



29 April 2015

PRESS SUMMARY

R (on the application of Hemming (t/a Simply Pleasure Ltd) and others) (Respondents) v Westminster City Council (Appellant) [2015] UKSC 25
On appeal from [2013] EWCA Civ 591

JUSTICES: Lord Neuberger (President), Lord Mance, Lord Reed, Lord Hughes, Lord Toulson

BACKGROUND TO THE APPEAL

In order to trade, sex shops in Westminster need a licence from Westminster City Council (“Westminster”) under schedule 3 of the Local Government (Miscellaneous Provisions) Act 1982, paragraph 19 of which provides that an applicant for the “grant, renewal or transfer of a licence...shall pay a reasonable fee determined by the appropriate authority” [1].

European Union law has placed limits upon the licence fees which can be charged. Article 13(2) of Directive 2006/123/EC, given domestic effect by regulation 18(4) of the Provision of Services Regulation 2009 SI No 2999, provides that the “authorisation procedures and formalities” for applicants “shall not be dissuasive...and any charges which the applicants may incur from their application shall be reasonable and proportionate to the cost of the authorisation procedures in question and shall not exceed the cost of the procedures”.

Mr Hemming runs sex shops in the Westminster area under the name Simply Pleasure Ltd. Westminster has over past years required applicants for sex shop licences to pay with their applications a substantial sum (£29,435 in 2011/12), broken down into a smaller amount (£2,667 in 2011/12) relating to the processing of the application and a larger amount (£26,435 in 2011/12) relating to the cost of administering and enforcing the licensing regime as a whole. The larger amount was refundable whenever an application failed [2].

Mr Hemming claims that this system was illegitimate under domestic and EU law. His primary case has been that there is no basis for requiring successful or unsuccessful applicants to meet the costs of administering and enforcing the regime. But he has also developed a secondary case, that there was no basis for requiring such costs to be paid with the applications, even on a refundable basis. The courts below agreed with Mr Hemming’s primary case, holding that such costs had to be funded by an authority such as Westminster out of its general rates or other funds [4].

Westminster appeals to the Supreme Court, submitting that:

- (1) Under domestic law, paragraph 19 is wide enough to cover the fees it charged.
- (2) Under EU law, article 13(2) and regulation 18(4) are concerned only with charges made in respect of authorisation procedures and their cost. The refundable amounts are not a cost of the application but a cost of the application succeeding.
- (3) Alternatively, if that is wrong, then the “authorisation procedures and formalities” to which article 13(2) refers can be interpreted widely enough to include all aspects of the licensing scheme, including the costs of enforcing the scheme against unlicensed operators, so that the

total sum required to be paid with applications can be regarded as a cost of such procedures and formalities.

JUDGMENT

The Supreme Court, Lord Mance giving its unanimous judgment, allows the appeal in part but, on the critical question of whether it was lawful to require payment of the larger refundable amounts with the applications, makes a reference to the Court of Justice in Luxembourg.

REASONS FOR THE JUDGMENT

The Court concludes that:

- (1) Paragraph 19 of schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982 enables a licencing authority to impose on an applicant a fee for the grant or renewal of a licence which covers the running and enforcement costs of the licencing scheme, to be payable either (a) at the time when the licence is granting; or (b) on a refundable basis, at the time when the application is lodged [7].
- (2) Article 13(2) of Directive 2006/123/EC deals only with authorisation procedures and fees relating to applications for permission to access or exercise a service activity, such as operating a sex shop. It does not prevent the imposition on those who receive licences of proportionate charges to fund the cost of administering and enforcing the licencing regime [15]-[17].
- (3) As to the legitimacy of Westminster’s system, it is helpful to distinguish between two types of scheme. Under Type A, applications for licences are made on terms that the applicant must, upon their application being granted, pay a fee to cover the cost of administering and enforcing the licencing regime. Under Type B, which represents the scheme actually adopted by Westminster, applications for licences are made on terms that the applicant must, at the time of making the application, pay a fee, refundable in the event that the application fails, to cover the cost of administering and enforcing the licencing regime [18].
- (4) Type A schemes are permissible under regulation 18(4) of the Provision of Services Regulation 2009 SI No 2999 and article 13(2) of Directive 2006/123/EC, because they permit a licencing authority to charge a successful applicant with a proportionate part of the cost of administering and enforcing the licencing regime as a whole [19].
- (5) Whether article 13(2) also permits Type B schemes is more problematic, because payment is required to be made by every applicant, albeit on a potentially refundable basis, at the time when the application is made. There was no evidence that a Type B scheme could or would have a potentially dissuasive effect upon applicants but it remains unclear whether it involves in law a “charge” incurred from the application, contrary to article 13(2) [20]-[24].
- (6) A reference to the Court of Justice is therefore required on whether and when a Type B scheme is consistent with article 13(2). The parties are invited to make proposals on the wording of the question to be referred [25].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

www.supremecourt.uk/decided-cases/index.html