R (on the application of Mahoney) v Secretary of State for Communities and Local Government

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The Administrative Court's decision last month in *R (on the application of Mahoney) v Secretary of State for Communities and Local Government* [2015] EWHC 589 (Admin) considered whether the system of 'home loss payments' in the Land Compensation Act 1973 discriminates against gypsies and Irish travellers. Lindblom J found for the Secretary of State, holding that, while the act treats those who live in 'bricks and mortar' houses differently from those who live in caravans, this does not amount to discrimination under article 14 of the European Convention on Human Rights when read with article 8 and article 1 of the First Protocol.

Background

Two applications for judicial review were brought by Irish travellers who live in caravans on a local authority site on Eleanor Street in the London Borough of Tower Hamlets. The site is being acquired from the council by Crossrail in connection with its construction of a new railway. It hopes to acquire the site by agreement with the council, failing which it will use its compulsory purchase powers. It has already compulsorily purchased the site to which it intends to relocate the inhabitants of the Eleanor Street site.

Under section 29 of the Land Compensation Act 1973, people who are displaced from their homes are entitled to a home loss payment (in addition to being rehoused or receiving compensation for the value of the land lost) in recognition of the distress caused when a person is forcibly removed from his home. Section 33 extends the scheme to those who live in caravans, but only where 'no suitable alternative site' is available to the caravan dweller 'on reasonable terms'.

The Applicants argued that this provision is incompatible with article 14 ECHR (prohibition on discrimination) when read in conjunction with article 8 (respect for private and family life) and article 1 of the First Protocol (protection of property) in that it discriminates unlawfully between those who live in houses and those who live in caravans. As Irish travellers they belong to a recognised ethnic group that falls within the prohibition of discrimination.

Judgment

In his comprehensive and carefully reasoned judgment, Lindblom J approached the applications by way of a three-stage analysis. He asked himself the following questions:

1. Does the case fall within the ambit of article 8 and/or article 1 of the First Protocol?

2. If so, is there any difference in treatment between persons in analogous situations?

3. If so, is the difference in treatment objectively and reasonably justified?

In summary, he found as follows:

1. Article 8 is not engaged. Article 1 of the First Protocol may be engaged on the most generous possible reading of the case law.

2. But in any case, the applicants' circumstances are not analogous to those of the people with whom they seek to compare themselves, so the question of discrimination does not arise.

3. Moreover, any difference in treatment falls within the wide margin of appreciation accorded to states in such matters, and is a proportionate means of achieving a legitimate aim.

Article 8 ECHR and article 1 of the First Protocol

The Applicants argued that home loss payments are one way in which the state gives effect to its duties under these two articles, and that it must do so without discrimination. However the court found that the statutory scheme for compensating people affected by compulsory purchase, taken as a whole, goes far beyond what is required to demonstrate respect for those Convention rights.

The court made two observations. First, that the particular provision under attack, which relates solely to home loss payments, is not what founds the 'expropriation of property' inherent in compulsory purchase, and therefore does not come within the ambit of the two articles in question. Second, that in any case it is well established that the statutory scheme for compulsory purchase as a whole is Convention-compliant.

With regard to article 8, the court found that there was no evidence before

it that the Applicants' private or family lives, homes or correspondence had been affected by the operation of section 33, and therefore that there was no interference with those rights.

The judge did not reach a firm conclusion about article 1 of the First Protocol. On the one hand he found that, even if the Applicants' licences to occupy the Eleanor Street site amounted to 'possessions' for the purposes of that article (which was doubted), it could not be said that section 33 operated to interfere with those possessions, since it was not the basis for the actual expropriation (as per his article 8 analysis).

On the other hand, he noted that Strasbourg jurisprudence extends the concept of possessions to include claims for compensation where there is a 'legitimate expectation' of receiving that compensation based on a legal provision or domestic case law *(Ernewein v Germany, application no 14849/08).*

The Respondent argued that the Applicants did not have any such legitimate expectation, since section 33(2) provides that '*No* home loss payment… shall be made to any [caravan dweller] *except* where no suitable alternative site for stationing a caravan is available to him on reasonable terms' [emphasis added], and that such a site was available (as the Applicants accepted).

However, by inverting the statutory provision, Lindblom J found that it could perhaps be said that a caravan dweller has a legitimate expectation that he *will* receive a home loss payment, *unless* there is a suitable alternative site. He found that this analysis was 'possible, and arguably preferable', but recognised that it required 'the broadest possible understanding of the concept of a "possession"... on a reading of the European jurisprudence as generous to the claimants as it could be'.

Although Lindblom J did not decide definitively whether article 1 of the First Protocol was engaged, it made no difference to the overall result because he went on to find that the answer to question 2 was in any case 'no', and that the applications must therefore be dismissed.

Analogous situations

The Applicants argued that their treatment as displaced caravan dwellers provided with a suitable alternative site should be compared with that of displaced house dwellers provided with suitable alternative houses. They argued that the situations of the two groups were analogous, and yet their treatment was different, thus engaging article 14 ECHR (prohibition on discrimination).

The court accepted that there was more to the concept of 'home' than just the

four walls of a habitation, including its garden, views, local facilities, ties with the community and so on, and that both groups of people would be equally affected by the loss of these 'amenities' if forcibly relocated.

However it found that there was a material difference between the two groups, in that the caravan dweller can take his caravan with him, whereas the house dweller must leave his house behind. Lindblom J found that this is a 'practical difference, and in my view a significant one', and that the analogy the Applicants sought to draw was therefore 'plainly false'.

As a result, he found that there was no discrimination and the applications were therefore bound to fail, even if the engagement of article 1 of the First Protocol could be established.

Objective and reasonable justification

For the sake of completeness, Lindblom J went on to consider whether, if section 33 had been held to be discriminatory, it could nevertheless be objectively justified. He found that it could.

Where the measure in question is one of economic or social strategy, as here, the state has consistently been found to enjoy a wide margin of appreciation. In such circumstances, provisions are only found to be unjustified where they are 'manifestly without reasonable foundation' *(James v United Kingdom [1986]* 8 EHRR 123 at 46).

The Applicants argued that they faced a 'blanket restriction' on receiving a home loss payment where a suitable alternative site was available, even if it was not possible to move their caravans to the new site (that was not in issue here, though one applicant feared his caravan may be damaged in the moving process). They also argued that the distress suffered by a displaced caravan dweller is just as great as that of a displaced home dweller due to loss of the aforementioned amenities, and in some cases even greater due to the hostility and prejudice frequently encountered by gypsies and travellers. In conclusion it was argued that the ability to move the caravan might justify a reduction in the home loss payment but did not justify exclusion of it.

However, the court found that, in restricting home loss payments to the circumstances described in section 33(2), Parliament was acting proportionately and within its margin of appreciation. The measure was not aimed specifically at a vulnerable group (being addressed to caravan dwellers in general, rather than gypsies and travellers in particular), and therefore did not call for the very high justificatory threshold imposed in cases of direct discrimination. Accordingly, the will of Parliament should be respected and the court 'slow to

substitute its view for that of the executive'.

Lindblom J also rejected the notion that there was a 'blanket' exclusion on caravan dwellers receiving home loss payments. Since each case must be considered on its own facts, in order to determine whether the alternative site offered is both 'suitable' and available 'on reasonable terms', there is always an element of discretion for the decision maker. For this reason he found the restriction in section 33(2) to be a proportionate qualification on the general availability of home loss payments, one that reasonably reflects the difference in situation between house dwellers and caravan dwellers.

Comment

The judgment confirms that a wide margin of appreciation is to be afforded to Member States under article 14 on matters of social and economic policy.

One of the reasons why such an approach was appropriate in the present case was that the measure in question was a provision of primary legislation. Lindblom J rejected the applicants' argument that, because section 33 had not been intensively debated in Parliament, less weight should be accorded to the will of the legislature in this regard. 'I do not think it is appropriate to deploy passages from Hansard in support of such an argument in a case of this kind,' he held, citing as support the House of Lords' judgment in *Wilson v First County Trust (No 2)* [2004] 1 AC 816.

He also drew support from the lack of consensus among Member States about the appropriate conditions for receiving home loss payments. In such situations, he noted, the Strasbourg court has traditionally accorded states a wider margin of appreciation.

Ben Lask appeared for the Secretary of State

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.