vary infinitely as will the requirements of providers prepared to participate in arrangements with them. I am impressed with the care shown in attempting to devise arrangements and with the resources devoted to attempts to achieve the statutory purpose. There is an important public interest in getting people back to work as well as a major saving in not having to pay Jobseeker's Allowance, and possibly other benefits.

50. I also appreciate that there could be a substantial saving of public money if effective sanctions are available when jobseekers are not cooperating with proposals properly put to them under the Act. The Secretary of State's object in these proceedings is not to end Jobseeker's Allowance but to ensure that it is only paid to those actively seeking employment and prepared to cooperate with attempts made by the state to achieve that end. The entitlement to receive the weekly sum should depend on such cooperation.

Conclusions

51. Having said as much, this is a question of statutory construction and I am unable to conclude that the statutory requirement for the Regulations to make provision for schemes of a prescribed description is met in regulations 2 and 3 of the 2011 Regulations. Simply to give a scheme a name cannot, in context, be treated as a prescribed description of a scheme in which claimants may be required to participate, within section 17A(1). I accept the submissions of Miss Lieven on ground 1.

52. Prescribed by regulations includes determined "in accordance with regulations". Section 17A(1), however, provides that it is for the regulations to make provision for schemes of a prescribed description. Arrangements are not made by the Secretary of State in accordance with regulations unless the statutory requirement for schemes of a prescribed description is met in the regulation itself. The statutory requirement is that the prescribed description is in the regulation.

53. Arrangements may only be made in accordance with the Regulations if there appears in the Regulations a scheme (or schemes) of a prescribed description, as required by section 17A. Even if the arrangements are in accordance with the regulations, that does not establish that the regulations are in accordance with the statute and that is the point at issue. It is a requirement of section 17A that regulations make provision for schemes "of any prescribed description". I do not consider that the statutory intention, which throughout has included the definition of "prescribed" relied on, contemplated that the expression "prescribed description" introduced in 2009 could be construed in the way the Secretary of State contends.

54. The approach adopted in the 2011 Regulations is different from that pursued previously under the 1995 Act, and avowedly so. I have referred, without listing them, to the copious regulations made under the 1995 Act prior to its amendment in 2009. The expressions "employment programme" and "training scheme" appear in regulation 75 of the 1996 Regulations, where particulars are given of the programmes and schemes contemplated.

55. Particular schemes are provided by other statutory instruments made under the 1995 Act. For example, the Jobseeker's Allowance (Jobseeker Mandatory Activity) Pilot Regulations 2005 (2005 No. 3466) established a Jobseeker's Mandatory Activity Pilot. This is defined, in Regulation 2(1) and:

> "means the employment programme known by that name and provided in pursuance of arrangements made by or on behalf of the Secretary of State under section 2 of the Employment and Training Act 1973(3), being a programme comprising an initial three-day work focused course and three follow-up interviews with an adviser, for any individual who has been receiving benefit for a continuous period of not less than six months ending on the first required entry date to any such programme."

56. The "benefit" involved is Jobseeker's Allowance. The arrangements were to be made under section 2 of the Employment and Training Act 1973. That section confers broad powers on the Secretary of State which include making "arrangements for providing temporary employment for persons in Great Britain who are without employment". The powers are markedly different from those conferred by section 17A of the 1995 Act. The approach adopted in this respect until 2009 throws light, in my view, on the word "scheme" in the statute, and the word "prescribed" introduced in 2009.

57. Mr Nicholls has not challenged Miss Lieven's submission that, if the Regulations failed to comply with section 17A in that fundamental respect, the Regulations are unlawful. Since the central purpose was to impose "requirements" on claimants, with sanctions for failure to comply, I agree that the Regulations must be quashed.

58. I would not have quashed the regulations for a failure to specify "prescribed circumstances" or "prescribed period". It is a summary description of circumstances but, reading regulations 3 and 4 together, the prescribed circumstances are that the claimant is selected by the Secretary of State and that the Secretary of State has given the claimant a notice in writing complying with the detailed requirements of regulation 4(2). That appears to me to comply with the requirement even though, in the CAP scheme, selection is on a random basis.

59. As to "period", by reading regulations 4 and 5 together, the date on which the claimant's participation will start is specified as are the circumstances in which the requirement to participate ceases; written notice to the claimant by the Secretary of State or determination of the Allowance. The period is not specified in the Regulations as a calendar period but it is specified by way of events with which it will begin and end. Given the purpose of the statute, with its undoubted need for flexibility where possible, that appears to me to be a tenable specification. I would not quash the Regulations on that ground alone.

60. The judge drew attention, at paragraphs 44 to 48 of his judgment, to the concern expressed in its 29th Report by the House of Lords Select Committee on the merits of statutory instruments. It referred to the lack of an adequate level of information in the explanatory memorandum accompanying the 2011 Regulations. At paragraph 10, it was stated that "these regulations interpret the Act very broadly so that future changes to the Scheme could be made administratively without any reference to Parliament." The Committee did not suggest that the Regulations were unlawful but I regard their concern as supportive of the conclusion I have reached.

61. Having come to that conclusion on ground 1, I propose to deal with the other grounds briefly. I understand the difficulty faced by a Secretary of State who seeks to tighten the procedures by way of sanctions he considers necessary. If the court is against the Secretary of State on this basic point, it is not, however, for the court to suggest ways in which the statutory requirement can be met. It may be that, when administrative needs are recognised, the difficulty is in the wording of section 17A itself.

62. I do not consider that a formal policy statement was required of the Secretary of State. The policy is stated in the statute. What is required is, first, that appropriate statements of the types of arrangement to be made and on offer are made publicly available, as the Secretary of State accepts. I accept the need for flexibility in dealing with particular claimants and providers. Secondly, it is then necessary to ensure that an individual claimant, before he embarks on an arrangement made following his Jobseeker's Agreement, is aware of his obligations. I add that it is also fundamental that the statutory purpose is at all times kept in mind; schemes must be designed to assist claimants to obtain employment and be made with a view to improving their prospects of doing so.

63. Regulation 4 recognises the need to give appropriate information to claimants. That requirement reflects administrative law principles applicable when it is proposed by regulation to impose sanctions. Claimants must be made aware of their obligations and of the circumstances in which, and the manner in which, sanctions will be applied. A notice in writing under regulation 4 is capable of meeting this requirement. I agree with the judge's conclusion that the notice given to Mr Wilson failed to comply with the statutory requirement. Further, no particulars were given as to what duties Mr Wilson would be expected to perform and no clear explanation, or apparently clear strategy, as to how the programme would improve Mr Wilson's prospects of obtaining employment or assist him to do so.

64. That being so, the requirement to participate in the scheme did not arise. The claimant selected under regulation 3 is required to participate only where a notice in writing complying with regulation 4(2) has been given. Notices purporting to impose an increasing level of sanction on Mr Wilson were sent to him but, for that reason, were of no effect.

65. I do not consider that ground 4 adds anything independently of grounds 2 and 3 in this case. Miss Lieven conceded that, had the appellants been made aware of the detail of what they were required to do, and had they agreed to do it, the arrangements made were not beyond the powers of the Act. It was not submitted that either of the arrangements proposed to the appellants was beyond the powers of the 1995 Act. There is no rationality challenge and it is not submitted that the Act is incompatible

with the Convention. Given arrangements properly made under the Act, article 4 would not be engaged.

66. In relation to unpaid work, that approach was adopted in *Van Der Mussele v Belgium* [1983] (6 EHRR 163), where the European Court of Human Rights rejected a submission that there had been a breach of article 4 where a pupil Avocat was compelled by regulations of the Order of Advocates to assist those in need of legal aid and represent clients without payment if so directed by the Order. At paragraph 37, the court held that there could be a breach "if the service imposed a burden which was so excessive or disproportionate to the advantages attached to the future exercise of that profession that the service could not be treated as having been voluntarily accepted beforehand." At paragraph 39, the court attached importance to the services falling within the ambit of the normal activities of an Avocat, that a compensatory factor was to be found in the advantages attaching to the profession and that the services contributed to the applicant's professional training, with its opportunity to enlarge his experience.

67. In a permission application, Bean J adopted that approach to requirements imposed under the 1995 Act (*R (Nikiforofa) v The Secretary of State* [2012] EWHC 805 (Admin)). Provided the arrangements made serve the statutory purpose stated in section 17A, they need not infringe article 4.

68. In so far as the Secretary of State relies on the case that the appellants are defeated by delay, I reject the submission and agree with the conclusions of the judge.

69. I would allow the appeal and quash the Jobseeker's Regulations 2011.

Lady Justice Black :

70. I am grateful to both Pill LJ and Sir Stanley Burnton whose judgments I have had the advantage to see in draft. They have left no ground that needs to be covered by me. I agree that for the reasons set out in their judgments, the 2011 Regulations must be quashed and I would therefore allow the appeal.

Sir Stanley Burnton :

71. I am grateful to Pill LJ for setting out the relevant facts, the applicable legislation, the parties' respective submissions and his conclusions so fully and clearly. I agree that this appeal must be allowed for the reasons he has given. I add some words of my own on ground 1 in view of the importance of the issue as to the legality of the 2011 Regulations and the fact that we are differing from the careful judgment of Foskett J.

72. I emphasise that this case is not about the social, economic, political or other merits of the Employment, Skills and Enterprise Scheme. Parliament is entitled to authorise the creation and administration of schemes that, in the words of section 17A(1) of the 1995 Act, are designed to assist the unemployed to obtain employment, and provided that the schemes are appropriate for that purpose, it is not easy to see what objection there could be to them. Parliament is equally entitled to encourage participation in such schemes by imposing sanctions, in terms of loss of jobseekers' allowance, on those who without good cause refuse to participate in a suitable scheme. This appeal

is solely about the lawfulness of the Regulations made by the Secretary of State in purported pursuance of the powers granted by the 1995 Act as amended.

73. Furthermore, like Pill LJ, I recognise that there are considerable advantages in there being a large measure of flexibility in designing and administering a statutory scheme.

74. However, any scheme must be such as has been authorised by Parliament. There is a constitutional issue involved. The loss of jobseekers' allowance may result in considerable personal hardship, and it is not surprising that Parliament should have been careful in making provision for the circumstances in which the sanction may be imposed. There are well known legislative formulae for conferring complete flexibility of decision making on a Minister. Section 17A might, for example, have authorised such schemes, designed to assist the unemployed to obtain employment, as the Secretary of State sees fit to establish. It did not do so. The availability of other legislative techniques than that adopted in the 1995 Act as amended, and the significance to the individual of the imposition of the sanction of the loss of jobseekers' allowance, do not lead me to strive to construe the Act and the Regulations as sought by the Secretary of State. In the present case, however, the question of the proper approach of the Court to the interpretation of the Act and the Regulations is of no importance, because I do not think it is possible to construe and to apply them in the manner contended for by the Secretary of State.

75. Where Parliament in a statute has required that something be prescribed in delegated legislation, it envisages, and I think requires, that the delegated legislation adds something to what is contained in the primary legislation. There is otherwise no point in the requirement that the matter in question be prescribed in delegated legislation. However, the description of the Employment, Skills and Enterprise Scheme in the 2011 Regulations adds nothing to the description of such schemes in the Act. It does not assist the Secretary of State that the Scheme is described as being provided pursuant to arrangements made by the Secretary of State. The Act distinguishes between arrangements (the subject of section 17B) and schemes (the subject of section 17A). A contract made by the Secretary of State with a provider of training for the unemployed is an example of an arrangement, but it is not itself a scheme. In effect, the Secretary of State contends that any scheme he creates is a scheme within the meaning of section 17A, notwithstanding that it is not described in any regulations made under the Act. Furthermore, it is not possible to identify any provision of the Regulations that can be said to satisfy the requirement that the description be "determined in accordance with" the Regulations. The scheme purports to be sufficiently described in regulation 2 of the 2011 Regulations.

76. Description of a scheme in regulations is important from the point of view of Parliamentary oversight of the work of the administration. It is also important in enabling those who are required to participate in a scheme, or at least those advising them, to ascertain whether the requirement has been made in accordance with Parliamentary authority. The question as to precisely how much detail must be included in the Regulations in order to comply with the requirements of the Act does not arise for consideration in this appeal, since the Regulations contain none.

77. In paragraph 17 of the judgment of Pill LJ, he refers to what Mr Nicholls QC described as programmes. However, Mr Nicholls accepted in argument that each of these "programmes" could be regarded as a scheme within the meaning of s. 17A. It

follows that each of the so-called programmes is indistinguishable from what would be a scheme within the meaning of the Act. The Secretary of State cannot avoid the requirements of the Act in relation to schemes by calling them programmes. It would be absurd to conclude that a scheme is subject to the statutory requirements only if the Secretary of State decided to call it such. The Act does not authorise programmes, or sub-schemes. These programmes are for the purposes of the Act schemes within the meaning of section 17A. It is significant that Mr Iain Walsh, the Deputy Director for the Labour Market Interventions Strategy Division in the Department for Work and Pensions, in his witness statement, referred to sector-based work academies as "the scheme in issue in Ms Reilly's claim". These "programmes" could have been described in the Regulations, but they were not, and there is nothing in the Regulations that leads to their description. In my judgment, each of them is a scheme which should have been described in the Regulations (or in any amending or supplementary regulation) but was not. The question as to precisely how much by way of detail needs to be included in the Regulations does not arise for consideration in this appeal.

78. It follows that the Regulations do not comply with the requirements of the Act.