



OUTER HOUSE, COURT OF SESSION

[2022] CSOH 64

P216/22

OPINION OF LORD SANDISON

In the Petition

OLA JASIM

Petitioner

for

Judicial Review of a decision of the Student Awards Agency Scotland, on behalf of the
Scottish Ministers, dated 9 December 2021

Petitioner: Haddow; Drummond Miller LLP
Respondents: Irvine; Scottish Government Legal Department

9 September 2022

Introduction

[1] Ola Jasim, the petitioner in this application for judicial review, was born in Iraq in September 2002. She came to the UK with her family shortly after her 11th birthday, and has resided here ever since. She presently has limited leave to remain in the UK, but intends, as soon as she qualifies by length of residence here, to apply for indefinite leave to remain. It is to be expected that such leave will be granted, effectively as a matter of routine. The petitioner has no intention of returning to Iraq or, indeed, of leaving the UK on any permanent basis. She went to secondary school in Scotland and excelled in her SQA

National, Higher and Advanced Higher examinations. As a result of those qualifications, and her personal aptitudes and attributes, she was offered a place to study for a degree in medicine by a Scottish university, on a course starting in October 2020. She was very happy to accept that offer. Then her problems began.

[2] In terms of section 77(f) of the Education (Scotland) Act 1980, as amended, the respondents to this petition, the Scottish Ministers, are empowered to pay allowances or loans to or in respect of persons undertaking, or who have undertaken, courses of education, and to make regulations governing such payment. The administration of the scheme for student support which has been mandated by regulation is carried out by the Student Awards Agency Scotland (SAAS), a body for which the Scottish Ministers are in law responsible.

[3] The regulations applicable to the matters in dispute in this petition were the Students' Allowances (Scotland) Regulations 2007 as amended. The 2007 Regulations have now been repealed and replaced by the Student Support (Scotland) Regulations 2022, but it is a matter of agreement that the new regulations are for present purposes not materially different from those which they replaced. Paragraph 1 of schedule 1 to the 2007 Regulations as they stood at the material time for the petitioner's case provided that allowances might be paid to:

"A person who –

- (a) is ordinarily resident in Scotland on the relevant date;
- (b) has been ordinarily resident in the United Kingdom and Islands throughout the period of 3 years immediately preceding the relevant date; and
- (c) is—
 - (i) settled in the United Kingdom within the meaning given by section 33(2A) of the Immigration Act 1971 on the relevant date;

(ii) under the age of 18 and has lived in the United Kingdom throughout the seven-year period preceding the first day of the first academic year of the course; or

(iii) aged 18 years old or above and, preceding the first day of the first academic year of the course, has lived in the United Kingdom throughout either half his or her life or a period of twenty years.”

[4] In order to understand the position in which the petitioner finds herself, a little further explanation of some terms used in the regulations is required. A person is “settled” in the UK for the purposes of the regulations if she is ordinarily resident here without being subject under the immigration laws to any restriction on the period for which she may remain. The petitioner will not be eligible to apply for indefinite leave to remain in the United Kingdom, and thus obtain “settled” status, until September 2023, when she will have been resident here for 10 years. The “relevant date” for the purposes of the regulations is the deemed first day of the first academic year of the course being undertaken by the applicant for an allowance. In the case of university and college courses commencing in the autumn, as most such courses do, the relevant date will be 1 August in the first year of the course. In the case of the petitioner’s course, the relevant date was 1 August 2020, when she was 17 years old.

[5] The petitioner did not apply to SAAS for student support in respect of her first year at university because she understood (wrongly) that she needed a National Insurance number in order to make an application, and she did not have one. Her parents made considerable sacrifices in order to fund her first year without support from the state. After finishing her first year, the petitioner applied for student support from SAAS. Her application was refused because, as at 1 August 2020, the deemed first day of the first academic year of her course, and thus the relevant date for the assessment of her application,

she did not have “settled” status, and, being under 18, had not lived in the UK for the period required of applicants of that age, namely 7 years. She was, as at the relevant date, short of the required period of residence in the UK by 58 days. SAAS had no discretion to make an allowance available to anyone not eligible for one in terms of schedule 1 to the 2007 Regulations.

[6] The financial and other pressures put on the petitioner and her family by having to continue to self-fund her course have become intolerable. She has no realistic means of obtaining state support for her current course, because her eligibility for such support will always depend on her circumstances as at the deemed first day of the first academic year of that course (the “year 1 rule”), when she was ineligible. If she were to abandon her current course and seek to start it again, or to start another course of higher education, she would be aged over 18 on the deemed first day of the first academic year of that new course, and so would require, in order to be eligible for support for that course, to have been living in the UK as at that date for at least half her life. In effect that means that she would not be eligible for support for any new course starting in the autumn before 2025, unless she obtains indefinite leave to remain, and with it “settled” status, which could happen from and after September 2023, rendering her potentially eligible for support for a course starting in the Autumn of 2024. Those options would both entail extensive disruption to her academic progress and considerable delay in embarking on her chosen career, with evident disadvantage to her and to others in need of the skills which she hopes to acquire. None of the choices available to her seems remotely palatable.

[7] In these circumstances, the petitioner considers that she is being treated unfairly in comparison with those of her schoolmates who have gone on to higher education without experiencing any such difficulties. With the benefit of legal advice, she goes further and

claims in these proceedings that the long residence criteria in the 2007 Regulations (as restated in the 2022 Regulations) are incompatible with her rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms as those rights have been given effect in the UK by the Human Rights Act 1998, and ultra vires, on the basis that they unlawfully discriminate against her on the basis of age, immigration status and length of residence. She asks the court in the first instance to declare that to be the case.

[8] Article 2 of the First Protocol to the Convention provides:

“Right to education

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.”

[9] Article 14 of the Convention provides:

“Prohibition of discrimination

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.”

Some legislative (and other) background

[10] In order to understand the petitioner’s position fully, particularly in relation to the degree of deference which the court should give to the policy choices made by the respondents as reflected in the 2007 Regulations, it is necessary to know something about how those regulations came to stand as they did at the point of the petitioner’s application for an allowance. Before 2017, neither the 2007 Regulations nor their English counterparts, the Education (Student Support) Regulations 2011, made any provision for financial support being made available to students without “settled” status. The validity of the relevant

English regulation was challenged by way of judicial review in the English courts, ultimately coming before the United Kingdom Supreme Court for determination: *Regina (Tigere) v Secretary of State for Business, Innovation and Skills* (Just For Kids Law intervening) [2015] UKSC 57, [2015] 1 WLR 3820. The Supreme Court decided, by a majority, that the regulation requiring settled status as a precondition for the provision of student support was in breach of the claimant's convention rights. The members of the majority suggested, more or less tentatively, that the regulations might be improved by transposing into them the additional possibility of being eligible for support by way of long residence along the lines of the requirements for such residence then made of an applicant for leave to remain in the UK on the grounds of private life; namely (with some simplification), in the case of an applicant under 18, 7 years' residence in the UK; for those over 18 but under 25, residence in the UK for half of the applicant's life; and in other cases, 20 years' residence in the UK.

[11] The UK Government consulted along those lines between December 2015 and January 2016. It published the results of that consultation, and of an Equality Impact Assessment that was also carried out, in April 2016, making the following observations:

"Less than 1% of applicants in 2015 applied to university when aged under 18, that is when they are still children. The Secretary of State considers, just as is the case with paragraph 276ADE(1) of the Immigration Rules, that it is reasonable to impose a lower qualification period on such persons. The introduction of a requirement of seven years' residence for those aged under 18, who will need to have entered the UK at 10 years of age or earlier.

...

Many respondents highlighted the fact that this rule, when placed alongside the proposal for those agreed [sic] 18 to 24 would create a cliff edge for those aged 25 years and above. A 24-year-old would be required to have lived in the UK since the age of 12 or earlier; whereas a 25-year-old would be required to have lived in the UK since the age of 5 or earlier. This was considered to be excessive, unfair and discriminatory.

...

We were persuaded by the argument respondents made about the marked difference in treatment between those aged 24 and those aged 25 or over, which would require them to have spent a substantially longer period in the UK. We have therefore amended the policy to take account of these concerns and decided that those aged 25 years or over should be required to have lived here at least half their life or for 20 years whichever is achieved first. We are therefore intending to introduce a single rule for adults which will be: Applicants aged 18 and above are required to have either spent at least half their life in the UK or at least 20 years in the UK."

[12] The UK Government thus proceeded to amend the English regulations so as to allow for the possibility of an applicant being eligible for student support in England by dint of 7 years' residence for those aged under 18 and by requiring applicants aged 18 and above to have either spent at least half their life, or at least 20 years, in the UK. In doing so, it amended its original proposal to impose differential residence requirements on those under 25 and those over that age, because the result would be "excessive, unfair and discriminatory" on those over 25. It took no steps to eliminate the differential residence requirements between those under 18 and over 18.

[13] In Scotland, the respondents decided that they should amend the 2007 Regulations in light of the decision of the Supreme Court in *Tigere*. They did not, however, carry out any consultation exercise or Equality Impact Assessment. They simply brought forward the Education (Fees and Student Support) (Miscellaneous Amendments) (Scotland) Regulations 2017, which amended the 2007 Regulations to the same effect as the changes made to the equivalent English regulations. The policy note which accompanied the 2017 Regulations noted that:

"The purpose of the amendments is to enable persons who have resided in the UK for significant periods of their lives to access student support on the same terms as UK nationals. The amendments have been guided by the decision of the Supreme Court in *R (on the application of Tigere) v Secretary of State for Business, Innovation and Skills*".

[14] On 20 June 2017 the Delegated Powers and Law Reform Committee of the Scottish Parliament considered the 2017 Regulations and agreed to express its disappointment “that fuller supporting documentation or an impact assessment was not supplied” and to “express its concern that a consultation was not considered necessary.” In response, the Deputy First Minister, in his capacity as Cabinet Secretary for Education and Skills, wrote to the Convenor of the Committee on 26 July 2017 stating that:

“In relation to the changes introduced by these Regulations, firstly, they will widen access to student support to third country nationals who have lived in the UK for a significant part of their life but do not have an unrestricted right to remain in the UK under immigration law. We have made these amendments to widen access to student support and in doing so we were guided by the recommendations of the Supreme Court in an English case (*R (on the application of Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57) and the amendments made by the UK Government in respect of the legislation providing for student support in England. Since this amendment widens rather than restricts entitlement to student support and there was clear guidance from the Supreme Court we did not consider it necessary to conduct a formal consultation or impact assessment which may have delayed the possibility of making the change for the forthcoming academic year.”

[15] In an affidavit dated 28 June 2022 provided to the court in these proceedings, Mr Alan Scott, the Senior Policy Lead for SAAS, stated that:

“The policy rationale for making this change was to ensure that we were taking a consistent approach with the rest of the UK in providing student support to those who had lived here for a significant period of time ... The Scottish Government Higher Education Student Support team were the lead officials on adopting this new Long Residence policy, but did engage with SAAS on this issue and gave us the reasons for this ... If the Scottish Ministers did not adopt these changes to our regulations then this would expose them to criticism and risk of legal challenge if it was considered that some students domiciled in Scotland were being treated less favourably than students in the same circumstances living in another part of the UK ... In relation to the long residency rule which was ultimately introduced in Scotland, the rationale for having a reduced period of time for children under 18 as opposed to adults is because it was considered reasonable to impose a lower qualification period on children since this reflected the approach in other areas, including under the immigration rules and is consistent across the UK. The overarching policy factor for allowing people to access student support is ensuring that they have a sufficient connection with Scotland, so that limited public funds are applied appropriately to students who are most likely to enter the labour market and

contribute to the Scottish economy after graduation. As explained above, establishing such a connection is based on a range of different criteria, including ordinary residence and immigration status. The long residence rule, when it was introduced, allowed people to establish a connection with Scotland even in the absence of settled immigration status. However, to ensure that student support was not offered to people who might not be able to remain in the UK for the duration of their studies or after graduation, the Scottish regulations followed the English approach of applying a two-limb rule based on age criteria which mirrored immigration policy. A person under the age of 18 would need to have entered the UK at 10 years of age or earlier in order to qualify under the first limb of the long residence rule.

...

There was no strong rationale to adopt a different set of age criteria from the rest of the UK. At the time, the main policy consideration for the Scottish Ministers was whether they wished to implement a long residence rule at all, given that the substance of the *Tigere* case concerned application of the English student support legislation. Ultimately, the Scottish Ministers decided to amend the Scottish legislation governing tuition fees and student support to incorporate a long residence rule equivalent to that introduced in England. This was done to enable people who have resided in Scotland, albeit without indefinite leave to remain, for the better part of their lives to access student support in the same fashion as UK nationals were able to ... The resulting long residence rule provides a clear and transparent approach to determining long residence that can be applied consistently to all applicants. This UK wide approach avoids a discretionary outcome in individual applications which would lead to significant inconsistency across the UK funding bodies regarding the outcome of cases."

[16] Many more students who have gone through the Scottish state education system enter university under the age of 18 than is the case amongst those who have gone through the English state education system. In Scotland, the question of whether children are old enough to enter the school system is usually assessed by reference to their age as at 1 March in a given year; in England, the reference date is usually 1 September. The result is that more pupils in Scotland enter the education system at a younger age than their English counterparts, and correspondingly leave that system and are ready to continue to university, if that is where they are destined to go, at a younger age. Various statistics were placed before the court; as is often the case, the figures can be interpreted in different ways, but the

under 18 proportion in England appears to be very low, perhaps as low as 1% or even less, whereas the corresponding proportion in Scotland may be in the approximate range of between 25% and 50%.

[17] Finally by way of background to the petitioner's case, at the time when the respondents introduced the 2017 amendments to the 2007 Regulations, they were, by dint of section 1 of the Children and Young People (Scotland) Act 2014, under a duty to:

“(a) keep under consideration whether there are any steps which they could take which would or might secure better or further effect in Scotland of the UNCRC requirements, and

(b) if they consider it appropriate to do so, take any of the steps identified by that consideration.”

[18] The reference there to “UNCRC requirements” is a reference to the obligations set out in the United Nations Convention on the Rights of the Child, which include the following:

“Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

...

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: ... Make higher education accessible to all on the basis of capacity by every appropriate means ...”

[19] The respondents had introduced Child Rights and Wellbeing Impact Assessments by 2015, which were designed to help officials satisfy the duties imposed on Ministers by the

2014 Act by ensuring that the possible direct and indirect impacts of proposed policies and legislation on the rights and wellbeing of children and young people were considered.

Petitioner's submissions

[20] In written and oral argument on behalf of the petitioner, counsel submitted under reference to *Tigere (supra)*, *Ponomaryov v Bulgaria* (2011) EHRR 799, *Hunter v Student Awards Agency for Scotland* [2016] CSOH 71, 2016 SLT 653 and *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420 that it was clear in law that, while Article 2 of the First Protocol of the European Convention did not impose on the state an obligation to provide, or to fund, tertiary education, such state support as was available had to be offered on a Convention-compliant basis. He similarly accepted that it was legitimate for resources to be targeted on persons properly part of the community and likely to remain indefinitely in the UK, thus contributing to society here. He stressed that education played a fundamental role in the furtherance of human rights in society and submitted that that role ought to inform the court's approach to the intensity of its review of the regulations complained of and, indeed, the substance of that review. While due respect had to be given by the court in reviewing for Convention compatibility decisions of the democratic institutions charged with formulating and enacting legislation, lesser respect was due to those decisions if there was no evidence that any particular care had been taken as to what their impact, particularly on Convention rights, might be.

[21] Length of residence ought to be regarded as an "other status" capable of giving rise to relevant discrimination within the meaning of Article 14 of the European Convention. Place of residence itself had been recognised as such a status: *Carson v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173. Length of residence was simply a

function of residence and time. The petitioner had been discriminated against by the impact upon her of the eligibility requirements of the 2007 Regulations as a whole.

[22] The standard of review which the court ought to apply was that of an ordinary proportionality review. The provision of student support in Scotland to those without settled status affected so few people that it could not sensibly be regarded as a material aspect of a general or strategic measure of economic or social policy, which was the principal field in which the court's ability to intervene in legislative decisions had traditionally been regarded as more circumscribed. Further, the provision of access to education, be that by way of necessary financial support or otherwise, had long been recognised as a matter of special importance in a democratic society, both to those undertaking it and to the other members of society who might reasonably be expected to benefit, directly and indirectly, from the knowledge and skills it bestowed. It was not an area of social policy in which the legislature ought to be regarded as having an especially wide margin of appreciation, certainly where Article 14 was engaged. Finally, it was apparent that the respondents had promoted the 2017 amendments to the 2007 Regulations under various important misapprehensions; namely, that the Supreme Court in *Tigere* had in effect directed the content of the long residence rules to be introduced in order to avoid unlawful discrimination on the basis of immigration status; secondly, that any degree of relaxation of an unlawfully restrictive rule would in itself result in a lawful rule; and thirdly, that the UK consultation and equality impact assessment exercises could simply be read over to the Scottish situation where the proportion of under 18s going to university was so markedly different from that in England. Nor was there any evidence that the respondents had complied with their obligations under the Children and Young People (Scotland) Act 2014 in

promoting the 2017 amendments. In these circumstances, no particular deference should be accorded by the court to a patently flawed legislative decision-making process.

[23] Turning to the application of the standard proportionality review to the facts of this case, it was not disputed that the restriction of the provision of student support to those likely to remain in the UK after their studies was a legitimate objective which was, at least in principle, capable of justifying the limitation of a right protected by the European Convention. However, various aspects of the eligibility requirements under the 2007 Regulations had no rational link to that objective, in particular the “year 1” rule and the “cliff edge” increase in the length of residence required as between under 18s and over 18s, neither of which informed in any way the answer to the appropriate question of the degree of connection that any applicant actually had to Scotland, and the likelihood of the applicant remaining here in the long term. Ease of administration could not in itself provide a rational link between the “year 1” rule and the legitimate objective. Less intrusive measures could have avoided the situation which the Regulations had created. The Regulations as a whole had not been shown to be a reasonable or proportionate interference with the petitioner’s right not to be discriminated against. They did not represent a fair balance between the rights of individuals and the rights of society in the important context of education.

Respondents’ submissions

[24] On behalf of the respondents, counsel submitted in writing and orally that there had been no relevant discrimination against the petitioner. Her true complaint was simply that she had not been in the UK for the required period, which was not a matter struck at by Article 14. That Article applied where there had been a difference in treatment between two persons in a relevantly similar situation on the ground of one of the characteristics listed in

the Article or a relevant “other status” and the difference in treatment could not be objectively justified. While each of age and immigration status was an “other status” for the purposes of the Article, length of residence was not. It was too transient and amorphous to qualify as such. Further, it had no significance independent of the discrimination which was said to flow from it; it was merely a way of describing the difference in treatment. Reference was made to *R (on the application of SC v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223, per Lord Reed at paragraph 69. Further, it was important to appreciate, in assessing the petitioner’s complaint, that the question for the court was not whether proper consideration had been given by the respondents to the impact of the amended regulations on the petitioner’s Convention rights, but whether those rights had actually been violated – *Belfast City Council* (*supra*), per Lord Hoffmann at paragraph 11, Baroness Hale at paragraphs 31 and 37. There were no circumstances in which a court conducting a judicial review of legislation could properly set at naught the views of democratic legislators, however flawed the court might consider the legislative process to have been: *SC*, per Lord Reed at paragraphs 162 and 182.

[25] The proper structured approach which the court ought to take to the assessment of proportionality was as set out in *Bank Mellat v Her Majesty’s Treasury (No 2)* [2013] UKSC 39, [2014] AC 700, see also *Christian Institute v Lord Advocate* [2016] UKSC 51, 2017 SC (UKSC) 29 at paragraph 90. The first question within that approach, namely whether the objective of the impugned legislation was sufficiently important to justify the limitation of a protected right, was not a matter in dispute in this case.

[26] The second question, namely whether the questioned measure was rationally connected to the objective, could be answered positively if it could be shown that the implementation of the measure could reasonably be expected to contribute towards the

achievement of the objective being pursued – *Bank Mellat*, per Lord Reed at paragraphs 92 to 93 and 116. That could be shown in this case; the 2007 Regulations as amended might well contribute towards (even if not in themselves achieving) the objective of limiting student support to those likely to remain in Scotland after their studies and to contribute to society here on a long-term basis.

[27] The third question, namely whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, did not require the court to identify the least intrusive available measure and accept only that as justified.

Rather, having regard to the respect due to the legislature, the true question was whether the restriction on the fundamental right in question was a reasonable one to impose for the achievement of the legitimate objective: *Bank Mellat*, per Lord Reed at paragraph 75, *Christian Institute* at paragraph 93. *Tigere* could not be regarded as having addressed this aspect of the proportionality assessment exercise correctly; in any event the Regulations in issue in the present case were, in the round, a reasonable measure to impose for the fulfilment of the identified objective.

[28] The fourth question, namely 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 and the extent to which the measure will contribute to its achievement, the former outweighs the latter (or in other words, whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure) required to be approached in the first instance by identifying the margin of appreciation to be afforded to the legislative choice in question. Notwithstanding the recognition in *SC* (per Lord Reed at paragraphs 9ff) that a more nuanced approach to the intensity of the court's review fell to be taken than had perhaps previously been recognised, the appropriate question for the court to ask in this

case remained that of whether the measure in question was manifestly without reasonable foundation. That was the approach which was generally applicable to matters of economic strategy or general measures of social or economic policy and the allocation of finite state resources. *Hunter (supra)* had wrongly failed to proceed on that basis.

[29] In principle, a “bright line” rule dividing those entitled to student support and those not so entitled was lawful. There was an inherent value in the promulgation of rules which were simple to state, understand and apply, and which allowed different situations to be distinguished easily, objectively and with certainty. In cases where a line had to be drawn, proportionality could not be tested by reference to outlying cases. Reference was made to the dissenting judgment of Lord Sumption and Lord Reed in *Tigere* at paragraphs 88 to 93.

[30] The long residence rules did not discriminate against the petitioner; the “year 1” element was applied in the same way to all applicants, with a very few and immaterial exceptions, and was reasonable to enable higher education institutions to undertake forward planning with an appropriate degree of confidence that funding in respect of a particular student would continue to be available, if need be, for the whole of that student’s course. It matched the rule in England, thus avoiding the encouragement of cross-border distortions, and its removal would cause huge administrative difficulties to SAAS and the higher education sector in general. The rules as to the requisite length of residence set out reasonable periods which served as a realistic proxy measure for degree of connection to the UK, and again mirrored the position in England.

[31] So far as the Children and Young People (Scotland) Act 2014 was concerned, the duty imposed on the respondents by section 1 thereof did not have the scope for which the petitioner contended. The duty required the respondents to keep certain matters under consideration, nothing more. The respondents had done so, by way of a whole variety of

measures increasing accessibility to higher and further education in Scotland on the basis of capacity. The duty could be discharged without express and recorded regard having been had to it in the context of individual policy decisions. The petitioner's argument based on the 2014 Act was in any event an aspect of her wholly misconceived process-based argument.

Decision

Relevant discrimination

[32] Although the petitioner presented her case on the basis that she had been discriminated against by reference to each of her immigration status, her age and her length of residence in the UK, on analysis it appears that her true complaint is, as was that of the claimant in *Tigere*, one of unlawful discrimination on the ground of her immigration status, and specifically her lack of settled status, alone. So far as length of residence is concerned, the petitioner does not complain about the requirement that all applicants for student support must have been ordinarily resident in the UK for three years preceding the relevant date, nor – given its universal application to all applicants – could she sensibly do so. The other length of residence rules apply only to those without settled status and by dint of her age at the relevant date, the petitioner was entitled to be, and was, treated by reference to the least demanding length of residence criterion applicable to that group. The petitioner's true cause of complaint is that she belongs to a group (those without settled status) which is subjected to demands that she could not meet and which are not demands made on those with settled status. That is a complaint based on discrimination by reference to immigration status, not by reference to age or length of residence. In essence, the petitioner maintains that the addition of the long residence requirements to the 2007 Regulations to allow for the

possibility of those without settled status receiving student support did not draw the sting of the unlawful discrimination on the grounds of immigration status identified in *Tigere*.

[33] It follows that it is not necessary to determine formally whether length of residence is indeed a relevant “other status” for the purposes of Article 14 of the European Convention. While it is true that the mere fact of being treated differently from someone else cannot in itself furnish the person so treated with a relevant status, and it is necessary to be able to identify some ground, basis or reason for the difference in treatment in terms of a characteristic which is not merely a description of the difference in treatment itself, it appears that very little, if anything, more than that is needed, whether in the jurisprudence of the European Court of Human Rights – *Clift v United Kingdom* (Application No 7205/07) (unreported) 13 July 2010, at para 60:

“the general purpose of article 14 is to ensure that where a state provides for rights falling within the ambit of the Convention which go beyond the minimum guarantees set out therein, those supplementary rights are applied fairly and consistently to all those within its jurisdiction unless a difference of treatment is objectively justified”

and at para 61:

“while ... there may be circumstances in which it is not appropriate to categorise an impugned difference of treatment as one made between groups of people, any exception to the protection offered by article 14 of the Convention should be narrowly construed”,

or domestically: *SC* [2019] 1 WLR 5867 (Court of Appeal), per Leggatt LJ at paragraphs 60-69, and in the Supreme Court per Lord Reed at paragraphs 69 and 71. Had it been necessary to do so, I would therefore have had no difficulty in finding that length of residence was indeed a “status” for the purposes of Article 14, albeit (like immigration status and age) not one which, when used as the basis for differential treatment, inherently requires very weighty reasons by way of justification.

Intensity of review

[34] There is no dispute that, at least in the context of the right to education, differential treatment based on immigration status is a difference in treatment which, if it is to be lawful, requires an objective and reasonable justification, to be determined by reference to whether the different treatment pursues a legitimate aim and whether there is a reasonable relationship of proportionality between the aim and the means employed to achieve it.

Further, the ECtHR recognises that there exists in every case a margin of appreciation for the state entity creating the difference in treatment in determining whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background.

[35] Apart from a need for domestic courts to stay in harmony, so far as reasonably possible, with the jurisprudence of the ECtHR in relation to the scope of the Convention, the margin of appreciation afforded to legislative choices exists because of the separation of powers between the elected branches of government and the judiciary. As Lord Reed observed in *SC* at paragraph 162:

“Since the principle of proportionality confers on the courts a very broad discretionary power, such cases present a risk of undue interference by the courts in the sphere of political choices. That risk can only be avoided if the courts apply the principle in a manner which respects the boundaries between legality and the political process.”

The elected branches of government are responsible for choosing policy and an effective means for its implementation; the judiciary for ensuring that the bounds of legality are not exceeded. Each branch should be astute not to impinge on the territory of the other.

Bearing in mind the reason for the existence of the margin of appreciation will often assist in determining how wide or narrow that margin may truly be in any individual case.

[36] It is now recognised in domestic law, in a way that was perhaps not quite so obvious when *Tigere* and *Hunter* were decided, that the width of any particular margin of appreciation, and thus the intensity of the court's review in the case in which that margin applies, is unlikely to be capable of being adequately described by way of a "test", or in other words by reference to requirements capable of simple expression, which will in themselves determine the appropriate outcome. Rather, as observed by Lord Reed in the course of a detailed review and analysis of patterns in the treatment by the ECtHR of various factors relevant to the ascertainment of the width of the margin of appreciation in *SC* at paragraphs 98–156,

"the European court has generally adopted a nuanced approach, which can be understood as applying certain general principles, but which enables account to be taken of a range of factors which may be relevant in particular circumstances, so that a balanced overall assessment can be reached" (para 142).

[37] So far as relevant to the present case, the following points from that review and analysis (some more obvious than others) may be noted. Firstly,

"the court has moved over time towards explaining the need for weighty reasons to justify certain grounds of differences in treatment in terms of the link between those grounds and problems of stereotyping, stigma and social exclusion, which prevent participation in society on an equal footing to others" (para 103).

Accordingly, rather than simply treating certain grounds for differential treatment as inherently "suspect" and thus as requiring very weighty reasons in order to justify them, and others as implicitly requiring lesser justification, it may be that other than in extreme cases (such as where the ground of discrimination is race or ethnic origin) the appropriate width of the margin of appreciation will be indicated by considering the precise role that the ground of discrimination is performing in the circumstances of the case, rather than concentrating exclusively or even largely on its nature. The fact that the relevant ground of discrimination is, for example, immigration status (a ground that is not normally regarded

in itself as necessarily calling for weighty justification – see, eg *Bah v United Kingdom* (2011) 54 EHRR 21) may not be determinative of the width of the appropriate margin if the effect of its deployment in the case at hand is social exclusion and the prevention of those with a certain immigration status from participating in society on an equal footing with others.

[38] Secondly, it is possible, if not indeed likely, that any single case will contain factors pulling the appropriate width of the margin of appreciation in different directions, and that, accordingly, the width of the margin that would ordinarily be applied to the field of governmental activity in question may not be the one which the case actually calls for. Thus a case involving general measures of economic or social strategy, which would traditionally be regarded as requiring the application of a wide margin of appreciation often expressed as permitting the intervention of the court only when the difference in treatment is “manifestly without reasonable foundation”, may on more detailed examination of other factors present allow only for a more narrow margin and a correspondingly more intense standard of review. The opposite – ie the allowance of a wide margin in an area of governmental activity generally regarded as calling for weighty reasons in justification – is also entirely possible.

[39] Thirdly, the determination of the appropriate margin of appreciation, and its subsequent application to the facts of the case, are matters for the court alone. Even a determination that a wide margin of appreciation is properly to be allowed does not deprive the court of its constitutional role in ensuring that a state measure remains within legal limits. Thus, the ECtHR noted in *Febić v Hungary* (2017) 66 EHRR 26 that measures taken on social or economic grounds:

“must nevertheless be implemented in a non-discriminatory manner and comply with the requirements of proportionality. In any case, irrespective of the scope of the

state's margin of appreciation, the final decision as to the observance of the Convention's requirements rests with the court" (para 115).

The same point was made by Lord Neuberger of Abbotsbury in *R (RJM) v Secretary of State for Work and Pensions* [2008] UKH 63, [2009] 1 AC 311 at paragraph 57:

"there will come a point where the justification for a policy is so weak, or the line has been drawn in such an arbitrary position, that, even with the broad margin of appreciation accorded to the state, the court will conclude that the policy is unjustifiable".

Quality of the legislative process

[40] It is beyond argument that a case based on Convention rights must, if it is to succeed, demonstrate an actual violation of those rights, and that a mere demonstration that the decision challenged is the product of a defective decision-making process will not suffice –

R (SB) v Governors of Denbigh High School [2006] UKHL 15, [2007] 1 AC 100; *Belfast City Council* per Lord Hoffmann at paragraphs 13 and 14, Baroness Hale at paragraph 31.

However, in the *Belfast* case, both Baroness Hale and Lord Mance observed that, in cases where the state entity in question had made no attempt to consider the impact of Convention rights in taking the action it had, then (per Lord Mance at para 47, agreeing with and paraphrasing Baroness Hale at para 37) the court's scrutiny was bound to be closer and it might "have no alternative but to strike the requisite balance for itself, giving due weight to such judgments as were made by the primary decision-maker on matters he or it did consider." In *Tigere*, Baroness Hale returned to the same theme, observing at paragraph 32 that the degree of respect to be afforded to the decision-maker would be "heightened where there is evidence that the decision maker has addressed his mind to the particular issue before us ... or that the issue has received active consideration in Parliament", observing that neither such state of affairs pertained in that case.

[41] This issue was returned to in SC, where Lord Reed observed at paragraph 182 that

“If it can be inferred that Parliament formed a judgment that the legislation was appropriate notwithstanding its potential impact upon interests protected by Convention rights, then that may be a relevant factor in the court’s assessment, because of the respect which the court will accord to the view of the legislature. If, on the other hand, there is no indication that the issue was considered by Parliament, then that factor will be absent. That absence will not count against upholding the compatibility of the measure: the courts will simply have to consider the issue without that factor being present, but nevertheless paying appropriate respect to the will of Parliament as expressed in the legislation.”

[42] Drawing these strands together, it appears that the criticisms advanced by the petitioner in relation to the lack of consultation or impact assessment before the promulgation of the 2017 Regulations are matters that could, in principle, be taken into account as a factor in determining the width of the margin of appreciation appropriate to the present case, at least insofar as they may reflect a failure to address the possible impact of the proposed amendments on Convention rights, and to the extent that such a failure results in the absence of something which, had it been present, might have heightened the respect due to the legislative process. I do not, however, consider that the petitioner’s criticisms of the legislative process insofar as they relate to the respondents’ alleged failure to comply with their duty under the Children and Young People (Scotland) Act 2014 are well-founded. That is because, in the first place, I accept the respondents’ submissions as to the essentially limited nature of that duty. In the second place, even if the petitioner’s submissions as to the nature and extent of the relevant duty were correct, and the respondents were in breach thereof, that would not in itself involve a failure to address the possible impact of the proposed amendments on European Convention rights, and could not accordingly qualify as anything more than a process-based error of the kind generally irrelevant to the determination of this variety of case.

The margin of appreciation in the present case

[43] The principal factors in play in the assessment of the width of the margin of appreciation in the present case include the following. Firstly, on a proper analysis of the petitioner's case, the ground of the differential treatment complained of is immigration status. That is not traditionally regarded as a "suspect" ground of discrimination calling for weighty reasons in justification. In *Bah* at paragraph 47, the ECtHR noted that:

"The nature of the status on which differential treatment is based weighs heavily in determining the scope of the margin of appreciation to be accorded to contracting states . . . Immigration status is not an inherent or immutable personal characteristic such as sex or race, but is subject to an element of choice . . . While differential treatment based on this ground must still be objectively and reasonably justified, the justification required will not be as weighty as in the case of a distinction based, for example, on nationality."

This point was repeated by Lord Sumption and Lord Reed in *Tigere* at paragraph 74. On the other hand, and consistent with the rather more holistic view which, it is clear, ought now to be taken in the assessment of the significance of factors bearing on the width of the margin of appreciation, the deployment of immigration status as a ground of discrimination in the case at hand can sensibly be said to result in a significant degree of social exclusion for those affected, and operates as a mode of prevention from them participating in society on an equal footing with others. Moreover, the ECtHR has indicated that, in order to achieve pluralism and thus democracy, society itself has an interest in the integration of minorities: *Ponomaryov* at paragraph 55.

[44] Secondly, the right which the petitioner claims is being infringed by the 2007 Regulations, the right to education, is not only a right which enjoys direct protection under the Convention, but one which has been recognised as so fundamental a right as to fall to be regarded as constitutive of a democratic society and not properly to be subject to a restrictive interpretation diminishing its practical effect: *Tigere*, per Baroness Hale at

paragraphs 23 to 24; *Hunter* at paragraph 43; *Ponomaryov* at paragraph 55. The strength of these observations is, however, somewhat modified by the fact that what this case is concerned with is access to tertiary education, in which area the state's margin of appreciation has been recognised as wider than at the primary and secondary levels.

[45] Thirdly, despite the petitioner's submissions to the contrary, I consider that the 2007 Regulations do indeed address themselves to general matters of social and economic policy such as have traditionally been regarded, at least when coupled with "non-suspect" grounds of discrimination, as calling for a wide margin of appreciation, often indeed to the extent of requiring a measure to be shown to be "manifestly without reasonable foundation" before the court's intervention would be justified: see Lord Sumption and Lord Reed in *Tigere* at paragraphs 74 and 75, founding on *Stec v United Kingdom* 43 EHRR 1017, especially at paragraph 52. That is not to say that the provision of student support falls necessarily to be treated to all intents and purposes as the equivalent of the provision of other forms of state benefit, but the terms upon which student support is to be made available clearly involve decisions having to be made as to the balance to be struck between various demands for financial support by students in or seeking to enter tertiary education and the proper distribution of the funds available to that end, and therefore fall squarely within the sphere of socio-economic decisions in which the elected arms of government must be permitted to exercise a judgment of wide ambit. Again, however, this issue may not in the case at hand point entirely in the direction which one might ordinarily expect. That is because, as has been seen, the policy objective underlying the 2017 amendments to the 2007 Regulations was to allow people to access student support if they had a sufficient connection with Scotland, and in particular to attempt to see to it that public funds were supplied to the students most likely to enter the labour market and contribute to the Scottish economy after graduation.

The petitioner takes no issue whatsoever with that policy objective; her complaint is, rather, that the means selected to achieve it are faulty.

[46] In many cases, a policy objective and the means chosen to achieve it may in practice not be severable from each other for the purposes of an assessment of Convention compliance. That may particularly be the case where objective and means have been conceived, designed, consulted upon and implemented together. In this case however, the policy objective of concentrating public funds on students most likely later to remain in Scotland and contribute to the Scottish economy pre-dated the 2017 amendments and underlay the 2007 Regulations as initially brought into force. It was then determined in *Tigere* that the means chosen for the implementation of the similar policy objective in England were not Convention compliant and it was consequently decided, in England and subsequently in Scotland, to introduce the long residence rules in supposed amelioration thereof. It is not controversial to suppose that the legislative process leading to the introduction in Scotland of the long residence rules by way of the 2017 Regulations left something substantial to be desired; that, after all, was precisely the view expressed by the appropriate legislative review committee of the Scottish Parliament, as already noted. Whether a more robust legislative process, in the circumstances which applied throughout the UK in the aftermath of *Tigere*, would have resulted in a materially different set of Regulations being adopted in Scotland (either because of the radically different numbers of Scottish students going to university under the age of 18 in comparison with the situation in England, or for other reasons) is not something that requires to be pondered. The position is that the petitioner does not challenge the policy objective underlying the long residence requirements in the 2007 Regulations; she challenges those requirements as a proportionate means of achieving that objective, and that particular issue is not one that can be shown to

have received any consideration, or even attention, at either executive or parliamentary levels in the course of the process leading to the introduction of the requirements in question. The consequence is that a factor which might have increased the margin of appreciation on the proportionality issue is absent from the mix in this case.

[47] In summary on the question of the intensity of the proportionality review, the effect of the deployment of the ground of discrimination in the particular circumstances calls for a rather greater review intensity than might apply in other uses of that ground; the rights affected are of a very important kind, if not the most significant within that kind; and the measure called into question is socio-economic in nature, but is unsupported by any positive legislative consideration of its impact on Convention rights having been undertaken. This case presents neither a situation in which a measure must be “manifestly without reasonable justification” in order to be deemed non-compliant with the petitioner’s Convention rights, nor one in which “very weighty reasons” would require to be adduced in support of it. Instead, it occupies a position on the spectrum of intensity somewhere near the mid-point, perhaps inclining somewhat towards a greater rather than lesser degree of intensity. Whether the location of the case at that point on the spectrum actually affects the outcome of the proportionality review to be undertaken is a point subsequently to be addressed.

Proportionality review in the present case

[48] The appropriate way for the court to approach the question of proportionality in a case like the present is that identified in *Bank Mellat (No 2)*, summarised at paragraph 90 of *Christian Institute* as follows:

“It is now the standard approach of this court to address the following four questions when it considers the question of proportionality: (i) whether the objective is sufficiently important to justify the limitation of a protected right; (ii) whether the

measure is rationally connected to the objective; (iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and (iv) 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 (ie whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure)."

[49] The petitioner does not dispute that the objective at which the long residence rules are directed is sufficiently important to justify a limitation on the protected right to education. As to whether the long residence rules are rationally connected to that objective, if a measure may reasonably be expected to contribute towards the realisation of the objective at which it is directed, it will satisfy that requirement; *Bank Mellat (No 2)* per Lord Reed at paragraphs 92 and 116, citing *Lavigne v Ontario Public Service Employees Union* [1991] 2 SCR 211 and *R (Sinclair Collis Ltd) v Secretary of State for Health* [2011] EWCA Civ 437, [2012] QB 394. Although the majority of the court in *Tigere* held that reliance on immigration status alone as a ground of discrimination did not satisfy the requirements of rational connection to the relevant policy objective, long residence rules are, in the abstract at least, more related to presence in, and thus presumptively to connection with and possibly to integration within, a particular society. Indeed, as has been seen, an element of the court in *Tigere* suggested that residence rules might form an appropriate solution to the problem there identified with exclusive reliance on immigration status. Long residence rules may reasonably be expected to contribute towards the realisation of the policy objective of restricting the availability of student support to those who are likely to remain in the UK after their studies.

[50] Turning to the third question, namely whether a less intrusive measure could have been used without unacceptably compromising the achievement of the policy objective, it is important to appreciate that in that connection the court is only required to ask whether the

limitation on the fundamental right in question is one which it was reasonable for the legislature to impose. To apply the question literally would be to involve the judiciary, by in effect requiring the selection of only one acceptable measure, in a role appropriate only for legislators – *Bank Mellat (No 2)* per Lord Reed at paragraph 75, citing *R v Edwards Books and Art Ltd* [1986] 2 SCR 713 and *Illinois State Board of Elections v Socialist Workers Party* (1979) 440 US 173; *Christian Institute* at paragraph 93. In *R (Bidar) v Ealing London Borough Council* (Case C-209/03) [2005] QB 812, in the (slightly) different context of discrimination on grounds of nationality under EU law in connection with eligibility for student support, Advocate General Geelhoed observed (at para 61 of his opinion) that, in relation to seeking to establish a genuine connection with a national education system and a national society, “a residence requirement must, in principle, be accepted as being an appropriate way to establish that connection”. Similarly, a long residence requirement is, in principle, a reasonable type of measure by which to impose limitations on the availability of student support based on likely future connection with a particular economy.

[51] The fourth and final question is, read short, whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure; read shorter, does the end justify the means? The impact of the rights infringement on persons in the position of the petitioner is very considerable indeed. The description of that impact given by Baroness Hale in *Tigere* (especially at paras 39 to 40) applies equally in the present case. The petitioner was brought to Scotland as a child by her parents, without positive choice on her part as to whether or indeed when to make the move. She then participated fully in Scottish society, and in particular in the education system here, in order to improve herself and her life prospects. She has no intention of leaving this country, which is her home just as meaningfully as it is the home of any of her schoolmates. She qualified herself

amply to proceed into higher education, but unlike her peers with settled status, cannot do so without incurring intolerable financial pressures, in consequence of which she is likely to be deprived of the opportunity of that education for which she is well suited at the time in her life when it would be most advantageous for her. If she is involuntarily diverted away from education for a lengthy period at this stage in her life, it may well be that the practicalities of life and work will make that diversion a permanent one, to the great detriment of the petitioner and of the society to which she would otherwise have contributed more richly.

[52] None of that might matter if it could be shown that the result which the long residence rules introduced into the 2007 Regulations produce in the petitioner's case was the result of some peculiar quirk or wrinkle in a system otherwise well calibrated to separate those likely to remain in Scotland after their higher education and to contribute to society and the economy here from those not in that position. However, in treating the petitioner and others in a similar position to her in the way in which they do, the long residence rules are functioning exactly as they were intended to function. They exclude from eligibility for student support at least some of those likely to remain in Scotland indefinitely, however long they may have been here at the relevant date of reckoning; they also confer eligibility upon some (for example, those with long residence here who are involuntarily absent from their home countries due to war or the political situation there) who make no bones about their intention to leave the UK as soon as it becomes practicable for them to do so. The core problem is that long past residence in a country is in itself but a very imprecise proxy for probable future substantial and permanent connection there. The line produced by reference to long residence rules is a crude one. The policy objective underlying the long residence rules is very imperfectly realised by them.

[53] In response to this analysis, the respondents in effect paraphrase GK Chesterton; they say that legislating, like art and morality, consists in drawing a line somewhere. In some situations that may certainly be so. In the present context, however, it is appropriate to bear in mind that the line drawn does not closely correspond with the policy objective, most significantly in that it excludes some of those whom the objective would wish to have included. Those finding themselves on the wrong side of the line have no opportunity to cross it other than by waiting for potentially very lengthy periods of time. Those excluded suffer considerable detriment to their Convention-protected right to education. The resultant situation is not materially different to that discussed by Baroness Hale in *Tigere* at paragraphs 36 and 37.

[54] The traditional justifications for having a “bright line” or “blanket” rule are practicality and legality. In relation to the first, it may be that in some circumstances there is “no realistic half-way house between selecting on the basis of general rules and categories, and doing so on the basis of a case-by-case discretion” (*Tigere*, para 89, per Lord Sumption and Lord Reed, citing the ECtHR in *Carson v United Kingdom* (2010) 51 EHRR 369).

However, there is no material before me supportive of the suggestion that, in the present context, that is the position. Mindful of the pitfalls of making any positive suggestion as to what sort of rules might be Convention compliant in this situation, I observe simply that a standard inclusionary bright line rule coupled with the possibility of inclusion by way of a more tailored approach to other cases, far fewer in number, falling outside the bright line rule but arguably within the ambit of the policy objective, while no doubt to a degree more cumbersome than the current system, is difficult to categorise as quite unworkable. As to legality, Lord Sumption and Lord Reed in *Tigere*, while acknowledging that there is no single principle for determining when that consideration justifies resort to rules of general

application and when discretionary exceptions are required, noted that the ECtHR “has always recognised that the certainty associated with rules of general application is in many cases an advantage and may be a decisive one” (para 90), under reference to *Collins v Secretary of State for Work and Pensions* (Case C-138/02) [2005] QB 145. However, at least in a case where there is discrimination in the provision of the means of access to the important protected right to education, that a substantively bad rule has at least the benefit of clarity lacks sufficient weight to operate as a justification for the rights infringement which it entails.

[55] Ultimately, then, the long residence rules in the 2007 Regulations fail to strike a fair balance between the impact which they have on those whom they exclude from eligibility for student support despite objective clear connection with Scotland which it is reasonable to suppose will continue, and the likely benefit to the state of adopting a set of rules which, while clear, provide only an approximate means of achieving the objective of the policy which they are intended to implement.

[56] At paragraph 61 of his opinion in *Bidar*, Advocate General Geelhoed stated that:

“Ultimately, it would appear to me that if the result of the application of a residence requirement is to exclude a person, who can demonstrate a genuine link with the national education system or society, from the enjoyment of maintenance assistance, that result is contrary to the principle of proportionality.”

While recognising that the factual and legal background in *Bidar* were not entirely the same as in the present case, it seems to me that the same conclusion is effectively inescapable when considering the proportionality of the long residence rules in the 2007 Regulations, for essentially the same reason.

[57] That is the case on the application of the degree of intensity of review already identified. It would have remained the case even had the appropriate intensity been much

less. The position is not very different from that identified in relation to the settlement rule in issue in *Tigere* by Lord Hughes of Ombersley at paragraph 58:

“The adoption of the rule in relation to this cohort creates discrimination which is outside the legitimate range of administrative decisions available to the Secretary of State, and whether the test is correctly characterised as a decision ‘manifestly without reasonable foundation’ or as some less stringent criterion.”

Conclusion

[58] For the reasons stated, I conclude that paragraphs 1(c)(ii) and (iii) of Schedule 1 to the 2007 Regulations are unlawful in light of Article 14 of and Article 2 of Protocol 1 to, the European Convention on Human Rights. At the request of the parties, further procedure in the petition and the nature of any further orders which may be required will be discussed at a By Order hearing which will now be fixed.