

A Coalition of the (un)willing? The convergence of landlord and renter interests in the “right to rent”.

Abstract

The Immigration Act (2014 c. 24) at Part 3 established a new regime with private landlords incurring penalties (and potentially criminal liability from 1 November 2016) if they allow a person disqualified, by reason of migration status, to live, as their only or main home, in a property let by them. Known colloquially as the “right to rent”, the provisions signal a different approach to what has been perceived by Government as an ongoing problem – that of dealing with illegal migration. They operate in two ways; by restricting those subject to immigration control, access to accommodation through letting and occupation, and by imposing onerous duties on landlords to check tenants’ migration status. Crucially, the legislation not only refocuses the object of regulation, but purports to redefine in some ways the manner in which property rights in land have been historically conceptualized – primarily as a private rather than a public legal order. The right to rent provisions arguably flip this notion by making the act of letting accommodation the subject of intense scrutiny. Further, in expanding the purchase of the legislation, conceptual and practical counterproductive effects can arise. This paper will consider how a change in the emphasis of regulation introduced by the provisions, resulted in the coalescence of opposition by landlords and renters in a way that historically would have been unthinkable. This is most evident in the successful recent judicial challenge to the provisions at first instance, in the case *R (JCWI) v. SSHD* brought by the Joint Council for the Welfare of Immigrants (JCWI), where both landlord and tenant or renter representative bodies combined forces. Using the lens of Foucault’s governmentality, it is possible to see how Government has sought to shift the locus of control, which through its legislative and policy stance resulted in such fierce opposition. This paper will argue that by over-extending itself, Government’s quest for control can lead to “unholy alliances” that were previously unthinkable.

Introduction

In the summer of 2018, the Joint Council for the Welfare of Immigrants (JCWI) obtained leave to challenge Government’s right to rent policy, which essentially constrains the right of unlawful migrants to gain access to accommodation in the private rented sector (PRS). The application (heard in December 2018), was made on the basis of a human rights challenge seeking a declaration under s4 Human Rights Act 1998 that the provisions were discriminatory and incompatible with an exercise of Convention Rights under the European Convention on Human Rights. It signalled a coalescence of both tenant and landlord interests, with the Residential Landlords’ Association (RLA) a body

representing over 35,000 private landlords, intervening along with the Equality and Human Rights Commission and Liberty (one of the country's foremost campaigning organizations challenging injustice) to support the challenge. On the 1 March 2019 Spencer J declared the provisions incompatible with Art. 14 (the right to a family and private life) of the European Convention on Human Rights (ECHR) in conjunction with Art. 8 of the same Convention – prohibiting discrimination in the enjoyment of any Convention right. He issued therefore a declaration of incompatibility under s4 Human Rights Act 1996. Government, to date has shown no sign of changing its stance and has stated its intention to appeal the decision. Of significance is the opposition to the Immigration Act provisions and how the arguments were framed. This paper considers the relevant provisions and, in particular, those aspects of controlling the conduct of actors' one step removed from the state (in this case private landlords) to secure public goals. They signal the classic methods identified by Foucault as an exercise of governmentality. The paper will consider in outline the policy background, before giving a closer reading to Foucault's idea of governmentality, the key provisions and the case decision itself. Foucault's work invites the reader to consider Government's policy and the law in a more critical way and goes some way to explaining why the challenge arose.

Background and Policy Context of the Term "Right to Rent"

The term "right to rent", itself a polymorphous idea, gained currency in the 1987 Conservative Party Manifesto, where it was used to signal a widening of private renting opportunities through the instruments of the assured and assured shorthold tenancies. Both types of tenancies were designed to encourage the growth of the sector, particularly facilitating landlords' rights to recover their property at the end of the tenancy term. Those changes aligned with the context of the Thatcher government's focus on deregulation in many spheres of economic activity.

After 2010 however, the term is applied to the migrant checks required to be carried out on prospective tenants in the PRS by landlords and/or their agents. The aim is to discourage tenants (with no apparent permission to be in, or remain in, the UK) accessing a home to rent and so free up stock for those here lawfully.

Following Prime Minister, David Cameron's speech (Cameron, 2013) on immigration proposing an extension of existing provisions restricting irregular migrants' rights to social housing, to the PRS, the then Home Secretary Theresa May (House of Commons, 2013a) suggested that the aim of the Immigration Act 2014 was to create a 'hostile' environment for illegal migrants, she claimed that

"We are not asking landlords to become immigration experts. Those who undertake simple steps will have nothing to fear and there will not be a penalty. Rogue landlords will face

penalties, hitting them where it hurts—in their wallets. This will make it harder for landlords to house illegal immigrants and harder for illegal migrants to settle in the UK.” (House of Commons, 2013a).

Government’s policy sought to crack down on illegal migrants already within the territory by harnessing the capacities of private, as well as public, actors. These micro measures, applying at the lower levels of state activity, exhibit the classic modes of governmentality, where an exercise of government extends to private actors to control the conduct of themselves and indeed others. The provisions are directed towards reducing “net immigration” by ostensibly maintaining social and economic cohesion. The rationale was to minimize the pressure on already scarce resources caused by immigration (Home Office, 2013a).

Governmentality, governability and the idea of the Right to Rent

Most are by now familiar with Foucault’s idea of surveillance as a medium of control (Foucault, 1979). Governmentality, by contrast, focuses on how the behaviours of others can be controlled by the state remotely to achieve its aims. Essentially this art of governing in the broadest sense, is a methodological tool from which to see the ‘micro’ activities of state control and how they can reach the activities of individuals. The series of lectures *Security, Territory and Population*, (Foucault, 2009) in introducing the notion of biopower, facilitated Foucault’s thinking on government. What emerged was the “problematic of government” and the rationalities deployed in the art of governing, as both a practice and a thought process (Foucault, 1991, p. 87). These techniques or rationalities of government (both intentional and otherwise) are imbued with a logic of power, giving rise to the possibility of the governance of the self and others. It is in effect the act of ‘doing’ to others, and in so doing, making them more compliant or malleable through intelligence – in the sense of gathering knowledge (Rose and Valverde, 1998). This theme has been used in a number of contexts, including crime control and health care (Rose, 2000 and 2007); security and immigration (Bigo, 2002); and Human Rights, (Sokhi-Bulley, 2011). When applied to the right to rent, knowledge of the tenant’s status becomes a powerful tool for the landlord, if she is to avoid the risk of incurring a penalty (whether civil or criminal) and for Government in manipulating that fear. For the latter, a reduction in unlawful migration has become a political imperative. The idea of government and indeed governing, broadens out the conception from a largely binary vision of sovereign control to include lateral forms, and even the conduct of the individual, and her relation to things e.g. wealth, resources and institutional factors including norms such as, “ways of acting and thinking” (Foucault, 1991, p. 93). It has often been conceived as the “conduct of conducts” (Foucault, 2002).

In sum, this “art of government” focuses on

“answering the question of how to introduce economy – that is ...the correct manner of managing individuals, goods and wealth within the family ... [and] how to introduce this meticulous attention of the father towards his family in the management of the state. (Foucault, 1991, p.92).

The problems of governability, for that is what governmentality ultimately questions, occur in many sites including the collective, individual and at organizational levels. This invites regulatory parallels – the relation between the subject and control. As mentioned the notion of governmentality has been deployed in many contexts and it is a useful lens from which to critique both the right to rent provisions as an illustration of the governmental tactics of control and indeed how the case was argued. The focus is on a much broader paradigm than positive law, challenging both conventional understandings of property rights in land and the historic juxtaposition of landlord and tenant interests. In the case of the latter, the two have rarely aligned.

While the imperfections in the PRS have been recognised, for decades, if not centuries, tenants’ rights have been juxtaposed with those of landlords (Cowan, 1999). Even as late as 2000, as Blandy (2001) identified despite deploying the rhetoric of rights and responsibilities, tenants have acquired few, if any, rights (whether in terms of security of tenure or housing condition) because to do so would be antagonistic to a framework of private rights or interests in land. Foucault’s historical take on the mechanisms of government triumphing over sovereignty and discipline (the latter being a common theme in Foucauldian thought), was able to point to paradoxical elements of state activity, where the “art of government” is something acted out and, at other times, acted upon. This performative element comes close to not only reconfiguring state - subject relations, but testing the outer limits of government control through changing mindsets and so behaviour. For Government at least, if self-government (self-discipline) can be deployed to achieve its ends, so much the better. One key aspect of the idea of governmentality is to shift the foci to the source of government, including those practices and techniques deployed for this end. This fine grained analysis looks at the subtle practices exerted that in accumulation exert control on society’s behaviour. One thing is sure, the vision is not restricted to legal principle and extends beyond the political domain.

The right to rent provisions use a conception of law as an instrumental force that together with policy can subvert, in the extreme, conventional visions of property rights in land; where the interests of the holders of those recognised rights are paramount and subject to limited state intervention. They do so, by recalibrating the landlord and tenant relation, to achieve the policy wider aim of tackling illegal migration (Home Office, 2013a, 2013b). In doing so, they have sought to redefine what is considered private and what, public. They also evidence Government’s attempt to secure compliance with these

aims in a way that calculative and 'economical' in the true Foucauldian sense, where through statistics the target of governmental control is conceived of via the phenomena of the population (both the subject and object of government) and is managed through discipline. To illustrate, much of the concern surrounding the enforcement of the provisions centred upon the uptake and promotion of the requirements as a measure of their effectiveness, as happened with the W. Midlands Pilot Scheme (Home Office, 2015b). It was not by chance that Government sought to co-opt landlord consultative groups when promoting the scheme (Independent Chief Inspector of Borders and Immigration, 2018). Much of the RLA's intervention in *R (JCWI) v. SSHD* [2019] EWHC 452 (Admin) was based upon an assessment of risk and rationality, both of which are statistically informed. In the case of the right to rent, the control is directed towards both the illegal migrant (noticeably through the common thematic and pejorative narrative of "overrunning", or "swamping the nation") and the private landlord. To assess these themes, however, the legislation will be outlined first before interrogating through the governmentality lens, possible causes for the operational failings of the provisions that would lead to a successful judicial challenge.

The Right to Rent Provisions

The measures were part of a raft of provisions that sought, to create a "hostile environment" for illegal migrants which, under the guise of promoting 'Britishness', sought to promote fear of "the other" by distinguishing and indeed fragmenting society into a "them" and "us" mentality. It made a tenuous (and arguably spurious) link between the "rights" of British people and the rest, and has been applied to healthcare, employment situations and other domains. The legislation sought also to streamline appeal rights of migrants and increase the powers of immigration officers; as well as targeting illegal working, access to certain services and increasing penalties for those working illegally as well as employers permitting the practice (House of Commons, 2015c).

The term "right to rent" is used in a restrictive manner, foreclosing the category of people for whom property can lawfully be made available. Rights are linked to citizenship and nationality and only British, EEA and Swiss nationals acquire them. The term is both limited and exclusionary in categorisation. It centres on the term "illegal" migrant, itself problematic as categories of migrants such as asylum seekers fall into the grey areas of the legal system until their claims are determined (Harvey, 2015). The term is used in the statutory Code of Practice issued in February, 2016 under the 'References' section as follows:

“[those] allowed to occupy privately rented residential accommodation in the UK by virtue of qualifying immigration status” (Home Office, 2016, section 1.5).

It is defined against those who have no such “right”, or whose rights are time-limited. The terminology post-2013 is predicated on creating groupings and linking migration status to the ability to access rental housing.

The provisions aim to target all types of occupation of residential property. The 2013 Impact Assessment (Home Office, 2013c, p.4) of the proposed legislation indicated that,

“[t]he policy will impact landlords of all private rented accommodation whether or not the landlord lives on the premises. The policy is therefore intended to include those within the small scale informal sector who may allow lodgers within their own home, as well as more formal landlords. Letting agents who provide checking services to landlords may also be affected”.

The rationale for the checks was to capture the whole of the rented sector by targeting both informal lodging situations and the formal lettings market. To encompass both, the definition of a “residential tenancy agreement” was drawn broadly, and extends beyond the various legal definitions of tenancies known to English law (immigration Act 2014, s20). Section 20(2) of that Act defines a residential tenancy agreement in very broad terms, one where a right of occupation of residential premises is granted “for the payment of rent” (whether a market rent or otherwise). The definition includes leases and licences, sub-leases and licences and agreements for each and less formal types of occupation including those who pay for board and lodging (Home Office, 2016, para. 3.1). Under section 37 Immigration Act 2014, no distinction is made between those instruments satisfying the formalities of being evidenced in writing and those which do not. An exception is made for arrangements listed under Schedule 3 to the same Act (which include social housing (social landlords and those exercising duties under the homelessness legislation are already subject to statutory duties to check the immigration status of their occupants), care homes; student halls of residence; emergency hostel accommodation). However, the statutory code warns that occupiers in social housing who sub-let their properties may be liable as landlords under the provisions (Home Office, 2016, para. 3.1). One key exception to the regime is leases having a duration of more than 7 years. The possible rationale for this as the Home Office Guidance (2016, para 3.7) indicates, is that

[these] arrangements are more akin to home ownership than traditional landlord and tenant arrangements.

Presumably, those having sufficient purchasing power to acquire a long lease, will not need to have recourse to public funds, which appears to be one of Government's underlying rationales for tighter control.

The Act attempts to confront unlawful residence in the country by requiring private landlords to control the occupancy of their property. The policy rationale identified by Government is to "ensure that property on the rental market is available to British citizens and those with the right to be in this country" (House of Commons, 2015a). Again the leitmotiv centres upon nationality, by providing housing for those people entitled to be in the UK (insiders; citizens, permitted nationals and those with immigration permission) and to restrict housing opportunities for those with no such right (outsiders) (Fox O'Mahoney, 2014). The broader policy context reflects this aim, as noted by various briefing papers (House of Commons, 2015c, 2018). This is, at best agnostic, to the principles of property law, which are founded upon autonomy and the rights of alienation, without state intervention (unless specifically authorised as a 'taking' (Gray and Gray, 2008; *Kelo v. City of New London, Connecticut*, 545 US 469 (2005); *Penn Central Transportation Co. v. New York City* 438 US 104 (1978)). Looked at another way, the power to exclude (considered a fundamental trait of property interests by some (Merrill, 1998), becomes a duty to do so with the rights of alienation – in the sense of letting 'freedoms', becoming eroded. Here, the Act confines a landlord's rights to let her property by determining the status of the 'acceptable' tenant.

These provisions follow a logic that focuses upon the identities of those in the private rented sector, as opposed to the autonomy underpinning the nature of interests in land. They stem from a Home Office consultation document, "Tackling Illegal immigration in privately rented accommodation" (Home Office, 2013a), in the next section the duties will be outlined.

The Landlord's Duties

The general thrust of the scheme is a general prohibition to landlords letting property to those the state considers to be undesirable or a threat to the nation, by reason of their migration status, as outlined by Spencer J in *R (JCWI) v. SSHD*. If the landlord fails to comply, and authorise those disqualified by reason of their status to occupy their premises, she is liable to receive a penalty notice requiring them to pay a civil penalty of up to £3000 (immigration Act 2014, section 23). Landlords, whether personally or through agents, must make reasonable enquiries as to who is to occupy the property. In situations where many family members are present, the landlord must try to ascertain who will live in the property in accordance with the letting agreement. In some situations, tenants

may introduce others into the property. It will be the tenant (in the context of being designated as ‘a landlord’) who bears responsibility for carrying out the relevant checks on other individuals. If there is a sub-lease or a sub-licence, similar arrangements will apply. The 2014 Act, at section 22, provides for ostensibly strict liability, where ‘reasonable enquiries were not made’ by the landlord or her agent, as to the occupiers *before* entering into any agreement, or constructive notice of the immigration status of the tenant would have been apparent if reasonable enquiries were made. Thus, landlords and their agents must check the immigration status of prospective tenants, if they are to maintain a “statutory excuse” for breaching the provisions. These, “due diligence” requirements may result in liability being avoided. Liability, both civil, by way of penalty notice (and since 2016 criminal) rests upon ‘authorising’ occupation by those adults – whether a tenant or otherwise – who are disqualified by reason of their migration status. The provisions, apply also where occupation is given to those with a time limited ‘right to rent’ which has subsequently expired. Here, landlords may only establish a statutory excuse when letting to such tenants by undertaking follow-up checks. These duties are continuing and landlords (or their agents) are required to report to the Home Office if, having undertaken follow-up checks they find the occupier no longer has the requisite status, if they wish to avoid criminal liability under section 39 Immigration Act 2016 (inserting section 33A into the original provisions of 2014).

In offering guidance on the provisions, the Code of Practice indicates that civil liability rests on the assessment of the reasonableness of the enquiries made by the landlord or her agent before the entering into the tenancy agreement (Home Office, 2016, para. 5.1). Under section 24 Immigration Act 2014, the Secretary of State may issue penalty notices, and where a landlord is given a notice requiring payment, they may raise a statutory excuse to the penalty imposed. The amount payable depends upon the type of accommodation and whether a notice has been issued before. The Home Office table is reproduced below.

Type of accommodation	Amount for a first time penalty	Amounts for further penalties
Lodgers in a private household	£80	£500
Tenants in rented accommodation	£1,000	£3,000

Fig. 1 (Home Office, 2019)

As with many other penalty notices, there is a discount of 30% for payment within 21 days. A right of objection against the penalty notice issued, exists under section 29. This must be made in writing to the Secretary of State. The grounds for objection are confined to three – that the recipient is not liable, or has a statutory excuse, or that the penalty imposed is excessive. A statutory right of appeal

(as a rehearing against the decision) can be made to the county court thereafter under section 30 of the 2014 Act. The Press Association (Property Industry Eye, 2017) has highlighted that between February and September 2016, 62 landlords were fined a total of £37,000. Between February 2016 and July 2017 468 referrals had been made to the Home Office's Civil Penalties Compliance Team resulting in the issue of 265 civil penalties and the levy of £167,520 (Independent Chief Inspector of Borders and Immigration, 2018). By March 2018 this figure had increased to £265,000, with an average penalty of £654 (Property 118.com, 2018).

Agents too may be subject to penalty notices under section 25 Immigration Act 2014, if there is a written agreement between the landlord and agent and the latter is responsible for complying with the requirements on the landlord's behalf. A distinction is drawn between those contraventions arising before the grant of any tenancy and those effectively arising as a result of an occupier having a time limited right to rent. In each case a landlord can claim the 'statutory excuse' where the requisite checks have been carried out or 'a person acting as the landlord's agent' bears responsibility for undertaking the prescribed checks on the landlord's behalf (Immigration Act 2014, section 24(2) and (6)). Whilst the duties imposed upon landlords are onerous, agents' liability can be compounded by reason of potentially greater scale – they will manage multiple properties for many different types of landlord. The scheme is such that checks must be made to assess whether the premises will be occupied as an individual's only or main home. If in doubt, landlords and agents are to assume that it is and carry out the checks, to create a statutory excuse (Home Office, 2016, p.19).

The 2016 Amendments to the Immigration Act 2014

Section 39 of the Immigration Act 2016 inserted sections 33A-33C into the Immigration Act 2014, which came into force from 1 December, 2016, by making amendments to the original Act. It extended the penalties for landlords and agents contravening the scheme, by imposing possible criminal liability. The provisions include the offence of knowingly letting premises occupied by an adult disqualified by virtue of their migration status. Additionally, an offence is committed if a tenant's leave to remain in the UK expires during the course of a tenancy and, the tenant continues to occupy the property with the landlord, or their agent knowing or having reasonable cause to believe this has happened. The new offences bring with them the risk of imprisonment for up to 12 months and/or a fine on summary conviction, or on indictment, imprisonment of up to five years, a fine, or both. The Minister for Immigration indicated that the criminal sanctions are intended for "rogue landlords" and repeat offenders (House of Commons, 2015b). Landlord groups were unhappy with the introduction of criminal sanctions, and surveys have indicated that landlords are reluctant to rent to those without

British passports due to these provisions (House of Commons, 2018). It seems that the prospect (however remote) of bearing criminal liability was sufficient to galvanise concern.

Both legislation and the policy narrative show neatly how the ‘art of government’ extends to the provisions. A concern with government involves a relational aspect, what Foucault would term the “complex of men and things” and bound up with this are wealth and resources. It is not necessarily the protection of property as a close reading governmentality shows, but the governing of all things in a way that serves the state’s aims (and that can include the wider collective interest) (Foucault, 1991, pp.94-5). Here law is used as a tactic to achieve wider ends and this happens to be through the landlord/tenant relation. In shaping landlord behaviour, if necessary through sanctions, Government seeks to steer how the “good landlord” is expected to behave and in turn protect the interests of the state. This is achieved through manipulating the property of the landlord (or rather the prospect of its disposal including creating rights or interests in or over it). It is indicative of a policy that seeks to introduce, through surveillance – here the checking of a migrant’s right rent – the “correct manner” of landlord behaviour and so in Foucault’s terminology, “economy” (1991,92). Paradoxically Government’s concern for economy, (which in Foucault’s sense is seen as analogous to the role of the father in the household), sharpens landlord anxieties that their interests are being adversely affected. They coincide with the criminalization of certain renting activity and the rising penalties imposed.

The “limited right to rent” category is particularly problematic. Landlords and/or their agents must make further checks, given the provisional nature of leave to remain for these individuals. They must according to the Code of Practice make checks again when either, the tenant’s leave to remain runs out or in a year’s time, whichever is the longer period (Home Office, 2016). There may be a disincentive to rent to some tenants given the burden of additional checks. Research by the JCWI (2017) indicates some reluctance to rent to individuals with a limited right to rent as landlords and agents in their survey had indicated a preference for those with permanent leave to remain. The potential for problems was identified early in Government’s response to the Home Office consultation (2013b) on the provisions, which noted that concern arose from respondents to the consultation that discrimination may arise as a result of “a perceived risk that landlords might discriminate on the basis of administrative convenience” (Home Office, 2013b, p.34). This became the focus of the JCWI judicial review.

The Judicial challenge: *R (JCWI) v. Secretary of State for the Home Department*

The public interest challenge centred on the discriminatory effects of the provisions, and in particular the failure of the Home Office to carry out an evaluation of them or to put in place monitoring measures despite being confronted with evidence of their discriminatory effects by others. It was

argued in particular that the scheme caused landlords to discriminate against those entitled to accommodation but who were not White, with landlords as, Spencer J. indicated,

“[discriminating] on grounds of both nationality and race, not because they want to be discriminatory but because the Scheme causes them to be [so] as a result of market forces.”(para 6).

The Human Rights implications of the proposal were identified during the course of the Bill’s progress. The Home Office (2015a) was clearly aware of Arts. 8 and 14 being engaged potentially. Art 8, as a qualified Convention right, states that:-

1. Everyone has the right to respect for his private and family life, his home and his correspondence

Any interference with the right by a public authority is only legally justifiable if made in accordance with the provisions of paragraph two of the Article. These are (a) that any interference is made in accordance with the law and (b) that the interference is necessary in a democratic society (with the test of necessity being a balancing act often between competing interests to establish a pressing social need, with the measure proportionate to the legitimate aim pursued), “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 protection of the rights and freedoms of others”, (Art 8 para 2 ECHR). The jurisprudence of the European Court of Human Rights is such that the scope of Art 8 is defined broadly, with the right to the “home” in the given context not being limited to a right or interest in land, *Surugiu v. Romania* (20 April 2004; Application No. 48995/99). Article 14, while not a “stand alone” right, prohibits discrimination.

Government thought however that the measures would be justified and proportionate, sufficient to be Art 8 compliant and that the margin of appreciation given to states was sufficiently wide to justify interference with Art 14. In each case the focus was on the illegal migrant rather than the lawful citizen. The impact assessment accompanying the Bill had identified however that the provisions could “provoke” discrimination against those who, though British nationals, were thought by landlords to be a higher risk, for example by reason of foreign sounding name or ethnicity (Home Office, 2013c). This was a concern flagged by the JCWI in response to the Home Office consultation document and other groups (Runnymede Trust, 2013). The Home Office response had been to issue guidance in the form of the statutory codes of practice (Home Office, 2014). Government undertook a pilot scheme in the W. Midlands, partly to assess its efficacy and whether evidence of systematic discrimination may be found. The pilot included a, “mystery shopping” exercise to assess the

possibility of BME participants testing the potential for discriminatory behaviour by landlords' when accessing accommodation (Home Office, 2015b). The Home Office found no evidence of clear landlord discriminatory behaviours affecting the outcome, of being offered properties, there was a risk of potentially discriminatory behaviour being exerted by a small number of them. The JCWI's own research (2015), being more extensive, showed the contrary. This suggested a comparative advantage to those whose immigration status is assured – whether visibly or by possessing the requisite passport. This, it was asserted, amounted to direct race discrimination in contravention of s13 Equality Act 2010 (JCWI, 2015, pp.25-7). While rights challenges centre upon the individuated case, given often the general nature of the assertions, reliance has to be placed upon inferences drawn from empirical data.

Interestingly, the challenge saw an alliance between civil liberties and immigration groups (Liberty and the JCWI) and a landlord association, the RLA. In each instance statistical evidence was used to support the claims made. In human rights cases courts will often use statistical information to determine how proportionate a measure is. The RLA's submission emphasised a rise in the percentage of landlords willing to rent to those without a British passport from 42% in 2017 to 44% in 2018 (Mykkanen and Simcock, 2018). This "incrementally cautious" behaviour was stated to have overall counterproductive effects on a sector, where the majority of landlords own only one property and rationally will take steps to mitigate liability. The scheme hence incentivized risk aversion with pathological effects. Both the RLA and JCWI evidence asserted the risky nature of the provisions leading to a greater propensity for discriminatory action, by triangulating survey results with statistical probability. Throughout, the discussion was one about trust in numbers, (in short, "the prestige and power of quantitative methods") and the inferences to be drawn from the surveys undertaken (Porter, 1995, p. viii). The deploying of empirical evidence in a human rights (and indeed property focused) challenge here gave rise to a generalized inferential and inductive approach. And here perhaps was the novelty, the generality of the information was taken as sufficient to support the rights challenge. Discriminatory behaviour by landlords was a logical consequence of a scheme that contained no sanction for preventing this. The likelihood of landlords adopting the approach was rational and supported by the survey evidence adduced by both the JCWI and the RLA (2016). The surveys (and in particular the "mystery shopper" exercises undertaken) were sufficient to demonstrate a causal link between the scheme and to conclude the existence of discriminatory behaviour on the part of landlords, particularly on the grounds of nationality. Two aspects are striking here, the consistency of the evidence deployed in challenging the (non)discriminatory assertions as to the effects of the scheme by the Home Office and secondly, the convergence in the evidence deployed by those bringing the case (see paras 93-96 of the case). Although criticism of the use of statistics in the broadest sense can be made on the basis the surveys do not necessarily suggest de facto discrimination, and that

evidence of this type may then be reduced to whoever uses the largest sample (Levanon, 2019 and Enoch et al., 2012), the case does suggest something deeply disturbing about the effects, intentional or otherwise of the scheme.

Conclusion

Foucault's notion of governmentality, or the "science of government" suggests that how we govern political and indeed civil actors including ourselves is subject to a continual refinement of what we perceive the state to be and its capacities or limitations. In the case of the right to rent, the techniques deployed by Government (including a rational calculation of the needs of the population overall) were, in fact, undermined by a convergence of the concerns of groupings conventionally understood to have opposing interests. Most interestingly, the challenge made to the scheme was made on the basis of broadly statistical evidence of the type most often used to sustain political decision. As Foucault suggested,

"... if the state is what it is today, this is so precisely thanks to this governmentality, ... since the it is the tactics of government which make possible the continual definition and redefinition of what is within the competence of the state and what is not."(Foucault, 1991, p.103).

Thus in declaring incompatibility, Spencer J. was able to find that by the sanctions Government imposed, the provisions gave not only, "the occasion or opportunity for landlords to discriminate" but that they caused them to do so (at para 105). The safeguards introduced by the Home Office including its guidance in 2014, were insufficient to avoid this. Further, it was not possible for Government to assert that it bore no responsibility for landlords' actions. The scheme was "without reasonable foundation" (para 123) and could not be justified, with the policy having disproportionately discriminatory effects.

Historically the interests of landlord and tenant (or renter) have been viewed in opposition, particularly in regulatory terms. Landlords' proprietary rights and interests have been preferred for a number of reasons. They perform a valuable social function (in the sense of providing accommodation to others – a function upon which government has become increasingly dependent over time given the scarcity of public and social housing) and their rights have been viewed within the jurisdiction as near sacrosanct given symbolic and cultural associations bound up with property and ownership. Tenants and renters by contrast, have at law, no right to a home or indeed to housing, save in the case of exceptional need as defined by statute (Bright, 2006, Blandy, 2001). This evident inequality in bargaining power has been replicated throughout resulting in regulation affording tenants only the

most basic rights of redress (mostly in relation to housing condition and minimal fitness) as against their landlord. In the past, landlords have been encouraged and persuaded to be responsible, while tenants have, at best been seen as dependent to the point of impotence. Whilst both groupings can be seen as heterogeneous, it is ostensibly surprising that the action evidences a coalescence of interests. Closer scrutiny may suggest why. Article 8 ECHR being directed to respect for private, family life and the home, (and here the emphasis is on the latter) may point to some subliminal affiliation in terms of “the home” albeit from different perspectives. The RLA’s concerns in particular might disguise the sense of outrage to the provisions (as evidenced when the Immigration Act 2014 was passed, gaining prominence and focus with the passing of the 2016 provisions). These could not be realistically framed in terms of legal principle, given the limited application of Art 1 of the First Protocol ECHR, the right to property. Landlords are citizens and have private rights too. The problem is how to sustain them.

Foucault’s governmentality alerts us to the micro tactics of control deployed by both Government and its offices that influence individual behaviour to induce behaviour that promotes its policies. What is less easy to draw from the approach is the significance of context and how it may shape the regulatory quest. While the use of private actors to secure public goals has been used in various situations e.g. employment with some success, this appears not to be so in the private rented sector where its effectiveness has been questioned. For now, at least, an attempt to exert influence and so redefine some property rights where public considerations impact significantly on the private sphere has been shown to be problematic. In this instance, the convergence or coalition of interests has placed a brake upon the reach of Governments immigration controls. The decision of *R(JCWI) v. SSHD* suggests that in given circumstances unusual coalitions may arise when the boundaries of what is considered acceptable within any given regulatory space are pushed to the limit. These are to be ignored by Government at its peril.

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