



Easter Term
[2020] UKSC 16
On appeal from: [2018] EWCA Civ 1284

JUDGMENT

**R (on the application of Palestine Solidarity
Campaign Ltd and another) (Appellants) v
Secretary of State for Housing, Communities and
Local Government (Respondent)**

before

**Lady Hale
Lord Wilson
Lord Carnwath
Lady Arden
Lord Sales**

JUDGMENT GIVEN ON

29 April 2020

Heard on 20 November 2019

Appellants
Nigel Giffin QC
Zac Sammour
(Instructed by Bindmans
LLP (London))

Respondent
Julian Milford
(Instructed by The
Government Legal
Department)

LORD WILSON: (with whom Lady Hale agrees)

The Issue

1. This appeal concerns the type of investments which those who administer the local government pension scheme are permitted to make or to continue to hold. More particularly, it concerns the breadth of the ethical investments which they are permitted to make or to continue to hold. By an ethical investment, I mean an investment made not, or not entirely, for commercial reasons but in the belief that social, environmental, political or moral considerations make it, or also make it, appropriate. Parliament has conferred on the respondent, the Secretary of State for Housing, Communities and Local Government (“the Secretary of State”), the power to issue guidance in relation to some of the functions of the administrators of the scheme, in accordance with which they are required to act. The issue arises out of two passages in the guidance which he has issued to them in relation to their making or continuing to hold ethical investments. By the second passage, which, as I will show, covers the ground covered by the first and indeed goes further, the Secretary of State provides that they “[s]hould not pursue policies that are contrary to UK foreign policy or UK defence policy”. The claim is that the issue of that guidance was unlawful. It was lawful only if it fell within the power conferred by Parliament on the Secretary of State. The issue therefore requires the court to analyse the scope of the power. Pursuant to the decision of the House of Lords in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, the court must analyse the power by construing the words by which it was conferred on him in their context. From the words in their context Parliament’s purpose in conferring the power can be identified; and the purpose will illumine its scope.

The Proceedings

2. The claim for judicial review of the two passages in the guidance was launched by, and in this appeal continues to be pursued by, two claimants. The first is Palestine Solidarity Campaign Ltd. This company is dedicated to campaigning both in support of the rights of the Palestinian people, in particular by challenging Israel’s occupation of the disputed territories, and in opposition to racism in all its forms, including antisemitism as well as islamophobia. The second is Ms Jacqueline Lewis, who is not only a member of the company’s executive committee but also an employee of a local authority and a member of its pension scheme.

3. The claim raised issues in relation to the guidance other than the issue identified above; they were determined, adversely to the claimants, in the lower

courts and can now be ignored. On 22 June 2017 Sir Ross Cranston, sitting as a judge of the Administrative Court of the High Court of England and Wales, upheld the claim by reference to the issue identified above and declared the two passages in the guidance under challenge to be unlawful: [2017] EWHC 1502 (Admin), [2017] 1 WLR 4611. But on 6 June 2018 the Court of Appeal, by a judgment delivered by Sir Stephen Richards with which Davis and Hickinbottom LJJ agreed, upheld the Secretary of State's appeal; set aside the declaration made by Sir Ross; and dismissed the claim: [2018] EWCA Civ 1284, [2019] 1 WLR 376. It is worthwhile to record that, in support of the application of the claimants for permission to appeal to our court, submissions were filed by the Religious Society of Friends in Britain, known as the Quakers, and by the organisation known as Campaign Against Arms Trade.

The Local Government Pension Scheme

4. The existing local government pension scheme (“the scheme”) is a statutory occupational pension scheme established by regulations made under section 7 of the Superannuation Act 1972 (“the 1972 Act”) and having effect as if made under the Public Service Pensions Act 2013 (“the 2013 Act”). Pursuant to the scheme, authorities in England and Wales, which can conveniently (albeit not entirely accurately) be taken to be local authorities, administer some 89 distinct funds, which are kept separate from other local authority resources. In its capacity as an employer, a local authority makes contributions into the pension fund referable to its employees, as do its employees themselves. The scheme provides statutorily defined pension benefits for about 5m past and present employees, referable in particular to their age, their pensionable earnings and their years of service. Therefore their benefits do not vary in accordance with the changing value of the fund in relation to them. A local authority is required to set contributions at a level appropriate to ensure its fund's solvency; and, were the fund to prove insufficient to meet its obligations to pay pensions to its employees, a local authority might be required to make increased contributions into it. The scheme is thus structurally different from other public sector pension schemes under which payment is unfunded, in other words made not out of ring-fenced funds but out of the overall resources of central government.

5. If we consider first the 2013 Act and then the regulations relevant to this appeal which were made under it, we will be able to drill down into the guidance issued pursuant to them which is under challenge.

6. The 2013 Act, which came mainly into force on 1 April 2014, provides by section 1(1) that regulations may establish schemes for the payment of pensions and other benefits to persons specified in subsection (2), which at (c) identifies local government workers for England, Wales and Scotland. By section 2(1) and

paragraph (3)(a) of Schedule 2, these so-called scheme regulations may, insofar as they relate to local government workers in England and Wales, be made by the Secretary of State as the so-called responsible authority. It follows that this appeal does not relate to such regulations as establish the scheme referable to local government workers in Scotland, nor for that matter to those in Northern Ireland, in relation to whom nothing akin to the guidance under challenge seems to apply.

7. Section 3 of the 2013 Act provides as follows:

“(1) Scheme regulations may, subject to this Act, make such provision in relation to a scheme under section 1 as the responsible authority considers appropriate.

(2) That includes in particular -

(a) provision as to any of the matters specified in Schedule 3;

(b) consequential, supplementary, incidental or transitional provision in relation to the scheme ...”

Section 3(2)(a) therefore sends us to the matters specified in Schedule 3, in which there is reference in paragraph 1 to eligibility and admission to membership; in paragraph 2 to the benefits which must or may be paid under the scheme; in paragraph 3 to the persons to whom benefits under the scheme are payable; in paragraph 9 to contributions; in paragraph 11 to funds; and in paragraph 12 to the following:

“The administration and management of the scheme, including

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(a) the giving of guidance or directions by the responsible authority to the scheme manager ...”

8. On 1 April 2014, when the 2013 Act came mainly into force, the regulations also came into force which established the existing scheme and which, as already explained, had effect as if made under that Act. They were entitled the Local Government Pension Scheme Regulations 2013 (SI 2013/2356). They made provision for the functioning of the scheme in numerous respects. Prior to 1

November 2016, however, the management and investment of funds within the scheme continued to be subject to regulations which had been made in 2009. It was only on that day that the latter were replaced by the regulations relevant to this appeal, namely the Local Government Pension Scheme (Management and Investment of Funds) Regulations 2016 (SI 2016/946) (“the 2016 Regulations”), which were duly made pursuant to sections 1 and 3 of, and to Schedule 3 to, the 2013 Act, as set out above. The guidance partly under challenge, to which I will later turn, took effect on that same day, 1 November 2016. I refer to the guidance at this stage only in order to quote from part 1 of it an interesting passage as follows, which illumines one of the aims of the 2016 Regulations themselves:

“One of the main aims of the [2016] regulations is to transfer investment decisions and their consideration more fully to administering authorities within a new prudential framework. Administering authorities will therefore be responsible for setting their policy on asset allocation, risk and diversity, amongst other things. In relaxing the regulatory framework for scheme investments, administering authorities will be expected to make their investment decisions within a prudential framework with less central prescription.”

9. Regulation 7 of the 2016 Regulations, entitled “Investment strategy statement”, provides:

“(1) An authority must, after taking proper advice, formulate an investment strategy which must be in accordance with guidance issued from time to time by the Secretary of State.

(2) The authority’s investment strategy must include -

(a) a requirement to invest fund money in a wide variety of investments;

(b) the authority’s assessment of the suitability of particular investments and types of investments;

(c) the authority’s approach to risk, including the ways in which risks are to be assessed and managed;

(d) the authority’s approach to pooling investments, including the use of collective investment vehicles and shared services;

(e) the authority’s policy on how social, environmental and corporate governance considerations are taken into account in the selection, non-selection, retention and realisation of investments; and

(f) the authority’s policy on the exercise of the rights (including voting rights) attaching to investments.”

10. By this stage, therefore, we have noticed, at para 7 above, that the 2013 Act enables the making of regulations which provide for the “administration and management” of schemes, including for the issue of guidance in that regard; and, at para 9 above, that the 2016 Regulations, clearly falling within that enabling power, require an administering authority within the local government scheme to “formulate an investment strategy” which accords with what they describe as “guidance” but which is in fact mandatory.

The guidance

11. The guidance, entitled “Local Government Pension Scheme: Guidance on Preparing and Maintaining an Investment Strategy Statement”, was issued by the Secretary of State on 15 September 2016. It was issued pursuant to regulation 7(1) of the 2016 Regulations, and it was thus to take effect when the regulations did so, namely on 1 November 2016. The express focus of the guidance was the formulation, publication and maintenance by administering authorities of their investment strategy statement.

12. On 30 June 2014, some two years prior to the issue of the guidance, the Law Commission of England and Wales had, following consultation, published a report entitled “Fiduciary Duties of Investment Intermediaries” (2014) (Law Com No 350). The government had generally accepted the Commission’s recommendations; and, as will become clear, the report, which in places specifically addressed the local government scheme, clearly influenced the drafting of part of the guidance. It is therefore worthwhile to keep in mind the following statements in the report:

(a) at para 4.3(3), that the local government scheme was not technically a trust but that at a practical level the duties of those managing its assets were similar to those of trustees;

(b) at para 4.79, that in practice administering authorities under the scheme considered themselves to be quasi-trustees, acting in the best interests of their members, and that, insofar as they might consider whether to take account of wider or non-financial factors in relation to investment, the rules applicable to pension fund trustees should also apply to them; and

(c) at para 6.34, in relation to investment decisions by trustees, that

“In general, non-financial factors may only be taken into account if two tests are met:

(1) trustees should have good reason to think that scheme members would share the concern; and

(2) the decision should not involve a risk of significant financial detriment to the fund.”

13. The Secretary of State’s guidance individually addresses each of the six topics which regulation 7(2) of the 2016 Regulations requires to be included in an authority’s investment strategy. The appeal concerns its address of the fifth topic, set out at (e) of para (2), which for convenience I set out again:

“the authority’s policy on how social, environmental and corporate governance considerations are taken into account in the selection, non-selection, retention and realisation of investments;”

The reference to corporate governance considerations appears to relate to assessing investment in a company by reference to the quality or otherwise of the manner in which it is governed and operated, including no doubt its treatment of its workforce.

14. The guidance in relation to the fifth topic comprises text, which is followed by a “Summary of requirements”. It is convenient to divide the relevant part of the text into three sections.

15. This is the first section of the relevant part of the text:

“Although administering authorities are not subject to trust law, those responsible for making investment decisions must comply with general legal principles governing the administration of scheme investments ... [S]chemes should consider any factors that are financially material to the performance of their investments, including social, environmental and corporate governance factors, and over the long term, dependent on the time horizon over which their liabilities arise.”

16. This is the second section of the relevant part of the text:

“However, the Government has made clear that using pension policies to pursue boycotts, divestment and sanctions against foreign nations and UK defence industries are inappropriate, other than where formal legal sanctions, embargoes and restrictions have been put in place by the Government.”

This part of the guidance, which I present in bold, is the first of the two passages in it under challenge. It begins by stating that “the Government has made clear that ...”. At the hearing of the appeal we asked where and in what circumstances the government had “made [it] clear”. In answer we were referred to a Procurement Policy Note, Information Note 01/16, issued by the Crown Commercial Service on 17 February 2016. It is entitled “Ensuring compliance with wider international obligations when letting public contracts”. It suffices to set out para 1:

“This [Note] sets out contracting authorities’ international obligations when letting public contracts. It makes clear that boycotts in public procurement are inappropriate, outside where formal legal sanctions, embargoes and restrictions have been put in place by the UK Government.”

The subject-matter of the note is therefore the entry by public authorities into contracts and, as its title indicates and its text proceeds to explain, the policy there identified has been substantially informed by international obligations. It has no relevance to investment decisions made by trustees or by those in an analogous position.

17. This is the third section of the relevant part of the text:

“Although schemes should make the pursuit of a financial return their predominant concern, they may also take purely non-financial considerations into account provided that doing so would not involve significant risk of financial detriment to the scheme and where they have good reason to think that scheme members would support their decision.”

It will be seen that this part of the guidance is an adoption, almost word for word, of the two tests identified by the Law Commission for investment by reference to non-financial considerations in para 6.34 of its report.

18. This is the “Summary of requirements”:

“In formulating and maintaining their policy on social, environmental and corporate governance factors, an administering authority:-

- Must take proper advice
- Should explain the extent to which the views of ... interested parties ... will be taken into account when making an investment decision based on non-financial factors
- Must explain the extent to which non-financial factors will be taken into account in the selection, retention and realisation of investments
- **Should not pursue policies that are contrary to UK foreign policy or UK defence policy**
- Should explain their approach to social investments.”

As indicated in para 1 above, the fourth bullet point, which I present in bold, is the second of the two passages in the guidance under challenge.

19. It is clear that the two passages in the guidance under challenge had been the subject of careful consideration by the Secretary of State. In November 2015 he had issued a consultation paper in relation to his proposal to replace the regulations made in 2009 with what became the 2016 Regulations; and in para 3.8 of the paper he had advertised his intention to issue guidance under the proposed regulations which would in particular relate to the extent to which administering authorities should take non-financial considerations into account in making investment decisions. He had there spelt out the proposed guidance in almost the same terms as those ultimately adopted. In September 2016 he had published a paper by way of response to the consultation, in which, under Part C, he had written:

“The majority of respondents also expressed concern about the way in which the policy on compliance with UK foreign policy is to be taken forward in the guidance to be published under draft regulation 7(1). However, the Government remains committed to the policy set out in November’s consultation paper that administering authorities should not pursue investment policies against foreign nations and UK defence industries, other than where formal legal sanctions, embargoes and restrictions have been put in place by the Government.”

The Legal Principles

20. The *Padfield* case, cited in para 1 above, arose out of the statutory requirement in England and Wales that producers of milk should sell it only to the Milk Marketing Board. Producers in the south east of England complained to the minister about the price paid to them by the board. Statute provided that, “if the Minister ... so directs”, a committee had to consider their complaint. The minister declined to direct the committee to do so. The House of Lords upheld the claim of the producers that he had acted unlawfully in declining to give the direction. Of the four judges in the majority, one (Lord Hodson) applied long-recognised principles of judicial review. But Lord Reid, supported by Lord Pearce at p 1053 and Lord Upjohn at p 1060, reached his decision by reference to a different principle which he explained as follows at p 1030:

“Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act [which] must be determined by construing the Act as a whole ... [I]f the Minister ... so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court.”

21. In *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349 the House of Lords applied the principle identified in the *Padfield* case, albeit in reaching a conclusion that the Secretary of State's order was not unlawful. His order, under challenge by a landlord, capped otherwise justifiable increases in the rent which had been registered as payable under regulated tenancies. The order was made pursuant to a power conferred in wide terms by section 31 of the Landlord and Tenant Act 1985. The landlord argued that Parliament's object in granting the power was that it should be used only in order to counter inflation but the appellate committee held that it had wider objects which extended to the purpose behind the capping order. Lord Bingham of Cornhill said at p 381:

“... no statute confers an unfettered discretion on any minister. Such a discretion must be exercised so as to promote and not to defeat or frustrate the object of the legislation in question ... The object is to ascertain the statutory purpose or object which the draftsman had in mind when conferring on ministers the powers set out in section 31.”

Lord Nicholls of Birkenhead said at p 396:

“The present appeal raises a point of statutory interpretation: what is the ambit of the power conferred on the minister by section 31(1) ...? No statutory power is of unlimited scope ... Powers are conferred by Parliament for a purpose, and they may be lawfully exercised only in furtherance of that purpose ... The purpose for which a power is conferred, and hence its ambit, may be stated expressly in the statute. Or it may be implicit. Then the purpose has to be inferred from the language used, read in its statutory context and having regard to any aid to interpretation which assists in the particular case. In either event ... the exercise is one of statutory interpretation.”

22. In *R (Ben Hoare Bell Solicitors) v Lord Chancellor* [2015] EWHC 523 (Admin), [2015] 1 WLR 4175, the Divisional Court of the Queen's Bench Division upheld a challenge by solicitors to the lawfulness of a regulation which withheld remuneration under the Civil Legal Aid scheme for work done on behalf of applicants for judicial review unless their applications eventually met with a specified result. The court chose to divide the challenge into two sections. It rejected the first, which it entitled “‘Strict’ ultra vires”, and upheld the second, which it entitled “The *Padfield* / statutory purpose ground”. With respect, it is not obvious that such was a helpful division of an inquiry into whether the impugned provision exceeded the scope of the statutory power under which it was claimed to have been

made. For those who continue to insist on Latin, an inquiry by reference to the principle in the *Padfield* case is an inquiry into whether the provision is ultra vires: *De Smith's Judicial Review*, 8th ed (2018), para 5-018.

The Application of the Principles

23. So we must start with the terms of the 2013 Act. Section 3(1) provides that the scheme regulations permitted by section 1(1) may make such provision as the Secretary of State “considers appropriate”. But the power cannot be as broad as that. No statutory discretion is unfettered. When we read further into section 3, we at once find a helpful signpost. For subsection (2)(a) states that the permitted provision includes, in particular, provision as to any of the matters specified in Schedule 3. It is only a signpost because the words “in particular” mean that the matters specified in Schedule 3 are not the only matters which can be the subject of provision in the regulations. But it valuably identifies the matters which, in particular, Parliament had in mind. And, when we turn to Schedule 3, we find the relevant matter, in relation to which the Secretary of State can not only make regulations but also give guidance, described as the “administration and management of the scheme”.

24. Next we turn to the terms of the 2016 Regulations. The content of any unchallenged regulations can be a guide to the interpretation of their enabling Act even when they are not made contemporaneously with the Act: *Hales v Bolton Leathers Ltd* [1951] AC 531, at 541, 544, 548 and 553. In this case the 2016 Regulations are, in themselves, unchallenged. By regulation 7, clearly made pursuant to the power to provide for the “administration and management” of the scheme, the Secretary of State mandates the formulation of an investment strategy, to include, at (e), the authority’s “policy” on “how” non-financial considerations are taken into account in relation to its investments.

25. Finally we address some of the unchallenged parts of the guidance. Its subject-matter, as identified in its title, is “Preparing and Maintaining an Investment Strategy Statement”. And in its text it adopts the two tests commended by the Law Commission for the taking into account of non-financial considerations: does the proposed step involve significant risk of financial detriment to the scheme and is there good reason to think that members would support taking it?

26. From these three instruments we therefore collect the following words:

(a) “administration”;

(b) “management”;

- (c) “policy”;
- (d) “how” considerations are taken into account;
- (e) “preparing”;
- (f) “maintaining”; and
- (g) “strategy”.

Yes, all these words must be considered in their context. But in my view, when so considered, they all point in the same direction: that the policy of the Act, recognised in the case of the scheme by the regulations and indeed by most of the guidance, is to identify procedures - and indeed the strategy - which administrators of schemes should adopt in the discharge of their functions.

27. In the two passages under challenge, however, the Secretary of State has insinuated into the guidance something entirely different. It is an attempt to enforce the government’s foreign and defence policies; and it purports to provide that, even when the tests commended by the Law Commission for reaching a potential investment decision by reference to non-financial considerations have both been met, an administrator is prohibited from taking the decision if it runs counter to such policies. Presumably it follows that, when the policy changes, the prohibition changes.

28. How does the Secretary of State seek to justify the prohibition?

29. In a witness statement one of his senior officers states as follows:

“UK foreign and defence policy are matters which are properly reserved for the UK government and do not fall within the competence of local government. It was therefore right to put safeguards in place to ensure that decisions made by the UK government on foreign and defence policy in the interests of the UK as a whole would not be undermined by local boycotts on purely non-pension grounds.”

The implied suggestion that the investment decisions in issue were a function of “local government” was adopted and developed by Sir Stephen Richards in para 20 of his judgment in the Court of Appeal, as follows:

“The public service pension schemes to be established under the 2013 Act include central as well as local government schemes. It must be possible to have regard to the wider public interest when formulating the investment strategy for central government schemes; and it would be very surprising if it could not also be taken into account in the giving of guidance to local government authorities, themselves part of the machinery of the state, in relation to the formulation of the investment strategy for schemes administered by them.”

As it happens, central government pension schemes are unfunded so the concept of an investment strategy does not apply to them. But of greater significance is Sir Stephen’s description of scheme administrators as “part of the machinery of the state”. It is a description which Mr Milford, on behalf of the Secretary of State, commends to us as apt to the present context. Indeed he goes further. “Pension contributions to the [scheme]”, he writes, “are ultimately funded by the taxpayer”. “It’s public money”, so he said to us at the hearing.

30. In my view there has been a misconception on the part of the Secretary of State which probably emboldened him to exceed his powers in issuing guidance which included the two passages under challenge. The misconception relates both to the functions of scheme administrators in relation to investment decisions and, linked to their functions, to the identity of those to whom the funds should properly be regarded as belonging. As the Law Commission observed, administrators of local government schemes have duties which, at a practical level, are similar to those of trustees and they consider themselves to be quasi-trustees who should act in the best interests of their members. The view, superficial at best, that the administrators are part of the machinery of the state, and are discharging conventional local government functions, fails to recognise that crucial dimension of their role. And it is equally misleading to claim that pension contributions to the scheme are ultimately funded by the taxpayer. As Sir Nicolas Browne-Wilkinson VC said in *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589, 597:

“Pension benefits are part of the consideration which an employee receives in return for the rendering of his services. In many cases ... membership of the pension scheme is a requirement of employment. In contributory schemes ... the employee is himself bound to pay his or her contributions. Beneficiaries of the scheme, the members, far from being

volunteers have given valuable consideration. The company employer is not conferring a bounty.”

The contributions of the employees into the scheme are deducted from their income. The contributions of the employers are made in consideration of the work done by their employees and so represent another element of their overall remuneration. The fund represents their money. With respect to Mr Milford, it is not public money.

31. Irrespective of whether the misconception to which I have referred played a part in leading the Secretary of State to include in the guidance the two passages under challenge, I conclude that his inclusion of them went beyond his powers. HOW does not include WHAT. Power to direct HOW administrators should approach the making of investment decisions by reference to non-financial considerations does not include power to direct (in this case for entirely extraneous reasons) WHAT investments they should not make.

The Result

32. I would allow the appeal and restore the order made by Sir Ross.

LORD CARNWATH:

33. In agreement with Lord Wilson I also would allow the appeal. I agree generally with his reasoning. However, since the court is split, and we are differing from the Court of Appeal, it may be helpful therefore for me to express my reasons in my own words.

34. The issue is as to the legality of two parts of the guidance:

“... the Government has made clear that using pension policies to pursue boycotts, divestment and sanctions against foreign nations and UK defence industries are inappropriate, other than where formal legal sanctions, embargoes and restrictions have been put in place by the Government ...

In formulating and maintaining their policy on social, environmental and corporate governance factors, an administering authority:- ...

- Should not pursue policies that are contrary to UK foreign policy or UK defence policy ...”

35. Lady Arden and Lord Sales (para 52) criticise Lord Wilson for overstating the effect of the second paragraph:

“52. Lord Wilson considers that the statement in the summary of requirements goes further than the statement in the body of the guidance that they should not pursue policies that are contrary to UK foreign policy or UK defence policy. However, the Secretary of State considers that the summary went no further than the body of the guidance. The appellants have not challenged that, and we proceed on that basis. The critical passage is therefore the statement in the body of the document.”

36. Even if that were a fair categorisation of the appellants’ position, I am unable to accept that approach. The guidance is a public document with significance far beyond the parties to this litigation. It must be considered in its own terms. We cannot be constrained by the way in which these particular claimants may have chosen to present their case. In any event, it is part of the appellants’ complaint that the guidance in this respect is “intrinsically unclear” in Mr Lanning’s words (witness statement for the first appellants). I share their difficulty.

37. Even if one directs attention only to the first paragraph, it is far from evident what exactly is its scope. It begins by referring to an earlier, unidentified policy statement (“the Government has made clear ...”). As Lord Wilson explains (para 16), this appears from the evidence to be a reference to a Procurement Policy Note issued in 2016, relating to boycotts in international trade. Like Lord Wilson I find it difficult to see the relevance of this to public sector pensions, which are governed by an entirely different statutory scheme. In what follows the objection in terms is limited to “boycotts, divestment and sanctions” against foreign nations and UK defence industries. Lady Arden and Lord Sales say there is “no issue” about the meaning of these concepts. That may be true as between the present parties, but again the meaning should be clear from the document itself.

38. From the government’s evidence (in the statement of Mr Megainey, quoted at length by Lady Arden and Lord Sales paras 53ff) it appears that the words were not intended to be read in the abstract, but reflected “concerns about the possible impact of the Boycott, Divestment and Sanctions movement”. Those terms are in turn explained by Mr Lanning, in a passage again quoted by Lady Arden and Lord Sales (para 51), as describing particular types of campaign conducted by his

organisation and others, directed principally against the State of Israel and Israeli companies and their investors. If the reference to these specific concepts is intended to mean no more than that administering authorities should not actively participate in political campaigns of that kind, the advice is unremarkable and clearly right. What however is not clear, even from that paragraph, is whether it would also to apply, for example, to an independent decision by an authority on ethical grounds, supported by its members but not directly linked to any campaign, not to invest in defence companies. I doubt if that would be naturally described as “boycott”, “disinvestment” or “sanction”. But it might more readily be said to involve the pursuit of “policies ... contrary to ... UK defence policy”, contrary to the second paragraph.

39. As I understand Mr Megainey’s evidence, the guidance was intended to be read in the wider sense. He distinguishes (paras 22-23 - in passages quoted by Lady Arden and Lord Sales) “other investment policies which (authorities) may legitimately adopt”. He refers for example to investment in companies making products harmful to health (“eg tobacco, sugar and alcohol”), or harmful to the environment (“eg water or air pollution caused by oil or gas companies”). He notes that administering authorities “have responsibilities for public health and the environment in their areas”, and distinguishes such policies from those carrying “general risks to UK trade, security or communities”, which are said to be matters properly reserved for the UK government. Thus the objection appears to be directed to investment policy generally, whether or not fairly described as boycott, disinvestment or sanctions. The difficulty with that line of reasoning, to my mind, is that there is nothing in the Act or the regulations which limits relevant “social” factors under regulation 7(1)(e) to matters for which the authority otherwise has statutory responsibility.

40. The judge (Sir Ross Cranston) also understood the guidance in the wider sense. He expressed his objection as follows:

“But the flaw in the Secretary of State’s approach is that the guidance has singled out certain types of non-financial factors, concerned with foreign/defence and the other matters to which reference has been made, and stated that administering authorities cannot base investment decisions upon them. In doing this I cannot see how the Secretary of State has acted for a pensions’ purpose. Under the guidance, these factors cannot be taken into account even if there is no significant risk of causing financial detriment to the scheme and there is no good reason to think that scheme members would object. Yet the same decision would be permissible if the non-financial factors taken into account concerned other matters, for example, public health, the environment, or treatment of the workforce. In my

judgment the Secretary of State has not justified the distinction drawn between these and other non-financial cases by reference to a pensions' purpose ..." (para 32)

Although I am doubtful of the value of his reference to "pensions purposes" (a term of somewhat uncertain scope), I agree with his identification of the logical flaw in the guidance.

41. I agree with Lady Arden and Lord Sales (para 86) that the scope of the guidance (under Schedule 3, paragraph 12 and regulation 7(1)) cannot be necessarily confined to purely procedural or operational matters, but I do not understand that to be the intended effect of Lord Wilson's words. In particular there is no reason why the guidance should not extend to guidance on the formulation of the investment strategy, including the social and other matters appropriate to be taken into account under regulation 7(e). However, I cannot agree that this opens the door, as they seem to suggest, to "the delineation of the functions of central government in relation to the fund", if by that they imply the broadening of the role of central government to include the imposition of its own policy preferences. In my view it is unhelpful to observe, as they do (paras 78, 87), that such a pension scheme is "liable to be identified with the British state" or that the administering authority is "part of the machinery of the state". The fact that the authority may for certain purposes be seen as a state agency tells one nothing about the legal powers and constraints under which it operates. Nor does it give the Secretary of State any decision-making role beyond that express or implicit in the relevant statutory framework.

42. Any guidance must respect the primary responsibility of the statutory authorities as "quasi-trustees" of the fund, as Lord Wilson puts it (para 12, echoing the words of the Law Commission). That the primary responsibility rests with the authorities is emphasised by the guidance itself. As it says in the Foreword:

"One of the main aims of the new investment regulations is to transfer investment decisions and their consideration more fully to administering authorities within new prudential framework ... The Secretary of State's power of intervention does not interfere with the duty of elected members under general public law principles to make investment decisions in the best long-term interest of scheme beneficiaries and taxpayers."

Responsibility for investment decisions thus rests with the administering authorities.

43. The same must be true of policy choices made under regulation 7(e). As Lord Wilson says (para 17) the guidance in that respect follows the approach of the Law Commission's report (Law Com No 350). That report in turn may be seen as having settled a long-running debate as to the extent to which pension trustees could take account of non-financial factors, dating back to cases such as *Cowan v Scargill* [1985] Ch 270 (see for example Lord Nicholls *Trustees and their Broader Community: where Duty, Morality and Ethics Converge* (1996) Australian Law Journal Vol 70, p 206). There appears now to be general acceptance that the criteria proposed by the Law Commission are lawful and appropriate. I agree. Thus administering authorities may take non-financial considerations into account -

“... provided that doing so would not involve significant risk of financial detriment to the scheme and where they have good reason to think that scheme members would support their decision.”

These are judgements to be made by the administering authority, not the Secretary of State. The attempt of the Secretary of State to impose policy choices was objectionable, not so much because they were not “pensions purposes” (in the judge's words - see above), but because they were choices to be made by the authorities, not by central government.

44. In this respect I agree with the submissions of Mr Giffin QC for the appellants:

“What the Secretary of State sought to do in the guidance was to promote the government's own wider political approach, by insisting that, in two particular contexts related to foreign affairs and to defence, administering authorities could not refrain from making particular investments on non-financial grounds, regardless of the views held by the scheme members.

The analogy drawn by the Court of Appeal between the basis upon which the administering authority may properly act, and the purpose for which the Secretary of State may properly issue guidance, was therefore founded upon a misconception of the administering authority's position in law. Whilst the Secretary of State was entitled to give guidance to authorities about how to formulate investment policies consistently with their wider fiduciary duties, he was not entitled to use the guidance-giving power, conferred by the Investment Regulations, to make authorities give effect to the Secretary of State's own policies

in preference to those which they themselves thought it right to adopt in fulfilment of their fiduciary duties.”

45. For these reasons I also would allow the appeal and restore the order of the judge.

LADY ARDEN AND LORD SALES: (dissenting)

46. *Padfield v Minister for Agriculture, Fisheries and Food* [1968] AC 997 (“*Padfield*”) was a ground-breaking decision of the House of Lords in which the exercise of a power by a minister for improper purposes was set aside. The House held that an unfettered statutory power could only be exercised to “promote the policy and objects of the Act.” We will call that holding “the *Padfield* principle”. The only issue on this appeal is whether it is outside the broad discretion given to the Secretary of State under the Public Service Pensions Act 2013 (“the 2013 Act”) to give guidance which prohibits the use of pension policies to pursue boycotts and similar activities against foreign nations against whom the UK has not imposed sanctions or taken similar steps. It is said that this exercise of the power contravenes the *Padfield* principle, in effect that this too was the exercise of a power for improper purposes rather than for the purposes of promoting “the policy and objects of the Act”.

47. We shall explain the powers, the guidance and the *Padfield* principle in more detail below. In summary, we conclude that the objects of the 2013 Act are not simply to set up public service pension schemes such as the Local Government Pension Scheme (“LGPS”) but also to ensure that the public interest is reflected in the arrangements for the management of those schemes. The 2013 Act was part of a package of measures to reform public service pensions which were intended to take due account of both the public interest and that of the beneficiaries of the pension funds. The powers to give guidance can, therefore, within appropriate limits, extend to matters which reflect the role of the Secretary of State or central government in relation to the funds, which is the essence of the challenged guidance.

The wide discretion

48. The 2013 Act was framework legislation setting out broad powers to enable the transition to new public service pension schemes to be achieved. The powers to make regulations under sections 1(1) and 3(1) were both broad. The regulations with which this appeal is concerned were made under both those powers. Although the powers are broad, they are not limitless. The powers in respect of the pension schemes are in circumstances such as those arising in this case at least subject to an

obligation to ensure that the administering authorities of the schemes remain able to perform their primary duties in relation to the schemes, to promote the financial well-being of scheme members. There may be other limitations. In this judgment, we focus on section 3(1).

49. The power to make regulations conferred by section 3(1) is to make provision as to certain matters and those matters are not limited to the provision of the matters listed in Schedule 3. However, paragraph 12 of Schedule 3 lists as one of those matters as to which regulations may make provision “the administration or management of the scheme”. The “scheme” in this case is the LGPS. The management of a scheme includes the delineation of the roles of those who have a relationship to the scheme. Pursuant to his statutory powers under sections 1(1) and 3(1) of the 2013 Act, the Secretary of State made the Local Government Pension Scheme Regulations 2013 (SI 2013/2356). These contained regulation 7, which Lord Wilson sets out in para 9 above. This regulation empowered the Secretary of State to give guidance about the formulation of the administering authority’s investment strategy statement.

The guidance in issue

50. The guidance in issue is contained in a document dated September 2016 issued by the Department for Communities and Local Government (“DCLG”) entitled *Local Government Pension Scheme - Guidance on Preparing and Maintaining an Investment Strategy Statement* (“the guidance”). As the title to the document states, the general purpose of the guidance is to assist administering authorities in formulating and maintaining their investment strategy statement. The relevant parts of the guidance are marked in bold in the following passage:

“The law is generally clear that schemes should consider any factors that are financially material to the performance of their investments, including social, environmental and corporate governance factors, and over the long term, dependent on the time horizon over which their liabilities arise.

However, the Government has made clear that **using pension policies to pursue boycotts, divestment and sanctions against foreign nations and UK defence industries are inappropriate, other than where formal legal sanctions, embargoes and restrictions have been put in place by the Government.**

Although schemes should make the pursuit of a financial return their predominant concern, they may also take purely non-financial considerations into account provided that doing so would not involve significant risk of financial detriment to the scheme and where they have good reason to think that scheme members would support their decision.

[...]

Summary of requirements

In formulating and maintaining their policy on social, environmental and corporate governance factors, an administering authority:-

...

- Must explain the extent to which non-financial factors will be taken into account in the selection, retention and realisation of investments
- **Should not pursue policies that are contrary to UK foreign policy or UK defence policy ...”**

51. There is no issue about the meaning of the concepts used in the guidance so we will set out the meanings given to them by the appellants in the context of the issues with which they are concerned:

“By way of brief explanation, ‘boycotts’ involve withdrawing support for Israel, and Israeli and international companies, that are involved in the violation of Palestinian human rights. ‘Divestment’ campaigns urge banks, local councils, churches, pension funds and universities to withdraw investments from all Israeli companies and from international companies complicit in violations of Palestinian rights - actions by organisations that have funds under their control, by which they dispose of or do not acquire holdings in certain types of investment. ‘Sanctions’ campaigns pressure governments to fulfil their legal obligation to hold Israel to account, including

by ending military trade and through free-trade agreements.”
(First witness statement of Hugh Lanning, para 30)

52. Lord Wilson considers that the statement in the summary of requirements goes further than the statement in the body of the guidance that they should not pursue policies that are contrary to UK foreign policy or UK defence policy. However, the Secretary of State considers that the summary went no further than the body of the guidance. The appellants have not challenged that, and we proceed on that basis. The critical passage is therefore the statement in the body of the document.

53. Mr Chris Megainey, an official of the DCLG, deals with the provenance of the guidance in his evidence on this application. He explains how the guidance, which had not previously been necessary, had come to be issued:

“12. ... It was clear to us that the new guidance on the new Investment Strategy Statement which replaced the [Statement of Investment Principles] under the 2016 Regulations would also need to cover what would be appropriate non-financial factors to take into account and the extent to which non-financial factors should or should not be taken into account. It was also clear that the power to give such guidance was provided by the 2013 Pensions Act (Schedule 3, paragraph 12) and that such guidance was consistent with the overall purpose of the Pensions Act.

13. However, there were factors which led us to consider whether the content and the status of the guidance on the 2016 Regulations should be strengthened in relation to local boycotts.

- Firstly, there were concerns about the possible impact of the Boycott, Divestment and Sanctions movement which sought to give practical force to criticism of the policies of certain foreign nations and exports of certain types of arms to certain countries. The Government’s fear was that this might undermine UK foreign policy and legitimate UK trade which was in accordance with international law, if adopted by a part of the UK state, in the form of administering authorities. There were also concerns about whether such campaigns might be perceived as legitimising anti-Semitic or racist

attitudes and attacks. I am aware from subsequent discussions with colleagues that although anti-Israel and pro-Palestinian campaigning in itself is not anti-Semitic, there is a pattern of anti-Semitic behaviour in connection with campaigns promoting a boycott of Israel. For example, protests outside an Israeli-owned shop in central Manchester in summer 2014 led to some Jewish people using the shop being racially abused by protestors, including shoppers being called 'Child killer', comments such as 'You Jews are scum and the whole world hates you', and Nazi salutes being made at Jewish shoppers using the Israeli-owned store. On social media, hashtags such as #BDS, #BoycottIsrael and #FreePalestine are regularly used by people posting anti-Semitic tweets and comments.

- Secondly, a Procurement Policy Note had been issued by the Cabinet Office in February 2016 restating the existing policy on procurement, that authorities should comply with international law and that boycotts are inappropriate, except where sanctions, embargoes and restrictions have been put in place by the UK Government. To my knowledge the question of whether investment boycotts could legitimately be put in place had not previously arisen in relation to the LGPS. The overriding duty of authorities to maximise investment returns and act in the interests of scheme members and taxpayers was clear, as was the risk of legal challenge if authorities did not comply with that duty. However, the existing guidance did not specifically address the question of investment boycotts.

14. Given the serious nature of the concerns and the potential impacts across the UK set out above, we concluded that statutory guidance including a specific requirement to reflect UK foreign policy was justified and would fall within the powers in the 2013 Pensions Act. The protection of beneficiaries and taxpayers from the possibility that investment decisions might be taken by authorities purely on the basis of non-pensions considerations is in my view a pensions purpose.”

54. Mr Megainey then explained that there was a public consultation on the statutory guidance which attracted over 23,000 responses, including responses from

supporters of charities in the field of famine relief, education, development and similar fields drawing attention to the problems that a ban on boycotts would have on the selection of investments based on non-financial considerations. After careful consideration the guidance was issued limited to boycotts which would undermine UK foreign and defence policy and which constitutionally were outside the competence of local government.

55. Mr Megainey confirmed that the pursuit of boycotts against foreign states was considered to be beyond the competence of local authorities, and that the circumstances with which the guidance was concerned would arise rarely:

“22. However, we were clear that UK foreign and defence policy are matters which are properly reserved for the UK government and do not fall within the competence of local government. It was therefore right to put safeguards in place to ensure that decisions made by the UK government on foreign and defence policy in the interests of the UK as a whole would not be undermined by local boycotts on purely non-pension grounds. We expected these circumstances to arise very rarely but it seemed right to take these steps in view of the nature and scale of the potential risks.”

56. The Secretary of State thus took the view that boycotts were not a matter for the administering authority but for central government. There is no challenge to the rationality of his decision. The decision was clearly one of policy as to what was in the public interest. Mr Giffin submits in reply that the guidance is a recipe for politicisation of pension schemes. We do not agree: if anything the purpose is to preclude their politicisation in limited respects. Mr Giffin further submits that the Secretary of State is seeking to cut back on the legitimate choices of the administering authority: but this is within the statutory power as we read it.

57. Nor do we agree that it is any part of the guidance to tell those who invest what investments to make (cf para 31 of the judgment of Lord Wilson). The guidance deals only with the situation where those who invest funds have no active duty to promote the best interests of the members of the pension fund in financial terms because the considerations are non-financial and there is no material financial consequence attached to the decision. If it were otherwise, the guidance could be said to invite administering authorities or scheme managers to breach the primary duties to safeguard the financial well-being of scheme members which the guidance accepts that they have.

58. The passage in the guidance quoted in para 53 above is concerned to regulate the extent to which scheme managers may make decisions based on factors which are not financial, in circumstances which, as explained in the next paragraph of the guidance can only arise where the financial interests of scheme members are not materially affected. In doing so, it recognises that framing investment decisions by reference to such factors may serve to communicate or express views of a political, social or ideological character. In our view, it is clear that the state (representing the interest of the general public) and scheme members may both have an interest in how this expressive function is exercised. The LGPS is liable to be identified with the British state. This is because of the impression produced by the combined effect of the nature of the persons who are members of the scheme, its designation as a public sector scheme, the identity of the scheme managers (which include county councils and London boroughs, which are part of the machinery of the state), the funding which the state provides for the scheme, and the degree of state regulation to which it is subject pursuant to the 2013 Act. The precise niceties of how investment decisions are taken are not likely to be recognised or understood. So, for instance, if the managers of funds within the LGPS decided to boycott Israel, that could readily be portrayed as the British state (in the guise of one of its major public sector pension funds) deciding to boycott Israel. Moreover, such a perception could well fuel difficult and sensitive tensions in society, as Mr Megainey explains. For the proper discharge of the government's role in the conduct of international affairs and in promoting harmonious relationships in society, it is important that it should be able to exercise control over the generation of perceptions about the attitude of the British state.

59. Any suggestion that these are not appropriate concerns for government would be unsustainable. No suggestion is made that the position taken in para 22 of Mr Megainey's witness statement was wrong in law, unreasonable or constitutionally incorrect. As explained, the only question on this appeal is whether the 2013 Act enables the Secretary of State to give the guidance in issue.

60. Mr Megainey makes the important point that the part of the guidance in issue related only to the use in limited circumstances of non-financial considerations to make investment decisions:

“23. The relevant section in the guidance was therefore carefully drafted in the light of the arguments in consultation responses and made in Parliament. It set out the very restricted range of investment policies which could go beyond the competence of an administering authority and potentially undermine policies of the UK government. But it left a very wide range of discretion for authorities on other investment policies which they may legitimately adopt and which are consistent with their wider responsibilities. One example might

be local policies against investment in companies responsible for particular products which may be harmful to health (eg tobacco, sugar and alcohol) or which have operations or activities which cause environmental harm (eg water or air pollution caused by oil or gas companies). Administering authorities have responsibilities for public health and the environment in their areas. The guidance makes clear that they may legitimately take into account the potential for harm by refusing to invest in tobacco manufacturers, fossil fuel companies or high sugar products: such policies do not carry general risks to UK trade, security or communities.”

61. Mr Megainey made the further important point that the guidance in issue did not interfere with the performance by the administering authority of their legal duties with respect to investment:

“24. The guidance did not therefore affect the ability of authorities to comply with their duty to act in the best interests of beneficiaries, nor did it prevent them from taking ethical considerations into account when making investment decisions except in a very narrow range of circumstances.”

62. It is common ground that regulation 7(2)(e) of the Regulations (set out in para 54 above) is within the regulation-making power in section 3(1) of the 2013 Act. Regulation 7(2)(e) contemplates that guidance issued by the Secretary of State may cover the administering authority’s policy “on how social, environmental and corporate governance considerations” (ie matters which include non-financial factors) “are taken into account in the selection, non-selection, retention and realisation of investments”. That is to say, the Regulations and the 2013 Act envisage that guidance may be issued as regards how non-financial factors may (or may not) be taken into account as substantive considerations when the administering authority makes investment decisions. We can see nothing in the wording or context of section 3(1) of the 2013 Act to indicate that its coverage in respect of the giving of guidance in relation to non-financial factors to be taken into account, or not, when making investment decisions is limited as the appellant contends. On the contrary, we consider that both the wording and the context of that provision indicate that it is not so limited. As Sir Stephen Richards put it in his judgment in the Court of Appeal (with which Davis and Hickinbottom LJ agreed), “[s]ince the Secretary of State is empowered to give guidance as to an authority’s investment strategy, it seems ... to be equally plainly within the scope of the legislation for the guidance to cover the extent to which such non-financial considerations may be taken into account by an authority” (para 20). We agree.

The Padfield principle

63. This is an important principle of statutory construction, which for present purposes is encapsulated in the following passage from the speech of Lord Reid in *Padfield* [1968] AC 997, 1030:

“Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so, uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court. So it is necessary first to construe the Act.”

64. We would make a number of observations. First, it is not the practice of Parliament to insert “purpose” clauses into legislation, and indeed the policies or objects of particular legislation may be quite complex. They may be deduced from the context, including the constitutional position. The relevant constitutional background which sets the context in which the 2013 Act falls to be construed includes the constitutional responsibility of central government for the conduct of the UK’s international affairs, for promoting the country’s economy and for seeking to preserve internal good order and harmonious relations between different parts of society.

65. In *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349 (“*Spath Holme*”), the House of Lords gave important guidance regarding the operation of the *Padfield* principle. Lord Bingham, referring to observations by Lord Simon of Glaisdale and Lord Diplock in *Maunsell v Olins* [1975] AC 373, 393, emphasised at [2001] 2 AC 349, 385E-G and 391A-B that a statute may well have more than one statutory objective. As Lord Simon (speaking for himself and Lord Diplock) said in *Maunsell v Olins*, in the passage relied on by Lord Bingham:

“For a court of construction to constrain statutory language which has a primary natural meaning appropriate in its context so as to give it an artificial meaning which is appropriate only to remedy the mischief which is conceived to have occasioned

the statutory provision is to proceed unsupported by principle, inconsonant with authority and oblivious of the actual practice of parliamentary draftsmen. Once a mischief has been drawn to the attention of the draftsman he will consider whether any concomitant mischiefs should be dealt with as a necessary corollary.”

66. The Bill leading to the 2013 Act laid down a common framework for pension provision within the public service so that the framework could be adapted to each sector as circumstances required. So, it was clear that the detail had to be filled in by secondary legislation and it is not surprising to find that the powers to make secondary legislation were given in broad terms. One of the purposes of the legislation, as one might expect, was to establish sound governance arrangements for the new schemes.

67. The second point is that it is not good enough if the minister misconstrues the legislation in good faith. This is because the courts are the authoritative organ for the interpretation of a statutory power. We do not have any equivalent of the *Chevron* doctrine in the United States (*Chevron v Natural Resources Defence Council* (1984) 467 US 837), where it was held that where a statute directed to a government agency was ambiguous, the court will follow any permissible reading adopted by the agency.

68. Thirdly, as Lord Nicholls explained in *Spath Holme*, at [2001] 2 AC 349, 396D-G, the *Padfield* principle depends upon the proper interpretation of the relevant statutory provision; and “an appropriate starting point is that language is to be taken to bear its ordinary meaning in the general context of the statute” (p 397B). “[T]he overriding aim of the court must always be to give effect to the intention of Parliament as expressed in the words used”: *Spath Holme* [2001] 2 AC 349, 388D, per Lord Bingham. Here, the language of section 3(1), according to its ordinary meaning, especially when it is read in context and alongside section 3(2) of and Schedule 3 to the 2013 Act, is apt to confer a very wide discretion upon the Secretary of State (as the responsible authority) to promulgate regulations which “make such provision in relation to a [public service pension scheme]” as the Secretary of State “considers appropriate”. We do not think that the limitation for which the appellant contends can be read into section 3(1). Again, we agree with Sir Stephen Richards, who said (para 21), “... I find it ... helpful to put the question in terms of whether the legislation permits wider considerations of public interest to be taken into account when formulating guidance to administering authorities as to their investment strategy; and ... given the framework nature of the statute and the broad discretion it gives to the Secretary of State as to the making of regulations and the giving of guidance, I can see no reason why it should not be so read.”

The policy and objects of the 2013 Act

69. The Preamble to the 2013 Act makes it clear that the 2013 Act is not only about pensions. It reads:

“An Act to make provision for public service pension schemes; and for connected purposes.”

70. This is a very wide formulation. A purpose may be connected with another even if it does not directly or otherwise promote that other provided that it has a relationship with that other. It is enough that it is reasonably or logically associated with it. The reason for having such a wide formulation is to be found in the circumstances leading to the 2013 Act.

71. We take these circumstances from the final report of the Independent Public Sector Pensions Commission issued on 10 March 2011 under the chairmanship of Lord Hutton of Furness (“the Hutton Report”). This forms part of the context of the 2013 Act admissible on its interpretation since it explains why the legislation was needed and what changes were introduced. What follows is not a comprehensive summary.

72. The Hutton Report found that the then current pensions structure for the public sector needed structural reform, for example because the cost was unfairly borne by employees, employers and the taxpayer. There was an unfunded past service deficit on the LGPS which fell on the employer, and ultimately in the case of local government employees, the taxpayer. Lord Hutton’s first set of recommendations were directed to ensuring the sustainability of public service pensions. The measures which he recommended included an employers’ cap, that is, a limit on the amount of contributions which employers would be obliged to make. Such a cap was introduced by the 2013 Act.

73. There was praise for some aspects of local authority pension scheme management (see para 6.62), in particular for the adoption by individual funds within the LGPS of express, transparent investment strategies. However, the Hutton Report also recommended improvements in governance of pension schemes, including the management of investments. It concluded there were valid reasons for differences in the governance arrangements between public service and private pension schemes, but the former could learn from the latter. At the time of his report, some functions were carried out by government departments.

74. On governance, the Hutton Report stated:

“Clear guidance will be required for members of pension boards on their role and duties. They would fulfil similar duties to trustees, acting in accordance with scheme rules, impartially and prudently, balancing the interests of scheme beneficiaries and of taxpayers. There will be a need for effective committee structures to facilitate sound decision making and strong oversight of scheme administrators and fund managers.” (para 6.16)

75. The government accepted the Hutton Report, subject to consultation. What this brief summary makes clear is that the 2013 Act was not simply about matters internal to pension schemes: it also concerned the relationship of ministers to pension schemes and the interests of the taxpayer. There was no suggestion that we have found that the powers of ministers should be limited to protecting the interests of members of pension schemes. The systems for governance would have to be put in place by government. The changes made by the 2013 Act were very significant indeed.

76. In his speech introducing the second reading of the Bill which became the 2013 Act, the Chief Secretary to the Treasury (Danny Alexander MP), the minister responsible for promoting the Bill, stated:

“Lord Hutton’s fourth key test related to governance and transparency. The reformed schemes should be widely understood, both by scheme members and by taxpayers. People understand what is in their pay packet each month, and it should be just as easy to understand how their pension works. Under the Bill, the schemes will have robust and transparent management arrangements.

Clause 5 [which became section 5] provides for each scheme to have a pension board which will work to ensure that the scheme is administered effectively and efficiently. There will be local pension boards in the case of the locally administered police, fire and local authority schemes. The boards will consist of member representatives, employer representatives and officials. They will operate in a similar way to boards of trustees, holding scheme administrators to account and providing scheme members and the public with more information about the pensions. The board members will be identified publicly, and their duties will be made clear to scheme members. I welcome the greater transparency that the

Bill will bring to this area of public pension administration.”
(Hansard, vol 552, col 63-4, 29 October 2012)

77. Unusually for public service pension schemes, the pension funds within the LGPS are funded. Their aggregate value as at 31 December 2020 was some £287 billion, which makes them very substantial investors indeed. There are some other funded public service pension schemes.

78. The relevant provisions of the 2013 Act apply to both funded and unfunded schemes. In the case of funded schemes like the LGPS, the funding for them has been provided by the state in the past (by funding the employers’ contributions from taxation and also funding the salaries of relevant employees from taxation, out of which employee contributions have been made) and continues to be provided and underwritten by the state into the future (subject to the employers’ cap). This is one reason why such public pension schemes are liable to be identified with the British state (para 58 above). It is also a further reason why the government and taxpayer have a legitimate interest in regulating how public sector pension schemes manage the money which is provided to them.

79. In our judgment, having regard to the scope and context of the 2013 Act, in particular as indicated by its preamble and the Hutton Report, the policy and objects of the 2013 Act include not simply setting up the new pension schemes but also the working out of the role of central government in relation to the newly-created schemes and in ensuring that the right balance is struck between the public interest and the interests of fund members. The 2013 Act is about introducing a new structure whereby these interests can be brought into account and held in balance.

80. Accordingly, we consider that the part of the guidance in issue was promulgated for reasons falling within the policy and objects of the 2013 Act. At first instance Sir Ross Cranston held the relevant guidance could not be for a pensions purpose because *ex hypothesi* the decision would have no adverse financial impact on the scheme. He held that the purpose is a desire to advance UK foreign and defence policy, without mentioning its significance in the pension context. However, as Mr Julian Milford for the Secretary of State submits, the court has to read the guidance as a whole and in its proper context. The relevant part of the guidance applies when the administering authority is making an investment decision. It regulates the extent to which they may act other than on the basis of ordinary financial factors. They may only take non-financial factors into account if that can be done without any material financial detriment for scheme members. In order to be *Padfield*-compliant, the relevant part of the guidance does not have to promote or affect the LGPS financially. The policy of the 2013 Act was also to establish suitable governance more generally for the deregulated LGPS. The public interest is implicated in decisions which might be made by scheme managers and

hence is an appropriate matter to be covered in the guidance relating to such governance. Therefore, if the minister considered that it was in the public interest to restrict the investment decisions that the managers could take consistently with their duties to the scheme members, then in our view this fell within the policy and objects of the 2013 Act.

81. Paragraph 12 of Schedule 3 to the 2013 Act (set out at para 52 above) is in general terms. It does not limit the scope of regulations to the management and administration of pension funds forming part of the LGPS or other public sector pension schemes. The power can be used for any purpose the minister thinks appropriate subject to the *Padfield* principle.

82. We have already explained that there are some limits on the broad discretion to make regulations to be deduced from the policy and objects of the 2013 Act. The minister cannot require the administering authority, the scheme managers or the board appointed pursuant to section 5 to transgress the primary legal duties upon them to safeguard the financial interests of scheme members. But the relevant part of the guidance has not sought to do this.

83. There was some confusion at the hearing as to whether the guidance in issue would force the administering authority to invest in any particular stock. However, that is not a fair reading of the guidance. The relevant part of it is simply guidance that the administering authority should refrain from making an investment decision for the particular purposes there stated. Moreover, it does not, for example, say that the administering authority could not decide that the LGPS should divest itself of an investment with the incidental purpose of relinquishing all investments in an industry to which the administering authority or the scheme members had ethical objections; but they could not do so for the sole or principal purpose of pursuing boycotts, divestment or sanctions against foreign nations which the UK government had not subjected to sanction, nor against the UK defence industry. This reading of the relevant passage in the guidance is precisely in line with the evidence which the government has filed and with Information Note 01/16, which Lord Wilson considers of no relevance. That Note explains that “There are wider national and international consequences from imposing such local level boycotts. They can damage integration and social cohesion within the United Kingdom, hinder Britain’s export trade, and harm foreign relations to the detriment of economic and international security.” The Secretary of State referred to this Note in the consultation document in November 2015 leading to the 2016 Regulations and in the government’s response to the consultation in September 2016.

84. It follows that we do not accept that the distinction made by Lord Wilson in para 31 of his judgment between how an administering authority should approach investment decisions and what investments they should not make applies in this

situation. The guidance in issue does not purport to tell administering authorities what investments they must hold.

85. One of the points made against the conclusion to which we have come is that government policy on relations with particular foreign nations may change. That is of course so, but it does not follow that the part of the guidance in issue falls outside the purpose and objects of the 2013 Act. The proper characterisation of the guidance is that it reflects and articulates the legitimate role of central government in relation to public sector pensions.

86. Lord Wilson considers that the guidance must be about procedures. That is in our judgment an inappropriately one-dimensional view of what management in relation to a scheme created under the 2013 Act involves. Guidance cannot in our judgment realistically be limited to operational controls but must be capable of extending more widely so as to include the objectives of pension provision, including the delineation of the functions of central government in relation to the fund. A public service pension scheme may, by reason of its particular status as a public service scheme funded in substance by the public, entirely properly be made subject to restrictions which are different from those of private sector pensions. For example, as explained by Mr Milford, the public sector equality duty may well apply in relation to public service schemes.

87. Sir Stephen Richards was surely correct to say in his judgment in the Court of Appeal that the administering authority is part of the machinery of the state. On the other hand, we agree entirely that the pensions provided by the LGPS are earned. As Sir Nicholas Browne-Wilkinson VC held in *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589, 597:

“Beneficiaries of the scheme, the members, far from being volunteers, have given valuable consideration.”

88. However, the benefits for scheme members are guaranteed by statute and so are underwritten by the state. If, for example, there is a significant change in life expectancy, and a deficiency emerges as regards employees or former employees of a local authority, that deficiency must be made good by the relevant local authority. That burden may therefore end up with local council taxpayers or possibly central government through the grant system. This is an aspect of the public interest in the LGPS. The fact is that there is both a public interest and private interests of scheme members which co-exist in relation to the LGPS. Both aspects are recognised by the statute and receive due respect according to the terms of the guidance.

89. Moreover, the guidance which the Secretary of State may give must, as a matter of ordinary language as employed in paragraph 12 of Schedule 3, be capable of covering any action of the administering authority in issue in this case, as regards the taking into account of non-financial considerations. We do not accept that the power could only be to explain the approach to investment and not in relation to the substantive power to invest in the circumstances with which we are concerned. There is no obvious or straightforward distinction between these matters, which both fall within the concepts of “administration” and “management” of a scheme. This point is reinforced by the terms of paragraph 11 of Schedule 3, which refers to “the administration, management and winding up” of any pension funds within a scheme, where the terms “administration” and “management” clearly cover both procedural and substantive aspects of fund administration and management.

90. We therefore consider that the Court of Appeal were correct to say that the judge read the legislation too narrowly. We would dismiss this appeal.