Easter Term
[2015] UKSC 25
On appeal from: [2013] EWCA Civ 591

JUDGMENT

R (on the application of Hemming (t/a Simply Pleasure Ltd) and others) (Respondents) *v* Westminster City Council (Appellant)

before

Lord Neuberger, President
Lord Mance
Lord Clarke
Lord Reed
Lord Toulson

JUDGMENT GIVEN ON

29 April 2015

Heard on 13 January 2015

Appellant
Nathalie Lieven QC
David Matthias QC
Jacqueline Lean
(Instructed by
Westminster City Council
Legal Services)

Respondents
Philip Kolvin QC
Victoria Wakefield

(Instructed by Gosschalks
Solicitors)

Interveners (1-4)
Timothy Dutton QC
Robert O'Donoghue
(Instructed by Russell-
Cooke LLP)

Interveners (5 and 6)
Michael Fordham QC
Hugh Mercer QC
(Instructed by Bevan
Brittan LLP)

Intervener (The Local Government Association)
Written Submissions Only
(Instructed by The Local
Government Association
Corporate Legal Advisor)

Intervener (Her Majesty's Treasury)
George Peretz QC
(Instructed by Government
Legal Department)

Interveners

1. The Architects Registration Board ("ARB")
2. The Solicitors Regulation Authority ("SRA")
3. The Bar Standards Board ("BSB")
4. The Farriers Registration Council
5. The Law Society
6. The Bar Council
7. The Local Government Association
8. Her Majesty's Treasury

LORD MANCE: (with whom Lord Neuberger, Lord Clarke, Lord Reed and Lord Toulson agree)

1. The appellants, who I shall call Westminster City Council, are the licensing authority for sex establishments (including "sex shops") in Westminster under Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982. The respondents have at all material times been licensees in respect of some sex shops in Westminster.

2. The agreed statement of facts and issues records that an applicant for the grant or renewal of a sex establishment licence for any year had to pay a fee made up of two parts, one related to the administration of the application and non-returnable, the other (considerably larger) for the management of the licensing regime and refundable if the application was refused. By way of example, for the year 2011/12 the total fee was £29,102, of which £2,667 related to the administration of the licence and was non-returnable, while £26,435 related to the management of the licensing regime and was refundable if the application was refused. Refundable in this context clearly meant refundable in law.

3. The respondents, during the course of the proceedings before the Supreme Court, appeared to the court to be throwing some doubt on the agreed fact that the second part of the fee was refundable. However, not only was that agreed in the statement of facts and issues, but it was accepted by both courts below: see Keith J's judgment dated 16 May 2012, [2012] PTSR 1676, para 32 and the Court of Appeal's judgment dated 24 May 2013, [2013] PTSR 1377, para 32. Further, the practice of refunding the second part of such a fee was recorded as long ago as 1985 in *R v Westminster City Council, Ex p Hutton*, tried and reported with *R v Birmingham City Council, Ex p Quietlynn Ltd* (1985) 83 LGR 461, 517. It is one which sex shop operators like the respondents must, on the face of it, have been aware of and have been able to enforce as a matter of public law. I see no basis in these circumstances for proceeding on any other basis.

4. The central issue is whether it was legitimate under domestic and/or European Union law for Westminster City Council to charge the £26,435 in 2011/12, or similarly refundable sums in other years. The respondents contend that it was not, essentially on the basis that these sums were, although refundable in the case of unsuccessful applicants, payable on account of the costs of enforcement of the licensing scheme which were unrelated to the costs of processing applications and should have been borne out of Westminster City Council's general funds and/or were, although payable on application by all applicants, sums which could only

benefit successful applicants. I note that this was, of course, why they were refundable.

5. In domestic law, Westminster City Council relies upon paragraph 19 of Schedule 3 to the 1982 Act as authorising such fees. Paragraph 19 provides that:

> "An applicant for the grant, renewal or transfer of a licence under this Schedule shall pay a reasonable fee determined by the appropriate authority."

6. Under this provision, it was established domestically some 30 years ago that a fee could be charged under paragraph 19 to reflect the costs not only of processing of applications but also of "inspecting premises after the grant of licences and for what might be called vigilant policing … in order to detect and prosecute those who operated sex establishments without licences": *R v Westminster City Council, Ex p Hutton* (1985) 83 LGR 516, quoted in the Court of Appeal's judgment, para 13.

7. The correctness of this case law, as and when decided, is in my view unquestionable. I also have no doubt that it is, as a matter of domestic law, open to a licensing authority under paragraph 19 of Schedule 3 to require an applicant for the grant or renewal of a licence to pay a fee to cover the running and enforcement costs of a licensing scheme, and to make this fee payable either (a) outright, as and when the licence is actually granted pursuant to the application or (b) on a refundable basis, at the time when the application is lodged. The respondents' contrary submission reads the wording of paragraph 19 over-restrictively.

8. However, the respondents submit that, even if paragraph 19 is so read, the position has changed as a result of the making, under section 2 of the European Communities Act 1972, of the Provision of Services Regulations 2009 (SI 2009/2999) to give effect to Directive 2006/123/EC on services in the internal market. Regulation 18 of the 2009 Regulations provides:

> "(2) Authorisation procedures and formalities provided for by a competent authority under an authorisation scheme must not -
>
> (a) be dissuasive, or
>
> (b) unduly complicate or delay the provision of the service.

> (3) Authorisation procedures and formalities provided for by a competent authority under an authorisation scheme must be easily accessible.
>
> (4) Any charges provided for by a competent authority which applicants may incur under an authorisation scheme must be reasonable and proportionate to the cost of the procedures and formalities under the scheme and must not exceed the cost of those procedures and formalities."
>
> Under regulation 4:
>
> "'authorisation scheme' means any arrangement which in effect requires the provider or recipient of a service to obtain the authorisation of, or to notify, a competent authority in order to have access to, or to exercise, a service activity …"

9. Paragraphs (2), (3) and (4) of regulation 18 implement article 13(2) of the Directive. Despite their reformulation, no-one suggests that these paragraphs have any wider or different effect than article 13(2). Article 13(2) reads:

> "Authorisation procedures and formalities shall not be dissuasive and shall not unduly complicate or delay the provision of the service. They shall be easily accessible and any charges which the applicants may incur from their application shall be reasonable and proportionate to the cost of the authorisation procedures in question and shall not exceed the cost of the procedures."

10. Article 13(2) is part of section 1, headed "Authorisations" in Chapter III of the Directive. Article 9, the first article in section 1, reads:

> "Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied:
>
> (a) the authorisation scheme does not discriminate against the provider in question;

(b) the need for an authorisation scheme is justified by an over-riding reason relating to the public interest;

(c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective."

Article 4(6) contains this definition:

> "'authorisation scheme' means any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof …"

11. Section 2 of Chapter III of the Directive, headed "Requirements prohibited or subject to evaluation", specifies in article 14 various "prohibited requirements", to compliance with which Member States may not make access to, or the exercise of, a service activity in their territory subject. One is an obligation to provide or participate in a financial guarantee or to take out insurance from a provider in their territory, but it is expressly provided that this shall not exclude a requirement to have insurance or a financial guarantee, or participate in a collective compensation scheme. Section 2 thus suggests that conditions attaching to the actual exercise of a service activity, once any necessary authorisation has been obtained, are a separate matter from the authorisation scheme and authorisation procedures and formalities. Similarly, Chapter IV, headed "Free movement of services" provides that Member States may not make access to or the exercise of a service activity in their territory subject to compliance with any requirements which do not respect general principles of non-discrimination, necessity and proportionality set out in article 16(1) or which involve certain requirements set out in article 16(2). Again, this suggests that the actual regulation of access to or the exercise of a service activity is a distinct matter from any prior authorisation scheme and its procedures, with which section 1 of Chapter III is concerned.

12. The courts below regarded article 13(2) as covering charges made to successful as well as unsuccessful applicants, and as preventing a licensing authority from charging those granted licences as well as unsuccessful applicants with the cost of investigating and prosecuting persons operating sex establishments in Westminster without a licence. On this basis, unsuccessful applicants could only be charged with the costs of dealing with their application (including investigating their suitability), while successful applicants could only be charged with similar costs, and, on any renewal, with the costs of monitoring and enforcing their compliance

with their licence in the past. This would, inevitably, leave the licensing authority out of pocket in operating and enforcing the licensing scheme for the benefit of those obtaining licences, since the authority would have no recourse against any applicant for the costs of enforcing the scheme against the operators of unlicensed sex establishments, even though such enforcement was for the benefit of licensed operators. The authority would have to have recourse to any general funds which it might have, ie those raised in the case of Westminster City Council from rate or council tax payers or received from central government. What the remedy would be in the case of other regulatory or professional bodies which might have no general funds and no ability to raise funds in any such way is not clear.

13. The Supreme Court has not only had the benefit of fuller and more refined arguments from the parties. It has also had the benefit of interventions by HM Treasury and a considerable number of regulatory or professional bodies, concerned about their ability to recover fees for enforcing other regulatory schemes, which might be regarded as similar to that presently under consideration.

14. Westminster City Council's case has been put in two alternative ways. The first way is that the concept of "authorisation procedures and formalities" in article 13(2) can be interpreted widely enough to cover all aspects of the licensing scheme, including the costs of its enforcement against unlicensed operators. The second way is that article 13(2) (and so regulation 18) is concerned – and concerned only - with charges made in respect of authorisation procedures and their cost. The refundable charges which accompany any licence application do not relate to authorisation procedures or their cost. They relate to the running and enforcement of the licensing scheme for the benefit of those whose applications are successful; it is for that reason they are refundable to those whose applications are unsuccessful.

15. I have no hesitation in rejecting the first way in which Westminster City Council puts its case. Article 13(2) is only concerned with authorisation procedures and formalities at the stage when a person is seeking permission to access or exercise a service activity. That is its natural meaning, read with the definition of "authorisation scheme" in article 4. Article 13(2) is not concerned with fees which may be required to be paid (eg annually) for the possession, retention or renewal of a licence, once the authorisation stage is satisfactorily past. The "charges which the applicants may incur from their application" to which article 13(2) refers cannot sensibly embrace fees of this nature payable by successful applicants for the licence or its retention or renewal after the authorisation stage. Nor can they in other language versions - eg the French, where "les charges qui peuvent en découler" refers to charges arising from the procedures and formalities, and the German, where "eventuelle dem Antragsteller mit dem Antrag entstehende Kosten" refers to costs associated with the application.

16. The respondents do not, as the court understands their position, quarrel with the conclusion expressed in para 15. It is also consistent with recitals 39 to 49 to the Directive, which are admissible as aids to its construction. These recitals include the following:

> "(39) The concept of 'authorisation scheme' should cover, *inter alia*, the administrative procedures for granting authorisations, licences, approvals or concessions, and also the obligation, in order to be eligible to exercise the activity, to be registered as a member of a profession or entered in a register, roll or database, to be officially appointed to a body or to obtain a card attesting to membership of a particular profession. Authorisation may be granted not only by a formal decision but also by an implicit decision arising, for example, from the silence of the competent authority or from the fact that the interested party must await acknowledgement of receipt of a declaration in order to commence the activity in question or for the latter to become lawful. …
>
> (42) The rules relating to administrative procedures should not aim at harmonising administrative procedures but at removing overly burdensome authorisation schemes, procedures and formalities that hinder the freedom of establishment and the creation of new service undertakings therefrom.
>
> (43) One of the fundamental difficulties faced, in particular by SMEs (small and medium sized enterprises), in accessing service activities and exercising them is the complexity, length and legal uncertainty of administrative procedures. For this reason, following the example of certain modernising and good administrative practice initiatives undertaken at Community and national level, it is necessary to establish principles of administrative simplification, *inter alia* through the limitation of the obligation of prior authorisation to cases in which it is essential and the introduction of the principle of tacit authorisation by the competent authorities after a certain period of time elapsed. Such modernising action, while maintaining the requirements on transparency and the updating of information relating to operators, is intended to eliminate the delays, costs and dissuasive effects which arise, for example, from unnecessary or excessively complex and burdensome procedures, the duplication of procedures, the 'red tape' involved in submitting documents, the arbitrary use of powers by the competent authorities, indeterminate or excessively long

> periods before a response is given, the limited duration of validity of authorisations granted and disproportionate fees and penalties. Such practices have particularly significant dissuasive effects on providers wishing to develop their activities in other Member States and require coordinated modernisation within an enlarged internal market of 25 Member States."

Recital (49) also expressly contemplates that there can be fees of a supervisory body.

17. It follows from paras 15 and 16 above that article 13(2) (and so regulation 18) is concerned – and concerned only - with charges made in respect of authorisation procedures and their cost, and that nothing in article 13(2) precludes a licensing authority from charging a fee for the possession or retention of a licence, and making this licence conditional upon payment of such fee. Any such fee would however have to comply with the requirements, including that of proportionality, identified in section 2 of Chapter III and section 1 of Chapter IV. But there is no reason why it should not be set at a level enabling the authority to recover from licensed operators the full cost of running and enforcing the licensing scheme, including the costs of enforcement and proceedings against those operating sex establishments without licences.

18. In over-long written submissions submitted after the hearing in response to a letter from the Court, the respondents have, however, emphasised that they do not accept that this enables a licensing authority to stipulate for the payment of such a fee on the grant or renewal of a licence in or as part of the application for a licence. Although the respondents did not develop their case in this way or identify any such typology, the logic of the respondents' case must, as I understand it, be that article 13(2) precludes a licensing authority from operating a scheme of either of the following types:

> *Type A:* Applications for licences are made on terms that the applicant must pay:
>
> i) on making the application, the costs of the authorisation procedures and formalities, and
>
> ii) on the application being successful, a further fee to cover the costs of the running and enforcement of the licensing scheme.

Type B: Applications for licences are made on terms that the applicant must pay:

i) on making the application, the costs of the authorisation procedures and formalities

ii) at the same time, but on the basis that it is refundable if the application is unsuccessful, a further fee to cover the costs of the running and enforcement of the licensing scheme.

Westminster City Council has until now operated a scheme of type B, as set out in paras 2 and 3 above.

19. The respondents' case is that, under both types of scheme (A and B), the requirement to pay the further fee mentioned in sub-paras (ii) above is an aspect of the authorisation scheme within the meaning of the Directive. In the case of a type A, I have no doubt that it is not. It is a mere provision that, if and when authorisation is successfully obtained, the actual grant or renewal of a licence will be subject to payment of a fee to cover enforcement costs. Once it is accepted (paras 15 to 17 above) that article 13(2) permits a licensing authority to levy on a successful applicant, in respect of the possession or retention of a licence, charges enabling the authority to recover the full cost of running and enforcing the scheme, it would be incongruous if an application could not refer to or include a requirement to pay such charges on the application being successful. The inclusion in the application of a requirement to pay a licence fee for the possession or retention of a licence, if the application is successful, does not turn that requirement into an authorisation procedure or formality or into a charge incurred from the application. It remains a licence fee incurred for the possession or retention of the licence.

20. That leaves for consideration whether article 13(2) permits a scheme of type B. In the view of at least some members of the Court, this is more problematic. Under a scheme of type B, every applicant is required to pay up front - even though on a refundable basis - a sum which is referable not to the costs of handling the application, but to costs which will be incurred for the benefit only of successful applicants. This is a requirement which attaches to the application, not to its success. The question is whether it infringes article 13(2).

21. The argument for treating article 13(2) as applicable to the requirement to pay the further fee mentioned in (ii) under a scheme of type B starts with the proposition that the requirement amounts to an "authorisation procedure" or "formality". It is not suggested that the requirement could or would "unduly

complicate or delay the provision of the service". But, as the argument developed before the Supreme Court, two other points emerged:

i) First, the respondents submit that a requirement to make even a refundable payment could have a "potentially dissuasive" effect on applicants.

ii) Second, they submit that even a refundable payment constitutes a charge, and that such a charge infringes article 13(2) because it exceeds the cost, understood as the cost to Westminster City Council, of the procedures.

22. The first point was not the subject of any submissions, evidence or investigation in the courts below, where the arguments were put more broadly. Whether something is "dissuasive" is on the face of it a question of fact and judgment. The refundable part of the fee payable on application is quite substantial, but sex shops are no doubt profitable or there would be no applicants, and the refundable part is a sum which anyone applying for a licence must be willing and able to pay for a licence. The Supreme Court was also informed by Mr Kolvin QC, counsel for the respondents, that it takes typically two months for an application to be decided, with the refund being then made if the application is refused; and that, if such a refusal is challenged by judicial review, any refund will await the outcome of the judicial review, which takes about six months. There is, on the material before the Supreme Court, no factual or evidential basis for a conclusion that a requirement to accompany an application with a payment refundable if the application fails could or would be likely to dissuade these or any other applicants from making any application for a sex establishment licence. I would not therefore accept the respondents' submission on the first point.

23. As to the second point, I agree that the reference in article 13(2) to "the cost of the … procedures" means their cost to Westminster City Council. The question is therefore whether the requirement to make a payment refundable on failure of an application is a "charge". When the application succeeds, the payment becomes due unconditionally. When the application fails, the payment is refundable and refunded. But is it a charge to have to advance the payment, in order to await one or other of these occurrences? Again, so far as this is a question of fact, there is no evidence that it cost these respondents, or any other applicants for sex establishment licences, anything to put up and make such payments during the period while any application was being considered. If the onus is on the respondents to establish that making such a payment on a refundable basis cost them anything, they have not done so. On the other hand, there might sometimes be a cost attached, eg by way of borrowing costs or even loss of interest.

24. The questions thus arising are

> (1) whether the requirement to pay a fee including the second refundable part means, as a matter of law and without more, that the respondents incurred a charge from their applications which was contrary to article 13(2) in so far as it exceeded any cost to Westminster City Council of processing the application, or
>
> (2) whether a conclusion that such a requirement should be regarded as involving a charge - or, if it is so to be regarded, a charge exceeding the cost to Westminster City Council of processing the application - depends on the effect of further (and if so what) circumstances, for example: (a) any evidence establishing that the payment of the second refundable part involved or would be likely to involve an applicant in some cost or loss, (b) any saving in the costs to Westminster City Council of processing applications (and so in their non-refundable cost) that would result from requiring an up-front fee consisting of both parts to be paid by all applicants.

No authority addressing these questions was cited to the Supreme Court, and the answers to them are in my view unclear. Accordingly, it is, I consider, necessary for the Court to make a reference to the Court of Justice in Luxembourg on this point.

25. The respondents sought to raise further objections going outside their case under article 13(2) on the requirement to make up front a refundable payment on account of the costs of running and enforcing a licensing scheme for the benefit of licensed operators of sex establishments. The new objections are that to charge licensed operators with such costs was and is, as a matter of principle and/or on the facts of this case, disproportionate and/or contrary to articles 9(1)(c) and/or 16 of the Directive and/or contrary to articles 49 and/or 56 TFEU. These are new and wider allegations involving issues of fact and law, which could and should have been raised for consideration and adjudication in the courts below, and which are not now open to the respondents. I need say no more about them.

26. It follows from the above that Westminster City Council's appeal should in my view succeed to an extent entitling it to a declaration that a scheme of type A is and would be consistent with regulation 18 of the Regulations and article 13(2) of the Directive. The question whether and when a scheme of type B is as a matter of law consistent with article 13(2) should be referred to the Court of Justice. I would invite the parties to make any proposals they may wish for any reformulation of the above questions within 14 days for the Supreme Court's consideration.