Right to Rent Scheme Discriminatory but Justified

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Overturning the decision of the High Court, the Court of Appeal in R. (on the application of Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department *[2020] EWCA Civ 542 has found that the scheme introduced by ss.20 to 37 of the Immigration Act 2014, which requires private landlords to take measures to ensure that they do not provide accommodation to tenants who have no right to be in the UK, was not unlawful. Although the provisions caused discrimination within the meaning of art.14 ECHR read with art.8 ECHR, it was justified because the scheme was capable of being operated in a proportionate way.*

The scheme

The Immigration Act 2014 (and orders made pursuant to powers under that Act) introduced a collection of measures seeking to make it more difficult for immigrants who had no leave to stay in the UK. Through those measures the Government imposed obligations on employers, banking providers and landlords to check the immigration status of any applicant, and not to grant them a job, bank account or accommodation if they were not satisfied that the person had leave to remain. Civil and/or criminal penalties were imposed on those who provided jobs, services or accommodation to those who could not show the correct immigration status.

In relation to landlords more specifically, the sanctions that could be imposed for renting to those without requisite leave were: criminal sanctions, including imprisonment of up to five years; a civil penalty of up to £3,000 per contravention; a loss of licence under Parts 2 and 3 of the Housing Act 2004; as well as a banning order and entry on the Rogue Landlord Database under the Housing and Planning Act 2016.

More details of the scheme, its operation and the facts of this case can be found in the writer's earlier case commentary following the High Court decision published in this journal as "Landlord Checks on Immigration Status Incompatible with Human Rights" (2019) 23 L. & T. Rev. 129.

Did the scheme cause discrimination?

Hickinbottom LJ, giving the lead judgment of the Court of Appeal with whom Henderson LJ agreed, accepted that almost all the evidence—which consisted of a number of surveys and mystery shopper exercises carried out by the Joint Council for the Welfare of Immigrants (JCWI) and other organisations—suggested that the level of discrimination would be less but for the scheme, and that courts usually take a broad brush approach to evidence in discrimination cases, given the difficulty in proving discrimination (at [66] and [75]).

However, his Lordship said that it was important not to over-state the level of discrimination (at [73] and [79]). This was because there was evidence from JCWI that discrimination by landlords on the grounds of nationality and/or race was "already commonplace" even before the scheme was implemented. Furthermore, some of the criticisms of the JCWI's mystery shopper exercise were compelling. For example, bias expressed in favour of certain individuals over others may have been as a result of the type of document being offered (a passport rather than a Home Office document showing immigration status or "other ID"). The Government's evidence noted that this is not prohibited under the Discrimination Code of Practice, which confirms that it is not unlawful for a landlord to favour a potential tenant who appears willing to provide a document or documents demonstrating that he has a right to rent over those who do not.

Davis LJ, however, was unable to accept that the scheme itself caused and was responsible for the discrimination. To the extent there was discrimination by a minority of landlords, it was because they had chosen not to comply with the law. This was a choice and not something that was compelled by the scheme (at [158]-[160]).

Was the present case within the ambit of Article 8 ECHR?

All the members of the Court of Appeal, agreeing with Martin Spencer J, found that the facts of the present case did not fall within the scope of art.8 (at [95]-[96]).

On the different question of whether they fell within the ambit of art.8, Hickinbottom LJ (with whom Henderson LJ agreed) was prepared to assume that they did without expressing a definitive conclusion on the point, even though the Strasbourg caselaw on the question of the ambit of art.8 in housing cases was not clear. He referred to Strasbourg caselaw indicating that, where a positive measure of the state is being considered, it is sufficient that the measure has more than a tenuous connection with the article in question. Although the present case was not a classic positive modality case, it did involve a positive measure by the state in the form of the scheme. Thus, His Lordship was prepared to proceed on the basis that the appropriate test for determining whether a case was within the scope of art.8 was to establish whether the facts had "more than a tenuous link" to the article in question. Such a test reflected the generous width of the concept of "ambit" consistently applied by the ECtHR (at [104]).

Davis LJ disagreed that the facts fell within the ambit of art.8. He stated that, while the direction of travel set by Strasbourg decisions was to have an increasingly broad and inclusive approach to cases that come within the ambit of art.14, there had to be some limit. Furthermore, not every act of discrimination is within the ambit of art.8 for the purposes of art.14. In the present case, the connection with Article 8 was not "more than tenuous" (at [175]). The link was indirect because there was no right to a home, as recognised by Strasbourg caselaw (see *Chapman v United Kingdom* (ECtHR Application No 27238/95) (2001) 33 E.H.R.R. 18) and, on the evidence in the present case, there was no risk of potential homelessness, which in any event would not have been sufficient to bring it within the ambit of art.8.

Was discrimination justified?

All members of the Court of Appeal agreed that any discrimination that arose was justified.

Hickinbottom LJ set out the four stage test for justification where there was a breach of an article of the Convention formulated by Lord Reed in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] A.C. 700 at [74]: (1) was the objective sufficiently important to justify the limitation of the protected right; (2) was the matter rationally connected to the objective; (3) was there a less intrusive measure that could have been used without unacceptably compromising

the achievement of the objective; and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

The parties agreed that the first three limbs were satisfied and that the real issue in the case was whether the infringement was disproportionate to the benefit (at [113]). In that respect, Hickinbottom LJ found that, where a claim is brought to challenge the validity of a statutory provision, rather than by an individual claiming that they have been the victim of discrimination as a result of the operation of the provisions. Following the Supreme Court's decision in *Christian Institute v Lord Advocate* [2016] UKSC 51, if a legislative provision is capable of being operated in a manner which is compatible with Convention rights in that it will not give rise to an unjustified interference with Article 8 rights in all or most cases, the legislation itself will not be incompatible with Convention rights (at [116]-[117]). His Lordship found that, in the present case, the scheme was clearly capable of being operated in a proportionate way in most individual cases—indeed, he was satisfied that it was capable of being operated by landlords in such a way in *all* individual cases (at [119]). This was enough to find that any discrimination that arose was justified.

However, he went on to consider what the correct test was in relation to the fourth limb set out in *Bank Mellat*: the test of weighing the benefits against the disbenefits which was set out by Lord Mance in *Re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3; [2015] A.C. 1016 at [52]; or the "manifestly without reasonable foundation" (MWFR) test set out by Lord Toulson in *R. (MA) v Secretary of State for Work and Pensions* [2016] UKSC 58; [2016] 1 W.L.R. 4550 at [32]-[38]. The latter test essentially stated that, where a measure concerns "economic and social matters which are pre-eminently for national authorities", the assessment of Parliament that its adverse effects are proportionate to the benefits to the public should be accepted unless that is manifestly without reasonable foundation.

Hickinbottom LJ concluded that the MWRF test was the correct one and that it applied to the fourth limb of the *Bank Mellat* test, despite what was said by Lord Mance in the *Recovery of Medical Costs* case. Although the MWRF test had been applied in welfare benefits cases, there was no need to limit it to just those cases, as argued by JCWI. This was because the first reference to the MWFR test in the Strasbourg jurisprudence appears to have been in *James v United Kingdom* (ECtHR Application No. 8795/79) (1986) E.H.R.R. 123, which was not a welfare benefits case. In that case, the ECtHR recognised that national authorities are in a better place than international judges to appreciate what is in the public interest. Furthermore, the decision to enact laws which involve the consideration of political, economic and social issues requires a wide margin of appreciation to be afforded to the legislature's judgment of what is in the public interest. In domestic case law, the same deference has been shown to the legislature in cases concerning controversial issues of social and economic policy, such as *R. (on the application of SG) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 W.L.R. 1449.

Despite these comments, his Lordship did not consider that applying the correct test was determinative in present case. First, he did not consider that the question of which test was applicable was a binary question. Rather, the area of judgment afforded to the government depended on the nature of the ground on which the difference in treatment was based. Application of the MWRF test did not mean that, wherever there was some element of social or economic policy in a case, it would simply "trump" any degree of discrimination. Thus, however the test was expressed, the result should be the same.

Secondly, he considered that, applying the usual balancing exercise, the discrimination in the present case was justified. This was an area where very considerable deference was to be afforded to Parliament. Parliament was implementing socio-economic policy and doing so against

the backdrop of EU legislation which required Member States to adopt sanctions against landlords who assisted a person who was not an EU national for financial gain. The aim of the scheme was to reduce irregular immigration and the evidence pointed towards the scheme having some more than insignificant contribution to that aim (at [146]). The scheme did not intend, encourage or directly create discrimination, but the discrimination was entirely coincidental. The landlords were not agents of the state but acted as private citizens and this was relevant to the justification balancing exercise. The nature and level of discrimination were also relevant to that conclusion.

Conclusion

This case raises issues of wider importance in the field of human rights law and it is not surprising that JCWI are seeking permission to appeal to the Supreme Court.

The first point to note is the analysis of when something will be considered to fall within the "ambit" of a particular right of the Convention, a point on which Davis LJ expressed a contrary view. Hickinbottom LJ's broad approach is certainly in line with Strasbourg jurisprudence such as *Bah v United Kingdom* (ECtHR Application No 56328/07) [2012] 54 E.H.R.R. 21 and with the obiter comments in a line of domestic cases such as *R. (on the application of HA) v Ealing LBC* [2015] EWHC 2375 (Admin); [2016] P.T.S.R. 16 and *R. (on the application of H) v Ealing LBC* [2017] EWCA Civ 1127; [2018] P.T.S.R. 541.

The second important aspect of the case is the court's approach to justification. It is interesting to note that it was common ground that the first three limbs of the justification test were satisfied. In respect of the third limb, it could have been argued that there were less intrusive measures that could have been taken to achieve the objective. For example, was the full breadth of civil and criminal penalties necessary in order to achieve the objective? Would a lesser package of sanctions have been sufficient?

Furthermore, the approach to the fourth limb of the justification test is something that is still subject to some uncertainty. Some Supreme Court cases have applied the MWRF test alongside the four-stage test (see, for example, *In re Brewster* [2017] 1 W.L.R. 516 at [66]), others have only applied the MWFR test (*R. (on the application of Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58; [2016] 1 W.L.R. 4550). In *R. (on the application of A (A Child) v Secretary of State for Health* [2017] UKSC 41; [2017] 1 W.L.R. 2492, Lord Wilson held that the MWRF test did not apply to the fourth limb of the test in *Bank Mellat*. This confusion seems to have been cleared up, domestically at least, in the *DA* case handed down on 15 May 2019, where the Supreme Court held that there should be "no future doubt" that the sole question in relation to the Government's need to justify what would be a discretionary effect of a rule governing entitlement to welfare benefits is whether it is manifestly without reasonable foundation.

However, since *DA*, the Court in Strasbourg seems to have restricted the MWRF test to circumstances where an alleged difference in treatment resulted from a transitional measure forming part of a scheme in order to correct an inequality. The ECtHR stated that, outside the context of transitional measures designed to correct historic inequalities, the margin of appreciation the state enjoys is considerably reduced (see *JD and A v United Kingdom* (ECtHR Applications Nos 32949/17 and 34614/17) at [88]-[89] (24 October 2019)).

In the present case, the Court of Appeal felt bound by the Supreme Court decisions rather than *JD and A*. In the recent case of *R. (on the application of Drexler) v Leicestershire CC* [2020] EWCA Civ 502, a case decided around the same time as the present one, a differently constituted Court of Appeal also concluded that the MWRF test applies when the impugned measure is an area of socio-economic policy. It will be interesting, therefore, to see whether the Supreme Court alters its position in light of *JD and A*, or accepts what appears to be a merging of the two tests

in the present case and in the approach of Leggatt LJ in *R.(on the application of SC) v Secretary of State for Work and Pensions* [2019] EWCA Civ 615; [2019] 1 W.L.R. 5687. An appeal from the latter case is due to be heard by the Supreme Court in October.

The law is stated as at 18 June 2020.