Finance Committee Meeting, Friday, 14 June 2002
FCR(2002-03)21

Suspension of Pension on Re-Appointment to the Public Service Pensions Ordinance, Cap. 89 and Pension Benefits Ordinance, Cap. 99

The Administration has been asked to advise on whether before exercising his discretion on an individual case under section 11 of the Pensions Ordinance and section 26 of the Pension Benefits Ordinance, it is lawful for the Chief Executive to announce in advance a policy of how the discretion will be exercised in respect of a defined class of pensioner.

The Statutory Provisions

2. Section 11 of the Pensions Ordinance provides, so far as is relevant, that –

> "If a person to whom a pension has been granted under this Ordinance is re-appointed to the public service …. payment of the pension may, with the person's consent, be suspended during the period of his service in the public service."

Section 26 of the Pension Benefits Ordinance provides, so far as is relevant, that –

> "(1) If an officer who is eligible for a pension or to whom a pension has been granted is re-appointed to the public service. …. the payment of the pension may be suspended during the period of his service after his re-appointment".

Unfettered discretion and the adoption of a policy

3. There is no objection to a public authority declaring in advance a policy that it proposes to follow, provided an application is properly heard and the possibility of exceptions to the policy is allowed for. Please see the attached passages of Wade and Forsyth – Administrative Law, Eighth Edition, pages 330 to 333. On page 330 the learned authors state that –

> "The court is careful not to inhibit public authorities from laying down policies, since consistent administrative policies are not only permissible but highly desirable. And it is no less desirable that polices should be made public, so that applicants may know what to expect."

Provided therefore an announced policy is based on objective and reasonable criteria, the courts will not regard it as an unlawful fettering of discretion.

Conclusion

4. Under section 11 of the Pensions Ordinance, the Chief Executive may only suspend the pension with the pensioner's consent. In the circumstances, the issue only arises in relation to section 26 of the Pension Benefits Ordinance. In accordance with the above principles, the Chief Executive has not unlawfully fettered his discretion by announcing in advance that, as a matter of policy, he would not suspend the payment of pension of a pensioner who is appointed to the specified office of principal official during the term of his or her appointment. In announcing such a policy, the Chief Executive has not in any way prejudged how he would exercise the discretion in relation to any other class of pensioner.

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18 June 2002

ADMINISTRATIVE LAW

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irrelevant, and provided that it is ready to consider exceptional cases.[97] Where it is at liberty to make a choice between conflicting policies, it may decide to make no exceptions, as where it adopts a policy of making all schools in its area into comprehensive schools and abolishing all grammar schools.[98] But even then it is in a stronger position if it has listened fairly to the objections of parents and others concerned.

Licensing authorities

The rule has often been canvassed in liquor licensing cases where the licensing justices have adopted some restrictive policy, for example for reducing the number of licences in their area.[99] If the justices refuse renewal of a licence under some new policy without considering the application on its merits, their decision will be quashed.[1] But there can be no objection to a declared policy provided that the application is properly heard and considered in each case. Thus where the justices announced publicly that they would renew restricted licences only subject to the same restrictions, save in very exceptional cases, and subsequently decided a case saying: 'The bench carefully considered the application but is not prepared to alter the policy', the court upheld its decision.[2] The court is careful not to inhibit public authorities from laying down policies, since consistent administrative policies are not only permissible but highly desirable. And it is no less desirable that policies should be made public, so that applicants may know what to expect. But the policies must naturally be based on proper and relevant grounds. The justices erred, therefore, in refusing an occasional licence under a policy of never allowing more than two such licences a year to any one applicant.[3] Even though they considered the case and were prepared to make exceptions, they acted on a policy different from that which the Act imposed upon them, which was public convenience. Similarly where the justices had refused a licence to sell liquor to one theatre, and for the sake of consistency felt obliged to refuse one to another theatre which had enjoyed it for fifty years previously, the decision was set aside since the statutory purpose was 'for ensuring order and decency' and the justices' motive was primarily to enforce consistency.[4] These decisions are merely examples of the

[97] *Cumings v. Birkenhead Cpn.* [1972] Ch. 12, where Lord Denning MR expounds the rules as to policy.

[98] *Smith v. Inner London Education Authority* [1978] 1 All ER 411.

[99] *Boyle v. Wilson* [1907] AC 45.

[1] *R. v. Windsor Licensing Justices ex p. Hodes* [1983] 1 WLR 685.

[2] *R. v. Torquay Licensing Justices ex p. Brockman* [1951] 2 KB 784, distinguishing *R. v. Walsall Justices* (1854) 18 JP 757 (refusal to hear any application for new licences) and following *R. v. Holborn Licensing Justices* (1926) 42 TLR 778 (fixed policy but case duly considered).

[3] *R. v. Rotherham Licensing Justices ex p. Chapman* (1939) 55 TLR 718 (explained in the *Torquay* case, above). See also *Perilly v. Tower Hamlets London Borough Council* [1973] QB 9 (mistaken rule of 'first come first served').

[4] *R. v. Flintshire CC Licensing Committee ex p. Barrett* [1957] 1 QB 350.

abuse of discretionary power, discussed elsewhere.[5] None of them is in any way hostile to the adoption of a policy as such.

Bankes LJ stated the basic distinction in a frequently cited judgment. He contrasted two classes of cases: 'cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case'; and 'cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made'.[6] Accordingly the Port of London Authority, which was empowered to grant or withhold permission for the construction of docks, was allowed to enforce its policy of refusing permission, after due consideration, in cases where the new dock would come into competition with its own docks.

Ministers and national policy

Ministerial policies are subject to the same principles as the policies of other authorities. Accordingly it was unobjectionable for the Minister of Housing and Local Government, in deciding planning appeals, to follow a policy of discouraging development likely to interfere with the Jodrell Bank radio telescope provided that he judged each individual case fairly.[7] The Home Secretary was likewise entitled to pursue a policy of discrimination against foreign students of 'scientology' by refusing to renew their residence permits, subject to the same qualification;[8] and he might change his policy so as to refuse release on licence ('parole') to certain classes of prisoners in all but the most exceptional cases, so long as each case was examined individually.[9] The Home Secretary fettered his powers unduly when he announced a policy of considering the release of life sentence prisoners on certain grounds only, but he remedied the fault by a later announcement that he would take account of exceptional circumstances.[10] He committed the same fault when he fixed a rigid tariff-period of 15 years for the minimum term of imprisonment of two boy murderers instead of fixing a term which would be provisional and always reviewable.[11] The law was reviewed by the House of Lords in another case where

[5] See particularly *R. v. Birmingham Licensing Planning Committee ex p. Kennedy* [1972] 2 QB 140 (unlawful requirement that licences be purchased), below, p. 393.
[6] *R. v. Port of London Authority ex p. Kynoch Ltd.* [1919] 1 KB 176 at 182.
[7] *Stringer v. Ministry of Housing and Local Government* [1970] 1 WLR 1281.
[8] *Schmidt v. Home Secretary* [1969] 2 Ch. 149.
[9] *Re Findlay* [1985] AC 318. Opinions in the Divisional Court and the Court of Appeal were divided.
[10] *R. v. Home Secretary ex p. Hindley* [2000] 2 WLR 730.
[11] *R. v. Home Secretary ex p. Venables* [1998] AC 407. Compare *R. v. Accrington Youth Court ex p. Flood* (1997) 10 Admin. LR 17 (rigid policy of sending female young offenders to remand centres instead of to young offender institutions held unlawful).

the Board of Trade had made it a rule to refuse all applications for investment grants for items costing less than £25.[12] The claimants had invested over £4m. in oxygen cylinders, but since each cylinder cost only about £20 the Board refused a grant, after giving full consideration to the case. The Act said merely that the Board 'may make' a grant. The House of Lords upheld the Board's action. Lord Reid said: '. . . if the Minister thinks that policy or good administration requires the operation of some limiting rule, I find nothing to stop him'. He added the familiar proviso: 'provided that the authority is always willing to listen to anyone with something new to say—of course I do not mean to say that there need be an oral hearing'. But he sounded a caveat against taking Bankes LJ's formula literally in every case; and Lord Dilhorne carried this further, saying: 'it seems somewhat pointless and a waste of time that the Board should have to consider applications which are bound as a result of its policy decision to fail'. There may thus be room for some relaxation of the requirement of consideration of every application on its merits, at any rate in cases involving a national policy where applications are multitudinous. And there is no real difference in this context between a 'policy' and a 'rule'.

In a strongly contrasting case a minister resolved to turn a deaf ear to all pleas for a change of policy and his decision was quashed.[13] He had consulted local authorities generally before obtaining statutory power to reduce the central government's rate support grant to those whose expenditure was in his view excessive. After the Act was passed he refused to receive further representations and decided on reductions in the case of several authorities. He was held to have fettered his discretion unlawfully by settling and announcing his policy before he obtained his powers and then refusing to consider any appeals for exceptions. He had disregarded his duty 'to listen to any objector who shows that he may have something new to say'. He had also disregarded the principles of natural justice.[14]

Sometimes a minister will have power to make regulations covering the same ground as some policy which he has adopted, and it may then be argued that he should enforce his policy openly by making regulations, which may be subject to Parliamentary scrutiny, rather than covertly by exercising discretion in each case. This argument was rejected by the Court of Session in a case where the Secretary of State had refused to approve the appointment of a chief constable on the ground that he came from within the local force.[15] The Secretary of State had both a discretionary power to withhold consent and also power to prescribe the

[12] *British Oxygen Co. Ltd.* v. *Board of Trade* [1971] AC 610; cf. *Kilmarnock Magistrates* v. *Secretary of State for Scotland* (below).

[13] *R.* v. *Secretary of State for the Environment ex p. Brent LBC* [1982] QB 593 (Divisional Court).

[14] See below, p. 526.

[15] *Kilmarnock Magistrates* v. *Secretary of State for Scotland* 1961 SC 350 (Secretary of State's decision upheld). This question has been much litigated in the United States: see Schwartz and Wade, *Legal Control of Government*, 93.

qualifications of chief constables by regulation but he had made no regulation embodying his policy for rejecting internal appointments. There might perhaps be cases where a regulation-making power could be held to exclude administrative discretion; but where both powers are conferred by the same statute it is reasonable to allow the minister to choose between them; and it is, indeed, his duty to decide every case as he believes the public interest requires at the time.

Indiscriminate action

It undoubtedly remains true that the court will not accept the indiscriminate use of a power where cases ought to be considered on their own merits. If a local authority has power to refer furnished lettings to a rent tribunal, in order to obtain adjudication of the rent, it may not adopt a rule of referring all tenancies in any block of flats where two or more reductions of rent have previously been ordered, whether or not the tenants have complained.[16] For it is inherent in the power to refer that there should be some reasonable and specified ground for doing so in each particular case. If the authority has power to require owners of unfit houses to repair them, or else to repair them itself at the owner's expense, it may not give standing orders that the latter course shall always be taken without regard to individual circumstances.[17] There can be no substitute for the genuine exercise of discretion on every occasion.

RESTRICTION BY CONTRACT OR GRANT

Contractual fetters on discretion

Just as public authorities must have policies, so they must make contracts. Like policies, contracts may be inconsistent with the authorities' proper exercise of their powers. But, unlike policies, contracts are legally binding commitments, and therefore they present more difficult problems. The general principle is the same: an authority may not by contract fetter itself so as to disable itself from exercising its discretion as required by law. Its paramount duty is to preserve its own freedom to decide in every case as the public interest requires at the time.[18] But at the same

[16] *R. v. Paddington and St Marylebone Rent Tribunal ex p. Bell London & Provincial Properties Ltd.* [1941] 1 KB 666 (below, p. 394). Cf. *Wood v. Widnes Cpn.* [1898] 1 QB 463 (over-rigid policy of requiring installation of water-closets).

[17] *Elliott v. Brighton BC* (1980) 79 LGR 506.

[18] See *Denman Ltd. v. Westminster Cpn.* [1906] 1 Ch. 464 at 476.