Trinity Term
[2015] UKSC 57
On appeal from: [2014] EWCA Civ 1216

JUDGMENT

R (on the application of Tigere) (Appellant) *v* Secretary of State for Business, Innovation and Skills (Respondent)

before

Lady Hale, Deputy President
Lord Kerr
Lord Sumption
Lord Reed
Lord Hughes

JUDGMENT GIVEN ON

29 July 2015

Heard on 24 and 25 June 2015

Appellant
Helen Mountfield QC
Raj Desai
(Instructed by Public Interest Lawyers)

Respondent
Steven Kovats QC
Vikram Sachdeva QC
(Instructed by The Government Legal Department)

Intervener (Just for Kids Law)
Karon Monaghan QC
Nick Armstrong
Sarah Hannett
(Instructed by Just for Kids Law)

LADY HALE: (with whom Lord Kerr agrees)

1. As is common knowledge, the whole system of funding higher education was reformed, broadly in accordance with the recommendations of Lord Browne's Report, *Securing a Sustainable Future for Higher Education* (October 2010), in 2011. The aims were further to widen participation in higher education, so that everyone who had the potential to do so should be able to benefit from it; to increase student choice and therefore competition between institutions; and to produce more investment for higher education. The fees which universities were allowed to charge their students would increase to something closer to what it cost to educate them; the fees paid by the students, and a sum for their maintenance, would be financed by loans from Government (through an arms-length entity); these loans would only be repaid when the students could afford to do so and at a rate which they could afford. This case is about the criteria for eligibility for those loans, which exclude young people who have been settled here for many years in the factual sense but are not so settled in the legal sense.

2. In order to qualify for a loan, a student must (a) be resident in England when the academic year begins; (b) have been lawfully ordinarily resident in the United Kingdom for the three years before then; and (c) be settled in the United Kingdom on that day. The issue is whether either criterion (b) or criterion (c) breaches the appellant's right to education, under article 2 of the First Protocol to the European Convention on Human Rights, or unjustifiably discriminates against her in the enjoyment of that right.

The Facts

3. The appellant is a national of Zambia, born in 1995. She came to this country with her parents in 2001, at the age of six. Her father had a student visa and she and her mother came with him, lawfully, as his dependants. Her father left the UK in 2003, but she and her mother stayed on after their visas had expired. The appellant has lived in the UK since 2001. She has been educated here, through reception, primary, secondary and sixth form studies, has worked hard and has done very well. She was Head Girl of her secondary school and went on to the sixth form at Archbishop Holgate's School in York. She has obtained seven GSCEs and the equivalent of three A levels with grades of A*, A, and C.

4. These would have been sufficient to enable her to take up the place she had been offered by Northumbria University to read for a degree in International Business Management in the academic year 2013-2014; but in order to do so she

needed a student loan. Hayden J was "perfectly satisfied that outside the loan scheme there is no other realistic option" for her to fund university education (para 7). Accordingly, on 20 April 2013, she applied on-line to Student Finance England (the trading name of the Student Loans Company Ltd, which administers the scheme). They requested further information about her immigration status. She took legal advice and discovered that she was not eligible for a student loan.

5. Her mother had taken no steps to regularise their immigration status after her father had left in 2003, but the appellant states that "growing up, I had no idea what my immigration status was", which seems likely. In September 2010, the UK Border Agency (UKBA) served upon her mother and her (as her mother's dependant) forms notifying them that they were over-stayers and thus liable to removal from the UK, but at the same time granting them temporary admission to the UK. On 30 January 2012, the UKBA granted them both discretionary leave to remain (DLR) until 29 January 2015. The letter stated that "You are free to take a job and do not need the permission of any Government Department before doing so. You are free to use the National Health Service and the social services and other services provided by local authorities as you need them". The grant of DLR was not subject to a condition that she did not have recourse to public funds. Accordingly, she is not excluded from state benefits such as income-based job-seeker's allowance and housing benefit (Immigration and Asylum Act 1999, section 115).

6. On 29 January 2015, the appellant applied for a further grant of DLR, using the correct form for doing so. On 30 April 2015, this was granted until 30 April 2018. Her covering letter asked that the Secretary of State also consider granting her indefinite leave to remain (ILR), but this was subsequently rejected on the ground that she had not shown compelling reasons for dispensing with the normal qualifying period of DLR. Under the terms of a published Home Office policy, which applies to those like the appellant who were granted DLR before 9 July 2012, she will be entitled to apply for ILR after six years of DLR, that is, in 2018. For those granted DLR after that date, however, consecutive periods of ten years of limited leave to remain are required before a person in her position is eligible to apply for ILR. Applications can be made for ILR to be granted outside the Rules, but the current guidance makes it clear that the Home Office does not regard the desire to qualify for a student loan as a good reason for granting ILR (Immigration Directorate Instruction, *Family Migration: Appendix FM*, section 1.0b, para 11.3.1).

7. These proceedings were launched in June 2013, but delayed while the proceedings in *R (Kebede) v Secretary of State for Business, Innovation and Skills* [2013] EWHC 2396 (Admin), [2014] PTSR 92, which raised the same issues, were continuing. They were renewed after the appeal against the refusal of relief in that case was withdrawn.

8. Meanwhile, the appellant did not take up the offered place at Northumbria, but applied through clearing for a place closer to her home in York. She was offered a place and started the course at the University of Hull in October 2013, with the aid of a commercial student overdraft facility and her mother, who took a better-paid job in London in order to help her. But it soon became apparent that she would not be able to afford the travelling costs and so she withdrew after two weeks. She made another attempt to start a course at Middlesex University in the academic year 2014-2015, again with the help of her mother and her mother's partner, but withdrew from that after the first term, because of her concerns about the financial pressures on her mother and the quality of the course. She still hopes to be able to start again in the academic year 2015-2016 and has unconditional offers from five universities, including Manchester Metropolitan University, her top choice. Whether this is a realistic possibility depends upon the outcome of these proceedings.

9. The appellant is not alone in her predicament. The Coram Children's Legal Centre and the interveners, Just for Kids Law, are aware of many other young people who have been in this country for years, have studied alongside their British classmates, and have planned and qualified to go on to university when their classmates do. Often they were unaware of their immigration status and the barrier it would pose to achieving their academic potential and ambitions. Save (perhaps) for those who arrived as unaccompanied asylum-seeking children, their immigration status is not their fault, but that of their parents or those responsible for their welfare (such as the local authority looking after the claimants in *Kebede*). Some of these young people have set up their own campaign group, under the auspices of Just for Kids Law, called "Let us Learn". Alison East, of the Coram Children's Legal Centre, describes the impact upon them thus:

> "Our experience … suggests that young people find not being able to go to university, when that would be a natural educational progression alongside their peers, incredibly difficult. They have worked hard to do well at school and at college, and aspire to achieve the best they can. … Seeing their friends and peers go to university when they cannot, and being aware of being held back for as long as ten years in pursuing qualifications that are essential in a competitive job market, inevitably causes these young people to feel marginalised. … They feel that it is deeply unfair as they are not asking for a grant of money but only to be loaned the money which will allow them to progress, alongside their peers, into well-paid work so that they can pay that loan back."

10. No-one knows how many such young people there are. In his first witness statement on behalf of the Secretary of State, Paul Williams assumed that there might be 2,400 extra applicants for student loans in any one year. In his second witness statement this had come down to around 2000. In fact, the Home Office

statistics reveal that in 2013, a total of just over 2000 people aged 16 to 23 were granted either DLR or its replacement, limited leave to remain (LLTR). These grants are, of course, for 30 months or two years. But not all of these young people will aspire to go to university or apply for student loans. It is perhaps fair to say that the numbers affected are not insignificant but a tiny proportion of the student loans which are made each year. It is also relevant to note that the cap on the number of home and EU undergraduate students who may be admitted to read for first degrees has been progressively relaxed and is to be removed completely in the academic year 2015-2016.

11. Professor Ian Walker, of the Department of Economics at Lancaster University, was commissioned by the Department for Business, Innovation and Skills (BIS) to write a report on *The Impact of University Degrees on the Life Cycle of Earnings: Some Further Analysis* (BIS Research Report No 112, 2013). This concludes that the average net financial benefit of a degree to the individuals concerned is of the order of £168,000 for men and £252,000 for women. The benefit to the government is even larger, of the order of £264,000 from men graduates and £318,000 from women. These calculations take into account the two elements of taxpayers' subsidy involved in the student loan scheme: first, the small difference between the interest rate levied on the loans and the cost to the government of borrowing the money; and second, the more important element of "forgiveness", in that repayments outstanding after 30 years are written off. This benefits graduates who do not do so well in the labour market and are not required to repay at the rates required of the higher earning graduates. These are purely financial calculations, leaving out all the other benefits of higher education, not only to the individuals but also to society: see *The Benefits of Higher Education Participation for Individuals and Society: Key Findings and Reports: "The Quadrants"* (BIS Research Paper No 146, October 2013), where they are graphically displayed with links to the supporting evidence. As Mr Williams accepts, the benefits of higher education have never been in dispute.

12. Professor Walker was asked, for the purpose of these proceedings, to explain the relevance of his research to the group of young people with DLR or LLTR who are currently ineligible for student loans. He points out that the incentives for them to move to another country are likely to be small, that there is no reason to think that they would perform less well, on average, in higher education and the labour market than their eligible peers: "The implication is that there would be sizeable gains to the Exchequer in the long run to extending student loans provisions to this relatively small group". It must, however, be borne in mind that gains to the Exchequer do not necessarily translate into gains for BIS, the Department which is responsible for funding the scheme.

These proceedings

13. The appellant claimed that both the settlement criterion and the lawful ordinary residence criterion constituted unjustified and discriminatory restrictions on her right to education under both article 2 of the First Protocol and article 14. Her claim was heard in July 2014 by Hayden J who held that her rights had been violated by the application to her of the settlement criterion but not by the application of the lawful ordinary residence criterion: [2014] EWHC 2452 (Admin). He did not grant any specific relief and gave both parties permission to appeal. The appeal was expedited and heard only two weeks later, on the last day of the legal year. The Secretary of State's appeal against the judge's decision on the settlement criterion was allowed and the appellant's appeal against his decision on the lawful ordinary residence criterion was dismissed: [2014] EWCA Civ 1216. Laws LJ (with whom Floyd LJ agreed) held that the Secretary of State was justified in making, and might even be rationally required to make, a bright-line rule and he was entitled to adopt a criterion based on settlement as defined from time to time by the Home Office. In the view of Vos LJ, however, what "saved" the requirement was the possibility that the Home Office might exercise its discretion to grant ILR to children in accordance with the Secretary of State's duty under section 55(1) of the Borders, Citizenship and Immigration Act 2009 to ensure that her functions are discharged having regard to the need to safeguard and promote the welfare of children in the United Kingdom. Neither side supports that view on the appeal to this court, not least because the Home Secretary does not regard the need to qualify for a student loan as a reason to make an exception to the Rules.

The law on eligibility for student loans

14. The parent statute is the Teaching and Higher Education Act 1998. So far as relevant, section 22 provides that:

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

The Secretary of State for this purpose is the Secretary of State for Business, Innovation and Skills, and not the Secretary of State for Education, who is responsible for primary and secondary education, or the Secretary of State for the Home Department, who is responsible for immigration.

15. The relevant Regulations are the Education (Student Support) Regulations 2011 (SI 2011/1986) ("the Regulations"). Regulation 4(2) defines an eligible student as a person whom the Secretary of State determines falls within one of the categories set out in Part 2 of Schedule 1. Part 2 of Schedule 1 has 12 paragraphs, listing some 20 categories of person. Six of these are to observe the UK's obligations in international law towards refugees and people granted humanitarian protection and their family members. Thirteen are to observe the UK's obligations towards people from the European Economic Area, Switzerland and Turkey, and towards people settled in the UK who have exercised their rights of residence within the EEA or Switzerland. That leaves paragraph 2, which contains the basic category:

> "(1) A person who on the first day of the first academic year of the course –
>
> (a) is settled in the United Kingdom …;
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> (b) is ordinarily resident in England;
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> (c) has been ordinarily resident in the United Kingdom and Islands throughout the three year period preceding the first day of the first academic year of the course; and
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> (d) … whose residence in the United Kingdom and Islands has not during any part of the period referred to in para (c) been wholly or mainly for the purpose of receiving full-time education."

16. In para 1(1) Part I of Schedule 1, "settled" is defined as having the meaning given in section 33(2A) of the Immigration Act 1971. This provides that "… references to a person being settled in the United Kingdom are references to his being ordinarily resident there without being subject under the immigration laws to any restriction on the period for which he may remain". This of course includes UK nationals with the right of abode, but for others it means that they have been granted indefinite leave to remain in the United Kingdom. Other forms of leave to enter or remain in the United Kingdom, including DLR and LLTR, are granted for specific periods. In most cases, a person's immigration status will be readily ascertainable

from his passport, if he has one. The persons to whom, and the circumstances in which, ILR will be granted are determined by the Immigration Rules made by the Secretary of State for the Home Department and her policies. Like all immigration policy, they are subject to change, as the facts of this case show: a person like the appellant, who was granted DLR before 9 July 2012, will normally be granted ILR after six years of DLR, whereas a person granted DLR after that date will have to wait for ten years. There is no reason to suppose that the Home Secretary takes the educational rights or aspirations of applicants into account in determining these criteria.

17. By para 1(2A) Part I of Schedule 1 to the Regulations, for the purpose of that Schedule, "a person is not to be treated as ordinarily resident in a place unless that person lawfully resides in that place". This was no doubt inserted out of an abundance of caution, despite the observation in *R v Barnet London Borough Council, Ex p Shah* [1983] 2 AC 309, at p 343, that, at least for educational purposes, "ordinary residence" did not include a person whose residence in a particular place or country was unlawful. However, there are contexts in which lawfulness is not implied (for example, in relation to "habitual residence" for the purpose of jurisdiction in matrimonial causes, see *Mark v Mark* [2006] 1 AC 98), and the implication had been challenged, albeit unsuccessfully, in *R (Arogundade) v Secretary of State for Business, Innovation and Skills* [2013] EWCA Civ 823, [2013] ELR 466. At an earlier stage in this litigation, it was argued that the grant of temporary admission in 2010 was sufficient to make the appellant's residence "lawful" for this purpose, but that suggestion was rejected by the Court of Appeal (para 60) and is no longer pursued. It is common ground, therefore, that the appellant did not achieve three years' lawful ordinary residence until January 2015.

18. It is perhaps worth noting that the three years' ordinary residence test dates at least as far back as the University and Other Awards Regulations 1962 (SI 1962/1689), made under the Education Act 1962, which introduced the system of mandatory grants for university education (from which so many of my generation of students benefitted). The settlement criterion, on the other hand, was not introduced until the Education (Mandatory Awards) Regulations 1997 (SI 1997/431). This was not only 35 years after a system of mandatory student finance had been introduced, but also 14 years after the House of Lords' decision in *Shah*, which had defined "ordinary residence" as "a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration" (p 343). This may have been a broader definition than had hitherto been thought, but principally because it included people who had come here wholly or mainly for the purpose of study. It cannot be suggested that before this time, "ordinary residence" was necessarily equated with ILR or any particular immigration status.

19. For completeness, it should be noted that in 1980, before the introduction of the settlement criterion, the requirement of three years' ordinary residence was removed for refugees (SI 1980/1352). For reasons which the Secretary of State is unable now to explain, in 1981, the definition of refugee was enlarged to include "a person who enjoys asylum in the United Kingdom in pursuance of a decision of Her Majesty's government though not so recognised" (that is, recognised as a refugee for the purpose of the 1951 Geneva Convention on the status of refugees). When the settlement criterion was introduced in 1997, a similarly worded category of "failed asylum seekers" continued to be exempted from both the settlement and the residence requirements. Not surprisingly, when challenged, the Secretary of State conceded that the distinction drawn between those people with DLR who had applied unsuccessfully for asylum and those who had not done so was irrational (see the account given by McCombe LJ in *Arogundade* at para 10). Thus, for a short time, all persons with DLR/LLTR were treated as eligible for student loans under this category. It was, however, soon abolished (see SI 2011/87).

20. It is fair to say that, just as there is no evidence of the reasons for including "failed asylum seekers" within the categories of eligible persons, there is also no evidence that thought was given to the impact of removing eligibility from all people with DLR or LLTR, irrespective of the strength of their connections with the United Kingdom. (There is evidence that the Department considered, but rejected, making an exception for unaccompanied asylum seeking children, who are routinely granted DLR/LLTR until the age of $17^1/_2$.) An Equality Impact Assessment of Student Funding Policy for Holders of Discretionary Leave to Remain in the UK was completed in 2011, but this was concerned only with the impact of the policy upon people with the characteristics protected by the Equality Act 2010 and not with the impact upon education rights under the European Convention.

21. Finally, it should be emphasised that we are concerned only with the law in relation to students who are ordinarily resident in England on the day when the academic year begins. Financial support for students ordinarily resident in Wales, Scotland and Northern Ireland is a devolved function, and the regulations in each place are different from those in England.

22. Under challenge in these proceedings, therefore, are (a) the settlement criterion, and (b) the lawfulness element in the three year residence criterion. This litigation is concerned only with eligibility for student loans, but such eligibility is also a passport to the right to be charged the fees applicable to home students; without it a university is free to charge the fees applicable to overseas students (often significantly higher), although it does not have to do so.

Convention rights

23. Under article 2 of the First Protocol to the European Convention on Human Rights (A2P1), "Everyone has the right to education". This does not, however, oblige Member States to provide any particular system of state education. Rather, as was stated in the *Belgian Linguistics case (No 2)* (1968) 1 EHRR 252, at p 281, it affords people "the right in principle to avail themselves of the means of instruction existing at a given time". Hence, in *Şahin v Turkey* (2005) 44 EHRR 99, at para 137, the Grand Chamber explained that "[a]lthough [A2P1] does not impose a duty on the contracting states to set up institutions of higher education, any state doing so will be under an obligation to afford an effective right of access to them." So fundamental is the role that education plays in the furtherance of human rights in a democratic society that the article should not be given a restrictive interpretation. The United Kingdom has indeed established a large and flourishing higher education sector, which, although technically consisting of private institutions, is to a large extent supported, either directly or indirectly, from public funds.

24. Furthermore, as the court reiterated, "It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical or illusory" (para 136). Making it prohibitively expensive for some students to gain access to higher education would make that right theoretical or illusory. Hence the Secretary of States accepts that in certain circumstances eligibility for financial support is capable of coming within A2P1 (and see *R (Kebede) v Secretary of State for Business, Innovation and Skills* [2013] EWHC 2396 (Admin), [2014] PTSR 92, para 33).

25. The appellant complains that denial of access to a student loan has denied her access to the higher education provided in this country. But her real complaint is that some people get student loans and others do not, in short of discrimination. Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

26. It is now conceded that immigration status is another status for this purpose. It is therefore unnecessary for us to consider whether, even if it were not, the denial of a student loan to this appellant, when such loans are made available to other university students, would constitute and unjustified denial of her right to education.

Whether considered under A2P1 alone or under article 14, taken together with A2P1, the issue is justification.

27. There has been some debate before us as to the approach which we should take to scrutinising a governmental decision in this area. On the one hand, in Strasbourg, "a wide margin of appreciation is usually allowed to the state under the Convention when it comes to general measures of political, economic or social strategy, and the court generally respects the legislature's policy choice unless it is 'manifestly without reasonable foundation'": see, for example, *Gogitidze v Georgia* (Application No 36862/05), (unreported) given 12 May 2015 para 97. This test was first developed when considering whether an interference with the rights of property guaranteed by article 1 of the First Protocol (A1P1) was "in the public interest": see *James v United Kingdom* (1986) 8 EHRR 123. That test has also been employed in Strasbourg and domestically when considering the justification for discrimination in access to cash welfare benefits, themselves a species of property right protected by A1P1: see *Humphreys v Revenue and Customs Comrs* [2012] UKSC 18, [2012] 1 WLR 1545; *R (SG) v Secretary of State for Work and Pensions (Child Poverty Action Group intervening)* [2015] UKSC 16, [2015] 1 WLR 1449.

28. On the other hand, education is rather different. Both sides in this case rely upon the language of the Strasbourg court in *Ponomaryov v Bulgaria* (2011) 59 EHRR 799. This concerned two boys, born to Russian parents in what is now Kazakhstan. After their parents' divorce, their mother married a Bulgarian and they all came to live in Bulgaria. The mother was granted a permanent residence permit and the boys were entitled to residence on the basis of her permit. They were educated at Bulgarian primary and secondary schools. There came a time when they should have had permanent residence permits of their own. Although both eventually succeeded in obtaining these, they complained that they had for a while been charged fees for their secondary education, whereas Bulgarian nationals and aliens having permanent residence permits were not.

29. The issue was whether, having decided to provide such education free of charge, the state could deny that benefit to a distinct group of people: "the notion of discrimination includes cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention" (para 53). The court started by observing that "a state may have legitimate reasons for curtailing the use of resource-hungry public services – such as welfare programmes, public benefits and health care – by short-term and illegal immigrants, who, as a rule, do not contribute to their funding. It may also, in certain circumstances, justifiably differentiate between different categories of aliens residing in its territory" (para 54). However,

> "Although similar arguments apply to a certain extent in the field of education – which is one of the most important public services in a modern state – they cannot be transposed there without qualification. It is true that education is an activity that is complex to organise and expensive to run, whereas the resources that the authorities can devote to it are necessarily finite. It is also true that in deciding how to regulate access to education, and in particular whether or not to charge fees for it and to whom, a state must strike a balance between, on the one hand, the educational needs of those under its jurisdiction and, on the other, its limited capacity to accommodate them. However, the court cannot overlook the fact that, unlike some other public services, education is a right that enjoys direct protection under the Convention. … It is also a very particular type of public service, which not only directly benefits those using it but also serves broader societal functions. Indeed, the court has already had occasion to point out that '[i]n a democratic society, the right to education … is indispensable to the furtherance of human rights [and] plays … a fundamental role ….' Moreover, in order to achieve pluralism and thus democracy, society has an interest in the integration of minorities" (para 55).

30. The court went on to say that the state's margin of appreciation increased with the level of education. University education remained optional and higher fees for aliens seemed to be almost universal and were fully justified. The opposite went for primary education, which provided basic skills and integration into society and was compulsory in most countries (para 56). Secondary education fell between the two extremes, but "with more and more countries now moving towards what has been described as a 'knowledge based' society, secondary education plays an ever-increasing role in successful personal development and in the social and professional integration of the individuals concerned" (para 57).

31. In the particular circumstances of the case, requiring these boys, who had come to Bulgaria lawfully as young children, had no choice in the matter, and were fully integrated into Bulgarian society, to pay fees on account of their nationality and immigration status was not justified.

32. Nowhere in that case do the words "manifestly without reasonable foundation" appear, nor did the Court of Appeal adopt that test, which Laws LJ described as a "blunt instrument" (para 30). As the appellant points out, education (unlike other social welfare benefits) is given special protection by A2P1 and is a right constitutive of a democratic society. Nevertheless, we are concerned with the distribution of finite resources at some cost to the taxpayer, and the court must treat the judgments of the Secretary of State, as primary decision-maker, with appropriate respect. That respect is, of course, heightened where there is evidence that the decision maker has addressed his mind to the particular issue before us (see, for

example, *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420), or that the issue has received active consideration in Parliament (see *R (SG) v Secretary of State for Work and Pensions*). Both are lacking in this case: there is no evidence that the Secretary of State addressed his mind to the educational rights of students with DLR/LTTR when making these regulations, which were laid before Parliament subject to the negative resolution procedure.

33. With those considerations in mind, I turn to the issue of justification. It is now well-established in a series of cases at this level, beginning with *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167, and continuing with *R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening)* [2011] UKSC 45, [2012] 1 AC 621, and *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700, that the test for justification is fourfold: (i) does the measure have an 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?

34. As to (i), the evidence presented on behalf of the Secretary of State suggests that settled students "are in a better position to make a significant economic contribution" and "have a right to remain and work in the United Kingdom". They are thus regarded as "more deserving" of the limited funds available. The appellant accepts that it is legitimate to target resources on those students who are not only likely to stay here to complete their education but also to stay on afterwards and contribute to the United Kingdom economy through their enhanced skills and the taxes they pay. If they stay, it will also be simpler and easier to collect the repayments due on the loans through the taxation system.

35. But (ii) are the means chosen rationally connected to those aims? The appellant argues that people in her situation are just as likely to stay here, to complete their education, to contribute to the economy and to repay their loans as are people who are "settled" here within the meaning of the Regulations. The reality is that even though she does not yet have ILR, her established private life here means that she cannot be removed from the UK unless she commits a serious criminal offence and she will almost inevitably secure ILR in due course. She is just as closely connected with and integrated into UK society as are her settled peers. She has no obvious alternative. As Professor Walker puts it "graduate wages in the UK labour market are large, relative to the wages reigning in those countries where DLR/LLRs are likely to have been born - so the incentives to move are likely to be small except for high-flyers who would face relatively low subsidies (because they would quickly repay) if they remained in the UK". He concluded that "it seems unlikely that the

overwhelming majority would emigrate - which is what it would take to make the net benefits to the UK fall to zero".

36. But even if there is no sufficient rational connection between the aim and the rule, is the Secretary of State nevertheless justified in adopting a "bright line" rule which enables those administering the scheme quickly and easily to identify those who qualify? The Strasbourg jurisprudence is not altogether clear on this question. On the one hand, it tends to disapprove of a "blanket" exclusionary rule, such as that on prisoners' voting (*Hirst v United Kingdom (No 2)* (2005) 42 EHRR 849), or a "blanket" inclusionary rule, such as that governing the retention of DNA profiles (*S and Marper v United Kingdom* (2008) 48 EHRR 1169). On the other hand, it recognises that sometimes lines have to be drawn, even though there may be hard cases which sit just on the wrong side of it (see, for example, *Animal Defenders International v United Kingdom* (2013) 57 EHRR 607). The need for bright line rules in administering social security schemes has been recognised domestically, for example in *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] 1 AC 311. Nevertheless, it was the absence of any possibility of taking the particular circumstances of the case into account which led to the finding of a violation in *Ponomaryov* (para 62).

37. The issue is therefore two-fold. First, even if a bright line rule is justified in the particular context, the particular bright line rule chosen has itself to be rationally connected to the aim and a proportionate way of achieving it: see, for example, *R (T) v Chief Constable of Greater Manchester Police (Liberty intervening)* [2014] UKSC 35, [2015] AC 49. Secondly, however, it is one thing to have an *inclusionary* bright line rule which defines all those who definitely should be included. This has all the advantages of simplicity, clarity and ease of administration which are claimed for such rules. It is quite another thing to have an *exclusionary* bright line rule, which allows for no discretion to consider unusual cases falling the wrong side of the line but equally deserving. Hitherto the evidence and discussion in this case has tended to focus on whether there should be a bright-line rule or a wholly individualised system. There are obvious intermediate options, such as a more properly tailored bright line rule, with or without the possibility of making exceptions for particularly strong cases which fall outside it. There are plenty of precedents for such an approach, including in immigration control.

38. Could therefore a bright line rule have been chosen which more closely fitted the legitimate aims of the measure? I quite accept that the settlement rule is a good rule of thumb for identifying those who definitely should be eligible for student loans. They are the people with the right to stay and work here for as long as they please. (The risk that high-flyers will move abroad applies to the settled and not settled alike.) But there are also people such as the appellant who have lived here for many years and cannot in reality be removed from the country unless they commit a serious crime. The appellant points to the criteria currently used in the

Immigration Rules for the grant of leave to remain on grounds of private life. Paragraph 276ADE (1) includes a person who (iv) is under the age of 18 years and has lived continuously in the UK for at least seven years (discounting any period of imprisonment) and it would not be reasonable to expect to leave the UK; or (v) is aged 18 years or above and under 25 years and has spent at least half his life living continuously in the UK (discounting any period of imprisonment). To this might be added an exceptional cases discretion. Given the comparatively small numbers involved, in the total scheme of things, it has not been shown that this would be administratively impracticable. Indeed, in principle, different fees could be charged for processing different applications, based on the administrative costs of doing so.

39. Finally, there is (iv) the fair balance to be struck between the effect upon the person whose rights have been infringed and the interests of the community, or, to put it another way, between the means and the ends. The Secretary of State argues that the effects upon the students denied loans until they have achieved ILR are not so great – access is not denied but merely delayed. Nevertheless, the impact upon the appellant and others in her position is clearly very severe. As Vos LJ put it,

> "she will be deprived of higher education at the time in her life when her primary and secondary education has led her reasonably to expect that she will go with her peers to university. She has no intention of leaving the United Kingdom. Her life was made here from the age of six and she is culturally and socially integrated into British society. Moreover, … under article 8 her removal is simply not an option. The fact that she falls foul of the twin requirements of the 2011 Regulations … is no fault of hers." (paras 74, 75).

40. One does not need to have been a university teacher to appreciate that it is important to keep up the momentum of one's studies, to maintain the habits and skills learned at A level, and in many cases (particularly the sciences) to retain the knowledge gained there. A voluntary gap year is one thing, but an enforced gap of several years is quite different. These young people will also find it hard to understand why they are allowed access to all the public services, including cash welfare benefits, but are denied access to this one benefit, which is a repayable loan.

41. Furthermore, in considering the overall balance, alongside the harm done to the individuals must be set the harm done to the community by such delay. Some of these young people may be lost to higher education forever. Others will not join the productive higher-skilled workforce until much later than they otherwise would have done. The overall benefits to the exchequer and the economy, described in Professor Walker's unchallenged evidence, will be reduced. These harms to both the individuals concerned and the community as a whole cannot be outweighed by the administrative benefits of this particular bright line rule, which could be achieved in

other ways. Any short-term savings to the public purse by denying these students finance, by way of loans, not grants, are just that, as most of them will eventually qualify for loans, and in the meantime the benefit their enhanced qualifications will bring to the exchequer and the economy have been lost. Furthermore, the additional short term cost of enabling these students to have loans pales into insignificance compared with the costs of removing the cap on home student numbers.

42. I conclude, therefore, that the application of the settlement rule to this appellant could not be justified and was incompatible with her Convention rights.

The lawful ordinary residence criterion

43. The appellant's challenge is directed towards the lawfulness element in the requirement of three years' ordinary residence in the United Kingdom. Once again, the Secretary of State has not clearly articulated its aim, but the appellant accepts that it is reasonable to restrict benefits to those who are genuinely integrated into the society and a period of residence can be a reasonable proxy for such "belonging": see *R (Bidar) v Ealing London Borough Council* [2005] QB 812, para 57. The established rationale for insisting that residence cannot be "ordinary" unless it is lawful is that a person should not be permitted to benefit from his own unlawful conduct: see *Shah* [1983] 2 AC 309, p 343*; Arogundade (No 2),* para 37. That being so, it is argued that this appellant (unlike the appellant in *Arogundade*) is in no way to blame for the fact that her residence was not lawful. That was the result of decisions taken by her parents over which she had no control.

44. The Secretary of State argues that "lawful residence" is not a status for the purpose of article 14. *A fortiori* the reason why that residence was not lawful cannot be such a status. Justification therefore does not arise. But even if it does, the rule is fully justified. In *Ponomaryov* the court said this:

> " … the applicants were not in the position of individuals arriving in the country unlawfully and then laying claim to the use of its public services, including free schooling. … Any considerations relating to the need to stem or reverse the flow of illegal immigration clearly did not apply to the applicants' case" (para 60).

45. There are indeed strong public policy reasons for insisting that any period of ordinary residence required before a person becomes entitled to public services be lawful ordinary residence. Furthermore, if the requirement were to be relaxed for people in the position of the appellant it would also have to be relaxed for all the other categories of persons eligible for student loans to whom the requirement of

three years' ordinary residence (here or in the EEA) applies, who are just as likely as the appellant to be the victims of their parents' decisions rather than their own. The administrative burden involved in making the moral judgments required would be intolerable. And the overall balance of harm involved in a delay of up to three years is of a different order from the balance involved in a six or ten year delay.

46. I would therefore prefer not to enter into the knotty problem of whether lawful residence is a status and whether lawful and unlawful residents are in an analogous situation for this purpose (questions which are analytically difficult to separate). There is ample justification for the rule. I conclude therefore that the application of the "lawful ordinary residence" criterion was compatible with the appellant's Convention rights.

Conclusion

47. The application of the settlement rule to this particular appellant violated her Convention right to be afforded access to education on equal terms with her peers. What remedy should flow from this?

48. The primary relief sought by the appellant is (i) a declaration that the impugned criteria breach her Convention rights, and (ii) that the Regulations should be read down so as to give effect to this, by inserting into regulation 4(2) (see para 15 above) "or where the grant of support is necessary in order to avoid a breach of the person's Convention rights within the meaning of the Human Rights Act 1998". Alternatively, if it is not possible to read down the Regulations in this way, she seeks an order quashing the impugned provision and requiring the Secretary of State to put in place a Convention-compatible basic criterion.

49. The problem with quashing the settlement criterion in its entirety is that there must be cases in which it is not incompatible with the Convention rights. The problem with reading down the regulation as suggested is that it would leave the Department with little guidance as to when the refusal of finance would be a breach of the Convention rights. But the appellant is clearly entitled to a declaration that the application of the settlement criterion to her is a breach of her rights under article 14, read with article A2P1, of the Convention. Such a declaration was granted, for example, in *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] AC 173, where it was held that the provision of the Adoption (Northern Ireland) Order 1987 excluding unmarried couples from applying jointly to adopt was incompatible with the appellants' Convention rights. A declaration was granted that "it is unlawful for the Family Division of the High Court of Justice in Northern Ireland to reject the applicants as prospective adoptive parents on the ground only that they are not married". Such a declaration would leave the department in no doubt that this

appellant is entitled to a student loan, while leaving it open to the Secretary of State to devise a more carefully tailored criterion which will avoid breaching the Convention rights of other applicants, now and in the future.

LORD HUGHES:

50. I agree with Lady Hale that this appeal should be allowed, but would make what seems to me a significant qualification in granting a declaration that the present settlement rule unlawfully infringes the appellant's Convention rights, whilst my reasoning is not exactly the same as hers.

51. This appeal was presented on the basis that there was both an infringement of A2P1 and unlawful discrimination. It was always accepted by the appellant that these two legal arguments went together. On inspection, I agree with Laws LJ in the Court of Appeal that the case depends upon a complaint of unlawful discrimination only. The jurisprudence of the Strasbourg court, and in particular *Ponomaryov*, makes it quite clear that, whatever may be the uncertain ambit of A2P1, it does not impose on any state an obligation to provide, or to fund, tertiary education. If, therefore, the UK were simply to decline to provide any university funding, that, whilst it would clearly not be acceptable publicly, would not entail any infringement of A2P1. Equally, it follows that A2P1 does not impose a requirement on the UK to fund tertiary education at any particular level or in any particular way, and whether or not it were to be asserted that such education had become prohibitively expensive for some individuals. This is an example of the UK's social and political realities being more exacting upon the state than the ECHR (and the Human Rights Act) require; it is not the only one. The law is not the only, nor even the principal, regulator of the provision of public services.

52. The complaint in this appeal therefore relates not to an infringement of A2P1 but to the fact that funding is provided on a basis which is discriminatory in that it excludes the appellant, and others in a comparable position, on the grounds of their immigration status. It was not disputed that her immigration status is a status for the purposes of article 14 ECHR. It follows that the discrimination must be justified.

53. Certain groups of European Union citizens have separate rights under EU law which are duly recognised in the eligibility rules set out in the Regulations. So also, under international obligations, do those accepted as legitimate refugees. Subject to that, the plain objectives of the government in promulgating the eligibility rules under consideration are:

(a) principally, to target the not inconsiderable subsidy represented by the student loan scheme (about 45% of £9 billion per annum) on those who are properly part of the community (in this case of England, for there are separate and different rules for the other parts of the UK);

(b) thereby to target the subsidy on those who are likely to remain in England (or at least the UK) indefinitely, so that the general public benefits of their tertiary education will enure to the country's advantage;

(c) thereby to increase the likelihood that, because the recipients of the loans will probably remain here, the public will receive repayment; and

(d) to provide a rule which is easy to understand and apply, and inexpensive to operate, so that the minimum part of the available funds are taken up in administration costs.

Those are, as it seems to me, plainly legitimate objectives.

54. The course which has been taken in pursuit of these objectives has been to define eligibility for student loans in part in terms of the immigration position of the applicant. This produces the two rules which are in question in the present appeal:

(i) the rule which requires the student to have been lawfully resident in the UK for three years immediately preceding the start of the University course;

and

(ii) the rule which requires the student to be "settled" in the UK as defined by section 33(2A) of the Immigration Act 1971.

55. It is readily understandable why the Secretary of State for Business, Innovation and Skills should have looked to the immigration rules for a convenient definition of those who are sufficiently connected with this country to justify receipt of the subsidy. But if he is to take that course, he needs to consider whether those rules do in fact adequately identify those who are sufficiently connected when it comes to University funding, and exclude those who are not. The purposes served by the immigration rules are not identical to the purposes of the regulations governing eligibility for student loans. In most respects, these two importations of

immigration concepts do sensibly identify those who are to be made eligible for student loan funding. But in one respect they do not, and the framers of the Regulations appear not to have considered the case of such as the appellant, where they do not.

56. I entirely agree with Lady Hale that the rule requiring lawful residence for three years is plainly justified. Special rules for refugees and EU citizens apart, no one queries, nor could they query, a rule requiring a period of UK residence before entitlement to receipt of a loan on advantageous terms from the state. The only challenge is to the additional requirement that such residence be lawful. But that also is plainly justified. It must be open to the state to exclude from its generosity those whose residence here is illegal or has not been legal for a qualifying period. It may be true that young people such as the appellant may become and remain illegal immigrants through the actions of their parents and at a time when they were not personally responsible for their movements. But whilst this is so, it is plainly open to the state to say that a parent cannot obtain for his children subsidised University education by entering or overstaying illegally in this country and choosing to keep quiet about what s/he is doing. Children are inevitably affected in many ways by decisions made for them by their parents when they were young; this is one such.

57. The settlement rule, insofar as it affects the cohort of which this appellant is an example, is different. Those in this cohort do not meet this rule but have these characteristics. They have lived in this country for the majority of their lives. They have passed through the education system, secondary certainly and often primary. Some, such as the present appellant, have done very well, but whether they have or have not, all have been treated throughout as members of UK society and have behaved as such. Their length of residence is such that no one doubts that there could be no question of removing them from the UK, at least in the absence of grave misconduct. They are, in any ordinary language, settled in the UK. They are, however, not settled for the purposes of the immigration legislation, because that defines settlement in terms of indefinite leave to remain ("ILR"). Increasingly, it is the practice of the Home Secretary to require a longer period of probationary limited leave to remain than was formerly the case, before ILR is granted. Until recently, and for this appellant, it was six years from the time when the unlawful presence is discovered, whilst for the future it will be ten years. At any time, the Home Secretary may alter this practice, whether by requiring a longer period of probation or by shortening it, or by imposing different conditions on grants of limited leave. The merits of this practice from the point of view of immigration administration have, correctly, not been debated in these proceedings, but I see no difficulty in understanding that it may have benefits when considered from that standpoint. For example, the grant of ILR brings other consequences in its train, such as family settlement rights for others. In any event, there is no doubt a case for a probationary period of limited leave. I see no grounds for criticising the Home Secretary for operating this practice. But what it brings with it, when invoked as a criterion for

eligibility for student funding, is increasing separation of the immigration concept of "settlement" from the question of whether the young person is in fact tied by long residence, habit and community membership to UK society. The reality is that young people such as the appellant are members of UK society as much as most others. They have been brought up here in the English system. They are as connected to the UK as most others and, like them, they can be expected to remain here indefinitely. There are therefore the same reasonable prospects of society benefitting from the contribution which tertiary education will equip them to make, and of it obtaining repayment of loans made, as there are in relation to the home-grown student population generally.

58. It follows that in respect of this cohort of people, the settlement rule, whilst no doubt intended to serve the first three objectives set out in para 53 above, does not in fact do so. It goes further than is needed to serve those objectives. In consequence, it excludes people who meet the criteria which those objectives are designed to include. It fails to strike a fair balance between the state's interests and those of the cohort concerned. There is little sign in the evidence lodged by the Department that this cohort was expressly considered. The adoption of the rule in relation to this cohort creates discrimination which is outside the legitimate range of administrative decisions available to the Secretary of State, and whether the test is correctly characterised as a decision "manifestly without reasonable foundation" or as some less stringent criterion.

59. There is evidence that the view was taken that a simply stated and applied rule had great merit. To an extent, whenever a rule draws a simple line, there may be hard cases which fall the wrong side of it. The Secretary of State's case, fully argued by Mr Kovats QC, is that the exclusion of the cohort of aspiring students of which this appellant is an example is the unavoidable consequence of this truth.

60. If this were so, I would myself have concluded that the settlement rule falls well within the ambit of lawful decisions which are available to the Secretary of State in framing the eligibility rules, and that the discrimination was thus justified. Like Laws LJ in the Court of Appeal in this case, and like Burnett J in the similar case of *Kebede* [2013] EWHC 2396 (Admin), [2014] PTSR 92, I agree that this is an area in which a rule which is simply stated, readily understood and easily applied is legitimate, and indeed advisable. Such rules tend to be described, when objection is taken to them, as 'blanket' rules, or, when conversely their virtues are recognised, as 'bright line' rules. But these descriptions, one pejorative and the other approving, obscure the reality which is that all rules are blanket rules, in the sense that those who meet them are included and those who are outside them are excluded. All such rules are both inclusionary and exclusionary; if one grafts onto them a residual discretion they cease to be rules based on readily ascertainable facts and become rules based in part on an evaluative exercise. The truth is that clear rules, based on readily ascertainable facts, which are simple to state, to understand and to apply,

have a merit of their own. An applicant can see comparatively easily whether she will qualify or not. The administrators can process a very large number of applications (approaching a million and a half in 2013-2014 with an increase to be expected now that the cap on student numbers has been lifted) in the relatively short time available each year for matching applicants to places. Some of the processing can be automated. The cost of administering the scheme can thus be kept down and the maximum possible proportion of the available budget preserved for loans.

61. As Lady Hale observes, the argument in this case has tended to proceed astride the fault line between individualised consideration of every case on the one hand and the existing settlement rule on the other. On behalf of the appellant, the primary submission advanced by Miss Mountfield QC remains that the court should read down the eligibility rule pursuant to section 3 of the Human Rights Act 1998, so as to require individual consideration in every case not plainly within the stated categories. The contention is that words should be added to the parent eligibility regulation 4(2) which directs one towards the several categories of eligibility set out in Schedule 1, Part 2. That would involve reading regulation 4(2) as follows, adding the words shown in bold:

> "Subject to paragraph (3) a person is an eligible student in connection with a designated course if **(a)** in assessing that person's application for support the Secretary of State determines that the person falls within one of the categories set out in Part 2 of Schedule 1 **or (b) where the grant of support is necessary in order to avoid a breach of the person's Convention rights (within the meaning of the Human Rights Act 1998)**."

62. If applied to regulation 4(2) this qualification would operate upon not only the settlement rule (Schedule 1, Part 2, para 2(1)(a)) but also all the other categories of eligibility, including the three year lawful residence rule (para 2(1)(c) and elsewhere). Even if only para 2(1)(a) were to have these or similar words attached, the problem would still be the same. It would mean that individualised assessment of a person's article 8 rights would have to be made by the Secretary of State in order to determine eligibility for a student loan. Such a determination is highly fact sensitive. It does not depend by any means only on length of residence in the UK. Even if that were the only consideration it would inevitably lead to inconsistent decisions as between apparently similar cases adjudicated upon on different occasions. But it would be likely also to entail consideration of, inter alia, family connections, dependants, community and other ties, employment, commitments and plans. It would require an entirely different skillset for those administrators charged with running the student loan scheme. There would be the unavoidable prospect of challenge to such individualised decisions by way of judicial review, at considerable cost in time and money. Meanwhile, the prospect would be opened up of inconsistent decisions upon article 8 as between on the one hand the Secretary of State for

Business, Innovation and Skills and his student loan administrators, and on the other the Secretary of State for the Home Department and the highly sophisticated system of tribunal appeals in the administration of immigration control.

63. It seems to me clear that such a system would have very powerful disadvantages when considered as a matter of public policy. It is impossible to say that the Secretary of State acts unlawfully in not adopting it. If, therefore, this were the inevitable consequence of recognising the position of the appellant's cohort of aspiring students, their exclusion from the eligibility criteria could not be held to be unlawful.

64. It is, however, clear to me, as to Lady Hale, that this consequence is not inevitable. There would be no difficulty in formulating a rule, as clear as the existing and as simple to operate, which recognises the position of this cohort of students. It is not for the court to devise such a scheme, but for the Secretary of State. The role of the court is limited to determining whether the justification for the present rule which is advanced is or is not made out. That suggested justification is, as the evidence of Mr Williams and the submissions of Mr Kovats make clear, that any alternative would involve either individual assessment of each applicant's ties with the UK, or if not that, at least checks on the length of residence. As to the former, for the reasons already given I agree entirely that the objection is well taken and the justification for the discrimination accordingly made out. As to the latter, Mr Williams draws attention to the possibility that checking whether an applicant had been through the UK school system

> "would result in checks being made with schools or education authorities and might require permission from other Government departments, and possibly changes in the law to allow the SLC to access such information."

65. This protests too much. Whilst it is for the Secretary of State to devise his own rule, one which extended eligibility on the basis of long (although not necessarily lawful) residence would be a simple rule, based on ascertainable fact rather than evaluative assessment. This would be so whether the length of residence were defined by reference to a set period of years, or to a proportion of the applicant's life. As it happens, there exists within the immigration rules a possible template which might be adopted, with or without modification. Immigration Rule 276ADE(1) creates just such a long residence rule for entitlement to the grant of limited leave to remain. It does so by reference to readily ascertainable factual criteria of residence, (a) for those under 18, seven years, (b) for those between 18 and 25, half one's life, and (c) in any event 20 years.

66. It is true that if such a rule, modified or otherwise, were to be adopted, the applicant whose passport did not show UK citizenship and who did not have ILR would no doubt have to demonstrate whatever long residence was stipulated. The onus can perfectly well be put upon such an applicant to provide confirmation from an authoritative source, such as a general practitioner or head teacher, rather as at present she is required to submit documentary evidence of household income. She could perfectly properly be required to consent to any confirmatory enquiries with education or health authorities which the student loan administrators might wish to make, and no delicate inter-departmental relations or changes in the law ought to be involved. If necessary, one would have thought that it would be very easy to insist on the certifier sending the confirmation direct, to minimise any risk of forgery, but these are details which could be worked out by those framing any new rule.

67. It can no doubt be said that if such a long residence rule were to be adopted, that would not entirely eliminate the risk of hard cases falling on the wrong side of it. Whilst that is true, it is not a justification for the present rule which fails altogether to address the position of those such as this appellant whose long residence is such that they are in reality "home grown" students. As Lady Hale observes, there is no sign that the Department did address this cohort at any stage, although it has done so since through the evidence of Mr Williams, referred to above. One can understand the difficulties of the Department, which had its eye in part on eliminating the entirely anomalous "failed asylum seeker" position exposed in *Arogundade*, but infringement of Convention rights has resulted, even if accidentally.

68. It follows that I agree that the appellant is entitled to the declaration of this court that the settlement rule infringes her Convention rights because the discrimination involved has not been justified. Since it is for the Secretary of State to devise a rule which does not thus infringe, it is of course open to him to adopt one which incorporates an elastic "exceptional case" discretion. But for my part I am wholly satisfied that if he should elect not to include such a discretion, that decision could not result in any infringement of Convention rights. That is the qualification to which I referred at the outset of this judgment, and which seems to me to be called for.

LORD SUMPTION AND LORD REED: (dissenting)

69. The position of persons whose legal right to be in the United Kingdom has not been definitively determined gives rise to difficult problems when it comes to deciding on the conditions of eligibility for state financial support. There are a number of considerations, financial, economic, administrative and political, which can point in different directions. No solution is satisfactory from every point of view or equally appropriate for every kind of support. Under section 22 of the Teaching and Higher Education Act 1998, the conditions of eligibility for student loans are

determined by the Secretary of State by regulation. In our opinion the current regulations represent a lawful policy choice by the Secretary of State and a proper exercise of his statutory powers. Other criteria could have been chosen. There is room for argument about which would have been the best choice. But within broad limits, which have not been exceeded in this case, these are matters for the Secretary of State, who is politically responsible for his decisions about them. The Court of Appeal recognised that they were beyond the proper limits of the competence of the courts, and for our part we would have upheld their decision and dismissed the present appeal. Since a majority of the court takes a different view, we will be as brief as we may in explaining our reasons.

The English legislative framework

70. In England, direct public financial support to students in higher education has never been dependent upon nationality. But except in the case of refugees and persons entitled under EU law to be treated as favourably as nationals, the criteria for eligibility have always included a sufficient and enduring connection with the United Kingdom. Under the system of discretionary state scholarships introduced by the Education Act 1944, the practice was to treat all persons ordinarily resident in England and Wales as eligible. This principle became statutory when a more comprehensive system of grants was introduced under the Education Act 1962. Regulations under that Act fixed the period of ordinary residence required at three years. A significant change to the criteria was made in 1997, when the Education (Mandatory Awards) Regulations (SI 1997/431) introduced an additional requirement of "settlement" which depended on the applicant's immigration status. The Regulations adopted the definition of settlement in the Immigration Act 1971. Section 33(2A) of that Act defined a person as "settled" if he was "ordinarily resident in [the United Kingdom] without being subject under the immigration laws to any restriction on the period for which he may remain". In other words, he had to have indefinite leave to remain. These criteria were retained when the Teaching and Higher Education Act 1998 introduced tuition fees and began the progressive replacement of student grants with loans. This remains the position today.

71. The current regulations are the Education (Student Support) Regulations 2011 (SI 2011/1986). Schedule 1, paragraph 2 makes it a condition of eligibility that the applicant should be (i) settled in the United Kingdom, within the meaning of section 33(2A) of the Immigration Act 1971; and (ii) ordinarily and lawfully resident in the United Kingdom at the beginning of the academic year and for three years before that. Under Schedule 1, paragraph 2 of the Education (Fees and Awards) (England) Regulations 2007 (SI 2007/779), the same criteria govern eligibility to be charged fees at the controlled rates for home and EU students, with the result that those who are ineligible for a student loan will usually also pay the substantially higher fees.

72. The immigration status of applicants for student loans is not a matter for the Department of Business, Innovation and Skills, which is responsible for higher education, but for the Home Office and the UK Border Agency. The Home Office grants leave to remain in the United Kingdom outside the Immigration Rules for limited periods on a discretionary basis. According to its current guidance document, published in May 2014, this power is used "sparingly" in limited categories of case, on what can broadly be described as humanitarian grounds. The practice has now been largely incorporated in the Immigration Rules, which provide for the grant of limited leave to remain for standard periods, generally three years until 2013 and thirty months thereafter. Discretionary or limited leave to remain is in principle renewable. Those such as Ms Tigere, who first obtained discretionary leave before 9 July 2012, will become entitled to apply for indefinite leave to remain after six years of discretionary leave. Those who first obtained it after that date must, under the current policy, wait for ten years. The Home Office has a discretion to accelerate the timetable in individual cases, but its policy is not to do so for the purpose of enabling an applicant to qualify for financial support for higher education.

Article 14 of the Human Rights Convention

73. Article 2 of the First Protocol to the Human Rights Convention provides that "no person shall be denied the right to education". It is well established that the negative formulation of article 2 means that it does not import a right to public financial support: *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252, at para B3. But such public support as is available must be offered on a Convention-compliant basis. In particular, article 14 of the Convention prohibits discrimination in the enjoyment of the rights within the scope of the Convention on grounds of "sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". These rights include the right not to be denied education. The same principle applies as regards nationals of other member states under EU law, by virtue of TFEU article 18.

74. The current eligibility criteria unquestionably discriminate on the ground of immigration status. The Strasbourg court has accepted that a person's immigration status can be an "other status" for the purpose of article 14: *Bah v United Kingdom* (2011) 54 EHRR 773, paras 45-46. But it also made it clear that, because immigration status is not an immutable characteristic of the individual affected, the state should be accorded a correspondingly wide margin of appreciation when determining whether discrimination based upon that status is justifiable and proportionate to its objective:

> "The nature of the status upon which differential treatment is based weighs heavily in determining the scope of the margin of appreciation

> to be accorded to Contracting States. ... Immigration status is not an inherent or immutable personal characteristic such as sex or race, but is subject to an element of choice. ... While differential treatment based on this ground must still be objectively and reasonably justified, the justification required will not be as weighty as in the case of a distinction based, for example, on nationality. Furthermore, given that the subject matter of this case – the provision of housing to those in need – is predominantly socio-economic in nature, the margin of appreciation accorded to the Government will be relatively wide (see the Grand Chamber judgment in *Stec v United Kingdom* (2006) 43 EHRR 1017, para 52)." (para 47)

75. Student loans are provided out of public funds on terms which are much more advantageous to students than any commercial alternative. They are a form of state benefit. Such benefits are almost invariably selective and the criteria for selection necessarily involve decisions about social and economic policy and the allocation of resources. For this reason, discrimination in their distribution gives rise to special considerations in the case law of the Strasbourg court. The test is to be found in the decision of the Grand Chamber of the European Court of Human Rights in *Stec v United Kingdom*, at para 52:

> "… a wide margin is usually allowed to the state under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the court will generally respect the legislature's policy choice unless it is 'manifestly' without reasonable foundation."

76. Commenting on this test in *R (RJM) v Secretary of State for Work and Pensions* [2009] AC 311, Lord Neuberger (with whom Lord Hope, Lord Walker and Lord Rodger agreed) remarked on its practical implications, observing that

> "the fact that there are grounds for criticising, or disagreeing with, these views does not mean that they must be rejected. Equally, the fact that the line may have been drawn imperfectly does not mean that the policy cannot be justified. Of course, there will come a point where the justification for a policy is so weak, or the line has been drawn in such an arbitrary position, that, even with the broad margin of appreciation accorded to the state, the court will conclude that the policy is unjustifiable."

The test was reviewed and reaffirmed by this court in *Humphreys v Revenue and Customs Comrs* [2012] 1 WLR 1545, at paras 15-21 (Baroness Hale). It has recently been applied by this court in *R (SG and others) v Secretary of State for Work and Pensions (Child Poverty Action Group intervening)* [2015] 1 WLR 1449, at paras 11, 69 (Lord Reed).

77. Lady Hale suggests that in the context of education, the test is not whether the justification for discrimination in the provision of state financial support was "manifestly without foundation" but a different and more exacting test. In our opinion, there is no justification for this critical departure from a test which has been consistently endorsed by the Strasbourg court and at the highest level by the courts of the United Kingdom. There is no principled reason why state benefits in the domain of education should be subject to any different test from equally important state benefits in other domains. The problems associated with the judicial scrutiny of criteria for the award of selective benefits are the same. The "manifestly without foundation" test was adopted in *Stec* notwithstanding that it was a sex discrimination case, a context in which "very weighty reasons" have always been required: see para 52. It has been applied by the Strasbourg court to discrimination in other contexts, including the provision of housing, affecting the applicant's right under article 8 to respect for her private and family life (*Bah v United Kingdom* (2012) 24 EHRR 773), and the grant of leave to enter the United Kingdom to the spouses of immigrants, again affecting article 8 rights (*Hode and Abdi v United Kingdom* (2012) 56 EHRR 960). It was applied by this court to basic subsistence benefits in *R (SG and others) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449, notwithstanding the indirect effect on the welfare of children of the gender discrimination considered in that case: see paras 81-91. The majority has not advanced a single reason in support of abandoning it in the case of state financial support for education except that the words "manifestly without foundation" do not appear in the judgment of the Strasbourg court in *Ponomaryov v Bulgaria* (2011) 59 EHRR 799, a case in which the nature of the test was not discussed and does not appear to have been in issue. We will return to *Ponomaryov* below. For our part, we would accept that the more fundamental the right which is affected by discrimination in the provision of financial support, the readier a court may be to find that the reasons for discrimination are "manifestly without foundation". But to discard the test would go well beyond anything that the Strasbourg jurisprudence requires.

78. The Convention refers generally to education, but the limits of what is justifiable in the distribution of financial support by the state are not necessarily the same at every level of the educational system. In England, full-time education is compulsory and available free in state institutions to the age of 17 (18 from September 2015). University education is not compulsory but a matter of choice. And it is not free but fee-based. According to the most recent figures published by the Department for Business, Innovation and Skills, in the academic year 2012/13 the Higher Education Initial Participation Rate among English-domiciled people

aged 17 to 30 was 43%. The corresponding figure is 24% for 18-year-olds, Ms Tigere's age at the time of her first application in January 2013. University education is an aspiration for very many young people. It has a high cultural and economic value. But it is not indispensable to social or economic participation, as primary and secondary education are. Still less is it indispensable to social or economic participation that an applicant should be able to go to university at the age of 18 or 19, instead of at the age of 23 when Ms Tigere seems likely to obtain indefinite leave to remain. The same figures suggest that 12%, ie rather more than a quarter of the 43%, are aged between 20 and 30 when they go to university.

79. Considerations of this kind, which apply in many if not all countries of the Council of Europe, were central to the analysis of the European Court of Human Rights in *Ponomaryov v Bulgaria* 59 EHRR 779. The case concerned a rule of Bulgarian law which limited the provision of free secondary education to Bulgarian nationals and those with Bulgarian residence permits. Others were required to pay. This was held to violate article 14 of the Convention in the particular circumstances of the applicants' case. For present purposes, its significance is that the European Court of Human Rights distinguished between discrimination in financial provision on grounds of national origin, according to the level of education involved and its significance for social participation. The court began by observing (para 54) that

> "a state may have legitimate reasons for curtailing the use of resource-hungry public services – such as welfare programmes, public benefits and health care – by short-term and illegal immigrants, who, as a rule, do not contribute to their funding."

It went on to point out that this principle could not be applied to education without qualifications, partly because education was specifically protected by article 2 of the First Protocol and partly because of its fundamental cultural significance (para 55). However, the force of these considerations was not the same at every level. The court observed, at para 56:

> "at the university level, which to this day remains optional for many people, higher fees for aliens - and indeed fees in general - seem to be commonplace and can, in the present circumstances, be considered fully justified. The opposite goes for primary schooling, which provides basic literacy and numeracy - as well as integration into and first experiences of society - and is compulsory in most countries."

Accordingly, the margin of appreciation increased with the level of education. That approach was endorsed by the Grand Chamber in *Catan v Moldova and Russia* (2012) 57 EHRR 99, para 140. It is clear from the decision in *Ponomaryov* that the

present case would have been most unlikely to succeed in Strasbourg. That conclusion is fortified by the decision in *Bah v United Kingdom*, where the court cited *Ponomaryov* in support of its conclusion that immigration status was a justifiable basis for differential treatment in the allocation of social housing.

Do the eligibility criteria have a legitimate objective?

80. The formulation of criteria for giving financial support to university students raises a classic question of social and financial priorities. It is common ground between the parties to this appeal that university education has very substantial economic advantages not only for graduates but for the society in which they live and work. That cannot, however, be the only relevant consideration in decisions about its funding. Student loans have a substantial element of public subsidy, currently estimated at about 45% of the total annual outlay. This is because the rate of interest is below the market rate, the loan is only conditionally repayable and not all repayable sums are collectable. There are finite funds available for providing this subsidy, and funding for higher education must itself compete with other potential uses of the money which may also have a high social or economic value. As the Strasbourg court put it in *Ponomaryov*, at para 55, the state "must strike a balance between, on the one hand, the educational needs of those under its jurisdiction, and, on the other, its limited capacity to accommodate them".

81. There is no direct evidence of the thought processes of ministers and officials as they resolved upon the current criteria. This is hardly surprising in the case of a policy which has been in place, in the case of the residence test since 1962 and in the case of the settlement test since 1997. Nor is such evidence necessary. In the first place, a challenge to a public authority's decision under the Convention is not a judicial review of the decision-making process. As Lord Bingham put it in *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, at para 31, "what matters in any case is the practical outcome, not the quality of the decision-making process that led to it"; cf Lord Hoffmann at para 68. Secondly, the objectives of the current eligibility rules for student loans are tolerably clear from the regulations themselves, and from the two witness statements of Paul Williams, Head of Student Funding Policy at the Department of Business, Innovation and Skills. Leaving aside the special cases of refugees and persons protected by EU and international law, the objectives of the current eligibility criteria are (i) to concentrate finite resources on those who (a) have a lawful and close personal connection with the United Kingdom and are therefore more deserving of assistance, and (b) are most likely to remain here permanently and use their enhanced qualifications to the benefit of the economy; and (ii) to do so according to criteria which are based on rules rather than case-by-case discretion, in the interests of clarity, consistency and administrative practicality, and in order to maximise the proportion of available funds that goes to support students as opposed to administering the system. In framing the criteria in substantially their current form in 1997, the Secretary of State cannot possibly have

been unaware that some of those adversely affected would include some young people who were well integrated in British society. That was the obvious consequence of adding to the existing residence test a settlement test based on indefinite leave to remain, and thereby requiring young people of university age to satisfy the extended residence requirement imposed by the immigration authorities.

82. It is common ground that it is in principle legitimate for the state to prioritise funding to those who can be shown to have a genuine, substantial and enduring connection with British society. The residence test and the settlement test are both approximate measures of the strength of that connection. Although the majority seeks to distinguish between the two tests, both of them in reality depend on a minimum period of past lawful residence, three years in the case of the residence test and six in the case of the settlement test. The settlement test serves in addition as a measure of the connection's likely permanence, which not only implies a closer connection with Britain but increases the economic value of the applicant's university education to society as a whole.

83. *R (Bidar) v Ealing London Borough Council* (Case C-209/03) [2005] QB 812 concerned a French national who had had been educated for four years in the UK secondary education system but was refused a maintenance grant to study at university under an earlier version of the same eligibility criteria. The criteria were challenged as constituting unjustifiable discrimination on grounds of nationality, contrary to what was then article 12 EC. The Grand Chamber of the Court of Justice of the European Union held, at paras 56-57, that even in the case of an EU citizen it was

> "permissible for a member state to ensure that the grant of assistance to cover the maintenance costs of students from other member states does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that state. … In the case of assistance covering the maintenance costs of students, it is thus legitimate for a member state to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that state."

The court accepted that this justified the residence test: para 60. It also accepted (para 61) that the settlement test

> "could admittedly, like the requirement of three years' residence referred to in the preceding paragraph, correspond to the legitimate aim of ensuring that an applicant for assistance has demonstrated a certain degree of integration into the society of that state."

The only reason why the settlement test was rejected was that applicants were unable to satisfy the residence test if at any time in the three year period the applicant had been here wholly or mainly for the purpose of receiving full-time education: see Schedule 1, paragraph 2(1)(d). The effect of this requirement, as the court pointed out (para 18), was that "a national of another member state cannot, in his capacity as a student, obtain the status of being settled in the United Kingdom". *Bidar* was distinguished on this ground in *Förster v Hoofddirectie van de Informatie Beheer Groep* (Case C-158/07) [2009] 1 CMLR 32. The imposition under Dutch law of a requirement of five years' prior residence in the Netherlands was held to be justified because the qualification was attainable by someone who had come to the Netherlands to study.

84. Paragraph 2(1)(d) of Schedule 1 has since been modified to make it inapplicable to students from other EU member states. Whether its continued application to nationals of non-EU states is lawful is not a question that arises on this appeal, because Ms Tigere has never been here wholly or mainly for the purpose of receiving full-time education. Unlike Mr Bidar, she can acquire settled status, albeit only after six years' lawful residence.

85. The qualification that periods of unlawful residence should be excluded from the qualifying period of residence for the purpose of the Immigration Rules was established by the decision of the House of Lords in *R v London Borough of Barnet, Ex p Shah* [1983] 2 AC 309. The statement of principle in the leading speech of Lord Scarman at 340E, 349C, is *obiter*, but has always been treated as authoritative and has recently been endorsed by the Court of Appeal in *R (Arogundade) v Secretary of State for Business, Innovations and Skills* [2013] ELR 466. The reasons were that unlawful residence could not be regarded as "ordinary" residence, and that a person cannot rely on his own unlawful act to qualify himself for an advantage. These were reasons for having such a rule even at a time when it was not expressly stated in the Regulations. But the justification in Convention terms of applying the rule to the criteria of eligibility for student loans is altogether more straightforward. The financial obligations of the state to those who are not its citizens and ought not to be on its territory cannot be of the same order as those which it owes to others. They are less deserving of support when it comes to claiming on the finite funds available for the purpose.

Proportionality and "bright-line rules"

86. In these circumstances, the real issue on this appeal turns on the second of the two objectives which we have summarised at para 81 above, namely the use of a "bright-line rule" to distinguish between those who do and those who do not qualify. The appellant's case, which is substantially accepted by the majority, is that many young people who do not satisfy the eligibility criteria, because they have not

been lawfully resident in the United Kingdom for the requisite period, or because they have not been granted the right to remain in the United Kingdom indefinitely, nevertheless have a connection with the United Kingdom which is just as strong as that of others who do satisfy them. They may have spent most of their lives here, attending British schools. They may have no subsisting social or cultural connection with any other country. Their connection with the United Kingdom, it is said, is not only just as strong, but is bound to endure after the expiry of their discretionary leave, because article 8 of the Convention would make it impossible to deport them. It follows, so the argument goes, that the distinction fails the test of proportionality. It is disproportionate, first, because it cannot be rationally related to the professed objective of requiring applicants to have a sufficient and enduring connection with the United Kingdom; and, secondly, because a more inclusive rule would not unreasonably compromise that objective. Both of these are integral parts of the test of proportionality: see *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, at para 20 (Lord Sumption), at para 73 (Lord Reed). In the present context they are in reality different ways of saying the same thing.

87. This argument has been cogently advanced by Ms Mountfield QC, who appeared for the appellant, and is accepted by the majority. But in our opinion it is fallacious.

88. Those who criticise rules of general application commonly refer to them as "blanket rules" as if that were self-evidently bad. However, all rules of general application to some prescribed category are "blanket rules" as applied to that category. The question is whether the categorisation is justifiable. If, as we think clear, it is legitimate to discriminate between those who do and those who do not have a sufficient connection with the United Kingdom, it may be not only justifiable but necessary to make the distinction by reference to a rule of general application, notwithstanding that this will leave little or no room for the consideration of individual cases. In a case involving the distribution of state benefits, there are generally two main reasons for this.

89. One is a purely practical one. In some contexts, including this one, the circumstances in which people may have a claim on the resources of the state are too varied to be accommodated by a set of rules. There is therefore no realistic half-way house between selecting on the basis of general rules and categories, and doing so on the basis of a case-by-case discretion. The case-law of the Strasbourg court is sensitive to considerations of practicality, especially in a case where the Convention confers no right to financial support and the question turns simply on the justification for discrimination. In *Carson v United Kingdom* (2010) 51 EHRR 369, which concerned discrimination in the provision of pensions according to the pensioner's country of residence, the Grand Chamber observed, at para 62:

> "… as with all complaints of alleged discrimination in a welfare or pensions system, it is concerned with the compatibility with article 14 of the system, not with the individual facts or circumstances of the particular applicants or of others who are or might be affected by the legislation. Much is made in the applicants' submissions and in those of the third-party intervener of the extreme financial hardship which may result from the policy … However, the court is not in a position to make an assessment of the effects, if any, on the many thousands in the same position as the applicants and nor should it try to do so. Any welfare system, to be workable, may have to use broad categorisations to distinguish between different groups in need … the court's role is to determine the question of principle, namely whether the legislation as such unlawfully discriminates between persons who are in an analogous situation."

This important statement of principle has since been applied by the European Court of Human Rights to an allegation of discrimination in the distribution of other welfare benefits such as social housing: *Bah v United Kingdom* at para 49. And by this court to an allegation of discrimination in the formulation of rules governing the benefit cap: *R (SG and others) v Secretary of State for Work and Pensions (Child Poverty Action Group intervening)* [2015] 1 WLR 1449, at para 15 (Lord Reed).

90. The second reason for proceeding by way of general rules is the principle of legality. There is no single principle for determining when the principle of legality justifies resort to rules of general application and when discretionary exceptions are required. But the case-law of the Strasbourg court has always recognised that the certainty associated with rules of general application is in many cases an advantage and may be a decisive one. It serves "to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case by case basis": *Evans v United Kingdom* (2007) 46 EHRR 728, at para 89. The Court of Justice of the European Union has for many years adopted the same approach to discrimination cases, and has more than once held that where a residence test is appropriate as a test of eligibility for state financial benefits, it must be clear and its application must be capable of being predicted by those affected: *Collins v Secretary of State for Work and Pensions* (Case C-138/02) [2004] 2 CMLR 8, at para 72, *Förster v Hoofddirectie van de Informatie Beheer Groep* (Case C-158/07) [2009] 1 CMLR 861, at para 56. As Advocate-General Geelhoed acknowledged in considering these very regulations in *Bidar* (para 61),

> "Obviously a member state must for reasons of legal certainty and transparency lay down formal criteria for determining eligibility for maintenance assistance and to ensure that such assistance is provided to persons proving to have a genuine connection with the national educational system and national society. In that respect, and as the

> court recognised in *Collins*, a residence requirement must, in principle, be accepted as being an appropriate way to establish that connection."

91. The advantages of a clear rule in a case like this are significant. It can be applied accurately and consistently, and without the element of arbitrariness inherent in the discretionary decision of individual cases. By simplifying administration it enables speedy decisions to be made and a larger proportion of the available resources to be applied to supporting students. Young people considering applying to universities need to know whether they will get a student loan or not. The Student Loan Company, which administers the scheme, needs to process a very large number of applications for loans in the relatively short interval between the acceptance of a student by a university and the start of the academic year.

92. None of this is seriously disputed by the appellant. Yet once it is accepted, the challenge cannot be to the application of the eligibility criteria to the appellant. It must be to the eligibility criteria themselves. In the last analysis, the appellant's case depends on the proposition that even on the footing that a rule is required, this particular rule draws the line in the wrong place.

93. In relation to this type of argument, it was noted in *Bank Mellat* at para 75 (Lord Reed) that courts must accord a measure of discretion to the primary decision-maker, and therefore exercise corresponding self-restraint, if there is to be any prospect of legislative and executive choices being respected. As the present case illustrates, it will almost always be possible for the courts to conclude that a more precisely tailored bright line rule might have been devised than the one selected by the body to which the choice has been democratically entrusted and which, unlike the courts, is politically accountable for that choice. But, in the words of Dickson CJ in *R v Edwards Books and Art Ltd* [1986] 2 SCR 713, pp 781-782, the courts are not called on to substitute judicial opinions for legislative or executive ones as to the place at which to draw a precise line. In a case concerned with the allocation of public expenditure in order to fulfil objectives of social and economic policy, the degree of respect paid by the court to the judgment of the legislature or executive, and the consequent width of the discretion afforded to the primary decision-maker, must be substantial. That is reflected in the test of whether the policy choice is manifestly without reasonable foundation.

94. The need to accord a measure of discretion to the legislator when considering the proportionality of general rules has been recognised by the European Court of Human Rights. In its judgment in *Animal Defenders International v United Kingdom* (2013) 57 EHRR 607, concerned with the prohibition on political advertising in this country, the Grand Chamber rejected the argument that a general prohibition was unduly restrictive of freedom of expression, and that a less restrictive rule should

have been adopted. It referred at paras 106-109 to its earlier case law recognising that member states could adopt general measures which applied regardless of the facts of individual cases, even if this might result in individual hard cases; that, in order to determine the proportionality of such a measure, the court must assess the choices underlying it; that it was relevant to take into account the risk of abuse if a general measure were to be relaxed; and that a general measure had been found to be a more feasible means of achieving the legitimate aim than a provision allowing a case by case examination when the latter would give rise to a risk of uncertainty, expense and delay, as well as of discrimination and arbitrariness. It continued (para 110):

> "The central question as regards such measures is not, as the applicant suggested, whether less restrictive rules should have been adopted or, indeed, whether the state could prove that, without the prohibition, the legitimate aim would not be achieved. Rather, the core issue is whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it."

95. In the circumstances of the present case, the argument that the rule which was chosen fell outside the area of discretionary judgment accorded to the Secretary of State appears to us to be particularly difficult to sustain. Wherever the line is drawn, there will be many young people on the wrong side of it whose connection with the United Kingdom will be just as strong and enduring as that of many others who find themselves on the right side. The point may be tested by taking the illustrative example commended by the appellant herself and adopted by Lady Hale and Lord Hughes. Rule 276ADE(1)(v) of the Immigration Rules draws the line in a different place for the purpose of determining the eligibility of persons aged between 18 and 25 to apply for limited leave to remain under article 8 of the Convention on account of their right to private and family life. It authorises applications by those have continuously resided in the United Kingdom for at least half their lives. It is not subject to the exclusion of periods of unlawful residence which apply to the tests of ordinary residence. The adoption of such a test as a criterion for student loans would mean that the present appellant would qualify. But the Secretary of State has to take a broader view and consider the functioning of the system as a whole. The policy considerations relevant to a decision whether to grant limited leave to remain on account of the applicant's article 8 rights are not the same as those which bear on a decision whether to grant financial support for higher education. Moreover, the difficulty, delay and administrative cost of requiring the Student Loan Company to assess evidence of the duration of actual residence, as opposed to the duration of leave to remain, should not be under-estimated. We cannot close our eyes to the fact that candour cannot always be assumed in this field.

96. However, the real objection to proposed alternative tests is more fundamental. They do not resolve the problem which is said to justify them. The adoption of a rule like rule 276ADE(v) would put the cut-off point for eligibility in a different place, but it would be equally open to the objection that it left many young people on the wrong side of it whose connections with the United Kingdom were just as strong and enduring as those on the right side. This is because characteristics such as the strength and enduring character of a person's connection with the United Kingdom are not absolute values but questions of degree. An element of arbitrariness is inherent in any rule-based scheme designed to address that situation. It cannot therefore be a proper objection to say that the line could have been drawn somewhere else where it would have excluded fewer people. The point may be tested by reference to the residence test, which the majority regard as justified. If the sole qualification were the current residence test of three years, some people in the position of the appellant, who is plainly well integrated into British society, would be enabled to qualify; but, correspondingly, eligibility would be extended to many others who were barely integrated at all. There is no one "right" balance between these competing considerations. If the qualifying period of residence were to be extended to six years, it would be difficult to challenge on the ground that the period of lawful residence should have been shorter (a five year period was accepted in *Förster*). Both periods would exclude some people with the same characteristics as those who were included. Yet the effect of a six-year qualifying period would be substantially the same as the settlement test as far as persons in Ms Tigere's position are concerned, since six years' residence would qualify her to apply for indefinite leave to remain.

97. In reality, as Lady Hale's judgment implicitly acknowledges, the appellant is driven to argue that there should not be a bright line rule at all. That appears to us to be the implication of the distinction drawn by Lady Hale between inclusionary and exclusionary rules, and of her suggestion that "an exceptional cases discretion" might be added. As we have explained, and as Lord Hughes acknowledges, a bright line rule, in relation to eligibility for a benefit, is both inclusionary and exclusionary: by defining those who are eligible, it necessarily excludes those who fall outside the definition. A discretion to include persons who fall outside the rule necessitates the consideration of cases on an individual basis in order to determine whether they are exceptional, defeating the purpose of having a bright line rule in the first place.

98. The answer to such arguments is that in a case where a line has to be drawn at some point in a continuous spectrum, proportionality cannot be tested by reference to outlying cases. The Secretary of State estimates that the exclusion of persons with discretionary or limited leave to remain from eligibility for student loans affects about 2,400 people. The appellant suggests that the number is only about 534. Both acknowledge the imprecision of their figures, but on any view it is a small proportion of the cohort of some 1.45m applying for loans annually. In *R (Reynolds) v Secretary of State for Work and Pensions* (reported sub nom. *R (Carson) v Secretary of State*

for Work and Pensions [2006] 1 AC 173, at para 41 Lord Hoffmann (with whom Lord Nicholls, Lord Rodger and Lord Carswell agreed), put the point very clearly in answer to the argument that that the payment of jobseekers' allowances at a lower rate to those under 25 years of age was unjustified, because there was no substantial difference between those just over and just under that age:

> "Mr Gill emphasised that the twenty-fifth birthday was a very arbitrary line. There could be no relevant difference between a person the day before and the day after his or her birthday. That is true, but a line must be drawn somewhere. All that is necessary is that it should reflect a difference between the substantial majority of the people on either side of the line. If one wants to analyse the question pedantically, a person one day under 25 is in an analogous, indeed virtually identical, situation to a person aged 25 but there is an objective justification for such discrimination, namely the need for legal certainty and a workable rule."

99. The argument is not fortified, as it seems to us, by suggesting, as Ms Mountfield did, that the appellant is in substance settled in the United Kingdom because even without indefinite leave to remain she could not be removed consistently with article 8 of the Convention. The argument is that this affects the position because it means that she is likely to remain in the United Kingdom and contribute with her enhanced qualification to the national economy. This seems to us to be a point of some, but limited relevance. In the first place, the likelihood that applicants for student loans will contribute in future to the economy is only one of a number of considerations underlying the current eligibility rules. Secondly, there is a world of difference between a person who has a legal right to remain in the United Kingdom and a person with no such right who nevertheless cannot be deported. Thirdly, while it is probably true that the appellant could not be removed consistently with article 8, there is no reason to believe that it is true of the generality of the people denied student loans under the current eligibility criteria. Article 8 does not automatically protect persons resident here from deportation as illegal immigrants. That will depend on a careful analysis of the infinitely variable facts of individual cases. Relevant considerations include, in particular, the duration of the applicant's residence, the significance of any family or social relationships that he has formed in the United Kingdom, the circumstances in which those relationships were formed, the availability of any alternative countries of residence where it would be reasonable to expect the applicant to reside, the best interests of any children involved, and the strength of any special justification advanced by the executive.

100. This court has always emphasised that however intensive the judicial scrutiny of a public authority's decision, it is not open to the courts to take the decision-making function out of the hands in which Parliament has placed it and assume that function themselves: see in particular *R (Corner House Research) v Director of the*

Serious Fraud Office [2008] UKHL 60; [2009] AC 756, at para 41 (Lord Bingham), *Bank Mellat v HM Treasury (No 2)* [2014] UKSC 39, [2014] AC 700, at paras 21 (Lord Sumption), 71, 93 (Lord Reed); *R (Lord Carlile of Berriew QC and ors) v Secretary of State for the Home Department* [2014] UKSC 60; [2014] 3 WLR 1404, paras 31, 34 (Lord Sumption). In a case where a range of rational and proportionate policy options is open to the decision-maker, the decision which provides the best allocation of scarce resources is a question of social and economic evaluation. These are matters of political and administrative judgment, which the law leaves to those who are answerable to Parliament. They are not questions for a court of law. It is enough to justify the Secretary of State's choice in this case that discrimination on the basis of residence and settlement are not "manifestly without foundation".