

“Manifestly without reasonable foundation” and deference in socio-economic cases



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Origins of the phrase

James and Others v. the United Kingdom, judgment of 21 February 1986, Series A no. 98, § 46

“The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature’s judgment as to what is “in the public interest” unless that judgment be manifestly without reasonable foundation.”

Context: whether the deprivation of possessions (through new leasehold enfranchisement laws) was “in the public interest” under A1P1.

National and Provincial Building Society and Others v. the United Kingdom,
judgment of 23 October 1997, *Reports 1997-VII*, § 80

“it is recognised that a Contracting State, not least when framing and implementing policies in the area of taxation, enjoys a wide margin of appreciation and the Court will respect the legislature’s assessment in such matters unless it is devoid of reasonable foundation”

Context: whether retroactive tax measures, which constituted an interference with the enjoyment of possessions, were justified under A1P1.

The phrase in the Art. 14 context

Stec (2006) 43 EHRR 74

Difference in treatment on the ground of sex in relation to entitlement to a state benefit. The benefit was linked to the statutory pension scheme, for which women qualified and 60 and men at 65, with equality to be achieved by 2020.

In determining width of margin of appreciation, the Court had to balance (see para. 52):

- the need for “very weighty reasons” to justify difference in treatment on the basis of sex
- Respecting the legislature’s policy choice as to general measures of economic or social strategy, unless “manifestly without reasonable foundation”.

Balancing MWRF with “suspect” grounds

The application of the “manifestly without reasonable foundation” principle is often counterbalanced by a principle pulling in the opposite direction: the need to provide “very weighty reasons” to justify different treatment on certain so-called “suspect” grounds e.g:

- Sex (Stec, *Zeman v Austria* (Application No 23960/02) (unreported) given 29 June 2006);
- Nationality (*British Gurkha Welfare Society v United Kingdom* (2016) 64 EHRR 11).

MWRF in relation to “non-suspect” grounds

No balancing of “manifestly without reasonable foundation” principle with the need for “very weighty reasons” if justifying a difference of treatment on a “non-suspect” ground e.g:

- Residence (*Carson* (2010) 51 EHRR 13)
- Prisoner status (*Stummer* (2011) 54 EHRR 11)

Socio-economic cases where MWRF dropped / qualified

- *Vrontou v Cyprus* (2015) 65 EHRR 31: Difference in treatment on ground of sex in provision of welfare benefits (specifically housing assistance to the children or men, but not women, displaced by the Turkish invasion of Cyprus) – “suspect ground” and no reference to MWRF.
- *Fábián v Hungary* (2017) 66 EHRR 26: Difference in treatment between civil servants and private sector employees under state pension scheme – non-suspect ground, and MWRF test supplemented at para. 115 by a requirement for non-discrimination and proportionality. Court has “final decision” “irrespective of the scope of the state’s margin of appreciation”.

Balancing “very weighty reasons” with MWRF

Supreme Court in SC (para. 130):

“... in cases involving “suspect” grounds in the field of welfare benefits and pensions, the determinative factor has generally been whether “very weighty reasons” have been shown, but that the court has taken account of the wide margin generally applicable in that field when making that assessment. Whether a measure has formed part of a scheme intended to address historical inequalities, and the presence or absence of common standards among the contracting states, have also been important factors.”

JD & A v United Kingdom

- *JD* [2020] HLR 5
- 2 complaints of discrimination on two “suspect” grounds: disability & gender.
- A1P1 alone: MWRF applies (para. 87).
- A1P1 + Art. 14 (paras 88-89):
 - “wide” margin “in principle”, but must not discriminate and must be proportionate
 - MWRF is limited to differences in treatment resulting from a transitional measure forming part of a scheme to correct an historic inequality.
 - Outside that context, margin is “considerably reduced” in disability and gender cases, and “very weighty reasons” required.

SC & Others v SSWP [2021] UKSC 26

Paras. 134 – 136: Lord Reed criticises the GC’s reasoning in JD paras. 87-89 as not accurately reflecting the ECtHR’s case law.

Based on JD, Appellants argued that JD establishes new rule:

“... complaints of discrimination on “suspect” grounds fall outside the scope of the wide margin and “manifestly without reasonable foundation” approach usually accorded in the field of welfare benefits, unless the case concerns “transitional measures”. Instead, cases concerned with suspect grounds are governed by the principles laid down in cases from outside that field, such as *Markin*, in relation to discrimination on the ground of gender, and *Guberina*, in relation to discrimination on the ground of disability.”

SC's view of ECtHR case law

Para. 142:

- Nuanced approach, with general principles applied, so that range of factors can take account of particular circumstances, leading to a balanced overall assessment.
- MWRF has neither been completely dropped, nor is it a mechanical rule to be applied.
- Wide margin for welfare benefits and pensions is an “important element”, but application can be “greatly affected” by other principles and the facts.
- Presence of a “suspect” ground is “particularly significant” – general need for “strict scrutiny, focused on the requirement for very weighty reasons”, unless the issue is timing of reform to address historical inequalities.

SC's view of domestic case law since *Humphreys*

1. Application of MWRF as a “test” does not reflect the ECtHR case law, which recognises that other factors may call for stricter standard, e.g. “suspect” grounds requiring “very weighty reasons”. Para. 151: “*the question is more complex than a “test” of whether the policy choice is “manifestly without reasonable foundation” might appear to be if that were regarded as the entirety of the inquiry*”.

2. MWRF does not “replace or supersede” the requirement for “very weighty reasons” where “suspect” grounds are in issue.

Key conclusions in SC – paras. 157-162

- MWRF still has a part to play, even in “suspect” cases outside the context of “transitional measures”.
- Domestic approach since *Humphreys* needs to depart from applying MWRF as a “test”.
- Para. 158: “a low intensity of review is generally appropriate, other things being equal, in cases concerned with judgments of social and economic policy in the field of welfare benefits and pensions, so that the judgment of the executive or legislature will generally be respected unless it is manifestly without reasonable foundation”.
- BUT: “the intensity of the court’s scrutiny can be influenced by a wide range of factors, depending on the circumstances of the particular case”.

Key conclusions in SC – paras. 157-162

- Some factors high intensity of review, e.g. “very weighty reasons” will usually have to be shown for difference of treatment on a “suspect” ground, or impact on best interests of children in a non-suspect case.
- Some factors will lower the intensity of review, e.g. “transitional measure” cases.
- Avoid a “mechanical approach” ... “the courts should generally be very slow to intervene in areas of social and economic policy such as housing and social security; but, as a general rule, differential treatment on grounds such as sex or race nevertheless requires cogent justification.”
- MWRF is just a way of describing a wide margin of appreciation. Court should focus on the question of whether a wide margin is appropriate in the light of the circumstances.

Interesting final observation from Lord Reed (para. 162)

“In practice, challenges to legislation on the ground of discrimination have become increasingly common in the United Kingdom. They are usually brought by campaigning organisations which lobbied unsuccessfully against the measure when it was being considered in Parliament, and then act as solicitors for persons affected by the legislation, or otherwise support legal challenges brought in their names, as a means of continuing their campaign. The favoured ground of challenge is usually article 14, because it is so easy to establish differential treatment of some category of persons, especially if the concept of indirect discrimination is given a wide scope. Since the principle of proportionality confers on the courts a very broad discretionary power, such cases present a risk of undue interference by the courts in the sphere of political choices. That risk can only be avoided if the courts apply the principle in a manner which respects the boundaries between legality and the political process.”

Thank you for listening

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