Neutral Citation Number: [2019] EWHC 614 (Admin)

Case No: CO/272/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/03/2019

Before:

MR JUSTICE MARTIN SPENCER

- -

Between:

THE QUEEN	
(On the application of MS KHATUNA GOLOSHVILI)	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**
- and -	
LIBERTY	**Intervener**

- -
- -

Mr Toby Vanhegan and Mr Riccardo Calzavara
(instructed by **Camden Community Law Centre**) for the **Claimant**
Mr David Pievsky and Mr David Lowe (instructed by **Government Legal Department**)
for the **Defendant**
Mr Martin Westgate QC, Mr James Kirk and Mr Daniel Clarke (instructed by **Liberty**)
for the **Intervenor**

Hearing dates: 18, 19, 20 and 21 December 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE MARTIN SPENCER

MR JUSTICE MARTIN SPENCER:

Introduction

1. This claim, which was heard with, and in association with, the claim of the Joint Council for the Welfare of Immigrants against Secretary of State for the Home Department (the "JCWI claim," see the judgment in [2019] EWHC 452 (Admin)) concerns the lawfulness of the issue by the Defendant of a "Notice of Letting to a Disqualified Person" ("NLDP") in respect of the Claimant on 19 October 2017. The issue for decision is whether the issuing of a NLDP amounts to direct discrimination on the grounds of nationality and is unlawful under the Equality Act 2010.

2. The NLDP was withdrawn by the Defendant when it became appreciated that its issue had been an error. In those circumstances, whether the NLDP was or was not lawful is now academic so far as this Claimant is concerned. It is the Defendant's case that the court should not entertain a claim which is academic and, in any event, the decision to issue the NLDP did not amount to discrimination on the basis of nationality: the Claimant was issued with the NLDP because of her immigration status and was treated no differently from anyone else who does not have Leave to Remain. It is further the Defendant's case that nationality discrimination is not unlawful in this context.

The facts

3. The Claimant was born on 2 January 1982 in Akhalgori, Georgia, and came to the UK in 2004 as a student. Thereafter she made further applications for Leave to Remain, the most recent being on 28 January 2008 when she was granted further Leave to Remain until 28 February 2009. Notice of the decision together with her Georgian passport and supporting documents were sent by the Border and Immigration Agency to the wrong address and were never received. The Claimant said that, since May 2009, she had been trying to obtain a new passport from the Georgian Embassy but had been unable to do so because she was unable to produce her old passport. By a letter dated 23 February 2017 the Home Office wrote to the Georgian Embassy confirming that the Claimant had submitted her Georgian passport to the Home Office in support of an application for a variation of Leave to Remain in the United Kingdom and, despite an extensive search having been undertaken, the Home Office had been unable to locate the passport and the Claimant had been advised to obtain a replacement document from the Georgian Embassy. The letter stated:

> "We respectfully request your most urgent consideration in regards to its issue."

4. It is now agreed that the Claimant had had Leave to Remain since 2008 by virtue of the provisions of Section 3C of the Immigration Act 1971 because the decision in July 2008 to grant her Limited Leave to Remain had not been properly communicated to her, with the result that her application for that leave remained outstanding and Section 3C operated to give her Leave to Remain pending the determination of that application.

5. In October 2017, the Claimant was granted an assured shorthold tenancy of premises at Manor Park Crescent, Edgware, Middlesex by a Mr Bardi and on 8 October 2017, the Claimant paid Mr Bardi a deposit of £220 and one week's rent in advance.

6. On 19 October 2017, Mr Bardi contacted the Home Office Landlord Helpline to request that a NLDP be issued to him as he did not believe that the Claimant had a right to rent in the UK. On the same day, Immigration Enforcement issued a NLDP which contained the following:

> "Your property is being occupied by one or more persons who are not allowed to rent in England due to their immigration status ('disqualified from renting'). It is an offence under Section 33A of the Immigration Act 2014 to rent property to someone if you know, or have reasonable cause to believe, they are disqualified from renting due to their immigration status. You could face an unlimited fine or be sent to prison for up to five years."

The Notice then gave details of the disqualified person, the Claimant, and set out the options available to Mr Bardi for ending the tenancy including reliance on the NLDP to begin the process to recover vacant possession.

7. On 26 October 2017, Mr Bardi served on the Claimant a Notice of Seeking Possession relying upon the receipt by the landlord of the NLDP naming the Claimant as a person not allowed to rent in England due to immigration status. This was followed by a claim for possession in the County Court on 15 November 2017. A defence was served and filed, contesting the claim and asserting that the NLDP amounted to a breach of her rights under Article 14 ECHR.

8. By letter dated 22 December 2017, the Claimant wrote to the Defendant requesting the withdrawal of the NLDP and the grant of permission to rent pursuant to Section 21(3) of the Immigration Act 2014. On the same date she sent a pre-action protocol letter for judicial review proceedings.

9. On 10 January 2018 Immigration Enforcement replied refusing to withdraw the NLDP and refusing to grant permission to rent. On 12 January 2018 the Claimant requested an internal review of the decision not to grant her permission to rent and by a letter dated 25 January 2018 Immigration Enforcement upheld its prior decision to refuse the Claimant permission to rent.

10. In the meantime, the Claimant had filed this claim for judicial review on 18 January 2018 and this was amended in the light of the review decision contained in the letter of 25 January 2018.

11. So far as the possession proceedings were concerned, on 12 February 2018 Mr Bardi issued a second possession claim based on arrears of rent and the defence and counterclaim were on similar terms as in the previous possession proceedings but additionally sought damages for disrepair. The claim was settled on 2 August 2018 on the basis that the Claimant gave up possession: by that stage, it had been recognised that she had a right to rent and she wished to move elsewhere.

12. On 3 May 2018, a solicitor at the Liverpool Law Clinic attached to the University of Liverpool wrote further to the Defendant on behalf of the Claimant stating:

> "Please note that we believe that Miss Goloshvili has continuing Leave to Remain under Section 3C of the Immigration Act 1971.

> She is being treated by the Home Office as having no Leave to Remain."

Having set out the terms of Section 3C of the Immigration Act 1971 and having referred to the case of *Syed* [2013] UKUT 144 dealing with the question of effective service, the letter went on to say:

> "The decision (to extend her leave) has not been communicated to Miss Goloshvili. It is therefore not effective. The application she made in February 2008 therefore remains outstanding and Miss Goloshvili has Leave to Remain on the same terms as those in place when she made the application. Indeed this was the position which appears to have been taken by the Home Office."

13. This letter hit home. On 24 May 2018 the Defendant accepted that the Claimant had Section 3C leave and on 25 May 2018 the Defendant notified the Claimant that the NLDP was withdrawn. On 5 August 2018, pursuant to a further application, the Claimant was granted Indefinite Leave to Remain.

These proceedings

14. Prior to the acceptance by the Defendant that the Claimant had Section 3C Leave to Remain and the withdrawal of the NLDP, Dove J had, on 8 May 2018, given the Defendant 21 days to file and serve an acknowledgment of service and summary grounds for defending the claim: although these documents had been completed on 5 March 2018, they were not received by the Claimant until 31 May 2018.

15. On 28 June 2018, permission to bring judicial review was refused on the papers by Walker J on the basis that the claim was academic save for the challenge based on the Human Rights Act 1998 and this was already in issue before the court in the JCWI claim.

16. The Claimant renewed her application for permission on 3 July 2018 and this was heard by Roger ter Haar QC sitting as a Deputy High Court Judge on 24 July 2018 when permission was granted on two grounds: (1) the "Public law challenge" alleging that the decision to issue the NLDP and to refuse to withdraw it were unlawful for the reasons set out in paragraphs 46 – 54 of the amended grounds; (2) discrimination under the Equality Act 2010. Permission was refused in relation to the other ground alleged, namely breach of Article 14 ECHR.

17. By notice dated 2 August 2018, the Defendant applied to set aside the grant of permission because the grounds were academic, but this application was refused by Richard Clayton QC sitting as a Deputy High Court Judge on 22 August 2018.

18. In these proceedings, the Claimant has not pursued the Public Law challenge, the Defendant having indicated an intention to change the procedure for issuing NLDPs. On 23 October 2018, Liberty had applied for, and been granted, permission to intervene in relation to the Claimant's Public Law challenge, in order to make submissions on the fairness of the Defendant's procedure for service of a NLDP. The resolution of the Public Law challenge rendered Liberty's intervention academic, they played no further

part in the claim and I am therefore only asked to consider the discrimination claim under the Equality Act 2010.

The Relevant Statutory Provisions

19. In the course of submissions, and in this judgment, reference has been and will be made to the following statutory provisions which, for convenience, are gathered together in this section.

20. **Section 4 of the Equality Act 2010** defines the protected characteristics:

> "The following characteristics are protected characteristics:
> age;
> disability;
> gender reassignment**;**
> marriage and civil partnership;
> pregnancy and maternity;
> race;
> religion or belief;
> sex;
> sexual orientation."

21. In relation to Race, this protected characteristic is further defined **in section 9 of the Equality Act 2010** which provides:

> "(1) Race includes –
> (a) Colour;
> (b) Nationality;
> (c) Ethnic or national origins"

22. **Section 13 of the Equality Act 2010** defines direct discrimination:

> "(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

23. **Section 19 of the Equality Act 2010** defines indirect discrimination:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

The relevant protected characteristics are as defined in section 4 (see paragraph 20 above).

24. **Section 29 of the Equality Act 2010**, dealing with provision of services etc, provides:

"**29. Provision of Services, etc.**

(1) A person (a 'service-provider') concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.

(2) A service-provider (A) must not, in providing the service, discriminate against a person (B) –

(a) as to the terms on which A provides the service to B;

(b) by terminating the provision of the service to B;

(c) by subjecting B to any other detriment.

…

(6) A person must not, in the exercise of a public function that is not the provision of a service to the public or a section of the public, do anything that constitutes discrimination, harassment or victimisation."

25. The application of Section 29 is limited by the provisions of Schedule 3 to the Act. **Paragraph 2 of Schedule 3 to the Equality Act 2010** provides:

"**2. Legislation**

(1) Section 29 does not apply to preparing, making or considering –

(a) an Act of Parliament; …"

26. **Paragraph 17 of Schedule 3 to the Equality Act** deals with nationality and ethnic or national origins and provides:

"**17. National and ethnic or national origins**

(1) This paragraph applies in relation to race discrimination so far as relating to -

(a) nationality or

(b) ethnic or national origins.

(2) Section 29 does not apply to anything done by a relevant person in the exercise of functions exercisable by virtue of a relevant enactment.

(3) A relevant person is –

(a) a Minister of the Crown acting personally, or

(b) a person acting in accordance with a relevant authorisation.

(4) A relevant authorisation is a requirement imposed or express authorisation given –

(a) with respect to a particular case or class of case, by a Minister of the Crown acting personally;

(b) with respect to a particular class of case, by a relevant enactment or by an instrument made under or by virtue of a relevant enactment.

(5) The relevant enactments are –

(a) the Immigration Act,

(b) the Special Immigration Appeals Commission Act 1997,

(c) a provision made under Section 2 (2) of the European Communities Act 1972 which relates to immigration or asylum, and

(d) a provision of EU law which relates to immigration or asylum."

27. **Schedule 23 to the Equality Act 2010** sets out general exceptions to the Act including, inter alia, paragraph 1 which refers to acts authorised by statute or the executive and provides (so far as relevant to this claim):

"1. **Acts authorised by statute or the executive**

(1) This paragraph applies to anything done –

(a) In pursuance of an enactment; …

(2) A person does not contravene part 3, 4, 5 or 6 by doing anything to which this paragraph applies which discriminates against another because of the other's nationality."

28. **Section 21 of the Immigration Act 2014** defines those disqualified from renting as a result of their immigration status and provides:

"**21 Persons disqualified by immigration status or with limited right to rent**

(1) For the purposes of this Chapter, a person ("P") is disqualified as a result of their immigration status from occupying premises under a residential tenancy agreement if –

(a) P is not a relevant national and

(b) P does not have a right to rent in relation to the premises.

(2) P does not have a "right to rent" in relation to premises if –

(a) P requires leave to enter or remain in the United Kingdom but does not have it or

(b) P's leave to enter or remain in the United Kingdom is subject to a condition preventing P from occupying the premises.

(3) But P is to be treated as having a right to rent in relation to premises (in spite of subsection (2)) if the Secretary of State has granted P permission for the purposes of this Chapter to occupy premises under a residential tenancy agreement.

(4) References in this Chapter to a person with a "limited right to rent" are references to

(a) a person who has been granted leave to enter or remain in the United Kingdom for a limited period or

(b) a person who –

(i) is not a relevant national, and

(ii) is entitled to enter or remain in the United Kingdom by virtue of an enforceable EU right or of any provision made under section 2(2) of the European Communities Act 1972.

(5) In this section "relevant national" means

(a) a British citizen,

(b) a national of an EEA State other than the United Kingdom or

(c) a national of Switzerland.

29. **Section 33D (2) of the Immigration Act 2014** deals with termination of a rental agreement where all the occupiers are disqualified and provides:

"**33D Termination of agreement where all occupiers disqualified**

(1) The landlord under a residential tenancy agreement relating to premises in England may terminate the agreement in accordance with this Section if the condition in subsection (2) is met.

(2) The condition is that the Secretary of State has given one or more notices in writing to the landlord which, taken together, -

a. Identify the occupier of the premises or (if there is more than one occupier) all of them,

b. State that the occupier or occupiers are disqualified as a result of their immigration status from occupying premises under a residential tenancy agreement."

Paragraph 33D then makes further provision for termination of the residential tenancy agreement by the landlord by giving the tenant notice in writing in the prescribed form.

The Claimant's submissions

30. By sections 20-37 of the Immigration Act 2014, a scheme was set up (hereinafter referred to as "the Scheme") imposing obligations on landlords to take measures to ensure that they do not provide private accommodation to disqualified persons. Mr Vanhegan, on behalf of the Claimant, submitted that the Scheme and the actions of the Defendant in issuing the NLDP amount to direct and indirect discrimination under Section 29 of the Equality Act 2010.

31. Mr Vanhegan submits that there is direct discrimination under Section 13 because the Claimant was only served with the NLDP because of her nationality. Thus she could not have been so served if she was a British citizen or a national of a EEA State or Switzerland by virtue of Section 21(5). He submits that direct discrimination on this basis is not capable of justification. The effect of the NLDP is to subject the Claimant to the immediate threat of summary eviction and the other consequences set out in the Scheme.

32. Mr Vanhegan further submits that there is indirect discrimination because of the service of the NLDP under the Defendant's guidance. The Claimant is put to a particular disadvantage which is not a proportionate means of achieving a legitimate aim. The legitimate aim is not immigration control – if it was, the Defendant would exercise immigration control in the usual manner, by use of its immigration officers and that would be a proportionate response. Instead the aim is to put pressure on the recipient of the NLDP to leave the country by depriving them of their home and to use landlords to achieve that goal. He submits that neither of these two aims is legitimate or, alternatively, if they are legitimate, the Defendant's powers have not been exercised in a proportionate manner.

33. Although Mr Vanhegan accepts that the claim is now academic for this particular claimant, he says that it raises significant points of public importance and if it is correct that the Scheme is being operated unlawfully, it is in the public interest that the court

intervenes. The matters raised in this claim sit alongside the matters raised in the JCWI claim in which, in a separate judgment, I have declared that the Scheme is incompatible with the rights protected by the European Convention on Human Rights.

34. In his oral submissions, supplementing his written submissions, Mr Vanhegan referred to Section 21 of the Immigration Act 2014 (see paragraph 28 above) and the specific reference to nationality therein, submitting that nationality dictates whether or not a person is subject to the Scheme. He submitted that the discriminatory nature of the Scheme can be seen by comparing two persons neither of whom has Leave to Remain: an EEA national who is not exercising his treaty rights and a non-EEA national. The former is not subject to the Scheme but the latter is. He referred to the decision of the Court of Appeal in *Ismail v Barnet LBC* [2006] 1 WLR 2771 which establishes that EEA nationals who are not exercising treaty rights are subject to immigration control. By the legislation then applicable, a person was subject to immigration control if he was "A person who under [the Immigration Act 1971] requires leave to enter or remain in the United Kingdom (whether or not such leave has been given)". Counsel for the Defendant had submitted that the phrase "requires Leave to Remain in the United Kingdom" refers only to a case where a person is legally obliged to make an application for leave in order to remain. As there was no such requirement on EEA nationals who could stay until removed and were committing no breach of duty and no criminal offence by not applying for leave, he submitted that the claimants in that case, all unqualified EEA nationals, fell outside the terms of the Asylum and Immigration Act 1996, Section 13 (2). This submission was rejected by the Court of Appeal. Buxton LJ found that the obvious construction of Section 13 (2) is that everyone is subject to immigration control who cannot lawfully remain in the United Kingdom without leave to do so, and that includes EEA nationals. Thus, submits Mr Vanhegan, nationality is the key to the Scheme: a non-EEA national is subject to the Scheme but an EEA national who is not exercising his treaty rights is not, the non-EEA national thus being discriminated against on grounds of nationality.

35. Mr Vanhegan derives further support from the decision of the Court of Appeal in *R (Morris) v Westminster City Council* [2006] 1 WLR 505. In that case, the claimant and her daughter had come to the United Kingdom from Mauritius initially as visitors but when their Leave to Remain expired the claimant applied for a British passport on the basis she was a British citizen by descent and that application was successful. However, her daughter was not thought eligible for British citizenship and remained a citizen of Mauritius alone. The claimant then applied to the defendant Council for accommodation under Part VII of the Housing Act 1996 but the application was refused by the defendant Council on the basis that the claimant could not rely on the need to accommodate her daughter as giving her a priority need for accommodation because of her daughter's immigration status, relying upon Section 185 (4) of the Housing Act 1996. This provides that a person is not eligible for assistance under Part VII of the Housing Act 1996 if he is a person from abroad who is ineligible for housing assistance and that includes persons subject to immigration control within the meaning of the Asylum and Immigration Act 1996. Keith J declared that Section 185 (4) was incompatible with Articles 8 and 14 ECHR and the Court of Appeal dismissed the appeal of the Council. In the course of his judgment, Sedley LJ considered whether national origin was the ground of distinction. It was submitted on behalf of the claimant that if the claimant's daughter had not been subject to immigration control, her mother would have had a priority need, and the reason she was subject to immigration control

was that she lacked British nationality and the decision letter had made it clear that this was the reason for refusal. For the appellants, it was submitted that the reason the daughter fell to be disregarded under Section 185 (4) was not her Mauritian nationality but the fact that she had been brought into the UK as a visitor and remained as an overstayer. Referring to the decision of the ECtHR in *Gaygusuz v Austria* 23 EHRR 364, Sedley LJ stated that the following proposition of logic answers the appellants' explanation for the claimant's ineligibility; a discriminatory measure is no less discriminatory for being partial or selective in its scope. The undoubted fact that the particular measure forms part of a complex of criteria makes it all the more important to ensure that an inadmissible ground of ineligibility does not form part of the complex. He said:

> "35. If, however, one asks what was the underlying element that rendered Mrs Morris' daughter subject to immigration control, the answer may be said to be her want of British nationality. True, such a want may be cured by the grant of some other right which relieves the entrant of the need for leave to enter or remain here, but the defining categories are the mutually exclusive ones of national and non-national. If therefore this was the ground of the differential treatment dictated by Section 185 (4) it fell within the proscribed Article 14 class of national origin."

36. In his written submission, Mr Pievsky, for the Defendant had relied on the provisions of Schedule 3 paragraph 17 of the Equality Act 2010 (see paragraph 43 below). In response, Mr Vanhegan submitted that the issue of a NLDP was not by a Minister of the Crown acting personally, relying on the statement of Charlotte Barton of the Home Office, served on behalf of the Defendant where she says:

> "4. I make this statement as the Housing Measures lead of the Civil Penalties Compliance Team (CPCT). The CPCT is the team within the Home Office who is responsible for the administration and monitoring of the issue of NLDPs."

In relation to the meaning of the expression "A Minister of the Crown acting personally" Mr Vanhegan referred to the decision of the Supreme Court in *R (Bourgass) v Secretary of State for Justice* [2016] AC 384 where Lord Reed considered "The *Carltona* principle". In the *Carltona* case [1943] 2 All ER 560, the Court of Appeal had rejected a challenge to a decision taken by a senior civil servant on the ground that the statutory power had been conferred on the Minister rather than on his officials. Lord Greene MR said:

> "In the administration of Government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them … It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed on ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department."

Lord Reed, in *Bourgass'* case, described this principle as being that a decision made on behalf of a minister by one of his officials is constitutionally the decision of the minister himself. He referred to the decision of Jenkins J in *Lewisham MBC v Roberts* [1949] 2 KB 608 at 629 rejecting an argument that the principle was one of delegation where Jenkins J said:

> "Those functions must, as a matter of necessary implication, be exercisable by the minister either personally or through his department officials; and acts done in exercise of those functions are equally acts of the minister whether they are done by him personally, or through his department officials, as in practice, except in matters of the very first importance, they almost invariably would be done. No question of agency or delegation … seems to me to arise at all".

Taking this up, Lord Reed said:

> "50. An official in a Government department is in a different constitutional position from the holder of a statutory office. The official is a servant of the Crown in a department of State established under the prerogative powers of the Crown, for which the political head of the department is constitutionally responsible. The holder of a statutory office, on the other hand, is an independent office holder exercising powers vested in him personally by virtue of his office. He is himself constitutionally responsible for the manner in which he discharges his office. The *Carltona* principle cannot therefore apply to him when he is acting in that capacity.
>
> 51. It is possible that a department official may also be assigned specific statutory duties. In that situation, it was accepted in *R v Secretary of State for the Home Department, Ex p Oladehinde* [1991] 1 AC 254 that the official remained able to exercise the powers of the Secretary of State in accordance with the *Carltona* principle.
>
> 52. It is also possible that the performance of statutory ministerial functions by officials, or by particular officials, may be inconsistent with the intention of Parliament as evinced by the relevant provisions. In such circumstances, the operation of the *Carltona* principle will be impliedly excluded or limited: *Oladehinde* at page 303."

These paragraphs are relied upon by Mr Vanhegan as showing the meaning of the words "Minister of the Crown acting personally". He submits that paragraph 17(3)(a) excludes the *Carltona* principle because, by its words, it is only exempting the minister when acting personally.

37. Mr Vanhegan also submitted that the issue or service of a NLDP is not expressly authorised by the Immigration Act 2014. He submitted that the statutory provisions are to be narrowly construed and no requirement is imposed by the Immigration Act to

serve a NLDP. In support of these submissions, he relied on a decision of Forbes J in *R (Tamil Information Centre) v Secretary of State for the Home Department* [2002] EWHC 2155 (Admin) where counsel had agreed that any provision that purports to exclude or limit the effect of the Race Relations Act 1976 must be construed narrowly (i.e. the obverse of a purposive construction of the Act). In that case, Section 19D of the Race Relations Act 1976 had similarly referred to a relevant person meaning "(a) a Minister of the Crown acting personally; or (b) any other person acting in accordance with a relevant authorisation", a relevant authorisation being defined to mean a requirement imposed or express authorisation given with respect to a particular case or class of case. Forbes J said:

> "It is clear that, for it to be a valid authorisation under Section 19 D (3) (a) the first authorisation must have been given by the Minister acting personally and so given in respect of a particular case or class of case. I also agree with Mr Allen that much of Mr Fordham's argument was one of convenience and to the effect that immigration officials can properly be empowered by the Minister's authorisation to identify an appropriate case or class of case and to define its boundaries and extent by making their own assessment of the relevant evidence and/or information in my view, that argument is wholly inconsistent with the clearly expressed statutory requirement that the authorisation in question must be an authorisation given by the minister acting personally in respect of a particular case or class of case."

38. Mr Vanhegan derived further support from the decision of the House of Lords in *Hampson v Department of Education and Science* [1991] 1 AC 171. In his speech Lord Lowry (with whom the other members of the appellate committee agreed) referred to the dissenting judgment in the court below of Balcombe LJ who had been of the opinion that acts done "in pursuance of any instrument" were to be restricted to acts done in the necessary performance of an express obligation in the instrument and did not extend to acts done in the exercise of a power or discretion conferred by the appointment instrument. The House of Lords agreed with this comment and endorsed Balcombe LJ's interpretation of Section 41 of the Race Relations Act 1976. The House of Lords agreed with Balcombe LJ that the exemption did not cover discretionary decision making.

39. Mr Vanhegan therefore submitted that there is nothing in the Immigration Act which requires or authorises the service of a NLDP and express authorisation is required, implied authorisation will not do. Furthermore, because the Defendant has a discretion under Section 21(3) to grant permission to rent, it follows that the issuing or service of a NLDP is itself discretionary and is therefore is not covered by the exemption. He referred to the Home Office's publication "Right to Rent: Landlords' Penalties" published on 1 May 2018 which, at page 30, provides:

> "Once an individual is identified as meeting the criteria for being subject of an NLDP, you must then consider whether a pause of 14 days is warranted before a notice is served on the landlord. A 14 day pause will be appropriate when an individual is a clandestine entrant who, until the point of encounter, has **never had any contact with the Home Office**, whether in or out of

> country. This is because the individual's circumstances may change within that period, meaning that an NLDP served in respect of them may become invalid."

40. Mr Vanhegan submits that the discretion not to serve the notice immediately but to wait for 14 days is inconsistent with any requirement to serve a NLDP. Furthermore the particular class is not clearly defined so even if, contrary to his primary submission, there is an express authorisation, there is no clarity in the Act as to whom it applies.

The Defendant's submissions

41. On behalf of the Defendant, Mr Pievsky's threshold submission is that the court should not entertain a claim seeking a quashing order of a decision which has been withdrawn. Despite the decision of Mr ter Haar QC, he submits that the issue whether the claim is academic and how far that academic claim should be entertained is still very much alive. Thus, were it otherwise, none of the decisions of this court at the substantive stage about whether to entertain academic claims could have been decided the way they were as they must have been given permission in order to reach a substantive adjudication. Mr Pievsky submits that the court cannot be bound by a decision to grant permission.

42. In relation to the substance of the claim, Mr Pievsky firstly submits that the decision was not one based on nationality. The Claimant was issued with a NLDP because of her immigration status and she was treated no differently to anyone else who does not have Leave to Remain.

43. Secondly, and in any event, Mr Pievsky submitted that nationality discrimination is not unlawful in the present context. He referred to Schedule 3, Part 17 of the Equality Act 2010 (see paragraph 26 above). Mr Pievsky further referred to Schedule 23 (see paragraph 27 above). Relying on these provisions, Mr Pievsky submitted that the distinction between EEA and Swiss nationals and other nationalities is a distinction which is drawn by the legislation. He submits:

> "The definition of relevant enactment includes the "Immigration Acts" which in turn (under section 61 of the UK Borders Act 2007 and section 5 of and schedule 1 to the Interpretation Act 1978) includes IA 2014 and IA 2016. The definition of a relevant person includes a Minister of the Crown acting personally and a person acting in accordance with an express authorisation given with respect to a particular class of case by a relevant enactment or an instrument made thereunder. None of that is surprising. Any workable immigration system will involve making distinctions between persons of different nationalities. The Equality Act does not make these distinctions unlawful."

44. In answer to Mr Vanhegan's submission that the issue of a NLDP is not an authorised act within the Immigration 2014, Mr Pievsky referred to Section 33D (2) of the Immigration Act 2014 which covers the situation in Ms Goloshvili's case where the rental agreement was terminated. He submits that "the power is given to the Defendant acting personally or through others on his behalf under the *Carltona* principle. The same is true (if relevant) of the power to grant Permission to Rent which comes from section 21 of IA 2014." Mr Pievsky submits that if Mr Vanhegan's submissions were correct, Section 33D would be a meaningless provision and the issue of any notice

would be an act of race discrimination entitling the tenant to sue the Home Office. He submits that this cannot be the result intended.

Discussion

45. The first question is whether the court should entertain this claim given that it seeks a quashing order in respect of a decision which has been withdrawn. The first point to make is that, in my judgment, Mr Pievsky is right that the matter remains alive and is not r*es judicata*. The only substantive matter which is decided when permission to apply for Judicial Review is granted is that the application is or is not too late.

46. Whether an appellate court or a court of first instance should proceed to hear a case involving a question of public law which has become academic between the parties was authoritatively considered by the House of Lords in *R v SSHD ex p Salem* [1999] 1 AC 450 at pages 456-7 where Lord Slynn said:

> "My Lords, I accept, as both counsel agree, that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties [to it]…
> The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

Although this passage related to an appeal, the same considerations apply to the Administrative Court hearing a claim at first instance.

47. As I have stated, the claim in this matter was heard at the same time as the JCWI claim. Had I been hearing this claim alone, and had Mr Pievsky applied at the start that it should not be entertained because it was academic, I would have acceded to that claim. I do not have any evidence that there is a large number of similar cases awaiting the outcome of this claim. As it was, I heard both claims together and reserved judgment in both matters. However, in accordance with the usual practice, I consider that the claim should not in fact be entertained because there is no outstanding 'lis' between the parties.

48. However, in case the matter should go further and an appellate court decides that the matter should be, or should have been, entertained, and also out of deference to the careful arguments adduced by the parties, I shall give my (obiter) views on the substantive claim, albeit briefly.

49. Mr Pievsky submitted that the decision to issue the NLDP in this case was not one based on nationality but was based upon the Claimant's perceived immigration status, the Claimant being treated no differently from anyone else who does not have Leave to Remain. In my judgment, the answer to this is to be found in the judgment of Sedley LJ in *R (Morris) v Westminster City Council* [2006] 1 WLR 505 referred to in paragraph

35 above. Although the immigration status of the person subject to the NLDP is, of course, critical, it is necessary to look behind the bare immigration status and examine the underlying reason for the Claimant having been treated in the way that she was, comparing her position with that had she been, for example, an EEA national not exercising her treaty rights. The immigration status of the two persons is identical: neither of them has Leave to Remain. However, the applicant was treated less favourably than she would have been had she been an EEA national not exercising her treaty rights purely on the basis of her nationality. In my judgment, this comprises direct discrimination on the basis of nationality and therefore, by reason of section 9 of the Equality Act 2010, race. The claimant's race is a protected characteristic: section 4 of the Equality Act 2010. Therefore, unless such nationality discrimination is rendered lawful by virtue of the provisions of the legislation, it offends against the Equality Act 2010.

50. In my judgment, the real issue in this case is whether the discrimination on grounds of race (nationality) which is inherent in the Scheme is one which is drawn by the legislation itself and is therefore exempt by reason of the application of paragraphs 2 and 17 of Schedule 3 to the Equality Act 2010. In my judgment, in this regard, Mr Pievsky's submissions were correct. By reason of paragraph 17 (2) of Schedule 3, section 29 of the Act, which is the relevant provision for the purposes of this claim, does not apply to anything done by a relevant person in the exercise of functions exercisable by virtue of a relevant enactment. The paragraph is expressly applicable to race discrimination on grounds of nationality.

51. The only potential answer to Mr Pievsky's submissions lies in Mr Vanhegan's submission that the issue of a NLDP does not come within the provisions of paragraph 17 because it only refers to anything done by a "relevant person" and this is a Minister of the Crown acting personally or a person acting in accordance with a relevant authorisation. Again, in my judgment Mr Pievsky is correct to refer to the provisions of section 33D (2) of the Immigration Act 2014 which amounts to authorisation of the issue or service of a NLDP under the Act. Where section 33D refers to the condition being that the Secretary of State "has given one or more notices in writing to the landlord" it thereby confers on the Secretary of State express authorisation to issue such notices. Otherwise, as Mr Pievsky submits, section 33D would be a meaningless provision and the issue of any NLDP would be an act of race discrimination entitling the tenant to sue the Home Office, a result which the legislation certainly cannot have intended. For this reason, to give appropriate respect to primary legislation, it is necessary to interpret section 33D (2) as containing express authorisation whether to issue such notices.

52. I also reject Mr Vanhegan's argument that the issue of a NLDP was not authorised because it was not done by a Minister of the Crown acting personally: in my judgment, this is covered by the *Carltona* principle. In *R. v Secretary of State for the Home Department Ex p. Oladehinde* [1991] A.C.254, where the applicant had sought judicial review of the accepted practice of allowing immigration inspectors to decide to deport immigrants on behalf of the Secretary of State, the House of Lords held that the Secretary of State could lawfully allow his officials to exercise this power within the *Carltona* principle on the basis that it is obvious that the Secretary of State cannot personally take every decision to deport a person who is in breach of his condition of entry or an overstayer and the decision could be taken by a person of acceptable

seniority. Although Lord Griffiths, giving the speech with which the majority agreed, referred to occasions in the Immigration Act 1971 where it can be seen that it was the intention of Parliament to exclude the *Carltona* principle, for example in relation to section 13(5) where it states "if the Secretary of State certifies that directions have been given by the Secretary of State (and not by a person acting under his authority)", I do not interpret the use of the adverb "personally" as having the same effect.

53. Finally, I cannot accept Mr Vanhegan's submission that the issuing or service of a NLDP is not covered by the exemption because the Defendant has a discretion under section 21 (3) of the Immigration Act 2014 to grant permission to rent. In my judgment, the reliance by Mr Vanhegan on the decision of the House of Lords in *Hampson v Department of Education and Science* [1991] 1 AC 171 is inapposite. That case was concerned with a decision that the appellant's course which she had completed in Hong Kong was not comparable to a course within the provisions of paragraph 2 (a) of Schedule 5 to the Education (Teachers) Regulations 1982 and the complaint was that the decision of the Secretary of State not to approve the Hong Kong course of teacher training amounted to direct discrimination under section 1 (1) (a) of the Race Relations Act 1976. The only question for the House of Lords was whether the action of the Secretary of State was covered by section 41 of the 1976 Act which exempted any act of discrimination done "in pursuance of any instrument made under any enactment by a Minister of the Crown". In the Court of Appeal, Balcombe LJ, in a passage with which Lord Lowry (who with the agreement of all members of the committee, gave the only substantive speech in the House of Lords) agreed, said:

> "This argument, which succeeded below, is incontrovertible if the words 'in pursuance of any instrument' are apt in their context to include, not only acts done in necessary performance of an express obligation contained in the instrument ('the narrow construction'), but also acts done in exercise of a power or a discretion conferred by the instrument ('the wide construction'). Those constructions are possible."

The House of Lords found that the Secretary of State could not rely on Section 41 because any wide construction of the expression would be irreconcilable with the purpose of the Act and would allow the imposition of conditions or requirements capable of racial discrimination without any prior opportunity for parliamentary scrutiny. In my judgment, the position is quite different where the act in question is expressly authorised (as I have found) by a provision in the Act itself which has, of course, been subject to parliamentary scrutiny. In relation to acts authorised by Acts of Parliament, there is no such principle that the acts done are restricted to acts done in the "necessary performance of an expressed obligation" and that this does not extend to acts done in exercise of a power or discretion. Even if the issue of a NLDP can properly be described as a discretionary act by virtue of the provisions of section 21(3) of the Immigration Act 2014, which I doubt, this does not render the issue of a NLDP unlawful given the critical part which it plays in the overall Scheme, a Scheme which is authorised by primary legislation and where the issue of a NLDP is, as I have found, expressly authorised by section 33D (2).

54. It follows, therefore, that, on the basis which I have found, the issue of a NLDP is not an unlawful act of race discrimination but, on the contrary, is lawful and authorised

within the provisions of the Immigration Act 2014 and section 29 of the Equality Act 2010 does not apply to the issue of NLDPs.

55. For all the above reasons, the Claim is dismissed.