

Hunter v Scottish Ministers & Others [2016] CSOH 71

26 May 2016

Hunter v Scottish Ministers & Others [2016] CSOH 71

The petitioner was a 56 year old woman who had left school at the age of 16 without any qualifications. She had spent much of her life caring for her father before deciding, after he had passed away, that she wished to undertake further education in order to obtain the qualifications necessary to allow her to start her own catering business. She applied for a student maintenance loan in order to meet the living costs associated with undertaking studies at HNC level, having already obtained various other vocational qualifications. Her application was refused on the basis of the eligibility requirements in regulation 3(2) of the Education (Student Loans) (Scotland) Regulations 2007/154, which provide that a person shall be eligible for a student maintenance loan only if they are either under the age of 50 on the first day of the course, or under the age of 55 on that date and the Scottish Ministers are satisfied that they intend to enter into employment after completing their studies.

The petitioner sought judicial review of the decision to refuse her application, and the 2007 Regulations, on the basis that they were incompatible with her rights under Article 14 (right to non-discrimination) when read with either Article 1 (right to property) or Article 2 (right to education) of the First Protocol to the European Convention on Human Rights (ECHR). The petitioner also sought judicial review of the failure of the Scottish Ministers to have due regard to the need to eliminate discrimination, advance equality of opportunity and promote good relations between persons of a particular age group, contrary to section 149 of the Equality Act 2010 (the so-called public sector equality duty or PSED). The latter ground of challenge proceeded inter alia on the basis that the Scottish Ministers (being the persons subject to the PSED, and responsible for promulgating the 2007 Regulations) had previously removed an age limit elsewhere in regulation 3(2) as regards student loans for the financing of tuition fees for certain post-graduate vocational qualifications, but had not undertaken any assessment of whether or not the age limit as regards student maintenance loans also ought to be maintained, at least not until the issue had been raised with the Scottish Ministers by the Equality and Human Rights Commission, at the prompting of the petitioner herself.

The Scottish Ministers resisted the petition on all grounds, arguing as regards the Article 14 ECHR challenge that the appropriate test for determining whether or not any interference with the petitioner's rights was justified under that provision was whether or not it was "manifestly without reasonable foundation", relying in that regard on the dissenting opinion of Lords Reed and Sumption in the Supreme Court decision in *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] 1 W.L.R. 3820. It was argued on behalf of the petitioner on this point in reply (relying on the decision of Lord Mance in *In re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] 2 W.L.R. 481) that the "manifestly without reasonable foundation" test could not, consistent with the court's role as a 'public authority' under section 6 of the Human Rights Act 1998, be applied to all four stages of the justification analysis under Article 14 ECHR, but rather required to stop short of the proportionality assessment, the latter being a straightforward question of law for the court. In a decision dated 20 May 2016, Lady Scott agreed with the petitioner as regards the application of the "manifestly without reasonable foundation test" to justification under Article 14 ECHR (i.e. that it required to stop short of proportionality), thereafter finding the 2007 Regulations (and the decision refusing the petitioner's application for a student loan) to

be a disproportionate interference with the petitioner's rights under Article 14 ECHR when read with the right to education in Article 2 of the First Protocol on the basis that she was:

"... not persuaded that there is a sufficiently clear and rational connection between the cut off in regulation 3(2)(b)(ii) and the primary aim of encouraging access to education. Indeed there is inherent conflict. Reviewing the relevant regulations in the round, including provision of the safety valve for those over 50 and under 55, I am not satisfied there is no less intrusive measure which could be employed, and I do not consider a "fair balance" has been achieved."

Lady Scott rejected the petitioner's submission that the regulation could be read down pursuant to section 3 of the Human Rights Act 1998 and accordingly agreed with the alternative submission that regulation 3(2)(b)(ii) of the 2007 Regulations was ultra vires being out with the legislative competence of the Scottish Parliament. The effect of that decision has been suspended pursuant to section 102(2) of the Scotland Act 1998 (Powers of courts or tribunals to vary retrospective decisions) and a by order fixed in order to consider the orders, if any, that the court should make to deal with the consequences of Lady Scott's decision.

As regards the argument advanced under the PSED, Lady Scott also agreed with the petitioner, finding the Scottish Ministers to have breached section 149 of the 2010 Act for the period prior to the review which is currently being undertaken at the prompting of the Equality and Human Rights Commission and the petitioner herself. In particular, Lady Scott agreed with the petitioner that the fact of the age limit for tuition fee loans having been removed elsewhere in the same regulation at issue ought to have been a sufficient 'trigger' for regard to be paid to the statutory goals in line with the PSED, on the basis that it (alone or in conjunction with the rise in the pension age and the position in England & Wales, where the age limit for student maintenance loans is 60) ought to have given the Ministers "grounds to believe" that the manner in which their public functions were being exercised was not such as to fulfil the statutory goals. Lady Scott was:

"... satisfied that such grounds to believe [were] established when the second respondents made amendments to regulation 3 of the 2007 Regulations. Reasonable scrutiny in respect of an issue regarding loans to those without age limitation in one part of that regulation ought to have involved the realisation that there was an issue of age in respect of regulation 3(2)(ii) which imposes such a stark age cut off and is - as the petitioner submitted - evidently discriminatory. The fact these amendments were a different part of the Regulations and that living loans were not affected is to take too narrow a view. I conclude that these amendments were sufficient to trigger the statutory duty".

Significantly, Lady Scott rejected the Ministers' argument that the provision for review of policies etc. which is made in the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012/162 was "strongly suggestive" of no parallel duty existing under section 149 of the 2010 Act. She further rejected the suggestion that the review which was stated to be currently underway rendered any order unnecessary, on the basis, first, that the details of the review were not before the court and, second, the review did nothing to address the period from 5 April 2010, when the PSED entered into force, to December 2014, when a compliance notice was issued by the EHRC and the review was said to have begun.

Lesley Irvine of Axiom Advocates acted for the petitioner.

<http://www.scotcourts.gov.uk/search-judgments/judgment?id=25d714a7-8980-69d2-b500-ff0000d74aa7>