Landlord Checks on Immigration Status Incompatible with Human Rights

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Declarations of incompatibility; Immigration policy; Immigration status; Landlords' duties; Race discrimination; Right to respect for home; Third parties

The High Court in R (on the application of Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department and Others *[2019] EWHC 452 (Admin) has considered the compatibility with arts 8 and 14 of the European Convention on Human Rights (ECHR) of the Government's scheme introduced by ss.20 to 37 of the Immigration Act 2014. Those sections prohibit landlords from providing accommodation to persons who do not have leave to enter or leave to remain in the UK. The Court also considered whether the SSHD had breached the public sector equality duty, set out in s.149 of the Equality Act 2010, by deciding to implement the scheme in Scotland, Wales and Northern Ireland without further evaluation of its efficacy and discriminatory impact.*

Background law

The Immigration Act 2014 was brought into force to limit access to services, facilities and employment by reference to immigration status. The purpose was to put the burden on those who provide services to check the immigration status of the individuals they dealt with. In relation to landlords, ss.20 to 37 impose a scheme prohibiting landlords from letting premises to disqualified persons: s.22. A landlord commits an offence if he lets premises to such persons where he knows or has reason to believe that they are so disqualified: s.33A.

A person is disqualified if they require leave to enter or remain but do not have it: s.21. British citizens, nationals of an EEA state and nationals of Switzerland are not disqualified persons for the purposes of the legislation: s.21(7).

A landlord who is found to have committed the offence is liable to imprisonment for a term not exceeding five years, a fine or both: s.33C. The Secretary of State may also issue a notice requiring the payment of a penalty, which may not exceed £3,000: s.23.

A landlord who has been issued with a notice under s.23 may be excused from paying the penalty in the following circumstances (s.24):

- if the notice is given for a pre-grant contravention, he will be excused if the prescribed requirements were complied with before he entered into the tenancy agreement
- if the notice is given for a post-grant contravention, if the landlord has notified the Secretary of State of the contravention as soon as reasonably practicable.

There is a right to object to the penalty notice under s.23 and a right of appeal as well: ss.29 and 30.

Pursuant to s.32, the Secretary of State must issue a code of practice relating to penalty notices. Section 33 is entitled "discrimination" and requires the Secretary of State to issue a

code of practice specifying what a landlord should or should not do to ensure that the landlord avoids contravening the Equality Act 2010, so far as relating to race. However, a breach of the code does not make a person liable in civil or criminal proceedings, but may be taken into account by a court or tribunal: s.33(6). The code is entitled: "Avoiding unlawful discrimination when conducting 'right to rent' checks in the private rented residential sector".

The effect of ss.20-37 of the Immigration Act 2014 in practice

The Joint Council for the Welfare of Immigrants (JCWI) carried out a "mystery shopper exercise" to discover whether the Government's scheme was having a discriminatory effect in practice. Six different prospective tenants were created and fictitious enquiries were made to landlords by email about accommodation they offered. The six mystery shoppers were:

1. Peter: British citizen, ethnically British name, British passport;
2. Harinder: British citizen, non-ethnically British name, British passport;
3. Ramesh: non-British citizen, non-ethnically British name, indefinite leave to remain (settled status) and an unlimited "right to rent" demonstrated through one document;
4. Colin: British citizen, ethnically British name, no passport but unlimited "right to rent" that could be demonstrated through two documents;
5. Parimal: British citizen, non-ethnically British name, no passport but unlimited "right to rent" that could be demonstrated through two documents;
6. Mukesh: non-British citizen, non-ethnically British name, limited leave to remain in the UK (two years) demonstrated through one document.

The exercise revealed that the scheme was having the effect of causing discrimination on the basis of nationality and race. Statistical data showed that: (1) landlords would discriminate against Ramesh in favour of Peter/Harinder (but not against Harinder in favour of Peter), thus supporting the suggestion that the legislation has the effect of causing discrimination on the ground of nationality; and (2) landlords would discriminate against Parimal in favour of Colin, thus supporting the suggestion that the legislation has the effect of causing racial discrimination where the housing applicants are British citizens without a passport.

The claimant commissioned an independent expert to confirm that the research and, in particular, its "mystery shopping" data, were statistically significant. The Report of 17 January 2018 concluded as follows:

"1. The evidence strongly supported the hypothesis that the prospective tenant who was not British but had indefinite leave to remain in the UK was more likely to receive a negative response or no response compared to a British citizen;
2. Where both prospective tenants had a British passport, there was no evidence of discrimination between the BME and 'White British' shoppers;
3. A 'White British' tenant without a passport was more likely to receive a negative response or no response than a 'White British' tenant with a passport;
4. A BME British tenant without a passport was more likely to receive negative response or no response than a BME tenant who could provide a British passport;
5. There was not enough statistical significance in the evidence to support the hypothesis that where both White and BME British citizens do not have passports, the BME tenant faces discrimination on grounds of ethnicity."

The Government had carried out its own evaluation of the scheme in 2015 and found that there was "no hard evidence of systemic discrimination towards foreign nationals, or that their

access to the housing market was restricted as a result of the scheme". However, there was no further ongoing assessment. The Claimant, therefore, issued a further pre-action protocol letter arguing that the Secretary of State for the Home Department (SSHD) was obliged to carry out an equality impact assessment prior to extending the scheme further.

The Government responded stating that they nonetheless intended to roll the Scheme out to the rest of the UK but that they had not established a time-frame. JCWI accordingly issued proceedings on 30 January 2018.

Following the issue of proceedings a report was issued by the Independent Chief Inspector of Borders and Immigration in relation to the scheme. The Inspector's review of the scheme's impact in relation to its stated objectives concluded that the scheme "is yet to demonstrate its worth as a tool to encourage immigration compliance" and that the defendant had "failed to co-ordinate, maximise or even measure effectively its use, while at the same time doing little to address the concerns of stakeholders."

A further "mystery shopper" exercise was also carried out by the claimant after the issue of proceedings which reached similar conclusions to the first.

The High Court ruling

Was Article 8 ECHR engaged?

Martin Spencer J was satisfied that the evidence showed that the scheme resulted in people who had the right to rent being discriminated against on the grounds of race. While that did not make it impossible for them to find housing, it made it harder for them to do so and would take them longer.

His Lordship recognised that the Strasbourg jurisprudence had held that art.8 did not give right to a home: see, for example, *Chapman v UK* (2001) E.H.R.R. 18 and *Demopoulos v Turkey* (46113/99). Thus, art.8 could not be directly engaged when the property in question was merely a potential rental property. However, he found that the scheme was within the ambit of art.8 for two reasons. First, the jurisprudence from Strasbourg suggested that race discrimination is regarded with particular anathema and, in such cases, the bar for determining whether the scheme comes within the ambit of art.8 should be set low. Second, art.8 gave the right to everyone to seek a home and the playing field should be even for everyone in the market for housing, irrespective of their race and nationality. Where the State interferes with the process of seeking to obtain a home, they must do so without causing discrimination.

Was there evidence of discrimination and was it caused by the scheme?

His Lordship had no difficulty concluding that there was evidence to suggest that landlords were discriminating on the grounds of nationality and ethnicity, and that this was because of the scheme. Although the Government had produced a report on the effect of the scheme following the pilot, the judge was struck by the consistency of the evidence to the contrary. Large scale surveys had been carried out by the Residential Landlords Association (RLA), Shelter, Crisis and JCWI. They indicated that landlords were discriminating. It was a short step, according to his Lordship, to conclude that this was happening as a result of the scheme. He found the evidence of Mr Smith, the policy director at RLA, particularly persuasive in this regard. Mr Smith explained the nature of the rental market for private landlords and the fact that many of them concluded that it was too risky to rent to those without a British passport as a result of the penalties

set up by the scheme. That the scheme caused landlords not to rent to those without a British passport was a logical conclusion and predictable.

Should the Government be held responsible for the acts of third party landlords?

The SSHD argued that the Government could not be held responsible for any discrimination that was occurring. If any discrimination existed, it was as a result of the voluntary intervention of third party landlords acting independently and inconsistently with the legislation. The legislation did not contain a requirement to provide a British passport and the statutory codes specifically told landlords not to discriminate or treat less favourably those who had a right to rent but no passport.

His Lordship was not persuaded by this argument. He found that the safeguards the Government had adopted to avoid discrimination—such as online guidance, telephone advice and codes of conduct and practice—had proved ineffective, as was indicated by his findings on causation. Since the general policy articulated in the scheme was having a disproportionately prejudicial effect on a particular group, then it was discriminatory and it did not matter that it involved the role of private individuals. The State had caused the discriminatory effect to occur.

Was any discriminatory effect justified?

His Lordship found that the scheme was not justified. He recognised that the Government was to be afforded a large margin of appreciation in relation to primary legislation such as this, which was in the area of social-economic policy. Furthermore, he recognised that the Strasbourg Court was loath to interfere with the right of a State to control immigration where there was no consensus across the Council of Europe as to the acceptable means of controlling immigration.

However, this was counter-balanced by the particular abhorrence with which racial discrimination is regarded in both domestic law and in the Strasbourg case law. Since the Government had indicated that it was anxious to avoid discrimination occurring and had put in place measures to avoid it, it must follow that they could not be justified in pursuing the scheme once it was found that it was, in fact, causing discrimination to occur.

Should there be a declaration of incompatibility?

The Government invited the Court to nonetheless exercise its discretion and not to make a declaration of incompatibility. The SSHD relied on *Christian Institute v Lord Advocate* [2016] UKSC 51, where the Supreme Court stated that a challenge on the validity of legislation on the basis of lack of proportionality faces a high hurdle and that, if a legislative provision is capable of being operated in a manner compatible with the convention, the legislation itself will not be incompatible with Convention rights.

However, his Lordship found that the intention of the legislation intended to “bite, and bite hard, on landlords in order for it to be efficacious”. He, therefore, had no doubt that he should should exercise his discretion and make a declaration of incompatibility.

The decision to roll out the scheme beyond England and the PSED

The PSED requires public authorities to have due regard to the three aims set out in s.149(1) of the Equality Act 2010 in the exercise of their public functions. One of the three aims is the elimination of discrimination.

Although there was, as yet, no decision to extend the scheme to Northern Ireland, Wales and Scotland, there was certainly an intention to do so. Furthermore, it was conceded by the SSHD that they were not committed to carrying out any further evaluation exercise prior to the extension. In circumstances where the court found there was a certainty of illegality if the scheme was extended, and where the decision to extend the scheme to all of England was not done following a detailed, thorough and conscientious evaluation, his Lordship found that too was irrational and a breach of s.149 to extend it further without a further evaluation. Thus, the second ground of challenge was equally made out.

Conclusion

This decision is important for two reasons. First, the judge's conclusion that the scheme comes within the ambit of art.8 ECHR is novel, but unsurprising. He noted that the "negative modality" doctrine had not been articulated in any judgments from Strasbourg or domestically. The modality doctrine describes a situation where the State positively intervenes in the promotion of a convention right using a particular means, such as offering a benefit. In such circumstances, the Strasbourg Court has confirmed that the means that are employed by the State must comply with obligations under art.14. It is not a large leap from that "positive modality" doctrine to the situation in the present case where, although the State is not granting a positive right, it is interfering with the process of seeking a home.

This conclusion is supported by the fact that even the SSHD was of the view, when the legislation was in the draft stages, that the scheme potentially engaged art.8. This is evident from a series of memoranda published by the SSHD. Indeed, not finding that art.8 was engaged would have absurd consequences. As Martin Spencer J made clear, if the article was not engaged, the Government could pass a rule that landlords may only rent to white, British nationals, and this would not offend the Convention because art.8 was not engaged.

Second, the case is also of interest because the legislation in question governed the relationship between private individuals. The Government's position that they could not be responsible for the actions of private individuals in situations where they had issued guidance about how to avoid race discrimination may have been a good one if the causative link was not so strongly established. Thus, while the courts have generally been reluctant to hold that art.8 was applicable in situations concerning private landlords (see, for example, *McDonald v McDonald* [2016] UKSC 28), the clear discriminatory effect of the scheme in contravention of art.14 justifies the conclusion in the present case.

The case has been given permission to appeal and is to be heard by the Court of Appeal before February 2020.

The law is stated as at 19 June, 2019.