Neutral Citation Number: [2020] EWHC 276 (Admin)

Case No: CO/3778/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/02/2020

Before:

MR JUSTICE NICOL

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Between :

OA	**Claimant**
- and –	
Secretary of State for Education	**Defendant**
-and-	
The Student Loans Company	**Interested Party**

- -
- -

Dan Squires QC (instructed by **Public Interest Law Centre**) for the **Claimant**
Galina Ward (instructed by **Government Legal Department**) for the **Defendant**
The Interested Party did not appear and was not represented

Hearing dates: 5th and 6th February 2020

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Approved Judgment

Mr Justice Nicol :

1. In this application for judicial review the issue is whether the Claimant was unlawfully refused a student loan. The Claimant says that the refusal was a breach of her right under the European Convention on Human Rights Article 14 when read with Article 2 of the 1st Protocol to the Convention.

2. The Claimant was born in 1993. She is a Nigerian national, but she has lived in the UK since 2011. She is anonymised as 'OA' as a result of an order of Roger Ter Haar QC, sitting as a Deputy Judge of the High Court on 16th January 2020. She is represented by Mr Dan Squires QC.

3. The Claimant was granted permission to bring this application for judicial review by Supperstone J. at an oral renewal hearing. The Interested Party, the Student Loans Company, administers the student loan scheme, but it has not appeared or been represented at this substantive hearing. The application has though been opposed by the Secretary of State for Education, represented by Ms Galina Ward.

The factual background

4. As I have said, the Claimant first came to the UK in 2011. She was given leave to enter as a Tier 4 student. Initially, her leave continued until January 2014. She came here to study for a B.Sc. in Information Systems and Management. However, the college at which she was studying was unexpectedly closed down before she could complete her course. In September 2011 the Claimant met the man who became her husband. He is a British Citizen of Nigerian origin. He and the Claimant married on 15th February 2013. On 13th December 2013 she applied for leave to remain as his wife.

5. Her application to remain as the wife of a British Citizen was granted on 14th March 2014 and her leave in that capacity continued until 14th September 2016.

6. The Claimant's husband was abusive towards her. It is unnecessary to go into the details. She left him in July 2016. While they were living together, the Claimant's husband, she says, controlled 'every aspect of my life'. He retained her documentation, including her passport. She says that in consequence she was unaware that her leave to remain in the UK had expired in September 2016.

7. After separating from her husband, the Claimant had obtained occasional work as a care assistant through an agency. In 2017 the agency informed her that she would not be able to work for them any more because she did not have leave to be in the UK.

8. The Claimant says that she was shocked to find this out. She obtained legal advice and, on 21st July 2017 she applied for leave to remain as a victim of domestic violence. The application was granted on 2nd August 2017 until 1st November 2017. I was told that this was an exercise of discretion outside the Immigration Rules in order to allow a person in the Claimant's position to regularise her situation, to access public funds and to give her time to prepare a full application for indefinite leave to remain in the UK ('ILR') as a victim of domestic abuse.

9. On 18th September 2017 the Claimant applied for ILR as a victim of domestic abuse. The Immigration Rules do cater for such an application – see Appendix FM to the

Immigration Rules Section DVILR. Her application was granted on 20th December 2017 since when she has had ILR in the UK and, since that date, she has, therefore, been 'settled in the UK' - see Immigration Act 1971 s.33(2A).

10. In July 2018 the Claimant was accepted for a place at the University of East London to study for a B.Sc. degree in Biomedical Science. She applied for a loan to the Student Loans Company which, as I have said, administers the system of student loans on the Defendant's behalf. The Claimant began her course assuming that she would be eligible for a loan (she could not otherwise have afforded the fees or to maintain herself). On 12th October 2018 she received a letter from the Student Loans Company to say that she was not eligible for a loan because she did not satisfy the three-year ordinary residence test (see below). The Claimant pursued various internal appeals but, on 21st May 2019, an Independent Assessor confirmed the decision to refuse her a loan.

11. Because of her financial situation, the Claimant had to leave the course at the University of East London in February 2019. She has applied for other courses and, on 23rd October 2019, she was accepted by London Metropolitan University to study Biomedical Science. Enrolment for the course is between 27th January and 10th February 2020. The Claimant will become liable for the fees 2 weeks after she enrols. Thus, she must pay the fees no later than 24th February 2020. She has said that if this application for judicial review is unsuccessful, she will give up the course before fees are incurred.

Student loans – legislative background

12. At all material times the relevant statute was the Teaching and Higher Education Act 1998 s.22 which says,

> '(1) Regulations shall make provision authorising or requiring the Secretary of State to make grants or loans, for any prescribed purpose to eligible students in connection with their undertaking (a) higher education courses or (b) further education courses
>
> which are designated for the purpose of this section by or under the regulations.
>
> (2) Regulations under this section may, in particular, make provision –
>
> (a) for determining whether a person is an eligible student in relation to any grant or loan available under this section ...'

13. For these purposes 'the Secretary of State' was the Secretary of State for Business Innovation and Skills. On 14th June 2016 the Department of Business Innovation and Skills was merged with the Department of Energy and Climate Change to become the Department of Business, Energy and Industrial Strategy. The responsibilities for universities (including student loans) was transferred back to the Department for Education.

14. The material regulations were made by the Secretary of State in 2011 – see Education (Student Support) Regulations 2011 SI 2011 No. 1986 ('the 2011 Regulations').

15. By regulation 4,

'(1) An eligible student qualifies for support in connection with a designated course subject to and in accordance with these Regulations.

(2) ... a person is an eligible student in connection with a designated course if in assessing that person's application for support the Secretary of State determines that the person falls within one of the categories set out in Part 2 of Schedule 1.'

16. Schedule 1 Part 2 sets out various categories of eligible persons. They include paragraph 2 which defines its category as follows,

'(1) A person who –

(a) on the first day of the first academic year of the course -

(i) is settled in the UK other than by reason of having acquired the right of permanent residence;

(ii) is ordinarily resident in England;

(iii) has been ordinarily resident in the UK and Islands throughout the three-year period preceding the first day of the first academic year of the course; ...'

17. For the purposes of the Schedule, 'settled' has the same meaning as in Immigration Act 1971 s.33(2A) – see 2011 Regulations Schedule 1 paragraph 1(1). By that provision of the 1971 Act a person is settled in the UK if he or she is ordinarily resident here without any restriction under the Immigration Acts on the period for which he may remain in the UK. That would include British Citizens and others with the right of abode in the UK - see Immigration Act 1971 s.2 – and others who, although requiring leave to be in the UK, have, like the Claimant now has, ILR here. ILR is not to be confused with a 'right of permanent residence'. The latter expression is defined by 2011 Regulations regulation 2 to mean a right arising under Directive 2004/38 to reside in the UK permanently without restriction. It is part of the bundle of rights of free movement which is presently enjoyed by EU nationals. Since the Claimant is not an EU national, it can be ignored for these proceedings.

18. By Schedule 1 paragraph 1(2A),

'For the purposes of this Schedule, a person is not to be treated as ordinarily resident in a place unless that person lawfully resides in that place.'

19. It is paragraph 1(2A) of Schedule 1 of the 2011 Regulations which has been the obstacle for the Claimant, although, even in the absence of this express provision, the reference to 'ordinary residence' in paragraph 2 of Schedule 1 would be interpreted by the courts as meaning lawful ordinary residence – see *R v Barnet London Borough Council ex parte Nilesh Shah* [1983] 2 AC 309.

20. Between 14th September 2016 when her leave to remain as her husband's wife expired and 2nd August 2017 when she was first granted leave to remain as a victim of domestic abuse, she had no leave to remain in the UK. As a Nigerian national without the right

of abode in the UK, it was not lawful for her to remain in the UK without leave to remain - see Immigration Act 1971 s.1(2).

21. This case has prompted the Secretary of State to reconsider whether provision ought to be made for victims of domestic abuse who leave their partners and who are unable to show that they had three years of lawful ordinary residence prior to their first year of university. He has decided that, as a matter of policy, he should. He has therefore made the Education (Student Fees, Awards and Support etc) (Amendment) Regulations 2020 SI 2020 No.46 ('the 2020 Regulations'). The 2020 Regulations were made on 21st January 2020, laid before Parliament on 23rd January 2020 and come into force on 13th February 2020. They are subject to the negative resolution procedure, but no such resolution has so far been proposed and I was invited by the Defendant to assume that the 2020 Regulations would be effective.

22. The 2020 Regulations only apply to the provision of support to a student in relation to a course which begins on or after 1st August 2020 – see 2020 Regulations regulation 1(3). Since the Claimant intends to commence her current course in February 2020, and incurred a debt as the result of the refusal of a loan for her previous course at University of East London in 2018-19, the 2020 Regulations do not directly benefit her. Nonetheless, Mr Squires prayed them in aid in support of his argument that the regime which did apply to the Claimant infringed her Convention right not to be subjected to discrimination in relation to other rights under the Convention, here the right to education. It is therefore necessary to say something of the 2020 Regulations.

23. Regulation 2(3) of the 2020 Regulations makes amendments to the 2011 Regulations. Materially for present purposes it adds to Schedule 1 of the 2011 Regulations a new category of eligible student – paragraph 4C which is,

> '**Persons granted indefinite leave to remain as a victim of domestic violence or domestic abuse** A person granted indefinite leave to remain as a victim of domestic violence or domestic abuse who is ordinarily resident in England on the first day of the first academic year of the course.'

24. It will be seen, therefore, that there is no equivalent to paragraph 1(a)(iii) of Schedule 1 to the 2011 Regulations. In other words, a person who has been granted indefinite leave to remain in the UK as the victim of domestic abuse will not in the future additionally have to show that she or he was lawfully resident in the UK for the three years prior to the first day of her university course.

Human Rights

25. The UK is a party not only to the European Convention on Human Rights, but also to certain Protocols to the Convention. The First Protocol includes Article 2 (conventionally referred to as A2P1) which says,

> '**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.'

26. Article 14 of the Convention says,

> '**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.'

27. As Article 14 says, the prohibition on discrimination applies to 'the enjoyment of the rights and freedoms set forth in this Convention.' It is well settled that it is sufficient for a complainant to show that the impugned discrimination is 'within the ambit' of one of the other Convention rights (or, of course, a right in one of the Protocols to which the UK is a party). In this case the Defendant accepts that the alleged discrimination was within the ambit of the right to education in A2P1. In view of this concession, it is not necessary for me to elaborate on the nature of the 'right to education' in A2P1.

28. The alleged discrimination must be on one of the prohibited grounds, although the final ground 'other status' allows for an element of flexibility. In this case, the Claimant has no need for such nuances. Her case is that the 3-year lawful residence requirement discriminates against her as a woman and sex is one of the express prohibited grounds of discrimination.

29. The 2011 Regulations do not in terms limit eligibility for student loans to men. In the language adopted by the Equality Act 2010, her complaint is not of direct discrimination on grounds of sex. In the terms used by the 2010 Act her complaint would be one of indirect discrimination – (see Equality Act 2010 s.19).

30. The Convention does not use the language of direct or indirect discrimination, but the European Court of Human Rights has developed a very similar concept to indirect discrimination in *Thlimmenos v Greece* (2001) 31 EHRR 15, a decision of the Court's Grand Chamber. As the Grand Chamber also expressed it in *DH v Czech Republic* (2008) 47 EHRR 3 at [184],

> '[discrimination] may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, discriminates against a group … Such a situation may amount to "indirect discrimination", which does not necessarily require a discriminatory intent.'

31. Ms Ward accepts that the *Thlimmenos* concept of discrimination in the Convention is so similar to indirect discrimination under the Equality Act that decisions regarding the domestic legislation can guide me in interpreting the Convention obligation.

32. Both Article 14 and A2P1 are among the 'Convention Rights' for the purposes of the Human Rights Act 1998 – see s.1(1)(a) and (b).

33. The 1998 Act requires the Secretary of State to make regulations, but it does not require him to make regulations which are in conflict with a person's rights under the Convention. If they are not compliant with the Convention, they are not therefore saved by Human Rights Act 1998 s.6(2).

The Issues for decision

34. Two principal issues remain:

i) Whether the 2011 Regulations disproportionately adversely affect women, and, if so,

ii) Whether that discriminatory effect is justified?

Whether the 2011 Regulations are discriminatory

35. Here, too, there is some common ground.

i) First, while some men suffer domestic abuse from their wives, in the overwhelming preponderance of cases it is wives who are the victims. Paul Williams is the Deputy Director for, and Head of, Student Funding Policy at the Department of Education. To his witness statement for these proceedings he attached statistics from the Home Office giving the numbers of spouses granted ILR as the victim of domestic violence and who previously had leave to remain as a spouse. By way of example in 2018 there was a total of 1308 such grants of whom some 92% were women. While the proportion obviously varies somewhat from one year to another, the reason for the Defendant's concession is clear.

ii) Domestic violence and abuse can take many forms, but one example is 'depriving [the victim] of the means needed for independence, resistance and escape' – see the Home Office Guide 'Victims of domestic violence and abuse' (version 14.0 published on 5th February 2018) page 6. This is why, unusually, a spouse who seeks indefinite leave to remain as the victim of domestic violence or abuse does not have to show that, at the time of the application, she or he currently had leave to be in the UK. The controlling spouse may have retained control of the victim spouse's passport or travel document and gaps in leave may therefore be no more than a manifestation of the abusive and controlling behaviour. Considering such matters may still be necessary as part of the usual assessment of an applicant's credibility, but gaps in leave are not critical. As the Home Office Guide goes on to say,

> 'If the applicant does not have valid leave to remain in the UK, you must check that there has been no grant of leave on a basis other than that of partner since the last grant as a partner. You must also consider the reason they were out of time and decide whether this affects the assessment of the evidence submitted in support of the application.
>
> You must also consider...
>
> If there are any other official reports, for example from the police, that show passports and travel documents were withheld and the police had to retrieve them.'

iii) Of course, there may, as Mr Williams says in his witness statement, be many other reasons why even a victim of domestic abuse has gaps in her or his leave to remain in the UK. As it happens, the briefing to Minister which led to the 2020 Regulations and which was dated 4th February 2019 specifically referred to the Claimant's case. It says

> 'The Home Office confirm that the break in her lawful leave is likely to have been due to the domestic abuse.'

iv) Conversely, not every spouse who is given indefinite leave to remain as a victim of domestic abuse will have a gap in her or his lawful residence. In his witness statement, Mr Williams said that there were no official statistics, but the Home Office estimate was that about 10% of those granted leave under DVILR would have such gaps.

36. The Claimant's case is straightforward. She submits that the requirement to have 3 years lawful residence prior to the commencement of the university course is likely to have a disproportionate effect on women. That is because more women than men are likely to be the victims of domestic abuse and because one of the forms that domestic abuse can take is the control of travel documentation, meaning that abused spouses (predominantly women) are liable to have gaps in their leave to remain in the UK.

37. The government's case is that there is no discrimination against women. The requirements for a student loan in the category relevant to the Claimant has to be seen as a whole. Viewed in that way it is a case of 'swings and roundabouts'. While it may, indeed, be the case that a victim of domestic abuse cannot show three years of lawful residence in the UK and that this is a result of spousal abuse, those who are the victims of domestic abuse will, on the other hand, be on a fast track to ILR and may be granted ILR earlier than if there had been no domestic abuse.

38. Further explanation is necessary here. Where couples remain together and there is not a case of domestic abuse, there may come a time when one is entitled to apply for ILR. Among the requirements which must then be fulfilled are that the applicant has had 5 years leave to remain as a partner of their spouse – see Immigration Rules Appendix FM paragraph E-ILRP1.3. That probationary period before a partner is granted ILR has been progressively extended. At one time it was 1 year, then 2 years. It has been 5 years since 2012. There is no equivalent minimum period of leave which a victim of domestic abuse must have accrued before being eligible for Indefinite Leave to Remain – see Immigration Rules Appendix FM paragraph E-DVILR.

39. Thus, Ms Ward submits, while a victim of domestic violence may be disadvantaged by the lawful residence part of the Rule, she or he may be advantaged by the speedier grant of ILR. Viewed overall, therefore, the eligibility criterion on which the Claimant relies does not adversely impact on women. She submits that the very change which brings about the alleged disadvantage (her status as a victim of domestic violence) also brings about a corresponding advantage so that, overall, there is no disadvantageous treatment of victims of domestic violence.

40. I do not accept this argument.

i) I recognise that, at least in theory, there may be measures which cannot be sub-divided into those that advantage a protected group and those that disadvantage them. In such cases, there may be no alternative but to consider whether, in the round, the measure substantially disadvantages the protected group.

ii) But, even if in theory, such a category can exist, I do not accept that the situation which I have to consider is an example of it. In my view, there are plainly

discrete requirements in the 2011 Regulations Schedule 1 paragraph 2. They include (i) that the applicant is settled in the UK and (ii) that she has been ordinarily, and therefore lawfully, resident in the UK for 3 years before the commencement of her course.

iii) I also agree with Mr Squires that his argument is supported by the decision of the Court of Appeal in *R (H) v Ealing London Borough Council* [2017] EWCA Civ 1127, [2018] PTSR 541. That case concerned two housing allocation schemes operated by Ealing which reserved a total of 20% of available lettings for priority schemes in the one case for "working households" and in the other for "model tenants". The Claimants alleged (among other things) that these schemes were unlawful under the Equality Act 2010 s.19 since they amounted to indirect discrimination against women, the disabled and the elderly and they were also alleged to be unlawful as contrary to Article 14 of the ECHR read with Article 8 ECHR. The Convention argument failed for reasons which are not material. In relation to the claim under the Equality Act, Ealing's arguments included a submission that there was no discrimination because some aspects of the scheme favoured women (and the other protected groups) and the impact of the schemes had to be judged as a whole.

iv) In the present case, of course, the Claimant does not rely on the Equality Act, but she does rely on the Convention. Ms Ward accepted that this was not a reason for treating the case as irrelevant. She accepts, as I have said, that the approach of the Strasbourg Court to the *Thlimminos* type discrimination is not materially different to the approach of the domestic courts to indirect discrimination under the Equality Act. At [40] Sir Terence Etherton, Master of the Rolls, quoted from the Explanatory Notes to the Equality Act and which gave examples of how indirect discrimination was intended to work. It said,

> 'An observant Jewish engineer who is seeking an advanced diploma decides (even though he is sufficiently qualified to do so) not to apply to a specialist training company because it invariably undertakes the selection exercises for the relevant course on Saturdays. The company will have indirectly discriminated against the engineer unless the practice can be justified.'

At [41] Sir Terence commented,

> 'On the stance taken by Ealing before the judge, one does not decide whether requiring the selection exercise to be held on a Saturday is more likely to disadvantage Jewish applicants. One should, instead, consider all of the criteria for admission to the diploma course (including, for example, requirements to hold a particular degree or have particular experience) and see whether, overall, Jewish applicants were more or less likely than non-Jews to be accepted. As the Commission [i.e. the Equality and Human Rights Commission which had intervened in the case] explains in its skeleton argument, that is not the approach of the Explanatory Notes. As the Explanatory Notes make clear, one examines only the PCP [i.e. provision, criterion or practice – see Equality Act 2010 s.19] (the requirement to undertake a selection exercise on a Saturday), and ask whether "it" (i.e. that PCP) places Jewish engineers at a "particular disadvantage" as compared with equally qualified non-Jewish engineers. One does not consider whether,

> overall, Jewish engineers are over or under represented on the course, given all the admission criteria.'

It is clear from this and from [56] that Sir Terence rejected Ealing's argument that there was no indirect discrimination.

Although there was a division of opinion in the Court of Appeal, Ms Ward did not suggest that there was any disagreement regarding these views, still less that a contrary view was part of the *ratio* of the case. In Convention terms, it is the 'measure' which is in issue rather than the PCP, but I agree with Mr Squires that what Sir Terence said about the PCP in *Ealing* applies equally to the measure in issue in the present case.

v) The same point was made by Baroness Hale in the Supreme Court in *Essop v Home Office* [2017] 1 WLR 1343 at [41].

41. Accordingly, I agree with the Claimant that the requirement in the 2011 Regulations Schedule paragraph 2(1)(a)(iii) that she have three years lawful residence in the UK before she started her course did discriminate against her as a woman and had to be justified if that discrimination was not to be a breach of Article 14 taken with A2P1.

Justification

42. Under the Equality Act 2010, the burden lies on the policy maker to justify the impugned PCP. I did not understand Ms Ward to contend that any different approach was required in the context of Article 14. That was understandable. The Grand Chamber of the Strasbourg Court has said as much – *DH v Czech Republic* (2007) 47 EHRR 3 at [177] and the position was endorsed by Lord Wilson in *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21, [2019] 1 WLR 3289 at [50].

43. In *R (DA) v Secretary of State for Work and Pensions* at [136] Baroness Hale said four questions arose in deciding complaints under Article 14. The fourth of those was,

> 'Does that difference or similarity in treatment have an objective justification, in other words does it pursue a legitimate aim and do the means bear a "reasonable relationship of proportionality" to the aims sought to be realised (see *Stec v UK* (2006) 43 EHRR [51])?

44. In *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57, [2015] 1 WLR 3820 SC, Baroness Hale said that [33] the test for justification was fourfold,

> '(i) does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right; (ii) is the method rationally connected to that aim; (iii) could a less intrusive means have been used; (iv) bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure contributes to that aim, has a fair balance been struck between the rights of the individual and the interests of the community.'

45. In some ways *Tigere* was very similar to the present case. That case, too, involved eligibility for student loans. The Claimant, who had been born in 1995, had been

brought to the UK by her parents at the age of 6 in 2001. Her father returned to his home in Zambia in 2003, but the Claimant and her mother remained in the UK as overstayers. In January 2012 she was granted discretionary leave to remain. This was subsequently extended to 2018, when she would have been eligible to apply for ILR. In April 2013 she obtained a place at university and applied for a student loan. She met two obstacles. The first was that she was unable to satisfy the 3-year lawful residence requirement; the second was that she did not at the time of her application for the loan have ILR. In the proceedings which she began in 2013, she argued that both of these requirements breached her rights under Article 14 of the Convention read with A2P1. It was accepted by the government in that case that immigration status was an example of 'other status' on the grounds of which Article 14 prohibited discrimination.

46. In the event in *Tigere* the Supreme Court held by a majority (Baroness Hale, Lord Kerr and Lord Hughes, Lord Sumption and Lord Reed dissenting) that the requirement of ILR was not compatible with Article 14 , but all of the judges held that the 3-year lawful residence requirement was compatible with Article 14.

47. The Supreme Court simply declared that the application of the settlement criterion to her was a breach of the Claimant's rights under Article 14 read with A2P1. Subsequently, by SI 2017 No 114, the 2011 Regulations were amended by adding a further category of eligibility based on long residence in the UK.

48. Ms Ward argued that, if the Regulations did discriminate against the Claimant, the discrimination was justified. She accepted that at this stage of the discussion, what had to be justified was the absence of any exemption or qualification for victims of domestic abuse - see *DA* at [54]. She submitted:

i) All 5 judges in the Supreme Court in *Tigere* had found that the 3-year lawful residence requirement was justified.

a) Lady Hale at [43] accepted that a period of residence in the UK was a reasonable proxy for belonging to the UK.

b) There were strong reasons of public policy to insist that the residence should belawful and if the requirement was relaxed for people in the claimant's group, it would also have to be relaxed for others who did not have personal responsibility for breaks in the lawfulness of their residence. Additionally, it would impose an intolerable burden on administrators in making moral judgments as to whether someone was to blame for remaining in the UK without leave. That, too, would lead to delays in the administration of the student loan scheme – see [45].

c) Lord Hughes said that the requirement that prior residence was lawful was 'plainly justified' [56]. He said,

> 'It must be open to the state to exclude from its generosity those whose residence here is illegal or has not been legal for a qualifying period. It may be true that young people such as the appellant may become and remain illegal immigrants through the actions of their parents and at a time when they were not personally responsible for their movements. But whilst this is so,

> it is plainly open to the state to say that a parent cannot obtain for his children subsidised University education by entering or overstaying illegally in this country and choosing to keep quiet about what s/he is doing. Children are inevitably affected in many ways by decisions made for them by their parents when they were young; this is one such.'

d) Lord Reed and Lord Sumption observed that the nature of the protected characteristic was relevant to justification and, while 'immigration status' had been recognised as a form of 'other status' for the purposes of Article 14 (see *Bah v UK* (2011) 54 EHRR 773 [45]-[46]), states had a wider margin for deciding that discrimination on such a ground was justified – *Bah* at [47]. A wide margin was also justified because student loans were a form of state benefit. It is fair to say that this line of reasoning led Lord Reed and Lord Sumption to conclude that the appropriate test was that referred to by its acronym MWRF or 'manifestly without reasonable foundation'. As to this, Ms Ward recognised that Lord Reed and Lord Sumption were in the minority and she did not urge me to apply MWRF in this case.

ii) The *H v Ealing* case had recognised that 'safety valves' or advantages of the package of conditions on which Ealing relied could be taken into account in deciding whether the discrimination represented by the disadvantageous elements of the package were justified – see *Ealing* at [59]. Thus it was material, at the stage of justification, to take into account that ILR under Appendix FM Section DVILR could be obtained earlier than would have been the case if the victims of domestic violence's partners had not been abusive and they had to apply for ILR by satisfying the requirements of Appendix FM paragraph E-ILRP.

iii) Although Ms Ward disavowed reliance on MWRF, she did submit that it was relevant that we were concerned with a form of state benefit – see Lord Hughes' judgment in *Tigere* at [56].

iv) It was not the case that all victims of domestic abuse would have gaps in their leave (only about 10% would).

v) Even where there were gaps in leave, they would not necessarily be caused by their manipulative or controlling partners.

vi) Investigating why there were gaps in leave would be burdensome on administrators and add to the costs of the scheme.

vii) There were advantages in having a bright line rule: it was easier and cheaper to operate. In *Tigere* Lady Hale (and Lord Kerr) considered the part that the advantage of having a clear dividing line might play in justifying discrimination – see [36]-[38]. At [37] they suggested that there might be a distinction between a bright-line rule which was inclusionary and one which was exclusionary, but that distinction did not appeal to Lord Hughes – see [60], or to the dissenting judges – see [88], and, therefore, there was no majority support for it. Overall, Ms Ward is entitled to treat *Tigere* as supportive of the idea that the value of

having a bright line rule is capable of being an element in the justification of discrimination.

viii) The change to the Regulations in 2020 did not assist the Claimant. Minsters were entitled to decide *as a matter of policy* to make such changes. It did not follow that the previous scheme (and that which applied to the Claimant) was unlawful discrimination.

ix) The 3-year ordinary residence requirement had a long history. According to Mr Williams it dated back to the 1960s. As Mr Williams put it in his witness statement,

> 'The Government believes that a reasonable inference as to a person being properly part of the community and their likelihood to remain a contributing part of society and the economy in the future, such that a public subsidy of higher education will be well spent, is the extent of their lawful residence in the UK in the immediate past.'

x) Ms Ward acknowledged that particular consideration had never previously been given to the discriminatory impact of the 3-year lawful residence requirementon victims of domestic violence. That was a necessary concession in view of what Mr Williams said in his witness statement,

> 'So far as I have been able to ascertain, this is the first time that a person who has been granted ILR as a victim of domestic violence has challenged the three-year ordinary residence requirement for accessing student finance or claimed that it is discriminatory. This is therefore the first time that the Department has had to consider whether any change to the 2011 Regulations should be made in order to take account of the position of victim of domestic violence, who until now were not considered as a separate category distinct from others with ILR or settled status.'

Nonetheless, Ms Ward submits, as the Court of Appeal said in *R (Ward) v Hillingdon London Borough Council* [2019] EWCA Civ 692, [2019] PTSR 1738 CA at [76],

> 'It is not a legal requirement of justification that the reasons put forward in defence of the PCP must have been present to the mind of the policy maker at the time when the PCP was introduced. It is open to a policy maker to advance an ex post facto justification '

xi) Allowance has been made in the Immigration Rules for the victims of domestic abuse, but as Lord Hughes said in *Tigere* at [55],

> 'The purposes served by the immigration rules are not identical to the purposes of the Regulations governing eligibility for student loans.'

xii) A relevant factor in the justification balance was the severity of harm which was suffered by the disadvantaged group – see Lady Hale in *Tigere* at [45]. In this case, victims of domestic abuse who were granted ILR as such would not be forever barred from student loans. Assuming that they did have breaks in their

lawful residence, at most they would have to wait for 3 years from their grant of ILR.

49. I appreciate the arguments deployed by Ms Ward, but in my judgment, even taken together, they do not justify the discrimination which arises in this case. My reasons are as follows:

i) Not all victims of domestic abuse who are granted ILR as such will have had a break in their lawful residence, but as Lady Hale said in *Essop v Home Office* [2017] 1343 at [27],

> 'There is no requirement that the PCP in question put every member of the group sharing the particular protected characteristic at a disadvantage.'

ii) I accept that the Defendant is entitled to rely on an ex post facto justification as Lewison LJ said in *Ward*. However, Lewison LJ added (still in [76]),

> 'However, in the case of an ex post facto justification, the court will not have had the benefit of the considered *decision* [Lewison LJ's emphasis] of the policy maker. Thus, as Lord Kerr of Tonaghmore pointed out in *In re Brewster* [2017] 1 WLR 519 [52]:
>
> > "Obviously, if reasons are proffered in defence of a decision which were not present to the mind of the decision-maker at the time that it was made, this will call for greater scrutiny than would be appropriate if they could be shown to have influenced the decision-maker when the particular scheme was devised. Even retrospective judgments, however, if made within the sphere of expertise of the decision-maker, are worthy of respect, provided they are made bona fide."'

I add at once that no one has suggested that the views put forward by Mr Williams were anything other than bona fide. They are within his and the Department's sphere of expertise. They are worthy of respect, though tempered as Lewison LJ and Lord Kerr said was appropriate.

iii) I accept, in principle, the proposition advance by Ms Ward that ministers have scope to make policy choices and it would be wrong to equate such a policy decision with an admission that the position before the change constituted unjustified discrimination, but while this is so, the 2020 Regulations make it harder for her to defend the prior position as justified discrimination.

iv) I also recognise that student loans are a form of social benefit. As Lord Hughes explained in *Tigere* at [53] a considerable proportion of the loans are never re-paid and the scheme of loans is therefore properly to be considered as a form of subsidy. The executive has particular expertise and democratic responsibility for deciding how such benefits are to be distributed. The respect which must be accorded to their decisions is accordingly enlarged. That said, the issue which I am considering is of a wholly different order to that which was being considered by the Supreme Court in *DA* (the second challenge to the benefit cap). In the briefing prepared for ministers, to which I have previously referred, it is said,

> 'Overall, we think the additional student numbers and long term costs falling on the student support budgets will be small or negligible.'

Likewise, the Explanatory Memorandum which accompanied the 2020 Regulations said that,

> 'the impact on the public sector is minimal.'

I recognise that the impact assessment was premised on the basis that the Regulations would have effect only for students starting a course after 1st August 2020. They are not retrospective. I realise that some additional cost would be involved if I were to conclude that the Convention required the same course to be adopted retrospectively, but I think it safe to infer that that additional cost would be relatively small. After all, as Mr Squires submitted, if the future cost is negligible, the cost of making it retrospective (especially bearing in mind rules on limitation) must be smaller still.

v) Of course, as Lord Hughes said in *Tigere*, the purposes served by the immigration rules are not the same as the purposes served by the student loans scheme, but there is nonetheless a close correlation between the two. In the particular context with which I am concerned, the student loan scheme makes use of the concepts (taken from immigration law) of ILR and ordinary residence. Victims of domestic abuse are allowed a fast track to indefinite leave to remain no doubt because the breakdown in their relationship is not their fault and there would be no purpose in requiring them to undergo a period of probationary leave before being entitled to ILR. The relief which the Supreme Court granted to the successful appellant in *Tigere* was a declaration that the 2011 Regulations as they then stood unlawfully discriminated against Ms Tigere by requiring her to have ILR. The Court did not see it as its task to re-write the regulations in a way which was Convention compliant. However, at [65] Lord Hughes said,

> > 'As it happens, there exists within the immigration rules a possible template which might be adopted, with or without modification.'

He was referring to the long residence rules (paragraph 276ADE(1) of the Immigration Rules). Following this decision, the student loan regulations were indeed amended using those rules as a model for the new category 13 in the Schedule to the 2011 Regulations.

vi) Ms Ward emphasised the administrative burden (and consequent costs) which would follow, particularly if it was necessary for an administrator to decide whether gaps in the 3 years of prior leave were due to spousal abuse or were for other, independent reasons. As I have shown, for the purposes of an application for ILR as a spousal victim of domestic abuse, the Home Office has decided not to investigate this question, as such. At most, it is a step on the way to a conclusion as to whether the applicant is indeed a victim of domestic abuse. One of the questions that I have to consider is whether there is a less intrusive measure which would avoid the discrimination. An alternative would be for the Defendant to take the same course as the Home Office. Admittedly, this would be over-inclusive since it would benefit those whose gaps in lawful leave were *not* due to domestic abuse. The same could be said of the Immigration Rules,

but the Home Secretary has nonetheless made the Rules in the form that she has. Further, and as importantly, so has the Defendant in making the 2020 Regulations.

vii) Ms Ward's argument that what is at issue is only an issue of timing (i.e. it is not whether the Claimant will be eligible for a student loan, but when she will be eligible) is, to some extent met by Lady Hale in *Tigere*. The same might have been said about the Claimant in that case. In time, she, too, would have been eligible to apply for ILR on the basis of her long residence, so the issue was whether the delay in her eligibility for a student loan was justified. As Lady Hale said,

> [40] One does not need to have been a university teacher to appreciate that it is important to keep up the momentum of one's studies, to maintain the habits and skills learned at A level, in many cases (particularly the sciences) to retain the knowledge gained there. A voluntary gap year is one thing, but an enforced gap of several years is quite different. These young people will also find it hard to understand why they are allowed access to all the public services, including cash welfare benefits, but are denied access to this one benefit, which is a repayable loan.
>
> [41] Furthermore, in considering the overall balance, alongside the harm done to the individuals must be set the harm done to the community by such delay. Some of these young people may be lost to higher education forever. Others will not join the productive higher-skilled workforce until much later than they otherwise would have done. The overall benefits to the exchequer and the economy described in Professor Walker's unchallenged evidence, will be reduced. Those harms to both the individuals concerned and the community as a whole cannot be outweighed by the administrative benefits of this particular bright line rule, which could be achieved in other ways. Any short term savings to the public purse by denying these students finance, by way of loans, not grants, are just that, as most of them will eventually qualify for loans, and in the meantime the benefit of their enhanced qualifications will bring to the exchequer and the economy have been lost. Furthermore, the additional short term cost of enabling these students to have loans pales into insignificance compared with removing the cap on student numbers.'

I recognise that the position of the cohort whom I am considering is not as acute as those being considered by Lady Hale. At most, those who are granted ILR as the victims of domestic abuse will have to wait another three years to be eligible for a student loan. In *Tigere* the delay before qualifying for ILR was 6 years. While I recognise this difference in degree, the points of principle to which Lady Hale referred are still applicable.

viii) While the 3-year ordinary and lawful residence rule survived challenge in *Tigere*, the nature of the present challenge is materially different. For Lord Hughes (see [56]) part of the justification in that case was that a person should not benefit from their unlawful conduct, nor should a child benefit from the unlawful conduct of their parents. That is not analogous to the present context. For Lady Hale and Lord Kerr (see [45]) the administrative burden in making moral judgments as to the reasons for unlawful stay would be intolerable and

the overall balance of harm made a bright line rule justifiable. Here, as I have shown, an alternative bright line rule has been chosen by the Home Office for immigration purposes and adopted by the Defendant for the purposes of future administration of the student loan scheme. It is also of some note that the discriminatory ground in *Tigere* was 'other status' (immigration status). In the present case it is sex. If and so far as the nature of the protected status in issue is relevant, that weighs in the Claimant's favour.

ix) I was not persuaded that the challenged measure could be justified by showing that, in other respects, the victims of domestic violence were advantaged by having quicker access to ILR. This was, in effect, recourse to the same 'safety valve' argument as had been advanced by Hillingdon in the *Ward* case, but as Lewison LJ said in that case at [86],

> 'the key principle is equality of outcome. If a PCP results in a relative disadvantage as regards one protected group, any measure relied on as a "safety valve" must overcome that relative disadvantage. Put simply, if the sales are titled in one direction, adding an equal weight to each side does not eliminate the tilt.'

In my view, Mr Squires was entitled to submit that this was also the case here. The relative advantage of speedier access to ILR did not eliminate the disadvantage of the discriminatory requirement of having 3 years ordinary and lawful residence.

50. In conclusion, I find that the Defendant has failed to justify the discrimination against the Claimant. It follows that there has been a breach of the Claimant's rights under Article 14 of the ECHR when read with A2P1.

51. No party has suggested that the interpretative obligation in Human Rights Act 1998 s.3 could lead to a Convention compliant outcome.

52. As I have said, when the Claimant succeeded in *Tigere* the Supreme Court made a declaration that her rights under Article 14 read with A2P1 had been infringed. I shall do the same.

53. The Claimant's Claim Form also sought an order quashing the decision of 26th June 2019 not to provide her with a loan for the 2018-2019 academic year. Following the decision of the Supreme Court in *RR v Secretary of State for Work and Pensions* [2019] UKSC, [2019] 1 WLR 6430 SC, the Defendant accepts that, if the Claimant succeeds on ground 1 of her challenge (see the previous paragraph) she is also entitled to succeed in relation to this matter. I shall therefore quash the decision of 26th June 2019.

54. In those circumstances, Ms Ward submitted, and I accept, that a mandatory order is unnecessary.