

CURRENT HUMAN RIGHTS ISSUES IN HOMELESSNESS AND THE ALLOCATION OF SOCIAL HOUSING

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Breakout session on housing and homelessness

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Introduction

1. It is well established that the European Convention on Human Rights (ECHR) does not provide a right to a home. See for example *Wandsworth LBC v Michalak* [2002] EWCA Civ 271, [2003] 1 WLR 617 at [18]. Rather Art.8 ECHR provides for the right to respect for one's home, together with respect for private and family life and correspondence. Nevertheless, there are a variety of circumstances in which human rights principles may provide assistance to those seeking, or seeking to retain, a roof over their head.
2. This paper seeks to explore some of the recent incidences of the application of human rights principles in the context of the law relating to homelessness and the allocation of social housing. The cases are grouped as follows, according to the ECHR right in play:
 - The first section deals with the case of *Poshteh v Kensington and Chelsea RLBC* and the question of whether or not the procedure for reviewing adverse homelessness decisions is compliant with Art.6 ECHR.
 - The second section gives an overview of some of the recent case law on the allocation of social housing and the challenges which have been brought to various allocation schemes relying on Art.8 and 14 ECHR.
 - The third section deals with Art.4 ECHR and the interplay between the obligations under this article and the State's other international obligations to protect victims of trafficking. This is not an area which has received much by way of judicial attention. But as the UK steps up its attempts to combat trafficking and identify and assist its survivors, the importance to this group of being able to access appropriate accommodation is gaining in importance. This final section of the paper will consider the possible impact that Art.4 might have on the performance of local housing authorities' functions under Housing Act 1996, Part 7 with this in mind.
3. Each section will consist of a short round-up of the relevant case law, before suggesting some points which might form the basis for further discussion at the seminar.

Art.6 ECHR

Poshteh v Kensington and Chelsea RLBC [2017] UKSC 36

4. P was an Iranian refugee who had been detained and tortured leaving her with post-traumatic stress disorder. She applied to Kensington and Chelsea as homeless and, in due course, was found to be owed the main housing duty. She was subsequently made an offer of accommodation in line with s193(7) Housing Act 1996. She refused the offer on the basis that a round window in the property reminded her of the cell in which she had been tortured and gave her flashbacks.

5. Kensington and Chelsea carried out a review and found that the property was suitable and (applying the law in force prior to the amendments introduced by the Localism Act 2011) that it would have been reasonable for her to have accepted the offer. As such the main housing duty came to an end.
6. The decision was upheld on appeal and the Court of Appeal (Elias LJ dissenting) dismissed a second appeal. The reviewing officer had been entitled to find that it would have been reasonable to accept the offer and had paid due regard to the public sector equality duty.
7. P appealed to the Supreme Court arguing that:
 - The decision of the Supreme Court in *Ali v Birmingham City Council* [2010] 2 AC 39 should be departed from in the light of the decision of a chamber of the ECtHR in *Ali v United Kingdom* (2016) 63 EHRR 20, to the effect that the duties under Part VII Housing Act 1996 gave rise to ‘civil rights and obligations’, meaning that Article 6 ECHR was engaged.
 - The review decision failed to explain the link between the objective reasonableness or otherwise of P’s assertion that the round window reminded her of a prison cell, and the rejection of her claim that it would have a significant impact on her mental health. Nor did the letter-writer address adequately the ‘subjective factors’ underlying her claim.
8. The Supreme Court rejected her appeal. On the first issue, the court declined to follow the decision of the ECtHR, on the footing that the decision of the chamber had failed to ‘address in any detail either the reasoning of the Supreme Court, or indeed its concerns over judicialisation of the welfare services, and the implications for local authority resources’. In such circumstances the court took the view that it would be more appropriate to ‘await a full consideration by a Grand Chamber before considering whether (and if so how) to modify our own position’ that Article 6 was not engaged in this context.
9. On the second issue, the court took the view that, taking into account the ‘sharp focus’ required by s149 Equality Act 2010 in cases of disability, the review decision contained adequate reasons.
10. Finally, the court declined an invitation to reconsider the standard of review applicable in homelessness cases (following the more flexible, context specific, approach as explained in *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591) but accepted that the restrictive approach advocated over 30 years ago in *R v Hillingdon London Borough Council, Ex p Puhlhofer* [1986] AC 484, was no longer appropriate.
11. Discussion points:
 - Is the decision correct?
 - What if the ECtHR takes a different view?
 - What would the practical ramifications of this be?

Art.8 and 14 ECHR

R (Jakimaviciute) v Hammersmith & Fulham LBC [2014] EWCA Civ 1438, [2015] HLR 5

12. The power under s160ZA(7) to designate classes of people who qualify for an allocation is subject to the duty under s166A(3) to secure reasonable preference to the five statutory categories set out in that section. Disqualification of 87% of homeless applicants fundamentally at odds with this requirement.

R (Alemi) v Westminster CC [2015] EWHC 1765 (Admin), [2015] PTSR 1339

13. Unlawful to exclude homeless applicants from allocation scheme for the 12-month period following acceptance of a duty toward them.

R (HLA) v Ealing LBC [2015] EWHC 2375 (Admin), [2016] PTSR 16

14. Five-year residence requirement unlawful as (among other reasons) it discriminated unlawfully against women who were victims of domestic violence, contrary to Articles 8 and 14 ECHR.

R (Woolfe) v Islington London Borough Council [2016] EWHC 1907 (Admin)

15. Points threshold which prevented applicants with less than 120 points from bidding not unlawful.

R (YA) v Hammersmith and Fulham London Borough Council [2016] EWHC 1850 (Admin)

16. LHA had unlawfully held spent convictions against Claimant (who was a care leaver) in refusing to allocate him social housing. However, the provisions in the allocation scheme disqualifying applicants for criminal convictions and related behaviour, which indirectly resulted in care leavers being treated less favourably than others, did not result in a breach of Art.8 and 14. The discriminatory effect of the scheme fell within the margin of appreciation afforded to the state in matters of social welfare and was justified.

R (Osman) v London Borough of Harrow [2017] EWHC 274 (Admin)

17. Reduced priority accorded to tenants in overcrowded accommodation in the private sector did not result in a breach of Art.8 and 14. Private sector tenants not in same position as council tenants and could reasonably be expected to seek alternative accommodation in private sector and should not be incentivised to remain in overcrowded conditions in hope of obtaining council accommodation.

R (XC) v London Borough of Southwark [2017] EWHC 736 (Admin)

18. Lawful to determine relative priority between those applicants with a statutory reasonable preference by taking into account various factors including their financial resources and the contribution made by the applicant to the borough or to their local community. The scheme did result in indirect discrimination contrary to the Equality Act 2010 against persons with a disability and against women. I.e. those less likely to be in work and more likely to have caring responsibilities. But there were no less intrusive measures which would not have unacceptably compromised the objective of the scheme.

R(C) v Islington London Borough Council [2017] EWHC 1288 (Admin)

19. Challenge to local lettings policy which provided that where homes were built on existing estates, priority would be given to those currently living on the estate when it came to allocating the new properties, and any left-over would then be allocated in accordance with the general provisions of the allocation scheme. C sought to argue this unlawfully discriminated against homeless people and victims of domestic violence (and therefore women), contrary to Art.8 and 14 ECHR. Claim dismissed. The scheme resulted in differential treatment but this was justified because of the 'churn' effect, which meant that every time a local tenant moved to a new unit of social housing, an existing unit would be freed up which would be allocated in accordance with the general provisions of the scheme. Further, the scheme contained a residual discretion to be used in exceptional cases to alleviate hardship.

R (H) v Ealing LBC [2017] EWCA Civ 1127¹

20. In October 2013, the London Borough of Ealing amended its scheme for the allocation of social housing, to remove 20% of available lettings from the general pool, and reserve them for 'working households' (those where a member of the household worked for 24 hours or more per week) and 'model tenants' (existing council tenants who had complied with the terms of their tenancy and were

¹ Since this is the first Court of Appeal case in this area since 2014 and since the judgment casts doubt (whether expressly or implicitly) on a number of the decisions set out above, more detail is being given here as to exactly what was decided and why.

applying for a transfer). A challenge to the amended scheme was brought by two families. The first was a family of six who were victims of domestic violence, headed up by a single mother with long standing mental health problems sufficient to render her disabled within the meaning of s6 Equality Act 2010. As a result of her disabilities and caring responsibilities she was unable to work. The second family comprised two grandparents, their daughter and her son. The daughter had significant physical disabilities including cerebral palsy, and the grandparents, who themselves had health problems, cared for both her and her son and were also unable to work. The two families challenged the legality of the amended scheme arguing that it gave rise to unlawful discrimination against women, disabled and elderly persons contrary to ss19 and 29 Equality Act 2010; that it resulted in unlawful discrimination against women, children, disabled and elderly persons and non-council tenants contrary to Art.8 and 14 ECHR; that in adopting and maintaining the scheme, Ealing was in breach of the public sector equality duty; and that in adopting and maintaining the scheme Ealing was in breach of s11 Children Act 2004. HHJ Waksman QC allowed the claim on all grounds: see R (H) v Ealing LBC [2016] EWHC 841 (Admin).

21. The Court of Appeal reversed his decision. Sir Terence Etherton, who gave the lead judgment, concluded as follows:

- The working households element of the scheme gave rise to indirect discrimination within the meaning of s19 Equality Act 2010. The judge had been right in this respect and had been right to reach this conclusion based on scrutiny of the particular element of the scheme that was subject to challenge, as opposed to considering the scheme as whole. However, the impact of the scheme as a whole on the various protected groups would need to be considered in deciding whether the discrimination could be justified.
- The judge had been wrong to hold that this discriminatory effect could not be justified. In particular, he should not have based his conclusion that other less intrusive measures were available, upon a comparison with the allocation schemes adopted by Barnet, Bexley and Hammersmith and Fulham. Those schemes were very different to Ealing's schemes and the provisions were not analogous. In addition, the judge had failed to consider the scheme as a whole when dealing with the issue of justification, and the various other ways in which the protected groups were given priority.
- In relation to the ECHR arguments, (with Davis and Underhill LJ expressing reservations on this point) the working households element of the scheme fell within the ambit of Art.8, since it related to the provision of accommodation to families who were not in secure accommodation already or who were not accommodated by Ealing at all. Their 'right to permanent accommodation' fell within the scope of 'family life' as protected by Art.8. Whereas, the model tenants element of the scheme, which was concerned with the transfer of secure tenants, did not relate to any of the core values which Art.8 was intended to protect.
- But in any event, on the basis of the evidence before him, the judge was not entitled to conclude that the discriminatory effect of the working households and model tenants was unjustified. As with his reasoning relating to the Equality Act 2010, the judge had wrongly rested his conclusion on the allocation schemes of other local authorities which were not analogous to Ealing's scheme.
- In relation to the public sector equality duty, there was no basis for concluding that the duty had not been discharged in relation to those affected by the model tenants element of the scheme. In relation to the working households element of the scheme, there had been a failure to discharge the duty at the time the scheme was devised and implemented in 2012-13. But Ealing was in the process of carrying out a major policy review of its allocation scheme and was alive to the discrimination issues that had been raised. As such it was not appropriate to quash the scheme on this ground.

- The judge had applied too exacting an approach in finding that there had been a breach of s11 Children Act 2004 and had overlooked the evidence adduced by Ealing as to the need for children to have access to stable accommodation and the proportion of lettings made to households with children led by women.
- In view of the fact that the scheme was currently under review, there was no purpose to be served by remitting the issue of justification under s19 Equality Act 2010 and Art.14 ECHR for further consideration.

22. Discussion points:

- The *H* case in the Court of Appeal is an important one. If it is correct that the allocation of social housing does not (or does not always) fall within the ambit of Art.8 then this may significantly curtail the ability of affected applicants to challenge discriminatory practices. Was the court correct in the view it expressed on this?
- If Art.8 is engaged, how should the court approach the task of evaluating whether or not a particular provision or scheme is discriminatory? Should the court apply the manifestly without reasonable foundation (MWRF) approach? In *H* in the High Court, the judge held that it should not be applied. Similarly in *XC* (in the context of Equality Act discrimination). Contrastingly in *C*, the MWRF test was deemed to be the correct one. The Court of Appeal in *H* had did not resolve this issue.
- If the MWRF test is the correct one, how should it be applied? In the *C* case, the court applied the structured *Bank Mellat* approach to proportionality, applying the MWRF test to the first three limbs of the test but not the fourth, following *re Recovery of Medical Costs for Asbestos Diseases (Wales) Bill* [2015] UKSC 3. Contrast *DA and Others v SSWP* [2017] EWHC 1446 (Admin) (the recent benefit cap challenge) where Collins J held that the MWRF test should be applied to all four limbs of the proportionality test.
- Should the MWRF test be applied when considering discrimination under the Equality Act 2010? The court declined to do so in *XC*, but on the basis that the subject matter in hand was a local authority policy on housing rather than matters of high policy contained in Regulations enacted by Parliament, and not because, on principle, the approach should be limited to the ECHR and not extended to the EA 2010. In *H*, it seems to have been submitted on behalf of Ealing that the approach should be applied to the EA 2010 (see [72]). The court did not deem it necessary to decide the issue.
- What does the future hold?

Art.4 ECHR

23. Art.4 ECHR provides that ‘1. No one shall be held in slavery or servitude. 2. No one shall be required to perform forced or compulsory labour.’ Where Convention Rights under the Human Rights Act 1998 are engaged, it is well established that they have to be interpreted and applied consistently with international human right standards *Nzolameso v Westminster CC* [2015] UKSC 22, [2015] HLR 22 at [29].
24. Of particular relevance are Articles 5(2) and 12(1)-(2) of the *Council of Europe Convention on Action Against Trafficking in Human Beings* (CETS No 197) (the Trafficking Convention).

Article 5 – Prevention of trafficking in human beings

...(2) Each Party shall establish and/or strengthen effective policies and programmes to prevent trafficking in human beings, by such means as: research, information, awareness raising and education campaigns, social and economic initiatives and training programmes, in particular

for persons vulnerable to trafficking and for professionals concerned with trafficking in human beings.

Article 12 – Assistance to victims

(1) Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery. Such assistance shall include at least: (a) a standards of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance;... (2) Each Party shall take due account of the victim's safety and protection needs.

25. As such these obligations are relevant to the scope of Art.4 ECHR and the ECtHR has held on several occasions that trafficking falls within Art.4. For example, in *Siliadin v France* (2005) 43 EHRR 287, the court found that a 15-year-old girl, brought from Togo to France and made to work for a family without remuneration for 15 hours a day, had been held in servitude and required to undertake forced labour and that France had violated Art.4 by failing to introduce criminal legislation which would afford effective protection to her.
26. Similarly, in *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1 the court accepted that Art.4 placed states under a positive obligation to provide practical and effective protection against trafficking and exploitation in general and specific measures of protection. In that case a young Russian woman had gone to Cyprus to work in a cabaret. Three weeks later she was found dead in a street in suspicious circumstances. The ECtHR upheld her father's complaint that Cyprus was in breach of Art.4 in that its regime for the issue of visas for cabaret artistes had failed to afford effective protection to her against trafficking and that its police had failed properly to investigate events. In reaching this conclusion the court noted as follows:

282. There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention. In view of its obligation to interpret the Convention in light of present-day conditions, the court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes 'slavery', 'servitude' or 'forced and compulsory labour'. Instead, the court concludes that trafficking itself, within the meaning of article 3(a) of the Palermo Protocol and article 4(a) of the Anti-Trafficking Convention, falls within the scope of article 4 of the Convention.

283. The Court reiterates that, together with arts 2 and 3, art.4 enshrines one of the basic values of the democratic societies making up the Council of Europe. 98 Unlike most of the substantive clauses of the Convention, art.4 makes no provision for exceptions and no derogation from it is permissible under art.15(2) even in the event of a public emergency threatening the life of the nation.

284. In assessing whether there has been a violation of art.4, the relevant legal or regulatory framework in place must be taken into account. The Court considers that the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking...

285. As with arts 2 and 3 of the Convention, art.4 may, in certain circumstances, require a state to take operational measures to protect victims, or potential victims, of trafficking. In order for a positive obligation to take operational measures to arise in the circumstances of a particular case, it must be demonstrated that the state authorities were aware, or ought to have been

aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited within the meaning of art.3(a) of the Palermo Protocol and art.4(a) of the Anti-Trafficking Convention . In the case of an answer in the affirmative, there will be a violation of art.4 of the Convention where the authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk.

27. The positive obligations flowing from Art.4 ECHR (read with Art.10 of the Trafficking Convention) fell for consideration by the High Court in *R (SF (St Lucia)) v Secretary of State for the Home Department* [2015] EWHC 2705 (Admin), [2016] 1 WLR 1439. That case involved a challenge by way of judicial review to a decision made by the Home Office that a person was not a victim of trafficking. A question arose in the case as to the appropriate level of scrutiny to be applied by the court in such cases. This issue was considered in detail at [84]-[107]. At [104] the judge stated as follows:

So pulling the threads together, the rationality of a gateway decision that a person is not the victim of trafficking requires a heightened or a more rigorous level of scrutiny both because it relates to fundamental rights and also because it arises in an area in which a court has the requisite knowledge. This means that the approach of the courts should be in accordance with the approach of Carnwath LJ (with whom Moore-Bick and Etherton LJ agreed) in *R (YH) v Secretary of State for the Home Department* [2010] 4 All ER 448, para 24, which was that: “the need for decisions to show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account”.

28. Finally, as well as bearing on the scope of the obligation under Art.4 ECHR, the requirements of the Trafficking Convention also bear on the application of domestic law: there is a ‘strong presumption in favour of interpreting English Law (whether common law or statute) in a way which does not place the United Kingdom in breach of an international obligation’. See *R v Lyons* [2003] 1 AC 976 at [27] per Lord Hoffmann quoted with approval at [50] of *Hounga v Allen* [2014] UKSC 47, [2014] 1 WLR 2889. *Hounga* was a case concerning whether or not the tortious defence of illegality operated as a bar to a trafficking victim bringing a discrimination claim against his or her employer. The Supreme Court held that it did not and in doing so recognised the ‘prominent strain of current public policy against trafficking and in favour of the protection of its victims’ and the relevance, in this context, of the obligations placed on the UK by the Trafficking Convention. See [46]-[52] per Lord Wilson JSC (with whom Baroness Hale DPSC and Lord Kerr JSC agreed).

29. Discussion points:

- Is the law, in so far as it makes provision for accommodation for vulnerable persons, adequate to protect victims of trafficking?
- How might the Housing Act 1996 be interpreted to address this and to take account of the obligations set out above?
- Priority need.
- Accommodation pending review.
- The duty to give reasons.

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