Neutral Citation Number: [2014] EWCA Civ 1216

C1/2014/2412 & C1/2014/2415

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(MR JUSTICE HAYDEN)

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 31 July 2014

B e f o r e:

LORD JUSTICE LAWS

LORD JUSTICE FLOYD

LORD JUSTICE VOS

Between:
THE QUEEN ON THE APPLICATION OF TIGERE

Appellant

v

SECRETARY OF STATE FOR BUSINESS, INNOVATION AND SKILLS

Respondent

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(Official Shorthand Writers to the Court)

Ms H Mountfield, QC and Mr R Desai (instructed by Public Interest Lawyers) appeared on behalf of the **Appellant**

Mr S Kovats, QC and Mr V Sachdeva (instructed by Treasury Solicitors) appeared on behalf of the **Respondent**

J U D G M E N T
(Approved)

1. LORD JUSTICE LAWS: This is an appeal with permission granted by the judge below brought by the Secretary of State against the decision of Hayden J in the Administrative Court on 17 July 2014 ([EWHC] Admin 2452) on grounds one and two of the judicial review claim before him. The Claimant in the case cross appeals also against his decision on ground four.

2. The claim arises out of the effective refusal of a student loan to the Claimant, who is a Zambian national born on 29 August 1995, on the ground that she was not an "eligible student" within the meaning of the Education (Student Support) Regulations 2011. The case principally raises issues in relation to Article 2 of the first protocol (A2P1) and Article 14 of the European Convention on Human Rights.

3. The Claimant was brought to the United Kingdom by her parents when she was 6. She entered as a dependent of her father who had a student visa. She has lived in the United Kingdom with her mother ever since. All her education has been in the English educational system. She has done very well in school and is determined to go to university. She has had a number of offers of university places.

4. Her determination is demonstrated by the fact that after it became apparent that she would not obtain a student loan -- I will, of course, come to that -- she applied for places at local universities which she could attend while living at home. She accepted a place at Hull University and was able to pay the first tuition fee instalment. Her mother had changed jobs to earn more. The Claimant obtained a student overdraft, but she had to pull out of the course. She could not meet the ongoing costs. She was liable to forfeit the tuition fee payment and was left overdrawn on her student account. However, she now has a place to you study International Business Management at Middlesex University starting in October 2014. She will not be able to take it up unless she secures a student loan by September. Her place, as is generally the case, is conditional on payment of upfront fees, albeit in instalments. Anyone acquainted with the facts of the case would wish to pay tribute to the Claimant's single minded ambition to gather the benefits of higher education.

5. I should say a little more about the Claimant's immigration history. Her father left the United Kingdom in early 2003 when his leave expired. The Claimant and her mother remained, unlawfully overstaying their leave. So the matter stood, as I understand it, until 6 September 2010 when UKBA served notice that they were liable to removal from the United Kingdom. However, they were granted temporary admission. On 13 January 2012, they were granted discretionary leave to remain until 29 January 2015. According to published Home Office policy, the Claimant will then have the opportunity to apply for a further three year period of discretionary leave and thereafter in 2018 for indefinite leave to remain.

6. I will shortly describe the relevant legal provisions relating to the state backed student loan scheme which, under arrangements made by the Secretary of State, is administered by the Student Loans Company Limited, which was named as an interested party in the litigation. As the judge observed in paragraph 7 of his judgment, such loans are "plainly far more

advantageous to the student than any commercial comparator". They are heavily subsidised by the tax payer. They are repayable only after the student has left his or her course and his or her earnings exceed £21,000 and then at the rate of 9 per cent of earnings over that figure.

7. The Claimant applied for a student loan in April 2013, but she did so online via the Student Finance England website. After seeking to grapple with questions regarding her immigration status, she obtained advice. On 20 May 2013, her solicitor confirmed that it was likely she would be refused a loan because of the immigration position. Indeed, she is ineligible on the face of the applicable regulations.

8. These proceedings were issued on 24 June 2013 seeking, among other things, a declaration that the provisions which exclude her from eligibility "on the sole basis that she has discretionary leave to remain" violate ECHR A2P1, the right to education, and/or Article 14 of the anti-discrimination provisions.

9. Supperstone J granted judicial review permission on 13 March 2014. There had been some procedural delays associated with the progress of another case raising like issues called Kebede [2013] EWHC (Admin) 2396 in which Burnett J gave judgment on 31 July 2013. An appeal to this court in Kebede was discontinued. As I understand it, the Claimants had obtained funding from an alternative source.

10. Now I will come to the relevant legislation. The public funding of students and institutions of higher education has quite a long legislative history outlined in the skeleton argument prepared on behalf of the Secretary of State by Mr Kovats, QC and Mr Sachdeva. I may go straight to the present day position.

11. Section 22 of the Teaching and Higher Education Act 1998 provides for regulations to be made authorising or requiring the Secretary of State to make grants or loans to eligible students in connection with their undertaking higher education courses. The regulations may, in particular, make provisions for determining whether a person is an eligible student in relation to any grant or loan available under section 22: see sub-section (2)(a). The regulations are made by statutory instrument subject to the negative resolution procedure: section 42(1) and (3). They may make different provisions for different cases, circumstances or areas: section 22(6). Pursuant to section 23(4) the Secretary of State has delegated his function of administering student loans to the Student Loans Company, which is owned by the department together with government agencies in Scotland, Wales and Northern Ireland.

12. The current regulations are the Education (Student Support) Regulations 2011 ("the 2011 regulations"). Regulation 4 provides, so far as material, that an eligible student is a person whom the Secretary of State has determined as falling within one of the categories set out in Part 2 of Schedule 1. There are eight such categories. Seven of the categories identify persons having rights or a status under EU law or associated rights. Thus they include the children of Swiss nationals and of Turkish workers. These categories are described by the judge in paragraph 17 of his judgment.

13. The remaining category is the "basic category" and is given in paragraph 2 of Part 2 of Schedule 1 to the regulations. It consists of persons who are settled in the United Kingdom and who have been ordinarily resident in the UK throughout the three year period preceding the first day of the academic year of the course. By paragraph 1(1) of Part 1 of Schedule 1 "settled" has the meaning given by section 33(2A) of the Immigration Act 1971; namely, a person who is ordinarily resident here without being subject under the immigration laws to any restriction on the period for which he may remain.

14. It is common ground that such a person, if not a British citizen, must have been granted indefinite leave to remain. It is also common ground that ordinary residence means lawful ordinary residence, though there is an issue arising on the Claimant's cross appeal on ground four of the judicial review grounds before Hayden J whether residence pursuant to the grant of temporary admission counts as lawful ordinary residence. On the face of the 2011 regulations, the Claimant does not fall within the basic category, nor, of course, any of the other seven categories.

15. A2P1 provides no person shall be denied the right to education. Article 14 provides:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

16. The judge set out the grounds of challenge in paragraph 19 of his judgment. I adopt his summary with some adaptations. Ground one; the blanket exclusion from eligibility predicated entirely on the Claimant's leave to remain is a disproportionate interference with her right of access to education under A2P1. Ground two; the blanket exclusion has the effect of unjustifiable discrimination against the Claimant on the grounds of her immigration status and ultimately, therefore, linked to her national origin. Ground four; the Claimant meets the statutory requirements of three years lawful ordinary residence by virtue of her period of residence following a grant of temporary admission and thereafter a grant of leave to remain. I need not go into ground three, which is now of historic interest only.

17. Hayden J noted that there was a good deal of common ground before him. In particular (judgment; paragraph 20(ii)) the Secretary of State now accepted that eligibility for financial support for higher education fell within the scope or ambit of A2P1. It was also common ground "that the objective of husbanding limited funds to afford priority for individuals who are likely to remain in the UK in order to complete their education and benefit the UK economy is a legitimate aim." (Paragraph 20 (iii)). See also in this court the skeleton prepared on behalf of the Claimant by Ms Mountfield, QC.

18. A major aspect of the debate in this case is the importance of education as a social good. There is much learning in the authorities to that effect, though I am not sure that the law is its

best teacher. It has been emphasised that education enjoys direct protection under the Convention: see, for example, Ponomaryov v Bulgaria [2011] ELR 491 at paragraph 55.

19. I turn to the argument on grounds one and two. The judge thought (paragraph 35) that "In the particular circumstances of this case, ground two adds nothing to ground one". It could be said that the reverse is true. At all events, the two grounds merge together.

20. No one contends that A2P1 requires the state to provide available funding to every successful candidate for higher education who needs it, whatever his or her immigration status. I note in that connection the funding decision in Belgian Linguistic Case (No. 2) [1968] 1 EHRR 252 at 280 to 281 and Burnett J's judgment in Kebede, paragraphs 24 to 26.

21. As I have said, it is accepted at least that funds may be prioritised so as to favour persons likely to remain in the UK to complete their education and benefit the UK economy, given that immigration status may be considered an "other status" for the purpose of ECHR Article 14. See, for example, Hode and Abdi v UK [2013] 56 EHRR 27 at paragraph 46.

22. Any distinction drawn for the purposes of distributing student loans between persons according to the strength of their connection with the United Kingdom by reference to their immigration status will constitute discrimination within the meaning of Article 14. The question will then be is the discrimination justified? More concretely, where may the Secretary of State draw the line? How high may the bar be set?

23. Mr Kovats for the Secretary of State has what may be described as a threshold point by reference to section 196 of and paragraph 1 of Schedule 23 to the Equality Act 2010. The latter provision precludes a Claimant to the 2010 Act for discrimination on grounds of nationality, place of ordinary residence or the length of a period of ordinary residence where the discrimination is required by act of Article 2 or statutory instrument.

24. But, in my judgment, this merely provides a defence to certain acts of discrimination which are, on the face of it, proscribed by the 2010 Act. It certainly does not allow free passage through the ECHR and, if it did, it would no doubt be vulnerable pro tempore to a declaration of incompatibility. This is so notwithstanding the force of Mr Kovats' submission that the Equality Act, just like Article 14, is concerned with discrimination.

25. The issue on grounds one and two is essentially one of proportionality. Mr Kovats says the test for proportionality in a case like this is whether the impugned measure is "manifestly without reasonable foundation". This formulation echoes the approach of the Supreme Court to the distribution of welfare benefits in Humphreys [2012] 1 WLR 1545: see per Lady Hale at paragraphs 22 and 23. Ms Mountfield submits that this is not such a case. Strictly, it is not. It is, however, a case in which the legal challenge is directed at a national strategic policy for the distribution of scarce resources in a field of great social importance. I will come back to this.

26. My first conclusion is that the Secretary of State is surely justified in promulgating a bright line rule and may even be rationally required to do so. At first instance, Ms Mountfield contended for what may be described as an open ended rule. She submitted that paragraph 4(2) of the 2011 regulations should be read as if it contained a further provision which would include a Claimant within the meaning of "eligible student", "where the grant of support is necessary in order to avoid a breach of the person's Convention rights (within the meaning of the Human Rights Act 1998)". This submission is repeated in Ms Mountfield's skeleton argument to this court (paragraph 128).

27. But this is surely an area in which everyone, especially the affected student or students, needs to know where they are and, in the nature of things, to know it within what may be a relatively short timescale. The court cannot commit the system of student loans to the emergency of nice arguments about the impact of the ECHR case by case. The objection is not merely that such a system would be expensive and effectively unworkable. The law may no doubt take a strict or purist view about an objection of that kind.

28. The real difficulty is that such a system would be uncertain and arbitrary. Some cases would be preferred over others on marginal grounds. Delays would occasion real hardship. Loss of confidence and even disrepute would, in consequence, dog the regime. So I have no doubt that a bright line rule is required or at least justified. I agree with what was said by Burnett J on the point at paragraph 46 in Kebede, which perhaps I may be forgiven for not citing. See also Förster [2009] 1 CMLR 32 at paragraph 53 and 58.

29. If then, as I would, hold there must be a bright line rule or at least it is proper for the Secretary of State to impose one where may it lawfully be set, has it been lawfully set by the Secretary of State? As I have said, the challenge in this case is directed at a national strategic policy for the distribution of scarce resources in a field of great social importance. It is, moreover, a field as recognised as meriting direct protection under the ECHR.

30. In these circumstances, with respect to the judge in this case and to Burnett J in Kebede at paragraph 37, I do not think that the test for a proportionate decision in this field is helpfully expressed by the blunt instrument "manifestly without reasonable foundation". The blunt instrument says nothing of priorities, but the Secretary of State is surely obliged to accord a high priority to opening higher education to those who may deploy their talents here. The bright line rule he adopts will reflect that priority.

31. The general proportionality rule has been expressed by a Lord Sumption in Bank Mellat [2013] UKSC 39 at paragraph 20 thus:

"the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the

rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap..."

32. Lord Reed was to similar effect at paragraph 74.

33. In Miranda v Secretary of State [2014] EWHC (Admin) 255 at paragraph 40, I expressed the view that the element four in Lord Sumption's formulation is troublesome. If the earlier elements are satisfied, there is real difficulty in distinguishing the test at (iv) from a political question to be decided by the elected arm of Government. This is, I think, a difficulty which persists in this area of the law. The law owes to the public a clearer boundary between what is for the judges and what is for Government and Parliament. At least, though this is no conceptual answer to the problem, as I said in Miranda, there must be a plain case if item (iv) is to be relied on.

34. With that caveat in relation to item (iv), I will apply the proportionality test as described by Lord Sumption informed by these following particular considerations. A, a high priority is to be accorded to the value of opening higher education to those who may deploy their talents here. B, that the Secretary of State enjoys a very broad margin of discretion.

35. It is confusing to use the term margin of appreciation, which is a term of art in the Strasbourg jurisprudence, in deciding how to give effect to that priority. This is for two reasons. One, as I have said, we are in an area of national strategic policy with the distribution of scarce resources. Two, as Ms Mountfield, QC accepts, there is in any event a broader margin of consideration in relation to decisions concerning higher education than as regards access to primary and secondary education: see, for example, Ponomaryov at paragraph 56.

36. I make it clear that though I would not use the language of the manifestly without reasonable foundation test, the deference owed to the Secretary of State's policy, given that it constitutes what Elias LJ in Hurley [2012] HRLR 374 paragraph 64 called a "resource decision", is very broad and is a central feature of this case. That said, it is clear that no particular discriminatory rule or practice can be justified by reference only to the need to save costs: Ministry of Justice v O'Brien [2013] 1 WLR 522, paragraphs 49 and 74. Compare R (PLP) v the Secretary of State for Justice [2014] EWHC Admin 2365, paragraph 8 and SG v the Secretary of State [2014] EWCA Civ 156, paragraphs 48 and 49.

37. This must be so. If there are one hundred potential candidates to benefit from a particular public scheme but only funds enough to support 50, the decision maker cannot lawfully select the 50 to be excluded on an arbitrary basis. His choice must have a supportable rationale.

38. I turn to the crucial question. Has the Secretary of State adopted a lawful bright line rule in formulating the "basic category" of eligible students given in paragraph 26 Part 2 Schedule 1 to the regulations?

39. First, it is significant that section 1(1) of the Education Act 1944 imposed on the Minister of Education a duty "to promote the education of the people of England and Wales". The provision is replicated in section 10 of the Education Act 1996. The phrase "the people of England and Wales" is not defined, but it provides, in my view, a legitimate steer for the enumeration of policy relating to student funding.

40. Next, I note that the requirement of ordinary residence for at least three years goes back to the University and Other Awards Regulations 1961 which was concerned with the making of grants rather than loans. The requirement that the eligible student be "settled" was introduced by the Education (Mandatory Awards) Regulations 1997 regulation 13(1). This requirement may have been introduced to overturn the decision of the House of Lords in Shah [1983] 2 AC 300. At all events, the requirement of settlement has been the primary rule from 1997 to date.

41. The 2011 regulations with which we are directly concerned consolidated amendments to regulations made in 2009. In 2010 and 2011, a special position arose in relation to persons who had been granted discretionary leave to remain after an unsuccessful trial of application, but this is now historic.

42. Current policy is described in an equality impact assessment of July 2013 and in the witness statement of Mr Williams, head of student funding policy at the Department for Business, Innovation and Skills. He says, paragraph 6:

"This policy concentrates what are inevitably limited public funds on those categories of persons with a lawful and substantial residential connection; those who are settled here without any restrictions upon the time they can remain in the United Kingdom. Such students can enjoy the benefit of the higher education that they have undergone here and are in a better position to make a significant economic contribution."

43. Then paragraph 10:

"There are rational reasons behind the policy aim and the amendment. First, it is considered that those with the permanent right of residence are more deserving of the limited funds at the Government's disposal. Second, those with the right to stay permanently at least have the right to remain and work in the United Kingdom indefinitely thereby contributing to the economy. Those with temporary leave to remain may or may not gain the right to stay permanently."

44. Paragraph 14:

"To have created a category of exceptional case, as the Claimant appears to contend should have been done, would, with respect, have been unworkable. It would be both inefficient and impractical to administer for it would inevitably lead to inconsistent decisions in individual cases, each of which would need to be considered in detail. Further, the Claimant suggests that the basis of her right to a student loan is the near certainty, she alleges, that she will be

granted settled status in due course. However, if the basis of an exceptionality policy was an applicant's potential immigration status, it would involve officials from the Department second guessing future decisions of officials from the Home Office; an obviously unworkable policy both from the perspective of institutional competence and as a matter of practicality."

45. As regards that last paragraph, I have already indicated my reasons why a bright line rule is proper.

46. Mr Kovats submits that these materials sufficiently describe and justify the Secretary of State's policy enshrined in the regulations. He also submits that the Claimant's case involves a usurpation of decisions of the Home Office relating to immigration control. In my judgment, the relation between these two government responsibilities setting immigration policy through the Immigration Rules and setting student funding policy by statutory instrument is at the centre of the case.

47. Mr Kovats argued this as follows. The Secretary of State, setting the rules for eligibility for student loans, is entitled to adopt as a primary criterion the requirement that the student be "settled" in the United Kingdom. This is a wholly proper application of the legitimate priority in favour of those who may deploy their talents here.

48. It is then, says Mr Kovats, for the Secretary of State for the Home Department to set the rules as to qualification for settlement as, of course, the Immigration Rules do, but they change from time to time. The criteria for eligibility for settled status changes; sometimes stricter, sometimes less strict. The question is whether so as to make a proportionate rule the Secretary of State, dealing with student loans, is obliged to track the changing provisions of the Immigration Rules relating to settlement as they have an obvious bite on entitlements on the student loan scheme. Mr Kovats submits he is not.

49. The essential argument for the Claimant on this point is that a bare adoption of the settlement criterion abandons the Secretary of State's duty of rigorous consideration of the effects of his respective policy on its potential candidates and, in the case of students such as this Claimant, there is real hardship, not justified by any appeal, to a bright line rule for establishing a connection with the United Kingdom which needs to be catered for.

50. Amongst other materials, Ms Mountfield deployed evidence from the Koran Children's Centre and a report published in October 2011 by the Department itself on the benefits, including the economic benefits, of higher education.

51. In my judgment, the Secretary of State is entitled to adopt a criterion dependent on settlement and is not required to modify it by reference to the fact that the Home Office may alter the Rules by which settlement is achieved from time to time. This approach serves the need of certainty and the avoidance of an arbitrary rule. If the Secretary of State is responsible for the education loan scheme and is required to uncouple the Rules he promulgates from the straightforward criterion of settlement, he is launched on a sea of arbitrary choices.

52. Is he to adopt a provision such as that contained in Paragraph 276ADE(1)(v) of the current Immigration Rules, a possibility canvassed by Ms Mountfield? That subparagraph provides for an entitlement to a grant of leave to remain where an Applicant:

"is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment)."

53. In the circumstances, what different rule should he adopt? The circumstances in which indefinite leave to remain is available are extremely variable, as Paragraph 276ADE demonstrates. The Secretary of State cannot, in my judgment, be required to pick out this or that potential criterion for settlement as apt for the grant of student loans as if one or the other indicated a greater or lesser commitment to the United Kingdom.

54. The possibility that he might be required to adopt a criterion less than settlement is fraught with yet greater difficulties. For someone who will probably/almost certainly achieve settlement, such a test would require individual judgments, not all of which would involve the obvious factual merits urged by Ms Mountfield in the present case. I do not think a "sub-bright line rule", as she put it, offers any panacea in this area.

55. Ms Mountfield's essential case is that the court should require the Secretary of State to adopt a rule more generous to Claimants for loans than is contained in the "basic category". That would, therefore, require the Secretary of State to delve into the multifarious bases upon which indefinite leave to remain may, under the present Rules, be granted and choose between them. It would require the Secretary of State to adopt a policy to favour persons who were liable to obtain indefinite leave though they had not yet obtained it.

56. This would enmesh the Secretary of State into an immigration policy. His picking and choosing candidates for settlement as eligible for student loans, while not, despite Mr Kovats' submission to the contrary, unconstitutional, would be a fragile and arbitrary basis for policy in an area where clarity and certainty are required.

57. There is another dimension to this part of the case. The making of the Immigration Rules is subject to parliamentary scrutiny: section 3(2) of the Immigration Act 1971. They are, therefore, subject to Parliament's discipline. They are also subject to the discipline of the law, being open to judicial review on public law grounds. This is not merely a pious truth. It means that it should be assumed that the Immigration Rules which specify the requirements or criteria according to which settlement may be obtained are reasonable and, therefore, lawful.

58. In fixing who is and who is not entitled to settlement, they are to be taken to be compliant without Convention obligations. Accordingly, the Secretary of State, promulgating rules concerning education loans, is entitled to rely on the legality, the propriety in public law terms, of the Immigration Rules relating to settled status. For all these reasons, I would allow the Secretary of State's appeal on grounds one and two.

59. Ms Mountfield's appeal on ground four was based on two propositions. The first is that her client's period of temporary admission between 2010 and 2012 should count towards lawful residence. The second was, I summarise, that the fact that the Claimant was, between 2003 and 2012, an over stayer should not count against her because, as a child aged 6 on entry, she bore no responsibility for her later irregular immigration status. More deeply, the fact that she was an over stayer, given her age at the time, is, as a matter of good sense and logic, irrelevant to the extent of her integration into British society.

60. The point on temporary admission is bad. It is clear that a person granted temporary admission under paragraph 1 of Schedule 2 to the Immigration Act 1971 is in exactly the same position vise vie the legality of his presence in the United Kingdom as opposed to as a person detained during the period in question. Such a person could not be regarded as lawfully resident here.

61. The case of Szoma [2006] 1 AC 564 is nothing to the point. It concerned a person seeking asylum upon arrival at the port. No issue relating to his status as a potential resident here which might be analogous to issues in this case could possibly be said to arise.

62. On the second point on ground four, Ms Mountfield's submission again requires the promulgation of a rule which would make an exception for cases like that of her client. But for reasons I have given, a bright line rule is lawful and perhaps required. This further argument cannot undermine the reasons I have given on grounds one and two for upholding the legality of the "basic category" in the regulations.

63. I would dismiss the cross appeal.

64. LORD JUSTICE FLOYDI agree.

65. LORD JUSTICE VOS:

66. I gratefully adopt Laws LJ's exposition of the facts and the abbreviations that he has used. I agree with Laws LJ as to the outcome of the appeal, but in certain respects I would express my reasons differently.

67. The basic question in this case is whether the eligibility requirements in the Education (Student Support) Regulations 2011 (the 2011 regulations) are compatible with Article 2 of the First Protocol (A2P1) and Article 14 of the European Convention on Human Rights (ECHR) (Article 14).

68. The Applicant was not eligible for a student loan because she was not settled in the United Kingdom and had not been ordinarily resident in the United Kingdom for three years (on the judge's analysis): see the provisions of regulation 4 and paragraph 2 of Schedule 1 to the 2011 regulations.

69. It was common ground before us that the Applicant's eligibility for financial support for higher education fell within the ambit of A2P1, which was, therefore, engaged. It was also broadly accepted that Article 14 was engaged, presumably because it was *prima facie* discriminatory to exclude from eligibility for student funding all persons who are not settled in the United Kingdom. In these circumstances, the burden of proving that the 2011 regulations were proportional shifted to the Secretary of State.

70. It was common ground that the latest exposition of the proportionality test is to be found in the speeches of Lord Sumption (at paragraph 20) and Lord Reed (at paragraph 74) in Bank Mellat v HM Treasury (No 2) [2013] 3 WLR 179. I would prefer Lord Reed's formulation (which he thought was anyway substantively the same as Lord Sumption's) to the effect that it is necessary to determine:

"(1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure 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."

71. The question on justification was stated by Burnett J in R (Kebede) v Business Secretary [2014] PTSR 92 at paragraph 37 as being whether "the measure is manifestly without reasonable foundation". This test was transposed by the Secretary of State before us into the question "whether the decision not to include persons with discretionary leave to remain within the categories of eligible student [was] manifestly without foundation". I agree with Laws LJ's reservations as to these formulations.

72. In justifying the eligibility criteria and in arguing proportionality, the Secretary of State relied on the cumulative effect of five interconnected considerations, namely: (a) the policy and object of the primary legislation, (b) government policy as evidenced by the regulations introduced from time to time and the equality impact assessments and as explained in the statements of Mr Paul Johnathan Williams and Ms Gillian Mary Walden, (c) the desirability of bright line rules on eligibility in this context, (d) the inability of the Secretary of State to usurp the Secretary of State for the Home Department's ("the SSHD") immigration functions, and (e) the fact that the eligibility criteria delay rather than deny a person's higher education.

73. In this connection, the Secretary of State's evidence dealt with the unworkability of any solution that required a discretion to be exercised in individual cases and the scarcity of public funds, but did not indicate that any step had been taken to evaluate the impact of the SSHD's recent changes to immigration policy in relation to the grant of indefinite leave to remain (ILR) as opposed to discretionary leave to remain (DLR) apart from the equality impact assessments of June 2012 and 3 July 2013. The latter document, which was the only one which came close to the consideration of the problems thrown up by this case, merely stated the policy rather than

evaluating whether another policy would be less likely to lead to breaches of the ECHR breaches.

74. I was initially very concerned that, despite the wide margin of discretion allowed to the Secretary of State in making regulations of this kind (to which Laws LJ has referred), the harshness of the effect of the 2011 regulations had come about by the fortuity of the SSHD's changes to her policy in relation to the grant of ILR in Article 8 cases. I could not immediately see how it was possible to demonstrate that the discriminatory effect of the bright line rule adopted by the Secretary of State could be justified when no consideration has been given as to how that rule would operate in the context of the new immigration arrangements.

Moreover, it seems to me beyond argument that the effect on the Applicant is very significant indeed. If her case is unsuccessful, she will be deprived of higher education at the time in her life when her primary and secondary education has led her reasonably to expect that she will go with her peers to university. She has no intention of leaving the United Kingdom. Her life was made here from the age of 6 and she is culturally and socially integrated into British society. Moreover, there is no possibility of her being removed from the United Kingdom by the SSHD when the time comes for her DLR to be extended because under Article 8 her removal is simply not an option.

75. The fact that she falls foul of the twin requirements of the 2011 regulations of settlement and of three years ordinary residence is no fault of hers. It is as a result of the actions of third parties over which she had no control and in respect of which she was neither consulted nor informed. The delay before the Applicant can obtain ILR will, therefore, be very significant.

The judge sought submissions from the parties as to when the Applicant could expect to obtain ILR and thereby become settled in the United Kingdom and eligible for student funding. He recorded these submissions at paragraph 21 of his judgment, but was not especially impressed with what he was told. In short, because the Applicant was granted DLR before 9 July 2012, the transitional provisions of the SSHD's new policy should enable the Applicant to obtain ILR after January 2018, which would mean that she would be 23 years old before she could start a course of funded higher education in September 2018. Had she not obtained her first DLR until after 9 July 2012, she would not have been able, under the current policy, to obtain ILR until 2022.

76. In order, however, to understand the effect of the SSHD's immigration policies on young people in the Applicant's position, it is important to consider the change to the SSHD's policy that took place on 24 June 2013 in response to Holman J's decision in The Queen on the application of SM and TM v SSHD [2013] EWHC 1144. That case determined that the SSHD's 2009 policy on DLR was unlawful in that it precluded specific consideration of the

welfare of the child concerned in making the discretionary decision as to whether to grant limited DLR or ILR (see paragraph 57 of Holman J's judgment).

The policy was unlawful because it failed to take adequate account of section 55(1) of the Borders, Citizenship and Immigration Act 1971 (section 55) which provided that the SSHD must make arrangements for ensuring that her immigration functions were discharged, having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom.

78. Taken together, paragraphs 1.2, 4.4 and 7 of the SSHD's current policy make it clear that a consideration of whether ILR is appropriate in the case of a child is necessary, particularly where there is "strong evidence to suggest that the child's life would be adversely affected by the grant of limited leave rather than ILR." (See the fourth bullet point under paragraph 4.4 in particular.)

79. It seems obvious that the Applicant's life would indeed be so adversely affected because of her inability to embark on a course of study at the right time in her life. These provisions were, of course, not in force when the Applicant was granted her three year DLR on 30 January 2012. The Applicant in this case reached her 18th birthday and, therefore, her adulthood on 29 August 2013 so that she is no longer covered by section 55. For these reasons, the Applicant has fallen between two stools.

80. The Secretary of State argued before us that her real complaint was not about the discriminatory effect of the 2011 regulations, but about the failure of the SSHD to grant her ILR. In a sense, he was correct, since had the Appellant applied for ILR on the grounds that she would not otherwise have been eligible for student funding at an appropriate age and had she made clear her situation and the strong likelihood, if not certainty, that she would anyway be entitled to ILR in 2018, she ought, all other things being equal, to have been entitled to have been granted it at once. Unfortunately, she did not do so because she was attaining her majority, applying for university and applying for leave to remain all at a time of rapid change in both the 2011 regulations and the SSHD's policy on DLR. She has been the unwitting victim of these coincident circumstances.

81. The question for us, however, is not whether the Applicant's extremely hard case merits a solution, for it certainly does. I am sure that the SSHD will consider carefully the grant of ILR to the Applicant as soon as an application can be and is made to her. The question for us is whether the specific eligibility provisions of the 2011 regulations are properly to be regarded as justified, notwithstanding the discriminatory effect they have had on the Applicant and no doubt on some others (though perhaps not quite as many others as has been suggested).

In my judgment, broadly for the reasons given by Laws LJ, the regulations are a proportionate bright line solution. It is not up to the Secretary of State to interfere in immigration policy. He is entitled to assume that the SSHD's immigration policies are in themselves lawful unless successfully challenged.

82. But I do not agree that the Secretary of State's obligations end there. It seems to me that he must ensure that his applicable regulations operate properly in the context of immigration policy. Whilst he cannot be expected to make frequent adjustments to the regulations as the Immigration Rules change, the Secretary of State must, I think, review the situation periodically to ensure that, for example, the requirement of "settlement" remains appropriate in the light of the way that the immigration processes operate. If, for example, it became unlawful to grant ILR to anyone who had not had 7 years of DLR, the requirement of "settlement" in the 2011 regulations might well be held to discriminate unjustifiably against all UK children without ILR living in the UK at the end of their secondary education.

Mr Stephen Kovats, QC for the Secretary of State said that the concept of "settlement" had not changed. Only the immigration policies had changed, which was not his concern. I do not accept that submission because settlement involves, in this situation, having ILR. The Secretary of State knows that. Therefore, if ILR is not obtainable in circumstances where it was previously available, that may affect the operation and discriminatory effect of the Secretary of State's regulations for which he is responsible.

83. In my judgment, what saves the eligibility requirements in the 2011 regulations is the fact that there has, at all relevant times, been a discretion to grant ILR to children on section 55 grounds. That discretion might have been infrequently exercised and might have been unknown to this Applicant. It might even have been that the SSHD's policy that was struck down by Holman J in Re SM may make the exercise of that discretion impossible without court challenge. But in theory at least, despite the changing immigration landscape, the Applicant could have applied to the SSHD for ILR on the basis of evidence that if it were not granted she could not be eligible for a student loan. The bright line rule chosen by the Secretary of State in the 2011 regulations has operated exceptionally harshly on this Applicant. That is much to be regretted. But a direct application of Lord Reed's test of proportionality does not seem to me to show that the eligibility requirements are disproportionate.

84. The objective of the eligibility criteria is to have a workable and affordable bright line rule that avoids the need for special decisions in any particular case. That objective justifies some limitation on both the A2P1 right and the Article 14 right and the eligibility criteria are rationally connected to that objective.

85. Whilst I am sure that other bright line rules might have operated less oppressively on this Applicant, as Ms Helen Mountfield QC submitted on her behalf, it was not shown what less intrusive measures could have been adopted without unacceptably compromising the achievement of the objective. The suggestion that the deployment of rules similar to those to be found in paragraph 276ADE(1)(iv) and (v) of part 7 of the Immigration Rules might be substituted for the existing eligibility criteria was not fully thought through.

86. More importantly, however, the criteria do not, as I have explained, have the blanket discriminatory effect that was suggested. What happened here, as I have said, was that the

Applicant fell between two stools. That does not demonstrate that the eligibility provisions themselves are necessarily fatally flawed.

87. Undertaking the balancing exercise suggested as the fourth test, the severity of the effect of the eligibility criteria in the 2011 regulations on the rights of individuals in the Applicant's position does not, as it seems to me, outweigh the importance of the objective of the criteria achieved. I cannot, therefore, as I have said, conclude that the regulations are disproportionate by the application of Lord Reed's test.

88. As to ground four, I agree with Laws LJ that both of Ms Mountfield's attacks fail. The requirement for three years lawful ordinary residence is, I think, more easily justifiable than the requirement for settlement. The need for a bright line rule that requires no individual consideration justifies the requirement of three years lawful ordinary residence whether or not the child applicant was aware of her situation. This Applicant will, once she obtains her ILR, have fulfilled this requirement.

89. Accordingly, for the reasons that I have given, I too would allow this appeal on grounds one and two and dismiss the appeal on ground four.