

Regulating the pensions pot



What authority does the government have to limit the participation of pension funds in political campaigns, asks **Geoffrey Bindman QC**

We are rightly encouraged to save for our retirement. We may be able to do this ourselves by creating a private pension fund, or our employers may establish a fund for our benefit. Where others are managing pension funds on our behalf we look to government to protect us as far as possible from bad management which puts our pensions at risk. But prudent investment still involves choices, including ethical ones, which are rightly left to the pensioners or those who manage their funds. They should not be determined by government.

That at least was the position until the recent decision of the Court of Appeal in *R (on the application of Palestine Solidarity Campaign Ltd and another) v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1284, [2018] All ER (D) 33 (Jun).

The Palestine Solidarity Campaign (PSC) has supported the so-called BDS (Boycott, Divestment and Sanctions) campaign, urging the boycott of products exported by Israel which have been produced in the occupied Palestinian territories. Pension funds, among others, are urged not to invest in companies that trade in such products. A second claimant is an individual member of PSC who, as a local authority employee, has contributed to the Local Government Pension Scheme for 40 years.

Non-financial considerations

The Public Service Pensions Act 2013 is the current statute which governs the management of such pension schemes. It empowers the Secretary of State to make regulations which 'make such provision in relation to a scheme as he thinks appropriate.' These may include giving guidance to the scheme manager, who is responsible for formulating an investment strategy. The current regulations relevant to this

case are the Local Government Pension Scheme (Management and Investment of Funds) Regulations 2016. They require the investment strategy to include, inter alia, a description of the scheme manager's policy on how social, environmental, and corporate governance considerations are taken into account in the choice of investments.

This requirement is elaborated (reg 7 (2) (e)). Schemes should act reasonably and, though not subject to trust law, should consider any factors that are financially material to the performance of their investments. Schemes should make the pursuit of financial return their predominant concern, but they may also take purely non-financial considerations into account where they have good reason to think that scheme members would support their decision and there would be no financial detriment.

Unfortunately, the Secretary of State in formulating the current guidance chose to add a statement 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 is summarised later as a direction that pension administrators 'should not pursue policies that are contrary to the UK foreign policy or UK defence policy.'

These are the passages in the regulations which prompted the challenge by the claimants, who were supported by, among others, War on Want, the Campaign Against the Arms Trade, and the Quakers. They object to the limiting effect of the guidance on their ability to campaign against the investment of local government pension funds in ways which affect the Palestinian people and the occupied territories, but of course they are concerned more broadly with unwarranted interference in their campaigning strategies.

Lacking statutory authority?

It is easy to understand the political reasons which motivated the Secretary of State to impose such restrictions, but did he have statutory authority to do it?

The main argument of the claimants was that the regulations and guidance made under the governing statute must be made for 'pension purposes'. Could restricting investment on avowedly political grounds be for 'pension purposes'?

When the case came before Sir Ross Cranston (sitting as a High Court judge in the Administrative Court), he stressed that the arguments for and against the imposition of such a restriction were irrelevant to his decision. He merely had to determine whether the inclusion of the words to which the claimants objected in the guidance had statutory authority. He held they had not. The Secretary of State had acted for an unauthorised purpose and therefore unlawfully.

Were it not for the specific exclusions in the regulations, administering authorities were free to pursue a strategy of disinvestment for reasons of public health, protection of the environment, the treatment of employees, or any other actual or supposed conduct of those in whom investment might be contemplated. The government did not seek to argue that pursuing boycotts need have any financial impact on the investment strategy. To exclude boycotts was thus entirely anomalous and outside the statutory purposes.

The Secretary of State appealed to the Court of Appeal.

The Court of Appeal judges accepted—as had been conceded by the government's lawyers—that regulations made under the statute must be for 'pensions purposes'. They agreed with Sir Ross Cranston that the merits of the restriction on boycotts were irrelevant. But their narrowly semantic analysis of the statutory language persuaded them that the contentious passages were within the scope of 'pensions purposes'. Unlike Sir Ross, they paid little attention to the irrationality of the outcome: that the freedom to choose investments prudentially but on non-financial grounds was uniquely excluded in this political instance.

Permission to appeal has now been sought from the Supreme Court. If granted, the court has a choice between views as to what the words of the statute mean. One can only hope that they will follow the Cranston view in excluding political interference in the freedom of pensioners to determine the investment of their own pension funds. That is what is at stake here.

NLJ

Sir Geoffrey Bindman QC, NLJ columnist & consultant, Bindmans LLP.