The Supreme Court ultimately dismissed the appeal. The dramatic error that had been made by the Canadian justice system was unfortunate, but not a result of bad faith by the Attorney-General of Canada. While the Supreme Court upheld the Court of Appeal's decision not to award any further damages to Hinse, it did resolve the outstanding issue of extrajudicial costs in Quebec. The Supreme Court agreed with the Court of Appeal that the trial judge's reference to the Ontario case was inappropriate, since 'costs at common law are different in nature from extrajudicial fees in Quebec law'. However, the Court considered and accepted the argument based on Article 1608 CCQ. While the Attorney-General of Canada was not found to be at fault, the Court nonetheless unanimously recognised the right of a party, where it is the victim of an abuse of process, to seek extrajudicial costs, even where the party's counsel is acting pro bono.

Thus, the decision by the Supreme Court of Canada in *Hinse v Canada (Attorney-General)* brought the law of Quebec on the effects of pro bono representation in the awarding of extrajudicial costs into line with the law of the common law provinces. The *Centre Pro Bono Québec*, represented by lawyers from Lavery, was successful in its intervention, hopefully encouraging more lawyers in Quebec to volunteer their services in deserving cases, in keeping with the Centre's mission of promoting access to justice.

Notes
1 *Hinse v Canada (Attorney-General)*, 2015 SCC 35.
2 *Ibid.*
3 *1465778 Ontario Inc v 1122077 Ontario Ltd*, 2006 CanLII 35819 (ON CA).
4 *1465778 Ontario Inc. v 1122077 Ontario Ltd*, 2006 CanLII 35819 (ON CA).

Decision time: blanket requirement for students to have 'indefinite leave to remain' ruled discriminatory in the United Kingdom

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This article summarises the decision in *R (Tigere) v Secretary of State for Business Innovation and Skills*[1] where the UK Supreme Court held, by a 3:2 majority, that the blanket requirement that all applicants for a student loan have indefinite leave to remain was discriminatory. Karon Monaghan QC, Nick Armstrong and Sarah Hannett of Matrix Chambers Ltd acted for intervenors, Just For Kids Law, on a pro bono basis.

Background

The appellant came to the UK with her parents lawfully as a young child in 2001, as a dependant of her father. She overstayed (with her mother) after the expiry of her visa. The appellant completed all of her primary and secondary education in the UK, performed very well at school and was head girl of her secondary school. She received a number of offers to attend university. The appellant obtained discretionary leave to remain (DLR) in 2012 and is highly likely to obtain indefinite leave to remain in 2018. However, she was treated as ineligible for a student loan because she did not have 'settled' immigration status.

In order to qualify for a student loan from the government to cover university fees and maintenance under the relevant regulations, an applicant must:
- be settled in the UK; and
- have been ordinarily resident throughout the three-year period prior to the first day of the course.

The appellant, who had only DLR, did not meet these criteria. She challenged the application of the criteria to a person (such as her) who had a clearly established private life right to remain in the UK. On that basis she argued that they breached her right to education, under Article 2 of Protocol 1 ('A2P1') of the European Convention on Human Rights (ECHR), and unjustifiably discriminated against her in the enjoyment of that right on the grounds of her immigration status, contrary to Article 14, ECHR.

The High Court[2] found that the blanket exclusion from eligibility for student loans based on the appellant's immigration status was a disproportionate interference with her right of access to education under A2P1 and unjustifiable discrimination linked to national origin contrary to Article 14. The Court of Appeal[3] allowed the Secretary of State's appeal on the basis that this was an area of national strategic policy relating to the distribution of scarce resources, and so a broad margin of appreciation should be afforded to government policy. The appellant appealed to the Supreme Court.

Supreme Court judgment

Giving the leading majority judgment, Lady Hale applied the familiar four-stage domestic proportionality test to the two criteria and not the 'manifestly without reasonable foundation' test.

She concluded that the application of the settlement criterion to the appellant could not be justified because, although it may be legitimate to target resources on those students who were likely to stay in the UK to complete their education and contribute to the economy afterwards, the settlement criterion was not rationally linked to that aim. It had not struck a fair balance between the rights of the individual and the community, and it could not be said that no less intrusive measure could have been used instead. Higher education benefited both individuals and the community, and the harm caused to both the individuals concerned and the community as a whole by application of the exclusion could not be outweighed by the administrative benefits of a bright-line rule.[4] In particular, the savings for the government would only be short term, as most young people like the appellant would eventually qualify for loans – whilst in the meantime the benefit of their enhanced qualifications to the Exchequer and the economy would be lost.

She reasoned that an exception, such as for individuals aged between 18 and 25 who had spent half their lives living continuously in the UK (based on paragraph 276ADE(v) of the Immigration Rules, on the grant of leave based on private life), might reasonably be added or an exceptional cases discretion created given the comparatively small numbers likely to be eligible under the exception.

In relation to the criterion requiring three years' ordinary residence, however, Lady Hale ruled that there was ample justification and strong public policy reasons for the rule that a period of lawful residence is required before a person becomes entitled to public services, and this did not impose the same detriment on the appellant as the settlement requirement. Lady Hale said that if the requirement were relaxed for the appellant it would also have to be relaxed for all the other categories of persons eligible for student loans to whom the requirement applies. The administrative burden involved in making the moral judgment would be intolerable.

Lady Hale held that the appellant was clearly entitled to a declaration that the application of the settlement criterion breached her rights under Article 14 and A2P1 of the convention. This would leave the department in no doubt that the appellant was entitled to a student loan and leave it open to the Secretary of State to devise a more carefully tailored criterion which will avoid breaching the convention rights of other applicants.

Lord Kerr agreed with Lady Hale, while Lord Hughes upheld the appeal on slightly different reasons.[5] Lord Sumption and Lord Reed gave a joint dissenting judgment.

The case is of wider legal interest in suggesting that: (i) the blunt instrument 'manifestly without reasonable foundation' justification test applicable to discrimination in the provision of other services provided by the state might not apply to education; and (ii) that it was not enough that a bright-line rule could be justified, but that the government must justify as proportionate the particular bright-line rule adopted.

Notes

1 [2015] UKSC 57, available:http://ukscblog.com/new-judgment-r-tigere-v-secretary-of-state-for-business-innovations-and-skills-2015-uksc-57/.
2 [2014] EWHC 2452 (Admin), available: www.bailii.org/ew/cases/EWHC/Admin/2014/2452.html.
3 [2014] EWCA Civ 1216, available: www.bailii.org/ew/cases/EWCA/Civ/2014/1216.html.
4 Cf https://en.wikipedia.org/wiki/Bright-line_rule.
5 Cf paras 50–68.