Neutral Citation Number: [2019] EWCA Civ 1770

Case No: A2/2018/2686

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION
Mr Justice Murray
HQ15X03584

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 October 2019

Before :

LORD JUSTICE LEWISON
LORD JUSTICE BEAN
and
LORD JUSTICE BAKER

- -

Between :

MR MUKHLIS SIMAWI	**Appellant**
- and -	
THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF HARINGEY	**Respondent**
- and –	
THE SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**Interested Party**

- -

MR S KNAFLER QC, MR T VANHEGAN & MS H GARDINER (instructed by **Burke Niazi Solicitors**) for the **Appellant**
MR N GRUNDY QC & MR S PHILIPS (instructed by **LB Haringey Legal Services**) for the **Respondent**
MR B LASK (instructed by **SSHCLG)** for the **Interested Party**

Hearing date : 15 October 2019

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Approved Judgment

Lord Justice Lewison:

Introduction

1. The issue on this appeal is whether the statutory provisions governing succession to secure tenancies unlawfully discriminate against Mr Simawi because of his status.

2. In 1994 Haringey LBC granted a secure tenancy of 25 Chettle Court to Mr Simawi's parents, Aziz Simawi and Fatima Hussein. The tenancy was a joint tenancy. Aziz Simawi died in 2001. Mrs Hussein thus became the sole tenant by right of survivorship. Under the statutory provisions relating to succession then in force, that counted as a first succession. Mrs Hussein died in October 2013. Mr Simawi was living with her at the date of her death, and had been for at least the preceding twelve months. However, because only one succession is permitted under the statute, Mr Simawi is not entitled to succeed to the tenancy.

3. Mr Simawi argues that if his parents had been divorced, and the tenancy had been transferred to his mother by court order in the course of the divorce proceedings, that transfer would not have counted as a first succession. In that situation, he would have been entitled to succeed to the tenancy on his mother's death. The fact that he cannot do so in the events which have happened amounts to unlawful discrimination on the ground of his status.

4. Murray J rejected that argument in a judgment at [2018] EWHC 2733 (QB), [2019] PTSR 615. With the permission of Floyd LJ Mr Simawi appeals.

Secure tenancies

5. Secure tenancies were introduced by the Housing Act 1980; which also introduced the right to buy. The broad intention was to give security of tenure to tenants of local authorities and other public sector landlords; and to enable secure tenants to buy their homes at a discount to market value. Until then, the main form of security of tenure enjoyed by short-term tenants was that under the Rent Acts. But those Acts did not apply to public sector landlords. Security of tenure under the Rent Acts took the form of a so-called statutory tenancy. A statutory tenancy was not a tenancy at all: it was no more than a personal status of irremoveability. Despite that, it was a status to which a family member of a deceased tenant could succeed. In general, two successions were permitted.

6. The scheme applicable to secure tenancies was different. A secure tenancy was a true tenancy, which continued until brought to an end either by act of the tenant or by court order. If it was a fixed term tenancy, a periodic tenancy came into being on its expiry. As a true tenancy, it was in theory capable of being transferred either by assignment or by devolution on death. Like the Rent Acts, the Housing Act 1980 in its original form contained provisions about succession. Section 30 permitted a deceased tenant's spouse or other family member to succeed to the tenancy "unless the tenant was a successor". Section 31 defined who counted as a successor. A tenant was a successor if:

i) The tenancy vested in him on the death of a previous tenant;

ii) He was a joint tenant and had become the sole tenant;

iii) The tenancy was a periodic tenancy arising on the expiry of a fixed term tenancy granted to another person or jointly to him and another person; or

iv) He became the tenant on the tenancy being assigned to him or on its being vested in him on the death of the previous tenant.

7. There was an important exception to this rule. A tenant to whom the tenancy had been assigned in pursuance of an order under section 24 of the Matrimonial Causes Act 1973 was a successor only if the other party to the marriage was himself a successor.

8. In substance, these provisions were reproduced when the legislation was consolidated in the Housing Act 1985: sections 87 and 88. Changes were subsequently made to accommodate civil partnerships and overseas divorces. In those cases, transfers made under court orders were treated in the same way as assignments pursuant to orders under the Matrimonial Causes Act 1973. In other words, they did not count as a first succession.

9. Rights of succession were significantly curtailed by section 160 of the Localism Act 2011; but those provisions do not apply to tenancies granted before the section came into force (i.e. on 1 April, 2012: section 160 (6)). They do not therefore apply to our case.

10. Thus, the one succession rule, in its various forms, has been a feature of the statutory scheme from its inception to date.

Transfer of tenancy on divorce

11. There are a number of ways in which a secure tenancy may be transferred from one spouse to another (or from spouses holding jointly to one of them alone) when a marriage breaks down. In what follows, I will deal with divorce only; but similar considerations apply on the breakdown of a civil partnership.

12. The first, and most obvious, way of transferring a tenancy from one spouse to another, or by spouses holding jointly to one of them alone is by agreement. The landlord's consent would be required: Housing Act 1985 s. 92 (1). But there are statutory provisions as well.

13. Section 24 of the Matrimonial Causes Act 1973 gives the court power to order a party to a marriage to transfer property to the other party (or to a child). Property includes a secure tenancy: *Jones v Jones* [1997] Fam 59. This power extends to an overseas divorce: Matrimonial and Family Proceedings Act 1984 s. 17. In deciding whether to exercise this power, the court will have regard to the local authority's housing policy; and to the consequences of the court's order on each of the parties to the marriage and to the consequences for any children: *Jones v Jones*.

14. Paragraph 7 (1) of Schedule 7 to the Family Law Act 1996 applies where a spouse, civil partner or cohabitant is entitled to a secure tenancy. That paragraph gives the court power by order to direct that, as from a date specified in the order, a secure

tenancy be transferred to and vested in the other spouse, civil partner or cohabitant. The order itself effects the transfer, and the co-operation of the parties is not required. The landlord has the right to be heard: Family Procedure Rules 2010 Part 8.31 and 32. If the spouse entitled to the secure tenancy is a successor within the meaning of Part 4 of the Housing Act 1985, his former spouse is deemed to be a successor: para 7 (3).

15. Paragraph 1 (2) (e) of Schedule 1 to the Children Act 1989 gives the court power to order either or both parents of a child to transfer property for the benefit of the child. Where the parent in question is a joint secure tenant, that power includes power to order the transfer of the secure tenancy from both parents to one of them alone: *K v K (Minors: Property Transfer)* [1992] 1 WLR 530. In fact the application need not be made by the parent of a child: it may be made by a guardian or special guardian, or by any person named in a child arrangements order. The order for transfer may be made in favour of that person.

16. As a general rule, a secure tenancy is incapable of assignment: Housing Act 1985 s. 91 (2). But there are exceptions to this rule. Those exceptions include all the means of transferring a tenancy on the breakdown of a relationship that I have summarised above; an order under the Children Act, and also an assignment to someone who would be qualified to succeed to the tenancy if the tenant died immediately before the assignment: s. 91 (3). Whether any of these means of transfer use up the one permitted succession is a different question.

Housing Act 1985 section 88

17. Section 87 of the Housing Act 1985 (in its unamended form) contains the basic rule about succession. It provides:

> "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."

18. Section 113 defines who is a member of the tenant's family. So far as material it provides:

> "(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) he is that person's parent, grandparent, child, grandchild, brother, sister, uncle, aunt, nephew or niece."

19. Where there is more than one person who potentially qualifies to succeed to a tenancy, section 89 (2) provided:

> "(2) Where there is a person qualified to succeed the tenant, the tenancy vests by virtue of this section in that person, or if there is more than one such person in the one to be preferred in accordance with the following rules—
>
> (a) the tenant's spouse or civil partner is to be preferred to another member of the tenant's family:
>
> (b) of two or more other members of the tenant's family such of them is to be preferred as may be agreed between them or as may, where there is no such agreement, be selected by the landlord."

20. As can be seen, section 87 prohibits succession where the deceased tenant was himself a successor. Thus, the provision with which we are immediately concerned is section 88 of the Housing Act 1985 (in its unamended form):

> "(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 etc) is a successor only if the other party to the marriage was a successor.
>
> (2A) A tenant to whom the tenancy was assigned in pursuance of an order under Part 2 of Schedule 5, or paragraph 9(2) or (3) of Schedule 7, to the Civil Partnership Act 2004 (property adjustment orders in connection with civil partnership proceedings or after overseas dissolution of civil partnership, etc.) is a successor only if the other civil partner was a successor."

21. The argument for Mr Simawi is not that the one succession rule is *per se* illegitimate. Rather, it is that the exception in section 88 (2) to the general rule that an assignee of a tenancy is a successor unlawfully discriminates against him. Put shortly, he says that if his mother had become the sole tenant as the result of an assignment of the tenancy pursuant to an order under section 24 of the Matrimonial Causes Act 1973, he would have been eligible to succeed to the tenancy. But since she became the sole tenant as the result of his father's death, he is not eligible. That difference in treatment engages respect for the home, protected by article 8 of the European Convention on Human Rights and Fundamental Freedoms. Article 14 prohibits 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"

22. Taking articles 8 and 14 together, Mr Simawi says that the difference in treatment between him (as a family member of the deceased survivor of joint tenants) and a comparator (as a family member of a divorced but now deceased former joint tenant) amounts to unlawful discrimination. Mr Knafler QC, on behalf of Mr Simawi, calls this the "death-divorce dichotomy". The point was pleaded in Mr Simawi's statement of case as follows:

> "Consequently, a child who satisfies the succession requirements of Housing Act 1985 ss. 87 and 113 is treated less favourably if her/his parent was a sole tenant by death than if the parent was a sole tenant by relationship breakdown."

23. By way of preliminary, there are a number of aspects that need to be considered. Let it be supposed that a married couple hold a secure tenancy in joint names. One spouse ("the departing spouse") leaves the matrimonial home, while the other spouse ("the remaining spouse") continues to live there. The two spouses then divorce. It hardly needs saying that proceedings under the Matrimonial Causes Act 1973 will always follow the irretrievable breakdown of a marital relationship. If the spouses held the dwelling on a joint periodic tenancy, the remaining spouse is vulnerable to losing security of tenure completely if the departing spouse gives notice to quit to the landlord. *Sims v Dacorum BC* [2014] UKSC 63, [2015] AC 1336 is one of many cases that demonstrate this principle at work. In many cases, as in *Sims* itself, the departing spouse is encouraged to give notice to quit by the housing authority as a precursor to being rehoused. In that situation there is no right of succession at all. Second, in other cases when a spouse leaves the matrimonial home, the position under the tenancy remains unchanged. Perhaps the spouses do not realise the significance of the legal title; or perhaps the cost of going to court for an order under section 24 of the Matrimonial Causes Act 1973 is too great. At all events, that is what happened in *Solihull MBC v Hickin* [2012] UKSC 39, [2012] 1 WLR 2295. Mr and Mrs Hickin were the joint periodic tenants of a council house. Mr Hickin left; but Mrs Hickin remained in residence. Nothing was done about transferring the tenancy from joint names to Mrs Hickin alone. When Mrs Hickin died, Mr Hickin became the sole tenant by right of survivorship. But since he was not living in the property the tenancy was no longer secure. The consequence of that was that the Hickins' daughter Elaine was not eligible to succeed to the tenancy. Third, the departing spouse may be willing to transfer the tenancy from joint names into the name of the remaining spouse without the need for a court order. Such an assignment, with the landlord's consent, is

permitted by section 91 (3) (c), because the remaining spouse is a person entitled to succeed. But an assignment in those circumstances, not made pursuant to an order under section 24 of the Matrimonial Causes Act 1973, still uses up the one succession available under the one succession rule. Fourth, let it be supposed that a secure tenancy was transferred from joint names to the remaining spouse pursuant to an order under section 24 of the Matrimonial Causes Act 1973. Once divorced the spouse who has now become the sole tenant may wish to remarry. If that spouse then dies, leaving a new spouse who had been living with her, that spouse will succeed to the tenancy in preference to any other member of the deceased spouse's family entitled to succeed: Housing Act 1985 s. 89 (2). Fifth, if the tenancy had been transferred under a different statutory power (e.g. the Family Law Act 1996 or the Children Act 1989) the assignment or transmission will be permitted by section 91 (3) (b); but it will use up the one permitted succession.

24. In none of these situations will the child of a deceased divorced tenant be entitled to succeed to the tenancy. It is plain, therefore, that the way in which Mr Simawi's case was pleaded is an oversimplification of the real position.

Discrimination under article 14

25. In considering whether there has been unlawful discrimination under article 14, the court asks itself a series of questions, which interlock and in some cases overlap. The questions (and the order in which they are asked and answered) have been formulated in various ways. I take the formulation from the judgment of Lady Hale in *R (Stott) v Secretary of State for Justice* [2018] UKSC 59, [2018] 3 WLR 1831 at [207]:

> "In article 14 cases it is customary in this country to ask four questions: (1) does the treatment complained of fall within the ambit of one of the Convention rights; (2) is that treatment on the ground of some "status"; (3) is the situation of the claimant analogous to that of some other person who has been treated differently; and (4) is the difference justified, in the sense that it is a proportionate means of achieving a legitimate aim?"

26. It is common ground that the answer to the first question is "yes". The answers to the remaining questions are in issue. I will need to come back to how the fourth question is to be formulated in due course.

Discrimination on the ground of other status

27. Mr Knafler argues that (leaving aside spouses and civil partners) there is a difference in treatment between those qualifying family members who will succeed to a secure tenancy, and those who will not. They are all in an analogous situation in the sense that (a) they will each have had a close relationship with the deceased tenant; (b) they will all have been recently bereaved; (c) they will all have been living in the dwelling as their only or principal home; (d) they will all have done so for at least twelve months; and (e) they will all need a home to live, and face losing their homes. One group is "rescued" from that situation but the other is not. The fact that the context of the measure is to promote family stability and social cohesion underlines the difference in treatment of persons who are in the "same family boat". This question

overlaps with the question whether Mr Simawi has an "other status"; so I turn to consider that.

28. It is clear that "other status" has some limits, otherwise the list of prohibited grounds in article 14 would be superfluous. Exactly where those limits are is more elusive. The early jurisprudence of the European Court of Human Rights appeared to limit "other status" to personal characteristics of the complainant: *Kjeldsen v Denmark* (1976) 2 EHRR 711. More recent case law, however, suggests that a broader approach is needed: *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21, [2019] 1 WLR 3298. In *JT v First Tier Tribunal (Social Entitlement Chamber)* [2018] EWCA Civ 1735, [2019] 1 WLR 1313 this court held that living with another person as a member of that person's household was an "other status"; on the basis that in the case of a parental relationship it was central to the development of an individual's personality and not something that he or she can be expected to change. That was said in relation to a child. One might, perhaps, argue that an adult could be expected to leave the parental home. In *Guberina v Croatia* (2018) 66 EHRR 11 at [78] the ECtHR held that article 14 also covered cases in which "an individual is treated less favourably on the basis of another person's status or protected characteristics". In that case it was the adult parent who relied on the disabled status of his child. But that case, too, concerned a family unit where the child was a minor. Nevertheless, it is possible to envisage circumstances in which an adult is less favourably treated because of a characteristic of their parent. One example mentioned in argument was the adult child of a former member of the secret police of a former Communist state.

29. Mr Grundy QC referred us to *Swift v Secretary of State for Justice* [2012] EWHC 2000 (QB), [2012] PIQR 21 in which Eady J quoted observations of Lords Bingham and Hope in *R (Clift) v Secretary of State for the Home Department* [2006] UKHL 54, [2007] 1 AC 484:

> "I do not think that a personal characteristic can be defined by the differential treatment of which a person complains." (Lord Bingham)
>
> "Each of the specific grounds of discrimination listed in article 14 shares one feature in common. That is that they exist independently of the treatment of which complaint is made. In that sense they are personal to the complainant." (Lord Hope)

30. In *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] 1 AC 311 at [45] Lord Neuberger said that it was not necessary for those characteristics to be immutable; but in general one should concentrate on what somebody is, rather than what he is doing or what is being done to him.

31. The latest domestic learning on the subject is the decision of the Supreme Court in *Stott*. Lady Black undertook a comprehensive review of the authorities, both domestic and in the ECtHR. At [56] she extracted a series of propositions from decisions of the House of Lords before the decision of the ECtHR in *Clift v United Kingdom* [2010] ECHR 7205/07. They were:

> "(i) The possible grounds for discrimination under article 14 were not unlimited but a generous meaning ought to be given to "other status".
>
> (ii) The *Kjeldsen* test of looking for a "personal characteristic" by which persons or groups of persons were distinguishable from each other, was to be applied.
>
> (iii) Personal characteristics need not be innate, and the fact that a characteristic was a matter of personal choice did not rule it out as a possible "other status".
>
> (iv) There was support for the view that the personal characteristic could not be defined by the differential treatment of which the person complained.
>
> (v) There was a hint of a requirement that to qualify the characteristic needed to be "analogous" to those listed in article 14, but it was not consistent … and it was not really borne out by the substance of the decisions.
>
> (vi) There was some support for the idea that if the real reason for differential treatment was what someone had done, rather than who or what he was, that would not be a personal characteristic, but it was not universal.
>
> (vii) The more personal the characteristic in question, the more closely connected with the individual's personality, the more difficult it would be to justify discrimination, with justification becoming increasingly less difficult as the characteristic became more peripheral."

32. She then went on to consider the extent to which these propositions continued to represent the law. At [63] she said that propositions (i) to (iii) continued to be reflected in both domestic decisions and those of the ECtHR. As to proposition (iv) she said:

> "Proposition (iv) lives on, in *R v Docherty* [2017] 1 WLR 181, but perhaps needs to be considered further, in the light of its rejection in *Clift v United Kingdom*: see further, below."

33. At [72] to [74] she drew attention to three difficulties with what she called the "independent existence condition":

i) It had been rejected by the ECtHR in *Clift v United Kingdom*;

ii) Before *Clift v SSHD* there was not much authority to support it; and

iii) It was not "at all easy to grasp".

34. She concluded at [75]:

> "In all these circumstances, I would be cautious about spending too much time on an analysis of whether the proposed status has an independent existence, as opposed to considering the situation as a whole, as encouraged by the ECtHR in *Clift v United Kingdom*…. In any event, it can properly be said that the status upon which Mr Stott relies exists independently of his complaint, which is about the provisions concerning his early release."

35. In the light of the concluding sentence, it is clear that Lady Black's discussion of the "independent existence condition" and her rather tentative conclusion about it were *obiter*. Lord Hodge agreed that Mr Stott had the required status; but he did not discuss the "independent existence condition" or endorse Lady Black's discussion of it. Lady Hale was more supportive of the "independent existence condition". At [210] she criticised the reasoning of the ECtHR in *Clift v United Kingdom*; and said:

> "That, it seems to me is the true principle: the "status" must not be defined solely by the difference in treatment complained of, for otherwise the words "on any ground such as …" would add nothing to the article."

36. In the following paragraph she drew an analogy with refugees, pointing out that both the House of Lords and the UN High Commissioner for Refugees adopted the principle that:

> "… a "particular social group" must exist independently of the persecution to which the group is subject: by this was meant that the group was not defined solely by the persecution it feared."

37. At [228] Lord Mance stressed the importance of "status" as an independent question:

> "I accept that the requirement of an "other status" cannot simply be ignored, or subsumed in the question whether any discrimination is unjustified. This is for at least three reasons. First, the language of article 14 states that there must be discrimination on a ground "such as" those specified, the last being "other status". There would be no point in this language, if the only question was whether there was discrimination."

38. On the "independent existence condition" Lord Mance said at [231]:

> "That a mere difference in treatment does not by itself constitute a difference in status is a proposition which is difficult to fault in the light of *Gerger v Turkey* and what I have already said. But problems have arisen from attempts to extend the application of such a proposition to cases beyond its scope. This is, I think, the root of the third difficulty expressed by Lady Black JSC in the first sentence of para [74] of her judgment. There is no reason why a person may not be identified as having a particular status when the or an aim is to

> discriminate against him in some respect on the ground of that status."

39. But he, too, concluded at [236] that Mr Stott had a status independent of the treatment of which he complained.

40. Lord Carnwath dissented. He considered that the court should not depart from the more restrictive approach to the question of "status" taken by the House of Lords in *Clift* and *RJM*. He would not have held that Mr Stott had the required status.

41. Where does that leave us? The observations of all the justices in *Stott* were *obiter*; because (with the exception of Lord Carnwath) they all decided that Mr Stott satisfied the "independent existence condition". As Lady Black said, the "independent existence condition" lives on in *Docherty*. *Docherty* was a decision of the Supreme Court in which *Clift v United Kingdom* was considered. The decision that Mr Docherty did not have "other status" because "the suggested status is defined entirely by the alleged discrimination" was part of the *ratio* of the decision. *Stott* does not depart from *Docherty* in that respect. It therefore binds us. Mr Simawi is entitled to rely on a status provided that it is not defined entirely by the alleged discrimination.

42. Upon what "other status" does Mr Simawi rely? The pleaded status was:

> "(i) whether a person becomes a sole tenant through death or assignment after relationship breakdown is a status for the purposes of Art 14…
>
> (ii) … the potential successor children of such persons are in an "analogous position" with each other for the purposes of Art 14…"

43. The judge dealt with this at [38] as follows:

> "It seems to me that whether a person is widowed or divorced is capable of being a personal characteristic or status for purposes of article 14. I accept that whether a person is a child of someone who is widowed or a child of someone who is divorced is more "peripheral or debateable" … as a personal characteristic for article 14 purposes, but in my view it is capable of being so in appropriate circumstances. I think that puts Mr Simawi's case, on this aspect of the four-stage analysis, at its highest."

44. The skeleton argument served on Mr Simawi's behalf seemed to support this description. It positively asserted that the judge was correct in his discussion of "other status" at [33] to [39] (which includeS the passage I have quoted). In oral submissions, however, Mr Knafler introduced the question of indirect discrimination against Mrs Hussein, Mr Simawi's mother. As put orally, Mr Knafler said that there was direct or indirect discrimination against Mrs Hussein because (a) she was a widow rather than a divorcee and (b) she was a woman; and that Mr Simawi was the son of such a person. That formulation seems to introduce the question of discrimination into the definition of the "other status" itself. So, too, does the pleaded

"other status" which is defined by what kind of tenancy was originally granted, and what happened to it. In my judgment that is impermissible, even after the decision of the Supreme Court in *Stott*.

45. On the other hand, the judge's conclusion that being the child of a widowed parent rather than a divorced parent is capable of amounting to an "other status" is a tenable conclusion. I proceed on that basis.

46. So I pass to the next question: is the difference in treatment of which Mr Simawi complains discrimination on the ground of that "other status"? In *R (Gangera) v Hounslow LBC* [2003] EWHC 794 (Admin), [2003] HLR 68 (which also concerned a challenge to the one succession rule) Moses J answered that question "No". He said at [26]:

> "But however widely "status" may be interpreted it is clear to me that there has been no discrimination on the grounds of status whatsoever. The reason why the claimant is not entitled to succeed to his mother's tenancy does not depend upon his status at all. It is because his mother had become the sole tenant and therefore, by virtue of the operation of s.88(1)(b) of the 1985 Act, she was herself a successor. The difference in treatment follows from the fact of a previous succession not because of the status of the claimant."

47. It is, in my judgment, difficult to see how the "status" on which Mr Knafler is entitled to rely constitutes the ground on which the alleged discrimination exists. It cannot simply be the status of being the child of a widow rather than the child of a divorcee. In the first place, as we have seen, there will be many situations in which the child of a divorcee will not be entitled to succeed to a secure tenancy. Second, if the secure tenancy had originally been granted to Mrs Hussein alone, Mr Simawi would have been entitled to succeed, whether or not she had divorced her husband. So one essential ground of the alleged discrimination must be the historic fact that the tenancy that Haringey granted was a joint tenancy. Nor is it possible to say that the ground of the discrimination is that Mrs Hussein became tenant by succession on death rather than following a relationship breakdown. Exactly the same consequences would have followed a relationship breakdown unless Mrs Hussein had obtained a formal court order under section 24 of the 1973 Act. It is clear, then, that the identification of the discrimination upon which Mr Knafler relies is dependent both on the nature of the tenancy originally granted and also on the manner in which Mrs Hussein became the sole tenant. The agreement into which Haringey and his parents chose to enter cannot, in my judgment, be regarded as anything to do with Mr Simawi's status. Those contractual arrangements, and the effect of the secure tenancy regime on those arrangements cannot, therefore, be regarded as discrimination on the ground of an "other status" for the purposes of article 14. Put another way, the only group that is "rescued", to use Mr Knafler's word, is the group whose family member secured a transfer of the tenancy through the mechanism of a formal order under section 24 of the Matrimonial Causes Act 1973. Those who have taken transfers under different statutory provisions, and those who have taken transfers by agreement are not "rescued". Those are no more than historic facts: see *R (S) v Chief Constable of the South Yorkshire Police* [2004] UKHL 39, [2004] 1 WLR 2196 at [50].

48. In my judgment, therefore, to the extent that Mr Simawi has been discriminated against, that discrimination has not been discrimination on the ground of his "other status".

Indirect discrimination

49. The second way in which the case is put is that the succession rules amount to indirect discrimination against women. For this purpose the succession rules are the combination of sections 87 and 88.

50. The argument runs as follows. Statistics show that in England while there are more divorced females than divorced males (2 million as against 1.4 million), there are vastly more widows than widowers (2 million as against 0.73 million). It follows that potential successor spouses are almost three times as likely to be women than men. A successor spouse cannot pass on succession rights to a family member who would otherwise qualify to succeed. Therefore, the inability to pass on succession rights has a greater impact on women than on men. Even though the succession rules are neutral on their face, their practical effect amounts to indirect discrimination against women.

51. What this argument overlooks is that, based on exactly the same statistics, more women than men benefit from succession rights. On the face of it, the advantages and disadvantages appear to be in balance.

52. In addition, since there are statistically more divorced women than divorced men, it is likely, all other things being equal, that more women than men will be able to take advantage of the exemption in section 88 (2) and thus be able to pass on succession rights. But when one factors in the likelihood that more women than men will be primarily responsible for childcare following a marriage breakdown, the likelihood of more women than men being able to take advantage of section 88 (2) increases.

53. Finally, as Mr Grundy points out, Mr Simawi's own position would be exactly the same whether his father had died before his mother; or his mother had died before his father.

54. I do not consider that the succession rules amount to indirect discrimination upon which Mr Simawi can rely.

Justification: the test

55. That is enough to dispose of the appeal. But in case I am wrong, I will go on to consider the question whether the alleged discrimination can be justified.

56. Public sector housing is a scarce resource. Since 1980, when secure tenancies were first introduced (together with the right to buy) the proportion of households occupying public sector rented housing, and the number of dwellings available to let on that basis, has substantially declined. Housing authorities select tenants from long waiting lists on the basis of their housing needs. Where a person is entitled to succeed to a secure tenancy, they do so by virtue of their relationship to the deceased tenant rather than as a result of any particular housing need.

57. There are many cases in which the courts have stressed the importance of judicial restraint in the context of the allocation of public housing. *Wandsworth LBC v*

Michalak [2002] EWCA Civ 271, [2003] 1 WLR 617 is an early example. In *Sheffield CC v Wall* [2010] EWCA Civ 922, [2011] 1 WLR 1342 at [33] this court approved the following observations of Moses J in *Gangera*:

> "It is plain that Parliament had to strike a balance between security of tenure and the wider need for systematic allocation of the local authority's housing resources in circumstances where those housing resources are not unlimited. The striking of such a balance is pre-eminently a matter of policy for the legislature. The court should respect the legislative judgment as to what is in the general interest unless that judgment was manifestly without reasonable foundation."

58. The last of the four questions posed by Lady Hale in *Stott* was whether there was an objective justification for the difference in treatment. How does that test apply to the subject-matter of this appeal? In *Gilham v Ministry of Justice* [2019] UKSC 44 Lady Hale explained at [34]:

> "… while it is well-established that the courts will not hold a difference in treatment in the field of socio-economic policy unjustifiable unless it is "manifestly without reasonable foundation", the cases in which that test - or something like it - has been applied are all cases relating to the welfare benefits system."

59. The reason for applying that test is that choices about welfare systems involve policy decisions on economic and social matters which are pre-eminently matters for national authorities. In *R (Turley) v Wandsworth LBC* [2017] EWCA Civ 189, [2017] HLR 21 this court held that where a provision relating to succession to secure tenancies had to be justified, there was no difference in principle between access to social housing and access to welfare benefits. Both were subject to the same test. The test that the court went on to apply was to ask whether the impugned measure was "manifestly without reasonable foundation". That is the same test that this court approved in *Wall*.

60. There had been some debate about whether that test applied at all stages of the analysis. That debate was resolved in *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21, [2019] 1 WLR 3289. The case concerned a cap on welfare benefits which was challenged by lone parents. Lord Wilson (with whom the majority agreed) said at [59]:

> "I now accept that the weight of authority in our court mandates inquiry into the justification of the adverse effects of rules for entitlement to welfare benefits by reference to whether they are manifestly without reasonable foundation."

61. Having referred to a contrary approach taken in other cases, he said at [65]:

> "For by then there was—and there still remains—clear authority … for the proposition that, at any rate in relation to the Government's need to justify what would otherwise be a

> discriminatory effect of a rule governing entitlement to welfare benefits, the sole question is whether it is manifestly without reasonable foundation. Let there be no future doubt about it."

62. Lord Carnwath agreed at [100]; as did Lords Hodge and Hughes at [125].

63. Mr Knafler argued that Lord Wilson's ringing endorsement of the "manifestly without reasonable foundation" test at [65] was qualified or watered down by what he said at [66]. In that paragraph Lord Wilson said:

> "How does the criterion of whether the adverse treatment was manifestly without reasonable foundation fit together with the burden on the state to establish justification, explained in para 50 above? For the phraseology of the criterion demonstrates that it is something for the complainant, rather than for the state, to establish. The rationalisation has to be that, when the state puts forward its reasons for having countenanced the adverse treatment, it establishes justification for it unless the complainant demonstrates that it was manifestly without reasonable foundation. But reference in this context to any burden, in particular to a burden of proof, is more theoretical than real. The court will proactively examine whether the foundation is reasonable; and it is fanciful to contemplate its concluding that, although the state had failed to persuade the court that it was reasonable, the claim failed because the complainant had failed to persuade the court that it was manifestly unreasonable."

64. I do not agree that this qualifies or waters down the test. It is concerned, and concerned only, with how the test fits in with the burden and standard of proof. It seems to me to be plain that the test of "manifestly without reasonable foundation" is a more stringent test than whether a measure is a proportionate means of pursuing a legitimate aim. Mr Knafler's reading of paragraph [66] assimilates the two. I also note that none of the other justices in the majority expressly agreed with that paragraph.

65. That is the test which, in my judgment, we must apply in this case.

Manifestly without reasonable foundation: the approach of an appeal court

66. The normal function of this court on an appeal is to review the decision of the first instance judge: CPR Part 52.21. In cases that involve a Convention right, the approach of this court is no different; at all events where the challenge is based on proportionality: *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911 at [36] (Lord Wilson); [83] – [90] Lord Neuberger; [137] – [139] (Lord Clarke).

67. Does it make any difference where the challenge is to the decision of the first instance court that an impugned measure is not manifestly without reasonable foundation? In my judgment it does not. Both the question of proportionality and the question whether a measure is manifestly without reasonable foundation involve a judicial

evaluative judgment. The appellate process ought therefore to be the same in each case.

68. The question for us, then, is whether the judge's evaluation was wrong. In considering this question, it is not necessary to identify a "significant error of principle" in the judge's reasoning. It is sufficient if there is:

> "… an identifiable flaw in the judge's reasoning, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion. However, it is equally clear that, for the decision to be "wrong" under CPR r 52.11(3), it is not enough that the appellate court might have arrived at a different evaluation."

(*R (R) v Chief Constable of Greater Manchester Police* [2018] UKSC 47, [2018] 1 WLR 4079 at [64])

The judge's conclusion on justification

69. The judge concluded that the impugned measure was not manifestly without reasonable foundation. He said:

> "[60] As to Mr Vanhegan's submission that it is unrealistic to suggest that succession rights are a serious consideration to a victim of domestic violence, it seems to me that it depends entirely on the circumstances. There is generally an acute stage of relationship breakdown involving domestic abuse where the key consideration is getting the victim and any children to a place of safety away from the abuser. Clearly succession rights are unlikely to be a consideration then. But matrimonial proceedings often follow, over subsequent weeks, months and even years. Housing will be a critical issue then. It is reasonable to suppose that Parliament had this firmly in mind when enacting section 31 of the Housing Act 1980, enacting section 88(2) of the 1985 Act and, under the Housing Act 1996, expanding the scope of section 88(2) (with effect from 1 October 1996 to add reference to section 17(1) of the Matrimonial and Family Proceedings Act 1984). The fact that reference to judicial assignment under matrimonial proceedings is also carefully set out in section 91(3) of the 1985 Act (as amended by section 222 of and paragraph 12 of Schedule 18 to the Housing Act 1996 and section 81 of and paragraph 24 of Schedule 8 and section 261(4) of and paragraph 1 of Schedule 30 to the Civil Partnership Act 2004) as an exception to the general prohibition on voluntary assignment of a secure tenancy set out in section 91(1) of the 1985 Act is further internal evidence from the statute that these provisions are carefully considered and not arbitrary or capricious.
>
> [61] There is, in my view, no force in Mr Vanhegan's criticism of Ms Walker's distinction between automatic statutory

> succession and judicial assignment following a fact-sensitive analysis by the court in matrimonial proceedings. If relevant statutory criteria are fulfilled, a secure tenancy passes automatically by statute. The fact that, in theory, a question could arise as to whether a statutory criterion had been fulfilled, requiring investigation or leading to a dispute, does not make this less true.
>
> [62] Mr Vanhegan's argument that there is no sensible housing policy reason for treating the child of a widowed tenant differently from the child of a divorced tenant can be met simply by the observation that the differential treatment is clearly not motivated only, or even primarily, by housing policy. By creating the exception in section 88(2), Parliament is clearly intending to address a different policy objective relating to the adjustment of property in matrimonial proceedings."

70. I do not consider that Mr Knafler identified any flaw in the judge's reasoning. Indeed, we were not referred to the judge's judgment at all. Mr Knafler's argument was, in essence, an attempt to persuade us to arrive at our own evaluation, based on the same arguments that had been canvassed before the judge. Unless we are in a position to say that the judge was wrong, the evaluation of the evidence and the making of the evaluative judgment was a matter for him. That, too, means that the appeal must fail.

71. But in deference to Mr Knafler's sustained argument, I will turn to the underlying evidence.

Justification: the evidence

72. Ms Frances Walker, a senior policy adviser on social housing at the Ministry of Housing, Communities and Local Government, gave evidence on the question of justification. She explained that, due to the passage of time, there were only limited documents relating to the original passage of what became the Housing Act 1980. The 1985 Act, with which we are concerned, was a consolidating Act.

73. The starting point is the one succession rule. The minister responsible for steering the Bill through the House of Commons in 1980 explained the justification for the "one succession" rule. It was to strike a balance between the natural desire of members of a deceased tenant's family to continue to live in the family home on the one hand; and the local authority's duty to manage its housing stock in the interest of the locality and in particularly in the interest of those in greatest housing need. The various cases in which a secure tenant was to be treated as a successor were all designed to prevent the avoidance of the "one succession" rule. In particular, succession to a joint tenancy on death had to be treated as using up the one permitted succession, otherwise a tenancy might endure for generations. But Ms Walker was unable to find original documents which explained why the limited exception to that principle consisting of an order under section 24 of the Matrimonial Causes Act 1973 was made.

74. She put forward a number of reasons, after consultation with her colleagues in the Department.

75. It is not a legal requirement of justification that the reasons put forward in defence of a legislative provision must have been present to the mind of the policy maker at the time when it was introduced. It is open to a policy maker to advance a retrospective justification: *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, [2006] 1 WLR 3213 at [129]; *Seldon v Clarkson Wright & Jakes* [2012] UKSC 16; [2012] ICR 716 at [59] and [76]. However, in the case of a retrospective justification, the court will not have had the benefit of the considered decision of the policy maker. Thus, as Lord Kerr pointed out in *Re Brewster* [2017] UKSC 8; [2017] 1 W.L.R. 519 at [52]:

> "Obviously, if reasons are proffered in defence of a decision which were not present to the mind of the decision-maker at the time that it was made, this will call for greater scrutiny than would be appropriate if they could be shown to have influenced the decision-maker when the particular scheme was devised. Even retrospective judgments, however, if made within the sphere of expertise of the decision-maker, are worthy of respect, provided that they are made bona fide."

76. This is not quite that case. It is not a stark question of retrospective justification. The problem is an evidential one due to the passage of time.

77. As Ms Walker explained, it is important that the succession rules strike an appropriate balance between those members of the deceased tenant'S family who consider the property their home, the interests of those on the waiting list who are identified as being in need of housing; and the interest of the local authority in making the best use of its stock. Obviously, the effect of permitting any succession at all is that the successor will acquire the secure tenancy, irrespective of housing need; and while the successor remains tenant that property cannot be allocated by the housing authority to someone in greater housing need. There is no doubt, in my judgment, that the one succession rule is amply justified, whatever the appropriate test.

78. If the one succession rule is to be effective, the legislation must prevent it from being circumvented or outflanked. On the death of a sole tenant, it is clear that succession to the deceased's tenancy is a true succession, and thus exhausts the one succession rule. But in many cases where the dwelling subject to the tenancy is the matrimonial home, the tenancy will have been granted in joint names to both spouses or cohabitants. If becoming sole tenant by right of survivorship were not to count as a succession, there would be a serious disincentive to the grant of joint tenancies to married couples or cohabitants; and the survivor of joint tenants would have an unjustified advantage over the survivor of a sole tenant.

79. In general, a secure tenancy is incapable of assignment. An assignment to a qualified successor, however, is permitted under section 91 (3) (c). But to allow such an assignment to take place, without at the same time treating that assignment as using up the one permitted succession, would undermine the one succession rule; because without that the tenancy could be assigned from generation to generation in perpetuity.

80. What, then, of relationship breakdown? Given the importance of the one succession rule, and the need to avoid its circumvention, it is entirely understandable why the

exception in section 88 (2) is narrowly circumscribed. It is clear that Parliament meant to draw a distinction between an assignment made by court order under section 24 of the Matrimonial Causes Act 1973 (which would not count as a succession) and an assignment made to a person qualified to succeed (which would). It was also clear from instructions to parliamentary counsel that this distinction was deliberate. The reasons that Ms Walker put forward to justify the distinction were that:

i) The exception ensures that the succession rules do not act as a disincentive to spouses, particularly those in unhappy or abusive relationships, from getting divorced. A spouse need not feel pressured to remain in a marriage where there is domestic abuse simply to avoid triggering a succession.

ii) By providing that the exception is confined to a court-ordered assignment the legislation ensures that there is a fact-sensitive discretionary decision by a court; and a considered judicial decision. Such a decision is qualitatively different from an automatic statutory succession.

iii) The intervention of the court is a safeguard against unjustified circumvention of the "one succession" rule.

81. Mr Knafler concentrated his fire on the exception to the one succession rule contained in section 88 (2). It was not easy to see where this took him, because if that exception were manifestly without reasonable foundation, it would leave the one succession rule intact without any exceptions.

82. There were two main prongs to Mr Knafler's attack; but they were closely intertwined. The first was what he called the "process attack". This was the submission that Ms Walker had made insufficient enquiries to establish the reasons on which she relied. The second was the submission that the evidential basis for her conclusions was too weak to support them; and that the conclusions themselves did not bear scrutiny.

83. It is no doubt the case that Ms Walker (or perhaps more accurately the Secretary of State) could have made further enquiries; and adduced more evidence. But the question is not whether further evidence could have been given. It is whether the evidence that has in fact been given satisfies the court that the impugned measure is not manifestly without reasonable foundation.

84. Mr Knafler's most forceful submission was that it defied reason that a woman would stay in an abusive relationship for the sake of preserving succession rights. A woman who is in an abusive relationship could seek out a refuge; or could get rehoused or could seek an injunction against her abusive partner. She would surely be driven by the immediate need to escape the abuse; and would not hang on for the speculative chance that one day she might be able to pass on succession rights. In so far as the submission was confined to abusive relationships there is, I think, force in it. But Ms Walker's point was not so confined. She dealt with both abusive and unhappy relationships. In addition, as the judge said at [60] (quoted above), even in the case of an abusive relationship there may be an acute phase in which succession rights have little or no influence; and a later time then they do. Mr Knafler did not explain why the judge was wrong to draw that distinction.

85. Mr Knafler also posed the rhetorical questions: if succession rights are so important on relationship breakdown, why is an order under section 24 of the Matrimonial Causes Act 1973 singled out for special treatment? Why are not other means of transferring a secure tenancy on relationship breakdown treated in the same way? And if succession rights are so important, why did Parliament cut them down in the Localism Act 2011?

86. It may well be possible to improve the list of exceptions to the one succession rule in a way that would tilt the balance more in favour of family members, and against those who are on the housing list. From the perspective of the family members that would, no doubt, be a fairer outcome. But in this respect, as in many areas of life, the best should not be the enemy of the good. Lord Dyson MR explained in *Swift v Secretary of State for Justice* [2013] EWCA Civ 193, [2014] QB 373 at [35]:

> "But the question is not whether the existing law is unfair and could be made fairer. Nor is it whether the existing law is the fairest means of pursuing the legitimate aim …. Rather, the question is whether the existing law pursues that aim in a proportionate manner. The Strasbourg jurisprudence does not insist that a state pursues a legitimate aim in the fairest or most proportionate way. It requires no more than that it does so in a way which is proportionate. There may be a number of ways in which a legitimate aim can be pursued. Provided that the state has chosen one which is proportionate, Strasbourg demands no more."

87. I do not consider that it avails Mr Simawi that Mr Knafler can devise statutory schemes which are fairer or more consistent. Parliament was, in my judgment, entitled to decide that the one succession rule was of prime importance; and that the only exception to it should be as narrowly drawn as possible in order to prevent serious hardship to those in unhappy or abusive relationships.

Result

88. I would dismiss the appeal.

Lord Justice Bean:

89. I agree.

Lord Justice Baker:

90. I also agree.