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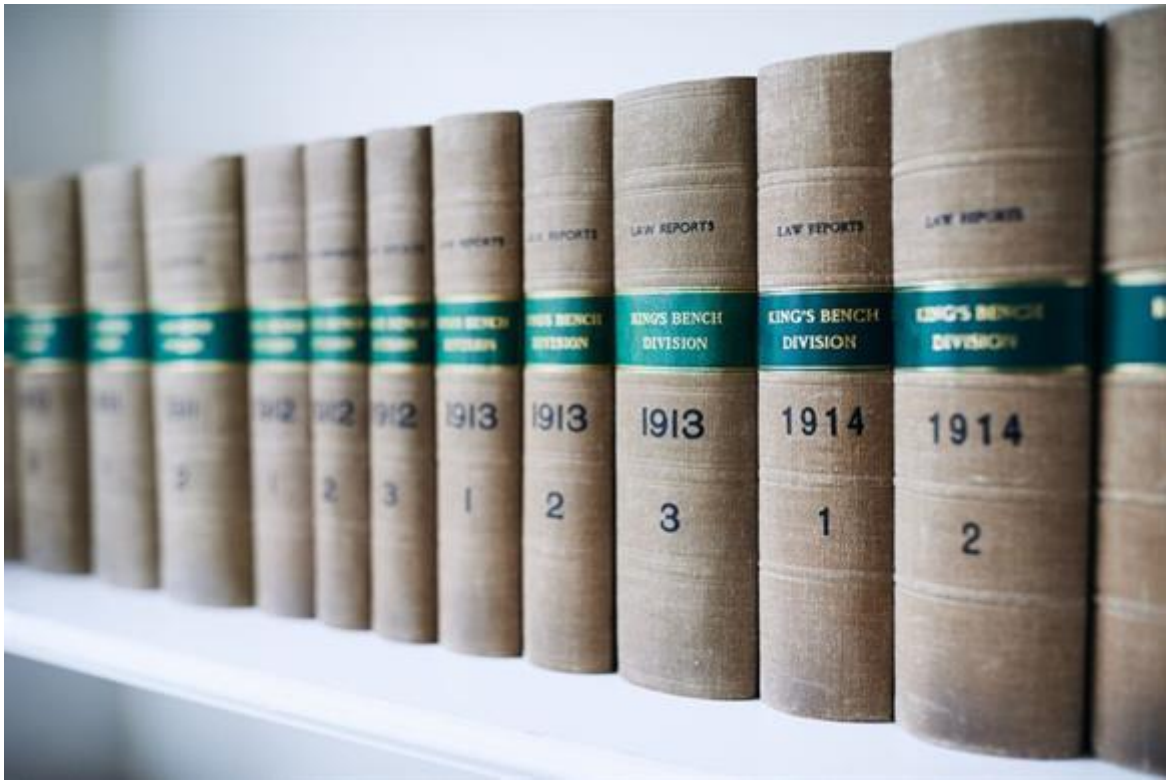

E-Flash

Permission to appeal granted in *Haringey LBC v. Simawi (Secretary of State for Communities and Local Government intervening)* [2018] EWHC 2733

Brief synopsis

The Court of Appeal has granted permission to appeal to a challenge to the lawfulness of the statutory succession scheme in the Housing Act 1985 on the grounds that it is incompatible with Article 14 when read with Article 8 of the European Convention on Human Rights.

Background

The Claimants claimed possession on the basis that the Defendant was unable to succeed to his mother's tenancy because she was herself a successor. The defence was twofold. First, it was argued that the no second succession rule is incompatible with article 14 when read with article 8

because there is a difference in treatment between an occupant in the position of the defendant, and an occupant whose parents' relationship broke down and the tenancy was transferred in family proceedings. In the latter case, the transfer does not count as a succession, so the child does not become a second successor. It is argued that this gives rise to indirect discrimination on the grounds of gender because women live longer, as well as age, because widows are significantly more likely to be elderly. This was called the ‘death-divorce dichotomy’.

The second ground of defence was that the Claimants had not properly applied their discretionary tenancy policy.

The Claim was transferred to the High Court because of the public importance of the first ground. The Defendant was successful on the second ground, however that did not give him a secure tenancy. The Claimants had not granted the defendant a secure tenancy either of his home, or suitable alternative accommodation, by the date of the hearing. It was agreed by all the parties, including the Secretary of State for Communities and Local Government, who was joined as an interest party, that if the defendant was granted a secure tenancy, ground 1 would become academic.

At a preliminary hearing, Nicklin J. decided that even if the case did become academic, it should still be determined because it was exceptional, and “raised a point of real importance and significance that potentially affects a large number of people and the point is likely to arise in several succession cases for many years to come.” (see [38] at [2018] EWHC 290 (QB)).

Decision

The matter was heard 2-3 October 2018 by Murray J. He handed down judgment on 19 October 2018.

It was generally accepted that the case fell within the ambit of Article 8. The court further held that a child of a deceased tenant was in an analogous position to a child of a divorced tenant. However, the court also held that it was not the Claimant’s status as a child of a widow (as opposed to a divorcée) that determined whether he could succeed to the tenancy, it was the legal mechanism by which his mother acquired her tenancy. Therefore the court did not accept that the Claimant had a ‘status’ for the purpose of Article 14. The court also held that even if he did, the measure was objectively justified as they were not manifestly without reasonable foundation.

Appeal

The Claimant appealed against the decision of the High Court on two grounds.

First, that the judge had been wrong to conclude that the Claimant had no status. This was inconsistent with the liberal approach to status identified in the case law, as well as precedent to the effect that living with someone as a member of the same family can be a status within the meaning of Article 14. It was also inconsistent to hold that the Claimant was in an analogous position but did not have status.

Secondly, the judge did not properly consider the issues of legitimate aim and justification. The issue of legitimate aim received no substantial consideration in the judgment. As gender discrimination was in issue, the court should have applied a 'very weighty reasons' test, as set out in *Re McLaughlin* [2018] UKSC 48 per Baroness Hale at [33]. The judge did not apply the four-stage proportionality test as laid out in *Bank Mellat v HM Treasury* (No 2) [2014] AC 700 and was wrong to apply the 'manifestly without reasonable foundation' test to the entirety of the proportionality analysis, as it should not apply to the fourth stage (see, for example, *In re Recovery of Medical Costs* [2015] UKSC 3 per Lord Mance JSC at [52]). Finally, the judge focused on whether the measure itself was justified, when in fact the question should have been whether the difference in treatment was justified (see *R (on the application of Steinfeld and Keidan) v SSID*[2018] UKSC 32, per Lord Kerr at [42]).

Consequences

The appeal has been listed for hearing in October 2019.

There are already a number of similar cases stayed behind this appeal. Since the decision in the High Court was handed down, some of those stays may have been lifted. Following the decision on permission, similar cases in the County Court should once again be stayed pending the outcome of the Court of Appeal hearing towards the end of this year.

Toby Vanhegan and Hannah Gardiner of 4-5 Gray's Inn Square are junior counsel for the Defendant in the case.

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Toby practises in the area of public law specialising in housing and homelessness, human rights and EU law, community care, discrimination, immigration and asylum, and in particular the rights of free movement of persons within the EU. His knowledge of immigration and asylum law has meant that he has developed an expertise in cases that involve the eligibility of immigrants and asylum seekers for housing and other forms of social assistance.
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