Secure Tenancies and Second Successions

Ian Loveland
Barrister, Arden Chambers, and Professor of Law, City University, London

LT Secure tenancies; Succession; Discrimination; Possession claims

Introduction

Many years ago, in 1975 perhaps, an era when councils still built houses, Dan and Dora Dobbs moved into a two bedroom semi as tenants of their local authority. Wilf and Wilma Watson moved in next door at the same time, also as joint secure tenants. In 1981, when the Housing Act 1980 came into force, the tenancies became secure.

Years passed, and Dan and Dora had a daughter, Denise, while Wilf and Wilma had a daughter called Wendy. Unhappily, in 2005, Dan and Dora got divorced when Dan left his home and family for another partner, and as part of the divorce settlement a court assigned the joint tenancy to Dora as a sole tenant.[1] Equally unhappily, in the same year, Wilf died and Wilma become the sole tenant by survivorship. Denise and Wendy have stayed living with their respective mums all of their lives, and in 2010 each had a daughter of her own.

In 2015, Dora died. And under the terms of the Housing Act 1985, Denise succeeded to her Mum's tenancy.[2] She, and her daughter, remained secure in their home. Wilma died at much the same time. And under the terms of the Housing Act 1985, Wendy became a trespasser. She and her daughter face possession proceedings brought by the local authority, which wants to allocate their home to a larger family. The local authority has acted lawfully in issuing the notice to quit and beginning proceedings, and an eviction does not seem disproportionate in the circumstances. She has, it seems, no defence to the claim.

Denise lives next door to Wendy. Their homes are identical. Denise and Wendy have similar part-time jobs and incomes. Their 5 year old daughters go to the same local infant school. All in all, their circumstances seem identical. But Denise is a tenant, and Wendy is a trespasser.

"I am sorry Wendy", you tell her when she seeks your legal advice, "but back in 1980 when the secure tenancy legislation was introduced, and then in 1985 when it was updated, the Act said that if a couple separate and a court assigns a joint tenancy to one of them, or transfers a sole tenancy from one of the couple to the other, the partner who stays is treated as if she was the first tenant.[3] But the Act also says that if one of a joint tenant couple dies, or if the sole tenant dies, his/her widow/widower is treated as if she/he was a successor to the tenancy.[4] And the Act only allows for one succession.[5] So your Mum succeeded to her own joint

[1] The legal mechanism being a property transfer order under the Matrimonial Causes Act 1973 s.24. For cohabiting couples or civil partners the mechanism is the Family Law Act 1996 s.53 and Sch. 7 (as amended).

[2] As a qualifying family member per Housing Act 1985 s.113.

[3] Housing Act 1985 s.88(2).

[4] Housing Act 1985 s.88(1).

[5] Housing Act 1985 s.87.

tenancy when your Dad died, which would mean you would be a second successor. And the Act does not allow for second successions. I am sorry, that's just what the law is".
Perhaps, but perhaps not.

An Art 14 issue ?

I had wondered a few years ago, wearing my academic hat, if this death/divorce dichotomy might be challenged via Art 14 of the HRA 1998. By happy coincidence, Niki Goss at the Wandsworth and Merton Law Centre, briefed me on a possession claim that raised this issue, which provided an obvious incentive to work the argument through.[6] As things turned out, the claimant local authority settled the case at the door of the court by offering Niki's client a secure tenancy of a smaller new build house, so the argument was not tested. In its current form, it goes something like this.

The ground of defence

The defence was pleaded in this form:

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.

The submissions which underlie it are structured as follows.

1. 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 114.

The statutory provisions

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

3. Therefore, a person (B2) who becomes a sole tenant when her spouse/partner (B1) 'leaves' her/him because of death is therefore treated less favourably than a person (A2) who becomes a sole tenant when his/her spouse/partner (A1) 'leaves' her/him because of relationship breakdown, in that B2 no longer has a tenancy which will pass to any new spouse (B3) she might become involved with or, if there is no new spouse, to a qualified family member (B4) on her/his death. This is a substantive disadvantage. But the distinction also works a procedural disadvantage on B2. This arises because while th death of B1 prevents B2 from seeking a judicial transfer of the tenancy to her/him as sole tenant de novo, desertion of A2 by A1 has no such effect.

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[6] I. Loveland, "Second succession to secure tenancies" [2012] Conveyancer and Property Lawyer 453.

4. Consequently, a new spouse (B3) or family member (B4) who otherwise satisfies the succession requirements of Housing Act 1985 is treated less favourably if her/his spouse (B2) became a sole tenant by death than if the spouse (B2) became a sole tenant by transfer consequent upon relationship breakdown.

……..

The Art 14 problem

8. 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; (emphasis added; footnotes omitted):

> "Relevant general principles
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> 67 According to the Court's settled case law, discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations….. 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…..
> *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….*
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> *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".*

9. 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 rational 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

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

> 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.

11. The ECtHR has identified many 'statuses' as falling within Art 14. In 1976, in *Kjeldsen, Busk Madsen* and *Pedersen v Denmark*(1976) 1 EHRR 711) the ECtHR indicated that 'any other status' would embrace the 'personal characteristics of the complainant. But it rapidly became apparent that this notion of 'personal characteristics' was not limited either to physiological or otherwise 'given' aspects of one's identity. It can also extend to choices one makes about how (or where) one lives one's life. One's place of residence can be a status (*Carson v United Kingdom* [2010] 51 E.H.R.R. 13), as can the legal tenure under which one occupies one's home (*Larkos v Cyprus* [2000] 30 E.H.R.R. 597). Being employed in the army (*Engel v Netherlands* (1976) 1 E.H.R.R. 647), being a member of a trade union (*National Union of Belgian Police v Belgium* (1979) 1 E.H.R.R. 578) or owning small rather than large pieces of land (*Chassagnou v France* (1999) B.H.R.C. 15) can all satisfy this element of the Art 14 test.

12. Domestic courts have unsurprisingly taken a similar view of the meaning of Art 14 of the HRA 1998: see in particular *LB Wandsworth v Michalak* [2002] EWCA Civ 271; [2003] 1 W.L.R. 617 at paras 34-35 per Brooke LJ; and *R (on the application of Carson) v Sec of State for Work and Pensions*. [2005] UKHL 37: [2006] 1 A.C. 173 at para 13 per Lord Hoffman.

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

14. 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. In conceptual terms, the nature of Art 14 statuses is perhaps best illustrated by 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 (in a passage approved by the full court in a judgment accepting that homelessness was an Art 14 status):

> "5…. "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. 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….. "

(ii) The 'analogous position'/comparator issue

15. It is not necessary for the complainant in an Art 14 case to identify a precise comparator, although the Appellant/Defendant has done so in this case. 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."
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> 25……. This suggests that, unless there are very obvious relevant differences between the two situations, ***it is better to concentrate on the reasons for the difference in treatment and whether they amount to an objective and reasonable justification."***

16. The Defendant nonetheless asserts 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.

17. In *Carson*, the issue was the differential treatment of retirement pensions received by retirees living in the UK and those who lived abroad. The former's pensions were inflation-linked; the latter's were not. 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 Hoffman:

> "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.

18. The claimant in *Carson* failed (both before the House of Lords and subsequently before the Grand Chamber; (2010) 51 E.H.RR. 13) because she was not in an analogous situation with her chosen comparators. The position of overseas residents was not 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. The differential treatment of the two groups thus had a demonstrably rational basis.

19. Such issues do not arise in the 'succession by death or divorce' comparator groups. The comparator groups obviously do not live in different jurisdictions: they might 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. This is a case where the determining question is that of justification for the differential treatment.

(iii) Justification

20. The differential treatment in issue here does not raise a 'due respect' problem in the *Carson* sense. It does not stigmatise widowhood. It sits in the outer rings of Lord Walker's 'concentric circles'. As it is a general social policy distinction in the *Carson* sense, the Claimant need not 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 at 29-30.

21. This differential treatment complained of in this case must however have - per Lord Hoffman in *Carson* - **'some rational justification'**. The burden of proof on this issue lies on the Claimant.

22. But it is very difficult to see any 'rational justification' *at all* for the distinction drawn by the Housing Act 1985 between death and divorce for succession purposes. The distinction is completely 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?

23. 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?

24. 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. 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*…..[I]*t 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".*

25. 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).

26. 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 113-115.

27. As Lord Hoffman made clear in *Carson* (at para 31), the analytical question is straightforward: "…[i]s there enough of a relevant difference between X and Y to justify different treatment?" In respect of the matter in issue in *Carson* 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 is manifestly 'No'.

(iv) Removing the incompatibiity

28. The court can – per the HRAct 1998 s.3 – lend the Housing Act 1985 s.88 a meaning which removes the incompatibility, for example, reading the italicised words below into s.88(1):

"[A person is a successor if, inter alia]
(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…."

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

> "[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)".

30. 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:

> "[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….".

75. The fact that this would create a 'second succession' does not undermine the policy of the 1985 Act precisely because the Act already envisages 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 be three, four or more 'successions'.

Conclusion

In 2014, in *LB of Haringey v Samawi*, the defence was dismissed as nonsense by a District Judge at a *Pinnock* summary disposal hearing.[7] That conclusion was overturned on appeal,[8] and the matter transferred to the High Court. As chance would have it, I then had a moment of inspiration when it struck me that the death/divorce dichotomy might be (indirectly) gender discriminatory since because women live longer than men there were likely many more widowed women than widowed men. Office of National Statistics figures (*Population Estimates by Marital Status, Mid-2010)* bear that supposition out:[9]

Total males	27,228,500	Total females	28,011,900
Divorced males	1,788,500	Divorced females	2,395,000
Widowed males	712,400	Widowed females	2,415,300

The number of divorced females exceeds the number of divorced males by some 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 13:4). In contrast, the percentage of women who are divorced is 8.5%, while the percentage of men who are widowed is 6.5% (a ratio of 5:4).

Parliament gave no thought to this matter in 1980 or 1985, and has not done so since. The discrepancy is however pertinent for Art 14 purposes, as the ECtHR's judgment in *Hoogendijk v Netherlands*[10] makes clear:

> "[W]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…."

Importantly for present purposes, this disparity arises in relation to a ***core*** Art 14 value. The burden of justification is therefore not merely rational basis as in *Carson*. Rather the

[7] Claim no: A01EC488; 21.10.2014.

[8] Before Mr Recorder Bowden in the central London County Court; 03.07.2015.

[9] http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-231283

[10] (2005) 40 E.H.R.R. 522

Claimant must – per *AL (Serbia)* advance: "very convincing and weighty reasons' in justification. This new point was added to the defence. No trial date has yet been set. An updating article will be written as soon as the judgment is delivered.