



29 July 2015

PRESS SUMMARY

R (on the application of Tigere) (Appellant) v Secretary of State for Business, Innovation and Skills (Respondent) [2015] UKSC 57
On appeal from [2014] EWCA Civ 1216

JUSTICES: Lady Hale (Deputy President), Lord Kerr, Lord Sumption, Lord Reed, Lord Hughes

BACKGROUND TO THE APPEAL

In 2011 the fees charged by universities were increased. The cost of fees and maintenance are generally financed by loans from the Government, which are only repaid when students can afford to do so and at an affordable rate. In order to qualify for a loan under Regulation 4(a) of the Education (Student Support) Regulations 2011 (“the Regulations”) a student must have been lawfully ordinarily resident in the UK for three years before the day the academic year begins (“the lawful residence criterion”); and be settled in the UK on that day (“the settlement criterion”). The effect of the settlement criterion is that all students with limited or discretionary leave to remain in the UK are ineligible for student loans.

The Appellant is a Zambian national, now aged 20, who came to this country in 2001 at the age of six. Her mother overstayed and the Appellant was unlawfully present in the country until 2012 when she regularised her immigration status. She presently has discretionary leave to remain in the UK. She will be able to apply for indefinite leave to remain in 2018. She has received her entire education in the UK, obtained good grades and wishes to go to university. She has been unable to take up the university places offered her as she is not eligible for a student loan because of her immigration status.

The issue in the appeal is whether either the lawful residence criterion or settlement criterion breaches the Appellant’s right to education under Article 2 of the First Protocol to the European Convention on Human Rights (“A2P1”), or unjustifiably discriminates against her in the enjoyment of that right.

The High Court found that the blanket exclusion from eligibility for student loans based on the Appellant’s immigration status was a disproportionate interference with her right of access to education under A2P1 and unjustifiable discrimination linked to national origin contrary to Article 14 ECHR. The Court of Appeal allowed the Secretary of State’s appeal on the basis that this was an area of national strategic policy related to the distribution of scarce resources and so a broad margin of appreciation should be afforded to government policy. The Appellant appealed to the Supreme Court.

JUDGMENT

The Supreme Court allows the appeal by a majority of 3:2. Lady Hale writes the leading judgment, with which Lord Kerr and Lord Hughes agree. Lord Hughes writes a concurring judgment. Lord Sumption and Lord Reed write a joint dissenting judgment.

REASONS FOR THE JUDGMENT

A2P1 does not oblige a state to provide any particular system of education. However, if the state sets up higher educational institutions it will be under an obligation to provide a right of access to them [23]. The Appellant complains that the denial of access to a student loan prevents her from undertaking higher education in the UK and that she has been discriminated against on the basis of her immigration status, contrary to Article 14 ECHR. Whether considered under A2P1 alone or in conjunction with Article 14 ECHR, the question is whether this discrimination is justified [25-26].

The relevant test is not whether the decision was “manifestly without reasonable foundation”. As this is a question of the distribution of finite resources, respect must be accorded to the primary decision-maker. However, greater deference is not warranted as the Respondent Secretary of State did not address his mind to the educational rights of students with discretionary or limited leave to remain when making these regulations [32].

The Regulations pursue a legitimate aim, namely targeting resources on those students who are likely to stay in the UK to complete their education and afterwards contribute to the UK economy through their enhanced skills and the taxes they pay [34]. The means chosen to pursue that aim, however, were not rationally connected to it. Although the Appellant does not yet have indefinite leave to remain, her established private life in the UK means that she cannot be removed unless she commits a serious criminal offence [35]. Even if a “bright line” rule is justified in the particular context, the particular rule chosen has to be rationally connected to the aim and a proportionate way of achieving it. Exclusionary rules, which allow for no discretion to consider unusual cases falling the wrong side of the line but equally deserving, are harder to justify [37]. In this case, a bright line rule which more closely fitted the legitimate aims of the measure could have been chosen. Given the comparatively small numbers involved, it has not been shown that it would be administratively unworkable to provide student loans to at least some of those with discretionary or limited leave to remain [38]. The denial of student loans has a very severe impact upon those it affects [40]. Denying or delaying higher education for these individuals also harms the community and the economy [41]. Therefore, the settlement criterion unjustifiably infringes the Appellant’s Convention rights [42].

The lawful residence criterion is compatible with the Appellant’s Convention rights. There are strong public policy reasons for insisting on a period of lawful ordinary residence before a person become entitled to public services. If the requirement were to be relaxed it would involve an intolerable administrative burden. The overall balance of harm involved in a delay of up to three years is of a different order from that resulting from the settlement criterion [45].

The court makes a declaration that the application of the settlement criterion to the Appellant is a breach of her rights under Article 14 ECHR read with A2P1 [49].

In his concurring judgment Lord Hughes argues that all rules are blanket rules and are both inclusionary and exclusionary. Clear rules of this sort are useful [60]. While the settlement criterion is unjustifiably discriminatory, the Secretary of State is not necessarily required to construct a rule which allows for a discretion to consider exceptional cases [68].

Lord Reed and Lord Sumption would have dismissed the appeal. A2P1 does not import a right to public financial support [73]. Given that this is a question of state benefits, the test for justification is “manifestly without reasonable foundation” [77]. The discriminatory effect of the Regulations is justified as it is legitimate to discriminate between those who do and those who do not have a sufficient connection with the UK [88]. A clear rule such as this can be applied accurately and consistently, without the element of arbitrariness inherent in the discretionary decision of individual cases. It simplifies administration and allows for faster decision-making [91]. The court must also accord a measure of discretion to the primary decision-maker [93].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

www.supremecourt.uk/decided-cases/index.html