OUTER HOUSE, COURT OF SESSION

[2025] CSOH 53

P196/24

OPINION OF LORD LAKE

In the Petition of

LEO BRUCE HUISMAN

Petitioner

for

Judicial Review of a decision as to student fee status by the University of the Highlands and Islands

Petitioner: F Whyte, advocate; Lindsays LLP
First Respondent: P Reid KC; Thorntons Law LLP
First Interested Party: D Welsh, advocate; Scottish Government Legal Directorate

24 June 2025

[1] The fees that may be charged by universities in Scotland are regulated by the Education (Fees) (Scotland) Regulations 2011. These have now been superseded by 2022 Regulations but the earlier ones still apply to the present petitioner. The regulations operate so that educational institutions may charge higher fees to some students than to others. The petitioner is a student at the University of the Highland and Islands. He seeks to challenge the decision of the university to charge him fees at the higher rate. The university are the respondent to the petition and the Scottish Ministers appear as an interested party.

[2] Regulation 4 of the 2011 Regulations stipulates, (1) that it is lawful to charge higher rates to students who do not have a relevant connection with Scotland, but (2) that it is not lawful to charge higher relevant fees to a student who is an excepted student as defined by the regulations. In the regulations, the definition of "relevant connection" is based principally on ordinary residence in Scotland for a period of 3 years prior to the start of the academic year in question. It is common ground that the petitioner does not meet this requirement. It is also common ground that he does not fall within any of the categories of excepted student if the regulations are given their ordinary or natural meaning. He contends, however, that the way that the regulations have been applied by the university is discriminatory and infringes Article 14 of the ECHR. The parties were largely agreed on the law that applies to this issue and the divergence of views concerns how the law is to be applied in the petitioner's circumstances

The issue

[3] ECHR, Article 14 is in the following terms:

> **"Article 14**
> 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."

Article 2 of the First Protocol is in the following terms:

> **"Article 2**
> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

[4] The parties were agreed that when applying Article 14, there are four matters that a court should consider. These were set out in *R (Stott)* v *Secretary of State for Justice*, [2018] UKSC 59, [2020] AC 51, by Lady Black as follows:

> "8. In order to establish that different treatment amounts to a violation of article 14, it is necessary to establish four elements. First, the circumstances must fall within the ambit of a Convention right. Secondly, the difference in treatment must have been on the ground of one of the characteristics listed in article 14 or 'other status'. Thirdly, the claimant and the person who has been treated differently must be in analogous situations. Fourthly, objective justification for the different treatment will be lacking. It is not always easy to keep the third and the fourth elements entirely separate, and it is not uncommon to see judgments concentrate upon the question of justification, rather than upon whether the people in question are in analogous situations. Lord Nicholls of Birkenhead captured the point at para 3 of *R (Carson)* v *Secretary of State for Work and Pensions [2006] 1 AC 173*. He observed that once the first two elements are satisfied:
>
> > 'the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact.'"

[5] There is no dispute that the first two requirements are met. Charging fees and grants provided for further education are within the ambit of Article 2 of the Third Protocol. There is also no doubt that the second requirement is met either by reason of it being discrimination on the basis of national origin or on the basis of "other status". The dispute between the parties centres on whether or not there are persons in an analogous situation to the petitioner who have been treated differently and/or whether or not there is justification for the differential treatment.

Submissions for the petitioner

[6] The petitioner contends that a number of the defined categories of accepted students have the common core concept of humanitarian protection. They deal with a situation where a student has been unable to remain in or return to their country of origin or ordinary residence through no fault of their own and has been permitted to stay in the United Kingdom for humanitarian reasons. It was noted that the categories are broadly in line with the categories in immigration law of those to whom the United Kingdom gives forms of protection to those arriving in the UK. It is submitted that the petitioner is in a similar position to these groups. He was born and raised in South Africa and lived there until 2021. However, he then had to flee with his mother following threats of retribution following her having acted as a whistle-blower in relation to reporting corruption. It was said this had led to harassment of her and threats being made to the family which the police and authorities appeared to have been unable provide effective protection against. They family left South Africa in early 2021 and do not consider it is safe to return.

[7] The petitioner was accepted onto and commenced a BSc course in Optometry in 2021. He did not meet the requirements to be considered "ordinarily resident" in Scotland at that time and the university said to him he was classified as an International Student such that he would have to pay higher fees. In the event, as a result of administrative errors, he was required only to pay the fees charged to Scottish students in his first year. Further error meant that this remained the position in his second year. The error came to light in the third year. The university claimed the higher rate of fees from him for the earlier years and the year of study he was about to undertake. There have been discussions between the parties and the university have permitted payment over a longer

period but insist that the fees at the higher rate are due. Sums claimed by the university remain unpaid.

[8] The petitioner recognises that he cannot bring himself within the terms of any of the categories of "excepted student" in the regulations. In particular, he does not fall within the category of "refugee". The regulations define that term by reference to recognition by the Government of a person's status in accordance with the 1951 United Nations Convention relating to the Status of Refugees and its protocol. That requires that in general, for a person to be a refugee, they must be unable to return to any country of which they are a national. The petitioner has dual nationality. He has British citizenship through his mother and South African citizenship by birth. As a British citizen, the petitioner has a right to enter and remain in the United Kingdom and therefore cannot be a refugee in this country.

[9] It was submitted that the way that the regulations are applied means that petitioner is being treated differently solely on the basis of his British citizenship. It was emphasised that this was not a challenge to the legality of the regulations as such. The petitioner submits that the respondent and interested party have said little to justify this differential treatment. It was claimed that there is no legitimate aim in predicating the definition of excepted students on the basis of immigration status such that British citizens are never able to bring themselves within the scope of the exceptions. The petitioner notes that in the 2022 Regulations now in force, there is a further category of excepted students for Ukrainian nationals who have made an application under one of the schemes in in terms of which they may be permitted to enter and to remain in the United Kingdom and, significantly, also a category of UK nationals who were resident in Ukraine at the start of 2022 and who left in connection with the Russian invasion on 24 February 2022. It was submitted that this is recognition that there was a lacuna in the 2011 Regulations which, if it had been addressed

in the same way, would have meant that the petitioner would be considered an excepted student. It was emphasised that the pursuer has not come to Scotland simply for the purpose of taking up university education and instead he is someone who has had to flee his place of residence abroad and has sought access to education under special circumstances. On this basis it was submitted that he should therefore be treated in a manner akin to the other exceptional cases.

[10] If it was accepted that there was on the face of it a breach of Article 14, section 3 of the Human Rights Act 1998 meant that the court required to read and give effect to the regulations in a manner compatible with the convention "so far as possible". It is submitted that this was possible by reading paragraph 4 of Schedule 1 to the regulations so as to produce the following result:

> "a refugee, *or any person who would qualify for such humanitarian protection but for their having British nationality*, who has been ordinarily resident in the United Kingdom and Islands at all times since that person was first recognised as a refugee, or …"

The text in italics was additional text which it is submitted the court must "read in". It was submitted that interpreting it in this way does not cut across the grain of the legislation and simply extends the category of "excepted student" in a way analogous with the classes already specified.

Submissions for the respondents and interested party

[11] The university argue that the terms of the regulations reflect a careful policy choice as to who should be recognised as excepted students. It is a choice as to how finite financial resources will be allocated. In part, it aims to ensure tuition fees associated with higher education are lower for students who normally live in Scotland and it was submitted that that is a reasonable decision. It is submitted then that it is not constitutionally appropriate

for the university of itself to, in effect, revise regulations which have been approved by Parliament.

[12] The Scottish Ministers note that the rights afforded by Article 2 of the First Protocol are not absolute. By reference to the *Belgian Linguistics Case (No. 2)* ((1968) 1 EHRR 252), it was noted that the nature of the right afforded by the article by their very nature called for regulation by the state. A margin of appreciation to pursue legitimate aims was recognised in *Sahin* v *Turkey* (2007) 44 EHRR 5 (ECtHR). The 2011 Regulations were put in place because of the differing approach to tuition fees between Scotland on the one hand and the rest of the United Kingdom on the other. The Scottish Government sought to charge lower fees for university education. The issue was who should benefit from that. A decision had been taken to limit it to students who, it might be thought, would maintain a longer term connection with Scotland with the intention that there would be a benefit to Scotland. On that basis, a decision was taken to remove any fee cap in respect of non-Scottish student. It was emphasised that this was an element of policy of the Scottish Ministers to maintain free access to higher education for students who normally live in Scotland. Therefore, if it was to be subject to proportionality assessment, it would meet the test. The policy was necessary in order to protect opportunities for students connected with Scotland. There was a concern that otherwise, Scottish institutions would be overwhelmed with applicants from elsewhere in the United Kingdom taking advantage of the absence of tuition fees. This was a legitimate aim and the difference in treatment was rationally connected to it and a reasonable measure. It was noted that in relation to the provision of education and related issues, there is a margin of appreciation and that the margin is greater where higher education is concerned.

[13] It was submitted that the mere fact that it had been thought necessary to address the position of UK nationals in Ukraine in the 2022 Regulations was an indicator that the

2011 Regulations could not be read in the way the petitioner contends. If they could have been, it would not have been necessary to make the new regulations.

Analysis and decision

[14] The petitioner's case hinges on him being analogous to the categories of students who are designated as excepted students, so that is the appropriate place to begin consideration of the submissions. The provisions of the schedule which identify these students may be summarised as follows:

- Where the person is a refugee recognised by Her Majesty's Government (paragraph 4).
- Where the person has applied for refugee status but has as a result of that application been informed in writing by a person acting under the authority of the Secretary of State for the Home Department that, although that person is considered not to qualify for recognition as a refugee, it is thought right to allow that person to enter or remain in the United Kingdom and that person has been granted leave to enter or remain accordingly (paragraph 5).
- Where the person is an Iraqi national who has been granted indefinite leave to enter the United Kingdom under the Locally Engaged Staff Assistance Scheme (Direct Entry) operated by the Home Department (paragraph 6).
- Where the person is a Syrian national who has been granted humanitarian protection to enter the United Kingdom under the Syrian Vulnerable Persons Relocation Scheme operated by the Home Department (paragraph 6A).

- Where the person is an Afghan national who has been granted limited leave to remain in the United Kingdom under the Locally Employed Staff Ex-Gratia Scheme operated by the Home Department (paragraph 6B).
- Where the person has been granted limited leave to remain in the United Kingdom as a stateless person under the immigration rules operated by the Home Department (paragraph 6C).
- Where the person has been granted discretionary leave to remain in the United Kingdom due to being identified as a victim of modern slavery (paragraph 6D).
- Where the person is a person who has been granted temporary protection (paragraph 7).
- Where the person is the child of an asylum seeker or is a young asylum seeker (paragraph 8).

[15] I have noted above how the term "refugee" is defined. "Temporary protection" means limited leave to enter or remain in the United Kingdom granted pursuant to Part 11A of the Immigration Rules (the rules made and revised by the Secretary of State in terms of the Immigration Act 1971, section 3(2)). In each category there is an extension to cover the spouse, civil partner or child of the person so described and there are requirements as to ordinary residence. In some, there is also an age requirement. None of those extensions or additional requirements affects the current issue.

[16] It is clearly correct for the petitioner to say that he is treated by the regulations in a different way from those students who fall within the capacity of excepted students in the 2011 Regulations simply by the fact that there is no definition of "excepted student" which covers his circumstances. The relevant issues in terms of *Stott* are therefore whether he

should be treated as being in the same position as the persons covered by the exceptions and, if so, whether the difference in treatment can be justified.

[17] The petitioner's argument is that he is in the same "cohort" as the persons who fall within the exceptions. He submits that the category defined within paragraph 5 is the one most closely analogous to his situation - not technically a refugee, but with the existence of reasons which suggest there are good grounds for seeking protection as they fear what will happen if they return to their former country of residence. He submits that the common theme of all these categories of excepted student are a recognition of a need for humanitarian or compassionate reasons to dis-apply the normal requirements for ordinary residence. The core theme is that it covers people who have left their place of ordinary residence and are unable to return for reasons which are no fault of their own and it was submitted that this describes his situation exactly. It is merely the quirk of having British nationality that means that he does not qualify but that is not relevant to the position he finds himself in.

[18] Although the petitioner points to the fact that all these categories relate to persons who have had to flee their country of residence for humanitarian reasons, that is not the only factor which binds the accepted categories. It is important, as was tangentially recognised by the petitioner, that none of the categories has an automatic right to reside in Scotland / the United Kingdom. The various categories concerning foreign nationals all include some proviso for leave or permission having to be given for them to take up residence in the United Kingdom. The petitioner, on the other hand, has an unconditional right to live anywhere he chooses within the United Kingdom. In considering the allocation of resources to provide grants for students, this is a material consideration. In passing the 2011 Regulations, the Scottish Government exercise a deliberate choice as to who would be

the beneficiary of funding for further education. At that time, they were, in part, restricted by the United Kingdom's membership of the European Union. Nonetheless, even at that time a distinction was drawn between persons with ordinary residence in Scotland and those whose ordinary residence was in the remainder of the United Kingdom. A person who had been born in and chosen to live in, say, Wales would nonetheless be able to become the beneficiary of Scottish funding if they came and lived in Scotland for the period to qualify them as ordinarily resident. They would have a right to take up that residence in Scotland whenever they chose.

[19] When considering the categories in the regulations in light of this, it is apparent that the petitioner has more in common with the students from the rest of the United Kingdom than he does with foreign nationals with no right to reside in any part of the United Kingdom. He was in a position to qualify for Scottish funding if he chose as he had an unconditional right to reside in Scotland. As that is the basis on which the Scottish Government have determined that funding should be allocated, it cannot be said that the petitioner is in the same category as foreign nationals who have no right to enter into the United Kingdom save for falling into one of the excepted categories.

[20] As the petitioner has not demonstrated that there was a breach of Article 14, the issue of whether the regulations can be read in a manner consistent with his rights does not arise. However, having heard submissions on the issue and in case this matter is considered further, I express my views briefly.

[21] I have set out above the way in which the petitioner contends paragraph 4 of Schedule 1 to the regulations must be read. Section 3 the 1998 Act requires that the legislation be read to give effect to the petitioner's rights and must be read and given effect in a way which is compatible with convention rights. This is subject to the qualification that

that applies "so far as it is possible to do so". That qualification was considered in detail in *Ghaidan* v *Godin-Mendoza* [2004] 2 AC 557. It established that it is not necessary that there be ambiguity in a provision for the court to read it in a way that differs from the plain meaning of the words used and that not only may the court be required to give an Act a meaning other than the natural meaning of the words, it may require additional words to be read into a provision. It is also clear that there are limits to this. They were described in that case by Lord Rodger of Earlsferry as follows:

> "It does not allow the courts to change the substance of a provision completely, to change a provision from one where Parliament says *x* is to happen into one that says *x* is not to happen. And, of course, in considering what constitutes the substance of the provision or provisions under consideration, is necessary to have regard to their place in the overall scheme of the legislation as enacted by Parliament."

[22] This limit is inconsistent with giving effect to the pursuer's interpretation. The 2011 Regulations are intended to identify who will be the benefit of government subsidy of further education costs. Though the subsidy is not paid directly to the student, the regulations require that some students are charged a lower rate and the balance of the cost of providing the education is provided by means of a block grant to the institution in question. Although it is correct for the petitioner to point out that he is in a position in some respects similar to other classes referred to in the regulations and it is likely to be true that the number of persons who could bring themselves within the expanded category he desires would be limited. This does not change the fundamental fact that the changes which the petitioner desires would have the effect of altering the class of people to whom government resources are directed. That is a matter particularly suited to decision by the democratically elected government and not the courts. Therefore, had I been satisfied that there was a breach of Article 14, I would not have granted the remedy of reading the regulations in the

way the petitioner desires but would have put the matter back out By Order to hear submissions as to whether a declarator of incompatibility should be made.

Conclusion

[23] For the reasons set out above, I repel the first and second pleas-in-law for the petitioner, sustain the third, fourth and fifth pleas for the respondent, sustain the second plea-in-law for the interested party and refuse the petition.