Case No: CO/3417/2002

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT
NEUTRAL CITATION NO. [2003] EWHC 1760 (ADMIN)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21st July 2003

Before :

THE HONOURABLE MR JUSTICE MAURICE KAY

Between :

THE QUEEN **On the application of**	
BRIAN ROBERTSON	**Claimant**
- and -	
THE SECRETARY OF STATE	**Defendant**
(1) EXPERIAN LIMITED **(2) EQUIFAX PLC**	**Interested Parties**

The Claimant did not appear and was not represented

Jonathan Crow and Steven Kovats (instructed by **Treasury Solicitor**) for the Defendant
David Pannick QC and Claire Weir (instructed by **Addleshaw Goddard**) for the Interested Parties.

Hearing dates : 19 May 2003

JUDGMENT : APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

Mr Justice Maurice Kay:

1. The origins of this case are to be found in **R (Robertson)) v. Wakefield MDC** [2002] QB 1052 (**Robertson No 1**), in which I held that the practice of selling the electoral register for direct marketing purposes without affording an individual elector a right of objection was a disproportionate interference with the individual's right to respect for private life under Article 8 of the ECHR and that, to the extent that the prevailing Regulations made the right to vote conditional upon acquiescence in the practice with no right of objection, they also involved an unjustified and disproportionate restriction on the right to vote by reference to Article 3 of the First Protocol. In the light of that decision, an amendment was made to the Representation of the People (England and Wales) Regulations 2001 by the Representation of the People (England and Wales) (Amendment) Regulations 2002. The position now is that Electoral Registration Officers maintain two registers – the full register (which is open to public inspection and copies of which are available by purchase or otherwise to certain persons and bodies subject to restrictions) and the edited register (which excludes the names and addresses of those electors who have requested to be excluded from the edited register and which is generally available for purchase). In the present case, the same Mr. Robertson has permission to apply for judicial review in relation to a provision in the amended Regulations which deals with the sale of the full register to credit reference agencies. Regulation 114 of the 2001 Regulations (as amended by Regulation 15 of the 2002 Regulations) is in the following terms:

> "Subject to regulation 112(2)..., the registration officer shall supply on request and on payment of a fee calculated in accordance with regulation 111....copies of a relevant document to a credit reference agency which is registered under Part III of the Consumer Credit Act 1974.....and which is carrying on the business of providing credit reference services.
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> (2) For the purposes of regulation 112(3)..., the relevant restrictions apply except for the purposes set out in paragraph (3) below.
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> (3) Those purposes are –
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> > (a) vetting applications for credit or applications that can result in the giving of credit or the giving of any guarantee, indemnity or assurance in relation to the giving of credit;
> >
> > (b) meeting any obligation contained in the Money Laundering Regulations 1993, the Money Laundering Regulations 2001 or any rules made pursuant to section 146 of the Financial Services and Market Act, 2000; and
> >
> > (c) statistical analysis of credit risk assessment in a case where no person whose details are included in the full register is referred to by name or necessary implication.

> (4) The registration officer may require a credit reference agency to provide such evidence that it is carrying on the business of providing credit reference services as he shall reasonably require."

2. Mr. Robertson's challenge to regulation 114 is put in two ways. First, it is said that my judgment in the earlier case makes it clear that all sales of the full register to commercial concerns are unlawful and that regulation 114 is inconsistent with that judgment. Secondly, even if the point was left open in the earlier case, regulation 114 still falls foul of Article 3 of the First Protocol.

3. Shortly before the Court assembled for the hearing of the application on 19 May, the Administrative Court Office received a copy of an e-mail sent that morning by Mr. Robertson to the Treasury Solicitor. It refers to funding difficulties regarding legal representation. As to that, the position is that Mr. Robertson commenced these proceedings in person and, although he was granted permission to apply by Sullivan J, the Legal Services Commission has refused to fund him. He has received two unfavourable opinions from highly respected counsel – one Queen's Counsel and one junior – and his equally respected solicitors are unable to take the matter further. Other firms have declined to act. The e-mail stated that he was not fit enough to travel from Yorkshire for the listed hearing and that he cannot afford to do so.

4. I should refer to the listing history of this case. Permission was granted at a hearing on 4 November 2002, Sullivan J warning Mr. Robertson that

> "you may well face an uphill path. It is a rather steeper uphill path than you faced last time."

Expedition was ordered, I suspect in deference to the commercial interests of the interested parties. The case was listed to be heard on 12 and 13 February 2003 but that listing was vacated on the application of Mr. Robertson who was seeking to resolve his funding problem with the Legal Services Commission. On 24 February I directed that the case be heard on the first available date after 10 April, having regard to the convenience of counsel and Mr. Robertson. In the meantime, another challenge to Regulation 114 was being processed in the Administrative Court Office. The Claimant is I-CD Publishing Limited and its complaint is not that Regulation 114 is too permissive (Mr. Robertson's case) but that it is too restrictive. On 27 February Jack J ordered that there should be a joint directions hearing in the two cases. This took place on 12 March before Hooper J who ordered that the two cases should be heard consecutively, commencing on 19 May, with Mr. Robertson's case being heard first. He also ordered Mr. Robertson to produce a paginated trial bundle by 28 April and a skeleton argument by 1 May. Mr. Robertson has not complied with those orders. His energies have continued to be applied to the issue of funding. On 1 April the Legal Services Commission funded a further opinion of junior counsel, notwithstanding the unfavourable opinion of leading counsel which had been provided in January. As I have related, it seems that the opinion of junior counsel was also unfavourable.

5. On 22 April Mr. Robertson lodged an application, without notice to the Secretary of State or the Interested Parties, for the proceedings to be stayed pending the resolution of his funding problem. I directed that he give notice of the application to the other parties and lodge a copy of counsel's opinion with the Court Office. All then went quiet until 16 May, the working day before the listed hearing, when Mr. Robertson e-mailed the January opinion of leading counsel to the Office and pursued his application for the listing to be vacated. I was in court on another matter until 5 p.m. on 16 May and had only a brief opportunity to consider Mr. Robertson's position during a short adjournment. I refused his application but said that he could renew it orally on 19 May. In the event he was not present to do so.

6. At the hearing on 19 May Mr. Crow on behalf of the Secretary of State and Mr. Pannick QC on behalf of the Interested Parties correctly observed that, in the absence of Mr. Robertson, the choice lay between adjourning the hearing (which they both opposed), dismissing the application without consideration of the merits (which neither sought) and hearing and ruling upon the application on the merits (the preference of both). I decided that the overall interests of justice called for the third of these possibilities. In reaching this decision I had regard to all the circumstances of the case including: (1) the previous listing history; (2) the history of Mr. Robertson's failure to secure funding; (3) the fact that he had chosen to commence and pursue the application in person; (4) the fact that he is an experienced and particularly intelligent litigant in person as the history of proceedings and (until he obtained representation late in the day) the earlier case shows; (5) the tenuous evidence of his inability to travel for health or financial reasons; (6) the uncertainty as to when the case could be relisted; (7) the absence of reason to believe that, notwithstanding the grant of permission (which seems to have been more on a public interest than an arguable basis), the Legal Services Commission would ever fund the case; (8) the interests of the Secretary of Sate and the Interested Parties in the prompt resolution of an expedited case; and (9) the interests of the many other litigants who are waiting to have their cases heard in this Court.

7. I turn now to consider Mr. Robertson's challenge to Regulation 114.

8. The first ground of challenge is uncomplicated. It is to the effect that **Robertson (No 1)** decided that any sale of the unedited register to commercial concerns or for commercial purposes is a disproportionate interference with an elector's rights.

9. It is true that in some passages of my judgment I referred to the sale of the register "to commercial concerns" (see paragraphs 1, 36, 38, 39 and 40). However, it is clear from the judgment as a whole, and the way in which the case had been put, that its essential subject – matter was the sale to commercial concerns for direct marketing purposes. Thus, in paragraph 2 I said:

> "In a nutshell the Claimant's case is that, as a potential elector, he is being unlawfully required to tolerate the dissemination of the Register to commercial interests who utilise it for marketing purposes...."

In paragraph 26 I referred to his concern that electoral registration officers "sell these personal details to commercial organisations in the knowledge that they will be used for direct marketing purposes". In paragraph 32 I referred to the way in which such sales affect electors "as marketing targets". The crucial passage in relation to Article 8(2) is in paragraph 38 where the reference is to "commercial concerns within the factual context to which I have referred". That context concerned direct marketing. I expressed it unequivocally in the decision on Article 3 of the First Protocol in paragraph 42:

> "In my judgment, if and to the extent that the 1986 and 2001 Regulations make the right to vote conditional upon acquiescence in the sale of the Register to commercial concerns for marketing purposes, with no individual right of objection, they operate in a manner which contravenes Article 3 of the First Protocol unless they are justifiable....."

I consider it to be free from all doubt that **Robertson (No 1)** does not enable Mr. Robertson, without more, to claim victory in relation to the 2002 amendments permitting sale of the full register to credit reference agencies pursuant to regulation 114.

2. Regulation 114 and Article 3 of the First Protocol

10. The next question is whether Article 3 affects Regulation 114. It provides:

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

11. In **Mathieu – Mohin and Clerfayt v. Belgium** (1987) 10 ECHR 1, 16, para. 15, the Strasbourg Court described and approved the way in which an "institutional" right had developed into "subjective rights of participation – the 'right to vote' and the 'right to stand for election'...." It described the ambit of Article 3 in this passage (at para 52):

> "In their internal legal orders the Contracting States make the rights to vote and stand for election subject to conditions which are not in principle precluded under Article 3. They have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Protocol No 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate. In particular, such conditions must not thwart 'the free expression of the opinion of the people in the choice of the legislature'."

In **Robertson (No 1)** the then current Regulations and practice, in the absence of a right of individual objection, failed the proportionality test. The case for Mr. Robertson in the present case is that Regulation 114 is doomed to the same failure.

12. Now that the direct marketing problem has been resolved, I propose to start from the position submitted by Mr. Pannick QC, which I accept, namely that Regulation 114 constitutes, at most, a very limited interference with the right to vote. Moreover, it is common ground that it pursues a legitimate aim.

13. After **Robertson (No 1)**, the Secretary of State embarked upon a consultation exercise. A consultation paper was published in May 2002. It set out, accurately, the implications of my judgment. It explained that the Government had concluded that, in principle, it would be lawful to provide for the sale of the full register "to certain commercial concerns", in addition to making it available, uncontroversially, for certain purposes related to security, law enforcement, crime prevention and the conduct of elections. In the commercial context, the policy considerations were explained thus:

> ".....there should be continued access to the full register for credit reference agencies when vetting applications for credit. Without access to the full register it would be more difficult for lenders to verify an applicant's identity and hence assess their credit risk. They would have to rely upon less complete and accurate data sources which would increase the cost and difficulty of making such assessments and reduce the quality of the decisions. This would have a number of adverse consequences that conflict with the public interest:
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> - There would be more fraud, as the inability to properly verify identity and address would mean more fraudulent applications for credit were authorised.
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> - The overall cost of credit would increase both because of the increased fraud losses and because the alternative, and less effective methods, of assessing creditworthiness would be more expensive. These extra losses and costs would be passed back to borrowers generally;
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> - There would be less credit provided to people who lacked other documentary means of establishing their identity, increasing the problems of financial exclusion. The Government is keen to ensure that all sections of the community have access to financial services including, where appropriate, credit facilities. Witholding the full register from credit reference agencies will reduce access to credit for people in those circumstances. "

Mr. Robertson was one of those who responded to the consultation document.

14. When the draft 2002 Regulations were published, they were accompanied by a regulatory impact assessment which stated:

> "The Government took into account both the views of those who promoted the interests of business in allowing wider access and those (including the Electoral Commission and the Information Commissioner) who wanted to see access restricted, preferably only making the register available for electoral purposes. The resulting draft was felt by the Government to provide the best balance between the various competing interests and to provide the widest access which is consistent with the law."

15. In my judgment, it is clear that the approach and the conclusion demonstrated by these documents fall within the wide margin of appreciation referred to in **Mathieu – Mohin**. Regulation 114 permits the dissemination of information which is in any event a matter of public record. It permits it only to a narrow group of recipients, subject to conditions, for a limited purpose. It represents a balance struck by Parliament following a process of consultation in which Mr. Robertson's voice was heard. It was undoubtedly permissible to conclude that the public interest in the facilitation of credit and the control of fraud outweighed the very modest interference with the right to vote. Although Mr. Robertson maintains that the contribution to the control of fraud is slight and inefficient, the contrary view is at the very least a permissible one. Indeed, the evidence and the written and oral submissions on behalf of the Secretary of State and the Interested Parties, which contain far more detail of a technical and demographic nature than I have rehearsed in this judgment, dispose me to the view that the balance struck by Regulation 114 is wholly unassailable by reference to public law criteria.

16. It follows that the two issues raised by this case must be resolved against Mr. Robertson. On this occasion, his application for judicial review fails and is dismissed. I shall hand down this judgment on the same occasion as the judgment in the **I-CD** case. Mr. Pannick has already indicated that the Interested Parties are not seeking costs against Mr. Robertson. If the Treasury Solicitor and Mr. Robertson are able to agree a form of order before judgment is handed down, there will be no need for any attendance when the hand down is listed.