

Supreme Court Judgement



ACCESS Joint Committee

Date: 17 July 2020

Report by: Officer Working Group

Subject:	Supreme Court Judgment
Purpose of the Report:	The purpose of this paper is to update the Joint Committee (JC) on the Supreme Court recent judgment on an LGPS related case and related matters.
Recommendations:	The Joint Committee is invited to note the report.
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1. Purpose

- 1.1. The purpose of this paper is to update the Joint Committee (JC) on the Supreme Court recent judgment on an LGPS related case and related matters.

2. Supreme Court judgment on Palestine Solidarity Campaign: LGPS investment guidance on foreign policy and defence issues

- 2.1. Following a hearing in November 2019, on 28 April 2020 the Supreme Court gave its judgment in R (Palestine Solidarity Campaign Ltd and another) v Secretary of State for Housing, Communities and Local Government [2020] UKSC 16. By a 3-2 majority the Court allowed the claimants' appeal against the decision of the Court of Appeal. Part of the guidance, relating to the Government's ability to prohibit LGPS funds from investing in a way contrary to UK foreign or defence policy, was therefore deemed unlawful. The rest of the guidance remains valid.
- 2.2. A two-page overview of the ruling, produced by the legal chambers representing the participants in the case, was included within the monthly briefing update emailed at to JC Members on 29 May. Web links to the full 36-page ruling is included in section 7 of this report.

3. Subsequent developments

- 3.1. On 11 May, the statement below was published on the web site of the National LGPS Scheme Advisory Board's (SAB):

The SAB welcomes the clarity brought by the judgement of the Supreme Court in the case of R (on the application of Palestine Solidarity Campaign Ltd and another) Appellants) v Secretary of State for Housing, Communities and Local Government (Respondent). In seeking to restrict the outcome as well as the considerations taken account of by an LGPS administering authority when developing its responsible investment policy, the government has been judged to have overstepped its powers. It is the Board's view that Responsible Investment policy decisions belong at the local level reflecting: the need to pay pensions both now and in the future; local democratic accountability and the views of scheme members; and that outcomes of policy developments should not be subject to restrictions based on unrelated matters'

The Board's secretariat and legal advisor have commenced work on a draft summary of the judgement which will be published on this site as soon as it is available.

Source: <https://lgpsboard.org/>

- 3.2. In the weeks following the judgment's publication, a number of LGPS Authorities received communications on this matter from individuals as well as organisations which included both the *Palestine Solidarity Campaign* and *UK Lawyers for Israel*.
- 3.3. On 8 June the SAB website posted a five-page summary of the Supreme Court judgment which is reprinted in full at Annex A to this report. The covering statement on the SAB website is as follows:

This summary was drafted with the assistance of the Board's legal adviser in order to attempt to clarify the impact of the judgement in this case on LGPS administering authorities. The summary concludes that the fundamental duties and responsibilities of authorities are not altered by the judgement, in particular that authorities remain responsible for investment decisions.

Should the authority wish to consider non-financial factors in its investment decisions it may do so taking into account the requirements of the guidance including the potential financial impact and the views of members. Such consideration may legally result in boycotts or disinvestment should the authority decide to take such action.

The summary represents the views of the SAB and does not constitute legal advice nor should it be relied upon or treated as a substitute for specific legal advice relevant to particular circumstances.

3.4. The concluding paragraphs of the summary state the following:

Although the judgement was primarily concerned with the exercise of the Secretary of State's powers, comments made by Lord Wilson and Lord Carnwath may be viewed as providing support for ensuring that, when taking non-financial considerations into account in relation to investment decisions, members' views should be effectively communicated to, and considered by, administering authorities as an intrinsic part of their investment decision making processes.

Otherwise, the judgement does not change the fundamental role or duties of LGPS administering authorities in relation to their investment or other powers and confirms that administering authorities remain responsible for the investment decisions of their respective funds.

3.5. Clifford Sims, from ACCESS's legal Advisers Squire Patton Boggs has attended briefing calls on this matter with the Chairman and Vice Chairman (who had extended the invitation to Cllr Oliver from the Norfolk Pension Fund) and to OWG.

4. Fiduciary duty

4.1. Members will recall that in January a combined ACCESS response was sent to the SAB's consultation on draft Responsible Investment guidelines. This centred on concerns around how the proposed guidelines characterised fiduciary duty and suggested a meeting. At the 9 March meeting of the JC, Members noted the SAB's February announcement that in light of concerns raised by respondents, allied to the then pending Supreme Court judgement (outlined above) it would be "imprudent" to offer any definitive fiduciary duty advice at that time. It is understood that the SAB has decided to restructure the proposed guidance to explain and clarify the terminology associated with Responsible Investment.

4.2. Officers from both Norfolk and the ASU spoke with colleagues at the LGA in early May and reaffirmed ACCESS's suggestion of a meeting. It was felt by all that this was best positioned both after Supreme Court's judgement, and at a time when face to face meetings are possible. At the time of writing the implications of the Supreme Court judgement are being considered in detail, and preparations for the above meeting are in hand.

5. Recommendations

5.1. The Joint Committee is invited to note the report.

6. Consultation with Key Advisers

6.1. Squire Patton Boggs and Paul Newman QC are providing legal advice.

7. Background papers

7.1. Web link to full Supreme Court judgment

<https://www.supremecourt.uk/cases/docs/uksc-2018-0133-judgment.pdf>

7.2. Web link to SAB summary of document (reprinted at Annex A below)

https://lgpsboard.org/images/Guidance/SAB_SCSN062020.pdf