Neutral Citation Number: [2018] EWCA Civ 2696

Case No: C1/2017/3260

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Irwin LJ and Haddon-Cave J
[2017] EWHC 2815 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/12/2018

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE DAVIS
and
LADY JUSTICE ASPLIN

- -

Between :

R (on the application of BA)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR HEALTH AND SOCIAL CARE	**Respondent**
- and -	
NHS BLOOD AND TRANSPLANT	**Interested Party**

- -
- -

Helen Mountfield QC and **Sarah Hannett** (instructed by **Deighton Pierce Glynn**) for the **Appellant**
Ivan Hare QC (instructed by **the Government Legal Department**) for the **Respondent**
The **Interested Party** did not appear and was not represented

Hearing date : 20 November 2018

- -

Approved Judgment

Sir Terence Etherton MR, Lord Justice Davis and Lady Justice Asplin :

Introduction

1. Paragraph 4 of the NHS Blood and Transplant (Gwaed a Thrawsblaniadau'r GIG) (England) Directions 2005 ("the 2005 Directions"), which were made by the Secretary of State for Health pursuant to the National Health Service Act 1977 ("the 1977 Act"), directed NHS Blood and Transplant Special Health Authority ("NHSBT") to allot organs for transplantation by prioritising persons ordinarily resident in the United Kingdom over persons not ordinarily resident (subject to limited exceptions). The 1977 Act has been repealed by the National Health Service Act 2006 ("the 2006 Act") but the 2005 Directions, as amended, continue in force under various statutory saving provisions. The issue on this appeal is whether that direction for prioritising those ordinarily resident in the United Kingdom, insofar as it applies to kidney transplants, was beyond the powers of the Secretary of State (*ultra vires*).

2. The appellant, who is suffering from end-stage kidney disease, entered the United Kingdom illegally in 2003 or 2004 and remained here illegally until he was granted limited leave to remain in July 2018.

3. This appeal is from the order dated 9 November 2017 of Irwin LJ and Haddon-Cave J (as he then was), sitting in the Divisional Court of the Queen's Bench Division, dismissing the appellant's application for judicial review.

4. We agreed to hear the appeal, without objection by the respondent Secretary of State, despite the appellant having been granted limited leave to remain since the date of the Divisional Court's order. There is a public interest in determining the appeal, which does not depend on a detailed consideration or dispute of fact and turns on a point of statutory interpretation. There are other existing and anticipated cases affected by the issue. Further, the point involves consideration of the ambit and consequences of the Secretary of State's overriding duty under section 1(1) of the 1977 Act and section 1(1) of the 2006 Act to promote a comprehensive health service, which is of considerable public importance beyond the facts and precise issue in the present case.

5. The appellant's challenge is advanced purely on the ground of *ultra vires*. It is not based on grounds of irrationality or the appellant's human rights under the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

The relevant statutory framework

6. The 2005 Directions state that they were made by the Secretary of State in exercise of the powers conferred on her by sections 16D(1), 17 and 126(4) of the 1977 Act.

7. The 1977 Act was repealed in its entirety by Schedule 4 of the National Health Service (Consequential Provisions) Act 2006 ("the Consequential Provisions Act"). Schedule 2 Part 1 para 1(2) of the Consequential Provisions Act contains the following general saving provision for anything done under a section of the 1977 Act that is re-enacted in the 2006 Act:

> "(2) Any subordinate legislation made or other thing done, or having effect as if made or done, under or for the purposes of

> any provision repealed and re-enacted by the consolidating Acts, if in force or effective immediately before the commencement of the corresponding provision of the consolidating Acts, has effect thereafter as if made or done under or for the purposes of that corresponding provision."

8. The 1977 Act was one of "the consolidating Acts" as defined by section 1 of the Consequential Provisions Act.

9. Sections 16D(1), 17 and 126(4) of the 1977 Act have their equivalent in sections 7, 8 and 272(7) of the 2006 Act. Relevant provisions of the 1977 Act are set out in the appendix to this judgment.

10. The 2006 Act is a consolidating Act. It is the latest in a sequence of Acts consolidating provisions relating to the National Health Service ("the NHS") since the original National Health Service Act 1946. Some parts of the 1946 Act, in particular section 1, have been reproduced in successor legislation with only stylistic rather than substantive changes. Other sections have undergone more radical change.

11. Section 1 of the 2006 Act provides as follows, so far as relevant:

> "**1 Secretary of State's duty to promote health service**
>
> (1) The Secretary of State must continue the promotion in England of a comprehensive health service designed to secure improvement—
>
> (a) in the physical and mental health of the people of England, and
>
> (b) in the prevention, diagnosis and treatment of illness.
>
> (2) The Secretary of State must for that purpose provide or secure the provision of services in accordance with this Act.
>
> (3) …
>
> (4) The services so provided must be free of charge except in so far as the making and recovery of charges is expressly provided for by or under any enactment, whenever passed."

12. Prior to the Health and Social Care Act 2012 ("the 2012 Act") the 2006 Act section 3(1) imposed a duty on the Secretary of State in the following terms:

> "**3 Secretary of State's duty as to provision of certain services**
>
> (1) The Secretary of State must provide throughout England, to such extent as he considers necessary to meet all reasonable requirements–
>
> (a) hospital accommodation,

(b) other accommodation for the purpose of any service provided under this Act,

(c) medical, dental, ophthalmic, nursing and ambulance services,

(d) such other services or facilities for the care of pregnant women, women who are breastfeeding and young children as he considers are appropriate as part of the health service,

(e) such other services or facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as he considers are appropriate as part of the health service,

(f) such other services or facilities as are required for the diagnosis and treatment of illness."

13. Those provisions are substantively the same as in section 3(1) of the 1977 Act. In 2002 those functions of the Secretary of State were by regulation made exercisable on his behalf by Primary Care Trusts. Pursuant to the 2012 Act, on 1 April 2013 Primary Care Trusts were abolished and Clinical Commissioning Groups ("CCGs") were established to perform some of the front line functions previously conferred on the Secretary of State by section 3 of the 1977 Act. Section 3 as amended, and so far as relevant, provides as follows:

"**3 Duties of clinical commissioning groups as to commissioning certain health services**

(1) A clinical commissioning group must arrange for the provision of the following to such extent as it considers necessary to meet the reasonable requirements of the persons for whom it has responsibility—

(a) hospital accommodation,

(b) other accommodation for the purpose of any service provided under this Act,

(c) medical, dental, ophthalmic, nursing and ambulance services,

(d) such other services or facilities for the care of pregnant women, women who are breastfeeding and young children [as the group considers] are appropriate as part of the health service,

(e) such other services or facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness [as the group considers] are appropriate as part of the health service,

(f) such other services or facilities as are required for the diagnosis and treatment of illness.

> (1A) For the purposes of this section, a clinical commissioning group has responsibility for—
>
> (a) persons who are provided with primary medical services by a member of the group, and
>
> (b) persons who usually reside in the group's area and are not provided with primary medical services by a member of any clinical commissioning group.
>
> (1B) …
>
> (1C) The power conferred by subsection (1B)(b) must be exercised so as to provide that, in relation to the provision of services or facilities for emergency care, a clinical commissioning group has responsibility for every person present in its area.
>
> (1D) Regulations may provide that subsection (1A) does not apply—
>
> (a) in relation to persons of a prescribed description (which may include a description framed by reference to the primary medical services with which the persons are provided);
>
> (b) in prescribed circumstances."

Such regulations must be made by statutory instrument: 2006 Act section 272(2), the equivalent of which in the 1977 Act was section 126(1).

14. Section 3A provides for CCGs to commission further services and facilities, as follows:

> "**3A Power of clinical commissioning groups to commission certain health services**
>
> (1) Each clinical commissioning group may arrange for the provision of such services or facilities as it considers appropriate for the purposes of the health service that relate to securing improvement—
>
> (a) in the physical and mental health of the persons for whom it has responsibility, or
>
> (b) in the prevention, diagnosis and treatment of illness in those persons.
>
> (2) A clinical commissioning group may not arrange for the provision of a service or facility under subsection (1) if the Board has a duty to arrange for its provision by virtue of section 3B or 4.

> (3) Subsections (1A), (1B) and (1D) of section 3 apply for the purposes of this section as they apply for the purposes of that section."

15. Section 5 states that Schedule 1 makes further provision about services under the 2006 Act. Paragraph 7C of Schedule 1 imposes on the Secretary of State a specific duty to make arrangements, for the purposes of the health service, for "facilitating tissue and organ transplantation".

16. Section 7 provides that the Secretary of State may direct a Special Health Authority to exercise any functions of the Secretary of State or any other person which relate to the health service in England and are specified in the direction. Section 275(1) defines "functions" as including powers and duties. NHSBT is a Special Health Authority. It was established pursuant to section 11 of the 1977 Act, which gave the Secretary of State power to establish Special Health Authorities for purpose of exercising any function conferred on them by or under the 1977 Act. The equivalent to that provision in the 2006 Act is section 28. As stated above, the equivalent provision to section 7 of the 2006 Act in the 1977 Act was section 16D, which was one of the provisions pursuant to which the 2005 Directions were stated to have been made.

17. Section 8 provides that the Secretary of State may give directions to, among others, Special Health Authorities, as follows:

> **"8 Secretary of State's directions to certain health service bodies**
>
> (1) The Secretary of State may give directions to any of the bodies mentioned in subsection (2) about its exercise of any functions.
>
> (2) The bodies are—
>
> …
>
> (d) Special Health Authorities.
>
> (3) Nothing in provision made by or under this or any other Act affects the generality of subsection (1)."

As stated above, the equivalent provision in the 1977 Act was section 17, which was another of the provisions pursuant to which the 2005 Directions were stated to have been made.

18. Section 175 of the 2006 Act, which is the equivalent of section 121 of the 1977 Act, states that regulations may provide for the making and recovery of charges in respect of services provided to such persons not ordinarily resident in Great Britain as may be prescribed.

19. Section 272(7) of the 2006 Act confers a wide power, when giving directions pursuant to the Act, to make differential provision, as follows:

> "(7) Any power under this Act to make orders, rules, regulations or schemes, and any power to give directions—

> (a) may be exercised either in relation to all cases to which the power extends, or in relation to those cases subject to specified exceptions, or in relation to any specified cases or classes of case,
>
> (b) may be exercised so as to make, as respects the cases in relation to which it is exercised—
>
> (i) the full provision to which the power extends or any less provision (whether by way of exception or otherwise),
>
> (ii) the same provision for all cases in relation to which the power is exercised, or different provision for different cases or different classes of case, or different provision as respects the same case or class of case for different purposes of this Act,
>
> (iii) any such provision either unconditionally or subject to any specified condition, and
>
> (c) may, in particular, except where the power is a power to make rules, make different provision for different areas."

As stated above, the equivalent provision in the 1977 Act was section 126(4), which was the other provision pursuant to which the 2005 Directions were said to have been made.

The 2005 Directions

20. The 2005 Directions provide, so far as relevant, as follows:

> "The Secretary of State for Health, in exercise of the powers conferred on her by sections 16D(1), 17 and 126(4) of the National Health Service Act 1977, and all other enabling powers, makes the following Directions -
>
> ….
>
> **Functions in relation to the transplantation of organs and tissues**
>
> 3(1) In order to promote or secure the effective transplantation of organs and tissues for the purposes of the health service, the Secretary of State directs NHSBT–
>
> (a) to provide an organ and tissue matching and allocation service, having regard to the need to ensure the –
>
> (i) maximum and most effective use of organs and tissues;
>
> (ii) safety of persons and their survival rates; and
>
> (iii) equity and integrity of the organ sharing system;

(b) to maintain a list of persons who are in need of or are considered suitable for an organ or tissue transplant and to determine the criteria for inclusion on such list;

…

Functions in relation to the allocation of organs for transplantation

4(1) …

(1A) … NHSBT shall have regard to guidance issued by the Department of Health on the allocation of organs for the purposes of transplantation which is published before 30th March 2010 …

(2) No person in Group 2 shall receive an organ for which there is a clinically suitable person in Group 1.

(3) Group 1 shall comprise –

(a) persons ordinarily resident in the United Kingdom;

(b) persons who are –

(i) members of Her Majesty's United Kingdom Forces serving abroad;

(ii) other Crown servants employed in the right of Her Majesty's Government of the United Kingdom having been recruited in the United Kingdom and who are serving abroad;

(iii) employees, recruited in the United Kingdom, of the British Council or the Commonwealth War Graves Commission and who are employed abroad;

or the spouse, civil partner or any child under the age of nineteen of any person falling within sub-paragraphs (i) to (iii) above;

(c) persons who are entitled under Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to medical treatment in the United Kingdom;

(d) persons entitled by virtue of a bilateral reciprocal health agreement or the European Convention on Social and Medical Assistance 1954 to medical treatment in the United Kingdom:

(e) persons ordinarily resident in the Channel Islands.

(4) Group 2 shall comprise persons who do not come within the categories of persons listed in Group 1."

21. Guidance has been published by NHSBT on the allocation of organs for the purposes of transplantation ("the Guidance"). It includes the following statements:

Paragraph 4(2)

3. Paragraph 4(2) of the Directions provides that when NHSBT allocate organs for transplantation, the people in Group 1 are to be given priority. All the people in Group 1 are to be given equal priority.

4. A person in Group 2 will only receive a UK donor organ if there is no person in Group one for whom the organ is clinically suitable.

Paragraph 4(3)(a) - Persons ordinarily resident in the United Kingdom

5. Paragraph 4(3)(a) applies irrespective of nationality.

6. A person should be accepted as "ordinarily resident" if lawfully living in the United Kingdom voluntarily and for settled purposes as part of the regular order of his or her life whether short or long duration. The person should be resident in the United Kingdom with some degree of continuity and apart from accidental or temporary absences.

Factual background

22. The appellant is a national of Ghana, born on 15 October 1970. He left Ghana in 2000, and entered the United Kingdom between 2003 and 2004. He has stayed ever since. As we have said above, he did not have leave to remain in the United Kingdom until he was granted limited leave to remain in July 2018.

23. The appellant was diagnosed with end-stage kidney disease in 2005. He has been receiving regular dialysis for this condition ever since. It has become increasingly difficult over time to administer this treatment, and he will soon be in need of a kidney transplant.

24. In view of the fact that he was not lawfully resident in the United Kingdom and so was liable to be removed, consistently with the Guidance the appellant was deemed not to be ordinarily resident. He was therefore placed in Group 2 in May 2015 in accordance with paragraph 4 of the 2005 Directions. In view of the scarcity of available kidney organs for transplantation, no person in Group 2 has a real prospect of receiving a transplant.

25. On 11 August 2015 the appellant applied for judicial review of the 2005 Directions. In his claim form he sought a declaration that his rights under Article 3 and/or Article 14 taken together with Articles 2, 3 or 8 of the Convention have been infringed; and an order quashing paragraph 4 of the 2005 Directions. Following refusals of permission in the High Court both on paper and on oral renewal, permission was ultimately granted by Gross LJ, on an application for permission to appeal, for the appellant to apply for judicial review solely on the ground that the 2005 Directions are *ultra vires* the 2006 Act. The claim was ordered to be remitted to the Divisional Court.

The judgment below

26. The claim was heard by Irwin LJ and Haddon-Cave J, who handed down the judgment of the Court on 9 November 2017. Their conclusions are stated in [41]-[53] of their judgment, and may be briefly summarised as follows.

27. The Divisional Court held that the duty of the Secretary of State in section 1 of the 2006 Act is a "target duty", which gives emphasis and colour to the more specific duties and powers of the Secretary of State under the 2006 Act. It held that, as a result of Lord Wilson's judgment in *R(A) v Secretary of State for Health* [2017] UKSC 41, [2017] 1 WLR 2492 ("*A*"), endorsing statements of Ward LJ *in R(A) v Secretary of State for Health* [2009] EWCA Civ 225, [2010] 1 WLR 279 ("*YA*"), the intention of Parliament in setting that target duty was to stipulate a focus on the promotion of health and the provision of services for those who have a legitimate connection with England. It held that this interpretation applies to both the promotion of physical and mental health under section 1(1)(a) and the treatment of illness under section 1(1)(b).

28. The Divisional Court held that the Secretary of State has a critical and wide discretion as to the allocation of resources under section 3 and other provisions of the 2006 Act.

29. The Divisional Court considered that the general function of a CCG is more limited than the functions of the Secretary of State, and that the position of a Special Health Authority is distinct. The Divisional Court also considered that, subject to issues of rationality, consideration of relevant factors and so forth, the power under section 8 to give directions to a Special Health Authority is limited only by the terms of section 1 of the 2006 Act.

30. The Divisional Court did not consider that provisions in the 2006 Act for charging those who are not ordinarily resident for NHS services were determinative. It did not accept that any fundamental common law right was overridden by the legislation or the Court's interpretation of it.

31. It concluded its judgment as follows:

> "53. In the end, the critical point in our judgment is that the power to give directions to NHSBT under Section 8 and Section 272 of the 2006 Act is not limited by any provision other than Section 1 of the Act. We do not accept that the 2005 Direction is in conflict with that "target duty". It is therefore not *ultra vires*. Since there is no longer any human rights challenge to the Directions, and no rationality challenge, we dismiss the claim for judicial review."

The grounds of appeal

32. The sole ground of appeal is that the Divisional Court erred in law in concluding that paragraph 4 of the 2005 Directions are not *ultra vires* the Secretary of State's powers under the 2006 Act.

Subsequent change in residence status

33. Following the decision of the European Court of Human Rights in *Paposhvili v Belgium* [2017] INLR 497, the Secretary of State granted the appellant limited leave to remain on 6

July 2018. He has now been added to Group 1. For the reasons we gave in paragraph 4 above, we nevertheless agreed to hear the appeal on the ground that it is in the public interest that we should do so.

Discussion

The appellant's submissions

34. The following four propositions lay at the heart of the oral submissions of Ms Helen Mountfield QC, for the appellant. First, the duty of the Secretary of State under section 1(1)(b) of the 2006 Act – to promote in England a comprehensive health service designed to secure improvement in the prevention, diagnosis and treatment of physical and mental illness – extended to the appellant even while he was an illegal immigrant Second, if a person is within the ambit of that duty, then, unless Parliament has provided otherwise, neither the Secretary of State nor anyone else exercising a duty or power under the 2006 Act to provide health services in the NHS can distinguish between that person and other persons falling within the ambit of the duty except on purely clinical grounds. Third, the prioritisation in the 2005 Directions of entitlement to organ transplant by reference to ordinary residence in the UK was not on clinical grounds, and was not authorised under any primary or secondary legislation, including, in particular, sections 16D(1), 17 and 126(4) of the 1977 Act (and is not now authorised under the corresponding provisions of the 2006 Act), which were the provisions on which the Secretary of State purported to rely in making the 2005 Directions. Fourth, and in particular, the Secretary of State was not entitled to conclude that such prioritisation was "necessary to meet all reasonable requirements" of the health services and facilities specified in section 3 of the 1977 Act (and the corresponding provisions of the 2006 Act), including facilities for the care of persons suffering from illness within section 3(1)(e) and such other services as are required for the diagnosis and treatment of illness within section 3(1)(f).

The section 1 duty

35. As to the first of those points, Mr Ivan Hare QC, for the Secretary of State, conceded for the purpose of this appeal that the appellant fell within the ambit of section 1(1)(b) of the 2006 Act notwithstanding he was an illegal immigrant and had no right to remain in England. That concession was contrary to the conclusion of the Divisional Court, which held (at [44]) that the entire section 1 duty of the Secretary of State was focused on promotion of health and provision of services for those who have "a legitimate connection with the country".

36. That conclusion of the Divisional Court was based on the judgment of Lord Wilson in *A*, in which he endorsed observations of Ward LJ in *YA*. *YA* was concerned with the question whether the claimant YA, whose claims for asylum and leave to enter were refused, was eligible for free treatment under the NHS or had to be charged for his treatment. Ward LJ, with whose judgment the other two members of the court agreed, said the following:

> "55 Here the statute in need of construction is the National Health Service Act 2006. As set out, at para 8 above, the Secretary of State's duty prescribed by section 1 is to continue the promotion in England of a comprehensive health service designed to secure improvement in the health "of the people of England". Note that it is the people *of* England, not the people *in*

> England, which suggests that the beneficiaries of this free health service are to be those with some link to England so as to be part and parcel of the fabric of the place. It connotes a legitimate connection with the country. The exclusion from this free service of non-residents and the right conferred by section 175 to charge such persons as are not ordinarily resident reinforces this notion of segregation between them and us. This strongly suggests that, as a rule, the benefits were not intended by Parliament to be bestowed on those who ought not to be here."

> "61 The words are to be given their ordinary meaning. Asylum seekers are clearly resident here but is the manner in which they have acquired and enjoy that residence ordinary or extraordinary? Normal or abnormal? Were they detained, then no one would suggest they were ordinarily resident in the place of their detention. While they are here under sufferance pending investigation of their claim they are not, in my judgment, ordinarily resident here. Residence by grace and favour is not ordinary. The words must take some flavour from the purpose of the statute under consideration and, as I have set out above, the purpose of the 2006 Act is to provide a service for the people *of* England and that does not include those who ought not to be here. Failed asylum seekers ought not to be here. They should never have come here in the first place and after their claims have finally been dismissed they are only here until arrangements can be made to secure their return, even if, in some cases, like the unfortunate YA, that return may be a long way off."

37. In *A* the claimants, a pregnant 15-year-old girl and her mother who were ordinarily resident in Northern Ireland, sought judicial review of the decision of the Secretary of State refusing to exercise his power under section 3 of the 2006 Act to provide abortion services in England for women from Northern Ireland. The claim was dismissed at first instance. The Court of Appeal dismissed the claimant's appeal and the Supreme Court, by a majority, dismissed a further appeal from the Court of Appeal. Lord Wilson, with whom Lord Reed and Lord Hughes agreed, said (at [9]) that section 1(1) of the 2006 Act created what he called "a target duty". He said:

> "… the express focus of both parts of it is improvement. It identifies the general objectives by reference to which the Secretary of State must exercise his functions under the Act."

38. Lord Wilson then referred as follows to the judgment of Ward LJ in *YA*:

> "10 Section 1(1) of the 2006 Act refers not to the people in England but to the people of England. In *R (A) v Secretary of State for Health* [2010] 1 WLR 279, Ward LJ suggested at para 55 that the reference is therefore to people who are "part and parcel of the fabric of the place". I agree and suggest, more simply, that it is to the people who live in England."

39. Lord Wilson observed that other legislation imposed an analogous target duty on the health authorities in Wales, Scotland and Northern Ireland, and that the general scheme was that the health service for the people who lived in Northern Ireland was to be provided for them there by the Northern Irish authority.

40. Lord Wilson noted that the original version of section 3(1) of the 2006 Act provided that:

> "The Secretary of State must provide throughout England, to such extent as he considers necessary to meet all reasonable requirements— … (c) medical … services, (d) such other services … for the care of pregnant women … as he considers are appropriate as part of the health service …"

41. He continued (at [11]):

> "The provision of abortion services fell within either (c) or (d), indeed probably within (c). But the Secretary of State's duty was to provide them "to such extent as he considers necessary to meet all reasonable requirements". When addressing the same words in the predecessor to section 3(1), the Court of Appeal, in *R v North and East Devon Health Authority, Ex p Coughlan [2001] QB 213*, observed at para 24 that the Secretary of State therefore had no duty to provide services "if he does not consider they are reasonably required or necessary to meet a reasonable requirement". Although in my view the claimants are right to question whether the existence of a reasonable requirement was left to the determination of the Secretary of State, his evaluation undoubtedly governed the extent to which it was necessary to meet it; so a broad area of the duty cast upon him by section 3(1) was left to be marked out by the exercise of his own judgement."

42. Lord Wilson then explained that in 2002 the Secretary of State's functions under what became section 3(1) of the 2006 Act were made exercisable on his behalf by Primary Care Trusts. The regulations which effected that change provided that the categories of persons for whose benefit a trust should exercise the functions were: (a) persons registered, other than temporally, with a GP in the area of the trust; (b) persons "usually resident in its area", and certain other categories, including all persons present in its area for the provision of any other services which the Secretary of State may direct. The claimants contended that the failure of the Secretary of State to exercise that power to provide for A, as a United Kingdom citizen usually resident in Northern Ireland, to be entitled to undergo an abortion free of charge under the NHS in England was unlawful both in public law and because it was a breach of A's human rights.

43. He noted (at [14]) that on 1 April 2013 the Health and Social Care Act 2012 ("the 2012 Act") abolished the Trusts and provided for the establishment of CCGs, which were to provide the services identified in the 2012 Act including, as before, medical services and services for the care of pregnant women. The duty was qualified in much the same terms as before: to make such arrangements only "to such extent as [the CCG] considers necessary to meet the reasonable requirements of the persons for whom it has responsibility". The 2012 Act introduced a new section 3A into the 2006 Act which conferred power on CCGs to arrange for the provision of such services as they considered

appropriate for securing improvement in the physical and mental health of those in relation to whom they had responsibility, namely persons registered with a GP in the CCG's area and persons usually resident in the CCG's area if not registered with a GP in another CCG's area. Lord Wilson said (at [16]) that, were it to have been unlawful for the Secretary of State to have failed to exercise in favour of persons in the position of A the power which he had prior to 1 April 2013, it was hard to understand why it had been otherwise than unlawful for the CCGs in that respect to have failed exercise the power which they had had since that date.

44. Lord Wilson said (at [18]) that there were two features which significantly diminished the ability of the claimants to rely on the duty of the Secretary of State in section 3(1): (a) a broad area of the duty was left to be marked out by the exercise of his own judgement; and (b) in discharging the duties, his target had to be to improve the health of the people who lived in England. He said (at [20]) that Parliament's scheme was that separate authorities in each of the four countries united within the kingdom should provide free health services to those usually resident there; and he was entitled to make a decision in line with that scheme for local decision-making and in accordance with the target duty imposed on him by statute.

45. Lord Wilson, accordingly, rejected the claim in public law. He also went on to reject the claim that the decision of the Secretary of State not to make the relevant direction was unlawful because it violated article 14 of the Convention taken in conjunction with article 8 of the Convention.

46. In his concluding paragraph [36] Lord Wilson referred to the dissenting judgments of Lord Kerr and Baroness Hale, and in particular Lord Kerr's conclusion that it was the duty of the Secretary of State (and of the CCGs) to provide for a United Kingdom citizen present but not usually resident in England the same medical services, free of charge, under the NHS as he provided (and they provided) for those usually resident in England. He said that the duty proposed to be cast upon the Secretary of State by Lord Kerr and Baroness Hale would precipitate both a substantial level of health tourism into England from within the United Kingdom and from abroad and a near collapse of the edifice of devolved health services. He said that he found himself unable to agree either that sections 1 and 3 of the 2006 Act or the human rights of United Kingdom citizens generated the suggested duty.

47. Lord Kerr and Baroness Hale would have allowed the appeal on both public law and human rights grounds. So far as concerned the public law ground, they did not agree with Ward LJ in *YA* or the majority in *A* that the duty of the Secretary of State under section 1(1)(b) of the 2006 Act - to continue the promotion in England of a comprehensive health service designed to secure improvement in the prevention, diagnosis and treatment of physical and mental illness - was confined to "the people of England". Lord Kerr explained as follows:

> "59 The primary obligation imposed on the Secretary of State is to continue to promote *in* England a comprehensive health service. The comprehensive health service was to secure improvement in two separate areas. The first of these was the physical and mental health of the people of England. The second (and distinct from the first) was the prevention, diagnosis and treatment of illness. That second purpose did not have a qualification that it should apply to the people of England only. This is important because it clearly indicates that the Secretary

> of State's duty was not fulfilled merely by bringing about an improvement in the health of the people of England. The duty also included the requirement to promote a comprehensive health service which would not only achieve that objective but would also advance the prevention etc of illness."
>
> "61 It can be readily understood why the two objectives of the comprehensive health service were identified in separate sub-paragraphs of section 1(1). It is understandable that the aspiration that a health service should *improve the health of the nation* can be expressed as applying to the people of England. After all, the Secretary of State does not have a responsibility to improve the health of other nations. When it comes to providing health services generally, however, a much wider constellation of issues arises. The diagnosis and treatment of illness, although it of course contributes to improving the health of the nation, involves more than fulfilling that objective. The treatment of individual patients, while it may contribute incidentally to an improvement in the health of people generally, requires the provision of adequate medical services, irrespective of the part that they may play in improving overall standards of health."
>
> "62 When, therefore, one comes to section 3 of the Act, the Secretary of State's duty to provide the services listed there is impelled, at least in part, by considerations other than improving the health of the people of England generally. …"
>
> "66 The services stipulated in sub-paragraphs (e) and (f) of section 3(1) plainly relate to the objective of section 1(1)(b)."

48. Baroness Hale (at [92]) agreed with Lord Kerr that the aim in section 1(1)(b) of the 2006 Act was not limited to the prevention, diagnosis and treatment of illness in the "people of England", and that it was only the aim in section 1(1)(a) which was so limited. She also agreed with him that the relevant services listed in section 3(1) were designed, or principally designed, to meet the aim of treating illness in section 1(1)(b) rather than health promotion in section 1(1)(a).

49. There can be no doubt that, according to Ward LJ's analysis in *YA*, persons present in England as illegal immigrants with no right of residence are outside the scope of the Secretary of State's target duty under section 1(1) of the 2006 Act, which has substantially the same wording as the predecessor legislation going back to the original National Health Service Act 1946. For this purpose, an illegal immigrant is in no different position to a failed asylum seeker. In Ward LJ's words, "the purpose of the 2006 Act is to provide a service for the people *of* England and that does not include those who ought not to be here." On the face of it, the majority of the Supreme Court in *A* endorsed and adopted his analysis since Lord Wilson, with whom Lord Reed and Lord Hughes agreed, expressly stated (in [10]) that he agreed with Ward LJ that section 1(1) of the 2006 Act referred to people "who are part and parcel of the fabric of [England]". It is also clear that the majority in *A* considered that the section 1(1) target duty, so circumscribed, coloured the duties of CCGs under section 3(1) of the 2006 Act, and the duties formerly on Primary Care Trusts and, before them, on the Secretary of State under section 3(1) of the 2006 Act. In explicitly

rejecting (at [36]) the analysis of Lord Kerr and Baroness Hale, Lord Wilson, like Ward LJ, was not for this purpose making any distinction between limb (a) and limb (b) of section 1(1). Furthermore, on the face of it, such a limitation of the target duty under section 1(1) of the 2006 Act was part of the ratio or essential reasoning of Lord Wilson in *A* as it formed a building block in his analysis of whether the duty to provide the relevant service under section 3(1) or section 3A of the 2006 Act extended to A as a person usually resident in the Northern Ireland.

50. Mr Hare, nevertheless, stated that the Secretary of State accepts that the appellant fell within the duty of the Secretary of State under section 1(1)(b) of the 2006 Act, and the corresponding provisions of section 1(1)(b) of the 1977 Act, notwithstanding his status as an illegal immigrant. We understood that this was essentially for two reasons. Firstly, we understood that the Secretary of State agrees with the appellant that neither Ward LJ's analysis of section 1(1) nor that of Lord Wilson is binding on us because the former was in the context of the provisions in section 175 of the 2006 Act and related regulations for charging those not ordinarily resident in Great Britain for health services, and the latter was in the context of devolution. Secondly, we understood that the Secretary of State accepts the analysis of section 1(1) by the dissenting minority in *A*, or, at the least, that the appellant, even as an illegal immigrant, satisfied Lord Wilson's suggested simplification (in [10]) of Ward LJ's description of those within the section 1(1) duty as "the people who live in England". We express no view on the correctness of the concession on behalf of the Secretary of State. As will become clear below, it is not essential to our conclusion in this case that *A* is binding on this court. Given the parties' agreement on the scope of section 1, we proceed with the rest of this judgment on the basis that the appellant falls within its scope.

The source of the power to make the Directions

51. Ms Mountfield's overarching submission was that, if the target duty of the Secretary of State under section 1(1) of the 2006 Act (and the equivalent provision in the 1977 Act) applies as much to illegal immigrants as to anyone else for the time being in England, then it is unlawful to prioritise between them for the provision of health care except on clinical grounds, unless Parliament has expressly provided otherwise. She submitted that none of the provisions specified in the introduction to the 2005 Directions, under which the Secretary of State purported to make the 2005 Directions, did so: namely, sections 16D(1), 17 and 126(4) of the 1977 Act, of which the equivalent provisions in the 2006 Act are section 7, 8 and 272(7).

52. We take each of those sections in turn. We understood that it was common ground before us that section 272(7) of the 2006 Act (equivalent to section 126(4) of the 1977 Act) did not do so. At any event, that is our finding. Section 272(7)(b)(ii) and (iii) of the 2006 Act (and section 126(4)(b)(ii) and (iii) of the 1977 Act) specifically provided for a power to give directions to be exercised so as to make different provision for different cases or different classes of case, and either conditionally or unconditionally. Those provisions, however, relate to an existing power to give directions to be found substantively elsewhere in the legislation. They are not themselves substantive or enabling provisions which create or enlarge a power. They provide how the power may be exercised consistent with its scope.

53. It is also not possible to find in section 7 of the 2006 Act (equivalent to section 17 of the 1977 Act both in its original form and as substituted by the Health Act 1999 ("the 1999 Act") s.12) a statutory basis for enabling the Secretary of State, when conferring a function

on a Special Health Authority, to provide for the Special Health Authority to conduct that function, in terms of priority of entitlement, by making priority dependent on ordinary residence if the Secretary of State could not have exercised the function in that way.

54. Mr Hare, however, laid considerable weight on the width of section 8 of the 2006 Act. That is the successor provision to section 16D of the 1977 Act, which was also inserted by section 12 of the 1999 Act.

55. He emphasised, in particular, section 8(3) which provides that the generality of section 8(1) – authorising the Secretary of State to give directions to any of the bodies mentioned in subsection (2) about its exercise of any functions – is not affected by anything in the 2006 Act or any other Act.

56. We are doubtful that section 8 on its own is sufficient to provide a statutory power for the differential treatment of patients based on ordinary residence in paragraph 4 of the 2005 Directions, for two reasons. A purposive reading of section 8, like sections 272 and 7 of the 2006 Act (and the equivalent provisions in the 1977 Act) would confine the power under section 8(1) and (3) in respect of a function delegated under section 7 to the same legal limitations of the function as operated prior to that delegation. Otherwise, sections 7 and 8 (and the equivalent provision in the 1977 Act) would provide an easy mechanism by which the Secretary of State could circumvent any legal limitations on the exercise of a health service function while vested in him or her. That is unlikely to have been the intention of Parliament.

57. We do not have to reach a conclusion on whether the 2005 Directions could have been made pursuant to section 8 alone because the matter does not end there. The 1977 Act, and its predecessor legislation, made no express provision for organ transplantation. Express provision was first made by paragraph 7C of Schedule 1 to the 2006 Act, which was inserted by the 2012 Act. It provides that the Secretary of State must, for the purposes of the health service, make arrangements for (among other things) facilitating tissue and organ transplantation. The Explanatory Notes to the 2012 Act explained that the Secretary of State had the responsibility for this under his then existing functions under sections 2 and 3 of the 2006 Act and, by virtue of the new paragraph 7C, would continue to have responsibilities for those arrangements despite changes to those sections made by the 2012 Act and that, as before, the functions would be performed by NHSBT rather than by the Department of Health.

58. It is clear from this that organ transplantation fell within the Secretary of State's functions under the original wording of section 3(1) of the 2006 Act (equivalent to the previous provisions in section 3(1) of the 1977 Act), most appropriately section 3(1)(e) and (f). Importantly, and as pointed out by Lord Wilson in *A*, under those provisions the Secretary of State's duty was to provide those services "to such extent as he considers necessary to meet all reasonable requirements". As Lord Wilson also observed, by virtue of the 2012 Act those services were to be provided by CCGs pursuant to the revised section 3 of the 2006 Act but their duty was also qualified in much the same way as before – namely, "to such extent as [the CCG] considers necessary to meet the reasonable requirements of the persons for whom it has responsibility".

59. The ultimate source of the power to make the 2005 Directions therefore derives from section 3(1) of the 1977 Act and section 3(1) of the 2006 Act in its successive iterations. That power was channelled through sections 16D(1), 17 and 126(4) of the 1977 Act, and

now the corresponding provisions in sections 7, 8 and 272(7) of the 2006 Act. The central issue on this appeal, therefore, resolves itself into the question whether section 3 conferred on the Secretary of State the power to give the directions in paragraph 4 of the 2005 Directions, and, in particular, whether she was entitled, as a matter of public law, to take the view that the prioritisation in paragraph 4 of those ordinarily resident in England over those who are not was all that was necessary to meet all reasonable requirements.

Were the 2005 Directions within the scope of section 3(1)?

60. Ms Mountfield submitted that the Secretary of State's discretion under s.3(1) was limited by the overall statutory duty of the Secretary of State under section 1(1), which made no distinction between those ordinarily resident in England and those who were not. In that connection, she referred to, and relied upon, *R (Public Law Project) v Lord Chancellor* [2014] EWHC 2365 (Admin), [2015] 1 WLR 251, in which the Divisional Court (Moses LJ, Collins and Jay JJ) held that a proposed statutory instrument which provided for the removal from the scope of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") (which specified certain legal services qualifying for public funding) of those who failed a residence test (subject to exceptions) was *ultra vires*. It was also held by the Divisional Court that the proposed residence test was unlawfully discriminatory, in breach of the common law and article 14 read with article 6 of the Convention. Moses LJ, with whom the other two members of the court agreed, said (at [34]) that the power to make delegated legislation must be construed in the context of the statutory policy and aims such legislation is designed to promote.

61. The Supreme Court, which allowed an appeal from the Court of Appeal, agreed with the decision of the Divisional Court that the Lord Chancellor had acted *ultra vires*. Its ground for doing so was the narrow one that, on its proper interpretation, the statutory provision (section 9) which permitted a variation or omission of the services set out in schedule 1 of LASPO was concerned with adding to, varying or omitting services, and not the individuals to whom the services may be provided: see [33] of the judgment of Lord Neuberger, with which all the other Justices agreed. In support of that interpretation, Lord Neuberger referred (at [34]) to the strong presumption, mentioned in *Bennion on Statutory Interpretation*, 6th ed (2013), section 129, that an "enactment applies to foreigners … within its territory as it applies to persons … within that territory belonging to it". Accordingly, the outcome in the *Public Law Project* case ultimately turned on the interpretation of particular provisions in LASPO. We do not consider that it sheds any useful light on the present appeal.

62. In our judgment the Secretary of State was not in breach of any public law duty in forming the view that what was necessary to meet all reasonable requirements for the allocation of kidney organs for the purpose of transplantation was an allocation which, among other things, prioritised persons ordinarily resident in England over those not ordinarily resident. Even though both section 1(1) of the 1977 Act and section 1(1) of the 2006 Act require the Secretary of State to promote a comprehensive health service in England, and even if a person not ordinarily resident falls within limb (b) of section 1(1), the Secretary of State was still entitled to exercise her judgement as to what was necessary to meet the reasonable requirements at any particular moment of time, if necessary by prioritising on the basis of residence. She was entitled to do so because, although she had to have regard to the duty in section 1(1), that was a time unlimited aspirational target (which, as recognised in *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at [25] might never in fact be reached) but her judgement of what was necessary had to be informed by a present

shortage of resources, and the acute shortage of donated organs for transplantation in particular. That conclusion is strongly supported by both *Coughlan* and *A*.

63. *Coughlan* concerned the lawfulness of the health authority's decision to close a NHS facility for the long-term disabled because the applicant and other residents did not need specialist nursing services but only general nursing care. Lord Woolf MR, giving the judgment of the Court of Appeal, said the following about the duty of the Secretary of State under section 3(1) of the 1977 Act:

> "23 It will be observed that the Secretary of State's section 3 duty is subject to two different qualifications. First of all there is the initial qualification that his obligation is limited to providing the services identified to the extent that he considers that they are *necessary* to meet all reasonable requirements. In addition, in the case of the facilities referred to in (d) and (e), there is a qualification in that he has to consider whether they are appropriate to be provided "as part of the health service". We are not concerned here with this second qualification since nursing services would come under section 3(1)(c).
>
> 24 The first qualification placed on the duty contained in section 3 makes it clear that there is scope for the Secretary of State to exercise a degree of judgment as to the circumstances in which he will provide the services, including nursing services, referred to in the section. He does not automatically have to meet *all* nursing requirements. In certain circumstances he can exercise his judgment and legitimately decline to provide nursing services. He need not provide nursing services if he does not consider they are reasonably required or necessary to meet a reasonable requirement.
>
> 25 When exercising his judgment he has to bear in mind the comprehensive service which he is under a duty to promote as set out in section 1. However, as long as he pays due regard to that duty, the fact that the service will not be comprehensive does not mean that he is necessarily contravening either section 1 or section 3. The truth is that, while he has the duty to continue to promote a comprehensive free health service and he must never, in making a decision under section 3, disregard that duty, a comprehensive health service may never, for human, financial and other resource reasons, be achievable. Recent history has demonstrated that the pace of developments as to what is possible by way of medical treatment, coupled with the ever increasing expectations of the public, mean that the resources of the NHS are and are likely to continue, at least in the foreseeable future, to be insufficient to meet demand.
>
> 26 In exercising his judgment the Secretary of State is entitled to take into account the resources available to him and the demands on those resources. In *R v Secretary of State for Social Services, Ex p Hincks (1980) 1 BMLR 93* the Court of Appeal held that

> section 3(1) of the 1977 Act does not impose an absolute duty to provide the specified services. The Secretary of State is entitled to have regard to the resources made available to him under current government economic policy."

64. In *A* Lord Wilson (at [11]) referred to the statement in paragraph [24] of the *Coughlan* case that the Secretary of State had no duty to provide services "if he does not consider they are reasonably required or necessary to meet a reasonable requirement". Lord Wilson questioned whether the existence of a reasonable requirement was left to the determination of the Secretary of State but said:

> "his evaluation undoubtedly governed the extent to which it was necessary to meet it; so a broad area of the duty cast upon him by section 3(1) was left to be marked out by the exercise of his own."

65. At various points in her submissions Ms Mountfield highlighted the fact that there are, and have been since 1949, express statutory provisions for the making and recovery of charges for NHS services provided for persons not ordinarily resident in Great Britain and that section 3(1D) the 2006 Act provides that regulations may provide for the limitation of services to persons of a prescribed description. The National Health Service (Clinical Commissioning Groups – Disapplication of Responsibility) Regulations 2013, for example, prescribed the persons in respect of whom a CCG does not have responsibility in relation to its duty to commission services. She submitted that such express provisions carried the implication that the Secretary of State could not lawfully have discharged her functions under the 1977 Act, and the present Secretary of State cannot now lawfully discharge his functions under the 2006 Act, by prioritising one group of persons over another on the basis of anything other than clinical need. We do not agree that such express provisions implicitly circumscribe to that extent the width of the Secretary of State's discretion and judgment under section 3(1) of the 1977 Act, as explained in *Coughlan* and *A*. That would be a substantial limitation on the otherwise very general language used by Parliament to confer a wide discretion on the Secretary of State under section 3(1), and one which it is highly unlikely Parliament would have intended to be left to inference.

66. It is, of course, critical to this analysis that, as we have said above, the challenge to the 2005 Directions on this appeal is one based purely on public law grounds and that the challenge is one limited to breach of a limitation imposed implicitly by section 1(1) of the 1977 Act and section 1(1) of the 2006 Act. There is no challenge on the ground that paragraph 4 of the 2005 Directions was irrational. Nor is there any challenge on the grounds of proportionality or the appellant's human rights. For those reasons, it is neither necessary nor appropriate to enter into a consideration of various examples floated by Ms Mountfield of the kind of prioritisation that the Secretary of State might direct if this appeal fails, such as favouring higher rate tax payers.

67. As *Coughlan* makes clear, in exercising her discretion under section 3(1) of the 1977 Act the scarcity of resources was a major consideration for the Secretary of State (and would have been for CCGs if the responsibility for the allocation of organs for transplantation rested with them under equivalent provisions in section 3(1) of the 2006 Act). Organs for transplantation are in short supply. That was made clear in a communication from the Department of Health to the directors of all organ transplant units in February 1996, which

was accompanied by Directions from the Secretary of State. Those Directions were substantially the same as those later contained in paragraph 4 of the 2005 Directions.

68. We were also referred by Mr Hare to the review on organ transplants led by Elisabeth Buggins CBE, which reported in June 2009. The terms of reference of that review were, so far as relevant, as follows:

> "In order to optimise the availability of organs for transplant for NHS patients and ensure public confidence in the fairness and transparency of the organ allocation system in the UK, to examine policy and practice in the UK, within the framework of European law, on the use of organs from UK deceased donors in respect of the referral, acceptance and transplantation of non-UK EU residents including the different funding arrangements testing …"

69. Paragraph 1.1 of the review stated that there are not enough donated organs for all the people who need them in the UK. The review was prompted by media statements that organs from NHS donors were being given to patients from outside the UK pursuant to fee paying arrangements with the governments of the foreign countries, mainly EU countries, from which those patients came. That is not the issue in the present case, but what are relevant are the following considerations expressed in the review report:

> "1.3 … transplants are only possible because of the free and willing donation of organs by people concerned to help others. There is an assumption that organs will be given to people on the NHS waiting list. That is not to say that donors would have any objection to helping other potential recipients once their fellow citizens needs had been met but, as we know, scarcity prevents this from being a realistic possibility.
>
> 2.3 Organ donation is sometimes characterised as 'helping our neighbour'; where that neighbour is assumed to be a fellow member of the society in which the act of generosity occurs. Whilst as a society we have taken steps to protect against discriminatory direction of organs by individual donors, organ donation cannot realistically be interpreted as an act of globally focussed compassion. However, we can and have taken steps to seek to ensure that donated organs are fairly and justly allocated.
>
> 2.4 Given the scarcity of organs, those who are resident in the UK are entitled to assume that, as potential donors and supporters of a nationally funded health service, they would be seen as potential recipients in priority to those not resident in the UK, unless non-residents were part of a formal reciprocal scheme.
>
> 3.40 … in a situation of scarcity, [the] interests [of non UK citizens] are trumped by those who are part of the system within which the resources exist - the NHS. The resources in this case

> being not only the transplant services but more importantly, the donated organ.
>
> 3.41 To remain true to the donation process we need to be able to assure potential donors that principles of justice and fairness are embedded within the organ allocation system. We also need to recognise what can be realistically assumed about the motivation and expectations of donors. …".

70. Ms Mountfield emphasised other parts of the report, which highlighted the need for decisions to be made on the basis of need and clinical suitability rather than payment and for priority to be given to NHS patients. Those observations were made against the particular media and public concerns which led to the commissioning of the review. Her emphasis misses the general point made repeatedly in the report, that donor expectations are critical in view of the shortage of organs and those expectations are that priority will be given to fellow citizens or at least those ordinarily resident in this country.

71. Ms Mountfield pointed out that, as is obvious, the Secretary of State could not have taken the Buggins review report into account in making the 2005 Directions as the report was not published until 2009. She also pointed out that there is no witness statement on behalf of the Secretary of State stating what considerations were borne in mind by the Secretary of State in directing the prioritisation in paragraph 4 of the 2005 Directions.

72. Her own argument, however, was that, in view of the target duty in section 1(1) of the 1977 Act and section 1(1) of the 2006 Act extending to illegal immigrants like the appellant, there could not lawfully be any reason at all for prioritisation under section 3(1) of those normally resident over those not normally resident save on the basis of clinical need. Once it is recognised that, for the reasons we have given above, the Secretary of State could lawfully have limited the services under section 3(1) to such extent as she considered necessary, even if that meant limiting the services to one particular category of persons in need, Ms Mountfield's argument leads nowhere. Had rationality been in issue on this appeal, which it is not, it would have been sufficient for the Secretary of State to point to any one or more possible grounds for a rational decision to prioritise those ordinarily resident over those not ordinarily resident for the purposes of the allocation of organs for transplantation. As it happens, the report of the Buggins review illustrates why such a prioritisation was a perfectly rational exercise of the Secretary of State's discretion.

Conclusion

73. For the reasons above, we dismiss this appeal.

Appendix
National Health Service Act 1977

"**1. Secretary of State's duty as to health service.**

(1) It is the Secretary of State's duty to continue the promotion in England and Wales of a comprehensive health service designed to secure improvement—

(a) in the physical and mental health of the people of those countries, and

(b) in the prevention, diagnosis and treatment of illness,

and for that purpose to provide or secure the effective provision of services in accordance with this Act.

(2) The services so provided shall be free of charge except in so far as the making and recovery of charges is expressly provided for by or under any enactment, whenever passed."

"3. Services generally.

(1) It is the secretary of State's duty to provide throughout England and Wales, to such extent as he considers necessary to meet all reasonable requirements—

(a) hospital accommodation;

(b) other accommodation for the purpose of any service provided under this Act;

(c) medical, dental, nursing and ambulance services;

(d) such other services and facilities for the care of expectant and nursing mothers and young children as he considers are appropriate as part of the health service;

(e) such other services and facilities for the prevention of illness, the care of persons suffering from illness and the after-care of persons who have suffered from illness as he considers are appropriate as part of the health service;

(f) such other services and facilities as are required for the diagnosis and treatment of illness."

"**11. Special Health Authorities**

(1) The Secretary of State may by order establish special bodies for the purpose of exercising any functions which may be conferred on them by or under this Act.

(2) The Secretary of State may, subject to the provisions of Part III of Schedule 5 to this Act, make such further provision relating to that body as he thinks fit.

(3) A body established in pursuance of this section shall (without prejudice to the power conferred by subsection (4) below to allocate a particular name to the body) be called a Special Health Authority.

(4) Without prejudice to the generality of the power conferred by this section to make an order (or of section 126(4) below), that order may in particular contain provisions as to—

(a) the membership of the body established by the order;

(b) the transfer to the body of officers, property, rights and liabilities; and

(c) the name by which the body is to be known."

"**16D.— Secretary of State's directions: distribution of functions**.

(1) The Secretary of State may direct a Strategic Health Authority, Special Health Authority or a Primary Care Trust to exercise any of his functions relating to the health service which are specified in the directions.

(2) The Secretary of State may direct a Special Health Authority to exercise any functions of a Strategic Health Authority or a Primary Care Trust which are specified in the directions.

(3) The functions which may be specified in directions under this section include functions under enactments relating to mental health and nursing homes."

"**17. Secretary of State's directions: exercise of functions.**

(1) The Secretary of State may give directions to any of the bodies mentioned in subsection (2) below about their exercise of any functions.

(2) The bodies are—

(za)…;

(b) Special Health Authorities;

(c) …

(d) …

(3) Nothing in any provision made by or under this or any other Act shall be read as affecting the generality of subsection (1) above."

"**126. Orders and regulations, and directions**.

(1) Any power to make orders, rules or regulations conferred by this Act shall be exercisable by statutory instrument, and a statutory instrument made by virtue of this Act shall, unless it is a PCT order or an instrument to which subsection (1A) applies, be subject to annulment in pursuance of a resolution of either House of Parliament.

…

(4) Any power conferred by this Act or Part I of the National Health Service and Community Care Act 1990 to make orders, rules, regulations or schemes, and any power to give directions, may unless the contrary intention appears, be exercised—

(a) either in relation to all cases to which the power extends, or in relation to all those cases subject to specified exceptions, or in relation to any specified cases or classes of case, and

(b) so as to make, as respects the cases in relation to which it is exercised—

(i) the full provision to which the power extends or any less provision (whether by way of exception or otherwise),

(ii) the same provision for all cases in relation to which the power is exercised, or different provision for different cases or different classes of case, or different provision as respects the same case or class of case for different purposes of this Actor Part I of the National Health Service and Community Care Act 1990 or that section,

(iii) any such provision either unconditionally, or subject to any specified condition,

and includes power to make such supplementary, incidental, consequential, transitory, transitional or saving provision in the orders, rules, regulations, schemes or directions as the persons making or giving them consider appropriate. "