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Case No: CO/22/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/06/2017

Before :

SIR ROSS CRANSTON
(Sitting as a Judge of the High Court)

Between :

The Queen (on the application of
(1) PALESTINE SOLIDARITY CAMPAIGN LIMITED
(2) JACQUELINE LEWIS) **Claimants**

- and -

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT **Defendant**

Mr Nigel Giffin QC and Mr Zac Sammour (instructed by **Bindmans LLP**) for the **Claimants**
Mr Julian Milford (instructed by **GLD**) for the **Defendant**

Hearing dates: 14 June 2017

Approved Judgment

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Sir Ross Cranston :

INTRODUCTION

1. This is a challenge to statutory guidance, *Guidance on preparing and maintaining an investment strategy statement* ("the guidance"), which the defendant Secretary of State for Communities and Local Government ("the Secretary of State") published on 15 September 2016. It governs the investment strategy for the local government pension scheme. The guidance permits ethical and social objections to a particular investment to be taken into account. However, the present challenge is to that part of the guidance which states that administering authorities must not:

> *".... [use] pension policies to pursue boycotts, divestment and sanctions ["BDS"] against foreign nations and UK defence industries...other than where formal legal sanctions, embargoes and restrictions have been put in place by the Government.";*

or

> *"pursue policies that are contrary to UK foreign policy or UK defence policy".*

This restriction operates even if an investment strategy with an element of boycott, divestment and sanction would not involve significant financial risk to the scheme and irrespective of member support.

2. The claimants' case is that the Secretary of State acted unlawfully in issuing this part of the guidance. They advance their case on three grounds: first, the guidance in this respect falls outside the proper scope of his statutory powers because it was issued for non-pensions purposes; secondly, it is unlawfully lacking in certainty; and thirdly, it is contrary to Article 18(4) of Directive 2003/41/EC on the Activities and Supervision of Institutions for Occupational Pension Provision.

3. The grounds raise for decision the proper (or authorised) purposes in relation to the exercise of statutory power in this context; the scope in public law for attacking ministerial policy, guidance, instructions and the like; and the reach of article 18(4) of Directive 2003/41/EC.

4. At the outset it is perhaps helpful to underline a rather obvious point: this case is about whether this part of the Secretary of State's guidance has a basis in law. The claimants and their supporters, including War on Want, the Campaign Against Arms Trade and the Quakers, object to the limiting effect of the guidance on their ability to campaign around the investment of local government pension funds affecting the Palestinian people and the Occupied Territories. In particular the second claimant, Jacqueline Lewis, wishes, as a matter of conscience, to influence how the pension monies she has earned are invested. On the other hand the government is concerned that local government pension funds should not be involved in such political issues because of the mixed messages it might give abroad; because it might undermine community cohesion at home by legitimising anti-Semitic or racist attitudes and attacks (although it accepts that anti-Israel and pro-Palestinian campaigning is not in

itself anti-Semitic); and because it could impact adversely on the financial success of UK defence industries.

5. None of these matters are at issue in this judicial review. The conclusion reached in the judgment has nothing to do with the political merits of the claimants' or the Secretary of State's position on these matters. In this court the challenges the claimants raise are soluble through legal analysis, not political argument. The political merits of the respective arguments have no relevance.

BACKGROUND

6. The Palestine Solidarity Campaign, the first claimant, is a company limited by guarantee which operates as a pressure group campaigning for, amongst other things, an end to Israel's occupation of the West Bank and Gaza Strip and the Israeli settlements in the Occupied Territories. It advocates boycott, divestment and sanctions against Israel and any company, whether Israeli or otherwise, which supports the occupation. It lobbies both local and central government to persuade them to support those policies. One focus of this is upon the settlements and upon companies with a presence in the UK which facilitate their construction, administration or maintenance.

7. The second claimant, Jacqueline Lewis, is a member of the first claimant. She has also been employed by a local authority for nearly forty years, during which time she has made financial contributions to the local government pension scheme. She is an elected official of the trade union Unison, which represents many local government employees who contribute to the local government pension scheme. Unison has also campaigned around the issue of the Occupied Territories.

8. The local government pension scheme provides pensions for some five million employees (or former employees) of local authorities and others providing local services in England and Wales. It is a defined benefit scheme, operated by eighty-nine administering authorities, each of which operates an individual fund. Benefits received by scheme members are guaranteed by statute and are not affected by the investment decisions or the investment performance of individual funds. Scheme members receive the same level of benefits, based on their salary and length of scheme membership, irrespective of their particular local fund or the asset allocation and investment strategy it pursues. However, administering authorities must set contributions for participating employers at a level appropriate to ensure a fund's solvency and long term cost-efficiency. If there were to be a funding gap that would need to be met through employer contributions, ultimately by increasing the level of council tax or reducing local authority services.

9. Government policy, as evidenced by the Localism Act 2011, has been to be less prescriptive about the ways in which local government manages its responsibilities. In line with that approach the government appointed an Investment Regulation Review Group to examine the Local Government Pension Scheme (Management and Investment of Funds) Regulations 2009. It recommended that administering authorities of the local government pension scheme should set out their policies in an investment strategy in line with good practice in the private sector and should improve their accountability and transparency.

10. In late November 2015 the government published draft regulations to replace the 2009 Regulations and issued a consultation paper. That inquired in relation to the proposal in the draft regulations for the introduction of statutory guidance regarding the statements of investment strategy. In particular the consultation asked for views about how non-financial factors should be taken into account when making investment decisions and its proposal to preclude administering authorities from using pensions and procurement policies to pursue boycotts, divestments and sanctions against foreign nations and the UK defence industry.

11. A Procurement Policy Note issued by the Cabinet Office in February 2016 restated the existing policy on procurement, that authorities should comply with international law and that boycotts are inappropriate, except where sanctions, embargoes and restrictions have been put in place by the UK Government.

12. In September 2016 the Secretary of State published the government's response to the consultation. The guidance was published on 15 September 2016. Its foreword stated that it was to come into force on the same date as the new regulations. The Local Government Pension Scheme (Management and Investment of Funds) Regulations 2016, replacing the 2009 Regulations, were made on 21 September 2016, laid before Parliament on 23 September 2016, and came into force on 1 November 2016.

LEGISLATIVE FRAMEWORK AND GUIDANCE

13. Section 1 of the Public Service Pensions Act 2013 ("the 2013 Act") contains an enabling power for public pension schemes to be constituted by regulations. Section 2 identifies who can make the regulations for particular schemes. Under paragraph 3 of Schedule 2 to the Act, scheme regulations for local government employees are made for England and Wales by the Secretary of State. His regulation-making power under section 3(1) is wide,

> *"to make such provision in relation to a scheme...as [he] considers appropriate",*

although that includes the specific pension purposes in Schedule 3.

14. Paragraphs 11 and 12 of Schedule 3 provide that the regulations may cover the administration and management of pension funds, and the administration and management of a scheme, including the giving of guidance or directions to the scheme manager. Paragraph 12 states:

> *"12 The administration and management of the scheme, including*
>
> *(a) The giving of guidance or directions by the responsible authority to the scheme manager (where those persons are different);*
>
> *(b) The person by whom benefits under the scheme are to be provided;*

(c) The provision or publication of information about the scheme."

15. The main instrument governing the local government pension scheme is the Local Government Pension Scheme Regulations 2013 ("the 2013 Regulations"), made under the Superannuation Act 1972. The 2013 Regulations deal with matters including eligibility for membership, contributions, benefits, and the organisation of the scheme. Section 106 obliges administering authorities to appoint local pension boards to assist in the administration of the scheme. Membership of the boards includes local government and member representatives: s. 107(2).

16. The Local Government Pension Scheme (Management and Investment of Funds) Regulations 2009 ("the 2009 Regulations") had constrained investment decisions to minimise risk and to protect the interests of scheme beneficiaries and taxpayers. They did this by ensuring that administering authorities did not develop unbalanced and risky portfolios of investments. There were restrictions on the choice and terms of appointment of investment managers, and upon the proportion of assets which could be placed with a single manager, collective investment vehicle, bank or institution.

17. As already indicated the Local Government Pension Scheme (Management and Investment of Funds) Regulations 2016 ("the 2016 Regulations") revoked the 2009 Regulations. They are made under the 2013 Act and provide for the management and investment of pension funds held by administering authorities required to maintain such funds by the 2013 Regulations. Regulation 7(1) of the 2016 Regulations provides for the formulation by administering authorities of an investment strategy statement in accordance with the Secretary of State's guidance.

> *"7(1) An authority must, after taking proper advice, formulate an investment strategy which must be in accordance with guidance issued from time to time by the Secretary of State."*

Regulation 7(2) sets out the matters that an investment strategy has to contain.

> *"7(2) The authority's investment strategy must include-*
>
> *(a) A requirement to invest fund money in a wide variety of investments;*
>
> *(b) The authority's assessment of the suitability of particular investments and types of investments;*
>
> *(c) The authority's approach to risk, including the ways in which risks are to be assessed and managed;*
>
> *(d) The authority's approach to pooling investments, including the use of collective investment vehicles and shared services;*
>
> *(e) The authority's policy on how social, environmental and corporate governance considerations are taken*

> *into account in the selection, non-selection, retention and realisation of investments; and*
>
> *(f) The authority's policy on the exercise of the rights (including voting rights) attached to investments."*

18. Under regulation 7(5), an administering authority must consult on the contents of its strategy. Under regulation 7(6), it had to publish a statement of its investment strategy by 1 April 2017. It must review and revise it as necessary and at least every three years: reg 7(7). Regulation 7(8) provides that an administering authority must invest any fund money not needed immediately to make payments from the fund in accordance with the strategy. Regulation 8 allows the Secretary of State to give directions where an administering authority fails to act in accordance with guidance issued under regulation 7(1).

19. Guidance on the 2009 Regulations was issued under which administering authorities had to adopt the approach of the Myners principles on investment as set out in a document issued by the Chartered Institute of Public Finance and Accountancy, *Investment Decision Making and Disclosure in the Local Government Pension Scheme: A Guide to the Application of the Myners* Principles, 2009. The Myners principles came from the report, *Institutional Investment in the UK: A Review*, prepared by Lord Myners for HM Treasury in March 2001. The principles included responsible ownership, and taking account of social, environmental and governance considerations.

20. The guidance published in September 2016, at issue in this judicial review, states that it is to guide administering authorities in the formulation, publication and maintenance of their investment strategy statement required by regulation 7 of the 2016 Regulations. Part 2 of the guidance deals in turn with each aspect of Regulation 7. By way of explanation, the document states that

> *"specific requirements under each heading are shown at the end of each sub section in a text box and in bold type."*

21. What can be called the text of the guidance in relation to regulation 7(2)(e) reads, so far as relevant:

> *"Regulation 7(2)(e) – How social, environmental or corporate governance considerations are taken into account in the selection, non-selection, retention and realisation of investments.*
>
> *The law is generally clear that schemes should consider any factors that are financially material to the performance of their investments, including social, environmental and corporate governance factors . . .*
>
> *However, the Government has made clear that using pension policies to pursue boycotts, divestment and sanctions against foreign nations and UK defence industries are [sic] inappropriate, other than where formal legal sanctions,*

> *embargoes and restrictions have been put in place by the Government.*
>
> *Although schemes should make the pursuit of a financial return their predominant concern, they may also take purely non-financial considerations into account provided that doing so would not involve significant risk of financial detriment to the scheme and where they have good reason to think that scheme members would support their decision..."*

22. That is followed by a box entitled "Summary of requirements", with part in bold type:

> *"In formulating and maintaining their policy on social, environmental and corporate governance factors, an administering authority...*
>
> • ***Should not pursue policies that are contrary to UK foreign policy or UK defence policy.***"

FIRST GROUND: PROPER/ AUTHORISED PURPOSE

23. The claimants' case is that the second paragraph of the guidance for regulation 7(2)(e) just quoted, and the summary in heavy type, fall outside the proper scope of the Secretary of State's statutory powers because they were issued not for pensions purposes but, to put it in broad terms, for foreign affairs and defence purposes. Regulation 7(2)(e) contemplates that social, environmental and corporate governance considerations can be grounds for investment decisions, and ordinarily the type of disinvestment strategy which the claimants seek would fall within this description. Yet although administering authorities could pursue a disinvestment strategy for reasons of public health, the environment, or treatment of the workforce, they cannot do so for foreign affairs and defence reasons. There is nothing in the 2013 Act or 2016 Regulations which provides this, and although the Secretary of State has wide discretion he must exercise it for purposes contemplated by those legislative measures. The guidance in this area does not.

24. By contrast, the Secretary of State contends that the guidance is made for pensions purposes, on a proper analysis of the 2013 Act and the 2016 Regulations. In his submission it is wrong to decide on what pension purposes are in the abstract. The purposes of this specific statutory scheme, by reference to what it says, are such that it is within those purposes for the Secretary of State to promulgate guidance on what sort of non-financial objectives administering authorities are entitled to pursue, unconnected with the prudential management of pension funds. That is what the guidance does in telling administering authorities that generally speaking they must not use pension policies to pursue boycotts, divestment or sanctions against foreign nations and UK defence industries. Such guidance is what regulations 7(1) and 7(2)(e) on the 2016 Regulations contemplate, expressly conferring power of the Secretary of State to give guidance on how non-financial factors should be taken into account in the selection or non-selection of investments. In the Secretary of State's submission, all this is unsurprising, since the guidance and 2016 Regulations were consulted upon and made as a package, with the guidance issued before, and in preparation for the coming into force of, the Regulations.

25. As Mr Milford for the Secretary of State's submission put it, what the claimants wish to do is to have their cake and eat it. They accepted that administering authorities may take non-financial factors into account in investment decisions but at the same time asserted that the Secretary of State could not give guidance on those very same factors. In his submission, there could not logically be a mismatch between the type of considerations that administering authorities might take into account when managing pension funds, which would be included in an investment strategy statement, and the matters on which the Secretary of State is entitled to give advice under regulation 7 of the 2016 Regulations. It was also illogical for the claimants to distinguish between the administering authorities as decision-makers when it comes to their investment strategy, so that their decisions on non-financial factors are intrinsically pensions-related, and the Secretary of State, who is not the decision-maker, and who can only impose regulatory rules for a pensions-related purpose.

26. In the Secretary of State's submission, the plain fact is that non-financial matters can (implicitly) be taken into account in investment decisions by virtue of regulation 7(2)(e) of the 2016 Regulations, and for that reason the Secretary of State is entitled to give guidance on them under regulation 7(1). That regulation 7(2)(e) itself draws no distinction between foreign/defence affairs and other areas of policy is irrelevant. Regulation 7(2) sets out the general matters which an investment statement must include, and regulation 7(1) contemplates that the Secretary of State will give guidance on those matters. In the Secretary of State's submission such guidance was obviously apt to contain detail and specificity not included in the regulations themselves, and nothing in regulation 7 precluded the guidance making a distinction of this sort. The distinction the Secretary of State has drawn between foreign/defence affairs and other areas of policy is fully justified, the Secretary of State contended, for the reasons summarised earlier.

27. To my mind the Secretary of State's submissions fails, in some respects, to distinguish between his general power to give guidance on the one hand and whether in doing so he exercised the power for a purpose for which it was conferred. There is no doubt that the Secretary of State had power to issue guidance under regulation 7 of the 2016 Regulations. The separate issue is whether in introducing foreign/defence considerations into the guidance he was acting in accordance with the statutory purposes authorised. That requires an analysis of the policy and objects of the legislative scheme and a consideration of the purposes for which the Secretary of State actually exercised the relevant power: *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997; *R(Rights of Women) v Lord Chancellor and Secretary of State for Justice* [2016] EWCA Civ 91; [2016] 1 WLR 2543.

28. The starting point in identifying the statutory purposes is the legislation. The preamble to the 2013 Act makes clear that it is to make provision for public service pension schemes and for connected purposes, and the substantive provisions are on their face included for pensions purposes. Therefore in the absence of any provision to the contrary, the regulation-making powers conferred by the legislation can only be exercised for pensions purposes. The purposes for which the power to make guidance under the 2016 Regulations can be exercised can be no wider than those behind the making of the regulations themselves. Thus it is a power which may only be exercised for pensions purposes.

29. Yet it is clear from the Secretary of State's own evidence that the parts of the guidance the claimants challenge were not issued in the interests of the proper administration and management of the local government pension scheme from a pensions perspective, but are a reflection of broader political considerations, including a desire to advance UK foreign and defence policy, to protect UK defence industries and to ensure community cohesion.

30. The Secretary of State attempted to meet the point with the argument that these foreign/defence affairs purposes are pension purposes since non-financial purposes, not connected with prudential management, can be pension purposes. Certainly the general law recognises that non-financial factors can be pension purposes, so long as there is no risk of significant financial detriment from taking investment decisions with such factors into account: for example, *Harries v Church Commissioners for England* [1992] 1 WLR 1241 and see Law Commission, *Fiduciary Duties of Investment Intermediaries*, Law Com No 350, 2014, [6.33]-[6.34].

31. So, too, with regulation 7(2)(e) of the 2016 Regulations and that part of the guidance stating that non-financial considerations can be taken into account provided that doing so would not involve significant risk of financial detriment and where there is good reason to think that scheme members would support the decision. There can be no objection to this part of the guidance: it is issued for pension purposes by imposing a base-line of risk and taking into account the role the legislative design gives local government pension scheme members through local pension boards and otherwise.

32. But the flaw in the Secretary of State's approach is that the guidance has singled out certain types of non-financial factors, concerned with foreign/defence and the other matters to which reference has been made, and stated that administering authorities cannot base investment decisions upon them. In doing this I cannot see how the Secretary of State has acted for a pensions' purpose. Under the guidance, these factors cannot be taken into account even if there is no significant risk of causing financial detriment to the scheme and there is no good reason to think that scheme members would object. Yet the same decision would be permissible if the non-financial factors taken into account concerned other matters, for example, public health, the environment, or treatment of the workforce. In my judgment the Secretary of State has not justified the distinction drawn between these and other non-financial cases by reference to a pensions' purpose. In issuing the challenged part of the guidance he has acted for an unauthorised purpose and therefore unlawfully.

SECOND GROUND: LACK OF CLARITY AND CERTAINTY

33. The claimants' second ground raises the legal issue of whether there is a principle of law that guidance may be held to be unlawful simply because it is materially unclear or ambiguous, or silent as to important circumstances. Their case is that the foreign/defence part of the guidance lacks the requisite standard of clarity and certainty and is therefore unlawful. The claimants cite three cases in support, *R (YA) v Secretary of State for Health* [2009] EWCA Civ 225; [2010] 1 WLR 279, *R (Letts) v Lord Chancellor* [2015] EWHC 402 (Admin); [2015] 1 WLR 4497, and *R (Fox) v Secretary of State for Education* [2015] EWHC 3404 (Admin); [2016] PTSR 405. In my view none of these cases is authority for the principle the claimants wish to invoke.

34. *YA* involved a challenge to the Secretary of State's non-statutory guidance to the NHS about charging those from overseas for treatment, in particular failed asylum seekers. The Court of Appeal concluded that in various respects the guidance was not clear and unambiguous, and as regards failed asylum seekers who could not be returned to their country was seriously misleading. It allowed the claimant's cross appeal on that basis and held that the guidance was unlawful. But the Secretary of State had accepted that the court could intervene if the guidance was materially unclear or misleading. There was no discussion of principle of when ambiguity or lack of clarity gives rise to unlawfulness.

35. Statutory guidance was at issue in *Letts*, to which the Director of Legal Aid Casework had to have regard. Green J applied *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 and held that the guidance was unlawful because it contained a material error of law. However, by reference to the Court of Appeal in *R (Tabbakh) v Staffordshire & West Midlands Probation Trust* [2014] EWCA Civ 827; [2014] 1 WLR 4620 he remarked, *obiter*, that a policy (or guidance) which, if followed, would lead to unlawful acts or decisions, or which permits or encourages such acts, would itself be unlawful: [116]-[118].

36. I regret that in this regard Green J may have been misled by remarks which I had made in *R (Tabbakh)* ([2013] EWHC 2492 (Admin); [2014] 1 WLR 1022), and which counsel before him accepted as representing the law for the purposes of their argument. However, those remarks did not win support in the Court of Appeal (see [48]). Perhaps I may be permitted to add that they did not represent the basis of my decision in that case. In fact *Tabbakh* involved the separate principle of procedural fairness and a policy (or guidance) being unlawful because it is inherently unfair. This sort of challenge involves a high threshold. It is a principle to which the Court of Appeal recently returned in *R (on the application of Howard League for Penal Reform) v Lord Chancellor* [2017] EWCA Civ 244; [2017] 4 WLR 92. That principle has no application in this case.

37. The third case the claimants invokes, *Fox*, held that the ministerial statement at issue conveyed a misleading assertion that delivery of religious studies consistent with the GCSE subject content would necessarily fulfil the state's legal obligations as to religious education. However, Warby J reached that conclusion not because the ministerial statement was unclear but because it was erroneous in law. In as much as there are wider *obiter* comments in the judgment, Warby J was simply applying what he concluded could be drawn from *Letts* and earlier cases.

38. In my view there is no binding principle that ministerial guidance or policy is unlawful because it is materially unclear or ambiguous, or silent as to important circumstances. For the courts to adopt such a principle would be too great an intrusion into the responsibilities of the executive government. Instead the principles which to my mind apply to the lawfulness of ministerial guidance, policy and the like are threefold.

39. First, it must be read in a practical, common sense manner, and as a whole, and not as if one were construing legislation or analysing a judgment. The fact that it might be more specific or better expressed, or that difficult judgments will be needed in its application to particular situations, will not in itself render it unlawful. There is plenty of authority for this, including Lord Scarman's speech in *Gillick v West Norfolk and*

Wisbech Area Health Authority [1986] AC 112, at 180G, Sir Thomas Bingham's judgment in *R v Director of Passenger Rail Franchising Ex p. Save Our Railways* [1996] CLC 596, at 601B, and what Lord Reed said in *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13; [2012] PTSR 983, [19].

40. Secondly, for policy, guidance or the like to be unlawful, it must in the circumstances be positively misleading or erroneous in law, not simply imprecise, lacking in specificity or requiring the exercise of judgment to apply it to a particular situation. The threshold for review is high, expressed by Lord Scarman in the circumstances of *Gillick* as "vagueness creat[ing] so obscure a darkness that it could reasonably be understood by a doctor as authorising him to prescribe without the parent's consent whenever he should think fit": at 181C-D. In that case, Lord Bridge referred to the occasions being rare when ministerial policy would raise a clearly defined issue of law, unclouded by political, social or moral overtones, and added that the court should exercise its jurisdiction with the utmost restraint: at 193H-194A-B. In the minority Lord Templeman agreed with Lord Bridge's sentiments (at 206F-G), as did Warby J in *Fox*.

41. Thirdly, while *Gillick* was concerned with non-statutory guidance, the same principle applies with statutory guidance, albeit that the threshold will be tempered by the legal character of the guidance, the extent to which it is binding, and the consequences laid down in the event of its breach. As we have seen *Letts* concerned statutory guidance, to which the relevant official had to have regard, but applying *Gillick* Green J held it to be unlawful because it was erroneous in law. An *a fortiori* case would be where the guidance or policy is binding, for then we are nearer the boundary of statutory material and a more testing standard of judicial oversight is justified.

42. The claimants pointed to a number of ambiguities and uncertainties in the guidance. First, there are said to be, and there are, inconsistencies between the text of the guidance and the so called summary of requirements, which in the foreword is said to constitute the "specific requirements". But as with any document one reads it as a whole. One may look to the summary first, but then to the preceding text to see whether it contains a more detailed explanation of the requirements summarised. In this case the summary and text can be reconciled and the lack of clarity the claimants allege disappears.

43. Next, the claimants contend that there is no way of knowing with any certainty what certain parts of the guidance mean, for example, what is "UK foreign or defence policy" at any given time? What are the "UK defence industries"? Similarly, it is submitted, the ambit of the guidance is unclear, for example, does it inhibit campaigning for disinvestment from a company which operates from or profits from the Occupied Territories or for the boycott of goods or services from there?

44. In as much as the guidance is unclear it is not in my judgment so unclear as to be positively misleading or erroneous in law. Terms such as "UK foreign or defence policy" can be given meaning by reference to government announcements and documents, and while there may be borderline cases with the phrase "UK defence industries" it has a readily accepted meaning in common discourse. I accept the Secretary of State's submission that a campaign advocating disinvestment from a private company connected with the Occupied Territories, in order to express disapproval of Israeli actions there, would be action against Israel, just as in the past

the campaign for disinvestment from South African companies, in order to express disapproval of apartheid, was in common parlance described as a boycott against South Africa. Disinvestment from such companies would thus be inconsistent with the guidance. So, too, with boycotting goods or services emanating from Israeli settlements in the Occupied Territories; it would be a boycott against Israel.

45. All this leads me to the conclusion that the non-statutory guidance in this case is not unlawful for uncertainty.

THIRD GROUND: EU IORP DIRECTIVE, ARTICLE 18(4)

46. The third ground of the claimants' challenge is that the guidance imposes a form of prior governmental approval of the investment decisions administering authorities make, contrary to Article 18(4) of Directive 2003/41/EC on the Activities and Supervision of Institutions for Occupational Pension Provision ("the IORP Directive").

47. Article 18 of the Directive is headed "Investment rules" and provides, so far as relevant:

> *"(1) Member States shall require institutions located in their territories to invest in accordance with the `prudent person' rule and in particular in accordance with the following rules:*
>
> *(a) the assets shall be invested in the best interests of members and beneficiaries...*
>
> *(b) the assets shall be invested in such a manner as to ensure the security, quality, liquidity and profitability of the portfolio as a whole...*
>
> *(c) the assets shall be predominantly invested on regulated markets...*
>
> *(d) investment in derivative instruments shall be possible [subject to specified conditions]*
>
> *(e) the assets shall be properly diversified...*
>
> *(f) investment in the sponsoring undertaking shall be no more than 5% of the portfolio as a whole...*
>
> *(2) The home Member State shall prohibit the institution from borrowing or acting as a guarantor on behalf of third parties...*
>
> *(3) Member States shall not require institutions located in their territory to invest in particular categories of assets.*

> *(4) Without prejudice to Article 12, Member States shall not subject the investment decisions of an institution located in their territory or its investment manager to any kind of prior approval or systematic notification requirements.*
>
> *(5) In accordance with the provisions of paragraphs 1 to 4, Member States may . . . lay down more detailed rules, including quantitative rules, provided they are prudentially justified, to reflect the total range of pension schemes operated by those institutions...*
>
> *(6) Paragraph 5 shall not preclude the right for Member States to require the application to institutions...of more stringent investment rules also on an individual basis provided they are prudentially justified, in particular in the light of the liabilities entered into by the institution..."*

48. The background to the Directive was the aim of creating an internal market for occupational retirement provision, whilst guaranteeing a high degree of security for future pensioners. The Commission Green Paper, COM(97) 283, *Supplementary Pensions in the Single Market*, which led to the Directive, contained this as one of the policy objectives:

> *"[R]emoval of any requirements on pension funds to invest in or refrain from investing in particular categories of assets . . . otherwise than on justified prudential grounds. Any restrictions imposed on prudential grounds must be proportional to the objectives they may legitimately pursue."*

49. Recitals 6 and 7 of the Directive state that it is intended as a first step on the way to the creation of an internal market for occupational retirement provision, whilst guaranteeing a high degree of security for future pensioners. Recital 8 provides that the relevant institutions "should have . . . freedom of investment, subject only to co-ordinated prudential requirements". Recital 32 recognises that supervisory methods and practices vary among Member States, and therefore Member States should be given some discretion on the precise investment rules they wish to impose.

50. There does not appear to be any jurisprudence regarding the meaning of prior approval in article 18(4). However, the Court of Justice of the European Union has considered a prohibition against subjecting decisions to "prior approval or systematic notification" in Directive 92/49/EC on non-life insurance. That Directive contains the principle of freedom to set rates in the non-life insurance sector: articles 6(3), 29 and 39.

51. In C-59/01, *Commission v Italy* [2003] ECR I-1759, the court held that a price control system in Italian law, applying to third party liability for motor vehicles, was caught as a system of prior approval or systematic control. However, in Case C-346/02, *Re Bonus Malus System* [2004] ECR I-7517; [2004] 3 CMLR 50, the court upheld a Luxembourg law establishing different rates for premiums depending on whether or

not a driver had an accident free record. The difference with C-59/01 *Commission v Italy*, it held, was that insurance companies could still set the basic rate for premiums: [23]. Similarly, in C-518/06, *Commission v Italy* [2009] ECR I-3491; [2009] 3 CMLR 22, the CJEU upheld Italian legislation obliging insurance companies to calculate pure premiums and loadings separately, and in a certain manner, since that did not amount to a form of prior approval or systematic notification of premium rates: [100]-[103].

52. The claimants submit that making the permissibility of an investment decision depend upon the guidance is to subject it to a form of prior approval for the purposes of article 18(4). Prior approval is not confined to situations where the administering authorities have to go cap in hand, as Mr Giffin QC put it: it covers the restrictions in the guidance at issue in this case. Article 18(4) cannot be sidestepped simply by making the necessary approval or otherwise of an investment decision a function of the state's general policy, rather than of some more explicit or individual approval process. The application of the Directive must depend upon substance, not form. The broader reading is reinforced, it is also said, by the descriptive phrase "any kind of" which precedes "prior approval" in article 18(4).

53. The claimants' construction accords, the claimants also submit, with the purpose of the Directive where the only limitations which Member States can lay down are so that investments are made prudentially. Otherwise there can be no restrictions as to where to invest. In that context the claimants contend that article 18(4) is the corollary of article 18(3): article 18(3) precludes positive interference, i.e. the state demanding investment in particular assets, whilst article 18(4) precludes negative interference, i.e. the state being able to withhold a required approval for a particular investment decision, whether such approval has to be sought in advance or by way of subsequent notification. Finally, it is said, the breadth of article 18(4) explains why it opens with a saving for article 12, which obliges states to require institutions to prepare periodic statements of their investment policy principles.

54. In my view the phrase "any kind of prior approval" connotes an obligation to subject individual investment decisions to external oversight before investments are made. It does not cover what the guidance in this case does, in allowing administering authorities to decide what investments to make, but providing a framework for the content of statements of investment policy which administering authorities must prepare. Further, as Mr Milford for the Secretary of State pointed out, prior approval in article 18(4) is linked with notification, both phrases connoting circumstances in which an administering authority must inform some external body about its investment decisions. This distinction between a general framework for investment decisions and a system of prior approval seems supported by the jurisprudence of the CJEU in the context of the use of that phrase in the Non-life Insurance Directive 92/49/EC.

55. This reading of the phrase prior approval is supported both by its immediate context and the Directive as a whole. Recital (32) and Articles 18(5) and (6) of the Directive permit Member States to impose general rules. These cannot mean the same thing as prior approval, since prior approval is by Article 18(4) always impermissible. Article 18(4) is without prejudice to Article 12, that is, Member States' duty to ensure that every institution prepares a strategy. So Article 18(4) itself makes clear that Member States do not subject occupational pension providers to any form of prior approval, merely by requiring them to produce a strategy in accordance with such rules as

Member States themselves may determine. As we have seen the guidance does not mandate investment or disinvestment in any particular class of asset. More generally, the Directive is concerned to ensure the smooth functioning of the single market, in particular, the free movement of capital, and the manner in which Member States can legitimately govern the prudential investment decisions of occupational pension providers. These purposes are unaffected by the guidance addressing the non-financial decisions of providers.

CONCLUSION

56. For the reasons given I grant judicial review on the first ground.