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Case No. CO/4629/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 11 March 2021

Before:

MRS JUSTICE LIEVEN DBE

Between :

The Queen on the Application of
THE JOINT COUNCIL FOR THE WELFARE OF IMMIGRANTS **Claimant**

- and –

SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

- -

Mr P. Bowen QC (instructed by the **Public Law Project**) appeared on behalf of the **Claimant**.
Mr D. Blundell QC (instructed by **The Government Legal Department**) appeared on behalf of the **Defendant**.

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Judgment

Mrs Justice Lieven:

1. This is an application for permission for judicial review made in respect of the EU Settlement Scheme ("EUSS"). The application was brought by the Joint Council For The Welfare Of Immigrants ("JCWI"). Mr Bowen, on behalf of JCWI, puts forward formal proposed grounds. This is a renewed application, permission having been refused on the papers by Martin Spencer J.

2. Ground 1 is an alleged failure to collect relevant equality data pursuant to a duty of enquiry, otherwise commonly known as the Tameside duty, which is said to be inherent within the public sector equality duty under s.149 of the Equality Act 2010. Ground 2 is an alleged breach of EU discrimination law and that breach splits up, on my analysis, into two sub-grounds; firstly, the procedural duty of enquiry that, in reality, reflects the duty under Ground 1, but, secondly, a substantive argument that a breach in relation to the substantive non-discrimination duty. The third ground is similar but arises under s.6 of the Human Rights Act in respect of an alleged breach of Article 8 and 14 and the fourth ground is alleged unlawful discrimination under the Equality Act 2010.

3. The EU Settlement Scheme is drawn up pursuant to the Withdrawal Agreement and it enables EU and other EEA and Swiss citizens, who were resident in the UK at the end of the transition period on 31 December 2020, and their family members to obtain the necessary immigration status to reside lawfully in the UK.

4. It is worthy of some note that the EU Settlement Scheme goes somewhat beyond the terms what would have been required under the Withdrawal Agreement itself, and is in somewhat more general terms

5. The scheme is described in the documentation as being a "constitutive scheme", a word, I have to say, which means little to me. As I analyse it, I would call it an application-based scheme. In other words, those who are potentially eligible under the criteria of the scheme have to apply by 30 June 2021 to be given the appropriate status. The alternative to such an application based scheme is what is described as a "declaratory scheme", in other words, one where all those eligible by reason of their residential status would automatically gain lawful entitlement to remain in the UK. The problem with a declaratory scheme is that issues as to whether the individual was or was not eligible may arise many years later and it may be very difficult for individuals to then establish their eligibility. The Secretary of State, in choosing an application based scheme, suggests that she considered that to be more appropriate, particularly in the light of some of the well-known problems that have arisen for those who came from what is known as the Windrush generation. In any event, there is no dispute that under the Withdrawal Agreement it was open to the UK Government to choose which form of scheme to adopt.

6. I also note at this point that although the date for application under the EUSS ends on 30 June 2021, there is provision (and there has to be provision) for late applications, although detail of how late applications will be dealt with and the criteria that will be applied has not yet been published by the Secretary of State, a point to which I will return.

7. The claimant is a charity which has a well-known long-established interest and concern with the position of and welfare of entrants to the UK, and there is no contest from the Secretary of State that JCWI have standing to bring the judicial review. There is an issue

relevant to Ground 3 as to whether JCWI can bring a claim under the Human Rights Act and a question of law in that regard. I will return to this.

8. Fundamental to all the grounds is that the claimant argues that the EUSS is likely to create particular difficulties for those with protected characteristics as set out under the Equality Act and in other parts of anti-discrimination law. The claimant refers in particular to the position in respect of child applicants, female applicants and those with disabilities and says they are more likely not to apply and, therefore, to lose the benefits of the scheme. The claimant has put in considerable evidence from various individuals, but also referable to various reports of the potential difficulties for people with protected characteristics in respect of the scheme and there is an application for expert evidence to be put in on that matter.

9. A particular concern and a particularly serious problem that Mr Bowen raises is the nature of having a cut-off date on 30 June 2021. This is what he described as a cliff edge because if a potentially eligible person fails to apply by 30 June 2021 then they will remain in the UK unlawfully and although their status may later be confirmed as being lawful under the scheme they will, at least for a time, be unlawful overstayers in the UK and that can have very serious consequences.

10. Mr Bowen, as I have already indicated, relies on a large quantity of evidence which is in the bundle and that evidence does suggest that certain categories of people may have more difficulty applying under the scheme, whether because they do not know about it or find the scheme process difficult. The evidence he relies upon already suggests that older people and children may be disproportionately affected by the nature of the scheme and that as but one example there are already seen to be a relatively low level of Polish applicants compared to the number of Polish nationals assumed or known to be in the UK.

11. The claimant argues that under the public sector equality duty in s.149 there is an inherent duty for enquiry, as I have said, known as a Tameside duty. In other words, the Secretary of State has to have sufficient information to be able to tell whether discrimination may occur in order to then lawfully exercise her duty under the public sector equality duty. The claimant argues the Secretary of State has failed to gather relevant equality data and, in particular, Mr Bowen focuses on a lack of baseline quantitative data across all or most of the relevant protected characteristics. The principle omission that the claimant is complaining about is on the lack of baseline qualitative data. The Secretary of State has gathered some such data in particular on age and nationality and the evidence suggests that where that has been gathered some particular steps have been taken and Mr Bowen says this shows the need for equivalent data across the piste.

12. In respect of Grounds 2 and 3, the claimant argues a very similar point as what I would describe as sub-limb A, but also argues that there is discrimination already occurring and there is a breach of a substantive duty of non-discrimination because of the effect of the disproportionate impact of the scheme. He argues that although we have not yet got to 30 June 2021, these issues have to be dealt with now because otherwise those with protective characteristics may not apply before the end of June 2021 and, therefore, fall off the cliff edge that I have already referred to. Ground 4 raises again very similar arguments under the Equality Act , but Mr Bowen very fairly admits that this ground is not, at the moment, fully particularised, he has not specifically identified documentation or the PCP upon which he is relying, and he accepted in oral submissions that the ground, certainly as currently put, adds little at the moment to the other grounds.

13. The Secretary of State, represented by Mr Blundell, points to a number of key features which are relevant to the challenge. In particular, he points to the fact that the scheme is limited to a specific class, namely EU citizens residing in the UK in accordance with EU law as at 31 December 2020. That Withdrawal Agreement expressly permits member states and the UK to introduce application-based schemes and many of the other EU member states have done the same and the Withdrawal Agreement sets out certain prescriptive residence requirements.

14. In respect of Ground 1, the Secretary of State accepts that she has a duty or requirement to carry out inquiries (the Tameside duty) but submits that that the exercise of that duty is subject to review by this court only on Wednesbury rationality grounds. I note at this point that Mr Bowen accepts the principle of Wednesbury rationality being applicable but he says that the approach to Wednesbury rationality may vary depending on the particular context.

15. Mr Blundell argues that the duty under the public sector equality duty is merely to have regard to relevant matters rather than to achieve a specific outcome. He argues that the Secretary of State has rationally considered how to discharge her duty under s.149 and has rationally considered the scope of the information that she considers necessary in order to discharge that duty. The Secretary of State has produced a policy equality statement ("PES") which sets out in very considerable detail various categories of people who fall within protected characteristics and the steps that the Secretary of State has taken to seek to assist such people in making their application.

16. I note that the PES refers to a large quantum of research and documentation, a good deal of which is the same research and documentation that JCWI referred to, so it does appear to me from that that the Secretary of State has regard to a number of the very issues that the claimant is concerned about.

17. The Secretary of State's position, in essence, is that she has amassed a large amount of qualitative data in relation to those with protected characteristics, as referred to in the PES, and that that is a rational and proportionate approach to meeting her s.149 duty. Mr Blundell argues that there is a disagreement between JCWI and the Secretary of State as to what data is useful and what data should be collected, but ultimately that dispute is not a matter for court so long as the Secretary of State has acted rationally. I should note at this point Mr Bowen relies on the case of Bridges. Mr Blundell says Bridges is largely irrelevant. I will come back to that when I come to my conclusions.

18. On Ground 2, which is the EU discrimination law argument, in respect of the substantive limb of this argument, Mr Blundell says that the claimant has not established any prima facie discrimination. He argues that EU law only protects those who fall within the Withdrawal Agreement, not the additional people who would fall within the Settlement Scheme. I have to say I am not sure this gets the court very much further forward, because so long as some people with protected characteristics fall within the Withdrawal Agreement and therefore are subject to EU discrimination law, the fact that there are other people who fall outside it and therefore would not be subject to EU discrimination law, certainly at a permission stage, does not appear to me to be of massive assistance. In any event, Mr Blundell's substantive argument is that there is no evidence that discrimination is occurring now, that the Secretary of State has fully considered the matter in PES and has taken appropriate steps and perhaps, under the terminology of the Equality Act , made reasonable adjustments in order to deal with, or try to deal with, potential discrimination issues.

19. It is appropriate that I note that the Secretary of State has, the evidence has shown, spent a significant amount of money working with a number of organisations to assist those with protected characteristics to make applications. Mr Blundell's skeleton argument refers to the Home Office having spent something in the region of £17 million in the last couple of years to help vulnerable people apply to the EUSS. As but one example I was taken to steps that have been taken in respect of children who had been in care in order to seek to assist them, as a potential category of people with protected characteristics, to make applications. So, it is correct to record that the Secretary of State has made significant efforts to try to meet discrimination concerns that may arise.

20. In respect of Ground 3, Mr Blundell effectively takes the same course, but he does say, as a preliminary point under Ground 3, which is the ground in respect of the Human Rights Act, that JCWI is not a victim under the HRA, but I will come back to that. On Ground 4 he says it is not fully particularised and it should be rejected for that reason alone.

21. I turn, then, to my conclusions. Ground 1; I accept that there is a duty of inquiry pursuant to Tameside. It seems to me that must be inherent within s.149. But the law is clear that a judicial review can only be brought in respect of an alleged failure to meet the duty of enquiry on Wednesbury rationality grounds. To some degree, I accept that Wednesbury will be context specific, whilst remaining a necessarily high test for a claimant. However, I do not accept on the case law that the burden is in some way reversed so that the Secretary of State has to prove that what she has done is not irrational or that the scope of the Wednesbury test is in some way watered down.

22. Mr Bowen relies, as I have said, on the case law in Bridges, R (on the application of) v Chief Constable of South Wales Police, a decision of the Court of Appeal concerning a facial recognition scheme being run by the police. In my view, Bridges is not of very great assistance to the current case because the nature of what data is required and the detail of the data and the scope of the error is necessarily going to be very fact-specific in cases concerning the public sector equality duty, which is a duty that can arise in a wide range of different contexts.

23. In Bridges , on my reading of the Court of Appeal decision, first of all, there was really very limited data that was said to meet the inquiry inherent in the PSED duties; secondly, the potential discriminatory effect of the facial recognition technology in issue was very obvious and very stark; thirdly, this was, it would be fair to say, novel technology, certainly in the context in which it it was being used. Mr Bowen says, "Well, the Settlement Scheme is a novel scheme," and, of course, almost anything is novel when it comes for judicial review. But, in my view, the crucial point is that there is nothing novel about designing a bureaucratic scheme by which you check that people with protected characteristics have access to the scheme. That is a totally different context, in my view, to a facial recognition scheme being used by police. Importantly, as I read Bridges, the Court of Appeal is not shifting the legal burden in a PSED case onto the public authority and is not seeking to establish that normal principles of Wednesbury rationality do not apply.

24. So, applying all of that to the context of this case, in my view, there is nothing irrational about the way the Secretary of State has approached the collection of data. She has sought, as is set out in the PES, to identify groups, including those with protected characteristics, who may have difficulties accessing the scheme and making applications. She has considered how to assist those groups and she has taken proactive steps in a qualitative sense in finding out about them and then liaising, inter alia, with groups who can assist.

25. I accept that the Secretary of State could have done a much more detailed qualitative analysis, and it is not impossible that may have had some benefit. But in my view, there is nothing irrational in the Secretary of State considering that that would be a more cumbersome, probably more expensive and quite possibly less useful method of undertaking her PSED duties. Therefore, in my view, Ground 1 is not arguable.

26. Ground 2, the alleged EU discrimination, I do not consider on the material before me that there is sufficient evidence at present to say it is arguable that there is discrimination within the scheme. The scheme follows from the Withdrawal Agreement. It could have been done in a different way, but the way the scheme is set out is, under the Withdrawal Agreement, a matter for the Secretary of State and Mr Bowen certainly did not advance in oral argument that the scheme was contrary to the Withdrawal Agreement other than in a potentially discriminatory effect. Other forms of the scheme, such as a declaratory scheme, would have had their own disadvantages. In my view, on the evidence as it stands at the moment, before the scheme has come to its application end date of 30 June, I do not think there is evidence that it is arguably acting in a discriminatory way.

27. I can see the risks if people do not apply by 30 June and there is a disproportionate number of people with protected characteristics. But, firstly, I accept that the nature of any application scheme is that it will have a date by which an application has to be made and that is allowed for by the Withdrawal Agreement. The Secretary of State, pursuant to the Withdrawal Agreement, makes provision for late applications and it is impossible at this stage to know how effective that provision is because at the present time, first of all, no guidance has been produced and, secondly, we have not got to the date to see how it is operating in practice. In my view, it would be entirely premature to reach any conclusions on the effectiveness of the safety net for those who do not apply at 30 June. For those reasons, I do not consider that it is arguable that the Settlement Scheme will have a discriminatory impact on the evidence at the point in time.

28. In respect of Ground 3, the same conclusions necessarily follow. In the circumstances, I do not consider it to be necessary to reach a conclusion on the arguments as to JCWI's victim status and the degree to which Ground 3 could simply focus on declaratory relief pursuant to the case of Rusbridger. I do not think it is necessary or, indeed, appropriate for me to deal with that legal issue here.

29. Finally, on Ground 4, as far as I can see Ground 4 adds nothing to the other three grounds. It is not properly pleaded at the moment and I would have refused permission on that point alone. But as it adds nothing and I am not granting permission on the other grounds, I will say no more about it.