Neutral Citation Number: [2016] EWCA Civ 125

Case No: C1/2015/1018

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
MR JUSTICE SINGH
CO/1258/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/03/2016

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE McCOMBE
and
LORD JUSTICE DAVID RICHARDS

- -

Between:

SECRETARY OF STATE FOR JUSTICE	**Appellant**
- and -	
PAUL BLACK	**Respondent**

- -
- -

James Eadie QC and David Pievsky (instructed by **Government Legal Department**) for the **Appellant**
Philip Havers QC and Shaheen Rahman (instructed by **Leigh Day**) for the **Respondent**

Hearing date: 15/02/2016

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Approved Judgment

Master of the Rolls:

1. The issue that arises in this appeal is whether Part I of the Health Act 2006 ("the Act"), which contains prohibitions on smoking in certain places and introduces various mechanisms by which such prohibitions are to be enforced, applies to Crown premises, and in particular whether it applies to HMP Wymott (a state-run prison in which the claimant is detained).

2. The claimant sought to challenge the Secretary of State's decision to refuse to provide confidential and anonymous access at that prison to the NHS Smoke-Free Compliance Line. The main basis for the challenge was that the Secretary of State had misdirected himself in law, by concluding that the ban on smoking set out in Chapter 1 of Part 1 of the Act did not bind the Crown and that the Act did not therefore require HMP Wymott to implement the ban.

3. The basic rule, which is long-established, is that no statute binds the Crown unless (i) there is an express provision to that effect; or (ii) that is the necessary implication of the legislation. There is no such express provision here. Singh J held that the Crown is bound by Chapter 1 of Part 1 of the Act by necessary implication and quashed the Secretary of State's decision. The Secretary of State appeals with the permission of the judge.

The relevant legislation

4. Part 1 of the Act relates to smoking. As the preamble to the Act makes clear, the purpose of Chapter 1 of Part 1 was "to make provision for the prohibition of smoking in certain premises, places and vehicles". The architecture of the provisions relating to smoking in Part 1 of the Act is as follows.

5. Section 1 provides:

> "(1) This Chapter makes provision for the prohibition of smoking in certain premises, places and vehicles which are smoke-free by virtue of this Chapter".

6. Section 2 defines "smoke-free premises". Section 3 is headed "smoke-free premises: exemptions". It provides:

> "(1) The appropriate national authority may make regulations providing for specified descriptions of premises, or specified areas within specified descriptions of premises, not to be smoke-free despite section 2.
>
> (2) Descriptions of premises which may be specified under subsection (1) include, in particular, any premises where a person has his home, or is living whether permanently or temporarily (including hotels, care homes, and prisons and other places where a person may be detained)…"

7. The Act imposes duties and penalties on people associated with or present in smoke free premises, places and vehicles. Thus, it is a criminal offence for any person to smoke in a smoke-free place (section 7(2)). Any person occupying or concerned with

the management of smoke-free premises must ensure that no smoking signs are displayed in the ways prescribed in regulations (section 6(3) and (4)): failure to do so will in many cases constitute a criminal offence (section 6(5)).

8. Part 1 provides two levels of enforcement. The first is that the controllers or managers of smoke-free premises are under a statutory duty to "cause" any person smoking in those premises to "stop smoking" (section 8(1)). Failure to comply with that duty is itself a criminal offence, but it is a defence to show that reasonable steps were taken to cause the person to stop smoking, or that the defendant did not know and could not reasonably have been expected to know that the person in question was smoking, or that on other grounds it was reasonable for the defendant not to comply with the duty (section 8(5)).

9. The second level of enforcement is that provided by section 10 and the regulations made thereunder. Section 10(3) provides that it is the duty of an enforcement authority to enforce the provisions of the Act relating to smoke-free premises. Thus, an officer of that authority can exercise powers of entry under section 10(7) and Schedule 2; and he can give penalty notices where he has reason to believe that a person is committing an offence under sections 6(5) or 7(2): see section 9(1). Obstructing such an officer acting in the exercise of his functions under the Act is itself a criminal offence (section 11(1)).

10. Regulations made under section 3 of the Act create exemptions which apply to premises that would otherwise be smoke-free premises under section 2. These are the Smoke-free (Exemptions and Vehicles) Regulations 2007 (SI 2007/765) ("the Regulations"). Regulation 2 provides that the exemptions in Part 2 of the Regulations apply only to premises that would be smoke-free under section 2 of the Act if those exemptions had not been made.

11. Regulation 5 provides:

> **"5 Other residential accommodation**
>
> (1) A designated room that is used as accommodation for persons aged 18 years or over in the premises specified in paragraph (2) is not smoke-free.
>
> (2) The specified premises are –
>
> (a) care homes as defined in section 3 (care homes) of the Care Standards Act 2000;
>
> (b) hospices which as their whole or main purpose provide palliative care for persons resident there who are suffering from progressive disease in its final stages; and
>
> (c) prisons."

12. Part 3 of the Act contains provisions for the "Supervision of management and use of controlled drugs". Section 23 of Chapter 1 of Part 3 provides:

> **"23 Crown application**

(1) This Chapter binds the Crown.

(2) No contravention by the Crown of any provision of this Chapter shall make the Crown criminally liable; but the High Court (or, in Scotland, the Court of Session) may declare unlawful any act or omission of the Crown which constitutes such a contravention.

(3) The provisions of this Chapter apply to persons in the public service of the Crown as they apply to other persons."

The case-law

13. The basic rule to which I have referred at para 3 above has been clearly stated and applied by the courts many times. An important early case is *Gorton Local Board v Prison Commissioners* (17 June 1887) which was approved and fully reported in *Cooper v Hawkins* [1904] 2 KB 164. This was an appeal by case stated to the Divisional Court (Day and Wills JJ). The Local Board made certain by-laws under the Public Health Acts. These provided *inter alia* for the inspection of new housing for the purpose of seeing whether it was fit for habitation. The Prison Commissioners (an emanation of the Crown) built some houses on the site of one of its prisons. They refused to allow the Board to carry out an inspection. The Board issued proceedings to enforce the by-laws. The issue was whether the by-laws were applicable to the Crown. There was no express mention of the Crown in the relevant legislation. The question was whether the by-laws applied by necessary implication.

14. Day J said:

> "There is certainly no express mention of the Crown so as to bind the Crown in the Public Health Act, 1875, and there is certainly no necessary implication that the Crown itself is to be bound. In the absence of express words the Crown is not to be bound, nor is the Crown to be affected except by the necessary implication. There are many cases in which such implication does necessarily arise, because otherwise the legislation would be unmeaning. That is what I understand by "necessary implication". Here the Crown is not mentioned and no necessary implication of any sort or kind arises, and it is clear that the Crown by its officials is quite competent to provide for the sanitary condition of these houses. It is quite competent to do all that it thinks fit to be done in the matter, and it is not to be controlled – that is, to my mind, a matter of the greatest public interest – the State is not to be controlled in the disposition of the property entrusted to the State for State management by any local authority whatever. I am clearly of opinion that on this ground the decision of the magistrate must be upheld and the appeal dismissed."

15. Wills J said:

> "How can it be said here that there is a necessary implication of the Crown? It is not necessary, as it seems to me, for the purposes of the public health and public good, which are intended to be served by the Public Health Act, that this jurisdiction should be vested in the local board. In the year 1865 substantially the same legislation with regard to the possibility of the enactment of by-laws by local boards was in existence, and in that year was passed the Prison Act, 1865, which enacts amongst other things, by s.26, that the Secretary of State "may approve of the plans submitted to him with or without modification, or may disapprove of the same," and there is no doubt that the subject-matter to which these plans may relate is large enough to cover such a building as this. There is, therefore, a high and responsible officer of State in whom is vested the discretion of approving or disapproving of such plans, and in whom was vested that discretion at a time when these by-laws and a great many other by-laws of a similar character must have been in force under the Local Government Act of 1858. Can anybody suppose that it was intended that the approval of the Secretary of State should not be effectual, and that because locus in quo was situated within the area of the jurisdiction of a local board, although the Secretary of State approved the plans, the plans which he approved should not be followed out? It seems to me something like an absurdity to suppose such a thing, and there is certainly as much reason in legislation giving credit to the Secretary of State that he would do his duty and would see that the great interests of the health of the public were regarded as in supposing that the local board in each district would do its duty. The protection of the public is as complete and as effectual as under the approval or disapproval of the local board. "

16. The court was also faced with an argument based on section 327 of the 1875 Act which provided exemption in respect of certain Government property. It was submitted that, since the Crown could not rely on the section 327 exemption, it must necessarily be inferred that the Crown was liable. This submission reflected the well-known canon of construction *expressio unius, exclusio alterius.* It was roundly rejected by Wills J in these terms:

> "It is suggested by Mr. Charles, and one was naturally struck with the argument at first, that we find a particular saving clause with regard to some portion of the rights of the Crown in s. 327 of the Public Health Act, and therefore that it may be presumed that all other exceptions of the Crown were intended to be done away with and to be given up. When one comes to look at the nature of the Public Health Act, 1875, generally and especially when one has regard to the consideration with which I have already dealt in regards to specific matters, and the fact of an approval being already vested in the Secretary of State under exactly similar legislation, I think that it is impossible to

> suppose that the saving clause, although limited as it is, was meant to give up everything else. It is always a question of circumstances, and it is very often a question not quite free from difficulty, whether a particular clause is put either in an Act of Parliament or in any other instrument ex majori cautelâ, or whether it is put in for the purpose of limiting the application of its provisions which otherwise might be supposed to extend beyond its own limits. It is seldom easy to say without a good deal of consideration which kind of interpretation ought to be put upon it. It seems to me, I confess, that, looking at the very great alteration which would be made in the status of the Crown property all over the kingdom if we were to hold that this exception of the rights of the Crown in s. 327 was intended to give up everything else, it is impossible for us to say that really was the intention of the clause, and I think that the clause was put in simply ex abundanti cautelâ."

17. In *Hornsey UDC v Hennell* [1902] 2 KB 73, the question on an appeal by case stated to the Divisional Court (Lord Alverstone CJ, Darling and Channell JJ) was whether the Crown, not being named in section 150 of the Public Health Act 1875, was bound by its provisions and therefore liable for expenses incurred by a local authority in respect of property owned and occupied for Crown purposes. Section 327 was relied on by the appellant in the same way as it had been relied on in *Gorton.* At p 80, Lord Alverstone (who gave the judgment of the court) said that the "principle that Acts of Parliament do not impose pecuniary burdens upon Crown property unless the Crown is expressly named, or unless by necessary implication the Crown has agreed to be bound is…still applicable to such a case". At p 81, he referred to earlier authorities which applied the principle that "notwithstanding the insertion of special exemptions in favour of certain Crown property…these exemptions were merely inserted ex majori cautelâ". He said:

> "There is, in our opinion, no such general practice as to lead to the view that the original doctrine of Crown exemption has ceased to exist, or has been infringed upon, or that the insertion of a particular protecting clause is intended to shew that only that class of Crown property was intended to be exempt."

18. In *Province of Bombay v Municipal Corporation of the City of Bombay* [1947] AC 58, the question was whether the Crown was bound by a statute which gave the Municipality power to carry water-mains "through, across or under any street….into, through or under any land whatsoever within the city". The judgment of the Privy Council was given by Lord Du Parcq. At p 61, he said: "If, that is to say, it is manifest from the very terms of the statute, that it was the intention of the legislature that the Crown should be bound, then the result is the same as if the Crown had been expressly named". He rejected the view of the High Court of Bombay that the Crown was bound by necessary implication if the legislation could not otherwise operate with reasonable efficiency. That view ignored "the possibility that the legislature may have expected that the Crown would be prepared to co-operate with the corporation so far as its own duty to safeguard a wider public interest made co-operation possible and politic, and may well have thought that to compel the Crown's subservience to the

corporation beyond that point would be unwise". On this point, he made reference with apparent approval to what Wills J had said in *Gorton.* Apart from these considerations, however, their Lordships were of the opinion that to interpret the principle in the sense put on it by the High Court would be "to whittle it down" and they could find no authority to support such an interpretation.

19. Lord Du Parcq then considered what relevance, if any, the apparent purpose of the statute had to the question of whether it was binding on the Crown by necessary implication. At p 63, he said:

> "Their Lordships prefer to say that the apparent purpose of the statute is one element, and may be an important element, to be considered when an intention to bind the Crown is alleged. If it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound. Their Lordships will add that when the court is asked to draw this inference, it must always be remembered that, if it be the intention of the legislature that the Crown shall be bound, nothing is easier than to say so in plain words."

20. At p 64, he said that their Lordships had done no more than express in their own words "a well-settled proposition of law". At p 65, he referred to the argument that an inference might be drawn that it was intended that the Crown should be bound from (i) certain express references to the Crown in other parts of the Act itself and (ii) the fact that, by the Government Building Act 1899, the legislature had provided for the exemption of government buildings from certain municipal laws. This argument (described by Lord Du Parcq as "not unfamiliar") was that no express provision saving the rights of the Crown would be necessary if the Crown were already immune. The argument was rejected on the grounds that "as has been said many times, such provisions may often be inserted in part of an Act, or in a later general Act, ex abundanti cautelâ".

21. In *BBC v Johns* [1965] Ch 32, Diplock LJ made the following statement:

> "*The Crown immunity question.* The B.B.C. is liable to pay income tax under schedule D upon any annual profits or gains accruing to it from its activities if it is included in the expression "any person" in Section 122(l)(a)(i) and (ii) of the Income Tax Act, 1952. The question is thus one of construction of a statute. Since laws are made by rulers for subjects, a general expression in a statute such as "any person", descriptive of those upon whom the law imposes obligations or restraints is not to be read as including the ruler himself. Under our more sophisticated constitution the concept of sovereignty has in the course of history come to be treated as comprising three distinct functions of a ruler: executive, legislative and judicial, though the distinction between these functions in the case, for instance, of prerogative powers and administrative tribunals is

> sometimes blurred. The modern rule of construction of statutes is that the Crown, which today personifies the executive government of the country and is also a party to all legislation, is not bound by a statute which imposes obligations or restraints on persons or in respect of property unless the statute says so expressly or by necessary implication."

22. In *Lord Advocate v Dunbarton District Council* [1990] 2 AC 580, the House of Lords reviewed a number of the authorities. Lord Keith gave the leading speech with which the other members of the Judicial Committee agreed. He cited with approval a number of earlier decisions, including *Gorton, Cooper* and *Bombay*. He specifically approved the statement by Diplock LJ in *Johns* as accurately and correctly expressing the effect of the authorities. At p 598B, he said that the mere fact that the statute in question has been passed for the public benefit is insufficient to found the necessary implication. At p 600D, he said that there was nothing "to indicate that if the Crown were not bound by [the statute] the purpose sought to be achieved by the enactment would in any material respect be frustrated". In using the language of frustration of purpose, Lord Keith must have had in mind what Lord Du Parcq said at p 63 of *Bombay*. He concluded at p 604C:

> "Accordingly it is preferable, in my view, to stick to the simple rule that the Crown is not bound by any statutory provision unless there can somehow be gathered from the terms of the relevant Act an intention to that effect. The Crown can be bound only by express words or necessary implication. The modern authorities do not, in my opinion, require that any gloss should be placed upon that formulation of the principle. However, as the very nature of these appeals demonstrates, it is most desirable that Acts of Parliament should always state explicitly whether or not the Crown is intended to be bound by any, and if so which, of their provisions."

23. Reference was also made during the course of argument both here and in the court below to the decision of the Divisional Court in *R (Revenue and Customs Commissioners) v Liverpool Coroner* [2015] QB 481. The Coroner issued notices under para 1(2) of Schedule 5 to the Coroners and Justice Act 2009, requiring the Revenue and Customs Commissioners to provide occupational information concerning the deceased for the purpose of investigating whether he had died as a result of an industrial disease. The Commissioners sought judicial review of the decision to issue the notices and asserted that the 2009 Act, which did not expressly bind the Crown, did not do so by necessary implication either. Gross LJ gave the judgment of the court. He referred to the case law (some of which I have summarised above) and said that the test as to whether particular legislation binds the Crown is well settled. At para 44, he drew attention to the Privy Council decision in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 and said that the exposition by Lord Hoffmann at paras 16 to 27 of the process of implication "serves as a reminder of the Court's task of ascertaining the true intention of the legislature from the terms of the statute understood in context".

24. Gross LJ said at para 48 that, if Crown immunity applied to Schedule 5 of the 2009 Act, then it would apply to the police, the NHS and private prisons, but would not

apply to the MoD, the Commissioners or prisons in the public sector. The court found that there was nothing to suggest a legislative intention to draw "so curious a distinction" and was unable to discern any "coherent, still less cogent, reasons" for such a distinction. At para 49, he said that he was mindful of the submission that generally speaking co-operation was to be expected from emanations of the Crown, but:

> "We are concerned here, typically, with matters such as the investigation of deaths in state custody. In this area it seems to us implausible that Parliament would have legislated with the purpose already outlined and left key Crown emanations to co-operate or not, depending on whether they regarded such co-operation as "possible and politic". Indeed to do so, could create the greatest difficulty for the Crown bodies concerned. We can well understand the Privy Council's concern in the Bombay case to keep the Crown's subservience to the municipal corporation within the limits of sensible co-operation; suffice to say that in the sphere of fulfilling article 2 obligations, very different considerations arise."

25. The court concluded, therefore, that the legislative purpose of Schedule 5 would be frustrated if it was not binding on the Crown. This purpose was that of strengthening the powers of coroners and thereby discharging the state's procedural obligation under article 2 of the European Convention on Human Rights. Investigations into deaths for which the State might be responsible would be frustrated if the 2009 Act did not bind the Crown.

The judgment

26. The judge held at para 49 that it was clear from the terms of the Act, read in its proper context in accordance with the principles to be derived from the case law, that it should apply to all public places and workplaces which fell within its scope, including those for which the Crown is responsible. The beneficent purpose of the Act would be "wholly frustrated" if the Crown were not bound by it. It was clear from the terms of the Act that Parliament had decided that the time had come when the criminal law had to enter this area of social life; the time had passed when it could simply be left to action through the powers of employers, landowners and Government policy.

27. At para 51, he said that the express reference to the possibility of an exemption being made in respect of prisons in section 3(2) was a statutory indicator that Parliament envisaged that, subject to any express exemption, prisons would be covered by the Act. There was no indication in the Act that Parliament intended the reference to prisons to be confined to the small number of existing private prisons or indeed to draw any distinction between private and public prisons in this context.

28. The judge found support for his interpretation of section 3 in the Regulations of 2007. He also relied on certain background material to which he referred at paras 55 to 62 of his judgment and to the international and European context in which the Act fell to be interpreted, which he summarised at paras 63 to 67.

29. He did, however, recognise that section 23 of the Act was a powerful indicator to the contrary. He did not, however, regard this as an insuperable obstacle to his

interpretation for two reasons. First, section 23 is in Part 3 of the Act; whereas section 3 is in Part 1. They are different Parts dealing with different subject-matters. Secondly, section 23 is concerned to specify the exact way in which Chapter 1 of Part 3 is to bind the Crown, namely as described in section 23(2) and (3). In other words, it was because Parliament wished to make these additional legal provisions clear that section 23 was inserted into the Act. On the other hand, Chapter 1 of Part 1 of the Act has a beneficent purpose which would be wholly frustrated if it did not bind the Crown.

Discussion

30. Chapter 1 of Part 1 of the Act is not expressly applied to the Crown. The Crown is therefore not bound unless it is bound by necessary implication. Necessary implication is a strict test, not least because nothing is easier than to provide expressly that the statute (or the particular statutory provision in question) is binding on the Crown (*Bombay* at p 63). Parliament is presumed to know how strict a test it is. The courts have variously said that the implication must be necessary because without it the legislation would be "unmeaning" (per Day J in *Gorton*)*;* or it must be "manifest from the very terms of the statute that it was the intention of the legislature that the Crown should be bound" (*Bombay* p 61); or that the test is not satisfied "unless there can somehow be gathered from the terms of the relevant Act an intention [that the Crown is bound]" (*Dunbarton* p 604C). Care must be taken not to "whittle down" the principle by importing notions of reasonableness or efficiency (*Bombay* p 62). It is not sufficient that the implication would be desirable, reasonable or sensible. Nor is it sufficient that the statute in question has been passed for the public good (*Dunbarton* p 598B).

31. The strictness of the test of necessary implication is illustrated by the repeated refusal of the courts to accept the argument that the Crown is bound by a statute because it is not included in a statutory list of exempt bodies (the *expressio unius, exclusio alterius* principle). I refer, for example, to the statement of Wills J in *Gorton* that he was naturally struck at first with the strength of the argument that the exclusion of the Crown from the list of exempt bodies mentioned in section 327 of the Public Health Act 1875 indicated an intention to include the Crown as a body to which the statute was intended to apply. But he rejected that approach (as did Lord Du Parcq in *Bombay* at p 65), although it would have been an orthodox and unexceptionable route to ascertaining the intention of Parliament as part of the process of statutory interpretation in most contexts.

32. The test may be satisfied if the statutory purpose would be wholly frustrated were the Crown not to be bound by its terms (*Bombay* at p 63). In determining whether the objects of a statute would be wholly frustrated if the Crown were not bound, the courts presume that the Crown acts responsibly in the public interest and in accordance with any policies which are broadly intended to meet those objects. The reasoning of Day J in *Gorton* is relevant here. He said that the Crown was quite "competent" to provide for the necessary sanitary condition of the houses and to do all that it thought fit to be done. Wills J said that it was to be presumed that the Secretary of State would do his duty and act in the public interest. The same point was made by Lord Du Parcq in *Bombay* at p 62. It is this expectation that the Crown will generally act conscientiously in the public interest (and be subject to judicial review on the

usual public law grounds) which usually leads the court to conclude that the statutory purpose would not be wholly frustrated even if the Crown were not bound.

33. Mr Havers QC places considerable reliance on the *Liverpool Coroner* case. He submits that the court's conclusion that there was nothing to suggest a legislative intention to draw "so curious a distinction" between public and private sector bodies and its inability to discern any coherent, still less cogent, reasons for such a distinction applies with equal force here. In reaching its decision, the Divisional Court was well aware of the argument that co-operation is to be expected from the Crown. It said, however, that "co-operation has its limits" and added:

> "it seems to us implausible that Parliament would have legislated with the purpose already outlined and left key Crown emanations to co-operate or not, depending on whether they regarded such co-operation as 'possible and politic'. Indeed to do so, could create the greatest difficulty for the Crown bodies concerned."

34. The *Liverpool Coroner* case did not, however, purport to create new law. The court referred to and applied some of the cases to which I have earlier referred, including in particular *Bombay* and *Dunbarton.* As regards the statement that "co-operation has its limits", it is clear from para 49 (see para 24 above) that the Divisional Court was able to distinguish *Bombay.* It concluded that "very different considerations" arose in the context of article 2 of the Convention that was in the case before it, as compared with the situation in *Bombay.* I accept the submission of Mr Eadie that in *Bombay,* the legislature was coherently to be regarded as intending the Crown to co-operate in the light of the wider public interest, rather than to be subservient to municipal authority.

35. I should add that care should be exercised in relying on the observations of Lord Hoffmann in *Belize* which were relied on by the Divisional Court in *Liverpool Coroner* (see para 15 above). It can always be said that, in construing a statute, the court's task is to ascertain the intention of the legislature. But in conducting that exercise, the court should give full weight to the strictness of the test that must be satisfied for the Crown to be bound by a statute. In ascertaining the legislative intention, the court should presume that Parliament is aware of the test and that, if it intends the Crown to be bound by a statute, it is very easy to say so.

36. Mr Havers also relies on regulation 5(2)(c) of the Regulations which makes an exemption in respect of designated rooms in prisons and draws no distinction between private and public prisons. But in my view, even if it is possible to have regard to the Regulations as an aid to the construction of the Act, regulation 5(2)(c) is of no assistance. That is because the same question arises in relation to both the Regulations and the Act: is the Crown bound?

37. He also relies on the legislative context comprehensively set out by the judge at paras 55 to 67 of his judgment. This includes the White Paper "*Choosing Health, making healthy choices easier"* (2004); the Explanatory Notes to the Act; and the Framework Convention on Tobacco Control (2003) drafted under the auspices of the World Health Organisation. He submits that this background demonstrates the correctness of the judge's conclusion that the statutory ban on smoking was to apply to all public places and workplaces, including those for which the Crown was responsible. The

background to the Act shows that it was enacted in furtherance of a move towards a comprehensive ban on smoking.

38. Mr Havers submits that, against this background, the intention of Parliament in passing the Act was that it should apply to all places within its scope, including those for which the Crown was responsible. If it were left to the Crown to formulate an effective ban on smoking policy and to introduce an effective means of enforcement, the statutory purpose would be frustrated. Court control by means of judicial review is a poor substitute for the scheme created by the Act. It follows that, if the Crown were not bound by the Act, the statutory purpose would be frustrated. Parliament cannot have intended that the beneficent purpose of the Act should only apply to private prisons (approximately 10% of the total number at the time of the passing of the Act). If the Crown were not bound by Chapter 1 of Part 1 of the Act, this beneficent purpose would be wholly frustrated.

39. I do not accept that the purpose of the Act would be wholly frustrated if Chapter 1 of Part 1 did not apply to the Crown. Although it is true that the 2004 White Paper (i) recognised the dangers of both active and passive smoking, (ii) noted a change in public attitude to smoking restrictions over recent years and (iii) expressed the desire to "shift the balance significantly" in favour of smoke-free environments, nevertheless it also stated that whether to ban smoking in certain establishments (including prisons) would need to be the subject of consultation. In other words, it acknowledged that it would not necessarily be appropriate to extend the smoking ban to all premises. Although the general aim of the Act was to shift the balance in favour of smoke-free environments, the Act did not require all premises to be smoke-free. Smoke-free premises are carefully defined. Moreover, there is a wide power in section 3(1) to pass regulations excluding categories of premises from the reach of section 2. The purpose of the Act cannot, therefore, be said to be to apply Chapter 1 of Part 1 to *all* premises. In these circumstances, it is impossible to hold that, if Chapter 1 of Part 1 were not to apply to the Crown, the purpose of the Act would be wholly frustrated.

40. The submission of Mr Havers also fails to have sufficient regard to the important point that, in determining whether a statutory purpose would be wholly frustrated if the statute were not binding on the Crown, the courts place considerable weight on the expectation that the Crown will perform its constitutional duty by acting in the public interest and applying relevant policies, subject to the control of the courts by judicial review. As regards the existence of this duty, I refer to what Wills J said in *Gorton* (see para 15 above) and what Lord Du Parcq said in *Bombay* (see para 18 above). I accept that judicial review is a less effective means of control than the methods of enforcement (backed by the sanction of the criminal law) provided by the Act. But the question is whether the statutory purpose would be wholly frustrated if the Crown were not bound. The case law shows that the courts are unwilling to answer this question in the affirmative in circumstances where it is to be expected that the Crown will act in the public interest so as substantially to meet the statutory objectives even if it is under no statutory obligation to do so.

41. What light does section 23 shed on the question whether the Crown is bound by Chapter 1 of Part 1? As we have seen, the judge considered that section 23 is the most powerful indicator in the terms of the Act itself that the Crown is not bound by Chapter 1 of Part 1. Mr Havers supports the judge's reasons for concluding nevertheless that the Crown is bound by Part 1. He submits that Parts 1 and 3 of the

Act cover entirely different ground and will have had an entirely different legislative and drafting history. It is happenstance that they are in the same statute. Part 1 relates to smoking and Part 3 relates to drugs, medicines and pharmacies and the supervision, management and use of controlled drugs. It cannot be inferred from the fact that Chapter 1 of Part 3 is stated expressly to bind the Crown that Parliament intended the Crown not to be bound by Chapter 1 of Part 1. Section 23 is concerned to specify the exact way in which Chapter 1 of Part 3 is to bind the Crown. Specifically, section 23(2) states that no contravention by the Crown of any provision of that chapter makes the Crown criminally liable, but the High Court may declare unlawful any act or omission of the Crown which constitutes such a contravention. Section 23(3) states that the provisions of Chapter 1 of Part 3 apply to persons in the public service of the Crown as they apply to other persons. Mr Havers submits that the judge was therefore correct to conclude that it was because Parliament wished to make those additional legal provisions clear that section 23 was inserted into the Act.

42. In my view, these attempts to diminish the significance of section 23(1) are unconvincing. The fact that section 23 is in Part 3 of the Act which deals with a different subject-matter from that dealt with in Part 1 is of no significance. The important point is that they are both in the same piece of legislation. Parliament must be taken to have been alive to the general principle that the Crown is not bound by a statute unless it is bound expressly or by necessary implication. Section 23 demonstrates the recognition by Parliament of the need (or the desirability for clarity) of expressly stating when and how the parts intended to bind the Crown do so. I accept the submission of Mr Eadie that the statement in section 23(1) that Chapter 1 of Part 3 binds the Crown is only explicable on the basis that the Crown would otherwise not be bound. That is a powerful pointer to the conclusion that, since there is no counterpart of section 23(1) in Part 1, the Crown is not bound by Part 1.

43. I cannot accept that the reason for section 23 was solely to specify the exact way in which the Crown was to be bound by Part 3. If that had been the sole object of section 23, it would have been simple enough to enact section 23(2) and (3) alone. Section 23(1) would have been misleading, stating that Chapter 1 of Part 3 binds the Crown (i.e. in every respect) or at best otiose (if the sole purpose of subsection (1) was to introduce subsections (2) and (3)).

44. Of perhaps greater importance is the fact that, if the judge is right about the significance of section 23, the contrast between Part 1 and Part 3 is remarkable. In Part 3, Parliament has expressly provided that the Crown is bound and has set out carefully the consequences of a contravention by the Crown of any provision of Chapter 1 of Part 3. These include that the Crown is not criminally liable for any contravention. On the other hand, in Part 1, Parliament has not expressly provided that the Crown is bound and has not specified the consequences of a contravention by the Crown of any provision of Chapter 1 of Part 1. It must follow that, if the Crown is bound by Chapter 1 of Part 1, it is subject to all the criminal sanctions provided for by the Act. No explanation has been put forward as to why, if it had intended the Crown to be bound by both Parts of the Act, Parliament should have treated the Crown so differently in the two Parts. As Mr Eadie points out, the subject-matter of Chapter 1 of Part 3 includes dangerous controlled drugs like heroin. If the judge is right, why should Parliament have exempted the Crown from criminal liability for breaches of Chapter 1 of Part 3, but not exempted it from criminal liability for breaches of

Chapter 1 of Part 1? Mr Havers responds by saying that inhalation of smoke is dangerous and causes death and serious illness. I do not doubt this. But controlled drugs are a scourge on our society; and they are dangerous and cause death. If the Crown is bound by Chapter 1 of Part 1, there is an inexplicable disparity in the treatment of breaches by the Crown of the statutory provisions. This alone powerfully suggests that Parliament cannot have intended that the Crown should be bound by Chapter 1 of Part 1.

45. Even if section 23 had not been included in the Act, I would have held for the reasons given above that the Crown was not bound by Chapter 1 of Part 1. The stringent necessary implication test is not satisfied. But this conclusion is reinforced by section 23. The inclusion of section 23 is a formidable obstacle to the submissions of Mr Havers. As we have seen, the *expressio unius exclusio alterius* rule of construction cannot be invoked in order to establish that the Crown is bound by necessary implication. The rule that the Crown is not bound by a statute unless bound expressly or by necessary implication is a powerful one. In particular, the necessary implication test is not satisfied simply because the Crown is *not* included in a statutory list of exempt bodies. But the converse is not true. Where the statute states that the Crown *is* bound by some of its provisions and is silent as to whether it is bound by any other provisions, that is highly relevant to the question whether the Crown is bound by those other provisions. This is because it sheds light on whether there is a necessary implication that the Crown is bound by the other provisions. The clearest source for finding that the Crown is bound by necessary implication is the language of the statute itself: see para 30 above. That is why, as the judge recognised, section 23 is of such significance.

46. I need to deal with the judge's point that section 3(2) was a statutory indicator that, unless an exemption applied, prisons (i.e. all prisons) would be covered by the Act. Mr Havers submits that there is nothing to suggest any legislative intention to draw the "curious" distinction between public prisons and private prisons which is advanced by the Secretary of State in this case. He says that there is no coherent or cogent reason for such a distinction. The express reference to prisons in section 3(2) of the Act without any distinction between private and public prisons indicates that Parliament intended all prisons to be covered by the Act.

47. I accept that, at first sight, it might seem odd to legislate only for private prisons, which represented only a small percentage of the prison estate. But there were private prisons for which the Act had to cater and the number of these might increase over time. More fundamentally, section 3(2) is of little significance as a statutory indicator when account is taken of the weight to be accorded to (i) the general rule that the Crown is not bound unless expressly or by necessary implication; and (ii) the effect of section 23 of the Act. In my view, section 3(2) does not suggest, still less indicate decisively, that the Crown is bound by Chapter 1 of Part 1.

Conclusion

48. For all these reasons, I would allow the appeal.

Lord Justice McCombe:

49. I agree.

Lord Justice David Richards:

50. I also agree.