Michaelmas Term
[2012] UKSC 58
On appeal from: [2011] CSIH 19; [2008] CSOH 123

JUDGMENT

RM (AP) (Appellant) *v* The Scottish Ministers (Respondent) (Scotland)

before

Lord Hope, Deputy President
Lady Hale
Lord Wilson
Lord Reed
Lord Carnwath

JUDGMENT GIVEN ON

28 November 2012

Heard on 23 October 2012

Appellant
Jonathan Mitchell QC
Lorna Drummond QC
(Instructed by Frank Irvine Solicitors Ltd)

Respondent
James Mure QC
Jonathan Barne
(Instructed by Scottish Government Legal Directorate Litigation Division)

LORD REED (with whom Lord Hope, Lady Hale, Lord Wilson and Lord Carnwath agree)

1. This appeal raises a question as to the effect of a commencement provision in a statute which provides that provisions "shall come into force" on a specified date, and a consequential question as to the effect of a provision conferring upon Ministers the power to make regulations, where the provisions which are subject to the commencement provision cannot come into effective operation unless such regulations have been made.

The legislation

2. These questions arise in relation to the Mental Health (Care and Treatment) (Scotland) Act 2003 ("the 2003 Act"). The relevant substantive provisions are contained in Chapter 3 of Part 17, comprising sections 264 to 273. That Chapter is concerned with the detention of patients in conditions of excessive security.

3. Section 264 is headed "Detention in conditions of excessive security: state hospitals". It applies where a patient's detention in a state hospital is authorised by one of the measures listed in subsection (1)(a) to (d): that is to say, a compulsory treatment order, a compulsion order, a hospital direction or a transfer for treatment direction. By virtue of subsection (2), an application can be made to the Mental Health Tribunal for Scotland ("the Tribunal") by any of the persons mentioned in subsection (6), including any patient falling within the scope of the section. By virtue of subsection (9), however, the Tribunal cannot determine any application without having first afforded the persons identified in subsection (10) the opportunity of making representations and of leading or producing evidence. Those persons include the "relevant Health Board". If, on hearing the application, the Tribunal is satisfied that the patient does not require to be detained under conditions of special security that can be provided only in a state hospital, it can then make an order declaring that the patient is being detained in conditions of excessive security, and specifying a period not exceeding three months during which the duties under subsections (3) to (5) are to be performed. The effect of such an order depends on whether the patient is a "relevant patient", in which case subsection (3) applies, or is not such a patient, in which case subsection (4) is applicable. In either case, an obligation is imposed upon the relevant Health Board to identify a hospital which it considers, in agreement with the managers of the hospital (if the Board is not itself the manager) and, in the case of a relevant patient, the Ministers, is a hospital in which the patient could be detained in

appropriate conditions and in which accommodation is available for the patient. The expression "relevant patient" is defined by section 273.

4. Section 265 makes provision for further orders in the event that a patient is not transferred to a hospital following an order made under section 264(2); and section 266 makes provision for further orders in the event that a patient is not transferred following an order made under section 265. In each case, an order can be made only after affording the persons identified in section 264(10), including the relevant Health Board, the opportunity of making representations and of leading or producing evidence; and the effect of the order is to impose a duty upon the relevant Health Board, the nature of that duty being dependent upon whether the patient in question is or is not a relevant patient.

5. Section 267 makes provision for the recall of orders made under sections 264 to 266. Recall can be sought by the relevant Health Board, amongst others. An application for recall can be determined only after affording the persons identified in section 264(10), including the relevant Health Board, the opportunity of making representations and of leading or producing evidence.

6. Section 268 is headed "Detention in conditions of excessive security: hospitals other than state hospitals". It applies where a "qualifying patient's" detention in a "qualifying hospital" is authorised by one of the measures listed in subsection (1)(a) to (d): that is to say, a compulsory treatment order, a compulsion order, a hospital direction or a transfer for treatment direction. Apart from its applying to qualifying patients in qualifying hospitals rather than to patients in state hospitals, section 268 otherwise follows closely the scheme of section 264, *mutatis mutandis*. In particular, subsection (2) permits an application to the Tribunal to be made by a qualifying patient, and for the Tribunal to make an order declaring that the patient is being detained in conditions of excessive security and specifying a period not exceeding three months during which the duties under subsections (3) to (5) are to be performed. Those subsections impose an obligation upon the relevant Health Board to identify a hospital in which the patient could be detained in conditions not involving excessive security and in which accommodation is available. Provision is made for the expressions "qualifying patient" and "qualifying hospital" to be defined by regulations made under subsections (11) and (12), which are in the following terms:

> "(11) A patient is a 'qualifying patient' for the purposes of this section and sections 269 to 271 of this Act if the patient is of a description specified in regulations.

(12) A hospital is a "qualifying hospital" for the purposes of this section and sections 269 to 271 of this Act if –

(a) it is not a state hospital; and

(b) it is specified, or of a description specified, in regulations."

Subsection (13) provides that regulations under subsection (11) or (12) may have the effect that "qualifying patient" means a patient, and that "qualifying hospital" means a hospital other than a state hospital, or a part of a hospital.

7. Sections 270 and 271 make provision for further orders following upon an order under section 268, analogous to the provision made by sections 265 and 266. Section 271 makes provision for the recall of orders made under sections 268 to 271, analogous to the provision made by section 267.

8. Section 272 makes provision for the enforcement of orders made under sections 264 to 266, and 268 to 270, and is not material to the issues in the appeal.

9. Section 273 defines the expression "relevant patient", and also makes provision for the expression "relevant Health Board" to be defined by regulations. In relation to the latter aspect, it provides:

"In this Chapter —

'relevant Health Board' means, in relation to a patient of such description as may be specified in regulations, the Health Board, or Special Health Board —

(a) of such description as may be so specified; or

(b) determined under such regulations."

10. In terms of section 326, regulations under the Act are to be made by statutory instrument. Regulations under section 268(11) and (12) are subject to affirmative resolution: that is to say, a draft of the instrument must be laid before the Scottish Parliament for approval, in accordance with section 326(4).

Regulations under section 273 are subject to negative resolution: in other words, the instrument is subject to annulment in pursuance of a resolution of the Scottish Parliament. In terms of section 329(1), "regulations" means regulations made by the Ministers.

11. The commencement provisions of the 2003 Act are contained in section 333. So far as material, it provides:

> "(2) Chapter 3 of Part 17 of this Act shall come into force on 1st May 2006 or such earlier day as the Scottish Ministers may by order appoint.
>
> (3) The remaining provisions of this Act, other than this section and section … 326 … shall come into force on such day as the Scottish Ministers may by order appoint.
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> (4) Different days may be appointed under subsection (2) or (3) above for different purposes."

12. The 2003 Act was passed by the Scottish Parliament on 20 March 2003 and received Royal Assent on 25 April 2003. Section 333 came into force on that date. All the remaining provisions of the Act, so far as not already in force, were brought into force on 5 October 2005, with the exception of Chapter 3 of Part 17. Sections 268 and 273 were brought into force on 6 January 2006, but "only for the purpose of enabling regulations to be made": the Mental Health (Care and Treatment) (Scotland) Act 2003 (Commencement No 4) Order 2005 (SSI 2005/161). As I shall explain, Ministers possessed the power to make such regulations in any event, by virtue of paragraph 10 of Schedule 1 to the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc of Acts of the Scottish Parliament) Order 1999 (SSI 1999/1379) ("the 1999 Order"), which applied to Acts of the Scottish Parliament between 1999 and 2010, and applies in particular to the 2003 Act. Regulations defining the expression "relevant Health Board" were made by the Ministers and came into force on 1 May 2006: the Mental Health (Relevant Health Board for Patients Detained in Conditions of Excessive Security) (Scotland) Regulations 2006 (SSI 2006/172). No regulations have been made under section 268(11) and (12) defining the expressions "qualifying patient" and "qualifying hospital". In consequence, sections 264 to 267 are in effective operation, but sections 268 to 271 are not.

13. In a guidance note issued to health boards, local authorities, the Tribunal and others in April 2006 (NHS HDL (2006) 25), the Ministers candidly

acknowledged the practical consequence of their failure to make regulations under section 268:

> "1. The main provisions of the Mental Health (Care and Treatment) (Scotland) Act 2003 came into effect on 5 October 2005. The provisions in Part 17 of the Act in relation to excessive security were not commenced at that time but are required by the Act to come into effect by 1 May 2006.
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> 2. The provisions in Part 17 will therefore come into effect on l May 2006. These provisions relate to appeals by patients in the State Hospital. No regulations have been made under section 268 to specify qualifying patients or hospitals to which the provisions in sections 268 to 270 apply. In effect these sections will not come into force on 1 May 2006."

The background circumstances

14. The appellant is a patient in Leverndale Hospital, which is not a state hospital. He has been detained there since 1995, latterly under a compulsion order. He is detained under conditions of low security. He believes that he is being detained under conditions of excessive security and wishes to be transferred to an open ward, which he believes would improve the quality of his life, increase his level of liberty, and advance the prospects of his eventual release from detention. He wishes to apply to the Tribunal under section 268(2) of the 2003 Act for an order declaring that he is being detained in conditions of excessive security. He cannot however make such an application in the absence of regulations specifying which patients are "qualifying patients" and which hospitals are "qualifying hospitals".

15. The appellant applied for judicial review of the Ministers' failure to draft and lay regulations under section 268(11) and (12) before the Scottish Parliament. He sought declarator that their failure to draft and lay such regulations before the Scottish Parliament prior to 1 May 2006 was unlawful, and an order that they draft such regulations and lay them before the Scottish Parliament within 28 days of the date of the order of the court or within such other period as the court saw fit. The appellant argued that, since the Scottish Parliament had enacted that section 268 shall come into force on 1 May 2006 at the latest, the Ministers were under a duty to make regulations under section 268(11) and (12) to give legal effect to section 268 by that date.

16. The Lord Ordinary, Lord Carloway, refused the petition for judicial review (*M v Scottish Ministers* [2008] CSOH 123; 2008 SLT 928). He accepted that a duty to make regulations, and to do so within a particular period, could be imposed by implication. If legislation vested a person or class of persons with a right which could only be exercised if regulations governing that exercise were in force, it would be assumed that Parliament intended that the person delegated with the relevant power should make regulations so as to activate the right in practice: *Singh v Secretary of State for the Home Department* 1993 SC (HL) 1; [1992] 1 WLR 1052. That was not however the position in the present case, since section 268 did not confer any rights on any person or class of persons but permitted the identification of such persons by regulation. It was only once such regulations were made that any right could arise (para 24). Section 268 was to be contrasted with section 264, under which, it was said, no further legislative action was required for the provisions to have effect once the chapter came into force (para 25).

17. A reclaiming motion was refused by an Extra Division of the Inner House on broadly similar grounds (*M v Scottish Ministers* [2011] CSIH 19; 2011 SLT 787). After referring to *Julius v Bishop of Oxford* (1880) 5 App Cas 214, the court contrasted section 268 with section 264, which identified the class of persons for whose benefit the provisions were intended. Although it was necessary for regulations to be made before the expression "relevant Health Board" was defined for the purposes of section 264 as well as section 268, the absence of such regulations would not have precluded a patient in the state hospital from making an application to the Tribunal under section 264. The Tribunal could, it was said, have made an order under section 264(2). If the Ministers' failure to define the expression "relevant Health Board" had the effect of preventing the implementation of the Tribunal's order, then, it was said, the court could undoubtedly have intervened to construe the legislation as imposing a duty upon the Ministers to make such regulations as regards patients in state hospitals. It was the clear intention of the Scottish Parliament that patients in state hospitals who satisfied any of the criteria in section 264(1)(a) to (d) should have effective rights of appeal against being detained in conditions of excessive security. In that situation the court would infer that there was a duty on Ministers to make any necessary regulations to give effect to that intention (para 9). In contrast to the provisions relating to patients in state hospitals, upon whom a right to apply to the Tribunal had been conferred by the Scottish Parliament, the provisions of sections 268 to 271 failed to identify any persons with actual rights to be effectuated by regulations (para 10).

18. The appellant has appealed to this court against the decision of the Extra Division.

19. In their printed case, the Ministers assert that sections 268 to 271 came into force and operation, along with the remaining provisions of Chapter 3 of Part 17, on 1 May 2006. With effect from that date, it is said, the Tribunal had jurisdiction to hear and determine applications from qualifying patients at qualifying hospitals, as well as to hear applications from patients in state hospitals. At the same time, the Ministers acknowledge that no applications can be made to the Tribunal under sections 268 to 271 unless and until the necessary regulations are made under section 268(11) and (12). The internal contradictions of the Ministers' argument are evident.

20. In their submissions at the hearing of the appeal, counsel for the Ministers drew a distinction between a provision's being in force and its being in operation, maintaining that the provisions of sections 268 to 271 were "in force", but did not "operate". They had become law on 1 May 2006, but they could not operate in practice unless and until the Ministers decided to make the necessary regulations. The Ministers' failure to make such regulations did not defeat the intention of the Scottish Parliament and was not unlawful. The contrary argument presented on behalf of the appellant was said to elide the distinction between the concept of "coming into force", on the one hand, and the concept of "taking effect" or "operating", on the other hand.

21. Counsel for the appellant submitted that it could be inferred from section 333(2) that the intention of the Scottish Parliament was that all the provisions of Chapter 3 of Part 17 should be in effective operation by 1 May 2006. The idea that it had been the intention of the Parliament that the provisions should technically have the force of law, but in practice be a dead letter, was inherently implausible. Why, counsel asked rhetorically, would the Parliament have bothered to enact section 333(2) if that was its intention? Why not leave matters entirely in the hands of the Ministers, as it had when it enacted section 333(3) in relation to most of the remaining provisions of the 2003 Act? Acknowledging that the court could not appropriately make an order requiring the Ministers to lay regulations before the Scottish Parliament, since the Ministers could alternatively invite the Parliament to repeal or amend the relevant provisions of the 2003 Act, counsel requested the court to make an order declaring that their failure to draft and lay such regulations prior to 1 May 2006, or since that date, was unlawful.

The commencement provision

22. An Act which has been enacted by both Houses of Parliament and has received the Royal Assent is on the statute book. But it does not follow that a provision of the Act is necessarily part of the law of the United Kingdom. As Hobhouse LJ stated in *R v Secretary of State for the Home Department, Ex p Fire Brigades Union* [1995] 2 AC 513, 529, whether or not a provision becomes part of

the law of the United Kingdom depends upon whether and when it comes into force: that is what coming into force means. When a statutory provision becomes part of the law of the United Kingdom depends upon what commencement provision Parliament has enacted. The same is true, *mutatis mutandis*, of statutes passed by the Scottish Parliament and the other devolved legislatures.

23. The Interpretation Act 1978 ("the 1978 Act") provides in Schedule 1, to which effect is given by section 5, that "commencement", in relation to an Act or enactment, means the time when it comes into force. That provision applies to statutes enacted by the United Kingdom Parliament. In relation to Acts of the Scottish Parliament, a similar definition is contained in Schedule 2 to the 1999 Order, and in Schedule 1 to the Interpretation and Legislative Reform (Scotland) Act 2010 ("the 2010 Act"), which has now replaced the 1999 Order.

24. Where no provision is made for an Act or provision of an Act coming into force, it comes into force at the beginning of the day on which the Act receives the Royal Assent (1978 Act, section 4(b); 1999 Order, Schedule 1, paragraph 2(b)); or, since 2010, in the case of an Act of the Scottish Parliament, at the beginning of the following day (2010 Act, section 3(2)). In practice, however, it is common for an Act to provide that it is to come into force at a time after it has received the Royal Assent, either on a date specified in the Act itself, or on a date or dates to be fixed by a separate order. Usually, although not invariably, this is done in order to allow time for persons affected by the Act to familiarise themselves with its provisions and to make any necessary adjustments to their affairs. Officials may also require time to prepare for the work involved in administering the Act. It may, for example, be necessary to draft regulations or other instruments to be made under the Act, after consultation with those concerned, or to prepare explanatory material for the guidance of officials and the public. The delay in commencement thus allows persons affected by the Act sufficient time to prepare for its practical operation.

25. Where commencement is postponed, Parliament may leave the decision when the Act (or a part of the Act) is to come into force to the discretion of Ministers, by enacting a provision such as section 333(3) of the 2003 Act ("… shall come into force on such day as the Scottish Ministers may by order appoint"). Parliament may on the other hand determine the date itself, as it did, for example, in section 9(1) of the Equal Pay Act 1970 ("… the foregoing provisions of this Act shall come into force on the 29th December 1975"), or it may provide for the Act to come into force upon the expiration of a specified period of time following Royal Assent. Parliament may also enable Ministers to make a commencement order, but specify the date, or the latest date, to be appointed by such an order. Section 9(2) of the Equal Pay Act provides an example: the Secretary of State was given a power to bring certain provisions of the Act into force "by order made to come into operation on the 31st December 1973". Another

example is section 5(2) of the Domestic Violence and Matrimonial Proceedings Act 1976, which provided that: "This Act shall come into force on such day as the Lord Chancellor may appoint by order … Provided that if any provisions of this Act are not in force on 1st April 1977, the Lord Chancellor shall then make an order by statutory instrument bringing such provisions into force".

26. Although most modern statutes favour the expression "come into force", the expression "come into operation" has also been used in the same sense, and was in more common use in earlier times. These expressions, and others such as "speaks from" and "comes into effect", have been used interchangeably by the courts, and are also used interchangeably in textbooks on statutory interpretation, such as *Bennion on Statutory Interpretation*, 5th ed (2008), and *Craies on Legislation*, 10th ed (2012). The latter states at para 10.1.1 that "the terms 'commencement', 'coming into force', 'taking effect', 'coming into effect' and 'coming into operation' are interchangeable and mean no more than the time when the legislation starts to have legal effect".

27. There is however another sense in which a provision may be said to be in operation (or an equivalent expression). As well as a provision's being said to be in operation in the sense that it forms part of the law of the land, it may also be said to be in operation in the sense that it is in effective operation as a matter of objective fact. It has rarely been necessary for the courts to advert to the distinction between these two senses, since a provision which has the force of law is normally also in operation as a matter of practical reality. There are however two decisions of the Court of Appeal in which the distinction has been material, and which contain an illuminating discussion of the point.

28. The first case is *R v Minister of Town and Country Planning, Ex p Montague Burton Ltd* [1951] 1 KB 1, which concerned section 37 of the Interpretation Act 1889 ("the 1889 Act"). Put shortly, that section provided that where an Act was not to come into operation immediately, and it conferred power to make regulations or other instruments for the purposes of the Act, that power could be exercised at any time after the passing of the Act, "so far as may be necessary or expedient for the purpose of bringing the Act into operation at the date of the commencement thereof". The term "commencement" was defined by section 36 as meaning "the time at which the Act comes into operation". The Court of Appeal held that the power conferred by section 37 was not confined to bringing the Act "into operation" in the sense of bringing it into legal force, but extended to taking measures which would enable the Act to operate in practice. Tucker LJ, with whose judgment Asquith and Jenkins LJJ agreed, said (p 6) that section 37 gave power to take the necessary steps to set up the machinery for bringing the Act into operation as well as for doing such an act as appointing a day for the Act to come into operation.

29. The second case, *Usher v Barlow* [1952] Ch 255, also concerned section 37 of the 1889 Act. Lord Evershed MR stated (p 259) that the section extended to something more than that which was requisite to enable the Act to come into operation at all: it covered such steps as would be required to enable the Act to operate effectively. Jenkins LJ, with whose judgment Morris LJ agreed, observed (p 263) that "operation" was used in section 37 in two different senses, namely the sense in which it appeared in the definition of "commencement" and the sense of "effective operation". The section should be construed as extending to whatever was necessary or expedient for the purpose of bringing the Act into effective operation, in the second sense, at the time when it came into operation, in the first sense.

30. Section 37 of the 1889 Act was replaced by section 13 of the 1978 Act, which provides as follows:

> "Where an Act which (or any provision of which) does not come into force immediately on its passing confers power to make subordinate legislation, or to make appointments, give notices, prescribe forms or do any other thing for the purposes of the Act, then, unless the contrary intention appears, the power may be exercised, and any instrument made thereunder may be made so as to come into force, at any time after the passing of the Act so far as may be necessary or expedient for the purpose -
>
> > (a) of bringing the Act or any provision of the Act into force; or
> >
> > (b) of giving full effect to the Act or any such provision at or after the time when it comes into force."

Similar provision was made in relation to Acts of the Scottish Parliament by paragraph 10 of Schedule 1 to the 1999 Order, and a more elaborate provision, to similar effect, is now made by section 4 of the 2010 Act.

31. Section 13 of the 1978 Act, like the equivalent legislation in respect of Acts of the Scottish Parliament, makes explicit, in setting out as alternatives the purposes described in paragraphs (a) and (b), the distinction which the Court of Appeal inferred in *Ex p Montague Burton Ltd* and *Usher v Barlow* from the terms of section 37 of the 1889 Act: the distinction, that is to say, between "bringing [an] Act … into force", on the one hand, and "giving full effect to the Act … when it comes into force", on the other hand.

32. It follows that the distinction which the Ministers have sought to draw between a provision being in force, in the sense that it has become law, on the one hand, and its being in effective operation, on the other hand, is in principle a valid distinction. In a commencement provision such as section 333(2) of the 2003 Act, in particular, the words "in force" can only bear the former of those senses. That is because the effect of a provision which fixes a date when provisions "shall come into force" is that those provisions will automatically come into force on the specified date. Nothing requires to be done in order for the provisions to come into force beyond passively awaiting the date fixed by the Act itself. If however the provisions being brought into force cannot be brought into effective operation without further action being taken – as is true, on any view of the matter, of the provisions to which section 333(2) applies – then the commencement provision must be referring only to the bringing of the provisions into force as law, and not to their being brought into effective operation.

33. That conclusion does not however permit one to infer, from a commencement provision in the form of section 333(2), that Parliament did not intend that the provisions to which it applies should be brought into effective operation on the date when they come into force. On the contrary: the inference which one would naturally draw, unless the contrary intention appears, is that that was indeed the intention of Parliament.

34. That inference reflects a number of overlapping considerations. First, it is ordinarily reasonable as a matter of common sense to infer that Parliament, when it fixes a date when a provision is to come into force, is not envisaging that the provision will technically have the force of law from that date but be in practice a dead letter. Parliament is not given to idly passing legislation. As Viscount Simon LC observed in *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014, 1022, Parliament would legislate only for the purpose of bringing about an effective result. Its intention can ordinarily be taken to be that an enactment, when brought into force, will not be futile but will have practical consequences for the life of the community. And it is for Parliament, not the Executive – unless Parliament confers the necessary power upon it - to determine when an enactment comes into force. This is an aspect of the wider principle, fundamental to our constitution since the seventeenth century, that Parliament makes the law and the Executive carries the law into effect.

35. Secondly, as I have explained, Parliament's delaying the commencement of a provision, rather than allowing section 4(b) of the 1978 Act (or the equivalent provisions of the 1999 Order or the 2010 Act) to take effect, will usually be referable to the need to allow time for the necessary preparations to be made, by those affected by the provision and by officials, before the provision can be brought into effective operation. In such circumstances, Parliament may enact a commencement provision which specifies a particular date when (or by which

date) a provision is to come into force, such as section 333(2) of the 2003 Act; or, on the other hand, it may enact the more common form of commencement provision which confers on ministers a discretion to fix the commencement date by order: a form of provision of which section 333(3) provides an example. As Lord Nicholls of Birkenhead observed in *Ex p Fire Brigades Union* [1995] 2 AC 513, 574, a provision of the latter kind is often the most convenient way of coping with the practical difficulty that, when the legislation is passing through Parliament, it is not always possible to know for certain what will be a suitable date for the legislation to take effect. Regulations may need drafting, staff and accommodation may have to be arranged, literature may have to be prepared and printed. There may be a host of other practical considerations. In the nature of things, these practical considerations will normally relate to the effective operation of the statute, rather than to its becoming law, insofar as those two matters can be distinguished.

36. If, therefore, Parliament has not been willing to leave it to ministers to decide when provisions are to come into force, it is ordinarily reasonable to infer that it has itself determined how much time should be allowed in order for any practical considerations to be addressed. It is natural to infer that Parliament's intention is that, once the allotted time has expired, the provision should be brought into effective operation as well as being given legal effect.

37. Thirdly, as Hobhouse LJ observed in *Ex p Fire Brigades Union* at pp 526-527, Parliament will be aware that when it has used words which leave it to a minister to appoint the day upon which a statutory provision shall come into force, this has meant that, on occasions, the minister has never made any appointment and the provision has never come into force. It is no doubt because Parliament is aware that some parts of statutes may not be brought into force by the minister that it has on occasions used wording requiring the minister to make his appointment by a certain date, as in the Domestic Violence and Matrimonial Proceedings Act 1976. The effect of such a provision is to impose a duty on the minister to bring the legislation into force by the specified date: *Ex p Fire Brigades Union* at p 550 per Lord Browne-Wilkinson. Another way of ensuring that provisions come into force within a given time is for Parliament itself to fix the date, as in section 333(2) of the 2003 Act. Whichever method is selected, Parliament's decision to fix the time by which the provisions are to come into force will ordinarily reflect the importance which Parliament attaches to the practical effect of the provision in question, and its consequent intention to ensure not merely that it comes into force on the specified date as a matter of law, but that it comes into effective operation as a matter of practical reality.

The commencement provision in the present case

38. It is common ground that it is unnecessary to resort to Parliamentary materials in the present case in order to resolve any ambiguity or obscurity in the legislation. Although counsel referred the court to various background materials, they are of limited relevance. In general, the 2003 Act had its roots in a review of Scottish mental health legislation which had been carried out by a committee chaired by the Rt Hon Bruce Millan at the invitation of the Minister for Health. The committee's recommendations were published in a report entitled *New Directions: Report on the Review of the Mental Health (Scotland) Act 1984* (SE/2001/56), which was laid before the Scottish Parliament in 2001. One of the recommendations was that "patients should have a right of appeal to be transferred from the State Hospital, or a medium secure facility, to conditions of lower security" (recommendation 27.19). As introduced, the Bill which became the 2003 Act did not contain any provision to implement that recommendation. In response to Parliamentary promptings, however, the provisions which became Chapter 3 of Part 17 of the 2003 Act were introduced by amendment at Stage 3 of the Bill.

39. Section 333(2) was also the result of an amendment at Stage 3 of the Bill. Accepting the amendment, the Deputy Minister for Health and Community Care said that it would "provide a guarantee that the new rights will be brought into force no later than May 2006" (*Proceedings of the Scottish Parliament*, 20 March 2003, col 16740). The member who had proposed the amendment responded that a cheer was appropriate (ibid). The language of the debate is consistent with an intention that the rights of application provided by Chapter 3 of Part 17 should be in effective operation by 1 May 2006: it is difficult to reconcile with an intention that the provisions might be in force, but of no effect: *vox et praeterea nihil*.

40. As I have explained, section 333(2) states that Chapter 3 of Part 17 of the 2003 Act "shall come into force on 1st May 2006" or such earlier day as the Scottish Ministers may by order appoint. It is apparent from the provisions of Chapter 3 of Part 17 that all the rights of application for which provision is made require regulations to be made before they can come into practical effect. That is as true of the provisions relating to state hospitals as of the provisions relating to other hospitals, since regulations have to be made under section 273, defining "relevant Health Board", before the Tribunal can determine an application under section 264, as well as regulations under section 268 being necessary before an application can be made under that section. It is therefore impossible to accept the contention of counsel for the Ministers that the Scottish Parliament's intention in relation to sections 264 to 267 was fundamentally different from its intention in relation to sections 268 to 271: in particular, that the former provisions, but not the latter, were intended to come into practical operation by 1 May 2006. There is nothing in the legislation which supports that contention.

41. Notwithstanding the need for regulations to be made in order for any of the provisions of Chapter 3 of Part 17 to be given practical effect, the Scottish Parliament stipulated that all those provisions were to come into force on 1 May 2006, if not earlier. Just as there is nothing in the 2003 Act which enables one to discern different intentions in relation to different provisions of Chapter 3 of Part 17, there is nothing to indicate that the Scottish Parliament intended that the provisions should become law on 1 May 2006 but might nevertheless remain a dead letter for an indefinite period thereafter. In the absence of any such indication, it is reasonable to infer, for the reasons I have explained, that the Scottish Parliament intended that the provisions in question should be in effective operation, as well as being in force, on 1 May 2006.

The discretion to make regulations

42. It has long been a basic principle of administrative law that a discretionary power must not be used to frustrate the object of the Act which conferred it: see for example *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997. If, as I have concluded, it was the intention of the Scottish Parliament that Chapter 3 of Part 17 of the 2003 Act should be in effective operation by 1 May 2006 at the latest, it follows that, although the Ministers had a discretion as to the manner in which they exercised their power to make the necessary regulations, they were under a duty to exercise that power no later than 1 May 2006.

43. In the event, the Ministers' failure to exercise their power to make the necessary regulations under section 268(11) and (12) of the 2003 Act by 1 May 2006, or since that date, has had the result that, although sections 268 to 271 are technically in force, they have no more practical effect today than they had on the date, more than nine years ago, when the 2003 Act received Royal Assent. The Ministers' failure to make the necessary regulations has thus thwarted the intention of the Scottish Parliament. It therefore was, and is, unlawful.

44. In their discussion of this aspect of the case, the Lord Ordinary and the Extra Division attached considerable importance to the fact that sections 268 to 271, unlike sections 264 to 267, did not confer rights of application upon an identified class of patients. It was only in the event that regulations were made, defining the expressions "qualifying patient" and "qualifying hospital", that any individual patient would have such a right. They accepted the Ministers' argument that authorities such as *Julius v Bishop of Oxford* 5 App Cas 214 and *Singh v Secretary of State for the Home Department* [1992] 1 WLR 1052; 1993 SC (HL) 1, which demonstrated that a duty to exercise a power would arise where its exercise was necessary to give effect to rights created by Parliament, were therefore distinguishable. Since no rights were conferred by section 268 in the absence of regulations, it followed that there was no duty to make such regulations.

45. I observe in the first place that the argument is circular: there is no duty to make regulations because no rights have been conferred; no rights have been conferred because no regulations have been made; and no regulations have been made because there is no duty to make regulations. The argument does not, in other words, provide any support for its conclusion, since it is premised upon that conclusion.

46. The fundamental flaw in the Ministers' argument is to assume that a failure to exercise a discretionary power can only be unlawful – or, to put the matter differently, to assume that an obligation to exercise a discretionary power can only arise - where the exercise of the power is necessary to make effective a legal right. That is too narrow an approach, as was made clear in *Padfield,* where the same argument was advanced (see pp 1020-1021) and rejected. As Lord Reid explained in that case at p 1033, the case of *Julius v Bishop of Oxford* is itself authority for going behind the words which confer a statutory power to the general scope and objects of the Act in order to find what was intended. In the words of Lord Cairns LC in *Julius* at pp 222-223, "there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty".

47. The importance of *Padfield* was its reassertion that, even where a statute confers a discretionary power, a failure to exercise the power will be unlawful if it is contrary to Parliament's intention. That intention may be to create legal rights which can only be made effective if the power is exercised, as in *Singh v Secretary of State for the Home Department.* It may however be to bring about some other result which is similarly dependent upon the exercise of the power. Authorities illustrating that principle in the context of a statutory power to make regulations, where such regulations were necessary for the proper functioning of a statutory scheme, include *Greater London Council v Secretary of State for the Environment* [1984] JPL 424 and *Sharma v Registrar to the Integrity Commission* [2007] 1 WLR 2849, para 26, per Lord Hope of Craighead. In the present case, the exercise of the power to make regulations by 1 May 2006 was necessary in order to bring Chapter 3 of Part 17 of the 2003 Act into effective operation by that date, as the Scottish Parliament intended. The Ministers were therefore under an obligation to exercise the power by that date.

48. Furthermore, although at the time when this case was before the Court of Session it might have been thought that the appellant lacked standing to challenge the Ministers' conduct unless he could complain of a violation of his rights, it is now clear from *AXA General Insurance Ltd and others v HM Advocate and others* [2011] UKSC 46; [2012] 1 AC 868; 2012 SC (UKSC) 122 that it is necessary for an applicant for judicial review to demonstrate only a sufficient interest in the

subject matter of the application. As a patient whose detention is authorised by a compulsion order, and who might benefit from regulations made under section 268(11) and (12), the appellant possesses such an interest.

Conclusion

49. For these reasons, I would allow the appeal, recall the interlocutor of the Extra Division and grant declarator that the failure by the Ministers to draft and lay regulations under section 268(11) and (12) of the Mental Health (Care and Treatment) (Scotland) Act 2003 before the Scottish Parliament prior to 1 May 2006, and their continued failure to do so since that date, was and is unlawful.