# "Right to Rent" scheme declared incompatible with the European Convention of Human Rights

1. In a landmark judgment, the High Court has declared the Government's controversial "Right to Rent" scheme incompatible with the European Convention on Human Rights.[1]

2. The scheme was introduced in 2016 as a key plank of the Government's "hostile environment" for illegal immigrants. Under the scheme landlords are responsible for checking the immigration status of tenants to ensure that they do not provide private accommodation to disqualified persons. Landlords who fall foul of the scheme face a fine of up to £3,000 or a prison sentence of up to five years. Disqualified occupiers may be summarily evicted. Following its implementation, the scheme was widely criticised on the basis that it was leading to discrimination against migrants and ethnic minorities.[2]

3. Pursuant to permission granted by Jay J on 6th June 2018, the Joint Council for the Welfare of Immigrants ("JCWI") sought judicial review by way of a declaration that sections 20 – 37 of the Immigration Act 2014 are incompatible with Articles 14 and 8 of the European Convention on Human Rights ("ECHR"). JCWI further sought an order quashing the decision of the Secretary of State to extend the scheme to Scotland, Wales and Northern Ireland on the grounds that the scheme gives rise to an inherent and unacceptable risk of illegality and breaches section 149 of the Equality Act 2010.

[1] *R (Joint Council for the Welfare of Immigrants) v. Secretary of State for the Home Department -and- (1) Residential Landlords Association (2) Equality and Human Rights Commission (3) Liberty* [2019] EWHC 452
[2] Passport Please: The impact of the Right to Rent checks on migrants and ethnic minorities in England, The Joint Council for the Welfare of Immigrants (February 2017)

4. The essential nature of the challenge was that the net has been cast too wide and the effect of the scheme has been to compel landlords to commit nationality and/or race discrimination against those who are perfectly entitled to rent with the result that they are less able to find homes than (white) British citizens. This was said to have been an unintended effect of the scheme and that, in implementing the scheme, landlords are acting in a way which is discriminatory on grounds of both nationality and race, not because they want to be discriminatory but because the scheme causes them to be.

5. The first issue for the High Court to determine was whether the scheme engaged, or came within the ambit of, Article 8 of the ECHR. Martin Spencer J accepted the Government's argument that the scheme did not engage Article 8 directly by reason of interference with the rights protected by that Article. If it did, then this would be tantamount to acknowledging that Article 8 gives a person the right to a home, which the authorities have repeatedly confirmed that it does not.[3] However, Martin Spencer J held that the scheme does come within the ambit of Article 8, for the purposes of the right not to be discriminated against under Article 14, for two reasons:

   (1) First, the jurisprudence emanating from Strasbourg suggests that race discrimination is regarded with particular anathema. If the legislation is causing landlords to discriminate on grounds of race, the ECtHR would agree that the bar should be set low in determining whether the scheme comes within the ambit of a substantive right such as Article 8. Otherwise, in circumstances where the court considers a contracting State obliged to use all available means to combat racism[4], a State which actually causes racism through its legislation would not be covered by the Convention.

   (2) Secondly, to find that the legislation comes within the ambit of Article 8 would not be tantamount to finding that Article 8 gives someone the right to a home. Although Article 8 does not give anyone the right to a home, it gives everyone the right to seek to obtain a home for themselves and their family even if they are eventually unsuccessful, and the playing field should be even for everyone in the market for housing, irrespective of their race and nationality. Where the State interferes with the

[3] *Chapman v UK* (2001) EHRR 18; *Demopoulos v Turkey* (46113/99)
[4] See, for example, *Nachova v Bulgaria* [2006] 42 EHRR 43 where the ECtHR identified race discrimination as "a particularly invidious kind of discrimination" requiring special vigilance from the authorities and a vigorous reaction

process of seeking to obtain a home, it must do so without causing discrimination and this either engages Article 8 or comes within its ambit. If the Government's arguments were correct, a law could be passed which enacted a rule that landlords may only rent to white, British nationals and this would not engage Article 8 and therefore not offend against the Convention because Article 8 does not give a right to a home, and this would not be a positive modality case. That cannot be right.

6. The next issue considered by the High Court was whether the scheme caused discrimination. Martin Spencer J had no hesitation in finding that it did. The evidence, when taken together, strongly showed not only that landlords are discriminating against potential tenants on grounds of nationality and ethnicity but also that they are doing so because of the scheme. The extent of the discrimination was such that it is a short further step to conclude that this is having a real effect on the ability of those in the discriminated classes to obtain accommodation, either because they cannot get such accommodation at all or because it is taking significantly longer for them to secure accommodation.

7. With this conclusion in mind, Martin Spencer J considered whether the State could be held responsible for the actions of private landlords. The Government argued that it could not, and that such discrimination, if it exists, arises from the voluntary intervention of third party landlords acting independently and inconsistently with the requirements of the Immigration Act 2014 together with the codes and guidance issued under that legislation. This argument was robustly rejected by Martin Spencer J:

> *"It is my view that the Scheme introduced by the Government does not merely provide the occasion or opportunity for private landlords to discriminate but causes them to do so where otherwise they would not. The State has imposed a scheme of sanctions and penalties for landlords who contravene their obligations and, as demonstrated, landlords have reacted in a logical and wholly predictable way. The safeguards used by the Government to avoid discrimination, namely online guidance, telephone advice and codes of conduct and practice, have proved ineffective. In my judgment, in those circumstances, the Government cannot wash its hands of responsibility for the discrimination which is taking place by asserting that such discrimination is carried out by landlords acting contrary to the intention of the Scheme."*

8. The final substantive issue was whether, in any event, the scheme was justified. The Government argued that the scheme was justified and placed reliance upon the fact that where legislation consists of socio-economic policy the starting point must be that the State is entitled to a large margin of appreciation. The Government argued that the question of how best to maintain a workable and fair immigration system is very much a matter for the executive and submitted that the court should be slow to interfere. Martin Spencer J acknowledged that the State is entitled to a large margin of appreciation as:

   (i) The scheme derives from primary legislation which has therefore enjoyed the support of Parliament and in particular Members of Parliament elected through the democratic process;

   (ii) The subject matter of the legislation is socio-economic policy which is archetypically the domain of the Government and not the courts;

   (iii) A fair and workable immigration system will involve many different parts or strands which will often, or usually, together form a coherent whole, intended to complement each other and work together: thus, for the court to interfere with one aspect potentially causes havoc to an overall strategy devised by the Government in accordance with its democratic mandate;

   (iv) The European Court of Human Rights is loath to interfere with the right of a State to control immigration where there is no consensus across the Council of Europe as to what is or is not acceptable as a means of controlling immigration;

   (v) Control of immigration must be recognised as a political issue which features near the top of highly charged political issues which are of concern to voters whether voting in a general election, by-election or a referendum.

9. Notwithstanding all of the above factors, Martin Spencer J came to the firm conclusion that the Government had failed to justify the scheme. In a damning judgment, he said:

> *"I have come to the firm conclusion that the Defendant has failed to justify the Scheme, indeed it has not come close to doing so. On the basis that the first question for the court to decide is whether Parliament's policy, accorded all due respect, is manifestly without reasonable foundation, I so find. On that basis, there is no balancing of competing interests to be performed. However, even if I am wrong about that, I would conclude that, in the circumstances of this case, Parliament's policy has been outweighed by its potential*

*for race discrimination. As I have found, the measures have a disproportionately discriminatory effect and I would assume and hope that those legislators who voted in favour of the Scheme would be aghast to learn of its discriminatory effect as shown by the evidence set out in, for example, paragraph 94 above. Even if the Scheme had been shown to be efficacious in playing its part in the control of immigration, I would have found that this was significantly outweighed by the discriminatory effect. But the nail in the coffin of justification is that, on the evidence I have seen, the Scheme has had little or no effect and, as Miss Kaufmann submitted, the Defendant has put in place no reliable system for evaluating the efficacy of the Scheme: see paragraphs 111 and 112 above, which, again, I accept. In these circumstances, I find that the Government has not justified this measure nor, indeed, come close to doing so."*

10. The High Court went on to make a declaration of incompatibility under section 4 of the Human Rights Act 1988 despite the Government's argument that it should exercise its discretion not to. The experience of the last few years had shown that any scheme of this kind will inexorably lead landlords down the path of discrimination and operate in a way which is incompatible with Article 14 ECHR. In the circumstances, Martin Spencer J had no doubt that a declaration of incompatibility was the appropriate order and there was no basis upon which the court should exercise its discretion to refuse such a declaration.

11. On the wider issue of whether the High Court should quash the decision of the Defendant to extend the scheme to the devolved parts of the United Kingdom or, alternatively, grant a declaration that a decision to commence the scheme in Scotland, Wales and Northern Ireland would be irrational and a breach of section 149 of the Equality Act 2010, Martin Spencer J held that a quashing order was inappropriate as no specific decision had been made. However, he declared that a decision to commence the scheme in Scotland, Wales or Northern Ireland without further evaluation of its efficacy and discriminatory impact would be irrational and a breach of section 149 of the Equality Act 2010.

12. In a statement issued on 5th March 2019, the Government announced that it disagreed with the decision and has been granted permission to appeal all aspects of the judgment. As to the position pending appeal: "*In the meantime, the provisions passed by this House in*

*2014 remain in force. There are no immediate changes to the operation of the policy. Landlords and letting agents are still obliged to conduct Right to Rent checks as required in legislation.*"[5]

13. Accordingly, whilst the decision of the High Court has been welcomed by critics of the scheme, it is likely to be some time before landlords and prospective tenants know whether the Right to Rent scheme will remain in force. In the meantime, landlords and letting agents will be obliged to comply with the legislation to avoid the risk of penalty.

**MICHELLE CANEY**

**8th March 2019**



[5] Right to Rent Scheme: Written statement - HCWS1379