Appeal No. UKEAT/0284/16/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 28 March 2017
Judgment handed down on 20 April 2017

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

(SITTING ALONE)

THE SECRETARY OF STATE FOR JUSTICE — APPELLANT

(1) MRS T J BETTS
(2) MR N PROCTER
(3) MISS K O'BRIEN
(4) MRS C PENN
(5) MR M JONES — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR BEN COLLINS (One of Her Majesty's Counsel) Instructed by: Government Legal Department Employment Group One Kemble Street London WC2B 4TS
For the Respondents	MR DECLAN O'DEMPSEY (of Counsel) Instructed by: Prospect New Prospect House 8 Leake Street London SE1 7NN

SUMMARY

JURISDICTIONAL POINTS - Fraud and illegality

The Claimants were engaged on sessional work in HMPS and their recruitment was not on merit on the basis of fair and open competition. The question that arose subsequently was whether contracts of employment found to have existed by the Employment Tribunal were ultra vires in the circumstances.

Held: The Employment Tribunal was wrong to draw a distinction between appointment and employment in the context of s.10(2) CRAGA 2010. The mandatory requirement for all appointments to the Civil Service extends to both and operates as a statutory limitation on selection for all appointments as civil servants. The contracts of employment are ultra vires, but the Claimants' status as workers is unaffected. The appeal was therefore allowed.

A **THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)**

Introduction

B 1. This is an appeal by the Secretary of State from a judgment of Employment Judge S Davies sitting in Cardiff with reasons promulgated on 9 March 2016. I shall refer to the parties as "the Secretary of State" and the Claimants as they were below. Although there were five Claimants in the original proceedings, the appeal is limited to addressing the claims of Mrs C Betts, Mr Proctor and Miss O'Brien. They were recruited at different times, and all worked at HMP Usk/Prescoed. The other two Claimants, Mrs Penn and Mr Jones, were already appointed to the Civil Service when they commenced the sessional teaching work and, accordingly, the D illegality argument raised by the Secretary of State but rejected by the Employment Tribunal could not apply in their cases.

E 2. The judgment under appeal followed a hearing to deal with two preliminary points. First, whether the Claimants had the status of employees at the material times; and secondly, if so, whether their contracts of employment were void for illegality. The Claimants had been engaged by Her Majesty's Prison Service ('HMPS') on the basis that they were "sessional F workers" and the Secretary of State contended that they were not employees in those circumstances. Further, because of that, they were not recruited on merit by a process of "fair and open competition". In a careful and well-constructed judgment, Employment Judge Davies G found that the Claimants had the status of employees at the material times and that their contracts were not void for illegality because of the way in which they were recruited.

H 3. There is no challenge to the factual findings of Employment Judge Davies, nor any challenge to the finding that the Claimants are (or were) employees. The two grounds of appeal

pursued by the Secretary of State challenge the conclusion that as a matter of law the contracts of employment are not void for illegality on the basis that:

(i) The Employment Tribunal misapplied s.10(2) of the Constitutional Reform and Governance Act 2010 (referred to as "CRAGA 2010") and its predecessor, Article 2(1) of the Civil Service Order in Council 1995 (referred to as the "OIC 1995") in holding that, while such provisions acted as a legislative constraint on the Secretary of State appointing the Claimants as civil servants, they did not act as any constraint on engaging them as employees within the meaning of the Employment Rights Act.

(ii) It was an error not to hold that, if there was a contract of service, it was void ab initio as being ultra vires.

The Facts

4. The facts so far as relevant to the appeal are in short compass and can be summarised as follows. The three Claimants worked as teachers. None had a written contract but it was common ground that they all worked under a contract and that the terms of the contract under which they worked had to be inferred from the conduct of the parties. Since the Secretary of State accepted that they worked under contracts which required them when working to provide personal service and to undertake work under the control of the HMPS management (their work being integrated within the Learning and Development service within the prison), the central issue in relation to employment status concerned mutuality of obligation.

5. The Claimants were each engaged at a time when there was a moratorium on recruitment of employed staff due to a restructuring programme within HMPS. The Employment Judge inferred that on their recruitment, there was a clear intention of long-term engagement. They were required to work to a timetable with public exams offered such as

A GCSE on some courses and with other courses offered on the basis of an ongoing commitment by the prison to continue offering it.

B 6. Mrs Betts commenced working in May 2010 and resigned with effect from 30 January 2015. The recruitment principles at the date when her engagement commenced were contained in the OIC. Initially she worked two days a week but increased that to full-time hours in due course. The Employment Judge accepted her evidence that she was unable to withdraw her C services on any particular day without prior permission and planning. She did not work for any other employer during the time that she worked as a teacher for HMPS. She worked under the control of HMPS and to their professional standards and the Employment Judge concluded that D there was sufficient mutuality of obligation to establish a contract of employment.

7. Mr Procter commenced working as a woodwork teacher in August 2011 and resigned E with effect from 27 February 2015. He worked a 35 hour week delivering level I City and Guilds qualifications to offenders. Had he been unavailable on any day, the class would have had to be cancelled. He was required to maintain data for the courses and was subject to inspection and observation to maintain standards. He did carry out some private work for F family and friends while working as a teacher but this was done at the weekend outside normal working hours at the prison. Again, the Employment Judge concluded that there was sufficient mutuality of obligation to demonstrate that an employment contract existed.

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8. Ms O'Brien commenced working teaching literacy in 2013 and remains in that role. She is primarily based at HMP Prescoed. She had a consistent pattern of working between H 2013 and 2015 and was also subject to data recording requirements, inspection and observation. The Employment Judge found there was a requirement to notify HMPS of leave and seek

approval and in reality, she was required to work to the planned timetable. The Employment Judge concluded that the level of control and the mutuality of obligation that existed supported the inference that she works under a contract of employment.

The Employment Judge's judgment on illegality

9. Having set out at paragraphs 28 to 63 inclusive the legislative framework in issue and the principles governing the issue of illegality, the Employment Judge set out her conclusions at paragraphs 64 to 93. She concluded that there were two key questions: first, whether a distinction could properly be drawn between appointment to the office of civil servant on the one hand and Crown employment on the other; secondly, whether the words of OIC 1995 and/or CRAGA 2010 prohibit the Secretary of State from entering into employment outside the recruitment principles of fair and open competition.

10. So far as the first question is concerned, she concluded that there is a distinction between appointment to the office of civil servant which must be subject to the recruitment principles on the one hand, and Crown employment which is determined by reference to tests set out elsewhere including s.230 Employment Rights Act 1996 on the other (see [72] to [78]). Having reached the conclusion that a distinction exists, she concluded that the recruitment principles apply only to appointment to "the Office of Civil Servant" and not to recruitment to Crown employment. She reached that conclusion on the basis of the wording of the OIC 1995 and CRAGA 2010 and in particular, the terminology of CRAGA 2010 which she regarded as underlining the difference between the two types of selection (see [79]).

11. The Employment Judge was not persuaded that the wording of the OIC 1995 is sufficiently explicit to displace the ability of the Secretary of State to enter into a contract of

A employment and concluded that the natural meaning of the words meant that the OIC 1995 applies to appointment to office only. She reached the same conclusion in relation to the CRAGA 2010. She therefore agreed that it was possible for the Claimants to be employed but not appointed to office with the Civil Service so that the OIC 1995 and/or CRAGA 2010 did not displace the Secretary of State's power to enter into contracts of employment outside the recruitment principles.

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12. Moreover although not necessary for her decision, she concluded that there was no evidence that either party knew of any possible illegality when the teaching engagements began and found the oral contractual arrangements entered into would not have appeared to be unlawful to anyone.

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The legislative framework

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13. The Secretary of State relies on the OIC 1995, issued under prerogative power, and the legislation which superseded it: CRAGA 2010. CRAGA 2010 was implemented as one aspect of constitutional reform of prerogative powers and placed the power to manage the Civil Service on a statutory basis.

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14. The Civil Service Commissioners' Recruitment Principles (April 2009 Edition) state:

> **"1. The Civil Service Order in Council 1995 (as amended) and the Diplomatic Service Order in Council 1991 (as amended) requires selection for appointment to the Civil Service to be on merit on the basis of fair and open competition ("the requirement") and that the Civil Service Commissioners ("the Commissioners") publish Recruitment Principles to be applied for the purposes of the requirement. This document sets out those principles.**
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> **2. "Role of the Commissioners" –**
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> **The role of the Commissioners in recruitment is to maintain the principle that appointments to the Civil Service are on merit through fair and open competition. Annex A provides more detail on how the Commissioners interpret the principle.**
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> **5. "Departments and agencies' responsibilities" –**
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> **Departments and agencies must comply with the principle of appointment on merit through fair and open competition and these Recruitment Principles, including Annexes A, B and C.**

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Overall responsibility for doing so rests with the permanent secretary or chief executive of each department or agency."

15. The Civil Service Commissioners' Recruitment Principles use the term appointment rather than employment. The Recruitment Principles were enshrined in the OIC 1995 which provided:

> **"2. (1) Except as otherwise expressly provided by this Order, no person shall be appointed to a situation in the Service unless**
>
> **(a) the selection for appointment is made on merit on the basis of fair and open competition; and...."**
>
> **(where "the Service" means "Her Majesty's Home Civil Service".)"**

16. There is no definition in the OIC 1995 of the terms "appointment" or "employment" and in fact, the OIC 1995 makes no reference to, or use of, the word 'employment'.

17. The OIC 1995 was superseded by CRAGA 2010 from 11 November 2010. It provides:

> **"Chapter 1 Statutory Basis for management of the civil service**
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> **1 Application of Chapter**
>
> **(1) Subject to subsections (2) and (3), this Chapter applies to the civil service of the State.**
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> **(2) .....**
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> **(3) .....**
>
> **(4) In this Chapter references to the civil service –**
>
> **(a) are to the civil service of the State excluding the parts mentioned in subsections (2) and (3)(c);**
>
> **(b) are to be read subject to subsection (3)(a) and (b);**
>
> **and references to civil servants are to be read accordingly.**
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> **3 Management of the civil service**
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> **(1) The Minister for the Civil Service has the power to manage the civil service (excluding the diplomatic service).**
>
> **(2) The Secretary of State has the power to manage the diplomatic service.**
>
> **(3) The powers in subsections (1) and (2) include (among other things) power to make appointments.**
>
> **4 Other statutory management powers**
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> **(1) All statutory management powers in effect when section 3 comes into force continue to have effect.**

(2) But those and all other statutory management powers are exercisable subject to section 3.

(3) "Statutory management power" means a power in relation to the management of any part of the civil service conferred by an Act (whenever passed) or an instrument under an Act (whenever made).

10 Selections for appointments to the civil service

(1) This section applies to the selection of persons who are not civil servants for appointment to the civil service.

(2) A person's selection must be on merit on the basis of fair and open competition.

(3) The following selections are excepted from this requirement –

(a) a person's selection for an appointment to the diplomatic service either as head of mission or in connection with the person's appointment (or selection for appointment) as Governor of an overseas territory;

(b) selection for an appointment as special advisor (see section 15);

(c) a selection excepted by the recruitment principles (see sections 11 and 12 (1)(b)).

(4) In determining for the purposes of subsection (1) whether or not a person is a civil servant, ignore any appointment for which the person was selected in reliance on subsection (3).

11 Recruitment principles

(1) The Commission must publish a set of principles to be applied for the purposes of the requirement in section 10(2).

(2)....

(3) In this Chapter "recruitment principles" means the set of principles published under this section as it is in force for the time being.

(4) Civil service management authorities must comply with the recruitment principles

12 Approvals for selections and exceptions

(1) The recruitment principles may include provisions –

(a)...

(b) Excepting a selection from that requirement for the purposes of section 10(3)(c)."

18. There is no single statutory definition of "civil servant" or "the civil service of the State" and the definitions in CRAGA 2010 are somewhat circular. However the definition undoubtedly includes those employed directly by government departments and by devolved administrations; but does not include local government and NHS employees or members of the Armed Forces and police officers who are not in Crown employment and not treated as civil servants.

19. Appointment to the Civil Service carries with it rights and obligations in what is a highly regulated structure. For example, civil servants are bound by the Civil Service Code and are regulated (among other things) in terms of their political and business interests. Not all of those who work within the Civil Service are necessarily civil servants - for example agency staff and various types of worker are routinely engaged in the Civil Service but are not subjected to the framework of obligations imposed on civil servants or given the same rights.

20. In the present case it is not disputed that those who work under contracts of employment for Her Majesty's Prison Service are civil servants. Some civil servants are officeholders. For example, the Commissioners of HMRC are statutory officeholders appointed by letters patent pursuant to s.1 of the Commissioners for Revenue and Customs Act 2005, but are also civil servants appointed in accordance with CRAGA 2010.

21. The Claimants here rely on the finding that they are employees working under contracts of employment and do not assert that they are statutory officeholders.

22. Because historically there was no certainty that Crown servants had contracts of employment, there could be no certainty that those in Crown employment or service would have employment protection rights in the absence of a specific provision applying the provisions of the Employment Rights Act 1996. Section 191 ERA therefore extends certain employment rights to those who are employed:

> **"under or for the purposes of a government department or any officer or body exercising statutory functions on behalf of the Crown" (s.191(3))**

and provides that the provisions of the ERA

> **"have effect in relation to Crown employment and persons in Crown employment as they have effect in relation to other employment and other employees or workers"(s.191)(1).**

A **The Appeal**

23. Recognising the unattractiveness of the argument he seeks to advance on the Secretary of State's behalf, Mr Collins QC nonetheless submits that the Secretary of State has no power to enter into contracts appointing people to office or employment in the Civil Service unless the provisions of s.10(2) CRAGA 2010 are complied with, requiring such appointment to be on merit on the basis of fair and open competition.

24. It is common ground that none of the Claimants was appointed by a process of fair and open competition, and no suggestion that any exception from the usual rules in relation to fair and open competition has been granted (see s.10(3) and s.12(1)(b) CRAGA 2010). No fault in this regard lies with any of the Claimants. They were engaged from outside the Civil Service as sessional workers without any form of competitive selection process through no fault of their own, and have throughout performed their work to a high standard.

25. However, Mr Collins contends that the provisions of the OIC 1995 and CRAGA 2010 applied and apply to appointments to the Civil Service. As a matter of primary legislation therefore, unless an exception applies, no person may be selected for appointment from outside the Civil Service into a position in the Civil Service unless that selection has been made on merit in accordance with the principle of fair and open competition. He submits that any contract entered into without complying with the mandatory requirements of these provisions is void and unenforceable for illegality irrespective of whether either or both of the parties is at fault. He relies on the principle that the court will not enforce a contract which is expressly or impliedly prohibited by statute: see St John Shipping Corporation v Joseph Rank Ltd [1957] 1QB 267 at 283, where Devlin J stated that if the parties enter into a prohibited contract, that contract is unenforceable. It matters not what their knowledge or intention is.

26. By drawing a false distinction between appointment as a civil servant and Crown employment, the Employment Judge sidestepped this issue. Mr Collins submits that if he is right that the Secretary of State was prohibited by statute from entering into contracts of employment with the Claimants, established authority makes it clear that any purported contract of employment would inevitably be void on the ground that it is or was ultra vires the terms of OIC 1995 and CRAGA 2010.

27. The first question that arises on this appeal is accordingly whether the Employment Judge was correct to hold, as a matter of law, that there is a difference in the meaning of the terms "appointment" and "employment" in this context.

28. Mr Collins contends that such a distinction is unreal and that when analysed by reference to the facts of the present cases no such distinction exists. The Claimants were all appointed to positions within the Civil Service. An impartial Civil Service selected for appointment on merit has been a cornerstone of the United Kingdom's constitutional settlement since the mid 19th century. This is a matter of fundamental constitutional importance. It would drive a coach and horses through that principle if it was accepted that a distinction can be drawn between appointment and employment in this context. This is therefore not a case where the Secretary of State is seeking for his own benefit to avoid liability for the consequences of a contract. Rather the Secretary of State is seeking to uphold a principle of the utmost public importance.

29. Mr O'Dempsey by contrast contends that the Employment Judge was correct to draw a distinction between appointment and employment in this context for the reasons she gave. Section 10 CRAGA 2010 makes explicit that the section applies to the selection of persons "for

A appointment to the Civil Service". If appointment encompassed Crown employment the provision would have said so. Moreover for the reasons given by the Employment Judge there is no requirement for the concept of Crown employment in the ERA 1996 to be considered to be coterminous with the concept of "appointment to the Civil Service". He submits that the Secretary of State's argument fails to give content to s.191 ERA, a provision that was expressly retained and deals with the concept of Crown employment. In his submission s.10 CRAGA 2010 captures those recruited on civil service terms and conditions only, but not those recruited as ordinary Crown employees who are in an employment relationship in the Civil Service, but do not have or rely on civil service terms and conditions.

30. I have concluded that the argument advanced by Mr Collins is correct. My analysis is as follows.

31. CRAGA 2010 applies to the Civil Service and its management: see s.3 which puts on a statutory basis in the hands of the Minister for the Civil Service, the power to manage the Civil Service, including the power to appoint civil servants. The Civil Service is the civil service of the State (see s.1) apart from those expressly excepted parts (such as the Security Service and GCHQ) set out in s.1 CRAGA 2010. That is a wide definition and covers appointments within HMPS, although in practice the Minister for the Civil Service gives authority to Ministers in charge of departments (including HMPS) to exercise certain management powers within their own departments including the power to appoint civil servants.

32. Section 10 applies to all appointments to the Civil Service. I do not consider that the use of the term "appointment" in this context draws a distinction between recruitment to an office in the Civil Service or an employment. The term appointment is a neutral one and

follows from the historical difficulties in relation to the status of civil servants (see for example Regina v Lord Chancellor's Department ex p. Nangle [1991] ICR 743 at 749E where Stuart Smith LJ noted: "Many contractual relationships of employer and employee are described as appointments".) It covers all recruitment and appointment to the Civil Service, and in that sense, "appointment" is the gateway into a position in the Civil Service. That is how one becomes a member of it. Employment is a subset of appointment so that appointment may or may not lead to employment but in my judgment undoubtedly covers it.

33. There is no rational basis for excluding employment selection from the principle of fair and open competition. To do so would deprive the OIC 1995 and CRAGA 2010 of much of their effect. It would be possible for an individual to be employed to work in the Civil Service who does not qualify for appointment and without fair and open competition. This is an important public safeguard to ensure recruitment on an impartial basis of those who are best qualified to serve, and to preserve the independence of the Civil Service. The safeguard would have limited effect if the requirement of fair and open competition only applied to appointment as a civil servant and not to employment in a post in the Civil Service.

34. Nor does s.191 ERA alter this position. This provision defines Crown employment for the purposes of extending certain rights conferred by the ERA, and it defines those rights. It does not provide a source of power for selecting to positions in the Civil Service or Crown service, nor does it deal with the means of appointment, but looks at those already appointed either by a government department or an officer or body exercising functions conferred by statute (such as ACAS established by s.247 Trade Union and Labour Relations (Consolidation) Act 1992 or the CICA, an executive agency of the Ministry of Justice).

35. Accordingly, in my judgment s.10(2) CRAGA 2010 operates as a statutory limitation on the selection for all appointments of persons, whether to an office or to employment in the Civil Service.

36. The next question is whether there is any residual power to appoint (by employing) people to what are positions in the Civil Service (here, HMPS) but outside the statutory limitation in s.10(2) CRAGA 2010. There is no suggestion that any of the statutory exceptions in CRAGA 2010 apply.

37. Mr O'Dempsey no longer relies on the Ram doctrine but contends that the prerogative power underpinned by s.191 ERA remains a source of power to employ. For the reasons given above I disagree. Section 191 looks at the position of those already appointed under s.10 CRAGA 2010. If that appointment results in Crown employment within the meaning of s.191(3), certain employment rights or protections under the ERA are conferred on the employee. Properly construed, this provision is not a source of power to appoint or employ.

38. In addition, Mr O'Dempsey relied on powers in the Prison Act 1952 and in particular, s.3 which empowers the Secretary of State to:

> **"appoint such officers and employ such other persons as he may, with the sanction of the Minister for the Civil Service as to number, determine."**

39. He relies on the distinction drawn between officers and employment, and submits that the only fetter on the power of the Secretary of State is as to the numbers to be appointed. HMPS may, accordingly, employ persons by s.3 of the Prison Act 1952, but if that appointment purports to be to the Civil Service, and if there is a complaint about such appointment (pursuant to s.13 CRAGA 2010) the Commission may consider the complaint and make

A recommendations. He submits that Parliament's intention was plainly that HMPS should have power to employ persons other than officers and such employment would not be restricted to civil servants. Moreover there is nothing in CRAGA 2010 to suggest any implied repeal of the power in s.3 Prison Act 1952 to employ outside the scheme of appointment to the Civil Service.

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40. I do not accept this submission. The power in s.3 of the Prison Act 1952 is expressly preserved by s.4(1) CRAGA 2010 but by s.4(2) CRAGA 2010 "those and all other statutory management powers are exercisable subject to section 3". Section 4(3) defines "statutory management power" as meaning "a power in relation to the management of any part of the civil service conferred by an Act (whenever passed) or an instrument under an Act (whenever made)". Section 3 CRAGA 2010 provides that the Minister for the Civil Service has the power to manage the Civil Service, with such power to include (among other things) power to make appointments.

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41. The power in s.3 of the Prison Act 1952 is accordingly subject to and limited by s.10 CRAGA 2010, and does not afford any residual powers outside the limitation of CRAGA 2010.

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42. Moreover, I agree with Mr Collins that the fact that s.3 of the Prison Act 1952 uses both the word "appoint" and the word "employ" supports the conclusion that both words refer to the engagement of individuals to positions in the Civil Service (noting that in 1952 the authorities were less clear as to the employment status of civil servants). Further, the term 'officers' in s.3 of the Prison Act 1952 is a reference to 'prison officers' whose position is addressed by s.7 Prison Act 1952, and who are employees and civil servants, and not officeholders.

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43. In these circumstances, I do not consider that the approach adopted in Shrewsbury and Telford Hospital NHS Trust v Lairikyengbam [2010] ICR 66 (EAT) can apply. I find the EAT's reasoning difficult to follow in this case, but even if correct, there was a general power to employ staff, so that although the appointment as a hospital consultant was ultra vires, the NHS Trust's general power could be relied on. In the present case, there is no general power to employ individuals under contracts of employment in HMPS other than in accordance with the recruitment principles, in light of my conclusions stated above.

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44. It seems to me that s.10 CRAGA 2010 occupies the ground leaving no residual power or discretion to select for employment to the Civil Service on a basis that is otherwise than on merit and fair and open competition. There are rational reasons for that approach. The absence of fair and open competition is unfair to people who might otherwise apply for these posts. Moreover it is in the interests of the public and the Civil Service as a whole to have recruitment on a fair and open basis in order to ensure that those best qualified for the post are recruited. To have recruitment on a basis otherwise than one that is fair and open and on merit has the potential to result in cronyism and/or appointment on an irrelevant, potentially irrational or at worst corrupt basis. It would be difficult to make sense of a statute which prohibits selection of persons to the Civil Service on a basis other than on merit and yet at the same time permits contracts of employment to be made on precisely that other basis i.e. not on merit. The existence of anti-discrimination legislation, though important, does not address this problem.

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45. The next question in those circumstances is what is the consequence of the Secretary of State's failure to comply with a limitation on the power of appointment? I do not think the statutory limitation in s.10(2) can be read as aspirational only and not mandatory. The section is expressed in mandatory terms and identifies certain selections that are excepted from this

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A requirement expressly at s.10(3) CRAGA 2010. One of those exceptions is s.10(3)(c) which excepts a selection that is itself "excepted by the recruitment principles". The recruitment principles are dealt with at s.11. The Commission is required to publish a set of principles to be applied for the purposes of selection on merit on the basis of fair and open competition: see s.11(1). Section 11(3) defines the "recruitment principles" as the set of principles published under this section as it is in force for the time being and s.11(4) obliges civil service management authorities to comply with the recruitment principles. The Commission has published Recruitment Principles in April 2009 and April 2012. In the latest published Recruitment Principles at Annex C, there is an exception for short-term appointments up to a maximum of two years. In light of the mandatory terms of s.10(2) and the careful statutory scheme created by CRAGA 2010, it seems to me that the obligation to select on merit on the basis of fair and open competition is a mandatory one, and not merely aspirational.

46. Although Mr O'Dempsey relied in writing on Patel v Mirza [2016] 3 WLR 399, I do not consider that it assists in a case where the issue concerns the Secretary of State's power to act. I have considered whether the approach of Lord Woolf, MR in Queen v Secretary of State for Home Department ex parte Jeyeanthan [1999] EWCA Civ 3010 offers a solution to this appeal. At [15] and [16] he held:

> **"15. An examination of the relevant authorities, the leading text books and the numerous authorities to which they refer confirm the limitations of applying a solely mandatory/directory classification (see Wade and Forsyth: Administrative Law 7th Ed. p255, Supperstone and Goudie: Judicial Review 2nd Ed. Chapter 4 and de Smith, Woolf and Jowell: Judicial Review of Administrative Action 5th Ed. p.265-271). Frequently the investigation involves doing no more than deciding the sense in which the word "shall" has been used as part of a particular procedural requirement. As the word "shall" is normally inserted to show that something is required to be done, the exercise tends to be an unrewarding one. Much more important is to focus on the consequences of non-compliance. Here the authorities show no constant pattern. This is the result of courts in those cases focusing on the issue of whether or not a requirement is mandatory and ignoring or failing to pay sufficient attention to the issue of the consequences of non-compliance with, in particular, a mandatory requirement. Here it is desirable to remember the wise words of Lord Hailsham of St Marylebone LC in his speech in London & Clydesdale Estates Limited v Aberdeen District Council [1980] 1 WLR 182 at pp.188 90. They are so important that it is desirable to set out the passage verbatim:**
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> > **"The contention was that in the categorisation of statutory requirements into "mandatory" and "directory", there was a subdivision of the category "directory"**

into two classes composed (i) of those directory requirements "substantial compliance" with which satisfied the requirement to the point at which a minor defect of trivial irregularity could be ignored by the court and (ii) those requirements so purely regulatory in character that failure to comply could in no circumstances affect the validity of what was done. The contention of the respondents was that, even on the assumption against themselves that the requirement of the Order that the certificate should include a notification of the appellants' rights to appeal to the Secretary of State, the rest of the certificate was so exactly in accordance with the provision of the Order that the remaining defect could be safely ignored....

"When Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail. But what the courts have to decide in a particular case is the legal consequence of non-compliance on the rights of the chain of events. It may be that what the courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another. At one end of this spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences upon himself. In such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedure simply as a shield or defence without having taken any positive action of his own. At the other end of the spectrum the defect in procedure may be so nugatory or trivial that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint. But in a very great number of cases, it may be in a majority of them, it may be necessary for a subject, in order to safeguard himself, to go to the court for declaration of his rights, the grant of which may well be discretionary, and by the like token it may be wise for an authority (as it certainly would have been here) to do everything in its power to remedy the fault in its procedure so as not to deprive the subject of his due or themselves of their power to act. In such cases, though language like "mandatory," "directory," "void," "voidable," "nullity" and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition. As I have said, the case does not really arise here, since we are in the presence of total non-compliance with a requirement which I have held to be mandatory. Nevertheless I do not wish to be understood in the field of administrative law and in the domain where the courts apply supervisory jurisdiction over the acts of subordinate authority purporting to exercise statutory powers, to encourage the use of rigid legal classifications. The jurisdiction is inherently discretionary and the court is frequently in the presence of differences of degree which merge almost imperceptibly into differences of kind."

These comments of Lord Hailsham were made in a case where a mandatory requirement was not complied with and this resulted in a document being set aside. It was not, however, held to be a nullity in the sense that it was not capable of being the foundation of valid proceedings. This was the position even though the requirement involved informing the subject of his right to question a decision. Lord Keith of Kinkel considered a different result "totally unrealistic" (paragraph 202H).

16. Bearing in mind Lord Hailsham's helpful guidance I suggest that the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test: The questions which are likely to arise are as follows:

(a) Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question.)

(b) Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver.

(c) If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question.)"

47. Adopting that approach and treating the fact that the statutory limitation in s.10(2) CRAGA 2010 is mandatory as a first step only, the three questions are to be answered as follows:

(a) on the 'substantial compliance' question, there has been no compliance at all. These Claimants were recruited entirely outside a selection process on merit based on fair and open competition. There is no suggestion that they were at fault in any sense in this regard, but that does not alter the result. The recruitment freeze cannot explain the failure to comply, and although the Recruitment Principles have allowed for exceptions to fair and open competition for short-term appointments up to a maximum of two years to provide managers with the flexibility to meet short-term needs, this was not adopted and the approval of the Civil Service Commissioners to an exception on this basis was not sought.

(b) On the discretionary question, I do not consider that the non-compliance is capable of being waived because absent selection in accordance with CRAGA 2010, I have concluded that the Secretary of State has no power to select people for appointment to the Civil Service whether in an office or employment. Section 10 CRAGA 2010 prevents unofficial, unfair selection for appointment and the statutory scheme would be severely undermined if it could be waived after the event outside the statutory exceptions expressly provided for.

(c) On the consequences question, for the Claimants the consequences of the Secretary of State's failure vary. All are (or were) workers for the purposes of certain ERA protections and have been paid fully in accordance with their worker contracts. Ms O'Brien continues to work for HMPS and will be deprived of protection for unfair

dismissal. An application to regularise her position could be made by HMPS to the Civil Service Commissioners based on "business needs". On the other side of the equation, the consequences for those deprived of the opportunity of selection for the posts occupied by the Claimants has also to be recognised, together with the important public interest in having independent civil servants recruited on merit on a fair and open basis.

48. In response to a request for information about the extent of the problem identified by this case, anecdotal information was provided on behalf of the Claimants but I was also referred to the Civil Service Commission Annual Report 2015-16 by the Secretary of State which seems to me to be more reliable.

49. The Report has a section at page 40 dealing with breaches of the Recruitment Principles. The Commission reports on "*breaches of the Recruitment Principles that are brought to the Commission's attention through our complaints investigation work, we also use our compliance monitoring audits and our other regular contacts with Departments to identify other situations where Departments may have failed correctly to apply the Recruitment Principles*".

50. The Commission identified 27 cases in 2015-16 where the Recruitment Principles had not been properly applied, in addition to 4 breaches uncovered following the investigation of complaints. A total of 31 breaches was therefore identified in the course of the year. I understand from Mr Collins that the figure for the previous year was 17. Furthermore, he makes the point that, not all of the breaches will have resulted in retrospective approval since the breach may have been discovered after the individual left or the employment came to an end otherwise or the breach might not have undermined fair and open competition. Retrospective

approval may be granted on terms (for example approval for a period of months to allow for a process of fair and open competition to take place).

51. I draw some comfort from the apparently relatively limited extent of the problem identified by this case.

Conclusion

52. For the reasons I have given, the Secretary of State had no power to enter into contracts of employment with the Claimants because their recruitment was not on merit on the basis of fair and open competition. I have not been able to find a way to avoid the result that their contracts of employment are therefore ultra vires. Their status as workers is unaffected by this conclusion; but their contracts of employment are necessarily ultra vires and of no effect.

53. The appeal is therefore allowed to this extent only.