Neutral Citation Number: [2019] EWHC 452 (Admin)

Case No: CO/598/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/03/2019

Before:

MR JUSTICE MARTIN SPENCER

- -

Between:

R (Joint Council for the Welfare of Immigrants)	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**
- and –	
(1) Residential Landlords Association	
(2) Equality and Human Rights Commission	
(3) Liberty	
	Intervenors

- -

Miss Phillipa Kaufmann QC and Mr Jamie Burton (instructed by **Leigh Day)**
for the **Claimant**
Mr David Pievsky and Mr David Lowe (instructed by **Government Legal Department**)
for the **Defendant**
Mr Justin Bates and Ms Brooke Lyne (instructed by **Anthony Gold Solicitors**)
for **Residential Landlords Association**
Mr Nick Armstrong for **Equality and Human Rights Commission,**
by written submissions only
Mr Martin Westgate QC and Mr James Kirk and Mr Daniel Clarke (instructed by **Liberty**)
for the **Intervenors**

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

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Mr Justice Martin Spencer:

Introduction

1. Would-be migrants seek to come to this country because of, among other things, their perception that we live in a fair, free and democratic society founded upon the rule of law, a society where they will not be persecuted but allowed to flourish. Lord Nicholls of Birkenhead, in *Ghaidan v Godin-Mondoza* [2004] 2 AC 557, movingly articulated why discrimination is anathema to all that we hold precious in our society:

> "Discrimination is an insidious practice. Discriminatory law undermines the rule of law because it is the antithesis of fairness. It brings the law into disrepute. It breeds resentment. It fosters an inequality of outlook which is demeaning alike to those unfairly benefited and those unfairly prejudiced. Of course all law, civil and criminal, has to draw distinctions. One type of conduct, or one factual situation, attracts one legal consequence, another type of conduct or situation attracts a different legal consequence. To be acceptable these distinctions should have a rational and fair basis. Like cases should be treated alike, unlike cases should not be treated alike. The circumstances which justify two cases being regarded as unlike, and therefore requiring or susceptible of different treatment, are infinite. In many circumstances opinions can differ on whether a suggested ground of distinction justifies a difference in legal treatment. But there are certain grounds of factual difference which by common accord are not acceptable, without more, as a basis for different legal treatment. Differences of race or sex or religion are obvious examples. Sexual orientation is another. This has been clearly recognised by the European Court of Human Rights: see, for instance, Fretté v France [2003] 2 FLR 9, 23, para 32. Unless some good reason can be shown, differences such as these do not justify differences in treatment. Unless good reason exists, differences in legal treatment based on grounds such as these are properly stigmatised as discriminatory."

For legislation to be castigated as discriminatory is therefore a serious accusation, and is to be treated seriously by any court before which such an accusation is made.

2. Pursuant to permission granted by Mr Justice Jay on 6 June 2018, the Joint Council for the Welfare of Immigrants (the Claimant) seeks judicial review by way of a declaration that, pursuant to Section 4 of the Human Rights Act 1998, Sections 20 – 37 of the Immigration Act 2014 are incompatible with Articles 14 and 8 of the European Convention on Human Rights ("ECHR"). An order is further sought quashing the alleged decision of the Secretary of State to extend the scheme to Scotland, Wales and Northern Ireland on the grounds that the scheme gives rise to an inherent and unacceptable risk of illegality and because the decision breaches Section 149 of the Equality Act 2010, alternatively a declaration that a decision by the Defendant to commence the scheme in Scotland, Wales or Northern Ireland without further evaluation of its discriminatory impact would be irrational and a breach of Section 149 of the Equality Act 2010.

3. The following interested parties have been given leave to intervene: The Residential Landlords Association ("RLA"), the Equality and Human Rights Commission, and Liberty (formerly the National Council for Civil Liberties).

4. The case concerns one aspect of the "hostile environment" (or "compliant environment") established by the Government to encourage irregular migrants to leave the UK. By the relevant sections of the Immigration Act 2014, a scheme was set up (hereinafter referred to as "the Scheme") imposing obligations on landlords to take measures to ensure that they do not provide private accommodation to disqualified persons. The aim of the Scheme is that persons who are in the UK illegally should not be able to obtain residential tenancies from landlords. A landlord is forbidden to rent a property to a disqualified person, namely a person other than a British, EEA or Swiss national who needs but does not have leave to enter or remain in the UK. The landlord must (to ensure he avoids a civil penalty) either request, obtain, check and copy the relevant identity documents before renting the property, or instruct an agent responsible for doing those things. Sometimes, a single document will suffice such as a passport, a document giving indefinite leave to remain or a biometric residence permit. However, for prospective tenants who do not have one of those documents, there is a longer list of alternative documents, any two of which can be provided in combination including a driving licence, a letter from an employer, a benefits document and so forth. Landlords who authorise disqualified persons from abroad to rent or occupy accommodation, knowing or having reasonable cause to believe that they are disqualified, are liable to be fined and/or imprisoned unless they can demonstrate that they undertook the prescribed checks and, where necessary, informed the Home Office of the disqualified person's occupation of the premises. Where a landlord is made aware that an occupier does not have the right to rent, the landlord is required to take reasonable steps to letting which may include steps to repossess the property.

5. The purpose of the Scheme is to tackle and discourage illegal residence and reduce the number of tenancies available to those who are in the UK illegally, thereby easing pressure on the housing market for lawful residents as well as pressures on other public services and increasing employment opportunities for lawful residents, and to enable rogue landlords who deliberately exploit the situation of illegal immigrants to be penalised or prevented from doing so.

6. The nature of the challenge is that the net has been cast too wide and the effect of the Scheme has been to cause landlords to commit nationality and/or race discrimination against those who are perfectly entitled to rent with the result that they are less able to find homes than (white) British citizens. This is said to have been an unintended effect of the Scheme and that, in implementing the Scheme, landlords are acting in a way which is discriminatory on grounds of both nationality and race, not because they <u>want</u> to be discriminatory but because the Scheme <u>causes</u> them to be discriminatory as a result of market forces. This challenge has been brought because, so it is said, the Defendant Department has refused to carry out its own evaluation of the Scheme or put in place any effective system for monitoring it in the face of what is said to be compelling evidence gathered by the Claimant and other non-governmental organisations of the discriminatory effect of the Scheme. The challenge is said to be brought in the public interest to ensure that the rule of law is vindicated in an area of obviously pressing public interest.

7. This judgment is set out in the following sections:

A: Background and history

8. On 3 July 2013, the Home Office issued a consultation document entitled "Tackling illegal immigration in privately rented accommodation". The then Home Secretary, Theresa May, stated in her foreword to the consultation document as follows:

> "The [Immigration] Bill will make it more difficult for illegal migrants to live in the UK and ensure that legal migrants make a proper financial contribution to our key public services. It is vital that we work together across government so that our immigration policy is built into our benefits system, our health system, our housing system and other services.
>
> This consultation seeks views on our proposals to create a new requirement on landlords to conduct immigration checks on tenants, with penalties for those who provide rented accommodation to illegal non-EEA migrants in breach of the new requirements."

9. The Claimant submitted its response to the consultation paper in August 2013 and immediately made it clear that it had concerns that the proposals would lead to discrimination and racism. The response stated:

> "JCWI's main concern is that these proposals are very likely to lead to racial profiling and discrimination against BME [Black and Minority Ethnicity] prospective tenants. … [The proposed immigration status checks] will serve to encourage indirect discrimination and in many cases direct discrimination. It will be far easier for a landlord to let his or her property to a British/EU national who will simply have to produce their passport to confirm status. The consultation itself quotes the Department for Communities and Local Government study that indicates more than half of those in private rented accommodation are non-British or Irish residents and that most new migrants are housed in the private rental sector. Thus, migrants will be disproportionately affected by these proposals.
>
> Landlords fearful of breaking the law or facing a fine will find it far easier to avoid renting to anybody who could have a complicated immigration history or anybody whose status is

> not immediately clear. This will undoubtedly result in BME individuals losing out on tenancies and increasing their chances of being made homeless."

10. On 25 September 2013, the Department issued its Impact Assessment document, Section F of which set out and considered the perceived risks of the proposed Scheme. One of the risks identified was that "Heavier penalties may provoke discrimination against those perceived to be a higher risk based on an unfounded belief that the person may be a foreign national". This risk was said to be met by legal migrants and landlords being supported by the Home Office through on-line guidance and advice services to minimise the risk that legal migrants might be viewed as a greater risk than prospective tenants from within the settled population and it was said that landlords who wished to check that the requirements had been met would be supported through telephone advice. In Annex 2 to the Impact Assessment, the Department set out a summary of the consultation responses which included the following:

> "d. Discrimination
>
> The consultation gave a clear message that discrimination against foreign born tenants is unacceptable. Particular concern was raised that the regulations would result in discrimination motivated not because of overt prejudice but because of administrative convenience where some people are more likely than others to have readily available documentation. The Government is equally concerned to address the risk that the new checking duty will result in unlawful discrimination."

This risk was said to be addressed by the provision of a statutory non-discrimination code "providing clear guidance on the steps landlords must follow to avoid unlawful discrimination, which may be taken into account by tribunals considering claims of unlawful discrimination." The Department also said that it would put into place administrative support and guidance for landlords.

11. Thus, before the legislation was introduced, it can be seen that the Claimant, among others, drew to the Government's attention its concerns that the Scheme would cause unlawful discrimination. The Government proceeded to implement the Scheme fully aware of those concerns and purportedly concerned to address the risk of unlawful discrimination. This awareness is further highlighted by a memorandum drafted by the Department in October 2013 dealing with the relationship between the Immigration Bill and the ECHR. In this memorandum, the Government recognised that the prohibition on the renting of property for occupation by a disqualified person and associated scheme for civil penalty potentially engaged Article 8 ECHR. It stated:

> "96. … while there is no right under Article 8 ECHR to be provided with housing (*Chapman v UK* [2001] 33 EHRR 18), the prohibition will prevent individuals from accessing the private rented sector in order to rent their only or main residence, and will further prevent individuals from living together at privately rented premises as their only or main

> residence where one of them is disqualified from occupation by reason of their immigration status. It therefore has the potential to impact on an individual's right to respect for his home, private and family life.
>
> 97. In relation to respect for an individual's home there will be no obligation on a landlord to evict an individual once in occupation. While an individual who is disqualified will not be able to establish a home in the private rented sector, if he has taken up residence at a time when he was lawfully present in the United Kingdom, the restriction will not result in the loss of a home once established."

(I interpose to comment that this has now changed as a result of the changes in the Scheme introduced by the Immigration Act 2016 which does impose an obligation on a landlord to take reasonable steps to end the letting including in some cases evicting an individual once in occupation, thus arguably strengthening the engagement with Article 8.) The memorandum then continues:

> "98. The restriction on establishing a residence in the private rented sector as one's only or main residence prevents the individual living his own personal life as he chooses and potentially prevents him from living with members of his family and in that respect engages his right to respect for private and family life. However, the restriction can be justified on the basis that it is both necessary and proportionate in pursuit of the legitimate aim of immigration control. …
>
> 99. The restriction will also impact on the right to respect for family life enjoyed by both the individuals themselves, and also British citizens, EEA nationals and those with an unlimited right to reside in the United Kingdom who will be prevented from arranging accommodation for themselves and any adult family member who is disqualified from occupation. This engages Article 8 and arguably Article 14. In relation to Article 8, the restriction can be said to be justified and proportionate for the reasons stated above. In relation to Article 14, the margin of appreciation is relatively wide given the differential treatment is based on immigration status, which involves an element of choice and the socio-economic nature of the subject matter (see *Bah v UK* [2012] 54 EHRR 21 paragraph 47). The restrictions here are therefore justified for the reasons set out above.
>
> 100. The Department is therefore satisfied that these provisions are compatible with Articles 8 and 14."

The acknowledgement by the Department in the memorandum that Article 8 is engaged is important for present purposes because it is the Defendant's case that not only do the facts of this case not engage Article 8 but do not even come within the ambit of Article 8.

12. A further document issued by the Home Office is "The Government's Response to the Consultation" dated 10 October 2013. This included, at Annex C, a Policy Equality Statement. This recorded that 58% of respondents to the consultation process had expressed concern that the policy might lead to greater racial discrimination including a perceived risk that landlords might discriminate on the basis of administrative convenience. It had been stated that:

> "The new rules might lead landlords to discriminate against people who they perceive to be foreign rather than conduct proper checks to ascertain their actual status."

In answer, the Department stated:

> "The level of checks required are *de minimis* - usually to the extent of copying one document with no need for further action. The Home Office will make regulations specifying the document types that must be checked and copied, and the document list has been constructed so that it reflects existing checking best practise by landlords and encompasses documents which are commonly held by the vast majority of those entitled to live in the UK. A Code of Practice will provide guidance in assisting landlords to conduct such checks without breaching equality legislation. The need to treat all tenants equally will be reinforced in guidance and tools provided for landlords. …
>
> Respondents to the consultation raised concerns that [non-EEA migrants who are not settled here] may suffer administrative discrimination, where landlords may consider that conducting more complex checks will prove more burdensome. The Government recognises that extra support may be required in some circumstances to ensure that legitimate visitors and legal migrants are not barred from the housing market (for example, the Home Office is committed to providing a service that will deal with general telephone enquiries asking for advice and allow landlords to request swift confirmation of a person's status).
>
> Where migrants with outstanding applications or appeals know that they need to undergo a landlord check in advance, the Home Office will provide a pre-certification service for these migrants, enabling them to obtain the documentation they need upfront. The Home Office also intends to amend the immigration application process to allow applicants to retain their biometric residence permit when making an immigration application. This will allow the migrant to show evidence of their identity, nationality and immigration status to a landlord [and] enable the landlord to carry out a speedy and accurate check with the Home Office on the person's current status."

Thus, whilst recognising that the proposed legislation potentially engaged Articles 8 and 14 ECHR, and alive to the risk that the Scheme would cause unlawful discrimination, the Government proceeded to enact the legislation through Parliament.

B: The Immigration Act 2014 ("IA 2014")

13. The IA 2014 received Royal Assent on 14 May 2014 and was implemented as a trial or pilot scheme in the West Midlands from 1 December 2014 covering properties in Birmingham, Dudley, Sandwell, Walsall and Wolverhampton. The Scheme applies to residential tenancy agreements including licences not otherwise excluded from its remit, as defined in Section 20. Section 21 disqualifies a person from occupying premises under a residential tenancy agreement ("RTA") if he is not a relevant national and does not have a right to rent, providing as follows:

> "(1) For the purposes of this Chapter a person ("P") is disqualified as a result of their immigration status from occupying premises under a [RTA] if –
> (a) P is not a relevant national, and
> (b) P does not have a right to rent in relation to the premises.
> (2) P does not have a 'right to rent' in relation to premises if –
> (a) P requires leave to enter or remain in the United Kingdom but does not have it
> …
> (3) But P is to be treated as having a right to rent in relation to premises (in spite of subsection (2)) if the Secretary of State has granted P permission for the purposes of this Chapter to occupy premises under a [RTA].
> (4) …
> (5) In this section 'relevant national' means –
> (a) A British citizen
> (b) A national of an EEA state other than the United Kingdom or
> (c) A national of Switzerland."

14. Section 22 of IA 2014 prohibits landlords from authorising disqualified adults to occupy premises under a RTA:

> (1) A landlord must not authorise an adult to occupy premises under a residential tenancy agreement if the adult is disqualified as a result of their immigration status.
>
> (2) A landlord is taken to "authorise" an adult to occupy premises in the circumstances mentioned in subsection (1) if (and only if) there is a contravention of this section.
>
> (3) There is a contravention of this section in either of the following cases.
>
> (4) The first case is where a [RTA] is entered into that, at the time of entry, grants a right to occupy premises to –
>
> (a) A tenant who is disqualified as a result of their immigration status,
>
> (b) Another adult named in the agreement who is disqualified as a result of their immigration status,

(c) Another adult not named in the agreement who is disqualified as a result of their immigration status (subject to subsection (6)).

(5) …

(6) There is a contravention as a result of subsection (4) (c) only if –

(a) reasonable enquiries were not made of the tenant before entering into the agreement as to the relevant occupiers, or

(b) reasonable enquiries were so made and it was or should have been apparent from the enquiries that the adult in question was likely to be a relevant occupier."

15. By sections 23 and 33A of the IA 2014, a contravention by a landlord (or an agent acting on his behalf) of section 22 can give rise to both a civil penalty notice and a criminal offence whereby the landlord is liable, on conviction on indictment to up to 5 years' imprisonment and/or an unlimited fine (the penalties were strengthened by the Immigration Act 2016).

16. By Section 33D of the IA 2014, there is provision for the termination of the RTA where the occupier is disqualified and the Secretary of State has served a Notice of Letting to a Disqualified Person ("NLDP"), Section 33D providing:

> "(1) The landlord under a [RTA] relating to premises in England may terminate the agreement in accordance with this section if the condition in subsection (2) is met.
>
> (2) The condition is that the Secretary of State has given one or more notices in writing to the landlord which, taken together, -
>
> (a) Identify the occupier of the premises or (if there is more than one occupier) all of them, and
>
> (b) state that the occupier or occupiers are disqualified as a result of their immigration status from occupying premises under a [RTA]."

17. The legislation is also reflected in amendments to the Housing Act 1988 and the Rent Act 1977, whereby new grounds for seeking possession have been introduced in respect of tenants or other occupiers of the property who are disqualified from renting under IA 2014.

C: The Codes of Practice

18. In association with the implementation of the Scheme in the West Midlands, the Home Office produced two codes of practice, in force from 1 December 2014: "The

Right to Rent Immigration Checks: Landlords' Code of Practice" and "Avoiding unlawful discrimination when conducting 'right to rent' checks in the private rented residential sector". Clearly, the latter is particularly important for the purposes of this application. It stated, in Part 3:

> "How to avoid race discrimination
>
> As a matter of good practice landlords and their agents should apply the right to rent checks in a fair, justifiable and consistent manner regardless as to whether they believe the prospective tenant to be British, settled or a person with limited permission to be here. Landlords should ensure that no prospective tenants are discouraged or excluded, either directly or indirectly, because of their personal appearance or accent or anything else associated with a person's race. They should not make and act upon assumptions about a person's immigration status on the basis of their colour, nationality, ethnic or national origins, accent, ability to speak English or the length of time they have been resident in the UK. The best way for landlords to ensure that they do not discriminate is to treat all prospective tenants fairly and in the same way, making sure their criteria and practises in this regard are appropriate and necessary.
>
> Prospective tenants should not be treated less favourably if they produce acceptable documents showing a time-limited right to stay in the UK. Once a person who has time-limited permission to stay in the UK has established their initial and ongoing entitlement to stay, they should not be treated less favourably than others even if further right to rent checks are subsequently required, as prescribed by the Scheme and set out in the code of practice. Neither should a landlord treat less favourably a prospective tenant who has the required combination of documents showing their right to rent (for example a driving licence with a long UK birth certificate) but does not have a passport. There should be no need to ask questions about a prospective tenant's immigration status where it is clear that they have permission to stay here. Any subsequent further checks need only establish that the tenant is still here with permission. If a person is not able to produce acceptable documents a landlord should not assume that they are living in the UK illegally. Subject to business requirements, landlords should try to keep the offer of accommodation open in order to provide a prospective tenant the opportunity to produce documents that will demonstrate their right to rent, but they are not obliged to do so."

These codes of practice are referred to in the statement of Parvaiz Asmat served on behalf of the Defendant.

D: Subsequent Events

19. Following the implementation of the pilot scheme in the West Midlands, there was a general election on 7 May 2015 which saw the end of the coalition Government and the return of a Conservative majority Government and on 21 May 2015, the Prime Minister, David Cameron, announced that the Scheme would be rolled out nationwide.

20. On 3 September 2015, the Claimant published its independent evaluation of the Scheme entitled "No Passport No Home". This reflected a survey of landlords and asserted that the Scheme was causing discrimination. It found that in the first seven months the Scheme had resulted in discrimination against people with foreign accents, foreign names and those without British passports. People with complicated immigration status, unclear documents and those who required time to provide relevant documents, were less likely to be considered and accepted for a property as a result of the Scheme despite having a "right to rent". It found evidence that individuals with the right to rent were wrongly refused tenancies. Importantly, 42% of the landlords surveyed said that because of the Scheme they were less willing to let to people without a British passport and 27% said they were reluctant to rent to people who appeared foreign.

21. On 20 October 2015, the Immigration Minister announced that the Scheme would be rolled out across the whole of England on 1 February 2016 (as in fact it was) and, on the same day, the Home Office released its own evaluation of the pilot based on 17 online surveys (with 550 responses, 12 focus groups and 36 1-2-1 interviews and 332 "mystery shopping" encounters (as to which, see further at paragraph 27 below)).

22. On 23 October 2015 the Home Office published a further Policy Equality Statement which summarised the findings of the evaluation as follows:

> "The evaluation found no hard evidence of systematic discrimination towards foreign nationals from letting agents or landlords, or that their access to the housing market was restricted as a result of the Scheme. At an overall level there did not appear to be major differences for White British and BME shoppers in accessing accommodation between the phase 1 location and the comparator area. There was evidence of differences at particular stages of the process of renting a property, although these were not necessarily indicative of discrimination against BME shoppers. A very small number of potentially discriminatory attitudes were reported. Whilst the evaluation did not find hard evidence of systematic discrimination, the government will continue to provide clear guidance on how to avoid acting in this manner … any landlord who discriminates is acting unlawfully and liable to prosecution."

23. The Claimant is highly critical of the Home Office's evaluation of the pilot. For example, only 62 of the 114 landlords surveyed had taken a new tenant since the implementation of the Scheme and the groups surveyed were not representative, the evaluation targeting letting agents who specialised in letting to students. The majority

of the 68 tenants involved in the research had not moved since the start of the pilot and most of them were students and the "mystery shopper" exercise had an unclear methodology and uncertain aims. It did not test for potential discrimination against foreigners or those perceived to be foreign only BME. There are many other criticisms of the Home Office's evaluation which it is not necessary to set out in detail.

24. On 17 September 2015, the Home Office produced a memorandum seeking to justify the Scheme under the ECHR. The memorandum referred at page 9 to clause 13 of the Immigration Bill dealing with eviction and permitting a private sector landlord of a private residential tenancy to seek possession of a property without court process. The memorandum appeared to recognise that this provision engaged Articles 3, 6, 8, 14 and Article 1 of protocol 1 to the Convention. Similarly, clause 14 dealing with orders for possession of dwelling houses, was recognised to engage Articles 3, 8, 14 and A1 P1, the memorandum stating:

> "In terms of Article 14, the Department once again considers that a similar analysis applies: for the reasons summarised above it is also satisfied that the differential treatment serves the legitimate aim of immigration control and is proportionate to the aims being pursued, given the wide margin of appreciation available in cases where differential treatment is based on immigration status."

25. On 6 January 2016, the Claimant's solicitors wrote a judicial review pre-action protocol letter maintaining that the Scheme was incompatible with Articles 8 and 14 ECHR and that the decision to roll out the Scheme across all of England was unlawful. On 18 January 2016, the Defendant responded denying that the Scheme was incompatible with the rights protected by the ECHR and declining to reconsider the decision to extend the Scheme. The Claimant's protocol letter was not followed up with an application to apply for judicial review at that stage, and the provisions of the Scheme came into force in the whole of England from 1 February 2016. The 2016 Act which introduced new criminal offences and granted landlords new powers to terminate tenancies, in some circumstances without a court order, was brought into force from 31 October 2016.

26. In February 2017, the Claimant published its research report on the Scheme entitled "Passport please: the impact of the right to rent checks on migrants and ethnic minorities in England". This report was based on landlords' surveys, letting agents' surveys, surveys of organisations working with or on behalf of affected groups, a "mystery shopper" exercise involving 1708 enquiries and 867 responses from landlords (see further paragraph 27 below), Freedom of Information Act requests and parliamentary questions. The main conclusion of the report was that the Scheme was causing foreign nationals and BME people of all nationalities to experience nationality and race discrimination respectively. The report found no evidence that the Scheme was encouraging irregular migrants to leave the UK. The responses to FOI requests demonstrated that the Defendant was not collecting data that would allow it to measure discrimination resulting from the Scheme, the cost-effectiveness of the Scheme, whether the Scheme was resulting in migrants' voluntarily leaving the UK or increasing the propensity of rogue landlords or the impact of the Scheme on agents and landlords.

The Claimant's Mystery Shopper Exercises

27. The research referred to as the "mystery shopper exercise" requires further explanation. In order to discover whether the legislation was having a discriminatory effect (or, more precisely, whether evidence could be established from which it might be inferred that the legislation was having a discriminatory effect), six different "mystery shoppers" were created, being prospective tenants as similar to each other as possible save for certain key characteristics relating to citizenship, ethnic/national origin, migration status and the types of documentation they were able to produce, who formed the basis of fictitious enquiries by email to landlords about accommodation. The 6 mystery shoppers were:

i) Peter: British citizen, ethnically British name, British passport;

ii) Harinder: British citizen, non-ethnically British name, British passport;

iii) Ramesh: non-British citizen, non-ethnically British name, indefinite leave to remain (settled status) and an unlimited 'Right to Rent' demonstrated through one document;

iv) Colin: British citizen, ethnically British name, no passport but unlimited 'Right to Rent' that could be demonstrated through two documents;

v) Parimal: British citizen, non-ethnically British name, no passport but unlimited 'Right to Rent' that could be demonstrated through two documents;

vi) Mukesh: non-British citizen, non-ethnically British name, limited leave to remain in the UK (2 years) demonstrated through one document.

Landlords were sent a combination of three out of a possible six adverts and the results were compared. Statistically significant results were obtained that, for example, (i) Landlords would discriminate against Ramesh in favour of Peter/Harinder (but not against Harinder in favour of Peter), thus supporting the suggestion that the legislation has the effect of causing discrimination on the ground of nationality; and (ii) Landlords would discriminate against Parimal in favour of Colin, thus supporting the suggestion that the legislation has the effect of causing racial discrimination where the housing applicants are British citizens without a passport. See further paragraph 32 below.

28. In the light of the results of this research, a further pre-action protocol letter was sent on 16 May 2017 enclosing the report. On the basis of the research set out in the report, together with the Defendant's failure adequately to monitor the Scheme, it was maintained that the Scheme was incompatible with the rights protected by Articles 8/14 ECHR. In addition, it was argued that the Defendant was obliged to carry out an equality impact assessment prior to roll-out of the Scheme. It was maintained that if the Defendant failed adequately to assess the Scheme's impact before further roll-out, any decision to roll-out the Scheme would be unlawful as there would be a real and unacceptable risk of illegality. For the same reason, it was asserted that a decision to roll-out without conducting further evaluation to determine to what extent the Scheme was causing discrimination would be irrational.

29. The Defendant responded by letter dated 26 May 2017 stating that although the Government intended to roll out the Scheme no date had yet been set and accordingly no decision to commence the Scheme in the other regions of the UK (Scotland, Wales and Northern Ireland) had been taken. There was, at that time, a further general election pending and the Defendant's letter stated that a period of "purdah" had been entered into in accordance with the custom that no ministerial decisions would be taken to initiate action of a continuing or long-term character pending the general election.

30. In view of the possibility that there would be a change of Government and the decision to roll out would be revoked, no challenge to the Scheme was brought at that stage. After the general election, which returned the Conservative party to power, albeit without an overall majority, there was further correspondence between the parties and they met on 6 September 2017. From that meeting, it emerged that the Defendant still intended to roll out the Scheme to the rest of the UK, but had not established a time-frame. In his statement, Mr Patel expresses the opinion that the Defendant could not identify any significant flaws with the Claimant's research, although the Defendant contended that it suffered from the failing that it did not offer a comparison with areas where the Scheme was not yet in force. It was acknowledged, though, that the Claimant had not been in a position to do so because the Scheme was in force across the whole of England, whilst the devolved administrations had different housing systems. It was made clear that the Defendant did not intend to conduct further research or monitoring of the costs, efficacy or unintended consequences of the Scheme, although it was proposed to address the extent to which landlords were aware of the Scheme.

31. A further pre-action protocol letter was sent by the Claimant on 17 October 2017 which focused on the decision to extend the Scheme to the remaining parts of the UK, the Defendants having indicated that they had decided to do that without conducting any further research into the discriminatory impact of the Scheme or to undertake a full evaluation of the Scheme despite the promise to that effect which had been made in the impact assessment.

32. To support the conclusions reached in its research, the Claimant commissioned an independent expert to confirm that the research and in particular its "mystery shopping" data were statistically significant. The research was analysed by Mr Ben Hickman of Myriad Research who, in the report dated 17 January 2018, stated that:

> "1. The evidence strongly supported the hypothesis that the prospective tenant who was not British but had indefinite leave to remain in the UK was more likely to receive a negative response or no response compared to a British citizen;
>
> 2. Where both prospective tenants had a British passport, there was no evidence of discrimination between the BME and 'White British' shoppers;
>
> 3. A 'White British' tenant without a passport was more likely to receive a negative response or no response than a 'White British' tenant with a passport;

4. A BME British tenant without a passport was more likely to receive negative response or no response than a BME tenant who could provide a British passport;

5. There was not enough statistical significance in the evidence to support the hypothesis that where both White and BME British citizens do not have passports, the BME tenant faces discrimination on grounds of ethnicity."

33. The Claim was issued on 30 January 2018. Subsequent to the issue of proceedings there has been a report by the Independent Chief Inspector of Borders and Immigration in relation to the Scheme. The Inspector's review of the Scheme's impact in relation to its stated objectives concluded that the Scheme "is yet to demonstrate its worth as a tool to encourage immigration compliance" and that the Defendant had "failed to co-ordinate, maximise or even measure effectively its use, while at the same time doing little to address the concerns of stakeholders." A number of recommendations were made. The Home Office did not accept the Inspector's recommendations in full.

34. A further development after the issue of proceedings was a second report from Mr Hickman of Myriad Research in relation to a further "mystery shopper" exercise carried out in August/September 2018. The conclusions were as follows:

1. The results did not show any significant finding that the white British tenant without a passport was more likely to receive a negative response or no response than the white British tenant with a passport;

2. The evidence showed that the BME tenant without a passport was more likely to receive a negative response or no response than the BME tenant with a passport;

3. There was no evidence of racial discrimination between the BME and white British shoppers when they both had a British passport;

4. There was evidence that when white and BME British citizens did not have a passport the BME tenant faced race discrimination.

E: The proceedings

35. By their detailed Statement of Facts and Grounds ("the Grounds"), the Claimant seeks the following relief:

i) A declaration pursuant to s.4 Human Rights Act 1998 that sections 20-37 IA 2014 (i.e. the Scheme) are incompatible with Articles 8 and 14 ECHR; and

ii) An order:

a) Quashing the Defendant's decision to extend the Scheme to the rest of the UK on the grounds that the Scheme gives rise to an inherent and

unacceptable risk of illegality and because the decision breached s.149 Equality Act 2010 (the public-sector equality duty), alternatively

b) Declaring that a decision by the Defendant to commence the Scheme in the rest of the UK without further evaluation of its discriminatory impact would be irrational and a breach of s.149 Equality Act 2010.

F: Declaration of Incompatibility

36. Having set out the history and the nature of the Scheme, the Grounds assert that a declaration of incompatibility should be made by reference to the fulfilment of three conditions: (1) Articles 8 and 14 are engaged by the Scheme ("Ambit"); (2) the Scheme causes landlords to behave in a discriminatory way ("Causation"); and (3) the Scheme cannot be justified because it is not a proportionate means of achieving a legitimate aim.

37. In response, the Defendant pleads that, for the Claimant to succeed in its claim for a declaration of incompatibility, it must establish four propositions, namely:

i) The case falls within the "ambit" of article 8 ECHR;

ii) The Scheme is in fact discriminatory on racial grounds (and, to be inferred, grounds of nationality);

iii) The discrimination cannot be justified; and

iv) A declaration under s. 4 of the Human Rights Act is appropriate as a remedy to be granted by the court in its discretion.

38. It is pleaded that the Claimant is unable to establish any one of these propositions:

i) First, the Scheme neither engages, nor comes within the ambit of, Article 8.

ii) Secondly, the Scheme is not prima facie discriminatory on grounds of race, the Defendant disputing that wherever there is a disparate impact in some area of life, discrimination for which the state is responsible may be inferred.

iii) Thirdly, the Scheme is justified. Thus, it is asserted that the Scheme had been implemented in pursuit of a legitimate objective, namely immigration control, and represents Parliament's considered choice on measures of social policy and strategy, namely to reduce unlawful immigration. As such the legislative policy is to be accorded due respect by the Court and the Scheme represents a proportionate means of achieving a legitimate aim.

iv) Fourthly, a declaration should be refused: even if it could be established that the Scheme causes unjustified discrimination (which is denied), it does not follow that the legislation is incompatible with Articles 8 and 14 ECHR. It is necessary to consider what the legislation requires and truly means, and even if some unintentional discrimination is caused, the relief sought is too broad and far-reaching.

G: Ambit

39. Article 8 ECHR provides:

> "1. Everyone has the right to "respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority except such as is in accordance with the law and necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the provision of the rights and freedoms of others."

40. Article 14 ECHR 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."

41. It is common ground between the parties that Article 14 is not a free-standing anti-discrimination provision but relates only to the enjoyment of the other Convention rights set out in the ECHR. A violation of, or interference with, the other rights does not need to be established, but the facts must fall within the "ambit" of one of those rights. As stated by Lord Nicholls in *Ghaidan v Godin-Mendoza* [2004] 2AC 557 at paragraph 10:

> "Unlike article 1 of the 12th Protocol, article 14 of the Convention does not confer a free-standing right of non-discrimination. It does not confer a right of non-discrimination in respect of all laws. Article 14 is more limited in its scope. It precludes discrimination in the "enjoyment of the rights and freedoms set forth in this Convention". The court at Strasbourg has said this means that, for article 14 to be applicable, the facts at issue must "fall within the ambit" of one or more of the Convention rights. Article 14 comes into play whenever the subject matter of the disadvantage "constitutes one of the modalities" of the exercise of a right guaranteed or whenever the measures complained of are "linked" to the exercise of a right guaranteed: *Petrovic v Austria* (1998) 33 EHRR 307, 318, 319, paras 22, 28."

See also paragraph 35 of the judgment of the ECtHR in *Bah v United Kingdom* (2012) 54 E.H.R.R. 21, cited below in this judgment at paragraph 46.iii).

(i) The Claimant's submissions

42. For the Claimant, Miss Kaufmann QC and Mr Burton, in their written submissions, acknowledge that Article 8 does not give a right to a home, as they were bound to do: see *Chapman v UK* (2001) EHRR 18 at paragraph 99 where the Grand Chamber said:

> "It is important to recall that Article 8 does not in terms recognise a right to be provided with a home. Nor does the jurisprudence of the Court acknowledge such a right…"

It was therefore submitted:

> "103. Even though there is no right to a home, these facts plainly fall within the ambit of the right to respect for private and family life, and to the home. Article [8] is therefore engaged."

43. Citing paragraph 10 of the *Ghaidan* case (see paragraph 41 above), the Claimant submits:

> "105. The application of article 14 does not presuppose a violation of one of the substantive rights guaranteed by the Convention. It is necessary but also sufficient for the facts of the case to fall within the ambit of one or more of the Convention articles. They will so fall whenever the subject matter of the disadvantage is a "positive modality" of the exercise of a right guaranteed or whenever the measures complained of are "linked" to the exercise of a right guaranteed.
>
> 106. It is not necessary for there to be even an interference with a substantive right in order to establish a 'link' and in a positive modality case no adverse impact is necessary beyond the denial of the benefit conferred by the measure in question. All that is required is that the connection between the facts and a core value of the substantive right must be more than merely tenuous.
>
> 107. Therefore, although there is no right to a home under the Convention a provision which restricted succession rights for tenants of private landlords fell within the ambit of Article 8. Similarly, restrictions on housing assistance or cash benefits used to defray housing costs have consistently been found to have more than a tenuous connection to the right to respect for family and private life under Article 8.
>
> 108. On any view the facts in this claim have more than a tenuous connection with family and private life as well as respect for the home. The Defendant's attempt to distinguish between matters affecting peoples' "actual homes" and their access to housing generally ("potential future homes") is not borne out by the authorities, derived from established principle or even reflected in the type of discrimination in issue (which may impact on both). It should be rejected accordingly.
>
> 109. Therefore, as the facts in this claim are plainly connected to the core values of Article 8 it is immaterial whether the Scheme is properly described as a "modality", viz. the grant or removal of the right to rent a home."

44. Miss Kaufmann, in her oral submissions, accepted however that this is not a "modality" case (as to which, see further paragraph 63 et seq below) but submitted that to prevent someone from acquiring a home interferes with that person's Article 8 rights. Thus, she submits that Article 8 is directly engaged.

45. Miss Kaufmann relies firstly upon what she submits is an acceptance and acknowledgment by the Government that Article 8 is engaged in its memorandum of October 2013: see paragraph 11 above.

46. Secondly, and expanding on this, Miss Kaufmann cited three cases:

i) *R (Countryside Alliance and others) v Attorney General and another* [2008] 1 A.C. 719 at paragraph 10 where Lord Bingham said, referring to Article 8:

"The content of this right has been described as "elusive" and does not lend itself to exhaustive definition. This may help to explain why the right is expressed as one to respect, as contrasted with the more categorical language used in other articles. But the purpose of the Article is in my view clear. It is to protect the individual against intrusion by agents of the state, unless for good reason, into the private sphere within which individuals expect to be left alone to conduct their personal affairs and live their personal lives as they choose."

ii) *A-MV v Finland* (2018) 66 E.H.R.R. 22 at paragraph 76 where the ECtHR said:

"Article 8 "secure[s] to the individual a sphere within which he can freely pursue the development and fulfilment of his personality". Article 8 concerns rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community.

iii) *Bah v United Kingdom* (2012) 54 E.H.R.R. 21 where the Applicant, a national of Sierra Leone, relying on Article14 in conjunction with Article8, claimed that she had been discriminated against by not being given priority for social housing. The judgment of the ECtHR included the following:

35. The Court recalls that Article14 complements the other substantive provisions of the Convention and the Protocols, but has no independent existence since it applies solely in relation to the "enjoyment of the rights and freedoms" safeguarded by those provisions. The application of Article14 does not necessarily presuppose the violation of one of the substantive Convention rights. It is sufficient—and also necessary—for the facts of the case to fall "within the ambit" of one or more of the Convention articles. The prohibition of discrimination in Article14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and Protocols require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention article, for which the Contracting State has voluntarily decided to provide. This principle is well entrenched in the Court's case law. It was expressed for the first time in the *Belgian Linguistic case*.

…

37. The scope of [the margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment] will vary according to the circumstances, the subject matter and the background. As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of nationality or sex as compatible with the Convention. On the other hand, a wide margin is usually allowed to the contracting 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".

…

40. Having thus defined the scope of its examination, the Court begins by observing that there is no right under Article8 of the Convention to be provided with housing. However, as the Court has previously held with regard to other social benefits, where a contracting state decides to provide such benefits, it must do so in a way that is compliant with Article14. The impugned legislation in this case obviously affected the home and family life of the applicant and her son, as it impacted upon their eligibility for assistance in finding accommodation when they were threatened with homelessness. The Court therefore finds that the facts of this case fall within the ambit of Article8. In so finding, the Court notes the conclusion of the Court of Appeal at [25] of *R. (Morris) v Westminster City Council* and further notes the fact that the Government agrees that Article8 applies to the instant case. The Court must therefore go on to consider whether the applicant was impermissibly discriminated against within the meaning of Article 14."

47. Relying on the passages cited, Miss Kaufmann submitted that the Scheme here interferes with the Article 8 rights of those affected, namely regular migrants and is also being felt by British nationals without a passport and by foreign nationals with a right to remain. She said: "It is the Claimant's case that Article 8 is therefore engaged".

(ii) Liberty's submissions

48. Supporting the position taken by the Claimant, Liberty submitted in writing that the Government's submissions failed to address the key features of the present challenge, as it is unnecessary to show a violation or interference with Article 8 for a scheme to come within its ambit. They submit:

"12. Article 8 protects the right to respect for a person's home and their private and family life. The features of the Scheme in issue in this challenge bear on a person's ability to establish a home at all and engage each of these aspects of the Article.

13. Specifically, Article 8 "secure[s] to the individual a sphere within which he can freely pursue the development and fulfilment of his personality", and concerns "rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community" (A-MV v Finland (2018) 66 EHRR 22 at para 76). These rights cannot be enjoyed without access to settled accommodation.

14. In *R(HA)v Ealing LBC* [2015] EWHC 2375 (Admin); [2016] P.T.S.R. 16, a provision of the local authority's housing allocations scheme was held to fall within the ambit of Article 8. Goss J explained (at para 29 cited by Sir Terence Etherton MR in H):

"29…. The link here is said to be home and family life. There is no enshrined right to a physical home; the right is to the enjoyment of a family life. However

this can in reality, only be enjoyed in settled accommodation. Accordingly, I am satisfied there is a sufficient link.

15. Clearly then the ability of an individual in general terms to acquire settled accommodation in which to enjoy a private and family life (as opposed to the ability of an individual to obtain any particular unit of accommodation) is a matter falling within the ambit of Article 8.

16. It is also relevant that the Scheme in issue here is part of a series of measures directed at making it more difficult for people without the right to remain to establish a settled lifestyle. By way of comparison, in *Aristimuno Mendizabal v France* (2010) 50 E.H.R.R. 50 the refusal to grant the applicant a long-term residence permit interfered with her rights under Article 8 on the basis that it left her in a precarious situation on successive short-term permits. The Court commented (at paras 70-72):

71. The applicant states in fact - and the Government has not contradicted her on this point - that the precariousness of her situation and the uncertainty as to her fate had a significant moral and financial impact on her (casual and unskilled jobs, social and financial difficulties, impossibility as a result of not having a residence permit, of renting premises and carrying on the professional activity for which she had undertaken training).

72. The Court considers that, in the circumstances of the case, the failure to issue the applicant with a residence permit for such a long period of time even though she had already been lawfully resident in France for over 14 years, constituted an undeniable interference with her private and family life.

17. The more severe impact of the "hostile environment" is an a fortiori case. That being so, the Court should lean against finding that particular aspects of the policy are outside the ambit of Article 8. Each of the elements furthers the overall aim and cannot realistically be separated from it.
…

19. As noted above in order to engage Article 14 it is not necessary for the effects of a scheme to be so severe as to amount to a *breach* of the rights contained in Article 8, nor even to an interference with those rights; it is sufficient that the effects of the scheme be linked to them. Accordingly, it is not necessary that the effects be such as to prevent an individual from being able to rent accommodation at all (as is intended to be the case for those without the right to rent); it is sufficient that they impair the individual's ability to do so (as in *HA*)."

49. The submissions on behalf of the Residential Landlords Association and The Equality and Human Rights Commission did not address further the question of the ambit of Article 8.

(iii) The Government's submissions

50. In contrast to the position taken by the UK in *Bah's case*, where the Government had accepted that Article 8 applied, here it is the Defendant's position that the Scheme

does not fall within the ambit of Article 8. It is submitted that Article 8 protects the right to respect for a person's actual, existing home, rather than the possibility of obtaining a suitable future home.

51. In their written submissions, Mr Pievsky and Mr Lowe, for the Defendant, first rely on the very wording of Article 8 and its use of the possessive pronoun ("respect for … his home"). Secondly, they submit that the contextual words of Article 8 suggest that the focus of the provision is on the personal and private sphere of an individual's life, which the State must respect. Thirdly, they rely on the authorities from Strasbourg which distinguish between the right to "a" home (not protected by Article 8) and the applicant's actual home. They refer to *Chapman v UK* (2001) EHRR 18, *Codona v UK* and in particular *Demopoulos v Turkey* (46113/99) where the ECtHR said at paragraphs 136-7:

> "The notion of "Home" has been interpreted dynamically by this Court; however, care must be taken to respect the intentions of the authors of the Convention as well as common sense… Thus it is not enough for an applicant to assert that a particular place or property is a "Home"; he or she must show that they enjoy concrete and persisting links with the property concerned … where "home" is claimed in respect of property in which there has never been any or hardly any occupation by the applicant or where there has been no occupation for some considerable time it may be that the links to that property are so attenuated as to cease to raise any or any separate issue under Article 8… Furthermore while an applicant does not necessarily have to be the owner of the "home" for the purposes of Article 8 it may nonetheless be relevant in such cases of claims to "homes" from the past that he or she can make no claim to any legal rights of occupation or that such time has elapsed that there can be no realistic expectation of taking up, or resuming, occupation in the absence of such rights…the fact that [the Applicant] might inherit a share in the title of that property in the future is a hypothetical and speculative element, not a concrete tie in existence at this moment in time..."

52. Fourthly, the Government relies on a series of cases from the English case law supporting the distinction between the acquisition of a home and interference with the enjoyment of an existing home: *R (Simawi) v Secretary of State for Housing* [2018] EWHC 2733 (QB), *R(G) v Lambeth London Borough Council* [2012] PTSR 364, *Harrow London Borough Council v Qazi* [2004] 1 AC 983 and R(H) v *Ealing London Borough Council* [2017] EWCA Civ 1127.

53. Thus, it is submitted that a Scheme which interferes with a person's ability to acquire a home does not engage Article 8.

54. In their written submissions, Mr Pievsky and Mr Lowe then go on to consider the "modality" cases and whether the Scheme comes within the wider ambit of Article 8. In this regard, they submit that it is necessary for the state to have "decided voluntarily to provide" something which engages the concept of private and family life: if it has not, then there is nothing that falls within the ambit of Article 8. Thus, in *R(N) v Secretary of State for Health* [2009] EWCA Civ 795, a case which concerned a claim to a right to smoke by those detained in Rampton Special Hospital, the claim failed because no "right to smoke" had ever been created by the state, and therefore there was no substantive right to which a claim under Article 14 could

attach. The need for the state to have voluntarily provided something in order to engage the concept of private and family life was referred to by Lord Hope in *R (Countryside Alliance and others) v Attorney General and another* [2008] 1 A.C. 719 at paragraph 63 where he said:

> "… For the reasons already given, I do not think that article 8 or article 11 is engaged. Article 14 would be if the claimants could show that their case nevertheless fell within, or was at least close to, the core of the values guaranteed by either of those articles. But this is not something that can be plucked out of the air. It must be related to a right that, as it was put in *Stec v United Kingdom* 41 EHRR SE 295, para 39, the state has decided voluntarily to provide. Having done so, it cannot limit access to that right, restrict it or take it away on grounds that would conflict with any of the core values. That however is not this case. The 2004 Act is not directed at anything that the state itself has provided or seeks to provide. Its sole purpose is to restrict an activity in which persons can engage if they wish but in which the state itself is not involved at all."

55. The Government submits that the "modality" cases are about situations in which the state intends to and chooses to promote Article 8 interests: where it does so, non-discrimination obligations arise under Article 14. Examples are the provision of free childcare (see *R (T) v SS for Education* [2018] EWHC 2582 (Admin) per Lewis J at paragraph 43), parental leave allowance, Child support (see *M v SSWP* [2006] 2 AC 91 at paragraph 16) and bereavement damages (*Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2018] 2 WLR 1063 at paragraph 72). However, it is submitted (and is accepted by the Claimant) that a tenuous link with one of the constituent parts of Article 8 is not enough.

56. Summarising its position, the Government submits:

> "(1) the right to respect for a person's "home" is not engaged;
> (2) there is, at best and in principle only a tenuous link with "private" or "family" life;
> (3) even if there were in individual cases, sufficient evidence from an affected individual about the strength of such a link, that would not be enough to demonstrate that the legislation nor the allegations made in this case, are within the ambit of Article 8;
> (4) The evidence in this case taken at its highest only goes so far. Even if the Claimant's mystery shopping exercises are entirely reliable … they do not come close to suggesting that people who are not disqualified under the Scheme are in fact unable to find or establish a home. Article 8 ECHR rights are not engaged where a person (for example) applies for 10 tenancies and only hears back from 7 landlords; all the more so when it cannot be shown that any non-response was attributable to the state."

57. In his oral submissions, Mr Pievsky pointed to a degree of confusion on the part of the Claimant as to whether it is the Claimant's case that the Scheme involves a direct interference with the Article 8 rights of tenants so as to engage that article, or whether this is a modality case (or, perhaps, a case which is analogous to the modality cases). Certainly, in their written submissions, the Claimant and Liberty rely heavily on the modality cases such as *Bah*, which was why these were addressed by the Government in its written submissions in reply. However, Mr Pievsky submitted that, as he now

understood the position, the modality analysis is abandoned. If, then, the case to be met is one of direct interference with Article 8 rights, he submitted that the Claimant has two fundamental problems:

i) As the European Court has repeatedly explained, Article 8 does not provide the right to a home; and

ii) The submissions of Miss Kaufmann start from the wrong premise, namely that the Scheme as a whole interferes with Article 8 rights, when the real question is whether the facts of this case, namely alleged discrimination against those who have the right to rent, are within the ambit of Article 8. In this regard, Mr Pievsky submitted that the evidence does not establish that those with a right to rent a home are unable to find a home. He conceded that if the Scheme made it virtually impossible for those with a right to rent to find a home because they were being discriminated against on grounds of nationality or race, then that would constitute an interference; but it would not be enough if, for example, the Scheme meant that potential tenants with the right to rent would hear back from 70% of landlords instead of, say, 90%. Thus, he submitted that there is no sufficient evidence that those who are said to be disadvantaged are even substantially impeded in their quest for a home.

58. Mr Pievsky then considered the cases relied on in support by the Claimant. He submitted that the remarks at paragraphs 76 and 77 of the judgment of the ECtHR in *A-MV v Finland* (2018) 66 E.H.R.R. 22 needed to be considered in the context of what were extreme facts and that the decision is fact-sensitive. What the case does not decide is that Article 8 rights are interfered with whenever a person is prevented from living in a particular place. So far as *Bah* is concerned, this is clearly a modality case which does not assist the Claimant in establishing interference with Article 8 rights. So far as *R (HA) v Ealing LBC* [2015] EWHC 2375 is concerned, the decision of Goss J was addressed by the Court of Appeal in *R.(H) v Ealing LBC* [2017] EWCA Civ 1127 which concerned allocation of housing by a local authority, and its scheme to reward model tenants in deciding who should get priority, the Model Tenants Priority Scheme or "MTPS". The Defendant relied on the following passage from the judgment of the Master of the Rolls:

> "100. In *HA* Goss J held that Ealing's policy that applicants for secure accommodation under section 193 of the Housing Act 1996 had to have lived in its area for a minimum of five years as a condition of joining the housing register was unlawful. Goss J addressed, obiter, whether the policy discriminated against women who were victims of domestic violence contrary to Article 14. He held that it did. He explained the link with Article 8 as follows:
>
> "29. … The link here is said to be home and family life. There is no enshrined right to a physical home; the right is to the enjoyment of a family life. However, this can, in reality, only be enjoyed in settled accommodation. Accordingly, I am satisfied there is a sufficient link."
>
> 101. None of the authorities support the claimants' case that the MTPS falls within the ambit of Article 8 in conjunction with Article 14. The MTPS is concerned with the transfer of a secure tenant, who is already housed pursuant to Ealing's duties under Part VII of the Housing Act 1996, from one Council

> property to another. I cannot see that this has anything to do with a core value which Article 8 is intended to protect."

Thus, Mr Pievsky submits that the Master of the Rolls is saying that even where a Public Authority has a duty to house and wants to transfer, the situation is not within the ambit of Article 8, and if that is correct, the Claimant's case cannot be correct. Otherwise, any disadvantage in obtaining a new home would involve an interference with Article 8 rights, and that is inconsistent with the decision of the Court of Appeal in *R. (H) v Ealing LBC*.

59. Summarising, Mr Pievsky submitted that a disadvantage in securing a new tenancy is not an interference with the rights protected by Article 8, such a position not being supported by the case law, and so to find would go significantly further than the European and domestic jurisprudence.

(iv) Discussion

60. In considering the question of "ambit", the starting point must be what is alleged to be happening as a result of the Scheme. This is that, to put it shortly, those with a perfect right to rent are being discriminated against in their quest for a property to rent on grounds of nationality or race. However, this does not make it impossible for those in the category of those discriminated against to get housing: at its highest, the evidence establishes that they will find it harder, in other words, it will take them longer. Nevertheless, I am asked to draw an inference that, given the scale of discrimination, there will be some who have been unable to find accommodation at all, or for such a long period that their family life has been interfered with. For the purposes of considering the ambit of Article 8, I am prepared to draw that inference.

61. In my judgment, for the reasons submitted by the Defendant, the Scheme does not engage Article 8 directly by reason of interference with the rights protected by that Article. If it did, then this would be tantamount to acknowledging that Article 8 gives a person the right to a home. However, this is not what Article 8 says and the authorities have consistently stated that Article 8 gives no such right: see *Chapman v UK* and the other authorities cited in paragraph 51 above. With respect to Mr Justice Goss and his (obiter) statement in *R(HA)v Ealing LBC* [2015] EWHC 2375, cited in paragraph 58 above, it cannot be right that Article 8 is engaged simply because family life "can, in reality, only be enjoyed in settled accommodation". This would have the effect of promoting the rights under Article 8 to including the right to a home by reference to the right to respect for family life, thus making words in Article 8 which refer to the right to respect for "his home" redundant and unnecessary, side-stepping the authorities referred to which are to the contrary effect. The decision of the ECtHR in *Demopoulos v Turkey* (46113/99) (see paragraph 51 above) is particularly instructive where the ECtHR referred to the need to show

> "that they enjoy concrete and persisting links with the property concerned … where "home" is claimed in respect of property in which there has never been any or hardly any occupation by the applicant or where there has been no occupation for some considerable time it may be that the links to that property are so attenuated as to cease to raise any or any separate issue under Article 8…"

It seems to me to follow *a fortiori* that Article 8 cannot be directly engaged when the property in question is merely a potential rental property with which the person has no existing connection, and which is not in any sense his home.

62. It may be that it was in recognition of this difficulty that Miss Kauffman, supported by Mr Westgate QC for Liberty, sought to put the case on the alternative basis that the disadvantage in the housing market experienced by those discriminated against is a disadvantage which has a connection with the right protected by Article 8 which is more than tenuous and is therefore within Article 8's ambit. Certainly, this alternative approach is well-recognised in what have been referred to as the "modality" cases.

"Modality" Cases

63. As submitted by Mr Pievsky, "modality" cases are archetypically concerned with situations where the state takes positive action to promote Article 8 interests and it has been held that it must do so in a way which is non-discriminatory. The term was used in *Petrovic v Austria* (1998) 33 EHRR 307 which concerned the provision of financial assistance enabling parents to stop working in order to look after their children, and which was alleged to have been applied in a way which discriminated against fathers, in breach of Article 14. Article 8 was not engaged because it does not guarantee a right to parental leave payments. However, the Applicant argued (with the support of the Commission) that the financial assistance in question, namely parental leave payments, was intended to promote family life and thus constituted a specific regulation by which the State, in the exercise of its margin of appreciation, discharged its duty under Article 8 of the Convention to show respect for family life. The legislation in question therefore came within the scope of Article 8 and carried with it the obligations under Article 14. The ECtHR stated:

> "28. The Court has said on many occasions that Article 14 comes into play whenever "the subject-matter of the disadvantage … constitutes one of the modalities of the exercise of a right guaranteed", or the measures complained of are "linked to the exercise of a right guaranteed".
>
> 29. By granting parental leave allowance States are able to demonstrate their respect for family life within the meaning of Article 8 of the Convention; the allowance therefore comes within the scope of that provision. It follows that Article 14—taken together with Article 8—is applicable.

64. The first quotation in paragraph 28 of the ECtHR's judgment comes from the earlier case of *National Union of Belgian Police v Belgium* (1979-80) 1 E.H.R.R. 578 which concerned legislation in Belgium which provided for State consultation with trade unions designated as 'most representative', on proposals concerning the status and working conditions of employees in the public sector. A Royal Decree specified that only those organisations which were open to all staff employed by the provinces and municipalities and which protected such staff's occupational interests were to be deemed 'most representative'. The applicant union, a 'category-based' organisation representing only members of the municipal police, requested the Government to include it in the designated category, but was rejected as not having fulfilled the necessary conditions to be eligible for consultation. The applicant alleged that the refusal of the Belgian authorities to recognise it as a representative organisation, thereby debarring it from State consultation, put it at a disadvantage as compared with

the broader-based trade unions and constituted a violation of Article 11 (1) (right to trade union freedom) of the Convention, read by itself and in conjunction with Article 14 (rights to be secured without freedom from discrimination). In the course of its judgment, the ECtHR stated:

> "45. The Court has already found that the applicant is at a disadvantage compared with certain other trade unions. The subject-matter of the disadvantage, i.e. consultation, is no doubt one which in principle is left by Article 11 (1) to the discretion of the Contracting States, but it constitutes one of the modalities of the exercise of a right guaranteed by this provision as it has been interpreted by the Court at paragraph 39 above, i.e. the right of the members of a trade union that their union be heard in the protection of their interests."

At paragraph 39, the ECtHR had said:

> "39. The Court does not, however, share the view expressed by the minority in the Commission who describe the phrase 'for the protection of his interests' as redundant. These words, clearly denoting purpose, show that the Convention safeguards freedom to protect the occupational interests of trade union members by trade union action, the conduct and development of which the Contracting States must both permit and make possible. In the opinion of the Court, it follows that the members of a trade union have a right, in order to protect their interests, that the trade union should be heard. Article 11 (1) certainly leaves each State a free choice of the means to be used towards this end. While consultation is one of these means, there are others. What the Convention requires is that under national law trade unions should be enabled, in conditions not at variance with Article 11, to strive for the protection of their members' interests."

65. It seems to me that whilst "modality" appears to have become something of a term of art used as a shorthand for those cases which, whilst not falling directly within Article 8, come within its scope because of the close connection between the Article and the right being exercised, "modalities" was originally used merely as an alternative term for "means" or "ways" (perhaps it was a direct translation of the term "modalité" in the French original) referring to the various means used by the state to achieve the end in question, that end being the fulfilment of the particular ECHR obligation.

66. There is no doubt that where the state positively intervenes in the promotion of an Article 8 right, using <u>means</u> such as provision of free childcare, parental leave allowance, child support and bereavement damages, those are "modality" cases which come within the ambit of Article 8 so that the means employed must comply with the obligations under Article 14. What is argued in the present case is that the position should be the same where the state intervenes not positively, but <u>negatively</u>, in a way which interferes with the right to respect for family life by making it more difficult for a person with the right to rent to obtain a home for him/herself and their family. However, as Miss Kaufmann conceded, she is unable to point to any decision of the ECtHR or a domestic court where this has been done before, and such an interpretation would be an extension of the Strasbourg jurisprudence. This would be in effect a new category of case where the legislation does not directly engage the Article in question, where it does not come within its scope because it represents one of the means by which the state has chosen to promote the right protected by the Article (or perhaps fulfil its obligation within the Article), but where it so touches or

concerns the rights protected by the Article in a negative way (perhaps, therefore a "negative modality" category) as to fall within its scope and carry with it the obligations arising under Article 14. As Mr Westgate QC put it in his written submissions, the way in which the Scheme impairs the ability of an individual in general terms to acquire settled accommodation in which to enjoy a private and family life is enough to bring the Scheme within the scope of Article 8.

67. I have found this to be the most difficult issue for decision in this case. Instinctively, that which is set out by the Government in its own memoranda cited at paragraph 11 above seems right:

> "98. The restriction on establishing a residence in the private rented sector as one's only or main residence prevents the individual living his own personal life as he chooses and potentially prevents him from living with members of his family and in that respect engages his right to respect for private and family life.

On the other hand, had there been such a "negative modality" doctrine, one might have expected such jurisprudence to have been articulated in one of the many judgments emanating from Strasbourg on the scope of Article 8 in conjunction with Article 14. Nor has the category been recognised in any previous English domestic decisions, so far as I am aware. The nearest recognition is the dictum of Goss J cited in paragraph 58 above but which was rejected by the Master of the Rolls in *R. (H) v Ealing LBC* [2017] EWCA Civ 1127.

68. Nevertheless, in my judgment the Scheme does come within the ambit of Article 8, for the purposes of the right not to be discriminated against under Article 14. First, the jurisprudence emanating from Strasbourg suggests that race discrimination is regarded with particular anathema and if, which I assume for the purposes of this discussion, the legislation is causing landlords to discriminate on grounds of race, then I consider that the ECtHR would agree that the bar should be set low in determining whether the Scheme comes within the ambit of a substantive right such as Article 8. Otherwise, in circumstances where the court considers a contracting State obliged to use all available means to combat racism (see, for example, *Nachova v Bulgaria* [2006] 42 EHRR 43 where the ECtHR identified race discrimination as "a particularly invidious kind of discrimination" requiring special vigilance from the authorities and a vigorous reaction), a State which actually causes racism through its legislation would not be covered by the Convention. Whilst this is possible in theory, it must be very rare in practice. Secondly, to find that the legislation comes within the ambit of Article 8 would not be tantamount to finding that Article 8 gives someone the right to a home. Although Article 8 does not give anyone the right to a home, in my judgment it gives everyone the right <u>to seek</u> to obtain a home for themselves and their family even if they are eventually unsuccessful, and the playing field should be even for everyone in the market for housing, irrespective of their race and nationality. Where the State interferes with the process of seeking to obtain a home, in my judgment it must do so without causing discrimination and this either engages Article 8 or comes within its ambit. If the Government's arguments were correct, a law could be passed which enacted a rule that landlords may only rent to white, British nationals and this would not engage Article 8 and therefore not offend against the Convention because Article 8 does not give a right to a home, and this would not be a positive modality case. That cannot be right. In my judgment, the law was correctly stated by Mr Westgate QC in his submissions: "the way in which the Scheme impairs the

ability of an individual in general terms to acquire settled accommodation in which to enjoy a private and family life is enough to bring the scheme within the scope of Article 8" and in this regard, I prefer his (and Miss Kaufmann's) submissions to those of Mr Pievsky.

69. In the circumstances, I find that the Scheme comes within the ambit of Article 8 ECHR.

H: Causation

(i) The Claimant's Submissions

70. For the Claimant, Miss Kaufmann submits that, on the basis of the evidence summarised at paragraphs 20 - 34 above in this judgment, the Scheme inevitably results in discrimination on the grounds of nationality and race and therefore causes such discrimination. The starting point is that the market for rental accommodation in the private sector is a "sellers' market". Thus, in most parts of the country, demand is such that a landlord/agent would have a choice of potential tenants. The Scheme places on landlords a heavy administrative burden with potentially serious penal consequences and is therefore both costly and risky. Given that most landlords have only one interest, namely letting their property and maximising their income, delays in letting which lead to periods of non-occupancy are unwelcome and the Scheme heavily incentivises

landlords to let to those individuals who do not need a "right to rent" and in particular where their status is incontrovertibly established with a passport. Thus, unless a potential occupier has convincing documentation establishing his British/EEA nationality and in particular a passport, it is to be expected that landlords and agents will use proxies instead, the obvious candidates being name, accent, colour and other signifiers of ethnicity. Such discrimination comprises direct race discrimination and, as such, is contrary to section 13 of the Equality Act 2010. It is irrelevant that the motivation of the landlord is simply to avoid the costs and the risks associated with the Scheme.

71. Furthermore, it is submitted that there is no effective mechanism to detect or deter such discrimination. Thus, there is no sanction under the Scheme for failing to comply with the prescribed requirements in relation to persons who do not need the right to rent and so a non-EEA national will always be at a comparative disadvantage. It would be difficult, if not impossible, for a prospective tenant to sue a prospective landlord on the basis that the landlord had let the property to another person discriminating against the prospective tenant illegally on the grounds of race and nationality. Miss Kaufmann submits that the design of the Scheme causes landlords to prefer tenants on the basis of nationality or ethnic group, and offers no additional protection for those discriminated against and she submits that it was inevitable that the Scheme would cause unchecked race discrimination in the private rental market.

72. In support of these contentions, Miss Kaufmann relies principally upon the two mystery shopping exercises referred to in paragraphs 27 to 34 above. She submitted that the results of those exercises, independently verified as being statistically significant, demonstrate that:

1. Non-British tenants who have a permanent right to rent face a clear disadvantage in comparison with their British counterparts;
2. Landlords are unwilling to undertake online checks for those who cannot otherwise provide documentary proof of their right to rent;
3. Landlords do not appear to treat BME persons unfavourably in comparison with their white counterparts when they both have a British passport: this is important because it indicates that landlords do not discriminate on grounds of race where the "playing field is level" i.e. where both have British passports: landlords are thus not inherently discriminatory supporting the proposition that the discrimination where neither applicant has a passport in favour of white applicants is caused by the Scheme; and
4. Landlords treat BME persons unfavourably in comparison with their white counterparts if neither have a passport.

73. Thus, whilst the results of the mystery shopping exercises do not confirm how much discrimination is occurring, they do establish, it is submitted, that the Scheme causes discrimination and this is likely to have a significant effect on actual outcome. Miss Kaufmann derives significant support for this from further evidence disclosed by the Government Legal Department shortly before the hearing. In the letter of 11 December 2018, the Defendant disclosed certain results from a "Private Landlord Survey for England" conducted by the Ministry of Housing, Community and Local Government independently of the matters raised in this dispute. One of the questions asked in the survey was:

> "Which, if any, of the following types of tenants are you not willing to let to? (select all that apply)"

This question was asked of 6,584 landlords and 25% selected "Non-UK passport holders". The Defendant's letter goes on to state:

> "The survey data has been weighted so that it represents 353,400 landlords who are registered with a Tenancy Deposit Protection Scheme. The reasons for landlords not being willing to let to non-UK passport holders were not explored."

Miss Kaufman submits that, although the reasons were not explored, they are obvious: these results fit well with the Claimants' mystery shopper exercises and the court can readily infer that the reason is the Scheme. With discrimination on this scale, it can be inferred that there are many prospective tenants who are failing to get a property, either altogether or for a significantly long time, because of discrimination caused by the Scheme.

(ii) The RLA's Submissions

74. Miss Kaufmann's submissions in this regard were strongly supported by submissions from Mr Justin Bates on behalf of the Residential Landlords Association ("RLA"). The RLA is an organisation that represents the interests of those residential landlords who make up its membership: it has approximately 30,000 members or associate members with a combined portfolio of about 300,000 properties. Mr Bates relies on evidence from Mr David Smith, the policy director of the RLA, to the effect that the

private rented sector is predominately made up of private individuals with small numbers of properties. Thus, according to December 2016 research, 62% of landlords own only a single rented property with landlords identifying as buy-to-let having a mean property portfolio size of 2.7 properties. Research shows a marked shift towards smaller portfolios among landlords, with the number of landlords having a portfolio of 6 or more properties at under a third in 2016 compared to the levels in 2004. Although the number of lodger landlords is much harder to calculate, research in 2014 suggested that the proportion of households taking in a lodger had almost doubled from the level in 2009. Mr Smith then says this:

> "15. For a landlord, any period in which a tenant is not in occupation (known as a void period) is a period where the property is an expense, not a source of income. At the risk of stating the obvious, there is no rental income. This means that the landlord must meet all the running costs (maintenance, insurance, mortgage payment, service charges) out of other income. Moreover, during a void period the landlord is responsible for council tax on the property. For all landlords, thereis a pressing requirement to minimise void periods as far as possible.
>
> 16. Landlords will usually try to arrange for new tenants to take over prior to their previous tenants leaving. However this can be risky because if the previous tenant does not vacate on time as expected the landlord will need to take them to court to secure possession which takes, according to Ministry of Justice figures, e of just under 17 weeks. This places the landlord at risk of legal proceedings from the incoming tenant who is unable to occupy despite having contracted with the landlord for that time period. Accordingly many landlords will put their property on the market but will refrain from entering into any agreement with a new tenant until the property is ready to occupy.
>
> 17. The Scheme introduces delays in the process of assessing a potential tenant that cause landlords potential loss through increased void periods without rent. This is particularly true in relation to prospective tenants who are not able to straightforwardly evidence a right to rent."

75. In addition, Mr Smith points to the difficulties for such small landlords created by the Scheme. Where the Scheme refers to "Group 2 documents" (a driving licence, a letter from an employer etc as referred to in paragraph 4 above in this judgment), the Scheme presents considerable challenges particularly where these are documents with which the landlords are unlikely to be familiar. He says:

> "25. … For example, few landlords are familiar with the very wide range of valid passport designs in use across the EEA, let alone the range of national identity cards. Basic familiarity with such documents is unlikely to be sufficient as the overwhelming majority have more or less sophisticated anti-forgery features embedded into their designs. Without specialist knowledge landlords have limited means of checking whether the document is suitable for their purposes. When asked, officials from the Defendant's departments have informed me that they are not able to create a searchable database of valid documents as there are too many and it would therefore be too expensive. The fact that there are so many potential documents and too

> many for the Defendant's department to deal with is illustrative of the difficulties faced by individual landlords."

76. Furthermore, Mr Smith points out that the potential penalties and risks to a landlord extend beyond those set out in the Scheme itself. For example, if the landlord has a "buy-to-let" mortgage, it is highly likely that the mortgage terms will impose a general duty on the landlord to comply with all legal requirements relating to the letting of the property and the mortgage terms will include a requirement to give a copy of any notice, proposal or order served on the landlord under any law or regulation concerning property as soon as reasonably possible after it has been received. Thus, a landlord who receives a financial penalty or a conviction under the Scheme would potentially be in breach of his mortgage conditions leading to action by the mortgage lender including calling in the loan. Mr Smith says:

> "This is not mere speculation or a hypothetical concern as lenders who wish to reduce their exposure to the buy-to-let sector will take opportunities afforded by inadvertent breaches of the mortgage terms in order to force a landlord to repay the loan or move to another lender."

77. As part of his conclusions, Mr Smith says:

> "53. … RLA research shows that landlords' approaches to potential tenants have been changed by the introduction of the Scheme in exactly the way the pressures built into the structure of the scheme would suggest. Landlords are significantly less likely to consider letting to anyone without a British passport, and even less likely to consider letting to foreign nationals outside the EU."

This statement was written before receipt of the letter of 11 December 2018 from the Defendant, and is wholly consistent with the result of the survey by the Ministry of Housing, Communities and Local Governments referred to in that letter.

78. Relying on this evidence, Mr Bates submits that the court should have regard to the nature of the private sector: it is not particularly sophisticated, comprising mainly small-scale landlords and the effect of a conviction under the IA 2014 is very significant as it could lead to a banning order (under s.14 Housing and Planning Act 2016), the loss of a letting licence (under Parts 2 and 3 of the Housing Act 2004) and the need to sell the property with interference with the landlord's stock. It is therefore inevitable that a landlord would take a low risk approach.

79. Mr Bates submitted that the primary driver for any landlord will be the amount of rent that can be recovered and that a landlord will be liable for the payment of tax and facilities even during void periods when the property is empty. The rational landlord will seek to avoid the situation and therefore anything that interrupts prompt re-letting will be avoided if possible. He submitted that the rational landlord, faced with a tenant who could move in on the day who has a British passport and one who cannot because they do not have a British passport will inevitably take the one with the British passport. He referred to the code of practice for landlords in relation to avoiding unlawful discrimination when conducting right to rent checks in the private rented residential sector (October 2014) which, he submitted, recognises that landlords might

have sound business reasons not to let properties to people who cannot immediately satisfy the right to rent checks:

> "If a person is not able to produce acceptable documents a landlord should not assume that they are living in the UK illegally. Subject to business requirements, landlords should try to keep the offer of accommodation open in order to provide a prospective tenant the opportunity to produce documents that will demonstrate their rights to rent, but they are not obliged to do so."

80. The words "subject to business requirements" are critical: a landlord's business requirements will inevitably be to secure a tenant as quickly and easily as possible. He therefore submitted that discrimination is inevitable by reference to basic knowledge of the way landlords operate and their business requirements.

81. Addressing the wider scheme, Mr Bates submitted that there are additional reasons and incentives for a landlord to take the least risky option. Thus, there are civil penalties whereby a landlord who breaches the prohibitions under section 22 (1) IA 2014 may be required to pay a penalty up to £3,000 and if a notice is served it is up to the landlord to persuade the Secretary of State to lift the notice or appeal to a County Court, with concomitant expense. Mr Bates asks rhetorically, 'so why would the landlord take the risk?' He also relies upon the unattractive nature of the requirement to evict, something a landlord will be most reluctant to do in respect of a tenant who is paying the rent. There are risks associated with obtaining a possession order against a tenant who appeared not to have a right to rent but did actually have such a right. Whilst eviction on the basis of a court order, even one made wrongly, is lawful, it is arguable that an administrative notice under IA 2014 may not have the same effect as a possession order in the County Court. Mr Bates submits that no landlord would want to be the person who has to run this test case.

82. All in all, Mr Bates submits that, from the perspective of landlords and the evidence put forward by the RLA, it is rational in the purely economic sense for a landlord to avoid the risks which he can do by renting to British passport holders. This fits well with the Government's survey which suggested that 25% of landlords responded that they would not be willing to let to non-UK passport holders. This dovetails further with the evidence of Mr Chaitanya Patel of JCWI who refers to evidence and surveys gathered by JCWI and other agencies. He says:

> "37. What this shows is that surveys conducted by different agencies at different times have received a consistent response from landlords on this point. Landlords have made their position quite clear: a very significant proportion of them will discriminate on the basis of nationality or citizenship as a result of the Right to Rent Scheme."

83. In his statement, Mr Patel further suggested three reasons why discriminatory behaviour on the part of landlords can properly be attributed to the Scheme:

> 1. Survey results provide compelling evidence from the mouths of landlords themselves that they will discriminate on the basis of nationality because of the scheme;

2. The mystery shopping exercises show that there does not appear to be any difference in treatment on the basis of ethnicity where both individuals have a British passport suggesting that landlords are not engaging in simple bigotry or prejudice; and
3. The logic of the right to rent Scheme incentivises precisely such behaviour.

(iii) The Government's Submissions

84. For the Defendant, Mr Pievsky argued that neither of the two mystery shopping exercises relied upon by the Claimant justifies the conclusion that there is discrimination on the grounds of nationality or ethnicity. He referred to the key evidence relied on by the Claimant namely that Harinder (non-ethnically British name, with British passport) does better than Ramesh (non-ethnically British name non-British citizen with indefinite leave to remain): see paragraph 27 above. He submitted that it is essential to consider the reason for the differential treatment and that the Claimant cannot leap from the fact that Harinder and Peter both had UK passports to the conclusion that landlords were discriminating against Ramesh and Colin on grounds of British nationality. Mr Pievsky delved into the detail of the mystery shopper exercises to show that the results were not consistent and the phenomenon relied upon by the Claimant was only detected when using the "paired" method, one of the two methods actually used in the Myriad report. In both exercises, the phenomenon was not detected in any statistically significant way when using the "unpaired" method when Ramesh did almost as well as Harinder and Colin and Peter's results were similarly almost identical.

85. Mr Pievsky also pointed to the lack of information about what landlords were actually told about the documents which non-passport holders were offering. Harinder and Peter were clearly offering a British passport but Ramesh and Colin are simply described as being able to demonstrate a right to rent through a "Home Office document" in the case of Ramesh, or two unidentified "other documents" in the case of Colin. He submitted that there is insufficient information for the court to be able to be satisfied, even at a prima facie stage, as to the reasons why (if it be the case) Ramesh did less well than Harinder or why Colin did less well than Peter in part of this experiment.

86. Thirdly, Mr Pievsky submitted that the results relied upon by the Claimant for nationality discrimination were not replicated in the second mystery shopper exercise when comparison between Peter and Colin resulted in no significant difference. He points out that the Claimant did not repeat the comparative exercise between Ramesh and Harinder in the second mystery shopper exercise even though this was and remains a critical part of the case in relation to nationality discrimination.

87. Fourthly, Mr Pievsky submitted that even if the different trends suggested by the Claimant have been correctly detected, there is the question of how to interpret them. Thus, he submitted that the comparisons between Harinder and Ramesh, and Colin and Peter, cannot show whether it was simply the fact of having a passport of some kind which is relevant, or whether the nationality of the individual concerned mattered. Other findings led to possible different conclusions. Thus, the fact that Harinder did about 20% better than Parimal (British, without a passport) suggests that non-British tenants are not directly discriminated against compared to British tenants

if landlords do have a preference for looking at passports. In fact, such a preference would be likely to have more of an impact on British people than on non-British people.

88. Finally, in relation to nationality discrimination, Mr Pievsky submitted that, under the European approach, it is necessary to show a "far greater" number of British tenants are able to obtain tenancies then others. He submitted that the Claimant's evidence does not establish what proportion of non-British tenants can obtain tenancies compared to British tenants. Even if the 2017 report had established that proportion he submitted that it is open to question as to whether a difference of 20% is sufficient.

89. So far as ethnicity discrimination is concerned, Mr Pievsky submitted that there is again an inconsistency in the results between the two mystery shopper exercises. Thus, in both exercises, the hypothesis was tested whether, where both White and BME British citizens do not have passports, the BME tenant faces racial discrimination. This was done by testing whether the BME tenant (Parimal) would be more likely to receive a negative response or no response than the White tenant (Colin). The conclusion in the second exercise was that "the large effect size and significance of the relationship in the paired data supports the hypothesis that where both White and BME British citizens do not have passports, the BME tenant faces racial discrimination." However, in relation to the first exercise the conclusion was as follows:

> "There was not a significant difference in the likelihood of a non/negative response between the scenarios in either the paired or the unpaired data … therefore there is not enough evidence to support the hypothesis that where both white and BME British citizens do not have passports, the BME tenant faces racial discrimination."

Mr Pievsky posed the question: "What is the reason for the difference?" He stated that there is no clear evidence as to what the landlords were told in relation to Parimal. In any event, he submitted that this inconsistency might suggest that what has been seen is not caused by the Scheme, particularly in the absence of evidence from places where the Scheme does not exist. He submitted that racial discrimination may have existed in any event and this has been exposed by an exercise of this nature. He met the argument that this is not simple prejudice because no difference was found where both applicants had British passports by submitting that this simply does not follow and logically, scepticism by landlords in respect of non-White people could have existed before the Scheme.

90. Mr Pievsky was also critical of the fact that the mystery shopper exercises only dealt with particular communications at the very start and didn't deal with how Parimal might fare in real life. Thus, he submitted that the evidence simply doesn't give enough information and this is borne out by the Government's evaluation where, whilst BME persons did less well in getting a response, they did better in getting offers of tenancy. This was a reference to the Government's own evaluation of the right to rent Scheme from October 2015 where, at page 5 of the evaluation, the impact on tenants in relation to discrimination was considered and the report stated:

- "The mystery shopping research found there were no major differences in tenants' access to accommodation between phase 1 and the comparator area.

- However, a higher proportion of BME shoppers were asked to provide more information during rental enquiries in the phase 1 area.

- Despite these differences during rental enquiries, BME shoppers in the phase 1 area were more likely to be offered properties, compared with White British shoppers.

- Together this suggests that there was no evidence of any difference regarding the final outcome from rental search.

- However, comments from a small number of landlords reported during the mystery shopping exercise and focus groups did indicate a potential for discrimination."

Mr Pievsky submitted that the mystery shopping exercises were insufficient and more evidence was needed before it could be concluded that this Scheme was causing discrimination.

91. So far as the evidence from the survey of the Ministry of Housing, Communities and Local Government was concerned, Mr Pievsky submitted that this survey said nothing about the reason for the 25% of landlords responding that they would not be willing to let to a non-UK passport holder. Whilst they might be committing racial discrimination as a result of the Scheme, equally that might have been their attitude and position in any event.

92. Mr Pievsky also referred to the surveys by Shelter and the RLA and he concluded by submitting that what is shown by all the surveys is as follows:

1. Some landlords do prefer UK passport holders;
2. Surveys of what landlords might do or will do is not proof of discrimination; and
3. It is not clearly established that the Scheme has caused the percentage to be as high as is seen in the 2018 survey.

(iv) Discussion

93. In my judgment the evidence, when taken together, strongly showed not only that landlords are discriminating against potential tenants on grounds of nationality and ethnicity but also that they are doing so because of the Scheme. Whilst any individual piece of evidence would not, by itself, be sufficient to lead to this conclusion, the evidence as a whole when taken together powerfully shows that this is the result. In my judgment, there is a consistency through the surveys and arising from the mystery shopper exercises that this is happening and the causal link with the Scheme was not only asserted by the landlords but is a logical consequence of the Scheme for the reasons convincingly submitted by, in particular, Mr Bates on behalf of the RLA.

94. The evidence that there is discrimination was set out by Miss Kaufmann in her submissions and can be summarised and referred to as follows:

1. The evidence of Mr Patel referred to at paragraphs 82 and 83 above;

2. The evidence of Mr Smith referred to at paragraphs 75 - 77 above and in particular his reference to the report of Mr Tom Simcock of November 2017 "State Intervention into Renting: Making sense of the impact of policy changes" which was based upon responses from 2,792 landlords across the UK in July and August, which made the following key findings:

    - 42% of landlords reported that they were now less likely to consider letting to someone without a British passport;

    - 49% of landlords reported that they were now less likely to consider letting to someone who had permission to stay in the UK for a limited time period;

    - 6% of landlords have refused a tenancy application as a result of the Right to Rent checks.

3. The survey of 1,071 private landlords by Shelter reflected in the report of February 2016 whereby 15% of private landlords said that the law on checking the immigration status of tenants would mean that they would be less likely to let property to people who do not hold British passports or people who appear to be immigrants and between 18 and 20% said they would be much less likely to do so, referred to in the witness statement of Polly Neate. In that statement, Miss Neate referred to the Government guidance and stated:

    "Unfortunately, from our perspective, such guidance is an inadequate remedy as prospective tenants are unlikely to know they've been discriminated against if the answer from a landlord to their enquiry about renting a property is simply 'the room has gone'."

4. The evidence of Matthew Downie of Crisis, an organisation that provides help to 11,000 homeless people every year including assistance with housing, employment, health and wellbeing, skills and training. Mr Downie says:

    "13. We have anecdotal evidence from our services that Crisis clients have struggled to find private rented sector accommodation because landlords would not accept them without a British passport. This includes people from the Windrush generation, even those who have naturalisation documents. For example, Crisis has been working with a client from the Windrush generation who was forced to find new accommodation after there was a fire in her house. The client had a right to rent, however new landlords would not accept her as a tenant, because she did not have a British passport.

> Moreover, the Scheme will undoubtedly lead to a rise in homelessness and rough sleeping for those who have a legal right to rent, but who are evicted from their homes because they live in a mixed tenancy where the tenancy was ended due to one of the tenants not having the right to rent."

5. The RLA report "The Right to Rent Scheme and the Impact on the Private Rented Sector" by Noora Mykkanen & Dr Tom Simcock dated December 2018 which considered in Chapter 2, the right to rent checks and the impact on landlord behaviour. The key findings included:

    - Around 44% of landlords reported that they are less likely to consider letting to someone with a British passport. In contrast, in 2017 42% of the landlords reported they were now less likely to consider letting to someone without a British passport.

    - 53% of landlords are less likely to consider letting to people who have permission to stay in the UK for a limited time period. In comparison it was 49% in 2017.

    - 20% of landlords are less likely to consider letting to EU or EEA nationals, up from 17% in 2017.

    - Around 5% of those surveyed have refused a tenancy application since 1 February 2016 as a result of the right to rent checks.

6. The information and evidence arising from the Claimant's report "Passport please: The impact of the right to rent checks on migrant and ethnic minorities in England" from February 2017 and in particular its evidence of discrimination on multiple fronts set out at pages 7-9 of that report;

7. The mystery shopping exercises and the reports by Myriad on them.

95. In contrast, the Government's own evaluation failed to consider discrimination on grounds of nationality at all, only on grounds of ethnicity and, as Miss Kaufmann submitted, so far as ethnicity is concerned, it failed to ask the right questions. In her written submissions, Miss Kaufmann said:

> "On behalf of the Defendant, Parvaiz Asmat makes several objections about the Claimant's survey evidence, chief amongst which is that the low level of response was insufficient to draw 'wide ranging findings' and those responding were not selected by the Claimant in a controlled fashion. Not only does this constitute double standards (the Defendant's pilot evaluation was based on a similarly sized survey and yet found his contention that the Scheme does not cause discrimination), the Defendant's objections are redundant in the face of the

> consistent and striking picture which emerges from the various large-scale surveys which now exist."

I agree with those comments.

96. In conclusion, I was struck by the consistency of the evidence from the various different sources including the JCWI, Shelter, Crisis, the RLA, the report by the independent Chief Inspector of Borders and Immigration and so forth. It is a short step to conclude that such discrimination is as a result of the Scheme when the landlords say so and when it is logical for them so to act for the reasons cogently set out by Mr Bates on behalf of the RLA. The extent of the discrimination is such that it is a short further step to conclude that this is having a real effect on the ability of those in the discriminated classes to obtain accommodation, either because they cannot get such accommodation at all or because it is taking significantly longer for them to secure accommodation. It seems to me that the anecdotal case referred to by Mr Downie is likely to be a typical example of the effect of the Scheme and, in so far as I have described the two conclusions above as short steps, they are ones which I am prepared to, and do, take.

I: Government responsibility

97. A further and separate argument on behalf of the Defendant is that the Government cannot be responsible for any discrimination which is occurring in association with the Scheme because such discrimination, if it exists, arises from the voluntary intervention of third party landlords acting independently and inconsistently with the requirements of IA 2014 together with the codes and guidance issued under that legislation. Thus, it is asserted that the legislation itself contains no requirement to provide a UK passport, or indeed any passport and the statutory Codes specifically tell landlords how not to discriminate and warn them not to treat less favourably those who have a right to rent but no passport.

(i) The Claimant's submissions

98. Miss Kaufmann submits that the answer to the question 'can the State be responsible for actions of private actors when the obligation under Article 14 is on the State' is 'Yes'. Firstly, she points to the mandatory wording in Article 14 that the rights protected under the Convention "shall be secured" without discrimination. This requirement mirrors the language of Article 1 of the Convention which obliges States to "Secure to everyone within their jurisdiction" the rights contained in the Convention. The ECtHR has consistently held that the duty to secure the rights in the ECHR entails the imposition of implied positive obligations to ensure that its citizens are not subject to treatment which is proscribed by the Convention, including by private individuals. She cites *Z v United Kingdom* [2002] 34 EHRR 3 where the ECtHR held at paragraph 33:

> "The obligation on the high contracting parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment,

> including such ill-treatment administered by private individuals."

Miss Kaufmann submits that such positive obligations can include the obligations to pass legislation proscribing treatment which is contrary to the rights protected by the Convention.

99. Miss Kaufmann submits that the ECtHR has identified race discrimination as "a particularly invidious kind of discrimination" which requires special vigilance from the authorities and a vigorous reaction: see, for example, *Nachova v Bulgaria* [2006] 42 EHRR 43 at paragraph 145. The court has referred to the obligation on the authorities to use all available means to combat racism. In those circumstances, where it is contended the Government has such a positive obligation, she submits that the Defendant cannot contend that the State is not responsible under the Convention when its own acts cause or materially contribute to discrimination by private individuals, particularly in circumstances where the Government foresaw the risk before the legislation was introduced. She submits:

> The Defendant's approach, which would absolve the State entirely of any responsibility for the acts of third parties that it has foreseeably by its own actions caused, is not only inconsistent with the duty cast by Article 14 to secure the enjoyment of convention rights without discrimination, it runs contrary to the core purpose of the Convention which is "intended to guarantee rights that are not theoretical or illusory, but rights that are practical and effective."

(The quotation is from *Matthews v United Kingdom*, decision number 24833/94 at paragraph 32).

Miss Kaufmann submits that when it is the Government's own actions in introducing the Scheme which has caused the discrimination to occur, the Government retains responsibility for that even though the discrimination is carried out by third party private individuals. Miss Kaufmann submits that the Defendant's position, namely that legislation which does not compel third parties to discriminate but is a material and significant cause of discrimination cannot be incompatible with Article 14, is wrong in principle and is inconsistent with the jurisprudence emanating from Strasbourg. The duty to secure the rights protected by Article 14 includes a duty not to cause discrimination by private persons.

100. It is argued by the Defendant that a decision to this effect would be an extension of the Strasbourg jurisprudence as no previous decision of the ECtHR has so held. If that is right, Miss Kaufmann submits that the court should not shirk away from grasping this nettle, relying on the dictum of Lady Hale in *Keyu v SSFCA* [2016] A.C. 1355 where she said at paragraph 291:

> "Fourth, there are cases on which there is as yet no clear and constant line of Strasbourg jurisprudence. We do not have to wait until a case reaches Strasbourg before deciding what the answer should be. We have to do our best to work it out for ourselves as a matter of principle: *Rabone v Pennine Care*

> *Foundation Trust* [2012] 2 AC 72 is an example of this … there may be other situations in which the courts of this country have to try to work out for themselves where the answer lies, taking into account not only the principles developed in Strasbourg but also the legal, social and cultural conditions of the United Kingdom."

Miss Kaufmann submits that both Strasbourg principle and the legal traditions of the United Kingdom speak with one voice where Parliament has long spoken about discrimination in the provision of services and the Equality Act 2010 renders discrimination, whether direct or indirect, unlawful on, inter alia, grounds of race.

(ii) The Government's submissions

101. For the Government, Mr Pievsky submits that whilst a person alleging indirect discrimination does not have to prove *why* or *how* the legislation puts a person at a particular disadvantage compared with others, they do at least have to show that it does so and a causal link between the rule imposed and the disadvantage which flows is generally an essential element of an indirect discrimination claim. He relies on *Essop v Home Office* [2017] 1 WLR 1343 where Lady Hale said at paragraph 25:

> "Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP (the relevant provision, criterion or practice) and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes equality of treatment – the PCP is applied indiscriminately to all – but aims to achieve a level playing field, where people sharing a particular protected characteristic are not subjected to requirements which many of them cannot meet but which cannot be shown to be justified."

And then, at paragraph 33, Lady Hale said:

> "In order to succeed in an indirect discrimination claim, it is not necessary to establish the reason for the particular disadvantage to which the group is put. The essential element is a causal connection between the PCP and the disadvantage suffered, not only by the group but also by the individual. This may be easier to prove if the reason for the group disadvantage is known but that is a matter of fact, not law."

Mr Pievsky submits that the voluntary intervention of a third-party landlord acting independently and indeed inconsistently with the requirements of the IA 2014 and the Codes is not consistent with there being such a causal link.

102. Mr Pievsky submits that neither the Claimant nor, in their written submissions, Liberty are able to point to any authority from Strasbourg or elsewhere for the proposition that a legislative scheme is discriminatory in circumstances where no provisions can be identified which are either directly or indirectly discriminatory or where, if private individuals do what is required by the scheme, they will not commit any discrimination.

103. Mr Pievsky submits that the court should reject the Claimant's proposition that it should recognise a positive obligation owed by the State to prevent acts of discrimination at the hands of other parties including non-State actors such as private landlords. He asks the court to reject the establishment of a negative obligation not to "expose" any person within the State's jurisdiction to a risk of discrimination at the hands of such people. Mr Pievsky submits that this would remove all real content from the well-established requirement in Convention jurisprudence that in Article 14 cases the facts have to fall within the ambit of another Convention right. To recognise such a positive obligation would, he submits, mean that there is effectively a free-standing right derived from Article 14 to protection from all discrimination in the enjoyment of other legal rights, for example in relation to protection from the actions of private individuals.

104. So far as the expansion of Strasbourg jurisprudence is concerned, Mr Pievsky submits that it is not generally right to expand the scope of Convention rights further than the jurisprudence justifies or to outpace Strasbourg's development of Convention principles, citing Lord Hope in *Ambrose v Harris* [2011] 1 WLR 2435 at paragraph 20:

> "That is why the court's task in this case, as I see it, is to identify as best it can where the jurisprudence of the Strasbourg court clearly shows that it stands on this issue. It is not for this court to expand the scope of the Convention right further than the jurisprudence of the Strasbourg court justifies."

Mr Pievsky points out that the Convention is not directly enforceable between private citizens in the rental sector and applications to Strasbourg which suggest otherwise are likely to be declared manifestly ill-founded.

(iii) Discussion

105. In my judgment, the answer to this issue lies in the findings I have already made in relation to causation. It is my view that the Scheme introduced by the Government does not merely provide the occasion or opportunity for private landlords to discriminate but causes them to do so where otherwise they would not. The State has imposed a scheme of sanctions and penalties for landlords who contravene their obligations and, as demonstrated, landlords have reacted in a logical and wholly predictable way. The safeguards used by the Government to avoid discrimination, namely online guidance, telephone advice and codes of conduct and practice, have proved ineffective. In my judgment, in those circumstances, the Government cannot wash its hands of responsibility for the discrimination which is taking place by asserting that such discrimination is carried out by landlords acting contrary to the intention of the Scheme. As Miss Kaufmann submitted, it is not the Claimant's case that the obligations under the ECHR should be enforced between private citizens but

that they should be enforced against the Government by reference to the Government's own actions in introducing the Scheme.

106. In their written submissions, Liberty relied on the decision in *DH v Czech Republic* [2008] 47 EHRR 3 which provides in relation to indirect discrimination that "A general policy or measure which has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group" (see paragraph 175). Liberty submit that although the Scheme is not aimed at people of specific ethnicities or nationalities, the evidence shows that the Scheme nonetheless places these groups at a higher risk of landlords deciding not to let a property to them and this constitutes "disproportionately prejudicial effects on a particular group". In his oral submissions, Mr Westgate QC submitted that the core question is whether the State action has caused a discriminatory effect and if it has then Strasbourg is unconcerned with the precise causation route including where that involves the role of private individuals. He submitted that causation is to be addressed by considering how it plays out in effect. I agree with those submissions and prefer them to the submissions of Mr Pievsky on behalf of the Government. In my judgment, there is significant support for the position adopted by the Claimant and Liberty in the decision of the House of Lords in *R (European Roma Rights) v Prague Immigration Officer* [2005] 2 AC 1 where the Home Secretary had made rules authorising immigration officers to operate pre-clearance immigration controls extra-territorially and following agreement with the Czech Government, such a scheme was implemented at Prague airport aimed principally at stemming the flow of asylum seekers from the Czech Republic, the majority of whom were Roma. The claimants had been refused leave to enter the UK by immigration officers at Prague airport and challenged the scheme on the basis that it violated the UK's international obligations under the Convention Protocol relating to the status of refugees and was contrary to customary international law. The object of the proceedings was to establish that the Prague operation was carried out in a discriminatory fashion. At paragraph 97-98, Lady Hale said:

> "All the evidence before us, other than of the intentions of those in charge of the operation, which intentions were not conveyed to the officers on the ground, supports the inference that Roma were, simply because they were Roma, routinely treated with more suspicion and subjected to more intensive and intrusive questioning than non-Roma. There is nothing surprising about this. Indeed the Court of Appeal considered it 'wholly inevitable'. This may be going too far, but setting up an operation like this, prompted by an influx of asylum seekers who are overwhelmingly from one comparatively easily identifiable racial or ethnic group, requires enormous care if it is to be done without discrimination. That did not happen. The inevitable conclusion is that the operation was inherently and systemically discriminatory and unlawful.
>
> 98. In this respect it was not only unlawful in domestic law but also contrary to our obligations under customary international law and under international treaties to which the United Kingdom is

> a party. It is commonplace in international human rights instruments to declare that everyone is entitled to the rights and freedoms they set forth without distinction of any kind such as race, colour, sex and the like."

In my judgment, this applies to the Scheme set up by the Government in this case operated here effectively through landlords as opposed to through immigration officers at Prague Airport in the *European Roma Rights* case. This is not to create a free-standing obligation not to discriminate pursuant to Article 14 of the ECHR, as Mr Pievsky submitted, but merely addresses the issue whether the Government can be responsible for discrimination where it causes such discrimination to be carried out by third party private individuals. In my judgment it can.

J: Justification

107. It is the Government's position that the Scheme is justified within the principles of Convention law. The parties agree that, in relation to justification, there are (per Lord Mance in *In Re Medical Costs for Asbestos Diseases* [2015] AC 1016 at paragraph 45) generally four questions to be considered:

i) Whether there is a legitimate aim which could justify a restriction of the relevant protected right;

ii) Whether the measure adopted is rationally connected to that aim;

iii) Whether the aim could have been achieved by a less intrusive measure; and

iv) Whether, on a fair balance, the benefits of achieving the aim by the measure outweigh the disbenefits resulting from the restriction of the relevant protected right.

There is no issue in relation to the first three of these questions and, in the present case, the issue surrounds the fourth question, namely whether in the present case on a fair balance the benefits outweigh the "disbenefits" or disadvantages.

108. The parties further agree that the correct legal approach to be adopted to the fourth question (at least in this court) is that set out by Lord Mance in the *Asbestos Diseases* case at paragraph 52 as follows:

> "I conclude that there is Strasbourg authority testing the aim and the public interest by asking whether it was manifestly unreasonable, but the approach in Strasbourg to at least the fourth stage involves asking simply whether, weighing all relevant factors, the measure adopted achieves a fair or proportionate balance between the public interest being promoted and the other interests involved. The court will in this context weigh the benefits of the measure in terms of the aim being promoted against the disbenefits to other interests. Significant respect may be due to the legislature's decision, as one aspect of the margin of appreciation, but the hurdle to

> intervention will not be expressed at the high level of "manifest unreasonableness". In this connection, it is important that, at the fourth stage of the convention analysis, all relevant interests fall to be weighed and balanced. That means not merely public, but also all relevant private interests. The court may be especially well placed itself to evaluate the latter interests, which may not always have been fully or appropriately taken into account by the primary decision-maker."

(i) The Claimant's submissions

109. For the Claimant, Miss Kaufmann submits that the discrimination is not justified, arguing as follows:

i) Under the Convention, no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society, relying on *DH v Czech Republic* [2008] 47 EHRR 3 at paragraph 176 where the ECtHR said:

> "Discrimination on account of, inter alia, a person's ethnic origin is a form of racial discrimination. Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment."

ii) Because the discrimination in this case is on one of the most sensitive grounds proscribed by Article 14, it can only be justified on the basis of very weighty reasons. See for example *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at paragraph 19 where Lord Nicholls said:

> "… where the alleged violation comprises differential treatment based on grounds such as race or sex or sexual orientation the court will scrutinise with intensity any reasons said to constitute justification. The reasons must be cogent if such differential treatment is to be justified."

iii) The Equality Act 2010 renders discrimination, whether direct or indirect, unlawful, inter alia, on grounds of race and the protected characteristics in the Equality Act 2010 and the scheme of the Act reflects the suspect grounds of discrimination in respect of which strict justification is required under Article 14. Legislation or governmental policy which causes landlords to discriminate falls to be judged by no lesser a standard.

iv) Whilst the Defendant recognised a risk that discrimination would occur as a result of the Scheme, it did not list it as a cost inherent to the Scheme or otherwise explain how it would be offset by other benefits.

v) Parliament presumed, wrongly, that the introduction of the safeguards (the Code, the helpline etc) would reduce the discrimination to zero, or to so low an amount that it did not require explicit justification. But this was an untenable

position when the Defendant's own evaluation of the Scheme showed that it was discriminatory.

vi) In any event the Code was never likely to address discrimination: not only is there no sanction imposed on landlords who fail to adhere to it but it is at best ambiguous in certain critical respects.

vii) Even if the Scheme is rationally connected to its stated objectives, it is simply not bringing any benefits of the kind said to justify its introduction: it is in fact ineffective (see further paragraphs 111 to 113 below).

110. In her oral submissions, Miss Kaufmann, whilst acknowledging that in general significant deference is to be paid to Parliament, particularly in the context of primary legislation, submitted that no such deference needs to be paid where Parliament had erroneously taken the view that discrimination would be eradicated by the guidance and the other measures so that there would be no discriminatory effect at all.

111. An important strand of Miss Kaufmann's submissions related to the Scheme's efficacy. She referred to the Claimant's research report from February 2017 "Passport Please: The Impact of the Right to Rent Checks on Migrants and Ethnic Minorities in England" which found no evidence that the Scheme is in fact encouraging irregular migrants to leave the UK. Thus, in terms of enforcement of immigration control, only 31 of 654 individuals who were purported to have come to the Home Office's attention as a result of the Scheme have since been removed from the UK, less than 5%. There was no evidence to suggest that the remaining 623 individuals did not have a right to remain in the UK at the date of the report. Furthermore, the Defendant has shown, she submitted, through FOI requests that the Department is not collecting data that would allow it to measure:

i) discrimination resulting from the Scheme,

ii) the cost-effectiveness of the Scheme,

iii) whether the Scheme is resulting in migrants voluntarily leaving the UK, or

iv) the impact of the Scheme on agents and landlords.

112. Miss Kaufmann referred to various sources which suggest that the Defendant has no system for evaluating the efficacy of the Scheme including:

i) An exchange during the hearing of the Home Affairs Committee on Windrush children of 15 May 2018 when the Home Secretary was asked if he was aware of any measure or yardstick used by the Home Office to show that the hostile environment is achieving what the Home Office wanted to achieve, to which the Home Secretary responded that he was not aware of any such measure and to which the Director General responsible for Borders, Immigration and Citizenship at the Home Office, Glyn Williams, said "I would agree, Chair, that we need to put in place an evaluation scheme" thus, confirming that there was no such evaluation scheme in place;

ii) The report of the Independent Chief Inspector of Borders and Immigration from 2016 which included a section "Hostile environment – measuring impact" where the report stated:

> "7.7 there was no evidence that any work had been done or was planned in relation to measuring the deterrent effect of the 'hostile environment' on would be illegal immigrants."

At paragraph 7.23 the report goes on to state:

> "However, justification for extending the 'hostile environment' measures is based on the conviction that they are 'right' in principle, and enjoy broad public support, rather than on any evidence that the measures already introduced are working or need to be strengthened, since no targets were set for the original measures and little has been done to evaluate them."

iii) The further report of the Independent Chief Inspector of Borders and Immigration dated March 2018 where there was reference to criticism of the absence of any monitoring of the Scheme at the Home Office and the report concluded:

> "3.16 Overall the right to rent scheme is yet to demonstrate its worth as a tool to encourage immigration compliance (the number of voluntary returns has fallen). Internally, the Home Office has failed to co-ordinate, maximize or even measure effectively issues. Meanwhile, externally it is doing little to address stakeholders' concerns."

The Chief Inspector recommended the setting up of a new right to rent consultative panel to develop and make public plans for the monitoring and evaluation of the Scheme including the impact of the measures on illegal migrants, on landlords and on racial and other discrimination, exploitation and associated criminal activity and homelessness. The response of the Home Office to this report rejected the formation of a new consultative panel and although it agreed to continue to monitor key related indicators including homelessness figures and levels of landlord non-compliance, there was no proposal to monitor the effect of the Scheme on the two groups discriminated against on grounds of nationality and race. Miss Kauffmann referred to the second witness statement of Mr Patel where paragraph 10 he said:

> "The ICIBI report, as a whole, reinforces and provides further independent and authoritative evidence in support of JCWI's contentions that the right to rent Scheme was implemented without prior sufficient thought as to the evidence base or adequate monitoring and overall it's efficacy is unproven and highly doubtful. It calls into question the utility of the Scheme in terms of enforcement activity and the hostile environment ('compliance') strategy."

iv) The report of Colin Yeo dated 1 October 2018 showing that immigration enforcement activity was declining across the board with a 35% reduction of migrants removed from the UK from the first quarter of 2014 to the second quarter of 2018.

113. By reference to this evidence, Miss Kaufmann submitted that the Defendant is wholly unable to justify the Scheme in the face of its discriminatory effect and given the nature of the discrimination, namely race, weighty justification would be required in order to provide a fair balance against the discriminatory effect. She submitted that the Defendant has not come near to providing sufficient evidence to justify the Scheme.

(ii) The Government's submissions

114. For the Defendant, Mr Pievsky submitted that where legislation consists of socio-economic policy, the starting point must be that the State is entitled to a large margin of appreciation. This he submitted is particularly so where what is in issue is a political matter, decided pursuant to a democratic process in an area where people may reasonably disagree and in respect of which there is no European consensus. He submitted that the question of how best to maintain a workable and fair immigration system is very much a matter for the executive. Thus, the court should pay great respect to the judgment of Parliament. He referred to *AL (Serbia) v Home Secretary* [2008] 1 WLR 1434 where, at paragraph 8, Lord Hope said that the nature of the problem to which the policy was directed carries the Home Secretary a long way in showing proportionality. He said:

> "His policy was devised as a solution to pressing administrative and financial problems in the sphere of immigration control. These problems lay peculiarly within the executive's area of responsibility."

The right of the State to control immigration is one recognised by the ECtHR.

115. Mr Pievsky further submitted that the Scheme fits into its historical context whereby, for example, since 2008 employers have not been allowed to employ those who do not have a right to work and by section 25 of the Immigration Act 1971 it is a criminal offence to facilitate the commission of breach of immigration law by a person who is not a EU citizen.

116. So far as the European context is concerned, Mr Pievsky drew attention to the report of the European Union Agency for Fundamental Rights into the fundamental rights of migrants in an irregular situation in the European Union from 2011 where, in relation to access to private accommodation, the report stated:

> "The EU Facilitation Directive imposes a duty on EU member states to punish anyone who, for financial gain, intentionally assists a person, who is not a national of a member state to reside in breach of the laws of the state concerned on the residence of aliens."

117. Mr Pievsky submitted that the Government's approach was consistent with that of the ECtHR as shown by the decision in *SAS v France* [2015] 60 EHRR 11 where the court said:

> "154. The court has a duty to exercise a degree of restraint in its review of Convention compliance since such review will lead it to assess a balance that has been struck by means of a democratic process within the society in question. The court has, moreover, already had occasion to observe that in matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy maker should be given special weight.
>
> 155. In other words, France had a wide margin of appreciation in the present case.
>
> 156. This is particularly true as there is little common ground amongst the member states of the Council of Europe as to the question of the wearing of the full-face veil in public. The court thus observes that, contrary to the submission of one of the third party intervenors, there is no European consensus against the ban. Admittedly, from a strictly normative standpoint, France is very much in a minority position in Europe: except for Belgium, no other member state of the Council of Europe has, to date, opted for such a measure. It must be observed, however, that the question of the wearing of the full-face veil in public is or has been a subject of debate in a number of European states. In some it has been decided not to opt for a blanket ban. In others such a ban is still being considered. It should be added that in all likelihood the question of the wearing of the full-face veil in public is simply not an issue at all in a certain number of members states, where this practice is uncommon. It can thus be said that in Europe there is no consensus as to whether or not there should be a blanket ban on the wearing of the full-face veil in public places.
>
> 157. Consequently, having regard in particular to the breadth of the margin of appreciation afforded to the respondent state in the present case, the court finds that the ban imposed by the law of 11 October 2010 can be regarded as proportionate to the aim pursued, namely the preservation of the conditions of 'living together' as an element of the 'protection of the rights and freedoms of others'."

There was further similar support from the judgment of the European Court of Human Rights in *Petrovic v Austria* [2001] 33 EHRR 14 at paragraphs 38 and 42-43.

118. Whilst acknowledging points including that race is a particularly suspect factor, that the absence of deliberate targeting is a relevant factor, and that the less direct the connection, the less force the suspect ground factor will have (*AM (Somalia) v Entry Clearance Officer* [2009] EWCA Civ 634 para. 61), Mr Pievsky submitted that the

correct approach to the question of justification involves a three-stage process asking the following questions:

i) Is Parliament's policy, accorded all due respect, manifestly without reasonable foundation? If so that is an end of the matter and the policy will not be capable of justification. If not the court will accord Parliament's policy considerable weight.

ii) Was Parliament's policy outweighed by its potential for race discrimination?

iii) If not has the position changed by reference to the new evidence showing that the measures have had a disproportionately discriminatory effect?

119. Relying on the witness statement of Parvaiz Asmat, Mr Pievsky submitted that the Scheme is rationally connected to the objective of immigration control and represents a fair balance by reference to seven factors or points:

i) The persons against whom the legislation is directed are in the UK unlawfully or seeking to enter the UK unlawfully and have no right to enter or remain;

ii) If they can enter into a new residential tenancy they are by definition seeking to prolong such unlawful residence and deepen their ties with the UK;

iii) In the absence of provisions such as those provided by the Scheme, there is nothing in the law which prevents landlords from helping them to do this;

iv) A person who has lived in the UK for a longer period is more likely to wish to say that, despite having no immigration status, they have a deepened ECHR Article 8 connection with the UK and can no longer be removed without incompatibility with human rights standards;

v) The measure is self-evidently designed to prevent those not entitled to be in the UK from developing and deepening their practical and de facto ties with the UK in breach of the rules set by Parliament, putting at risk the integrity and effectiveness of a workable immigration system;

vi) The Scheme is also likely to reduce pressures on the housing market and on other public resources for those who are lawfully resident and to discourage rogue landlords;

vii) Other European states have also restricted or regulated the ability of landlords to rent property to illegal migrants.

120. Having made further submissions in response to those of Miss Kaufmann, Mr Pievsky submitted that the Scheme does in fact have efficacy, referring to the evidence of Parvaiz Asmat at paragraphs 47-49 and on that basis he submitted that the Scheme is manifestly justified and the evidence adduced by the Claimant is not so powerful as to alter the balance such as should lead the court to say that Parliament had got it wrong.

(iii) Discussion

121. It must be acknowledged, as submitted by Mr Pievsky and accepted by Miss Kaufmann, that the State is entitled to a large margin of appreciation in relation to the Scheme for all the reasons set out above:

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

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

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

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

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

122. Whilst, therefore, I recognise that the above factors carry the Government a long way towards justification of the Scheme, they are at least partly counter-balanced by the particular abhorrence with which racial discrimination is regarded and the recognition of this both domestically and in Strasbourg. In my judgment, it is of particular significance that recognition of such discrimination did not feature as part of the cost accepted by the Government as necessary in order to achieve the aim of the Scheme as part of the "hostile environment". On the contrary, all the indications are that, when introducing the Scheme, the Government was anxious to avoid such discrimination and put in place measures to avoid it. If those measures have proved ineffective, as I have found, then a declaration of incompatibility might in fact be welcomed by the Government so that it can re-think its strategy and see how the same aims can be achieved without the unwanted and unwelcome effect of discrimination.

123. For the reasons submitted by Miss Kaufmann and set out in paragraphs 109 to 112 above, which I accept, I have come to the firm conclusion that the Defendant has failed to justify the Scheme, indeed it has not come close to doing so. On the basis that the first question for the court to decide is whether Parliament's policy, accorded all due respect, is manifestly without reasonable foundation, I so find. On that basis, there is no balancing of competing interests to be performed. However, even if I am wrong about that, I would conclude that, in the circumstances of this case, Parliament's policy has been outweighed by its potential for race discrimination. As I have found, the measures have a disproportionately discriminatory effect and I would assume and hope that those legislators who voted in favour of the Scheme would be aghast to learn of its discriminatory effect as shown by the evidence set out in, for example, paragraph 94 above. Even if the Scheme had been shown to be efficacious

in playing its part in the control of immigration, I would have found that this was significantly outweighed by the discriminatory effect. But the nail in the coffin of justification is that, on the evidence I have seen, the Scheme has had little or no effect and, as Miss Kaufmann submitted, the Defendant has put in place no reliable system for evaluating the efficacy of the Scheme: see paragraphs 111 and 112 above, which, again, I accept.

124. In these circumstances, I find that the Government has not justified this measure nor, indeed, come close to doing so.

K: Discretion: Section 4 of the Human Rights Act 1998

125. It is submitted on behalf of the Defendant that the court should not make a declaration of incompatibility if the Scheme is capable of being applied in a non-discriminatory way. Declarations of incompatibility are dealt with by section 4 of the Human Rights 1998 which provides:

> "(1) subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
>
> (2) if the court is satisfied the provision is incompatible with a Convention right, it may make a declaration of that incompatibility."

In general, the court will not exercise its discretion to make a declaration of incompatibility unless the legislation is incapable of being applied otherwise than in a way which is incompatible with a Convention right. Thus, in *R (Bibi) v Home Secretary* [2015] 1 WLR 5055 Lord Hodge said at paragraph 69:

> "For the reasons which I discuss below, I think that there may be a number of cases in which the operation of the rule in terms of the current guidance will not strike a fair balance. But there may also be many cases in which it will. The court would not be entitled to strike down the rule unless satisfied that it was incapable of being operated in a proportionate way and so was inherently unjustified in all or nearly all cases: *R (MM (Lebanon)) v Home Secretary* [2015] 1 WLR 1073, paras 133 - 134 per Aikens LJ. As a result, the appellants failed to show that the rule itself is an unjustifiable interference with Article 8 rights."

Furthermore, I bear in mind what was said by the Supreme Court in *Christian Institute v Lord Advocate* [2016] UKSC 51 at paragraph 88:

> "This court has explained that an *ab ante* challenge to the validity of legislation on the basis of a lack of proportionality faces a high hurdle: if a legislative provision is capable of being operated in a manner which is compatible with Convention rights in that it will not give rise to an unjustified interference

> with Article 8 rights in all or almost all cases, the legislation itself will not be incompatible with the Convention rights."

126. Relying on these authorities Mr Pievsky for the Defendant asks the court to consider whether the legislation is wholly incompatible with Article 8 and 14 rights or whether it operates incompatibly only in a minority of cases. He submits that if the latter is the case no declaration of incompatibility should be made but if the former is the case then the court has a discretion. In this regard he submits that the relief sought by the Claimant does not tie in with the objection to the legislation. Thus he submits that the legislative source of what a landlord needs to do to have a statutory excuse is the Immigration (Residential Accommodation) (Prescribed Requirements and Codes of Practice) Order 2014 and in those circumstances the Claimant's attack is, he submits, misdirected. He submits that the Claimant needs to make good the proposition that even if Parliament eased the requirements for landlords to avoid a penalty, thus reducing the temptation to discriminate, that would not be good enough and the primary legislation would still be incompatible.

127. In my judgment, the legislation is intended to bite, and bite hard, on landlords in order for it to be efficacious. It would appear that this has not turned out to be the case and, if anything, this would cause the Government to tighten up the requirements for landlords rather than ease them. In my judgment, any easing of the requirements for landlords to avoid a penalty would deprive the Scheme of its "raison d'etre" and therefore, contrary to the submissions of Mr Pievsky, I consider that the attack on the Scheme was not misdirected but well directed. What the experience of the last few years has shown is that <u>any</u> scheme of this kind will inexorably lead landlords down the path of discrimination and operate in a way which is incompatible with Article 14 ECHR. In the circumstances, I have no doubt that, if the other conditions are fulfilled, a declaration of incompatibility is the appropriate order and there is no basis upon which the court should exercise its discretion to refuse such a declaration.

L: Ground 2: Declaration of Irrationality

128. The second ground of relief sought by the Claimant is either an order quashing the decision of the Defendant to extend the Scheme to the devolved parts of the United Kingdom or, alternatively, a declaration that a decision by the Defendant to commence the Scheme in Scotland, Wales and Northern Ireland would be irrational and a breach of Section 149 of the Equality Act 2010 without any further evaluation of its discriminatory impact in the form of an exercise to measure the extent of discrimination caused by the Scheme.

129. In my judgment, the Defendant is correct to assert that, in the absence of an actual decision to extend the Scheme to Scotland, Wales and Northern Ireland, as opposed to an intention to do so, an order quashing such a decision is inapplicable and inappropriate.

130. In relation to a declaration that a decision to commence the Scheme would be irrational and a breach of 149 Equality Act 2010, Mr Pievsky submits that it is not appropriate for the court to make a declaration in respect of a decision which has not been made. However, in my judgment that is not right where the Government has expressed a clear intention to roll out the Scheme to the devolved territories, and such

a declaration is appropriate if I conclude that such a decision would be irrational and a breach of Section 149.

131. In my judgment, a decision by the Defendant to commence the Scheme in Scotland, Wales or Northern Ireland without any further evaluation of its efficacy on the one hand and its discriminatory impact on the other in the form of an exercise to measure each of those matters effectively would indeed be irrational and a breach of Section 149 of the Equality Act 2010. The reasons are essentially those which have already been considered in relation to the application for a declaration of incompatibility. Given that I have found that there is little or no evidence of efficacy in relation to the Scheme and convincing evidence that the Scheme causes landlords to behave in a discriminatory way, and in particular in a racially discriminatory way, no reasonable Home Secretary could decide to extend the Scheme further without first securing evidence to dispel the evidence garnered by the Claimant and the interested parties and which I have found convincingly demonstrates that the Scheme is discriminatory in its effect, with little evidence of its efficacy.

132. In his submissions, Mr Pievsky on behalf of the Defendant submitted that there is no case where the court has declared unlawful the bringing into force of legislation on the basis of the risk of illegality at the hands of private persons as opposed to a public authority. He further submits that, in any event, the evaluation of the Scheme before its extension to all of England was detailed, thorough and conscientious and there is no reason to think that the same would not occur in relation to Scotland, Wales and Northern Ireland. He submits that there is no reason to assume that the consideration of the Home Secretary will be other than thorough and conscientious. However, he conceded that the Home Secretary is not committed to carrying out a further evaluation exercise.

133. In my judgment, the experience of the implementation of the Scheme throughout England has been not that there will be merely a <u>risk</u> of illegality should the Scheme be extended to the devolved territories but a <u>certainty</u> of illegality because landlords in those territories will have the same interests and will take into account the same considerations as their counterparts in England. In my consideration of the application for a declaration of incompatibility, I have considered whether the evaluation before the extension of the Scheme to all of England was detailed, thorough and conscientious and I have found that it was not. It seems to me that a further evaluation exercise would be essential before the Home Secretary could possibly justify any further roll-out of this Scheme and any decision to do so without such further evaluation would be irrational and a breach of Section 149 of the Equality Act 2010. In those circumstances, the Claimant is entitled to the order sought.

M: Conclusion

134. In the circumstances, there will be:

i) an Order pursuant to s.4 Human Rights Act 1998 declaring that sections 20-37 of the Immigration Act 2014 are incompatible with Article 14 ECHR in conjunction with Article 8 ECHR; and

ii) An Order declaring that a decision by the Defendant to commence the Scheme represented by sections 20-37 of the Immigration Act 2014 in Scotland, Wales or Northern Ireland without further evaluation of its efficacy and discriminatory impact would be irrational and would constitute a breach of s. 149 Equality Act 2010.