

The justiciability of legislative commencement decisions (*R (British Medical Association) v Secretary of State for Defence*)

This analysis was first published on Lexis®PSL on 6 June 2022 and can be found [here](#) (subscription required).

Public Law analysis: The British Medical Association (BMA) judicially reviewed the decision of the Secretary of State for Defence (SSD) not to commence section 192 of the Employment Rights Act 1996 (ERA 1996). If implemented in full, that section would enable service personnel to bring employment tribunal claims for causes of action including unfair dismissal. Mr Justice Bourne dismissed the claim on all four grounds. He rejected the submission that the SSD had given the issue ‘only provisional and partial consideration’, finding no basis for the submission that any consideration of the question was legally required to be ‘full’ rather than ‘partial’ (at para [64]). Further, the SSD was not bound to consider every time he addressed the issue whether there had been a change of circumstance (at para [65]). The SSD probably had not acted under material factual misapprehension (at para [72]). Bourne J rejected the submission that the SSD’s decision was irrational (at para [87]) and that the SSD had failed to take reasonable steps to acquire the relevant information which was needed in order to make a rational decision (at para [93]). Written by Jonathan Lewis, barrister at Henderson Chambers.

R (British Medical Association and another) v Secretary of State for Defence [\[2022\] EWHC 1262 \(Admin\)](#)

What are the practical implications of this case?

This decision provides insight into how courts are now likely to apply the principles in *R v Home Secretary ex p Fire Brigades Union* [1995] UKHL 3, [\[1995\] 2 AC 513](#) in deciding whether a failure/refusal to bring a statutory provision into force is unlawful. It helpfully distils principles from *R v Home Secretary ex p Fire Brigades Union* and makes clear that decisions by ministers as to whether or not to commence statutory provisions are not out of the reach of the courts. This reflects a general trend since the 1990s of a greater willingness for courts to scrutinise executive decision making.

The decision does nonetheless provide a salutary reminder that it will be an uphill struggle to persuade a court that such a commencement decision is unlawful. Given the expertise of the decision-maker, and the multi-factorial decision that has to be made, a court will apply a fairly low standard of review and will need to be persuaded that the decision was *Wednesbury* unreasonable.

What was the background?

For a number of decades, members of the armed forces have not benefited from certain employment causes of action. The [ERA 1996](#) has built into it, the power to extend those causes of action to the armed forces through [ERA 1996, s 192](#). The version of [ERA 1996, s 192](#) that has not been brought into force (the ‘principal’ version) provides, inter alia, that the relevant provisions could be applied to members of the armed forces by an Order in Council. As it stands, the ‘transitory’ version [ERA 1996, s 192](#) (found in [ERA 1996, Sch 2, para 16](#)) applies initially, until it is replaced by the principal version on ‘such day as the Secretary of State may by order appoint’.

In lieu of [ERA 1996](#) rights, internal arrangements for service complaints have been put in place for service personnel, such as a service complaints system (SC). Its efficiency and effectiveness have however been doubted. When first faced with this claim, the SSD indicated that the SC was to be reviewed and decision would be made in respect of [ERA 1996, s 192](#) in due course. Around January 2021, the minister decided that the government should not commence/fully implement [ERA 1996, s 192](#) but that the situation would be kept under review.

Judicial review was sought on four grounds. First, that the SSD had failed to comply with his duty to consider, conscientiously and from time to time, the commencement of [ERA 1996, s 192](#). Second, he had made a material error of fact. Third, he had acted irrationally by taking account of irrelevant factors and failed to take account of relevant factors. Fourth, he failed to make sufficient inquiry into

the costs which claimants or the Ministry of Defence might incur, relative to such costs under the SC system.

What did the court decide?

Bourne J analysed the five speeches in *R v Home Secretary ex p Fire Brigades Union* to distil the relevant principles governing the nature and the justiciability of the SSD's duties when deciding whether to exercise a power to bring [ERA 1996, s 192](#) into force (at para [32]).

R v Home Secretary ex p Fire Brigades Union concerned provisions of the [Criminal Justice Act 1988 \(CJA 1988\)](#) which codified a criminal injuries compensation scheme but had not been brought into force. Instead, the government had introduced a non-statutory scheme, which would be less expensive to run. The claimants sought declarations that (1) the Secretary of State had acted unlawfully in breach of his duty under [CJA 1988](#) by failing or refusing to bring the provisions into force; and (2) that he had acted in breach of his duty under [CJA 1988](#) and/or had abused his common law powers by implementing the tariff scheme. The House of Lords refused to grant the first declaration sought but granted the second.

Bourne J (at para [39]) distinguished *R v Home Secretary ex p Fire Brigades Union* on the basis that, there, the Secretary of State had abrogated his discretion by permanently implementing an inconsistent non-statutory compensation scheme and the sections would never be brought into force. Whereas in this case, the commencement of [ERA 1996, s 192](#) would be kept under review.

He identified two key principles emerging from *R v Home Secretary ex p Fire Brigades Union* (at para [40]). First, a provision for commencement on a day to be appointed by the Secretary of State does not impose a duty which could be enforced by mandatory order to appoint a commencement date. Second, such a provision does however impose on the Secretary of State a duty to keep the question of commencement under review or to consider it from time to time, unless and until the provisions are either commenced or repealed.

After considering *R v Home Secretary ex p Fire Brigades Union* dicta touching upon the questions before him, decided that *R v Home Secretary ex p Fire Brigades Union* did not constrain him to decide that a court cannot question the lawfulness of the SSD's decision—it was unlikely that the House of Lords would have refused to countenance a challenge on a fundamental ground, such as bad faith (at para [53]).

Bourne J noted that the intensity of review, or the width of discretion or margin of appreciation allowed to the decision maker, depends on the factual and legal context (at para [54]). He endorsed a 'light touch' approach in this case for the three reasons (at para [55]). First, the width of the discretion (the SSD 'may' appoint a date). Second, 'the multiplicity of reasons, either practical or reasons of a policy nature reflecting changing circumstances, which could persuade a Secretary of State that now was not the time to appoint a date'. Third, 'the policy-related nature of the judgments to be made, not just as to the timing of commencement but as to which employment law rights should be introduced'. Hence, it was for the SSD acting in good faith to judge what factors to take into account and what weight to give them (at para [56]). The court would intervene only if that judgment was irrational in the *Wednesbury* sense.

Case details:

- Court: Queen's Bench Division, Administrative Court (Birmingham)
- Judge: Mr Justice Bourne
- Date of judgment: 25 May 2022

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