Rape Crisis Centre v Secretary of State for the Home Department

Court of Session (Outer House)

2000

Lord Kagiaros

I. The Facts and petitioners' arguments

Earlier this year, the boxer Mike Tyson, a citizen of the United States, was invited to fight two boxing matches in Glasgow and Manchester. In 1992, Mike Tyson was tried and convicted in the United States of rape. He was sentenced to six years in prison and eventually served close to three years of this sentence. In 1999, Mr Tyson once again served 9 months in prison for assaulting two motorists after a traffic accident. Upon his release, Mr Tyson returned to boxing, and continued what had been a successful career.

In order to enter the United Kingdom lawfully, Mr Tyson was required under section 3(1) of the Immigration Act 1971 to apply for leave. The grounds on which leave for entry to the United Kingdom can be refused are to be found in s3(2) of the 1971 Act. This provision allows the Secretary of State 'from time to time […] to lay before Parliament statements of the rules, or of any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom'. Rule 320 of the rules, produced under s3(2) of the 1971 Act, sets out in more detail the grounds on which permission to enter the United Kingdom will normally be refused. Paragraph 18 of rule 320 stipulates that leave can be refused in the following circumstance:

> save where the Immigration Officer is satisfied that admission would be justified for strong compassionate reasons, conviction in any country including the United Kingdom of an offence which, if committed in the United Kingdom, is punishable with imprisonment for a term of 12 months or any greater punishment or, if committed outside the United Kingdom, would be so punishable if the conduct constituting the offence had occurred in the United Kingdom.

Rape is an offence which fulfils this criterion, as it is punishable in Scotland with imprisonment for a period exceeding that of 12 months (see *R v Roberts and Roberts* [1982] 4 Cr App R (S) 8).

The legal status of the immigration rules is difficult to categorise or classify. As stated by Lord Denning MR at pages 780-781 in *R v the Secretary of State for Home Office ex parte Hosenball* [1977]:

> They are not rules of law. They are rules of practice laid down for the guidance of immigration officers and tribunals who are entrusted with the administration of the Act. They can be, and often are, prayed in aid by applicants before the courts in immigration cases. […] In addition, the courts always have regard to those rules, not only in matters where there is a right

> of appeal; but also in cases under prerogative writs where there is a question whether the officers have acted fairly. But they are not rules in the nature of delegated legislation so as to amount to strict rules of law.

The decision-maker has significant discretion in deciding whether and how they will be used in practice, as the provision stipulates that the rules will apply 'normally'. In light of this, Mr Jack Straw MP, acting in his capacity as Secretary of State, instructed immigration officers to allow entry to Mr Tyson to the United Kingdom so he could participate in both boxing matches.

The decision was announced in the House of Commons during Parliamentary Question time by Mr Straw. More specifically, Mr Straw noted the following:

> In reaching my decision I took note of the fact that Mr Tyson has relevant convictions for the purpose of the application of this Rule. I also noted that there are recent allegations of an assault on an employee of a night-club in Las Vegas, but we understand this is still under investigation. And I took into account the views expressed by the public about Mr Tyson visiting the UK.
>
> I did not consider that there were strong compassionate reasons which would justify admission in Mr Tyson's case for the purposes of the Rules. However, I concluded that there were other exceptional circumstances which justified his entry to the country for the purpose of participating in the boxing match. My decision took account of the following factors:
>
> - that Mr Tyson's behaviour on his previous visit to the UK was satisfactory;
>
> - that any risk to the public to which his criminal convictions and the other allegations referred to above might be relevant, would be minimised by the circumstances of his proposed visit, i.e. his high media profile, the presence of his trainers and other supporting entourage and the limited duration of his visit;
>
> - and that a refusal to permit entry would result in loss of economic benefit to the UK and in particular to the areas in which engagements took place and would not enhance the UK's standing as a venue for major sporting events.

The first petitioners, the Rape Crisis Centre, offer free and confidential emotional and practical support, information and advocacy to all members of the public who have experienced sexual violence at any time in their lives. Furthermore, they work to change attitudes about gender-based violence and improve services for survivors of sexual assault.

The second petitioner, Ms Brindley, is employed by Rape Crisis Centre and assists rape and sexual assault victims in their subsequent interactions with the police and the criminal justice system. She also serves as a member of the Scottish Partnership on Domestic Abuse, a body funded by the Scottish Executive to reduce the number of incidents of rape and violence in Scotland.

The petitioners seek the reduction of the Secretary of State's decision on the ground that the decision is procedurally improper. They note that in his statements, the Secretary of State accepted that he 'took into account the views expressed by the public about Mr Tyson's visiting the United Kingdom'. This referred to a meeting the Secretary of State had with individuals who would describe themselves as supporters of Mr Tyson, namely individuals who had invited Mr Tyson to Glasgow. The petitioners' argument is as follows: as this was a matter of exceptional and legitimate public interest, it was procedurally improper for the Minister not to also receive representations from groups opposing Mr Tyson's entry to the country. While the petitioners concede that hearing views from the public is at the Minister's discretion, by seeking the views of one party he should have acted in accordance with the rules of natural justice and taken representations from the opposing side as well. The petitioners argue that this duty was dictated by the principle of *audi alterem partem*. The petitioners argued that they had important additional material to bring to the attention of the Secretary of State, which arose from their activities in Scotland, that would have allowed him to make a more informed decision on the issue at hand. Counsel for the Secretary of State argued that Mr Straw was aware of the arguments against entry and that the petitioners would have nothing of substance to add to the information of which he was already aware. Additionally, the petitioners argued that the considerations Mr Straw took into account when reaching his decision were irrelevant and, consequently, he was abusing the discretion conferred on him by the 1971 Act.

Therefore, it is for this Court to respond to three questions:

1. Do the petitioners fulfil the requirements of *locus standi* in Scots law? Namely, can they demonstrate both title and interest to sue?
2. Do the rules of natural justice generate a legal duty for the Minister to hear representations from the petitioners before reaching his decision to allow Mr Tyson entry to the United Kingdom?
3. Were the considerations Mr Straw took into account when reaching his decision relevant? More specifically, was Mr Straw's key consideration (that hosting a sports event of international interest would enhance the UK's sporting reputation), one that the Secretary of State was entitled to take into account when exercising his discretion in relation to immigration?

The Court will address each of these issues in turn.

II. Rules of locus standi.

Before examining the merits of the petitioners' arguments, this Court must assess whether the petitioners satisfy the criteria for standing (*locus standi*).

The rules of standing differ between Scotland and England. In Scotland, petitioners are required to demonstrate that they have both title and interest to sue. It is not contested by the parties that the petitioners, by virtue of their function, have interest to sue. The Rape Crisis Centre is a well-known organisation that supports survivors of sexual assault. Ms Brindley has many years of experience representing the

interests of those who have been exposed to any form of sexual violence. Therefore, they clearly have an interest in the decision being set aside.

With regards to title to sue, Lord Dunedin's dictum in *D & J Nicol v Dundee Harbour Trustees* 1915 S.C. (H.L.) 7 remains relevant. In that judgment, his Lordship explained that in order to have title to sue, the petitioner must demonstrate that he is 'a party (using the word in its widest sense) to some legal relation which gives him [*sic*] some right which the person against whom he raises the action either infringes or denies'.

This precludes this Court from examining petitions where the petitioner can only demonstrate an academic interest in the outcome of the case or is seeking to reduce a decision merely because it is not to her liking. Such petitioners do not satisfy the criteria required to invoke the supervisory jurisdiction of the Court of Session in Scotland.

The Rules on which Mr Straw relied do not confer any rights to the general public. The only rights they confer are to Mr Tyson and potentially the boxing promoter. This of course means that the petitioners in this case do not meet the criteria for locus standi in Scotland.

Such a requirement for the petitioner to show title to sue is not in place in England, where petitioners need only demonstrate a sufficient interest in the outcome of the case. Earlier this year, for instance, Mr Tyson's visit to the United Kingdom for the boxing match scheduled to take place in Manchester was the subject of a different legal challenge before Mr Justice Sullivan in *Regina v Secretary of State for the Home Department, ex parte Bindel* at the High Court of Justice Queen's Bench Division. While the petitioners, a similar women's group, were ultimately unsuccessful on the merits, no issue of standing arose, unlike in these proceedings.

The rules of standing, as formulated in Scotland, require campaign and advocacy organisations who wish to challenge administrative decision-making to either seek litigants who fulfil the criteria for standing or limit their contribution to public interest interventions under Rule 58.8A of the Rules of the Court of Session where this is possible. In cases like these, the title and interest requirement found in Scots law renders decisions such as the one made by Mr Straw potentially immune from judicial review as exercised under the supervisory jurisdiction of the Court of Session. In the case at hand, since the Minister's decision is favourable to Mr Tyson and the boxing promoters, the decision becomes one that is out of the reach of the Scottish courts, since only Mike Tyson himself or the boxing promoters could have petitioned to challenge the Secretary of State's decision. Thus, there are key and perhaps problematic differences in how public interest issues are dealt with in England and how they are dealt with in Scotland.

This brings to mind the dictum by Lord Diplock, making reference to the English rules of standing in *R v Inland Revenue Commissioners Ex p National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617, at p 644:

> It would, in my view, be a grave lacuna in our system of public law if a pressure group were prevented by outdated technical rules of locus standi

from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.

There are of course good reasons to justify the restrictive rules in Scotland. If mounting a challenge were open to anyone, significant time of the courts might be taken up, and respondents (mostly government departments already functioning on limited budgets) would be forced to withstand the time and costs of litigation brought against them by such petitioners. This approach, however, is deeply disadvantageous to vulnerable groups or individuals, who may not wish to be involved in litigation or lack the necessary resources, and usually rely on the assistance of NGOs or other charities to put forward legal arguments on their behalf.

In England, women's pressure groups have achieved some success by petitioning against administrative decisions without having to produce a litigant with title to sue. For instance, the House of Lords in *R. v Secretary of State for Employment Ex p. Equal Opportunities Commission* [1995] 1 A.C. 1 permitted the Equal Opportunities Commission to challenge provisions of the Employment Protection (Consolidation) Act 1978 on the basis that these were incompatible with the United Kingdom's anti-discrimination obligations under European Community law, namely Council Directive 75/117/EEC of 10 February 1975 (the Equal Pay Directive) and Council Directive 76/207/EEC of 9 February 1976 (the Equal Treatment Directive). In this case, the group was found to have 'sufficient interest' on the basis that the organisation played a key role in the fight for equality and the elimination of gender discrimination. Also, the organisations in question played an important role in giving advice, guidance and assistance to any claimants for these purposes. This was considered sufficient for the petitioners to fulfil the requirement of *locus standi*.

In light of this, in this case, the Court also notes the nature of the work carried out by the petitioner organisation. It seeks to support victims of rape, and sexual assault more broadly, all particularly odious crimes where survivors have to overcome significant obstacles when deciding to disclose their experiences, including the distress of recounting their experience in a courtroom. This makes many survivors reluctant to speak up. As a result, their experiences have often been overlooked or disregarded. This makes the role of organisations such as those petitioning the Court of Session in this case all the more important. Recent academic research by mental health professionals treating survivors of sexual violence demonstrates the 'secondary victimisation' of rape victims who speak up to seek redress (for example, Rebecca Campbell and Sheela Raja, 'Secondary Victimization of Rape Victims: Insights from Mental Health Professionals Who Treat Survivors of Violence' (1999) 14 Violence and Victims 261). The petitioner organisation is therefore indispensable in giving voice to the very serious concerns raised by Mr Tyson's visit and providing, beyond psychological support to survivors, legal interventions where it is in the interest of its members or the broader public interest to do so.

It is therefore hoped that the rules of locus standi in Scots law, which prohibit the petitioners from suing in this instance, will be revisited by the Inner House of the Court

of Session or the Appellate Committee of the House of Lords soon, to correct what seems to be an unjust system of determining standing.

A lack of standing usually means that the reviewing court will not examine the remaining arguments put forward by the petitioners. However, the Secretary of State has argued that the petitioners' averments are irrelevant and that the petition should be dismissed for that reason, quite apart from questions of title and interest. For reasons of clarity and completeness, even though there is no standing in this case, I provide responses to the Secretary of State's arguments against the claim brought by the petitioners. It is a matter of primary significance whether Mr Straw's actions were procedurally improper and whether his decision was one he was entitled to reach. Even if this Court cannot provide a remedy due to lack of standing in this case, it can assist in determining future similar cases, by suggesting what the rules of natural justice require for a decision of this kind to be fair.

III. Right to be heard / Audi alteram partem

The petitioners seek reduction of the Secretary of State's decision on the basis that Mr Straw exercised his discretion to accept submissions from Mr Tyson's supporters. This, according to the petitioners, generated a common law duty on Mr Straw to also hear submissions from those opposing Mr Tyson's entry to the United Kingdom. The petitioners argued that the Minister would have reached a more informed and balanced decision by providing them with the opportunity to make representations.

This argument raises important questions relating to the common law principles of natural justice (fairness), a component of which is *audi alteram partem* (the right to be heard). This common law principle allows an individual who may be adversely affected by an impending decision to make representations to the decision-maker. In *Ridge v Baldwin* [1963] UKHL 2, Lord Reid famously noted that the principle of *audi alteram partem* 'goes back many centuries in our law and appears in a multitude of judgments of judges of the highest authority'. This principle, along with the common law rules against bias, is a prerequisite for a decision to be fair. But when is this duty triggered? Namely, under what circumstances will a failure of a decision-maker to take representations before reaching a decision render their decision unfair and therefore a nullity? Fairness in decision-making is a broad principle and its exact meaning falls to be determined in the specific context of each case. As Lord Bridge explains in *Lloyd v McMahon* [1987] UKHL 5:

> [T]he so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when anybody, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates.

Therefore, the norms the decision-maker has to follow to ensure the fairness of the decision will depend on various factors. It is not surprising that Mr Straw sought to hear from Mr Tyson's team, as their interests, primarily pecuniary in nature, would be

directly affected by the decision. Would fairness in this context, however, also create a duty on the Minister to hear representations from the petitioners?

Here it is important to keep in mind Glidewell LJ's dicta, in *R v Lautro ex parte Ross* [1993] QB 17 at p 50: 'the law does not require the decision-making body to give an opportunity to every person who may be affected, however remotely, by its decision, to make representations before the decision is reached. Such a principle would be unworkable in practice'. Therefore, it is for this Court to determine whether in this case the interests of the petitioners (which will be discussed further below) can be viewed as 'remote', so as to absolve the Minister of the duty to take representations.

The purpose of *audi alteram partem* is to ensure that anyone whose interests may be affected negatively by an imminent decision is permitted to argue their position before the decision-maker in advance of that decision being made. There must, however, be some nexus between the decision and the interests of the petitioners. As discussed above in reference to the issue of standing, the immigration rules do not confer any rights to the petitioners or generate any obligations on them. The two parties involved in the decision to grant leave to enter to Mr Tyson are Mr Straw and Mr Tyson himself. Any dispute about Mr Tyson's entry to the country would be a dispute between the Minister and Mr Tyson. Lord Diplock addressed this point in *Cheall v Association of Professional Executive Clerical and Computer Staff* [1983] 2 A.C. 180. At 190 he held that:

> Decisions that resolve disputes between the parties to them, whether by litigation or some other adversarial dispute-resolving process, often have consequences which affect persons who are not parties to the dispute; but the legal concept of natural justice has never been extended to give such persons […] rights to be heard by the decision-making tribunal before the decision is reached.

In accordance with this authority, it would be difficult to conclude that Mr Straw was under a common law duty to take representations from the petitioners for his decision to be fair. The lack of a legal duty, however, should not discourage a Minister from seeking the broadest possible assistance when reaching decisions that will cause distress to marginalised groups. Administrative decision-making can only benefit from exposure to all available advice, especially advice that is the result of comprehensive research on (and engagement with) the issues that form the basis of the petitioners' specialist knowledge in this case. Ignoring the concerns, and expertise, of the petitioners and choosing to meet Mr Tyson's representatives in secret does not contribute to the values of openness and transparency one would associate with fair decision-making. Mr Straw's refusal to meet the petitioners and engage with their views may undermine the legitimacy of his decision in the eyes of the public and sends an alarming message to survivors of sexual assault. It suggests that the government not only does not have their interests in mind, but refuses to engage with them altogether.

Additionally, counsel for Mr Straw argued that he was aware of the issues the petitioners were planning to raise and therefore it was not necessary to provide them with a hearing. The suggestion that Mr Straw had no need to hear opposing views because he was already aware of the arguments the petitioners would have presented is

unconvincing. The petitioners were hoping to deliver evidence to the Minister, based on their expertise, that rewarding Mr Tyson with significant sums of money for a boxing match would send the wrong message to impressionable young males, therefore contributing to the perpetuation of 'rape culture'. Mr Tyson's visit could thus be viewed as a direct insult to women in Scotland who have survived rape, sexual assault and are facing, on a day to day basis, the repercussions of the violence to which they were subjected. While the threat of Mr Tyson reoffending while in the UK was taken into account by Mr Straw, who concluded that no such risk exists, it was also vital for the Minister to consider the psychological harm his visit, and the celebrations associated with it, could cause to others. They key concerns associated with permitting Mr Tyson entry to the UK, beyond the risk of his reoffending, relate to the fact that his example would affect impressionable young minds and further the suffering of women and other survivors of sexual assault by celebrating and normalising his behaviour, while at the same time ignoring the harm that this celebration might trigger.

The petitioners, both the Rape Crisis Centre and Ms Brindley, through their work and advocacy are uniquely placed to provide information to the Minister on the impact his decision would have upon survivors of sexual assault and more widely. In carrying out this assessment, no other body in Scotland could have provided more insight and vital information. It is highly unpersuasive for the Minister to proclaim that his expertise on the matter equals that of the Centre and that the petitioners would have nothing of substance to add. While Mr Straw may believe he has a clear idea of how allowing a convicted rapist into the country may affect survivors and our understanding of sexual crime, he certainly would have more to hear from the petitioners. Hearing their views on a matter of public interest when reaching this decision, especially in light of its impact, would not have been too onerous.

In spite of this, it would be unpersuasive to suggest that hearing the representations from the petitioners was a duty that is recognised in law. For reasons of propriety, Mr Straw should have been more attuned to the concerns of the petitioners before making his decision. Yet, based on our understanding of fairness as developed through common law, especially *R v Lautro ex parte Ross*, the scheme of immigration rules under which Mr Straw made his decision to admit Mr Tyson into the UK created no legal duty to take representations from the petitioners. It is hoped that, notwithstanding this fact, more attention will be paid to such matters in administrative decision-making when similar issues arise in the future. Good decision-making can only be achieved where decision-makers seek the widest expertise available on an issue, and they should aspire to this even where they do not have a legal duty to do so.

IV. Relevant and Irrelevant considerations / Abuse of Discretion

Another ground on which the decision should be examined is abuse of discretion on the basis of irrelevant considerations. The petitioners argue that Mr Straw's consideration when applying the immigration rules (protecting the reputation of the United Kingdom as a desirable venue to host sporting events) was irrelevant. If this is the case, Mr Straw would be abusing his discretion and the decision would be a nullity.

Judicial control of administrative action has developed so as to allow courts to assess whether or not the decision-maker's discretion was exercised properly (*Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997). A decision-maker can, among other reasons, misdirect herself in the law when she takes into account extraneous or irrelevant considerations. On occasion, the statute that confers decision-making powers to the decision-maker will explicitly set out the considerations that must be taken into account for the decision to be reached lawfully. More often, however, it is for the courts to determine which matters are relevant or irrelevant, after examining the terms of the legislation as a whole (*Harvey v Strathclyde Regional Council* 1989 S.L.T. 25; 1989 S.L.T. 612, HL). It was also established in *R v Secretary of State for the Home Department, ex parte Venables* [1998] AC 407, that power is not lawfully exercised if a body takes 'irrelevant considerations' into account or fails to take account of relevant factors. Additionally, in *R v Somerset County Council ex parte Fewings* [1995] 3 All ER 20 it was held that whilst a body may not take into account any irrelevant considerations, it is not required to take into account all relevant considerations.

Applying the law to the case at hand, when reaching his decision, Mr Straw helpfully laid out the considerations he took into account. He evaluated Mr Tyson's behaviour during his last visit to the United Kingdom, he assessed the financial damage to the organisers if the event did not go ahead as planned, he claimed to be aware of the issues raised by the petitioners and, finally, he argued that 'a refusal to permit entry […] would not enhance the UK's standing as a venue for major sporting events'. It is not for the court in the course of judicial review proceedings to weigh these competing considerations against each other and determine which would be paramount. That discretion has been conferred by Parliament to the Minister. Judicial review is not an appeal on the merits of the decision and does not allow the court to set aside the decision merely on the ground that it would have reached a different conclusion under the same circumstances. It is for the Court of Session, however, in the exercise of its supervisory jurisdiction, to determine whether the Minister was entitled to take these considerations into account when exercising his discretion.

It is clear that the immigration rule in question – Rule 320 – confers significant discretion to the Minister to allow entry to convicted criminals for reasons other than compassion (which is explicitly mentioned in the rules). However, even though the discretion is considerable, it is not without limits. Here, I will focus on one of the considerations mentioned above, namely, the interest relating to the enhancement of the UK's reputation as a sporting venue.

In order to determine whether such a consideration would be relevant, the Court must first establish the policy and object of the power-conferring instruments, namely the 1971 Act and the immigration rules. In *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, Lord Reid noted at 1029 that:

> Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the Court. In a matter of this kind it

> is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the Court.

Reading the 1971 Act as a whole, alongside the immigration rules, the following conclusions about their policy and object can be reached. The 1971 Act seeks to regulate the entry of foreign nationals into the UK and to provide a statutory basis for deportations. The key consideration behind administrative decisions in the Act is the promotion of 'the public good'. Entry or deportation of foreign nationals is assessed on this basis. More specifically, there are multiple references to the 'public good' in the Act - for instance s3(5)(b) or s9(4)(a) - that instruct the Minister to make immigration-related decisions with reference to this public good. Additionally, the Rules regulate the conditions for entry into the UK of convicted criminals. The assessments that immigration officials are required to make relate to the potential harm that could be caused by allowing entry to the offender (Rule 320(19)). Additionally, the Rules call upon immigration officials to focus on the character of the convicted individual (Rule 320(19)) and their past behaviour (Rule 320(18)). The Rules explicitly prohibit entry into the UK of convicted criminals whose offences are punishable by at least 12 months imprisonment and create an exception to this rule for compassionate reasons. These references to potential harm, the character of the offender and their past behaviour, and the bar to entry for individuals who have committed offences carrying sentences of at least 12 months imprisonment, lead me to very specific conclusions about the policy and object of the immigration framework. It is evident to me that this framework is intended to secure public safety and to ensure that members of the UK public are not exposed to undue harm. The overriding purpose of barring convicts from entering the UK is to protect the public, and any exceptions must be examined through this lens. Therefore, there is in the broader immigration framework within which Mr Straw's decision is located a presumption in favour of not providing entry to individuals in Mr Tyson's circumstances.

It is this potential harm to public safety that Mr Straw seems to have ignored by refusing to meet with the petitioners. While he noted that he was aware of their concerns and confirmed that he took into account the possibility of Mr Tyson committing new crimes in the UK (a possibility that was remote according to the Minister), Mr Straw did not adequately examine the concerns the petitioners have about Mr Tyson's visit. I have discussed these concerns in detail when examining *audi alteram partem* in this judgment: they relate to the endorsement of rape culture caused by Mr Tyson's visit and the psychological harm to which survivors of sexual assault will be exposed, both of which might be conceived of as related to public safety. Instead, Mr Straw chose to focus on how Mr Tyson's visit will affect the reputation of the UK as a desirable sporting venue.

While the Minister has significant discretion to override the presumption in favour of not allowing Mr Tyson to enter the UK, Mr Straw's suggestion that the normal rule will not apply on the basis of enhancing the reputation of sport in the UK is difficult

to accept as a consideration that is in line with the overall purpose of the immigration framework discussed above. A 'sports exception' to immigration laws for convicted criminals seems to be drawn out of thin air. It does not seem to me to be the result of a thorough assessment of the issues at hand keeping in mind the policy and objectives of the framework under the 1971 Act and the rules and, as such, could rightly be described as an irrelevant consideration. While the Court agrees with counsel for the government that compassionate reasons are not the only reasons that would allow the Minister to grant leave to a convicted criminal, these other reasons for such exceptional treatment must be linked closely to the overall policy objectives promoted by the immigration framework. Otherwise, the decision is arbitrary.

To conclude, the very real and concrete harm caused by the visit, which the petitioners highlighted, cannot within the bounds of the Minister's discretion be balanced against an opaque and unprovable promise that Mr Tyson's visit will enhance the UK's sporting reputation. The Minister's taking into account such considerations is extremely difficult to justify when attending to the purpose of the 1971 Act and the immigration rules. Therefore, I reach the conclusion that in this matter, by allowing exceptional entry to the UK for Mr Tyson, the Home Secretary abused his discretion by taking into account irrelevant considerations. Due to the lack of standing, however, this Court cannot nullify Mr Straw's decision.

V. Conclusion

It is unfortunate that the rules of standing in Scotland do not allow this case to move forward as the equivalent case, brought by a similar pressure group, did in England. This speaks to the obstacles particular to Scotland that pressure groups and NGOs such as the Rape Crisis Centre face when trying to challenge decisions of this nature. This is detrimental not just to the petitioners and those that they represent but more broadly to the rule of law. Judicial review is a key means by which to check the powers of the state and to ensure that decisions reached are lawful. Invoking the Court of Session's supervisory jurisdiction should, therefore, not be restricted to too small a group of persons. The ability to invoke this jurisdiction should extend to groups acting in the public interest who can convincingly argue that the relevant decision affects the interests of the section of the public they seek to represent. This is particularly pertinent where survivors of rape seek representation through an organisation, such as Rape Crisis, which has developed unparalleled expertise in fighting on their behalf.

Reflective Statement on rewriting Rape Crisis Centre v Secretary of State for the Home Department

Rape Crisis Centre v Secretary of State for the Home Department, decided on 2nd June 2000 by the Outer House of the Court of Session, offers ample opportunity to engage with the key themes and objectives of the Scottish Feminist Judgments Project.

The original judgment delivered by Lord Clarke is straightforward. The petitioners did not satisfy the test of standing that applied in Scotland at the time and, consequently, the case was dismissed. Lord Clarke in the original judgment eloquently summarised the relevant law and offered convincing reasons for his conclusions. When viewed through a feminist lens, however, the judgment is disappointing. This is not merely because the judgment did not deliver the outcome the petitioners would have hoped for, but because the facts of the case raised significant feminist issues which were largely left unaddressed. This provided fertile ground for a rewritten, feminist judgment which would delve in greater depth into these points.

In my view, there are a number of key issues in the case which I hoped to address in my rewritten judgment. Firstly, the issue of standing raises important questions about the role of pressure groups such as Rape Crisis Centre in keeping government accountable for its actions through judicial review. This is a particularly pressing matter for organisations that represent women who have survived sexual assault and who may, for very good reasons, not be willing or able to initiate litigation themselves. Secondly, and turning to the substance of the Minister's decision, I was struck by Mr Straw's approach to weighing the competing considerations in this case. As activists at the time eloquently argued, Mr Straw had clearly placed profit and the UK's reputation as a desirable sports venue before the specific needs of survivors of rape and indeed those of the public at large. Could there be any legal recourse for this considering the limited role of judicial review in challenging the merits of administrative decision-making? This, I felt, was at least worth exploring. Finally, the rather condescending approach by Mr Straw towards the petitioners and their expertise (according to him, they had nothing of substance to add to what he already knew) was endorsed by Lord Clarke in the original judgment. As he noted,

> While counsel for the petitioners endeavoured to persuade me that the petitioners had particular additional material to bring to the attention of the Secretary of State which arose from their activities in Scotland, I was not satisfied that counsel was in a position to specify anything which raised matters of substance, which differed from, or would have added materially to, the views of which the Secretary of State must have already been fully aware.[1]

[1] *Rape Crisis Centre v Secretary of State for the Home Department* 2000 S.C. 527, 538.

This approach seemed problematic to me particularly because it ignored the specialist knowledge and expertise that Rape Crisis Scotland had developed over the years.

These issues became the impetus for me to explore whether a judgment that addressed these controversies head-on, relying on the law as it was at the time, would have made any substantial difference or added anything of value to the original judgment.

Rewriting the judgment required me to make many difficult choices. I was originally planning to discuss the relevance of the economic considerations that, according to Mr Straw, outweighed the legitimate concerns the petitioners had about Mr Tyson's entry to the UK. This was one of the key aspects of Mr Straw's decision that rightfully outraged feminist campaigners and rape support groups at the time.[2] From a legal standpoint, and taking into account the limited capacity judicial review offers to challenge the merits of a decision, I discovered that it was difficult to credibly argue that this consideration was one the Minister was not entitled to take into account. Even though I believed the decision was wrong in this respect, I struggled to find a convincing avenue to challenge its legality. Ultimately, I decided to abandon this dimension of the judgment and focus instead on other considerations that seemed to me to stretch the Minister's powers under the Immigration framework to their limits.

While I was in the final stages of rewriting this judgment, the controversies surrounding the rules of standing once again generated debate amongst constitutional lawyers following the UK Supreme Court's judgment in *Northern Ireland Human Rights Commission for Judicial Review (Northern Ireland)* [2018] UKSC 27. In this judgment, the UKSC determined by a majority of 4-3 (with Lady Hale, Lord Kerr and Lord Wilson dissenting) that the Northern Ireland Human Rights Commission did not have standing to challenge legislation banning abortions in Northern Ireland as being incompatible with the European Convention on Human Rights. For the majority, the Commission did not satisfy the 'victim test' that petitioners are expected to demonstrate when reviewing administrative action on Convention grounds. This did not deter the majority of UKSC justices from declaring the impugned Act disproportionate and therefore incompatible with the rights protected under the European Convention, although the appeal was eventually dismissed due to the lack of standing.

I decided to follow a similar approach in my rewritten judgment. Rape Crisis Centre precedes the landmark judgment of *AXA General Insurance Limited and others v The Lord Advocate and others* [2011] UKSC 46 where the rules of standing in Scotland were significantly relaxed by the UK Supreme Court. Rather than pre-empting *Axa* and having the Outer House of the Court of Session change the rules of standing 11 years before the UKSC did, I decided that the petitioners would not have standing and their

[2] A spokesperson for Rape Crisis Centre at the time commented "Given the gravity of the crime of rape, we were deeply saddened that the Home Secretary appears to have given economic considerations greater weight than the trauma experienced by women and girls who have suffered the crime of rape" in --. 'Women's group seeks Tyson review' (news.bbc.co.uk, 26 May 2000) available at http://news.bbc.co.uk/1/hi/scotland/765641.stm .

case would be dismissed. I would, however, go on to assess the substance of the case and reach a conclusion as to its lawfulness. Therefore, I decided that the key difference between Lord Clarke's judgment and my own would be that my feminist rewriting would more clearly highlight the feminist issues arising in the case, it would more thoroughly address the pitfalls of a stringent standing test that would exclude groups such as Rape Crisis Centre from seeking to set aside such decisions, and it would provide more rigorous scrutiny of the Minister's exercise of discretion.

My rewritten judgment reflects the law as it was at the time and chooses to rely heavily on obiter statements to highlight the issues and concerns raised for various pressure groups, especially those that provide assistance to classes of individuals that have traditionally faced societal or other barriers when bringing their cases to court. While much debate still exists on the appropriate approach to standing, hopefully such a judgment, had it been delivered in 2000, would have contributed to this discussion and become the impetus for change. The many obiter statements I have included could have had some persuasive value in subsequent judgments.

When reading the rewritten judgment, one could object to the tone and style of its delivery. It would be fair for readers to question whether a judgment containing such extensive obiter statements chastising a Minister could have ever been delivered. It is also up for debate whether a judgment of this nature would realistically contribute to the clarity and precision of the law, something we have come to expect from judges in their opinions. I believe that such objections may be missing the point of the project. The impetus behind rewriting these judgments, in my view, is to push the boundaries of what may have been conceivable to include in a judgment at the time the case was decided and to offer an alternative, feminist perspective. This should then allow us to assess whether a more overt consideration of the feminist issues underpinning the case would have had an impact upon our understanding and development of the law. Hopefully, the rewritten judgment will provide such food for thought.

While working on the *Rape Crisis Centre* judgment, I heavily relied on the invaluable expertise of Sandy Brindley, one of petitioners in this case, who continues to be at the forefront of the battle for supporting survivors of sexual assault, fighting domestic violence and trying to effect change through activism. In our meeting, she shared her frustration in relation to the continuing difficulties posed to pressure groups by particularly restrictive standing rules. For instance, in spite of the changes brought by the *Axa* judgment, for challenges on Convention rights grounds, petitioners must demonstrate 'victim status' for their case to proceed. This sets obvious obstacles for survivors of sexual assault and the pressure groups hoping to support their interests.

For my analysis, I also found accounts on the law at the time by engaging with a variety of useful sources.[3] The contributions of the editors and the fellow feminist

[3] Tom Mullen and others, *Judicial review in Scotland* (Wiley, 1996), Scott Blair, *Scots administrative law: cases and materials* (W. Green/Sweet & Maxwell, 1999), Aidan O'Neill, *Judicial review in Scotland: a practitioner's guide* (Butterworths, 1999). From more recent publications, I relied on Chris Himsworth & Christine O'Neill, *Scotland's Constitution Law and Practice* (Bloomsbury Professional, 2015), Paul Reid, *Public Law* (W. Green, 2015), Beatson and others, *Administrative law: Text and Materials* (Oxford University Press, 2011), Ronagh J.A. McQuigg 'The victim test under the Human Rights Act 1998 and its implications for domestic violence cases'

judges during the various workshops were equally indispensable in highlighting the feminist issues in the judgment and finding ways to interpret the law in that direction.

As a final point, it may be interesting to examine what happened in the end with Mr Tyson's match in Glasgow. In his analysis of the Rape Crisis Centre judgment, Lord Hope,[4] recounted his experience from attending the eventual match. As he describes:

> 'Outside the Hampden Park Stadium there was large crowd of women who were engaged in a protest. They had lined the streets with banners reading "Straw equals Tyson equals Money before Justice". Those who had dared to enter the stadium had had to run the gauntlet of their drum beats and cat-calls. The women belonged to an organisation known as Glasgow Women against Rape'.[5]

It is hoped that in similar situations where the legal process fails to provide a remedy, concerned citizens will continue to raise their voices and cause discomfort to those who try to ignore them.

[2011] *European Human Rights Law Review* 294-303, Rebecca Campbell, and Sheela Raja, 'Secondary Victimization of Rape Victims: Insights from Mental Health Professionals Who Treat Survivors of Violence' (1999) 14 *Violence and Victims* 261.

[4] Lord Hope, 'Mike Tyson comes to Glasgow - a question of standing' [2001] *Public Law* (Sum) 294-307.

[5] Ibid at 294.