



Michaelmas Term

[2017] UKSC 81

On appeal from: [2016] EWCA Civ 125

JUDGMENT

R (on the application of Black) (Appellant) v Secretary of State for Justice (Respondent)

before

Lady Hale, President

Lord Mance, Deputy President

Lord Kerr

Lord Hughes

Lord Lloyd-Jones

JUDGMENT GIVEN ON

19 December 2017

Heard on 31 October and 1 November 2017

Appellant

Respondent

Philip Havers QC

James Eadie QC

Shaheen Rahman QC

David Pievsky

(Instructed by Leigh Day)

(Instructed by The Government Legal Department)

LADY HALE: (with whom Lord Mance, Lord Kerr, Lord Hughes and Lord Lloyd-Jones agree)

1.

The issue in this case is whether the Crown is bound by the prohibition of smoking in most enclosed public places and workplaces, contained in Chapter 1 of Part 1 of the Health Act 2006 (for shorthand, I shall call its provisions “the smoking ban”). The issue comes before this Court because a prisoner, who is serving an indeterminate sentence at Her Majesty’s Prison Wymott and a non-smoker with a number of health problems, complains that the ban is not being properly enforced in the common parts of the prison. But the same issue affects the myriad of premises which are occupied by central government departments, the civil servants and other people who work there, and the members of the public who visit the premises for business or pleasure. They need to know whether the smoking ban

which applies to those premises is simply an instruction from the managers or whether it is backed up by criminal sanctions and other enforcement measures having the force of law.

This case

2.

The appellant suffers from a number of health problems which are exacerbated by tobacco smoke, including hypertension and coronary heart disease. He has a history of myocardial infarction and required surgical coronary intervention in 2009. He complains about his exposure to second-hand tobacco smoke in the common parts of the prison. He alleges that both staff and prisoners often smoke in areas of the prison where smoking is prohibited. The Secretary of State disputes this, but it is not the business of these proceedings to resolve that factual dispute.

3.

In September 2013, the appellant asked that the National Health Service Smoke-free Compliance Line (SFCL) be put on the prison phone system for all prisoners. This would enable them to report breaches of the smoking ban to the local authorities charged with enforcing it. He followed this up with a pre-action protocol letter as a prelude to issuing judicial review proceedings. At first, this brought him the result he was looking for - on 13 January 2014, the prison issued instructions that arrangements be made for him to have access to the SFCL on his individual phone account. By itself, that might be thought to indicate that the prison thought that the smoking ban applied to them, for what would otherwise be the point of relaxing the general ban on adding Freephone numbers to prisoners' mobile phones, if not to enable them to alert the enforcement authority of possible breaches of the ban?

4.

However, that is unlikely to be the case, because the very next day the Secretary of State stated in a letter, in answer to the pre-action protocol letter, that

"Part 1 of the Health Act does not bind the Crown. Accordingly, the Secretary of State is of the view that Local Authorities (including on reference by the Compliance Line) have no statutory role in relation to the enforcement of smoke-free provisions at HMP Wymott."

The appellant therefore launched these proceedings in March 2014, seeking judicial review of the Secretary of State's refusal to provide confidential and anonymous access to the SFCL to prisoners. He was successful before Singh J, who held that the Act did bind the Crown and quashed the Secretary of State's decision: [\[2015\] EWHC 528 \(Admin\)](#); [\[2015\] 1 WLR 3963](#). The Secretary of State appealed successfully to the Court of Appeal, which held that the Act did not bind the Crown: [\[2016\] EWCA Civ 125](#); [\[2016\] QB 1060](#). The appellant now appeals to this Court.

The background to the smoking ban

5.

It has, of course, been known for a long time that smoking tobacco is hazardous to the health of the smoker. Recognition of the dangers of passive smoking is more recent. An account of the genesis of the smoking ban, in the context of hospitals, including mental health units, can be found in Appendix A to the judgment of the Court of Appeal in *R (G) v Nottinghamshire Healthcare NHS Trust* [\[2009\] EWCA Civ 795](#); [\[2010\] PTSR 674](#), an unsuccessful challenge to the smoking ban at Rampton Hospital on human rights grounds. Briefly, in 1998, Smoking kills: A White Paper on Tobacco (Cm 4177) estimated that smoking in the United Kingdom caused 46,500 deaths from cancer and 40,300 deaths

from all circulatory diseases. Smokers who smoked regularly and then died of smoking-related diseases lost on average 16 years from their life expectancy when compared with non-smokers. However, at that time it was thought that the case for legal action to restrict smoking was not sufficiently strong.

6.

In reports of 1998 and 2004, the Scientific Committee on Tobacco and Health concluded that exposure to second-hand smoking (SHS) was a cause of a range of serious medical conditions and recommended restrictions on smoking in public places and work-places so as to protect non-smokers from SHS. The overall increased risk of lung cancer for non-smokers exposed to SHS was put at 24%. In December 2005, the House of Commons Health Committee reported that SHS caused at least 12,000 deaths a year in the United Kingdom of which a minimum of 500 were due to the presence of smoke in the workplace (First Report Session 2005-2006, Smoking in Public Places, HC 485-I, para 17). One year after the smoking ban came into force, the Department of Health published a report, Smoke-free England - one year on (2008), which stated:

“Medical and scientific evidence shows that exposure to second-hand smoke increases the risk of serious medical conditions such as lung cancer, heart disease, asthma attacks, childhood respiratory disease, sudden infant death syndrome (SIDS) and reduced lung function. Scientific evidence also shows that ventilation does not eliminate the risks to health of second-hand smoke in enclosed places. The only way to provide effective protection is to prevent people breathing in second-hand smoke in the first place.”

7.

In his foreword to that Report, Sir Liam Donaldson, Chief Medical Officer, recalled that he had first called for public places and workplaces to made smoke-free in his 2002 Annual Report, which was met with considerable hostility as well as support. The following year, his 2003 Annual Report set out the economic case for smoke-free legislation, and recommended that smoke-free workplaces and smoke-free enclosed public places should be created as a priority through legislation.

8.

This recommendation was reinforced by the international obligations undertaken by the United Kingdom. In 2003, the World Health Organisation published its Framework Convention on Tobacco Control . The United Kingdom ratified this in December 2004 and it came into force on 27 February 2005. Article 8, headed Protection from exposure to tobacco smoke , provides:

“1. Parties recognize that scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability.

2. Each Party shall adopt and implement in areas of existing national jurisdiction as determined by national law and actively promote at other jurisdictional levels the adoption and implementation of effective legislative, executive, administrative and/or other measures, providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places and, as appropriate, other public places.”

9.

In 2004, after extensive public consultation, the Department of Health published a White Paper Choosing Health - Making Healthy Choices Easier (Cm 6374), canvassing a number of health-related initiatives. Among these, reducing the number of people who smoke was a priority:

“because it leads to heart disease, strokes, cancer and many other fatal diseases; because many people felt this was an area in which they needed more support in addressing the problem; because many people were concerned about the effects of second-hand smoke; and because many parents were concerned about their children taking up smoking.” (Executive Summary, para 10)

10.

Hence, in paragraph 76 of the paper, the Government explained its policy thus:

“Change has been slow and public demand for action has increased. It is one of the few instances in this White Paper where we believe the right response is Government action in the form of legislation.

We therefore intend to shift the balance significantly in favour of smoke-free environments. Subject to parliamentary timetables, we propose to regulate, with legislation where necessary, in order to ensure that:

all enclosed public places and workplaces (other than licensed premises which are dealt with below) will be smoke-free.”

11.

The rest of paragraph 76 was devoted to restaurants, pubs, clubs and other licensed premises.

Paragraph 77 continued:

“We intend to introduce smoke-free places through a staged approach:

by the end of 2006, all government departments and the NHS will be smoke-free;

by the end of 2007, all enclosed public places and workplaces, other than licensed premises (and those specifically exempted), will, subject to legislation, be smoke-free;

by the end of 2008 arrangements for licensed premises will be in place.

We will use the intervening period of time to consult widely in the process of drawing up the detailed legislation, including on the special arrangements needed for regulating smoking in certain establishments - such as hospices, prisons and long stay residential care. In implementing this policy there are also a range of practical issues that will need to be addressed - we will need to consult, for example, with schools and other institutions on how best to give practical effect to this policy, as well as how best to enforce the policy and what penalties will be appropriate for people who do not follow the law.”

12.

It is noteworthy that, although the government contemplated bringing in a smoking ban in government departments and the NHS before other premises, nowhere is it stated that any proposed legislation would not cover government departments. On the contrary, the reverse is suggested by including prisons, the overwhelming majority of which are Crown property, amongst the establishments for which special arrangements would be needed.

13.

The Queen's Speech on 17 May 2005 announced that legislation to restrict smoking in enclosed public places and workplaces would be introduced in that session. In June 2005, the Government published its Consultation on the Smoke-free Elements of the Health Improvement and Protection Bill, covering matters such as definitions, exceptions, signage, offences and enforcement. Paragraph 1 announced that the aim of the policy was to make "almost all enclosed public places and workplaces smoke-free". Only a limited number of exceptions would be permitted in regulations. Once again, there is no hint that the legislation would not bind the Crown or apply to central government departments. Exceptions were canvassed for establishments where people lived, and "prisons and other places of detention" were listed.

14.

The Bill was published in October 2005 and the House of Commons Health Committee conducted an extensive enquiry during October and November. Their Report, *Smoking in Public Places* (see above), was published in December. It commented, at para 62:

"Neither the Department of Health nor any other Government witnesses made reference to the issue of Crown immunity during our inquiry. It is not mentioned in the Explanatory Notes to the Bill nor was any reference made by Ministers at the Bill's second reading. We find these omissions extraordinary especially as Crown Immunity removes the necessity for exempting many premises."

The Government's response (Cmnd 6769, March 2006) was this, at para 7 of its conclusions and recommendations:

"Through convention, legislation is not usually binding on Crown land. The Health Bill is no exception. No specific reference was therefore made since this legislation followed this usual convention.

While Crown Immunity does remove the requirement for specific premises to be exempted from smoke-free legislation, it is important that plans are in place for such places to become smoke-free, keeping in the spirit of the legislation. Strategies are in place which will see all central government and NHS buildings in England become totally smoke-free by the end of 2006."

The Bill was passed on 19 July 2006 and the smoking ban came into force on 1 July 2007.

The smoking ban

15.

Section 2(1) of the 2006 Act defines "smoke-free premises":

"Smoke-free premises

(1) Premises are smoke-free if they are open to the public.

But unless the premises also fall within subsection (2), they are smoke-free only when open to the public.

(2) Premises are smoke-free if they are used as a place of work - (a) by more than one person (even if the persons who work there do so at different times, or only intermittently), or (b) where members of the public might attend for the purpose of seeking or receiving goods or services from the person or persons working there (even if members of the public are not always present).

They are smoke-free all the time."

16.

Section 3(1) provides that the “appropriate national authority” (the Secretary of State in England and, as originally enacted, the National Assembly in Wales) may make regulations exempting specified premises, or areas within them, from being smoke-free. Section 3(2) provides that descriptions of premises which may be specified under section 3(1) include, in particular, “any premises where a person has his home ... (including hotels, care homes, and prisons and other places where a person may be detained)”.

17.

Section 4 allows the appropriate national authorities to designate, as smoke-free, premises which would not otherwise fall within section 2. Section 5 deals with vehicles. Section 6(1) imposes a duty on “any person who occupies or is concerned in the management of smoke-free premises” to make sure that the required no-smoking signs are displayed in compliance with the section. Failure to comply is an offence (section 6(5)), punishable with a fine on level 3, currently £1,000 (section 6(8); Smoke-free (Penalties and Discounted Amounts Regulations (SI 2007/764), regulation 2(1)), although there are various defences (section 6(6)). The prescribed no smoking signs are required to state “No smoking. It is against the law to smoke in these premises” (The Smoke-free (Signs) Regulations 2007 (SI 2007/923), regulation 2).

18.

Section 7(2) makes it an offence to smoke in a smoke-free place, punishable with a fine on level 1, currently £200 (section 7(6) and SI 2007/764, regulation 2(2)). Section 8(4) makes it an offence, punishable by a fine on level 4, currently £2,500 (section 8(7) and SI 2007/764, regulation 2(3)), for “any person who controls or is concerned in the management of smoke-free premises” to fail to comply with the duty (in section 8(1)) to cause a person smoking there to stop smoking. Once again there are various defences (section 8(5)).

19.

Section 10 deals with enforcement. The “appropriate national authority” designates the enforcement bodies; in England these are the local authorities with environmental health functions and their authorised officers are the local environmental health officers. The enforcement authority has a duty to enforce the ban (section 10(3)) and powers of entry to enable it to do so (Schedule 2). Obstructing its officers is an offence under section 11, carrying a maximum fine at level 3, currently £1,000 (section 11(1), (2), (3) and (4)).

20.

While the Bill was going through Parliament, the Department of Health consulted on the proposed regulations: Smoke-free premises and vehicles: Consultation on proposed regulations to be made under powers in the Health Bill (July 2006). This made it clear that “there is no intention through smoke-free legislation to prevent individuals from smoking in areas of premises which are considered to be private residential space. Nevertheless, in certain types of residential accommodation, balance is needed between allowing people to smoke in their own residential spaces and protecting others from exposure to second-hand smoke, including the other people who call the premises home and the people who work there”. Among the premises listed where such a balance was needed were prisons (para 3.12). Once again, there was no suggestion in the Consultation that government premises would be exempt from the ban, and therefore that only private prisons would be included. Accordingly, the Smoke-free (Exemptions and Vehicles) Regulations 2007 (SI 2007/765), regulation 5, provide that the person in charge of such premises, including prisons, may designate bedrooms or smoking rooms as not smoke-free. Prisons are expressly exempt from the requirement that doors which open onto smoke-free premises must be automatically self-closing (regulation 5(3)(e)).

21.

Not surprisingly, perhaps, Her Majesty's Prison Service took the view that the smoking ban did apply to them. A Prison Service Instruction, Smoke-free Legislation: Prison Service Application (PSI 09/2007), dated 2 April 2007, was clearly drafted on the assumption that prisons were bound to comply with the legislation, as was the Foreword to a research study, Stop Smoking Support in Prisons (January 2007), signed by the Director of Prison Health at the Department of Health and the Deputy Director General of Her Majesty's Prison Service.

When do Statutes bind the Crown?

22.

The classic and conventional statement of principle is that a statutory provision does not bind the Crown save by express words or "necessary implication". As authority for that proposition, it is not necessary to look further than two cases, one in the Judicial Committee of the Privy Council and one in the House of Lords.

23.

In *Province of Bombay v Municipal Corporation of the City of Bombay* [1947] AC 58, the issue was whether an Act giving the municipality power to lay water mains for the purpose of water supply through, across or under any street and into, through or under any land in the city allowed it to lay a water main in a private road belong to the government. Lord du Parc, giving the judgment of the Board, said this (at 61):

"The general principle to be applied in considering whether or not the Crown is bound by general words in a statute is not in doubt. The maxim of the law in early times was that no statute bound the Crown unless the Crown was expressly named therein, 'Roy n'est lie par aucun statute si il ne soit expressement nomme.' But the rule so laid down is subject to at least one exception. The Crown may be bound, as has often been said, 'by necessary implication.' If, that is to say, it is manifest from the very terms of the statute, that it was the intention of the legislature that the Crown should be bound, then the result is the same as if the Crown had been expressly named. It must then be inferred that the Crown, by assenting to the law, agreed to be bound by its provisions."

24.

There being no express provision, the Board was concerned with necessary implication. They rejected the view of the Chief Justice that the necessary implication could be found if the law could not operate "efficiently and smoothly" if the Crown were not bound. This seemed to ignore the possibility that the legislature may have expected that the Crown would "co-operate with the corporation so far as its own duty to safeguard a wider public interest made co-operation possible and politic" (p 62). The Board also rejected the view, albeit supported by much earlier authority, that the Crown must be held to be bound by any statute enacted "for the public good", because every statute must be supposed to be for the public good (p 63). Nevertheless the purpose was relevant:

"Their Lordships prefer to say that the apparent purpose of the statute is one element, and may be an important element, to be considered when an intention to bind the Crown is alleged. If it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound." (emphasis supplied)

The Board also declined to adopt a rather different approach which had found favour in Scotland (see further below) (p 64) and pointed out that express savings for the Crown might be inserted "ex

abundanti cautela” without necessarily implying that the Crown was bound by other provisions in the Act (p 65).

25.

The second case is Lord Advocate v Dumbarton District Council [1990] 2 AC 580, where Lord Keith of Kinkel, with whom the other members of the appellate committee agreed, dealt rather more comprehensively with the modern cases. The issue was whether the Ministry of Defence was entitled to close off a section of the A814 road without the permission of the roads authority under the Roads (Scotland) Act 1984 or the local planning authority under the Town and Country Planning (Scotland) Act 1972. The first question was whether the law of Scotland was the same as the law of England in this respect. Before the Acts of Union, Scots law did not have the same presumption as English law, and there were Scottish cases suggesting that the rule was rather different there. Lord Keith held that there were no rational grounds for adopting a different approach to the construction of statutes in Scotland and in England and that the modern English approach should prevail (p 591).

26.

He then reviewed most of the “modern” English authorities in detail, beginning with Gorton Local Board v Prison Comrs (Note), decided in 1887 but reported as a footnote to the report of Cooper v Hawkins [1904] 2 KB 164. In Gorton it was held that the Prison Commissioners were not bound by local by-laws made under the Public Health Act 1875, requiring the local authority to certify that newly built houses were fit for human habitation. In Cooper, it was held that vehicles driven by Crown servants on Crown business were not subject to the speed limits laid down by the local authority under the Locomotives Act 1865.

27.

The next case was Attorney General v Hancock [1940] 1 KB 427, in which it was held that the Crown could enforce a debt for unpaid income tax without the leave of the court, not being bound by the provisions of the Courts (Emergency Powers) Act 1939, which prohibited enforcement without leave. (It is perhaps worth pointing out that a similar conclusion was reached in Attorney General v Edmunds (1870) 22 LTR 667 and Attorney General v Randall [1944] 1 KB 709, where it was held that the Debtors Act 1869 restriction on imprisonment for debt did not apply to debts owing to the Crown.)

28.

Lord Keith then quoted from the Province of Bombay case, including the passage cited at para 23 above, and from the case of Madras Electric Supply Corporation Ltd v Boardland [1955] AC 667. This was not directly concerned with whether the statute in question bound the Crown, but with whether the Crown was a “person” for a particular purpose. While holding that the Crown was such a person, their Lordships reiterated the classic doctrine, Lord MacDermott and Lord Reid locating this as a rule of statutory construction rather than an aspect of the royal prerogative. Similarly in Ministry of Agriculture, Fisheries and Food v Jenkins [1963] 2 QB 317, it was held that the Crown was not bound by the Town and Country Planning Act 1947 to get planning permission for the afforestation of its land.

29.

Finally, Lord Keith cited with approval the dictum of Diplock LJ in British Broadcasting Corp'n v Johns [1965] Ch 32, at 78-79:

“The modern rule of construction of statutes is that the Crown, which today personifies the executive government of the country and is also a party to all legislation, is not bound by a statute which

imposes obligations or restraints on persons or in respect of property unless the statute says so expressly or by necessary implication.”

30.

Lord Keith went on to consider in detail the language of the two statutes with which the House was concerned, before concluding that they did not bind the Crown. He returned, at the end of his speech, to the distinction drawn by the Lord President in that case, between actions which would otherwise have been lawful (and thus presumed not to be prohibited by the statute) and actions such as this interference with the highway (which was unlawful and thus presumed to be prohibited). He rejected this distinction as undesirable, requiring as it would a minute inquiry into the powers of the Crown in the particular context and involving a different construction of the same statute depending upon the outcome of that inquiry. He concluded thus, at 604:

“Accordingly it is preferable, in my view, to stick to the simple rule that the Crown is not bound by any statutory provision unless there can somehow be gathered from the terms of the relevant Act an intention to that effect. The Crown can be bound only by express words or necessary implication. The modern authorities do not, in my opinion, require that any gloss should be placed upon that formulation of the principle.”

31.

The only other case which it is necessary to consider is *R (Revenue and Customs Comrs) v Liverpool Coroner* [2014] EWHC 1586 (Admin); [2015] QB 481. The issue was whether or not the Coroners Act 2009, and specifically the investigatory powers contained in Schedule 5, was binding on the Crown, so that the Commissioners were entitled and obliged to provide the coroner with historical occupational information for the purpose of investigating whether the deceased had died of an industrial disease, overriding their statutory duty of confidentiality. The Court held that the Act did bind the Crown, as it was intended to strengthen the powers of coroners and to enable them to conduct an effective investigation into deaths for which the state might bear some responsibility, as required by article 2 of the European Convention on Human Rights. That legislative purpose would be frustrated if it was not binding on the Crown. Mr James Eadie QC, for the Secretary of State in this case, accepts that the Liverpool Coroner’s case was rightly decided .

The solution in this case?

32.

Mr Phillip Havers QC, for the appellant, urges one of three courses upon us, each of which would have the result that the smoking ban is binding on the Crown. In reverse order, these are (1) to revisit the rule itself; (2) to modify the rule; or (3) to apply the existing rule in such a way that the smoking ban binds the Crown.

(1) Revisit the rule

33.

Mr Havers points out that the rule has been subject to criticism from distinguished commentators, ranging from Glanville Williams, who called it “a gap made in the ‘rule of law’” (in *Crown Proceedings*, London, Stevens, 1948, at p 49); and Bennion on Statutory Interpretation, which describes insistence on necessary implication as “typical of the unrealistic attitude displayed by some judges in resisting implied meaning in statutes” (London, LexisNexis, 6th ed, Oliver Jones (ed), 2013, at p 181), to Paul Craig, who describes the present law as unsatisfactory, unclear and the product of a misinterpretation of earlier authority (in *Administrative Law*, London, Sweet & Maxwell, 8th ed

(2016), at para 29.003). In his view, careful thought is not always given to whether the Crown should be bound, which may be overlooked or receive scant attention when legislation is drafted.

34.

Two solutions have been canvassed. One, favoured by Glanville Williams and Paul Craig, is to reverse the presumption, so that the Crown is bound unless expressly excluded from some or all of the Act's provisions. This would have the merit of clarity and certainty. It would force the Crown to think carefully about whether and to what extent it should be bound and to justify any exemption. The other, favoured by Bennion, is that there should be a single test: what did Parliament intend? In other words, there would be no presumption either way and no requirement that any implication be "necessary". This would be to apply the general rule of statutory interpretation to the question, but it would not produce the clarity and certainty of the alternative suggestion.

35.

It is easy to see the merits of the solution put forward by Glanville Williams and Paul Craig. However, the problem for this Court in adopting either of the solutions proposed is that the presumption, as stated in the *Bombay*, *Madras* and above all the *Dumbarton* cases, is so well established in modern times that many, many statutes will have been drafted and passed on the basis that the Crown is not bound except by express words or necessary implication. Decisions of this Court, or indeed any court, generally operate retrospectively to alter the previous understanding of the law. It may be possible for the Court to declare that a new understanding of the law will operate only prospectively: the possibility was canvassed at length in *In re Spectrum Plus Ltd* [2005] UKHL 41; [2005] 2 AC 680. But such a course would be wholly exceptional and the case for doing so has certainly not been made before us. I would therefore decline to abolish the rule or reverse the presumption, although I would urge Parliament, perhaps with the assistance of the Law Commission, to give careful consideration to the merits of doing so.

(2) Modify the test

36.

It is certainly open to this Court to clarify the test, even if such clarification has the effect of modifying the understanding which some, at least, may have had of it. We can begin with some simple propositions:

(1) The Crown is not bound by a statutory provision except by express words or necessary implication.

(2) This is not an immunity from liability, strictly so-called, but a rule of statutory interpretation.

(3) The goal of all statutory interpretation is to discover the intention of the legislation.

(4) That intention is to be gathered from the words used by Parliament, considered in the light of their context and their purpose. In this context, it is clear that Lord Hobhouse's dictum in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21; [2003] 1 AC 563, at para 45, that "A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context" must be modified to include the purpose, as well as the context, of the legislation.

(5) In considering the intention of the legislation, it is not enough that it is intended for the public good or that it would be even more beneficial for the public if the Crown were bound.

(6) However, it is not necessary that the purpose of the legislation would be “wholly frustrated” if the Crown were not bound. In the *Bombay* case, it is clear that the Board was only using this as one example of where the Crown would be bound by necessary implication. In this case, it is accepted that the Liverpool Coroner’s case was rightly decided. The purpose of the Coroners Act would not have been “wholly frustrated” had it not bound the Crown. But one very important purpose of the Act would have been frustrated: that was to render the inquest process compliant with the United Kingdom’s obligations under the European Convention on Human Rights, so that deaths for which the state might bear some responsibility could be properly investigated.

(7) In considering whether the purpose of the Act can be achieved without the Crown being bound, it is permissible to consider the extent to which the Crown is likely voluntarily to take action to achieve it. Inaction cannot be assumed. It may be that the Act’s purpose can as well be achieved by the Crown exercising its powers properly and in the public interest. But if it cannot, that is a factor to be taken into account in determining the intention of the legislation.

37.

In my view, that is all that need be said. It is neither necessary nor desirable to add further glosses to the test, or to characterise it by adjectives such as “strict”. The question is whether, in the light of the words used, their context and the purpose of the legislation, Parliament must have meant the Crown to be bound.

(3) Applying the test in this case

38.

Some strong points can be made in favour of the conclusion that Parliament did indeed mean the Crown to be bound by the smoking ban. Although the government announced an intention to bring in a ban before the legislation was passed, there is no hint in the government publications leading up to the adoption of the policy that the Crown would not be bound by the legislation when it came into force (other than the exchange with the Health Committee referred to at para 14 above). If this had been made clear, one might have expected the anti-smoking campaigners and the trade unions and staff associations protecting the interests of civil servants and others working for the government to say something about it. The ban was intended to protect workers and visitors from the known dangers of being exposed to second-hand smoke, when reliance on voluntary measures had not proved effective, and omitting Crown premises would deny statutory protection to large numbers of people.

39.

There are very significant differences between a smoking ban voluntarily imposed by an occupier or employer and the smoking ban imposed by the Act:

- (i) The signs displayed have to say that “it is against the law” to smoke in these premises.
- (ii) The occupier or manager is guilty of a criminal offence if such signs are not displayed.
- (iii) It is a criminal offence to smoke in smoke-free premises.
- (iv) The manager has to take reasonable steps to stop people smoking and is guilty of a criminal offence if he or she does not.
- (v) Environmental health officers can be called in to enforce the ban, either against smokers, or against occupiers and managers, or both.
- (vi) Environmental health officers have powers of entry to enable them to do so.

(vii) Individual non-smokers who complain about breaches of the ban do not have to bear the expense and burden of bringing proceedings to enforce it.

40.

None of this applies to a ban voluntarily imposed in government premises. Any signs displayed cannot say that smoking is “against the law”. The ban is not backed up by criminal sanctions against smokers or managers. It is not backed up by the enforcement powers of environmental health officers. The only method of challenging a refusal to impose or to enforce a smoking ban would be to bring judicial review proceedings. It is unrealistic to expect workers and members of the public who are adversely affected by exposure to second-hand smoke in government premises to bring judicial review proceedings. These are expensive, time-consuming and inaccessible to most people, nor will they necessarily produce a remedy which is anything like as effective as the statutory enforcement process.

41.

In principle, it is not an objection to the Crown being bound that the Act imposes criminal liability. This was not mentioned as an objection in the leading English and Scottish cases. In practice, apart from the smokers themselves, it would be the individual managers of the premises in question who might be prosecuted, rather than the relevant Secretary of State. Nor, in principle, is it an objection that enforcement powers are given to local environmental health officers. The similar enforcement provisions in the Health and Safety at Work etc Act 1974 and in the Food Safety Act 1990 do apply to the Crown. There is nothing unconstitutional about local government officers, or officers of the Health and Safety Executive, enforcing obligations intended for the protection of workers or the public in government premises.

42.

The strongest indication in the language of the Act that the ban is intended to apply to government premises is the express mention of prisons in section 3(2). At the time of its enactment, there were only ten private prisons. All the rest were state run and the great majority still are. No sensible reason has ever been given for distinguishing between state and private prisons. Any practical problems of enforcement by environmental health officers are as great in private prisons as they are in public prisons. Prisoners in public prisons are in just as much need of protection from second-hand smoke, and discouragement from smoking, as are prisoners in private prisons. Her Majesty’s Prison Service certainly thought that the ban would apply to them and that view must have been shared by the Department of Health’s Director of Prison Health, who signed the Foreword to the research study, Stop Smoking Support in HM Prisons: the Impact of Nicotine Replacement Therapy (January, 2007).

43.

Against all that, there are powerful indicators in the language of the Act itself that the Crown was not to be bound by the smoking ban. First and foremost, it does not say so and it would have been easy enough so to do.

44.

Secondly, in Acts with comparable structures and enforcement powers, there are provisions dealing expressly with exactly how and to what extent the Act is to apply to the Crown. A good example is section 48 of the Health and Safety at Work etc Act 1974:

“48. Application to Crown

(1) Subject to the provisions of this section, the provisions of this Part, except sections 21 to 25 and 33 to 42, and of regulations made under this Part shall bind the Crown.

(2) Although they do not bind the Crown, sections 33 to 42 shall apply to persons in the public service of the Crown as they apply to other persons.

(3) For the purposes of this Part and regulations made thereunder persons in the service of the Crown shall be treated as employees of the Crown whether or not they would be so treated apart from this subsection.

(4) Without prejudice to section 15(5), the Secretary of State may, to the extent that it appears to him requisite or expedient to do so in the interests of the safety of the State or the safe custody of persons lawfully detained, by order exempt the Crown either generally or in particular respects from all or any of the provisions of this Part which would, by virtue of subsection (1) above, bind the Crown.

(5) The power to make orders under this section shall be exercisable by statutory instrument, and any such order may be varied or revoked by a subsequent order.

(6) Nothing in this section shall authorise proceedings to be brought against Her Majesty in her private capacity, and this subsection shall be construed as if section 38(3) of the Crown Proceedings Act 1947 (interpretation of references in that Act to Her Majesty in her private capacity) were contained in this Act."

45.

To very similar effect is section 54 of the Food Safety Act 1990. Such provisions enable the offence-creating and enforcement provisions of legislation intended for the benefit of all to be tailored to the special position of government departments and, indeed, of Her Majesty in her private capacity.

46.

Furthermore, the 2006 Act contains just such a provision in another Part of the Act. Section 23, which is contained in Chapter 1 of Part 3, dealing with the Supervision of Management and Use of Controlled Drugs, provides:

"23. Crown application

(1) This Chapter binds the Crown.

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

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

Thus the Crown has to abide by the requirements of that Chapter but the serious criminal offences imposed in section 21 for obstructing the powers of entry and inspection conferred by section 20 cannot be committed by the Crown. They can however be committed by persons in the public service of the Crown.

47.

As it happens, virtually identical provision is made in the Scottish equivalent to the smoking ban contained in Chapter 1 of Part 1 of the 2006 Act, by section 10 of the Smoking, Health and Social Care (Scotland) Act 2005, which preceded the 2006 Act:

"10. Crown application

(1) This Part binds the Crown.

(2) No contravention by the Crown of this Part or any regulations under it makes the Crown criminally liable; but the Court of Session may, on the application of a council in the area of which the contravention is alleged to have taken place, declare unlawful any act or omission of the Crown which would, but for this subsection, have been an offence.

(3) Subsection (2) does not extend to persons in the public service of the Crown.”

48.

Had Parliament intended Part 1 of Chapter 1 of the 2006 Act to bind the Crown, nothing would have been easier than to insert such a provision into that Part. It would have made clear who could be prosecuted for the offences created. Furthermore, the Report of the Health Committee does indicate that Parliament was alive to the question of whether the smoking ban would bind the Crown and aware of the case for further exemptions if the Act were to do so. It might also be taken to indicate that Parliament was aware that the mischief at which the Bill was aimed was smoking on private premises over which the Government had no control.

49.

It might well be thought desirable, especially by and for civil servants and others working in or visiting government departments, if the smoking ban did bind the Crown. But the legislation is quite workable without doing so. It cannot be suggested, in the way that it could be suggested in the Liverpool Coroner’s case , that a major plank of the Act’s purpose would remain unfulfilled if the Act did not bind the Crown. The Crown can do a good deal by voluntary action to fill the gap. The Commissioners were not able to fill the gap unless their obligations under the Act overrode their duty of confidentiality.

50.

Thus, not without considerable reluctance, I am driven to the conclusion that this appeal must fail. There is a presumption that Acts of Parliament only bind the Crown by express words or necessary implication. Necessary implication entails that Parliament must have meant to bind the Crown. The fact that where Parliament did mean to do so in this Act, it said so, and made tailored provision accordingly, is to my mind conclusive of the question.