



24 June 2015

PRESS SUMMARY

**R (on the application of Lumsdon and others) (Appellant) v Legal Services Board
(Respondent) [2015] UKSC 41**
On appeal from [2014] EWCA Civ 1276

JUSTICES: Lord Neuberger (President), Lady Hale (Deputy President), Lord Clarke, Lord Reed and Lord Toulson

BACKGROUND TO THE APPEAL

The Legal Services Board (“the Board”) supervises approved regulators of persons carrying on legal activities, including the Bar Standards Board (“BSB”), the Solicitors Regulation Authority (“SRA”) and the ILEX Professional Standards Board (“IPS”). On 26 July 2013 the Board granted an application by the BSB, SRA and IPS for approval of alterations to their regulatory arrangements to give effect to the Quality Assurance Scheme for Advocates (“the scheme”). In making its decision the Board had regard to the “Better Regulation Principles” in section 3(3)(a) of the Legal Services Act 2007: regulatory activities should be “transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed”. It noted concerns about standards of criminal advocacy and evidence pointing to a risk of advocacy not being of the required standard. The scheme provides for the assessment of criminal advocates in England and Wales by judges. Full accreditation for criminal work at one of the upper levels depends on an assessment as “competent” by a trial judge.

The appellants, barristers practising criminal law, sought judicial review of the Board’s decision on various grounds, all unsuccessful in the courts below. Permission to appeal to the Supreme Court was granted on the single question of whether the decision was contrary to regulation 14 of the Provision of Service Regulations 2009, which the Board considered did not apply. The Regulations implement Directive 2006/123/EC on services in the internal market. Regulation 14 is nearly identical to article 9(1) of the Directive. It provides:

“(1) A competent authority must not make access to, or the exercise of, a service activity subject to an authorisation scheme unless the following conditions are satisfied.

(2) The conditions are that –

- (a) the authorisation scheme does not discriminate against a provider of the service,
- (b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest, and
- (c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because inspection after commencement of the service activity would take place too late to be genuinely effective.”

The Supreme Court of the United Kingdom

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JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Reed and Lord Toulson give a joint judgment with which Lord Neuberger, Lady Hale and Lord Clarke agree

REASONS FOR THE JUDGMENT

Lord Reed and Lord Toulson consider the appellants' submissions that the scheme fails to meet the conditions set out in regulation 14(2)(b) and (c) on the hypothesis that the Directive (and therefore the Regulations) applies to the scheme. [21, 118] They review the case-law of the Court of Justice of the European Union ("CJEU") on the principle of proportionality. This principle is given effect in the Directive in article 9(1)(c) from which regulation 14(2)(c) is derived. [22-82]

Lord Reed and Lord Toulson reason that the issue is whether the legitimate and important objectives of protecting recipients of the services in question, and the sound administration of justice, justify the scheme in the form approved by the Board. Judicial assessment is automatic in relation to all advocates, and is carried out in order to decide whether full accreditation should be granted, for renewal of accreditation and for progression to higher levels. The BSB had previously suggested an alternative proposal whereby judicial assessment would take place only if concerns were raised about a particular advocate, through a rolling programme of judicial assessment. The critical question is whether the objectives cannot be attained by means of a less restrictive measure. [93-97]

The proper basis for considering the requirement of article 9(1)(c) of the Directive and regulation 14(2)(c) is: (1) it is for the court to decide whether the scheme is proportionate, (2) it should approach the matter in the same way in which the CJEU would approach the issue in enforcement proceedings, (3) the court must decide whether the Board has established that the objectives cannot be attained by means of a less restrictive scheme, (4) that does not involve asking whether the Board's judgment was "manifestly wrong", (5) in considering the question of necessity arising under article 9(1)(c), it should be borne in mind that EU law permits member states to exercise a margin of appreciation as to the level of protection to be afforded to the public interest pursued, and to exercise discretion as to the choice of means of protecting such an interest. [108]

The Board noted the potentially serious consequences of poor advocacy and considered that a scheme applicable to advocates generally was justified in view of the gravity of the risk. It also noted that the scheme was to be reviewed after two years. [110-111] The core feature of the scheme was that every criminal advocate who wishes to practise at one of the upper levels must undertake judicial assessment at the outset. A precautionary scheme of this kind provides a high level of public protection and places a corresponding burden on those affected by it. Whether such a level of protection should be provided is exactly the sort of question about which the national decision maker is allowed to exercise its judgment. [114-116, 64-65] In Lord Reed and Lord Toulson's opinion, the Board's judgment that the level of risk presented by a self-certifying scheme, such as the BSB's previous proposal, was unacceptable, did not fall outside the appropriate margin of appreciation. Since the only way of providing the desired level of protection was to have a comprehensive assessment scheme, it followed that such a scheme was proportionate to the aims pursued. Therefore, the Supreme Court dismisses the appeal.

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.shtml>