IN THE ROYAL COURTS OF JUSTICE
QUEEN'S BENCH DIVISION

/ **Claim no: HQ15X03584**

Formerly claim no: A01EC488 in the County Court at Clerkenwell and Shoreditch

BETWEEN:

LB OF HARINGEY
Claimant

- and -

MR MUKHLIS SAMAWI
Defendant

SKELETON ARGUMENT FOR THE DEFENDANT

For the hearing (floating) on 24-26th October 2016 at 10.00 am

Ian Loveland, Arden Chambers, Counsel for the Appellant/Defendant
Instructed by Burke Niazi, Solicitors

Estimated reading time : 1 hour

Essential reading : Skeleton argument

References in the text : [D1], [B 5] etc are to pages in the trial bundle

[TAB1], [TAB 5] are to the authorities bundle

R (on the application of Carson) v Sec of State for Work and Pensions [2005] UKHL 37: [2006] 1 A.C. 173 **[TAB 15]**

31…..There is a single question: is there enough of a relevant difference between X and Y to justify different treatment?"

LB Hounslow v Powell: [2011] UKSC 8; [2011] 2 A.C. 186 **[TAB 13]** per Lord Phillips.

[98]….section 3 of the 1998 Act applies to all legislation, whether enacted before or after the 1998 Act came into force. In so far as this alters the construction given to legislation before the 1998 Act came into force, the 1998 Act has the effect of amending legislation: see Ghaidan v Godin- Mendoza [2004] 2 AC 557.

Chronology

27.10.2013	Fatima Hussain (former tenant as successor) dies
--.11.2013	D applies to succeed to Fatima Hussain's tenancy or be granted discretionary tenancy
10.12.2013	C issues notice to quit
13.01.2014	C's notice to quit expires
31.03.2104	C rejects D's applications
03.06.2104	C issues claim
21.10.2014	Hearing before DJ Manners (summary judgment for C)
24.11.2014	Recorder Cohen grants permission to appeal
03.07.2015	Appeal before Recorder Bowen (appeal allowed on all grounds)
	Claim remitted to county court and transferred to High Court

Background

1. The Claimant brings this claim for possession **[B 1-4]** on the basis that:

   (a) The former secure tenant of the premises, Fatima Hussein (the Defendant's mother), died on 27.10.2013.

   (b) Mrs Hussein had succeeded to the secure tenancy on the death of her husband, Aziz Simawi, in June 2001.

(c) Because Mrs Hussein was herself a successor to the secure tenancy, no further right of succession could arise under the scheme of the Housing Act 1985.

(d) Thus even if – which the Claimant does not accept – the Defendant satisfies the succession criteria of Housing Act 1985 s.87 and s.113, he could not succeed to the tenancy.

(e) The contractual tenancy of Mrs Hussein was determined by a notice to quit which expired on 13.01.2014, since when the Defendant has been a trespasser in the premises.

2. The Defendant defends the claim **[B 18-24]** on the basis that:

(a) he has succeeded to his deceased mother's secure tenancy; or

(b) the Claimant has acted unlawfully in issuing these proceedings consequent upon its failure properly to apply to the Defendant its policy relating to the offer of discretionary tenancies to persons who are not entitled to succeed to a tenancy previously held by a now deceased person.

3. The argument advanced in respect of point (a) above is that the succession provisions of the Housing Act 1985 are incompatible with Art 14 of the Human Rights Act 1998 because they draw an unjustified and unjustifiable distinction for succession purposes between persons who became sole tenants consequent upon death of a former tenant and those who became sole tenants consequent upon a judicial assignment of the tenancy following relationship breakdown. The former are treated as 'successors' by the Act, and no further succession to the tenancy is permitted upon their deaths. The latter are not treated as successors, and so upon their death a qualified person can succeed to the tenancy.

This will be referred to hereafter as the **'death-divorce dichotomy'**.

4. The matter came before DJ Manners on 21.10.2014 **[A 27].** The issue before the court on that day was whether the Defendant had a defence to the claim which satisfied the threshold requirements of:

(a) CPR 55.8 that the claim can be disputed on grounds which 'appear to be substantial'; and

(b) The HRA 1988 requirements that Art 8 and/or public law grounds be 'seriously arguable'.

5. DJ Manners concluded that the defence failed as none of the grounds pleaded were seriously arguable. In short, she held that the Art 14 point was nonsense and accepted

as a matter of fact that the Claimant had properly applied its policy. The judgment of of DJ Manners is at **[B ---].**

6. Permission to appeal was granted by Recorder Cohen QC on 24.11.2014 **[B --].** The grounds of appeal are at **[A 9-10].** The matter came before Recorder Bowden on ---------. He found for the Appellant on all grounds of appeal. The order of Recorder Brown is at **[B -----]** . On being remitted to the county court, the matter was transferred to the High Court for trial. The Defendant was granted permission to supplement his defence by the insertion of para 21a **[B ---].**

A contested question of fact

7. In order to argue the point at 2(a) above the Defendant must satisfy the court that:

   (i) he occupies the premises as his home for the purposes of HRA 1998 Art 8; ie that he has sufficient and continuous links with the premises;

   and

   (ii) he satisfies the succession criteria of the Housing Act 1985; ie that he is the son of the deceased former tenant (s.113(1)(b) and that (per s.87(b)) he:

   "resided with the tenant throughout the period of twelve months ending with the tenant's death"; ie from 27.10.2012 to 27.10.2013.

8. In order to argue the point at 2(b) above the Defendant need only satisfy the court as to (i) above.

9. Both issues are essentially matters of fact for the court to determine on the evidence before it. As a matter of law, it would be entirely possible for the court to find for the Defendant on issue (i) but not issue (ii); if, for example, the court found that the Defendant lived in the premises as his home for several years until a few months (or indeed even a few days) before his mother's death and then again after her death, but not for the statutorily crucial entire year immediately prior to his mother's death.

10. The law on the meaning of s.87(b) is best summarised and stated in *Freeman v Islington LBC* [2009] EWCA Civ 536; [2010] H.L.R. 6 **[TAB 6]** per Jacobs LJ:

> 27 …[A]n intention to live with the tenant to nurse him/her does not preclude "residing with" but on the other hand is not conclusive of it. And it shows that one does look to the intention after death of the tenant—to throw light on the nature of the occupation pre-death.
>
> 28 The authorities also clearly establish that mere physical presence is not enough to amount to "residing with". There must be to a significant degree an intention which can be characterised as making a home with the tenant—not just staying there.

29 Moreover—and this was not in dispute—the nature of the occupation must have the necessary qualities of "residing with" for the whole year before the death.

11. It is the Defendant's case that he satisfied this test for many years immediately prior to his mother's death, and that insofar as he occupied other addresses in the relevant s.87 period he did so only a casual, intermittent basis for the purposes of staying overnight in close proximity to his then places of employment.

12. In support of this contention, the Defendant adduces evidence in the form of his own witness statement **[B --]** and exhibited thereto records relating to his mother's health and social care, witness statements from his neighbours as to the quality and duration of the Defendant's presence at the premises **[B ----------]** and a witness statement from his brother **[B --]** who will say he was a regular visitor to the premises and in constant communication with his mother prior to her death.

Ground 1 of the defence

13. Ground 1 was pleaded in the defence as follows **[B 20]:**

Ground 1. The Defendant is the secure tenant of the premises by succession because in the circumstances of this case the 'no second succession' rule contained in the Housing Act 1985 ss.87-88 is incompatible with Human Rights Act 1998 Sch. 1 Arts 14 and 8.

14. The crux of ground 1 can be presented in this way:

Scenario 1

D1 and D2 are spouses who live in a house let on a secure tenancy before April 2012, either as joint tenants or with D1 as sole tenant.

D1 leaves D2 and the house when the relationship breaks down.

The law enables D2 to have the tenancy transferred to her as a sole tenant on the basis that she is a secure tenant *de novo.*

Thus if D2 availed herself of this legal opportunity and she were to find a new spouse (D3) that spouse could succeed to her tenancy on her death, or if there was no such spouse a qualifying family member (D4) would be entitled to succeed.

Scenario 2

W1 and W2 are spouses who live in a house let on a secure tenancy before April 2012, either as joint tenants or with W1 as sole tenant.

W1 leaves W2 and the house because he dies.

The law requires that W2 becomes a sole tenant who is a *successor* to the original secure tenancy. The law does not afford her any opportunity to become a sole tenant de novo.

Thus if W2 were to find a new spouse (W3) that spouse could not succeed to her tenancy on her death, or if there was no such spouse a qualifying family member (W4) would not be entitled to succeed.

15. Starkly put, the Defendant's submission is that this differential treatment (the **death/divorce dichotomy)** of a person (whether male or female) who becomes a sole tenant consequent upon her relationship breaking down and a person who becomes a sole tenant consequent upon her spouse's death has no rational basis and is thus contrary to HRA 1998 Art 14.

16. It is further contended that the death/divorce dichotomy is indirectly discriminatory on the grounds of gender and that no justification has been or can be advanced to defend the dichotomy that would surmount the scrutiny test that is applied per Art 14 to gender based differential treatment.

17. What is in issue here is whether *the law* differentiates unjustifiably between different groups. The point is what has come to be known as a *Kay* 'gateway A' argument; per Lord Hope in *Lambeth LBC v Kay* [2006] UKHL 10; [2006] 2 A.C. 465 at **[TAB 11]** (emphasis added):

> 114 *There may, however, be cases like Connors where the incompatibility with the article 8 Convention right lies in primary legislation which the county court is being asked to apply to the case by the public authority: see para 86. In such a case it would be open to the High Court to make a declaration of incompatibility, if it was not possible to read or give effect to the legislation under section 3 of the Human Rights Act 1998 in a way which was compatible with the Convention right.*

<u>The relevant statutory provisions in relation to 'succession'</u>

18. The succession provisions in respect of secure tenancies which began after April 2012 per the terms of the Localism Act 2011 do not have retrospective effect, and for the purposes of this case it is the pre-2012 provisions (reproduced below) which are in issue.

19. Housing Act 1985 s.87-88 provide (emphases added):

87 Persons qualified to succeed tenant.

A person is qualified to succeed the tenant under a secure tenancy if he occupies the dwelling-house as his only or principal home at the time of the tenant's death and either—

(a) he is the tenant's spouse or civil partner , or

(b) he is another member of the tenant's family and has resided with the tenant throughout the period of twelve months ending with the tenant's death;

unless, in either case, the tenant was himself a successor, as defined in section 88.

88 Cases where the tenant is a successor.

(1) The tenant is himself a successor if—

(a) the tenancy vested in him by virtue of section 89 (succession to a periodic tenancy), or

(b) he was a joint tenant and has become the sole tenant, or

(c) the tenancy arose by virtue of section 86 (periodic tenancy arising on ending of term certain) and the first tenancy there mentioned was granted to another person or jointly to him and another person, or

(d) he became the tenant on the tenancy being assigned to him (but subject to subsections (2) to (3) , or

(e) he became the tenant on the tenancy being vested in him on the death of the previous tenant or

(f) the tenancy was previously an introductory tenancy and he was a successor to the introductory tenancy.

(2) A tenant to whom the tenancy was assigned in pursuance of an order under section 24 of the Matrimonial Causes Act 1973 (property adjustment orders in connection with matrimonial proceedings) or section 17(1) of the Matrimonial and Family Proceedings Act 1984 (property adjustment orders after overseas divorce, &c.) is a successor ***only if the other party to the marriage was a successor***.

20. Housing Act 1985 s.113 provides:

113 Members of a person's family.

(1) A person is a member of another's family within the meaning of this Part if—

(a) He is the spouse or civil partner of that person, or he and that person live together as husband and wife or as if they were civil partners, or

(b) e is that person's parent, grandparent, child, grand-child, brother, sister, uncle, aunt, nephew or niece.

(2) For the purpose of subsection (1)(b)—

(a) a relationship by marriage or civil partnership shall be treated as a relationship by blood,

(b) a relationship of the half-blood shall be treated as a relationship of the whole blood,

(c) the stepchild of a person shall be treated as his child, and

(d) an illegitimate child shall be treated as the legitimate child of his mother and reputed father.

21. Family Law Act 1996 Schedule 7 para 7 provides:

Protected, secure or assured tenancy or assured agricultural occupancy

7 (1) If a spouse, civil partner or cohabitant is entitled to occupy the dwelling-house by virtue of a protected tenancy within the meaning of the Rent Act 1977, a secure tenancy within the meaning of the Housing Act 1985 F14, an assured tenancy] or assured agricultural occupancy within the meaning of Part I of the Housing Act 1988 or an introductory tenancy within the meaning of Chapter I of Part V of the Housing Act 1996, the court may by order direct that, as from such date as may be specified in the order, there shall, by virtue of the order and without further assurance, be transferred to, and vested in, the other spouse, civil partner or cohabitant—

(a) the estate or interest which the spouse, civil partner or cohabitant so entitled had in the dwelling-house immediately before that date by virtue of the lease or agreement creating the tenancy and any assignment of that lease or agreement, with all rights, privileges and appurtenances attaching to that estate or interest but subject to all covenants, obligations, liabilities and incumbrances to which it is subject; and

(b) where the spouse, civil partner or cohabitant so entitled is an assignee of such lease or agreement, the liability of that spouse, civil partner or cohabitant under any covenant of indemnity by the assignee express or implied in the assignment of the lease or agreement to that spouse, civil partner or cohabitant.

(2) If an order is made under this paragraph, any liability or obligation to which the spouse, civil partner or cohabitant so entitled is subject under any covenant having reference to the dwelling-house in the lease or agreement, being a liability or obligation falling due to be discharged or performed on or after the date so specified, shall not be enforceable against that spouse, civil partner or cohabitant.

(3) If the spouse, civil partner or cohabitant so entitled is a successor within the meaning of Part 4 of the Housing Act 1985—

his former spouse (or, in the case of judicial separation, his spouse),

his former civil partner (or, if a separation order is in force, his civil partner), or

his former cohabitant,

is to be deemed also to be a successor within the meaning of that Part.

22. If Housing Act 1985 s.88(1)(b) is literally construed, the Appellant/Defendant could not succeed to the tenancy because his mother was herself a successor and s.87 (final clause) permits only one succession.

23. S.88(2) expressly provides that a former joint tenant who becomes a sole tenant as a result of a property transfer order following divorce or relationship breakdown *is not to be regarded as a successor.*

24. A person (W2) who becomes a sole tenant when her spouse/partner (W1) 'leaves' her/him because of death is therefore treated less favourably than a person (D2) who becomes a sole tenant when his/her spouse/partner (D1) 'leaves' her/him because of relationship breakdown, in that W2 no longer has a tenancy which will pass to any new spouse (W3) she might become involved with or, if there is no new spouse, to a qualified family member (W4) on her/his death. This is a substantive disadvantage.

25. But the distinction also works a procedural disadvantage on W2. This arises because while the death of W1 prevents W2 from seeking a judicial transfer of the tenancy to her/him as sole tenant de novo, desertion of D2 by D1 has no such effect.

26. Consequently, a new spouse (W3) or family member (W4) who otherwise satisfies the succession requirements of Housing Act 1985 is treated less favourably if W2 became a sole tenant by death than if she became a sole tenant by transfer consequent upon relationship breakdown.

27. That this differential treatment is problematic in an Art 14 becomes evident when one considers the ECtHR's current understanding of Art 14, articulated recently in *Serife Yigit v Turkey* (2011) 53 E.H.R.R. 25 **[TAB 19]** (emphasis added):

> "Relevant general principles
>
> 67 According to the Court's settled case law, discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations.[22.] [See DH v Czech Republic (2008) 47 E.H.R.R. 3 at [175]].
> A difference in treatment has no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. [23] [See Larkos v Cyprus (2000) 30 EHRR 597 at [39]].
> *The provisions of the Convention do not prevent, in principle, contracting states from introducing general policy schemes by way of legislative measures whereby a certain category or group of individuals is treated differently from others, provided that the difference in treatment which results for the statutory category or group as a whole can be justified under the Convention and its Protocols.*[24] [See, mutatis mutandis, Ždanoka v Latvia (2007) 45 E.H.R.R. 17 at [112]].
>
> 7*1 As to the burden of proof in this sphere, the Court has established that once the applicant has shown a difference in treatment, it is for the Government to show that it was justified.*[30] DH (2008) 47 E.H.R.R. 3 at [177]; Timishev v Russia (2007) 44 E.H.R.R. 37 at [57]; and Chassagnou v France (2000) 29 E.H.R.R. 615 at [91]–[92].

28. There is no obligation arising under the Convention in international law or under the HRA in domestic law for Parliament to have created any rights of succession at all; or indeed to have created secure tenancies. Having enacted such rights for some persons however, Parliament has created both an international and domestic law obligation to ensure that those rights are applied consistently with Art 14.

29. It cannot credibly be argued that this question does not arise within the 'ambit' of Art 8 in respect both of respect for the home and respect for family life.

30. The Defendant asserts that:

    (a) whether a person becomes a sole tenant through death of a spouse or judicial transfer after relationship breakdown is a 'status' for the purposes of Art 14 of Sch. 1 of the Human Rights Act 1998: and that

(b) The potential successor spouses and/or family members of such persons are in an 'analogous position' (ie are valid comparators) with each other for the purposes of Art 14 of Sch. 1 of the Human Rights Act 1998; and that (either taking point (b) as an issue anterior to point (c) or conflating the two points)

(c) There is no sensible justification for the less favourable treatment accorded to successors by death and their putative successor spouses/family members than to successors by divorce and their putative successor spouses/family members.

(i) The 'status' issue

31. Although Art 14 does list various types of 'status', the specific matters listed are clearly not exhaustive. The list begins with 'such as' and ends with 'other status'.

> ARTICLE 14
>
> Prohibition of discrimination
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

32. The ECtHR has identified many other statuses as falling within Art 14. The ECtHR takes such a generous view of this element of its Art 14 analysis that there is little scope to doubt that being a person who loses her/his partner through death rather than desertion crosses the threshold for the purposes of Art 14 of Sch. 1 of the HRA 1998; see in particular *R (on the application of Carson) v Sec of State for Work and Pensions* [2005] UKHL 37: [2006] 1 A.C. 173 **[TAB 15]** at para 13 per Lord Hoffmann.

33. *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 A.C. 173 **[TAB 10]** Lord Hoffmann observed:

> 7 It is clear that being married is a status. In *Salvesen or von Lorang v Administrator of Austrian Property [1927] AC 641* , 653 Viscount Haldane said: "the marriage gives the husband and wife a new legal position from which flow both rights and obligations with regard to the rest of the public. The status so acquired may vary according to the laws of different communities."
>
> 8 If being married is a status, it must follow that not being married is a status…..

If being married or being not married are both a 'status', it would seem to follow that being widowed or divorced has that quality too.

34. Being a widow or a divorcee is properly regarded as a 'personal characteristic' for Art 14 purposes. See for example Lord Walker's 'concentric circles' analysis in *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63; [2009] 1 A.C. 311

[TAB 16] (in a passage approved by the full court in a judgment accepting that homelessness was an Art 14 status):

5 The other point on which I would comment is the expression "personal characteristics" used by the European Court of Human Rights in Kjeldsen, Busk Madsen and Pedersen v Denmark (1976) 1 EHRR 711 , and repeated in some later cases. "Personal characteristics" is not a precise expression and to my mind a binary approach to its meaning is unhelpful. "Personal characteristics" are more like a series of concentric circles. The most personal characteristics are those which are innate, largely immutable, *319 and closely connected with an individual's personality: gender, sexual orientation, pigmentation of skin, hair and eyes, congenital disabilities. Nationality, language, religion and politics may be almost innate (depending on a person's family circumstances at birth) or may be acquired (though some religions do not countenance either apostates or converts); but all are regarded as important to the development of an individual's personality (they reflect, it might be said, important values protected by articles 8, 9 and 10 of the Convention). Other acquired characteristics are further out in the concentric circles; they are more concerned with what people do, or with what happens to them, than with who they are; but they may still come within article 14 (Lord Neuberger instances military status, residence or domicile, and past employment in the KGB). Like him, I would include homelessness as falling within that range, whether or not it is regarded as a matter of choice (it is often the culmination of a series of misfortunes that overwhelm an individual so that he or she can no longer cope). The more peripheral or debateable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify. There is an illuminating discussion of these points (contrasting Strasbourg jurisprudence with the American approach to the Fourteenth Amendment) in the speech of Baroness Hale of Richmond in *AL (Serbia) v Secretary of State for the Home Department [2008] 1 WLR 1434* , paras 20–35.

35. See also Lord Neuberger at paras 41-45:

41 It is unnecessary to decide whether, and if so when, it may be appropriate in some cases not to consider the "status" issue as an entirely self-contained question. (However, having seen in draft the opinion of my noble and learned friend, Lord Walker of Gestingthorpe, I agree with what he says in para 5.) In any event, in the present case, I am content to adopt the approach which has been consistently taken in article 14 cases by this House, when the issue has arisen. Accordingly, it is necessary to decide whether homelessness can fairly be described as a "personal characteristic" as that expression was meant in Kjeldsen 1 EHRR 711 and in Kafkaris 12 February 2008 . In my view, it is.

42 First, it seems clear that "a generous meaning should be given to the words 'or other status'", per my noble and learned friend, Lord Hope of Craighead, in *Clift [2007] 1 AC 484* , para 48. To similar effect, at para 4.14.21 of *Lester & Pannick, Human Rights Law and Practice* , 2nd ed (2004), it is stated that the ECtHR applies "a liberal approach to the 'grounds' upon which discrimination is prohibited". That appears to me to be entirely in accordance with the approach one would expect of any tribunal charged with enforcing anti-discrimination legislation in a democratic state in the late 20th, and early 21st, centuries.

(ii) The 'analogous position'/comparator issue

36. It is not necessary for the complainant in an Art 14 case to identify a precise comparator, (although the Defendant has done so here); cf *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63; [2009] 1 A.C. 311 **[TAB 16]** per Lord Neuberger:

40 Indeed, this was recently recognised in this House in *AL (Serbia) [2008] 1 WLR 1434* , para 24, where Baroness Hale of Richmond, in the course of an instructive analysis of the approach of the ECtHR to allegations of infringement of article 14 , said that "the classic Strasbourg statements of the law do not place any emphasis on the identification of an exact comparator". Rather, she said, they "ask whether 'differences in otherwise similar situations justify a different treatment'" (quoting from *R*

(Carson) v Secretary of State for Work and Pensions [2006] 1 AC 173 , para 3). Similarly, as she recognised in para 25, in most ECtHR judgments in article 14 cases, "the comparability test is glossed over, and the emphasis is (almost) completely on the justification test" (quoting from *Feldman on Civil Liberties and Human Rights in England and Wales* , 2nd ed (2002), p 144).

37. The point is underlined in *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42; [2008] 1 W.L.R 1434 **[TAB 1]** per Baroness Hale; (emphasis added)

24 It will be noted, however, that the classic Strasbourg statements of the law do not place any emphasis on the identification of an exact comparator. They ask whether "differences in otherwise similar situations justify a different treatment". Lord Nicholls put it this way in *R (Carson) v Secretary of State for Work and Pensions [2006] 1 AC 173* , para 3:

"the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to that question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."

25……. This suggests that, unless there are very obvious relevant differences between the two situations, ***it is better to *1445 concentrate on the reasons for the difference in treatment and whether they amount to an objective and reasonable justification.***

And see *R (SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 W.L.R. 1449 at paras 7-8 per Lord Reed **[TAB 17]**

38. The Defendant nonetheless submits (out of an abundance of caution) that the persons who becomes sole secure tenant on widowhood and person who become sole secure tenants on relationship breakdown (and their respective putative successors) are proper comparators in an Art 14 context.

39. In *R (on the application of Carson) v Sec of State for Work and Pensions* [2005] UKHL 37: [2006] 1 A.C. 173 **[TAB 15]** the issue before the court was the differential treatment of retirement pensions received by retirees who lived in the UK and those who lived abroad. The former's pensions were uprated in line with inflation; the latter's were not.

40. The court held that the way in which the notion of 'analogous situation' or 'comparator' is defined for Art 14 purposes is broad; per Lord Hoffmann:

"15 Whether cases are sufficiently different is partly a matter of values and partly a question of rationality. Article 14 expresses the Enlightenment value that every human being is entitled to equal respect and to be treated as an end and not a means. Characteristics such as race, caste, noble birth, membership of a political party and (here a change in values since the Enlightenment) gender, are seldom, if ever, acceptable grounds for differences in treatment. In some constitutions, the prohibition on discrimination is confined to grounds of this kind and I rather suspect that article 14 was also intended to be so limited. But the Strasbourg court has given it a wide interpretation, approaching that

> of the Fourteenth Amendment, and it is therefore necessary, as in the United States, to distinguish between those grounds of discrimination which prima facie appear to offend our notions of the respect due to the individual and *those which merely require some rational justification*: Massachusetts Board of Retirement v Murgia (1976) 427 US 307"; (emphasis added).
>
> 16 There are two important consequences of making this distinction. First, discrimination in the first category cannot be justified merely on utilitarian grounds, eg that it is rational to prefer to employ men rather than women because more women than men give up employment to look after children. That offends the notion that everyone is entitled to be treated as an individual and not a statistical unit. On the other hand, differences in treatment in the second category (e g on grounds of ability, education, wealth, occupation) usually depend upon considerations of the general public interest. Secondly, while the courts, as guardians of the right of the individual to equal respect, will carefully examine the reasons offered for any discrimination in the first category, decisions about the general public interest which underpin differences in treatment in the second category are very much a matter for the democratically elected branches of government.

41. The claimant in *Carson* failed (both before the House of Lords and subsequently before the Grand Chamber)[1] because she was not in an analogous situation with her chosen comparators. Carson was a retiree UK citizen who lived abroad and the differential treatment of the two groups had a demonstrably rational basis. Because she lived abroad her retirement pension was not subject to annual inflation-linked increases as were the pensions of pensioners who lived in the UK. The position of overseas residents was not considered analogous to that of domestic residents in part because of the complex, interlocking nature of welfare benefit provision overall and in part because of the wide variations in living costs experienced by pensioners in different countries.

42. The differences between groups at play in *Carson* do not arise in the 'death/divorce dichotomy' comparator groups. The comparator groups obviously do not live in different jurisdictions: they might very well live next door to each other. The Convention Right in issue is not part of a complex network of benefits: succession rights are not contingent at all on eligibility for any other welfare provisions or tax liabilities. The comparison is direct, immediate and simple.

43. This is a case where the determining question is that of justification for the differential treatment.

(iii) The 'justification' issue – directly differential treatment of widows and divorcees and their respective putative successors

44. There is no reason to think that the differential treatment in issue here raises a 'due respect' problem in the *Carson* sense. It is not stigmatising of widowhood, or in any way attributing second class status to persons whose relationships end through death rather than desertion. It is an issue which sits in the outer rings of Lord Walker's 'concentric circles' (para 46 above).

[1] [2010] 51 E.H.R.R 13.

45. Since the death/divorce dichotomy is a general social policy distinction in the *Carson* sense, it need not be subjected to intense scrutiny. It is not necessary that the Respondent/Claimant advance "very convincing and weighty reasons' in justification; see Baroness Hale in *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42; [2008] 1 W.L.R 1434 **[TAB 1]** at 29-30:

> 29 What does matter is whether this condition falls within the class for which "very weighty reasons" are required if a difference in treatment is to be justified. Thus, for example, Strasbourg has said that where a "difference of treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible" (DH v Czech Republic (Application No 57325/00) (unreported) 13 November 2007 , para 196), while "very convincing and weighty" reasons are required to justify a difference in treatment based on sex (e g Abdulaziz, Cabales and Balkandali v United Kingdom 7 EHRR 471 , para 78), or sexual orientation (e g EB v France (Application No 43546/02) (unreported) 22 January 2008 , para 91), or birth or adopted status (e g *Inze v Austria (1987) 10 EHRR 394* , *1446 para 41; Pla v Andorra (2004) 42 EHRR 522 , para 61), or nationality (e g *Gaygusuz v Austria (1996) 23 EHRR 364* , para 42).
>
> 30 It is obvious that discrimination on some grounds is easier to justify than others. In the *Carson case [2006] 1 AC 173* , paras 15–17 Lord Hoffmannn explained that some grounds of distinction are so offensive to "our notions of respect due to the individual" that they are seldom if ever acceptable grounds for differences in treatment. The mere fact that it might be rational to distinguish, for example, between men and women because most women are not as strong as most men, is not sufficient to justify assuming that all women are weaker than all men, and thus refusing to consider the individual woman on her merits. He went on to say that other grounds of distinction do not fall within this "suspect" category. They usually depend upon considerations of the general public interest and might only require some rational explanation. And some grounds of discrimination might fall on the borderline between the two.

46. This differential treatment complained of in this case must however have - per Lord Hoffmann in *Carson* - **'some rational justification'** if it is to pass Art 14 inspection. See also Lord Hoffmann in *In Re G* **[TAB 10]** at para 16; *R(RJM)* **[TAB 16]** per Lord Mance at para 14.

47. The burden of proof as to this issue lies on the Respondent/Claimant:

Serife Yigit v Turkey (2011) 53 E.H.R.R. 25 **[TAB 19]:**

> 71 As to the burden of proof in this sphere, the Court has established that once the applicant has shown a difference in treatment, it is for the Government to show that it was justified.[30] DH (2008) 47 E.H.R.R. 3 at [177]; Timishev v Russia (2007) 44 E.H.R.R. 37 at [57]; and Chassagnou v France (2000) 29 E.H.R.R. 615 at [91]–[92].

See also *R(RJM)* **[TAB 16]** per Lord Mance at para 14.

48. The Claimant has offered no evidence on the point. That omission necessarily means that the Defendant's argument succeeds.

49. Should the court nonetheless feel it is proper to address the question of its own volition, the Defendant submits that is very difficult to see any 'rational justification' *at all* for the distinction drawn by the Housing Act 1988 between death and divorce

for succession purposes. The distinction is completely arbitrary and capricious. There is simply no sensible housing policy reason for treating a person (and her potential successors) who became a sole tenant through death less favourably than a person (and her potential successors) who becomes a sole tenant consequent upon divorce. Both may stand in exactly the same position vis a vis the landlord. Both may have the same housing needs. Nor does any reason appear if one views the matter from the landlord's perspective. The pressures placed on its housing stock by the widow (and her potential successors) are no greater than those placed by the divorcee (and her potential successors). So why are the widow and divorcee treated differently?

50. If the legislative concern is to maximize the council's autonomy in using its housing stock, then the divorcee would also have to take as a successor. But if the concern is to give councils a 'bit more' autonomy, why is that done to the disadvantage of widows rather than divorcees? It is perhaps conceivable that an exacting actuarial analysis might tell us that there is a statistically significant difference between the longevity of remaining life expectancy of children of widows and those of divorcees, or that widows have more children than divorcees, or that widows' financial means are greater than those of divorcees, or that losing a partner through divorce engenders far greater emotional trauma than losing him/her through divorce and such trauma can be assuaged by living in one's home as a tenant de novo rather than tenant by succession. But clearly no such calculation underlies this differential treatment within the scheme of the 1985 Act.

51. It might also be argued – although the contention seems bizarre – that widows are in some moral sense less worthy or deserving of becoming tenants de novo rather than as successors than are divorcees. Again, there is no indication that such sentiments informed legislative decisions about the secure tenancy regime.

52. The ECtHR has latterly indicated that careful legislative consideration of a particular issue may incline the court to accept that a particular outcome falls within a State's margin of appreciation. The most cogent illustration of the point is the Grand Chamber's judgment in the prisoners' voting rights case, *Hirst v United Kingdom* [2006] 42 E.H.R.R. 41 **[TAB 8]** While the Court accepted that on this issue States should enjoy a wide margin of appreciation, the breadth of that margin would diminish if a State could not demonstrate that its impugned law was the result of a properly informed and thorough lawmaking process (emphases added):

> 79 As to the weight to be attached to the position adopted by the legislature and judiciary in the United Kingdom, *there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote*. It is true that the question was considered by the multi-party Speaker's Conference on Electoral Law in 1968 which unanimously recommended that a convicted prisoner should not be entitled to vote. It is also true that the Working Party, which recommended the amendment to the law to allow unconvicted prisoners to vote, recorded that successive Governments had taken the view that convicted prisoners had lost the moral authority to vote and did not therefore argue for a change in the legislation. It may perhaps be said that, by voting the way they did to exempt unconvicted prisoners from the restriction on voting, Parliament implicitly affirmed the need for continued restrictions on the voting rights of convicted prisoners. *Nonetheless it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern day penal policy and of current human*

rights standards for maintaining such a general restriction on the right of prisoners to vote.

53. The ECtHR has underlined this principle – and confirmed that is a principle of general application - in *Animal Defenders International v United Kingdom* (2013) 57 E.H.R.R. 21 at paras 106-109 and 113-155 **[TAB 2].**

54. There is no evidence that Parliament produced this differential treatment of widows/divorcees for succession purposes on a carefully reasoned basis. We cannot find: 'any substantive debate by members of the legislature on the continued justification' for the rule. There is – legislatively speaking – nothing for the courts to consider and so nothing to defer to; (because, of course, nothing can come of nothing).

55. Lest it be thought that these points are merely the musings of the ECtHR as to the meaning of the Convention, and so relevant to these proceedings only to the extent mandated by HRA 1998 s.2, the Defendant notes that these principles have been firmly endorsed by the Supreme Court in recent Art 14 HRA cases.

56. Thus in *R (SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 W.L.R. 1449 the Supreme Court **[TAB 17]** (per Lord Reed at paras 17-45 charts in detail the exacting governmental and parliamentary processes that led to the enactment of the 'benefit cap' rules, a matter which is of great significance because, as Lord Reed concludes at paras 92- 95:

> 92 Finally, it has been explained many times that the Human Rights Act 1998 entails some adjustment of the respective constitutional roles of the courts, the executive and the legislature, but does not eliminate the differences between them: differences, for example, in relation to their composition, their expertise, their accountability and their legitimacy. It therefore does not alter the fact that certain matters are by their nature more suitable for determination by Government or Parliament than by the courts. In so far as matters of that nature have to be considered by the courts when deciding whether executive action or legislation is compatible with Convention rights, that is something which the courts can and do properly take into account, by giving weight to the determination of those matters by the primary decision-maker.
>
> 93 That consideration is relevant to these appeals, since the question of proportionality involves controversial issues of social and economic policy, with major implications for public expenditure. The determination of those issues is pre-eminently the function of democratically elected institutions. It is therefore necessary for the court to give due weight to the considered assessment made by those institutions. Unless manifestly without reasonable foundation, their assessment should be respected.
>
> 94 As I have explained, the Regulations were considered and approved by affirmative resolution of both Houses of Parliament. As Lord Sumption JSC observed in *Bank Mellat v HM Treasury (No 2) (Liberty intervening) [2014] AC 700* , para 44:
>
> "When a statutory instrument has been reviewed by Parliament, respect for Parliament's constitutional function calls for considerable caution before the courts will hold it to be unlawful on some ground (such as irrationality) which is within the ambit of Parliament's review. This *1479 applies with special force to legislative instruments founded on considerations of general policy."

> 95 Many of the issues discussed in this appeal were considered by Parliament prior to its approving the Regulations. That is a matter to which this court can properly have regard, as has been recognised in such cases as *R (Williamson) v Secretary of State for Education and Employment [2005] 2 AC 246* , *R (Hooper) v Secretary of State for Work and Pensions [2005] 1 WLR 1681* , R (Countryside Alliance) v Attorney General [2008] AC 719 and R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] AC 1312 . Furthermore, that consideration followed detailed consideration of clause 93 of the Bill, which became section 96 of the 2012 Act. It is true that the details of the cap scheme were not contained in the Bill which Parliament was debating, but the Government's proposals had been made clear, they were challenged by means of proposed amendments to the Bill, and they were the subject of full and intense democratic debate. That is an important consideration. As Lord Bingham observed in R (Countryside Alliance) v Attorney General [2008] AC 719 , para 45: "The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament." The same is true of questions of economic and political judgment.

57. The principle has been endorsed as much in circumstances where the government and Parliament have considered the pertinent issues in detail and those where it has not; cf *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57; [2015] 1 W.L.R. 3820 **[TAB 18]** per Baroness Hale at para 32:

> 32…[W] are concerned with the distribution of finite resources at some cost to the taxpayer, and the court must treat the judgments of the Secretary of State, as primary decision-maker, with appropriate respect. That respect is, of course, heightened where there is evidence that the decision maker has addressed his mind to the particular issue before us (see, for example, *Belfast City Council v Miss Behavin' Ltd [2007] 1 WLR 1420*), or that the issue has received active consideration in Parliament: see R (SG) v Secretary of State for Work and Pensions . Both are lacking in this case: there is no evidence that the Secretary of State addressed his mind to the educational rights of students with DLR/LTTR when making these Regulations, which were laid before Parliament subject to the negative resolution procedure.

58. The Defendant repeats – with apologies for the repetition – that there is no evidence that any Minister or either House of Parliament has ever "addressed his mind to" the death/divorce dichotomy.

59. This does not preclude the possibility that what would essentially be an ex post facto rationalisation of an initially overlooked or unappreciated differentiation will suffice to save such differentiation in an Art 14 sense. The burden of proof on that point lies on the Claimant; (per *Serife* Yigit at para 71 cited at para 47 above). But any ex post facto justification of a longstanding legislative suffers from two weaknesses.

60. **The first is chronological.** The justification was not part of the original decisionmaking equation, and it is therefore impossible to assess what weight – if any – the justification might have had in the minds of legislators when the relevant law was enacted.

61. **The second is institutional.** Any ex post facto justification of the provisions of the 1985 Act could only sensibly be said to have come from 'Parliament' if one can point to consideration of the question by either or both Houses, whether that be in legislative debate or committee proceedings. A justification which consists of no more

than the current government's viewpoint is inadequate for that purpose from a separation of powers perspective. It is, to bastardise a celebrated judicial aphorism: "a naked usurpation of the legislative function under the thin guise of justification".

Conclusion as to ground 1

62. As Lord Hoffmann made clear in *Carson* **[TAB 15]** (at para 31) the analytical question is really quite straightforward:

> "There is a single question: is there enough of a relevant difference between X and Y to justify different treatment?"

63. In respect of the matter in issue in *Carson* sense such differentiation is demonstrably rational. In respect of the differential treatment accorded to secure tenants losing their partners through death and divorce however, the answer to Lord Hoffmann's question is manifestly 'No'.

64. If however the court takes the view that the difference between divorcees and widows is 'enough' in that sense, the Defendant invites the court to consider a second Art 14 dimension of the death/divorce dichotomy.

(iii) The 'justification' issue – indirectly differential treatment of women and men and their respective putative successors

65. When this matter was remitted to the county court following the appeal before Recorder Bowden, the Defendant was granted permission to supplement his defence with the following averral:

> 21a. Further, the distinction drawn in s.88 is indirectly discriminatory on gender grounds. The distinction is prima facie gender neutral. However the distinction adversely affects women and their putative successors relative to men. This is because women as a class live longer than men, and so are statistically more likely to become sole tenants as a result of widowhood rather than divorce. Sole tenancy arising consequent upon divorce is gender neutral as – obviously – both parties to the relationship are alive. However because of women's greater longevity the surviving sole tenant consequent upon widowhood is more likely to be a woman than a man.

66. It is of course not suggested that Parliament deliberately sought to discriminate between men and women when enacting the succession provisions of the Housing Act 1985. There is no direct, intended gender discrimination. However, the provisions have that effect because of :

(a) the very wide difference in the absolute numbers of women and men who are respectively widowed and divorced; and

(b) the very wide difference in percentage terms within each gender group of the percentage of women and men who are respectively widowed and divorced.

67. The Defendant refers the court to the statistics below:

Office for National Statistics - *Population Estimates by Marital Status, Mid-2010* **[TAB 20]**
http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-231283

All ages

Divorced males	1,788,500	Divorced females	2,395,000
Widowed males	712,400	Widowed females	2,415,300

So the number of divorced females is larger than the number of divorced males by approximately 30%.

*But the number of widowed females is larger than the number of widowed males by approximately **350%.***

Relatedly, the percentage of women who are widows is 8.6%, while the percentage of men who are widowed is 2.6% (a ratio of over 13:4). In contrast, the percentage of women who are divorced is 8.5%, while the percentage of men who are divorced is 6.5% (a ratio of only 5:4).

All ages

Total males	27,228,500		Total females	28,011,900	
Divorced males	1,788,500	(6.56%)	Divorced females	2,395,000	(8.5%)
Widowed males	712,400	(2.6%)	Widowed females	2,415,300	(8.6%)

68. As to the pertinence of these statistics to the argument advanced by the Defendant, the court is referred to *R (SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 W.L.R. 1449 **[TAB 17]** per Lord Reed at para 61:

> 61 The next question is whether the Regulations result in differential treatment of men and women. This is conceded on behalf of the Secretary of State. Given the statistics as to the proportion of those affected who are single women as compared with the proportion who are single men, that concession is understandable. It is indeed almost inevitable that a measure capping the benefits received by non-working households will mainly affect households with children, since they comprise the great majority of households receiving the highest levels of benefits. It follows inexorably that such a measure will have a greater impact on women than men, since the majority of non-working households with children are single parent households, and the great majority of single parents are women. That consequence could be avoided only by defining "welfare benefits" so as to exclude benefits which are directly or indirectly linked to responsibility for children, a possibility to which it will be necessary to return.

69. It would seem likely that Parliament gave no thought at all to this matter in 1980 or 1985, and has not done so since. The discrepancy is however pertinent from an Art 14 perspective. The Defendant refers to the judgment of the ECtHR in *Hoogendijk v Netherlands* (Application No.58641/00) (2005) 40 E.H.R.R. 522 **[TAB 9]** (emphasis added):

> "The Court considers that where an applicant is able to show, on the basis of undisputed official statistics, the existence of a *prima facie* indication that a specific rule—although formulated in a neutral manner—*in fact affects a clearly higher percentage of women than men*, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex. If the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the respondent Government, it will be in practice extremely difficult for applicants to prove indirect discrimination…."

70. The Defendant need do no more than show a 'prima facie' indication of disparate impact on gender grounds. The ONS data excerpted above fulfils that requirement. There do not appear to be more detailed official statistics charting, for example, the numbers and percentages of men/women who are the beneficiaries of property transfer orders on relationship breakdown; nor a breakdown of the marital status figures cited above by housing tenure. Those above cited figures do raise a prima facie indication of disparate treatment. It is then for the Claimant to justify the disparate impact.

71. This disparity arises in relation to a ***core*** Art 14 value. In some circumstances, this would entail that the burden of justification is not merely a rational basis burden as in *Carson*. Rather the Claimant would have to advance: "very convincing and weighty reasons' in justification"; see Baroness Hale in *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42; [2008] 1 W.L.R 1434 **[TAB 1]** at 29-30.

72. It is however accepted by the Defendant that in the field of welfare provision – and that is essentially the field into which succession rights to social housing must fall – that the rational basis test – ie manifestly without reasonable foundation' – is the proper test to apply; cf. *R (SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 W.L.R. 1449 **[TAB 17]** per Lord Reed at para 11.

73. The Defendant limits his submissions on this point to the evidential matters – or lack thereof – discussed at paras 52-61 above.

(iv) Removing the incompatibiity

74. It is possible for the court - in accordance with the Human Rights Act 1998 s.3 – to lend the Housing Act 1985 s.88 a meaning which is compatible with Art 14 of Sch. 1 of the Human Rights Act 1988 by, for example, reading the italicised words below into s.88(1)(e):

(e) he became the tenant on the tenancy being vested in him on the death of the previous tenant *save where he was the spouse or civil partner of the deceased previous tenant* or….

75. This is a (now) orthodox s.3 technique as Lord Nicholls explains in *Ghaidan v Mendoza* [2004] UKHL 30; [2004] 2 A.C. 557 **[TAB 7]:**

'[32]. . . . Section 3 enables language to be interpreted restrictively or expansively. But s 3 goes further than this. *It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it convention-compliant.* In other words, the intention of Parliament in enacting s 3 was that, to an extent bounded only by what is "possible", a court can modify the meaning, and hence the effect, of primary and secondary legislation.'; (emphasis added).

76. And this orthodox technique leads to a now orthodox consequence as Lord Phillips observes in *LB Hounslow v Powell*: [2011] UKSC 8; [2011] 2 A.C. 186 **[TAB 13]:**

[98]….section 3 of the 1998 Act applies to all legislation, whether enacted before or after the 1998 Act came into force. In so far as this alters the construction given to legislation before the 1998 Act came into force, the 1998 Act has the effect of amending legislation: see Ghaidan v Godin- Mendoza [2004] 2 AC 557.

77. The fact that this would create a 'second succession' cannot credibly be said to undermine the policy of the 1985 Act precisely because the Act's provisions themselves envisage what are de facto 'second successions' in cases where the tenancy is judicially transferred following separation. Indeed, in the (admittedly rare) instance of a serial monogamist there could well be three, four or more 'successions' arising under the scheme of the Act.

78. Should the court consider that there is an Art 14 incompatibility, but that the incompatibility it cannot be removed through use of s.3, the Defendant invites the court to issue a Declaration of Incompatibility per HRA 1998 s.4.

In the alternative

79. Ground 2 is at **[B 22].**

Ground 2. The Claimant's decision not to grant a discretionary tenancy to the Defendant and its consequent issue and continued pursuit of these proceedings were/are unlawful

24. These proceedings were issued and are being pursued consequent upon the Claimant's decision of not to grant a discretionary tenancy of other premises to the Defendant. Those decisions were/are unlawful on either or both of the following bases.

(a) Failure to take account of relevant consideration/ failure to correctly apply the Claimant's own policy

25. The Claimant's current allocation policy at para 15.23.15 provides:

Grants of Tenancy instead of Succession

……..

15.23.15 A tenancy may also be granted if:

……. They would be entitled to rehousing under the homelessness legislation if they have to leave the property.

26. (i) As is evident from its letter to the Defendant of 31.03.2014 in which the Defendant's application was refused, the Claimant failed to consider properly or at all if the Defendant fell into this category;

Or in the alternative

(ii) The Claimant misunderstood and misapplied its own policy in that the policy as it relates to putative homeless person does not attach any time period requiring residence in the premises but the Claimant has improperly applied a one year residence requirement to the policy in this case; (in the letter from its officer Beatrice Bellot to the Defendant dated 21.01.2014 the Claimant states):

"It is not the intention of Homes for Haringey to make homeless vulnerable people and we will do all that we can to help however [sic]; you need to provide the requested proof. If you have documents to prove that you have been residing with your mother 12 months prior to her death then produce them and they will be part of your supporting documents that will be given to Haringey for consideration".

27. For the avoidance of doubt that Defendant avers that if he had to leave his current home he would for the purposes of the Housing Act 1996 Part VII:

(a) be homeless;
(b) be in priority need;
(c) not be intentionally homeless;
(d) have a local connection with Haringey;

and would thus be entitled to the full housing duty per s.193.

Additionally and in the alternative

(b) Material error of fact and procedural unfairness

28. The Claimant's current allocation policy at para 15.23.14 provides:

Grants of Tenancy instead of Succession

15.23.14 If an occupant has no legal right to succeed to a Council tenancy when the tenant dies, they may still be granted a tenancy at the Council's discretion if there has already been a statutory succession and they have lived in the property continuously for the past five years. This may happen in the following situations:

They are the tenant's partner, civil partner or spouse;

They are the tenant's child or sibling;

They were a member of the tenant's household and named on the tenancy agreement when the tenancy agreement began.

29. The Claimant has made a material error of fact in concluding that the Defendant was not living continuously in the property for the past five years prior to his mother's death.

30. The Claimant by letter of 31.03.2014 informed that Claimant that his application had been refused:

"because the evidence provided does not corroborate 5 years of residency".

31. The Claimant acted in a procedurally unfair fashion in that it provided no proper explanation to the Defendant as to why the evidence was inadequate and afforded the Defendant no proper opportunity to address or rebut the Claimant's conclusion as to the adequacy of the provided evidence.

80. These grounds raise trite issues of public law. C is a statutory body performing statutory functions. In discharging those functions it is subject to all of the orthodox grounds of judicial review. The orthodox public law grounds are wide-ranging; cf. *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229 per Lord Greene MR [TAB 3]:

'It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in Short v. Poole Corporation gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another'.

81. It is NOT argued here that the steps taken by the Claimant in issuing these proceedings were substantively irrational in the core *Wednesbury* sense. The argument is the long established one that a body amenable to judicial review must take account of relevant considerations and act in a procedurally fair way before making decisions that it knows will impact adversely on people's interests. This is an argument about the *conduct* of the decisionmaking process, not about the *outcome* of that process. It speaks to a requirement at common law that the decisions made by government bodies respect the interests of the people who will be adversely affected by them.

82. This ground avers simply that the Claimant has failed properly to understand and apply its own policy and in doing so has failed to take account of obviously relevant considerations and/or made an error of fact and or acted in a procedurally unfair way

in deciding not to offer D a discretionary tenancy. The details of that failing are pleaded clearly above. It may be that the Claimant will rebut those averrals on the basis of the evidence it adduces at trial.

83. The High Court's judgment in *Birmingham City Council v Howell and Beech* [2013] EWHC 513 (QB) **[TAB 4]** (at para 51) makes it perfectly clear that a failure to take account of a relevant consideration will make a Claimant's decision to bring proceedings unlawful; and the Court of Appeal's judgment in *Leicester City Council v Shearer* [2013] EWCA Civ 1467; [2014] H.L.R. 8 **[TAB 12]** makes it similarly clear that a council's failure properly to consider and apply its own discretionary rehousing policies will make a decision to initiate possession proceedings unlawful.

84. It is no answer to this point that the Claimant might have considered these factors later, or that if it had considered them it would still have issued proceedings. D refers the court to *Eastlands Homes Partnership Limited v Sandra Whyte* [2010] EWHC 695 (QB) (per HHJ Holman Sitting as a Judge of the High Court) **[TAB 5]:**

> 62 I respectfully adopt the reasoning of Waller and Patten LJJ. Mr Whatley argued that the continuum cuts both ways. He suggested that the unlawful act (if there was one) was only potentially suspensory, and the circumstances had to be considered at the date of trial. He postulated as an example a situation where the arrears were £1000 at the service of notice, had been cleared at review stage (which would make the decision to proceed irrational) but had risen to £5000 by the hearing date.
>
> 63 I reject this submission. Gateway (b) requires the authority to keep the situation under regular review. This is for the protection of the tenant and Gateway (b) provides a defence to the claim. If the authority makes a decision which no reasonable person would consider justifiable, the guillotine comes down, as it were. The decision in this case to issue proceedings is unlawful, and in my judgment is incapable of retrospective validation.

85. The way in which DJ Manners dispatched this ground of the defence is addressed in ground 4 of the grounds of appeal before Recorder Bowen **[B ---]** :

> Per CPR 52.11(3)(a) and (b)
>
> 4. Ground 2(a) of the defence averred that the initiation of proceedings was unlawful because they were initiated following an unlawful failure by the Claimant properly to apply its discretionary succession policy to the Defendant (Defence paras 24-27; Defendant's skeleton below at paras 37-43).
>
> The policy expressly canvasses the grant of a discretionary policy to a person who would qualify for rehousing as a homeless person. The decision letter on this issue sent to the Defendant (trial bundle p 114) makes no mention at all of this criterion. The only other document before the court on the point (at trial bundle p 113) was an e-mail to the Defendant from the Claimant inviting him to submit evidence as to the longevity of his residence in the premises. The e-mail does not invite evidence as to possible qualification under the homelessness legislation.
>
> In the course of the hearing, the Claimant's solicitor apparently instructed the Claimant's counsel that a document sent by the Claimant to the Defendant had indicated he might have some psychiatric problems and that this showed that the homelessness criterion had been

considered. The document was not put before the court. DJ Manners did not ask to see it. The Claimant had not led any evidence as to the existence of this document or the use made of it by the Claimant's officers. (Indeed, the Claimant offered no evidence of any sort). DJ Manners nonetheless accepted that this unseen document was sufficient evidence to establish that the Claimant had properly considered the 'homelessness' criterion of its discretionary succession policy.

DJ Manners was wrong to reach such a conclusion in a substantive sense and in doing so she also committed a serious procedural irregularity by relying on 'evidence' that was not before the court.

86. This ground of appeal was successful. In his submissions before Recorder Bowen the Defendant noted (at para 83; **[B --])** that some 9 months after the hearing before DJ Manners the Claimant had still not produced any evidence to show that the policy and been taken into account and properly applied. A further year has passed. The Claimant has still not produced any evidence on either point.

87. It may be that if the Claimant had properly considered these matters it could quite defensibly have concluded that the Defendant was not a person entitled to rehousing under the homelessness legislation. It may be that the relevant officer did indeed carefully consider the homelessness limb of the successions policy. It may be that upon the filing of a witness statement by the officer and disclosure of pertinent documents then either the Defendant would have concluded that the point is not properly pursuable or if the point is pursued the court would have concluded it is not made out. But that is a matter that demands the evaluation of evidence; and this Claimant has led no evidence to show that it properly considered and applied its discretionary succession policy.

Relief sought

88. The Defendant asks the court to order:

1. Claim for possession dismissed.

2. The Claimant shall pay the Defendant's costs of his defence.

3. There shall be detailed assessment of the Defendant's publicly funded costs.

LIST OF AUTHORITIES RELIED ON

Case law

1. *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42; [2008] 1 W.L.R 1434

2. *Animal Defenders International v United Kingdom* (2013) 57 E.H.R.R. 21

3. *Associated Provincial Picture Housed Ltd v Wednesbury Corporation* [1948] 1 K.B. 223

4. *Birmingham City Council v Howell and Beech* [2013] EWHC 513

5. *Eastlands Homes Partnership Limited v Sandra Whyte* [2010] EWHC 695 (QB)

6. *Freeman v Islington LBC* [2009] EWCA Civ 536; [2010] H.L.R. 6

7. *Ghaidan v Mendoza* [2004] UKHL 30; [2004] 2 A.C. 557

8. *Hirst v United Kingdom* [2006] 42 E.H.R.R. 41.

9. *Hoogendijk v Netherlands* (Application No.58641/00) (2005) 40 E.H.R.R. 522

10. *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 A.C. 173

11. *Lambeth LBC v Kay* [2006] UKHL 10; [2006] 2 A.C. 465

12. *Leicester City Council v Shearer* [2013] EWCA Civ 1467; [2014] H.L.R. 8

13. *LB Hounslow v Powell*: [2011] UKSC 8; [2011] 2 A.C. 186

14. *Manchester CC v Pinnock* [2011] UKSC 6; [2011] 2 A.C. 104

15. *R (Carson) v Sec of State for Work and Pensions* [2005] UKHL 37: [2006] 1 A.C. 173

16. *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63; [2009] 1 A.C. 311

17. *R (SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 1 W.L.R. 1449

18. *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57; [2015] 1 W.L.R. 3820

19. *Serife Yigit v Turkey* (2011) 53 E.H.R.R. 25

Government documents

20. Office for National Statistics (2015) *Population estimates by marital status…* http://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/populationestimatesbymaritalstatusandlivingarrangements/2015-07-08