

Jasim for Judicial Review: Decision-maker Discretion and Quality of Process in Making Delegated Legislation

A. INTRODUCTION

In *Jasim*,¹ a student brought a judicial review action against the decision of the Student Awards Agency for Scotland (SAAS) to refuse to provide her with state funding to support her studies because she did not meet the eligibility criteria set down in the relevant Regulations. She challenged the lawfulness of the underlying Regulations on the basis that they were contrary to her rights under the European Convention on Human Rights (ECHR). The Outer House of the Court of Session upheld her petition, confirming that the Regulations were unlawful. The final orders made in the case have not been published, but it has been reported by the petitioner's backers that the Scottish Government has committed to introducing interim measures followed by new Regulations in due course.²

This article will review the regulatory context, with reference to the Scottish and English positions as well as previous case law on the matter, and will then outline key aspects of the decision in the Court of Session. It will then analyse two aspects of importance, namely decision-makers' discretion to ensure proportionality in Convention compliance, and the implications for the quality of the legislative process in determining the intensity of the court's review and the executive's margin of appreciation. Finally, it will conclude by considering the wider implications of the decision for other Scottish Regulations and for England.

B. THE REGULATORY CONTEXT

Sections 73 and 74 of the Education (Scotland) Act 1980 empower Ministers to make regulations to enable "the payment of allowances or loans" to students undertaking a course

¹ *Jasim for Judicial Review against a decision of the Student Awards Agency Scotland, on behalf of the Scottish Ministers* [2022] CSOH 64.

² JustRight Scotland, Press release on "Access to Higher Education – A court case that has changed the rules for migrant students across Scotland", available at https://view.officeapps.live.com/op/view.aspx?src=https://www.justrightscotland.org.uk/wp-content/uploads/2022/10/221013-Press-Release_Judicial-Review-Tuition-fees-for-migrant-students.docx&wdOrigin=BROWSELINK.

of study.³ The Students' Allowances (Scotland) Regulations 2007 were made under these statutory provisions, and provided a funding framework for certain students in some circumstances. The principal category of eligible persons comprised those who met three requirements, namely that they: had settled status within the terms of the Immigration Act 1971; were ordinarily resident in Scotland at the start of the academic year when they commenced their studies; and had been ordinarily resident in the UK for the previous three years.⁴

Similar arrangements operated in England under the Education (Student Support) Regulations 2011, which again required settled status as well as ordinary residence.⁵ Those English Regulations were successfully challenged in *R (on the application of Tigere) v Secretary of State for Business, Innovation and Skills*.⁶ That case was brought by a Zambian national who had Discretionary Leave to Remain in the UK when she began her university studies, but who had no access to public funds by virtue of not having settled status at that time. The UK Supreme Court held that the Regulations' requirement for settled status breached the student's rights under Article 14 of the ECHR (freedom from discrimination), in connection to her right to education under Article 2 of the First Protocol. The majority—comprising Lady Hale, Lord Kerr and, with some qualification, Lord Hughes—held that in education matters the court should adopt the test as laid down in *Bank Mellat v HM Treasury (No 2)*,⁷ restated by Lady Hale as:

i) does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right; (ii) is the measure rationally connected to that aim; (iii) could a less intrusive measure have been used; and (iv) bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community?⁸

³ These sections were misidentified as section 77(f), which was repealed by the Further and Higher Education (Scotland) Act 1992, Sch 10 para 1. See *Jasim* [2].

⁴ Students' Allowances (Scotland) Regulations 2007 reg 3(1), Sch 1 para 1.

⁵ Education (Student Support) Regulations 2011 reg 4, Sch 1 para 2.

⁶ [2015] UKSC 57.

⁷ [2013] UKSC 39.

⁸ *Tigere* [33]. See the original test in *Bank Mellat (No 2)* at [74].

Accordingly, Lady Hale found it problematic that the Regulations prescribed blanket requirements without giving discretion to consider difficult cases. She further indicated that the Regulations did not fulfil the policy grounds adequately, and did not strike a fair balance for either the individual or societal needs.⁹ She noted the petitioner's comparison to the long-duration residency test in the Immigration Rules, which had threshold points at 18 and 25 years of age, and suggested "[t]o this might be added an exceptional cases discretion."¹⁰

Following *Tigere*, the UK Government launched a consultation on the funding issue, which reported in 2016.¹¹ On that basis, it made the Education (Student Fees, Awards and Support) (Amendment) Regulations 2016, which amended four earlier Statutory Instruments with relevant provisions. These 2016 Regulations were remade to correct an error as the Education (Student Fees, Awards and Support) (Amendment) Regulations 2017. The 2016 and 2017 Regulations added an alternative long-duration residency requirement. Those under 18 years of age needed to have lived in the UK for seven years, while those over 18 had to have lived in the UK for either half their life or at least 20 years.¹² This roughly mirrored what was included in the Immigration Rules, but no discretion was provided to extend funding to difficult cases as had been suggested by Lady Hale.

This amended framework was adopted by the Scottish Government in the Education (Fees and Student Support) (Miscellaneous Amendments) (Scotland) Regulations 2017.¹³ Those Regulations were repealed and reissued, with some new alternative grounds for funding eligibility, by the Student Support (Scotland) Regulations 2022.¹⁴

⁹ Ibid [36]-[42].

¹⁰ Ibid [38].

¹¹ Department for Business Innovation and Skills, *Report on New Eligibility Category for Higher Education Student Support: Government Response* (2016), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/517544/bis-16-199-new-eligibility-category-government-response.pdf; Idem, *Report on Equality Impact Assessment: New Eligibility Category for Higher Education Student Support* (2016), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/517514/bis-16-200-new-eligibility-category-for-higher-education-student-support-equality-impact-analysis.pdf.

¹² Education (Student Fees, Awards and Support) (Amendment) Regulations 2017 regs 24, 29, 31, 37.

¹³ Education (Fees and Student Support) (Miscellaneous Amendments) (Scotland) Regulations 2017 regs 5, 7, etc.

¹⁴ Student Support (Scotland) Regulations 2022, Sch 1 para 1.

C. JASIM

Ola Jasim entered the UK at age eleven, and progressed from school to study Medicine at University in Scotland in 2020. Her family self-funded her first year of study, but she applied for public funding from SAAS in advance of entering her second year. She was held to be ineligible under the Regulations (because, at the start of her studies, she was 58 days short of the seven-year requirement and did not have settled status) and SAAS did not have discretion to extend public funding to her. To qualify for a reassessment, she would have needed to abandon her current degree and restart her studies. She would also not have been eligible for support towards a new degree commencing before 2024 under the settled status requirement or 2025 under the half her life status, as by then she would have been older than 18 so the test of seven years' residency would no longer have applied.¹⁵

She therefore brought a judicial review action, alleging a breach of her rights under Article 14 of the ECHR in connection with the right to education under the Article 2 of the ECHR's First Protocol. Her case was heard by the Lord Ordinary (Lord Sandison) in the Court of Session Outer House in August 2022, with the decision being rendered in September 2022. There were arguably three principal elements to his judgment: status, the appropriate degree of judicial deference, and application of the test of proportionality.

(1) Status under Article 14

A successful claim under Article 14 requires the petitioner to establish discrimination on specific characteristics "or other status". Jasim argued that "length of residency ought to be regarded as an 'other status' capable of giving rise to relevant discrimination within the meaning of Article 14".¹⁶ However, the Lord Ordinary ultimately decided instead that the case was one of "discrimination by reference to immigration status";¹⁷ *Tigere* had already accepted that immigration status could be considered such an "other status".¹⁸ This was because it was the lack of settled status which determined whether an individual would be subject to the long-duration residency test.

Furthermore, the Lord Ordinary stated that he did not need to determine whether residency duration is an "other status" for the purposes of Article 14.¹⁹ However, he noted

¹⁵ *Jasim* [6].

¹⁶ *Ibid* [21].

¹⁷ *Ibid* [32].

¹⁸ *Tigere* [26].

¹⁹ *Jasim* [33].

obiter that he would have been willing to hold that residency duration was a status under Article 14, “albeit ... not one which, when used as the basis for differential treatment, inherently requires very weighty reasons by way of justification.”²⁰

(2) Intensity of the Court’s review

Three substantive sections of the Lord Ordinary’s decision, when taken together, considered how intense the Court’s proportionality review of the Regulations should be, and therefore the width of the margin of appreciation that could be applied.²¹ As Paul Craig has observed,

The UK courts have ... developed tools that impact on the intensity of proportionality review ... through according deference to the executive or legislature on epistemic, constitutional and institutional grounds, which has generated a significant body of literature. The salient point ... is that adjudicative deference fine tunes the basic standard of proportionality review as it applies to rights-based cases, and in doing so affects the intensity of judicial review.²²

At the outset, as in *Tigere*, the Lord Ordinary identified education as a particular area in which appropriate justification for differential treatment is required. He commented that “[t]he scope of this margin [of appreciation under Article 14] will vary according to the circumstances, the subject matter and the background”, and linked this to “the intensity of the court’s review in the case in which that margin applies”.²³ He reflected subsequently that “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”.²⁴ After outlining the question of intensity, he then proceeded to consider the quality of the legislative process and the margin of appreciation doctrine in turn.

With respect to the former issue, the petitioner raised concerns that the UK Government’s consultation and impact assessment for the 2016 Regulations had been “simply read over” to the Scottish Regulations, despite a different educational context.²⁵ The

²⁰ Ibid [33].

²¹ Ibid [47].

²² P Craig, “Varying intensity of judicial review: a conceptual analysis” [2022] *Public Law* 442 at 447.

²³ *Jasim* [35], [36].

²⁴ Ibid [47].

²⁵ Ibid [22].

Lord Ordinary confirmed that problems with the quality of the legislative process would not be sufficient to imply problems with validity. However, citing *Tigere* and other cases, he acknowledged that “the court’s scrutiny was bound to be closer” where the executive could not show that there had been full consideration of the legislation and its potential impact.²⁶ The Lord Ordinary indicated that these “are matters that could, in principle, be taken into account as a factor in determining the width of the margin of appreciation”.²⁷ In other words, the deference that the Court would accord to a decision-maker is, in part, determined by the robustness of the decision-making process.

The petitioner also highlighted that no account had been taken of obligations enshrined in the Children and Young People (Scotland) Act 2014.²⁸ Section 1 of that Act requires the Scottish Government to “keep under consideration” how the interests of children and young people as outlined in the United Nations Convention on the Rights of the Child and Child Rights might be advanced. However, the Lord Ordinary rejected this argument. He held that this duty was limited in nature, and indicated that (even if there had been such a breach of duty) this would not “involve a failure to address the possible impact of the proposed amendment on the European Convention rights”.²⁹

With respect to margin of appreciation, the Lord Ordinary observed that the Regulations concern “general matters of social and economic policy” and therefore would normally be considered to have a very wide margin of appreciation, “requiring a measure to be shown to be ‘manifestly without reasonable foundation’ before the court’s intervention would be justified”.³⁰ However, following *Tigere*, he indicated a narrower margin of appreciation might be had in light of the importance of the right to education under the ECHR.³¹ The relevant policy objective (namely to ensure public funds were directed to those who would likely remain in Scotland after graduation) was non-contentious between the parties, although the petitioner challenged the proportionality of the Regulations in meeting that aim.³²

Overall, the Lord Ordinary concluded that the intensity of review should therefore be more than would normally be expected for this sort of discrimination because the matter of

²⁶ Ibid [40].

²⁷ Ibid [42].

²⁸ Ibid [22].

²⁹ Ibid [42].

³⁰ Ibid [45].

³¹ Ibid [44]-[45].

³² Ibid [45].

education was an important right, and the impact of the provision had not been given proper consideration in the legislative process. Therefore, this case “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 [of review].”³³

(3) Proportionality

The Lord Ordinary finally moved to review the proportionality of the Regulations, applying the *Bank Mellat* test.³⁴ He concluded that the fourth component of that test (“the extent that the measure will contribute to its achievement”³⁵) was not met. He regarded the Regulations to poorly deliver the underlying policy, because “long past residence in a country is in itself but a very imprecise proxy for probable future substantial and permanent connection there”.³⁶ Additionally, he expressed concern over the lack of discretion given to SAAS in relation to borderline cases, finding that the lack of discretion to consider cases which might fail to meet that test but which would meet the policy objective was disproportionate.³⁷ He hesitantly suggested that a blanket rule with discretionary opportunity to consider excluded cases to determine whether those individuals who met the policy aim should be workable.³⁸ It is therefore notable that, while SAAS’s lack of discretion appears not to have formed a key component in the petitioner’s case, it does appear to have been central to the Lord Ordinary’s thinking. In the end, therefore, per the fourth component of the *Bank Mellat* test, he held that fair balance was not struck between the “severity of the measure’s effects” and the “importance [and fulfilment] of the objective”.³⁹

³³ Ibid [47].

³⁴ On the distinction between this proportionality test and the ordinary common law ground of reasonableness review, see K Costello, “Wrenched from its context: The interpretation of *Associated Provincial Picture Houses v Wednesbury Corporation*” (2020) 136 Law Quarterly Review 609.

³⁵ *Bank Mellat (No 2)* at [74].

³⁶ *Jasim* [52].

³⁷ Ibid [54]-[55].

³⁸ Ibid [54].

³⁹ Ibid [48], quoting *Bank Mellat (No 2)*, and [55].

D. ANALYSIS

(1) The role of discretion

The use of a blanket requirement and the lack of discretion provided to the awarding body, whether Student Finance England in *Tigere* or SAAS in *Jasim*, factored into both judgements. As mentioned above, Baroness Hale had indicated in *Tigere* that discretion could have been added to the legislation in addition to long-duration residency.⁴⁰ Although not explicit, the Lord Ordinary appears to have built on her suggestion, noting that “a more tailored approach” in excluded cases should be workable.⁴¹ Both Courts thus looked favourably on the potential addition of a discretionary decision-making power to the legislation and it is submitted that, by implication, this would likely have tipped the balance towards the Government’s favour.

While both courts tried to avoid being prescriptive on this point, the strong suggestion is that, in frameworks involving education and like issues, the Government should give consideration to including a discretionary decision-making power in addition to (and to soften) any blanket exclusionary rule. Where such a discretionary power is not given, the courts in both jurisdictions have made it clear that they will be more willing to treat this as a significant factor in their consideration of whether an appropriate balance has been struck. However, both judgments also indicated that the discretion might be limited to the few exceptional cases which might meet the policy objectives but fall outside the blanket measures outlined within the legislation. It has been reported that the replacement framework(s) being introduced by the Scottish Government will give discretion,⁴² although it remains unclear at the time of writing how extensive this will be.

(2) Legislative process

The Lord Ordinary took the unusual step of reopening the quality of the Scottish Government’s decision-making within the legislative process. He identified that a lack of consultation or impact assessment on the implications of the provision in practice justified a narrower margin of appreciation and closer scrutiny of the Regulations.⁴³ Elsewhere in the

⁴⁰ *Tigere* [38].

⁴¹ *Jasim* [54].

⁴² R Percival, “SNP ministers ‘breached human rights’ legislation over their free tuition fee rules”, *Scottish Daily Express* (13 October 2022), available at <https://www.scottishdailyexpress.co.uk/news/politics/snp-ministers-breached-human-rights-28228787>.

⁴³ *Jasim* [42].

judgement, he observed that the Scottish Parliament's Delegated Powers and Law Reform Committee had criticised the lack of consultations,⁴⁴ which supported his view 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".⁴⁵ Thus, in effect, the poor quality of the legislative process and the Scottish Government's failure to consider the practical implications contributed to the intensity of the court's review and the extent of its scrutiny of the legislation. It is important to note that there was no statutory requirement to consult or conduct an impact assessment; the consideration was purely in terms of determining the level of judicial scrutiny applied based on "evidence that the decision maker has addressed his mind to the particular issue" within the Convention rights context.⁴⁶

This raises the question as to whether a lack of consultation or impact assessment implies any foregone conclusion regarding proportionality. Two aspects of the judicial reasoning would seem to set down further requirements for such a consultation. First, because the revised provision was based on the UK Government's consultation and equivalent amendments in light of *Tigere*, it seems that reliance on a UK Government consultation cannot be assumed to be sufficient to satisfy this condition. Secondly, the consultation and impact assessment would likely need to be quite specific to the provision at issue. Indeed, although not acknowledged in the judgement, the Scottish Government was at the time undertaking an extensive consultation and independent review into their wider funding policies for education (albeit that reported after the Regulations were made).⁴⁷

However, concerns might be raised at such an approach and the implications for the role of the courts. It is acknowledged that the Lord Ordinary indicated that, even should a less intense level of judicial scrutiny have been applied, it is likely that the decision would have been the same.⁴⁸ In other contexts, however, this may be a more material consideration. Such an approach might, indirectly, affect the requirements of the legislative process if any government sought to implement these measures to shield legislation from heightened

⁴⁴ Ibid [14].

⁴⁵ Ibid [46].

⁴⁶ Ibid [40], quoting *Tigere* [32].

⁴⁷ Scottish Government, Report on *A New Social Contract for Students: Fairness, Parity and Clarity* (2017), available at <https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2017/11/independent-review-student-financial-support-scotland/documents/00527875-pdf/00527875-pdf/govscot%3Adocument/00527875.pdf>.

⁴⁸ *Jasim* [57].

judicial scrutiny. It is notable in that regard that the Scottish Government is reportedly planning a consultation prior to the new Regulations being made.⁴⁹

First, whether the executive has undertaken a consultation or an impact assessment is a difficult test for whether it has addressed its mind to the impact of the measures on Convention rights. This might be particularly the case when—as in this case—there is extensive evidence of the Scottish Government’s reasoning, if perhaps reasoning which was overly deferential to the UK Government approach. Although more young people in Scotland enter higher education prior to attaining the age of 18 than in England,⁵⁰ there is no guarantee that any consultation or impact assessment would have highlighted this as a significant issue. Nor, indeed, is it clear that the Scottish Government would have decided to not follow the English approach as a result.

Secondly, this might have significant implications for governmental legislative practice. The Scottish Government policy underpinning the legislation recognised the importance of maintaining equivalence of requirements with England.⁵¹ That same explicit justification to retain consistency with wider UK frameworks also underpinned the Scottish Government’s routine reliance on UK Government consultations during the Brexit process, albeit with reference to UK SIs.⁵² This practice might prove challenging should a human rights issue be raised in connection with Scottish delegated legislation either implementing common frameworks or similar policy aims.

Thirdly, the need to satisfy any perceived requirement to evidence appropriate reasoning risks a perfunctory and superficial approach being taken to the consultation process. This might become quite burdensome, particularly if the genuineness of such consultations or impact assessments, or their consideration, become routinely considered by the courts.

Finally, any perceived requirement for a consultation has implications for the speed of the legislative process. The 2017 Regulations were explicitly made quickly following the UK

⁴⁹ L Adams, “Tuition fees residency rules breached human rights”, BBC News (13 October 2022), available at <https://www.bbc.co.uk/news/uk-scotland-63228362>.

⁵⁰ *Jasim* [16].

⁵¹ *Ibid* [15].

⁵² R B Taylor and A L M Wilson, Briefing Paper on *Brexit Statutory Instruments: Identifying the Challenges* (Scottish Parliament Information Centre SB 21-53, 2021). For further information, see also: *Idem*, Briefing Paper on *Brexit Statutory Instruments: Powers and Parliamentary Processes* (Scottish Parliament Information Centre SB 21-45, 2021); *Idem*, “Briefing Paper on *Brexit Statutory Instruments: Impact on the Devolved Settlement and Future Policy Direction* (Scottish Parliament Information Centre SB 21-52, 2021).

Government response to ensure that the decision in *Tigere* was implemented in time for the 2017/18 academic year.⁵³ A separate consultation or impact assessment might have slowed down the decision-making process and prevented the legislation being in place within good time.

D. CONCLUSION

This article has shown that *Jasim* potentially has wider implications for decision-makers' discretion, judicial deference and the extent to which consultation forms part of the legislative process in the future, as well as for lawfulness of these specific Regulations.

Furthermore, the judgment will also potentially affect more than just this one set of Regulations. Although not mentioned anywhere in the case, the funding Regulations sit alongside those which set down students' fee status, namely the Education (Fees) (Scotland) Regulations 2022. Those fee status Regulations have the same eligibility requirements for recognition as a student to be given Home tuition fee status, again with the same further alternative criteria in the 2022 funding Regulations.⁵⁴ Without this Home status, such students are normally liable to unregulated tuition fees.⁵⁵ It is the combination of the fee status Regulations and the funding Regulations which identify a student as a Home student eligible for lower-rate fees paid on their behalf by SAAS, or an international student with higher-level fees and no recourse to public funds. The fee status Regulations will also need to be addressed by the Scottish Government, else a disconnect could arise where a student may be assessed as international for the purposes of tuition fee status, but be assessed as eligible for state funding support.

Meanwhile, this decision may have implications for the corresponding provisions in England. These may now need to be rectified to prevent a parallel case arising in the English courts, albeit there is no guarantee that an English court would be persuaded by the Lord Ordinary's reasoning.

Robert Brett Taylor and Adelyn L M Wilson
University of Aberdeen

⁵³ *Jasim* [14].

⁵⁴ Education (Fees) (Scotland) Regulations 2022 reg 3; Student Support (Scotland) Regulations 2022, Sch 1 para 1.

⁵⁵ Education (Fees) (Scotland) Regulations 2022 reg 4.