Phasing out of tenancies for life: Part 4

A particularly controversial feature of the Housing and Planning Act 2016 is its requirement that most new local authority tenancies be granted subject to a fixed term of between two and ten years. This is achieved by inserting a new section 81A to the Housing Act 1985, under the heading "*phasing out of tenancies for life*". The ten-year limit was increased from five years following the 'ping pong' debate between the Commons and the Lords in the weeks leading up to assent.

Subject to limited exceptions, this essentially puts an end to the Thatcherite expectation that a secure tenancy is a tenancy for life.

A further nail in this coffin is seen in amendments to succession rights. Section 120 and Schedule 8 to the 2016 Act amend the 1985 Act to provide that any new succession after the commencement of the reforms will be for a fixed term of 5 years. Authorities remain free to extend these succession rights in the tenancy agreement. This removes the previous distinction introduced by the Localism Act 2011 between tenancies entered into before and after 1 April 2012: in other words, where a tenant dies after the commencement of the changes, there can be no succession to anybody other than a spouse, civil partner or person living with the tenant as a partner – unless the tenancy agreement provides otherwise (and many do). Even then, the successor is entitled only to a fixed term 'secure' tenancy of 5 years: section 89(2A) Housing Act 1985.

New section 81B of the 1985 Act provides that "old-style" indefinite term secure tenancies may only be granted in accordance with regulations made by the Secretary of State – the details of which have yet to be confirmed, and must first be subjected to Parliamentary debate – or where an authority offers the tenancy to replace a previous old-style secure tenancy, where the tenant has not made an application to move. It follows that the precise scope of this exception is yet to be defined, and it seems unlikely that these regulations will simply be waved through the negative resolution procedure without controversy.

Between 6 and 9 months prior to the expiry of the fixed term, local housing authorities must carry out a review to decide whether or not to offer a new fixed-term tenancy: section 86A Housing Act 1985. There is no requirement that any new tenancy will relate to the same property. If no such offer is made (or is not taken up), a mandatory ground for possession

will arise. This essentially imports a review of the tenant's ongoing 'need' for the tenancy – and puts pressure on both successors and ordinary tenants to exercise their right to buy.

Three 'Options' are provided for the authority on the review: Option 1 is to grant a new fixed term secure tenancy over the same property; Option 2 is to seek possession of the property but offer a new fixed term secure tenancy over a different property; Option 3 is to seek possession without offering a new tenancy at all. In any case, the authority "must" offer advice on other housing options, including the exercise of the right to buy "if the landlord considers that to be a realistic option for the tenant" (section 86A(6) HA85). Where the authority decides to seek possession of the property, the tenant has a right to request a reconsideration of a decision under section 86C within 21 days of notification of the decision, subject to further regulations.

Challenges to the length of a new fixed term secure tenancy can be made under section 81D, again within 21 days of receipt of the offer. Authorities will be relieved to note however that this right of appeal is constrained: section 81D(2) provides that "The sole purpose of a review under this section is to consider whether the length of the tenancy is in accordance with any policy that the prospective landlord has about the length of secure tenancies it grants." It follows that if a robust policy is drafted and clearly followed, challenges under this section are unlikely to succeed.

Proceedings for possession under the new mandatory ground at section 86E must be brought within 3 months of the end of the fixed term tenancy. Section 86D provides that a new 5-year fixed term tenancy arises upon the expiry of the fixed term, so the tenant does not become a trespasser whilst possession proceedings are ongoing – but this new tenancy does not affect the availability of the mandatory ground, and possession of the new fixed term tenancy can still be sought under the familiar grounds as well (which may be especially helpful if the 3 month deadline is missed).

Importantly, section 86E(3) provides that "the court may refuse to grant an order for possession under this section if the court considers that a decision of the landlord under section 86A or 86C was wrong in law". It is by this route that tenants are entitled to challenge the lawfulness of the review process in possession proceedings before the County Court. Authorities will need to ensure that their policies and procedures reflect the pending guidance from the Secretary of State.

The rationale for these reforms, it seems, is twofold: promote social mobility by encouraging secure tenants to see their home as a short- or medium-term stepping stone rather than a permanent home; and incentivise tenants to manage their tenancies responsibly to avoid giving the authority any additional reasons not to renew the fixed term.

On one view, this fits well with government rhetoric around social mobility and empowering local communities to manage the housing crisis in the most effective way for them. For housing authorities, however, many questions remain. What factors should structure authorities' discretion in fixed term cases? What are the boundaries of that discretion? Where is there scope for legitimate dissent between authorities on policy decisions on extensions to fixed terms, and to what extent is it appropriate for local feeling to influence these decisions? Section 81A(5) in particular promises new guidance on these questions, and obliges authorities to have regard to the same.

There is a statutory exception to the maximum fixed term which applies to households that have informed the authority "in writing" that a child under the age of 9 will live in the dwelling-house (section 81A(3)). The tenancy may be granted for more than ten years to such families to last until the youngest child is 19. Seemingly, this exception acknowledges a need for stability in children's lives, supporting the relatively uncontroversial view that the best interests of children will play a key role in decisions relating to grants and renewals of fixed term tenancies. Whilst authorities appear to enjoy a broad discretion on how to make best use of housing stock in individual cases in their local area, the Act only extends the maximum term in such cases, and does not mandate the grant of a fixed term that will last until the child attains the age of 19. It is hoped that the statutory guidance will deal with the question as to the circumstances in which authorities are expected to grant a shorter fixed term to a family to whom the longer fixed term is ostensibly available, though the wording of section 81D suggests that this will essentially be a policy decision to be taken by authorities themselves.

Fixed term tenancies are not new: the introductory tenancy regime has been in place since 1997, and has given authorities a great deal more flexibility in evicting problem tenants during the fixed term trial period. Indeed, new introductory tenancies will need to be granted for a fixed term of between two and five years (new section 124A Housing Act 1996), signalling that introductory tenancies are here to stay. What is new, however, is the requirement to reassess continuing entitlement to new secure tenancies every few years, signalling an important ideological shift in social housing policy.

As Conservative peer Baroness Evans put it (HL Deb 18 April 2016, vol 771, col 509), the aim of these reforms is to "*ensure that social housing is focused on those who really need it, for as long as they need it, and that tenants are provided with more appropriate tenancies as their needs change over time*". Bound up in this statement is an implication that many secure tenants are under-occupying their social homes, whilst many simply don't "*really need*" a social home at all.

At risk of over-analysis, there are hints here at a distinction between 'need' and 'real need' – and, from there, a parallel with the concept of deserving and undeserving poor. Whether or not this is ideologically palatable is a matter for the reader, but it does highlight an important consequence of reliance on local decision-making in this system: the question whether a tenant is in 'real need', 'some need' or 'no need' of a social home is a decision that is ripe for legal challenge, and will depend to a great extent on the interaction between national guidance and local policy. In my view, authorities should prepare to face public law defences to possession claims arising from decisions to renew or not to renew lapsed fixed term tenancies, which could raise issues similar both to reviews of decisions to seek possession on a mandatory ground, and to homelessness appeals on issues such as priority need, intentionality, and suitability (of location, physical features, and tenure).

It follows that the new Act confers additional flexibility on local housing authorities in the management of their stock, at the cost of significant additional administrative and legal burdens of review and appeal. Authorities already have the discretion to seek to bring a tenancy to an end where there are clear behavioural grounds for doing so; these reforms essentially place an onus onto tenants to demonstrate their ongoing 'real need' for their social home, with a corresponding burden on authorities to verify the same. The reforms will also make it more difficult for long-term subletting to go undetected, as the tenant will essentially need to remain engaged with the authority in order effectively to participate in the fixed-term review process. It follows that there will be greater turnover in social homes in the medium to long term, enabling more families in pressing need to be accommodated within existing stock.

It would appear that in order to give effect to Parliamentary intent, courts deciding these challenges must be prepared to uphold the proposition that several years of paying rent on time and being a good neighbour is not enough, without more, to justify the grant of a new tenancy. The greatest impact may therefore be felt by so-called 'model' tenants, facing

repossession through effluxion of time alone, who would otherwise have expected to continue indefinitely in their homes as secure tenants. Such tenants might otherwise have taken advantage of social rent for a longer period to save up for a deposit to exercise their right to buy. Could it be that occasional miss-management of a rent account in fact strengths a tenant's case for being in ongoing 'real need' of a social home?

Subject to guidance and regulations, these reforms appear to make room for an expectation that where a tenant is in employment, such that a private sector rent (perhaps abated by Housing Benefit) would be affordable, they are no longer in 'real need' of a social home, and should either purchase their existing home or move into the private sector. In practice, there is a risk of conflation between 'real need' and desirability as a tenant: careful policy – and careful training – will be essential to lawful decision-making in this controversial field.

Of course, these changes are likely to free up social homes for those in priority need of accommodation, by empowering authorities more readily to identify issues such as fraud and under-occupation, giving rise to a more efficient use of housing stock. Trading away the right to stay in a home that is larger or cheaper than strictly required – which might be considered to be a relative luxury – is perhaps an inevitable consequence of the huge pressure that authorities face to abate long waiting lists of families eligible for housing support. On one view, it is no different to being asked periodically to re-apply for benefit in order to show that the conditions for eligibility still exist.

A hidden cost of these reforms, however, is likely to be found in claims for housing benefit, as more social tenants are 'encouraged' to transition into rising private sector rents whilst remaining on relatively low incomes. The comparative lack of security of tenure in the private rented sector may lead to tenants finding themselves unintentionally homeless once again – and being put to the bottom of the queue for housing assistance as a result.

Authorities must anticipate challenges to decisions not to renew fixed term tenancies, even though the force of Parliamentary intent is likely to present tenants with an uphill struggle. By their nature, these challenges will take several years to come to light, and the law is likely therefore to be slow to develop, giving rise to a degree of uncertainty in the medium term. However, if these decisions are to withstand scrutiny, robust and well-written policies will need to be drafted and adopted in advance, with an eye to national guidance, secondary legislation, and emerging case law on the subject. The question of what amounts to 'real

need' at a local level is likely to be highly controversial, so authorities would be well advised to start the process of settling these policies now.

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