Neutral Citation Number: [2017] EWHC 1488 (QB)

Case No: HQ16X01766

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/06/2017

Before :

MRS JUSTICE ELISABETH LAING DBE

- -

Between :

HERTFORDSHIRE COUNTY COUNCIL	**Claimant**
- and -	
BRYN COLIN DAVIES	**Defendant**

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- -

Andrew Lane and Tara O'Leary (instructed by **Hertfordshire County Council Legal Services**) for the **Claimant**
Toby Vanhegan and Riccardo Calzavara (instructed by **Arkrights Solicitors**) for the **Defendant**

Hearing dates: 16.05.2017 – 17.05.2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE ELISABETH LAING DBE

Mrs Justice Elisabeth Laing DBE :

Introduction

1. This is a claim by the Claimant, Hertfordshire County Council ('the Council') for possession of the School Bungalow, Cock Lane, Hoddesdon. Hertfordshire ('the Bungalow'). The Bungalow is owned by the Council. The Defendant moved into it with his family in about January 2003 when he became the caretaker at Sheredes School ('the School'). On 12 June 2015, after a disciplinary hearing, the Council dismissed the Defendant for gross misconduct. He appealed against the decision to dismiss him, unsuccessfully.

2. He brought proceedings in the Employment Tribunal ('ET') claiming compensation for unfair dismissal. He did not claim re-engagement or reinstatement. He did not claim that his dismissal was wrongful. He presented his claim outside the statutory time limit. The ET held it had jurisdiction to hear the claim. The Defendant appealed. The Employment Appeal Tribunal overturned the ET's decision. I was told at the hearing that the Defendant's paper application for permission to appeal to the Court of Appeal was pending in the Court of Appeal. I gather that it has since been refused.

3. In the meantime, as is accepted by the Council, on 16 June 2015, it served a notice to quit dated 12 June 2015 requiring the Defendant to give up possession on 10 July 2015. The Council issued proceedings for possession on 10 September 2015. The claim was in due course transferred to the High Court because one of the remedies sought by the Defendant in his counterclaim is a declaration that paragraph 2 of Schedule 1 to the Housing Act 1985 ('the 1985 Act') is incompatible with his rights conferred by the European Convention on Human Rights.

4. The Defendant is still living in the Bungalow with his wife and three children, who are between 8 and 18 years old.

5. When the Defendant started work, the School was managed by the Council in the discharge of its education functions. On 1 September 2016, the school became an academy, the Robert Barclay Academy. It is now owned and run by the Sir John Lawes Academy Trust ('AT'). The Council lets the school grounds to the AT. It has excepted the Bungalow from that lease and retained it.

6. The Defendant has raised various arguments concerning his tenure of the Bungalow to defend the possession proceedings. He has also pleaded that the service of the notice to quit was unlawful because it was a public law decision and the Council failed to have regard to various matters when deciding to serve the notice to quit.

7. As a matter of principle, the Defendant is entitled to raise public law challenges as a defence to that decision: see *Wandsworth London Borough Council v Winder* [1985] AC 461. In that case the council took possession proceedings relying on arrears of rent. The tenant argued that the decisions to increase those rents were ultra vires. The House of Lords decided that he could rely on those arguments as a defence to a private law claim. In the event, those defences did not succeed (*Wandsworth London Borough Council v Winder (No 2)* (1988) 20 HLR 400). There must, however, be a link between the breach of public law which is asserted and a private law right: see

Tower Hamlets LBC v Abdi (1992) 25 HLR 80, CA, at p 87, cited with approval by the Court of Appeal in *London Borough of Hackney v Lambourne* (1993) 25 HLR 172. I must decide what impact, if any, those defences may have on the Council's claim.

8. The Council was represented by Mr Lane and Ms O'Leary, and the Defendant by Mr Vanhegan and Mr Calzavara. I thank counsel for their helpful written and oral submissions. I heard evidence from Mr Oddy and Mr De La Croix for the Claimant and from the Defendant, his wife, Mrs Davies, their two daughters, Grace and Emily Davies and Mr Hemmings. This is my reserved judgment.

The facts

9. The Defendant started work for the Council in January 2003. He had been offered the job of 'Resident Caretaker' at the School, subject to various conditions, in a letter dated 2 December 2002, and permitted to enter the Bungalow in order to make it ready for his occupation. This letter said that the Defendant would receive a formal written contract in due course.

10. The job description dated November 2002 said, under heading 3, that attendance at evenings and weekends was essential and shared with the assistant caretaker. Under heading 4, the description stipulated that presence on site was essential for reasons of security: 'the post holder must be residential'. Other duties requiring presence on site were listed under that heading. The document made clear that it did not list all the possible duties, as these could change from time to time. The dwelling might not be available until 24 January 2003. Under the heading 'The School and the Accommodation' the description said 'The current rent is £75.05 per month, with [other matters] being paid by the tenant'.

11. The formal offer letter is dated 20 December 2002. The post is described as 'Caretaker'. The appointment was subject to the relevant collective agreement 'or as amended by the Governing Body'. Details of the disciplinary procedure were set out in the 'EPCON Booklet'. In bold type, at the foot of the first page, the letter said, 'As a condition of your employment you will be required for the better performance of your duties to occupy the accommodation provided at [the Bungalow]'. The 'current standard charge' for the accommodation was set out. That was to be deducted monthly from the Defendant's salary. The relevant paragraph then said, 'You will, in due course, be required to complete a formal agreement in respect of your occupation of the accommodation'. The letter said that the EPCON Booklet was enclosed with it. A letter dated 22 January 2003 and headed 'Accommodation Charges' notified the Defendant of 'an increase in rent to Residential Caretakers' employed in schools. The letter set out the new 'weekly rent charges'.

12. A document headed 'Service Occupancy – Tenancy Agreement' was signed by the Defendant and a representative of the Claimant on 2 July 2003. The 'Commencement Date of the Tenancy' was said to be 1 January 2003. The rent payable was £75.05 per month.

13. The agreement recited that the Defendant had been appointed to work at the school named in the Agreement, and that, 'as a condition of this employment you are required to live in the dwelling [ie the Bungalow] so that you can *better perform your*

employment responsibilities [original emphasis]'. It continued, 'This document allows you to occupy the dwelling and sets out your rights and responsibilities as a tenant. It also sets out the rights and responsibilities of the Council as your landlord'. The next heading is 'Your rights whilst the tenancy continues'. The Agreement permitted the Defendant to use the Bungalow for his own private residential purposes. It said that he was entitled to live in it without interference from the Council, so long as he kept to the conditions of the Agreement. One of his responsibilities was 'to pay rent [w]hilst the tenancy continues'. The Council had rights of access to inspect the condition of the Bungalow and to work in the Bungalow to comply with the Councils' responsibilities under 'this Lease'.

14. It therefore appears that the agreement granted the Defendant exclusive possession of the Bungalow (cf *Facchini v Bryson* [1952] TLR 1386 at p 1388-9 per Somervell LJ).

15. Under the heading 'Termination of the Agreement' the agreement said, 'This Agreement can come to an end in the following circumstances'. At the first bullet point, it said 'Since your occupation of the dwelling is a condition of your employment with the Council, your right to live in the dwelling will end automatically when your employment with the Council ends, or …if your terms and conditions change so that you are no longer required to live in the dwelling to perform your employment responsibilities'. If the Defendant assigned, underlet or parted possession with the Bungalow, the Defendant would be entitled to end the Agreement. If either the Defendant or the Council wanted the Agreement to end, they could give at least 28 days' notice expiring on any weekday. Provision was made for the mechanics of giving notice. The Agreement also permitted the Council to bring 'the Tenancy' to an end if the Defendant was in breach of its terms. This section of the agreement then said, 'In practice the Council will usually be obliged to serve a notice to quit on you of at least 28 days' duration (this is not an obligation imposed on the Council by this Agreement but by the Protection from Eviction Act 1977)'.

16. A job description revised in January 2008 said (section 2) that 'This is a residential role with the post holder being required to live on site in school provided accommodation'. It referred to a standard working week of 37 hours, but said that the post holder would be required to provide an out-of-hours service which could entail early morning, evening and weekend work. Additional payments would be made for out-of-hours 'attendance of lettings and maintenance of the swimming pool'. Section 3 listed the main areas of responsibility, including various tasks which would be better performed if the defendant lived on, or very near, the school site.

17. The Defendant had surgery in June 2011 for slipped discs, and in May 2014 had an operation for a double hernia. On 25 June 2014 an occupational therapist ('OT') gave advice about his fitness to return to work. It is not clear to me exactly when he returned, but given the date of the discussions to which I refer in the next paragraph but one, it must have been at some point in September 2014.

18. The job description was revised in September 2014. Section 2 said that 'This is a residential role with the post holder may be required to live on site in school provided accommodation [sic].' It repeated what the 2008 description had said about working hours. Extra payments would be available for out of hours attendance of lettings, callouts and maintenance of the swimming pool. Section 3 again listed the main areas of responsibility, including various tasks which would be better performed if the

defendant lived on, or very near, the school site. Hours of work were dealt with in section 12, which said there 'may be call-outs and occasional weekend work'. There could be up to 11 hours' overtime.

19. The Defendant said in his witness statement (paragraph 25) that the new job description 'removed the necessity for the job holder to live on site'. He referred in his witness statement (paragraphs 27 and 28) to two incidents after September 2014 when he was contacted out of hours about the alarms going off. Mr De La Croix referred in his evidence in cross-examination to a flood in a field when asked for 'one single example' of an occasion when the Defendant was required to do work at a weekend. The Defendant accepted in cross-examination that before 2014 he was required to live on site and that no-one told him after 2014 that that was no longer required. He accepted that he could have been asked to do all the tasks listed in section 3 of the 2014 job description but said that, in fact, he was never asked to do them. A security company was contracted to ensure that the site was safe and secure, an alarm company dealt with the alarm, and someone else dealt with evening lets. After the 2014 job description, he was given no overtime. He accepted that he had only worked under the new description from September 2014 until the end of that year.

20. He had refurbished the Bungalow from top to bottom and he would not stand for it to be taken away for someone else's monetary gains. His wife and daughters' evidence emphasised how important the Bungalow was in their lives as their family home, where they had lived for 12 years. Mrs Davies explained the difficulties which the uncertainty over the future of their home was creating for their son, in particular.

21. Mr De La Croix, the headteacher, said in his evidence that the 2014 revision of the job description was preceded by three or four meetings between representatives of the school (Mr De La Croix, Ms Knight, the school's business manager and Sandy Abery from the Council's HR department), the Defendant, and his representative from UNISON. The job was re-evaluated at the Defendant's request, because he felt he deserved a pay rise. Mr De La Croix said that the School made it clear at those meetings that the school still needed an on-site residential caretaker. The words of the job description were changed so as to give the school the flexibility, in the future, not to require the caretaker to live on site. This change to the language of the description was made on the advice of the Council's HR adviser. 'Going forward many schools were not requiring an on-site residential caretaker' as, with modern buildings, there was less need for one. But the school still needed a residential caretaker and he made this clear at the meetings. In his view as headteacher, 'It was more beneficial and advisable to have someone on site to respond to emergencies and assist out of hours as necessary'. There were times when it was necessary and beneficial to the school to have the Defendant on site, because of the school's 'context' and 'layout'. The Defendant was not told by Mr De La Croix or, as far as he knew, by anyone else, that he was no longer required to live in the Bungalow.

22. Alarm call-outs were contracted out when the Defendant was absent from work, as the School had no choice, said Mr De La Croix. When the Defendant came back to work in September 2014, the school organised a phased return and adjusted his duties appropriately, taking into account an occupational health report. As far as Mr De La Croix knew, the Defendant's physical disability did not create problems for him with his job; the only issue was getting in and out of the bath (see the Defendant's letter to

him of 3 November 2014). Mr De La Croix's evidence was that he first knew that the Defendant had a disability when he read the Defendant's witness statement in these proceedings.

23. The Defendant went on sick leave on 20 January 2015. On 28 April 2015, a second OT gave advice. The Defendant was unfit to work because of sickness and anxiety. In late April, the Defendant put a walk-in shower in the Bungalow to replace the bath; he was finding it hard to get in and out of the bath. The Council gave him permission to do that on 5 May 2015. On 12 June 2015 there was a disciplinary hearing to consider allegations of gross misconduct against the Defendant. The outcome was that the Defendant was dismissed with effect from that date; he was notified of this and given the notice to quit on the same day, 16 June 2015. He appealed internally against his dismissal, unsuccessfully.

24. Mr De La Croix accepted that when the school advertised for a new caretaker, in August 2015, the post holder was not required to live on site. This was because '…the property was not vacant'. Whether the new postholder would be required to live on site would be a decision for the school, its governors, and the academy trust, not for Mr De La Croix.

25. There is medical evidence from two experts. Only one report is relevant. In his report dated 28 March 2017, Mr Cosker, a consultant orthopaedic surgeon, says that he was asked to consider whether the Defendant 'has any physical impairment which has a substantial and long-term effect on his ability to carry out normal every day activities …(upon consideration of section 6 and Schedule 1 of the Equality Act 2010)' and whether 'the Defendant is at a particular disadvantage with respect to the proposed eviction when compared with non-disabled persons of the subject property, including what those disadvantages might be [sic]'.

26. Mr Cosker noted that the Defendant has had his bath modified, and has handrails at the back and front doors. He no longer depends on bed guards and a raised toilet seat. The Defendant's symptom is 'ongoing pain in his lower back'. He takes Tramadol four times a day. The pain was not caused by trauma but by degenerative changes. Mr Cosker believes '*based on examination today*' [my emphasis] that the Defendant 'has a physical impairment which has a substantial long term adverse effect on his ability to carry out normal everyday activities'. He also 'believe[d]' that '*with respect to the proposed eviction*' [my emphasis] the Defendant was 'at a particular disadvantage when compared to non-disabled persons of the subject property'. This was because he had had 'significant modifications made around his home including in particular to his bathroom, but also handrails near the front and rear door'. Mr Cosker also referred to the fact the Bungalow is on one floor and the Defendant was worried about managing stairs. This was not to say that the Defendant could not move. Similar adaptations could be made to another property. 'I believe', he said, 'that the [Defendant] does meet the criteria of being disabled under the Equality Act 2010'.

The Law

The law of landlord and tenant

Tenancy/licence

27. As Lord Hoffman said in *Bruton v London & Quadrant Housing Trust* [2000] 1 AC 406, at p 413E, *Street v Mountford* [1985] AC 809 'is authority for the proposition that a 'lease' or 'tenancy' is a contractually binding agreement, not referable to any other relationship between the parties, by which one person gives another the right to exclusive occupation of land for a fixed or renewable period or periods of time, usually in return for a periodic payment in money. An agreement having these characteristics creates a relationship of landlord and tenant to which the common law or statute may then attach various incidents'. In *Mexfield Housing Co-operative Limited v Berrisford* [2011] UKSC 52; [2012] 1 AC 955, at paragraph 101, Lord Mance, said, 'The three characteristic hallmarks of a contractual tenancy, as distinct from a contractual licence, are (a) exclusive occupation, (b) rent and (c) a term which the law regards as certain'; he then cited the passage from *Bruton* to which I have just referred.

28. There is a fundamental distinction between a tenancy and a licence. A tenancy is (and has been for many centuries) an interest in land, and a licence is a contractual right to occupy land. Whether an arrangement is a lease or licence is a question of substance, not form (see *Street v Mountford*). The fact that the parties have called the arrangement a 'licence' is not decisive. The question is whether residential accommodation has been granted for a term at a rent with exclusive possession (and if so, whether the landlord provides attendance or services). The same is true, mutatis mutandis, of an agreement which the parties have described as a 'lease': see *Facchini v Bryson*, p 1389, per Somervell LJ. So whether an agreement creates a lease or a licence is a question of law. It does not depend on how the parties have labelled their agreement.

29. In *Street v Mountford*, Lord Templeman, with whom the other members of the Appellate Committee agreed, said (at p 818) that occupation by a service occupier was an exception to that rule. 'A service occupier is a servant who occupies his master's premises in order to perform his duties as a servant. In those circumstances, the possession and occupation of the servant is treated as the possession and occupation of the master and the relationship of landlord and tenant is not created; see *Mayhew v Suttle* (1854) 4 El. & Bl. 347. The test is whether the servant requires the premises he occupies in order better to perform his duties as a servant.…'

> *"Where the occupation is necessary for the performance of services, and the occupier is required to reside in the house in order to perform those services, the occupation being strictly ancillary to the performance of the duties which the occupier has to perform, the occupation is that of a servant' (per Mellor J. in Smith v. Seghill Overseers (1875) LR 10 QB 422 , 428)."*

30. *Smith* concerned the question whether the appellants, who lived in houses provided by their employer, were entitled to be entered in the rate book as occupiers of those houses (and thus to vote). It was not necessary for them to live in the houses to do

their work. The distinction is between an employee who occupies a dwelling provided by his employer (even if that occupation is part of his remuneration and is co-extensive with his employment) and an employee who occupies the dwelling for the purpose of performing his duties: see the judgment of Lush J in *Smith* (at p 430), citing the judgment of Tindal CJ in *Hughes v Overseers of Chatham* 5 M. & G. 54, 78. 'It may be that he is not permitted to occupy, as a reward, in the performance of his master's contract to pay him, but required to occupy in the performance of his contract to serve his master'.

31. *Glasgow Corporation v Johnstone* [1965] AC 609 was a rating case. The issue was whether a church house, occupied by the church officer, was occupied for the purposes of the church (a charity) or by the officer. He was required by his contract of employment to occupy the house and to leave it when his employment ended. The question was whether, if the occupation of the house was not necessary for the performance of his duties, that prevented his occupation being that of the charity, his employer. Lord Reid said, at p 619E, that in requiring occupation to be 'necessary' for the performance of the employee's duties, the judgment of Mellor J in *Smith* was out of line with the other authorities. It was enough for the church to show that their employee 'was bound to reside there and that his residing there was of material assistance to them in the carrying out of their activities' (p 618F).

32. Lord Upjohn said, at p 626E-G, that the distinction was between an employee who occupied a house as part of his pay, who was in the same position as a tenant, and an employee who was 'genuinely obliged by his [employer] for the purposes of his [employer's] business or if it is necessary for the [employee] to reside in the house for the performance of his services'. The latter's occupation was that of his employer. In 'rating language the distinction is between a 'service tenancy' and a 'service occupancy' and in order to come under the latter head the requirement or obligation to reside is an essential feature'. He agreed with Lord Reid that Mellor J had gone too far, if he had intended to state that not only should the employee be required to live in the employer's premises but that his residence there was necessary for the purposes of his employment (p 627C). His view was that if either the employee was required to live in the house, or his residence there was necessary for the purposes of the employment, his occupation would be that of his employer.

33. This view is in consistent with a passage from *Fox v Dalby* (1874) LR 10 CP 285 (DC) also cited by Lord Reid. *Fox v Dalby* was a case about the 'occupation franchise': a man could vote if he had occupied a dwelling-house as 'owner or tenant' and had been rated and paid rates accordingly. Lord Coleridge CJ explained succinctly why the respondent did not occupy as a tenant: the house was built under military legislation, it was assigned to him by his commanding officer, it was a breach of discipline for him to leave it without permission, and he could be turned out of it at any time. 'It seems to me that no one incident of a tenancy is stated in the case'. All three judges agreed that the test for occupation as a tenant was not met if the occupier was required to occupy the premises for the purpose of performing his duties (or for the better performance of his duties). Lord Coleridge CJ and Brett J also said that that test was not met if the occupier's occupation of the premises was necessary for the performance of the occupier's duties, even if he was not required to occupy the premises.

34. In the *Johnstone* case, Lord Guest added that a 'capricious' requirement to live in the house would not be enough: the requirement had to be 'with a view to the more efficient performance of the [employee's] duties' (p 629B). Lord Evershed agreed with Lord Reid, and gave a judgment of his own. Lord Wilberforce agreed with Lord Reid.

35. At first sight, Lord Reid's judgment is not entirely consistent with that of Lord Upjohn, but I think this apparent difference can be explained because there was no issue in the *Johnstone* case about the requirement in the contract of employment. Lord Upjohn went further than Lord Reid, in saying, obiter for the purposes of that case, that if there was no requirement in the contract of employment that the employee live in the accommodation, his occupancy could nonetheless be a service occupancy if his occupancy was necessary for him to do his duties.

36. The distinction between a service occupancy and a tenancy is also reflected in Section 3 of Chapter 3 of 'The Rent Acts' by Sir Robert Megarry (eleventh edition) and paragraph 15 of Volume 62 of Halsbury's Laws of England (sixth edition). No express provision of the Rent Acts excluded a service occupier from the protection of that legislation. But statutory protection was only conferred on those who occupied pursuant to a lease (see, for example, section 1(1) of the Rent Act 1968). So as a matter of construction, those who occupied a dwelling house under a contractual licence were not so protected, because they did not occupy pursuant to the terms of a tenancy.

Secure tenancies

37. Before the legislative changes introduced by the Housing Act 1980 ('the 1980 Act') and by the 1985 Act, local authority tenants had no security of tenure. Government policy changed, and this new legislation conferred security of tenure, and the 'right to buy'. Not all local authority tenants were granted such security, however, as will become clear.

38. Section 79(1) of the 1985 Act defines 'secure tenancy': 'A tenancy under which a dwelling-house is let as a separate dwelling is a secure tenancy at any time when the conditions described in sections 80 and 81 as the landlord and tenant condition are met'. Section 79(2) provides that section 79(1) 'has effect subject to – (a) the exceptions in Schedule 1 (tenancies which are not secure tenancies)…' By paragraph 2 of Schedule 1, '…a tenancy is not a secure tenancy if the tenant is an employee of the landlord or of a local authority… and his contract of employment requires him to occupy the dwelling-house for the better performance of his duties'.

39. Section 79(3) of the 1985 Act provides that 'The provisions of this Part apply in relation to a licence to occupy a dwelling-house (whether or not granted for a consideration) as they apply to a tenancy'.

40. If a tenancy is a secure tenancy and it is a weekly or other periodic tenancy, or a tenancy for a term certain but subject to termination by the landlord, it can only be brought to an end by the landlord if he gets an order for possession of the dwelling and execution of the order (or by other means not relevant here) (section 82). Section 84 restricts the grounds on which the court may make an order for possession.

41. One issue clearly raised by this case is the relationship between the cases I have referred to above and the exception created by paragraph 2 of Schedule 1 to the 1985 Act ('the Exception'). Mr Vanhegan helpfully drew my attention to section 79(3). The existence of this provision explains, I think, why the exception created by paragraph 2 to Schedule 1 is necessary. The policy of Part IV of the 1985 Act is to confer security of tenure on tenants of local authorities and also on those who occupy a dwelling under, not a lease, but a licence. The Exception (which does not precisely overlap with the test for a service occupancy) mirrors, to an extent, the position which applied, for example, under the Rent Acts (as a matter of statutory construction), that statutory security of tenure was not conferred on service occupiers in the private sector. The existence of section 79(3) also explains why the courts which have considered the application of the Exception have not needed, in general, to decide whether or not the arrangement being considered in a particular case is a lease or a licence.

42. The House of Lords considered the Exception in *Hughes v Greenwich London Borough Council* [1994] 1 AC 770. The issue was whether a headteacher, who lived in a house in the grounds of a boarding school, outside the curtilage, was entitled to buy the house under Part V of the 1985 Act. The judgment does not explain on what terms the headteacher occupied the house, and it seems to have been assumed that he occupied it under a tenancy. There was no express term in his contract of employment requiring him to live in the house. The issue was whether such a term could be implied. The judge had found that the headteacher could have done his job just as well by 'sleeping over the road'. Lord Lowry, with whom the other members of the Appellate Committee agreed, said at p 177C that '…the only way in which the term…could be implied into the contract would be to show that, unless he lived in the Cedars, Mr Hughes *could not* perform his duties as headmaster [emphasis supplied]. Lord Lowry went on to say that there must be a compelling reason for the implication and such a term would only be implied if such occupation was essential to the performance of the employee's duties. It was not enough that such a term would have promoted the better performance of those duties.

43. One of the issues in *South Glamorgan County Council v Griffiths* 24 HLR 334 was, if a service occupier stays in occupation after employment ends, whether the Exception ceases to apply and the occupier becomes a secure tenant. The employee, a school caretaker, was provided with a house. His contract of employment provided, 'It shall be a condition of employment that a caretaker must reside in school accommodation where such premises are available and a tenancy agreement must be entered into'. The employee paid a weekly rent, but there was no document recording the terms on which he occupied the house. In 1990 it was decided that the school in which he worked was to close. He retired on February 14 1990 but asked, and was allowed, to stay in the house until the school closed. An effective notice to quit was not served until August 8 1990. The Court of Appeal appears to have assumed that the agreement for the occupation of the house was a tenancy, not a licence.

44. The Court of Appeal, in an ex tempore judgment, rejected the argument that the Exception had ceased to apply on the facts. It only ceases to apply if the circumstances are such that a new tenancy can be inferred. A new tenancy may be inferred if the former employee's continued occupation ceases to be referable to his former employment: see *Greenfield v Berkshire County Council* 28 HLR 691, CA.

The status of the tenancy is not unchangeably fixed at the moment it is entered into. A change in circumstances can, but does not necessarily, result in a change in the status of the tenancy. Whether it does is a question for the court and will depend on whether the occupation is still referable to the former employee's employment and the requirement that he occupy the dwelling for the better performance of his duties and whether there had been any agreed or intended change in the nature or purpose of the occupation. In *Greenfield*, there had been such a change, and the Exception ceased to apply (per Schiemann LJ at p 696).

45. The Court of Appeal in *Greenfield* expressed some hesitation about the approach in *Griffiths*. Schiemann LJ, giving the judgment of court, described it as 'a generous interpretation of the statute' (at p 695). He went on to describe the sorts of policy considerations which 'no doubt motivated the court to adopt that interpretation of the statute'. Schiemann LJ referred to a second decision of the Court of Appeal, *Elvidge v Coventry City Council* [1994] QB 241, in which Hoffmann LJ expressed doubts about the reasoning in *Griffiths*. He did not, however, say that it was wrongly decided (presumably because he was bound by it). The 1985 Act was later amended, but Parliament did not reverse the decision in *Griffiths*. The *Griffiths* approach should be applied narrowly (p 699). He noted the provisions of paragraph 2 (4) of Schedule 1 to the 1985 Act in that context.

46. In *Wragg v Surrey County Council* [2008] EWCA Civ 19; [2008] HLR 30 it was 'a condition' of the claimants' contracts of employment that they would occupy 'on a permanent and full-time basis' a property provided by their employer which was provided 'for the better performance' of their duties. They were countryside rangers. They were each provided with accommodation. They served notices under Part V of the 1985 Act, asking to buy their accommodation. The local authority argued that they were not secure tenants, because of the terms of their contracts of employment. The judge having heard evidence decided that the claimants were not required to occupy the accommodation for the 'proper' or 'efficient' performance of their duties.

47. On appeal, Richards LJ noted (judgment, paragraph 3) that 'A further issue said to have been left on one side was whether the claimants were tenants or licensees; but it would seem that the argument proceeded on the assumption that they were tenants'. He also noted (at paragraphs 7-9) that the language of the Exception was very similar to the language used in a long line of authorities, including *Fox v Dalby* and the *Johnstone* case. He also referred to a later case, *Commissioner for Valuation for Northern Ireland v Fermanagh Protestant Board of Education* [1969] 1 WLR 1708, where the test for 'rating and other ancillary purposes' was summarised by Lord Upjohn at p 1722.

48. At paragraphs 18-27 Richards LJ described the Council's policy about the provision of tied accommodation to rangers. He then recited the facts found by the judge about each of the claimants' jobs. In paragraphs 38-49, he considered the 'proper construction of the statutory provision'. The Council's primary argument was that the test was a purely contractual test. He rejected that argument at paragraph 40. He said that the test has two distinct parts. The first looks only to the terms of the contract (does the contract have such a requirement?), but the second raises 'an issue of fact outside the contract'. The question is not whether the contract states that the condition is for the better performance of the employee's duties, but whether 'the

requirement is in fact for the better performance of his duties'. At paragraph 41, he gave his reasons for reaching that view.

49. First, it was consistent with the case law (see above). Its 'general tenor' is to distinguish clearly between a contractual requirement to occupy and the factual question whether that is for the better performance of the employee's duties. The language of paragraph 2 'is identical' to that in *Fox v Dalby*. This suggests a legislative intention to adopt essentially the same approach as the case law.

50. Second, the legislative policy must be to deny an employee security of tenure (and the right to buy) only in those cases where there is a real link between the requirement to occupy and the performance of the employee's duties, 'such as to justify' the recovery of the accommodation by the employer when the current employee's employment ends. That policy would be frustrated in a case where there was real justification for the recovery of the property, and the employee would be deprived of the right to buy, if the test could be met by a provision in the contract and no more. If it were otherwise, there would be a burden on the employee to show that a 'better performance provision' in a contract of employment was a sham which would be 'highly unsatisfactory'. On the other hand, if all agreed that the requirement in the contract was in fact for the better performance of the employee's duties, it would be 'surprising' if the statutory exception did not apply unless the contract also stated that the requirement was for that purpose.

51. Richards LJ then considered what question of fact was raised by the second limb of the exception. He rejected the possibility that the expression referred to the subjective intention or purpose of the parties in agreeing the requirement (judgment, paragraph 42). That would run counter to 'the need in terms of legislative policy, for a real link between the requirement…and the performance of the employee's duties' (paragraph 43). He considered that the later cases were not consistent with such a view of the test (paragraph 43). At paragraph 44 he said, the '…provision should be construed as including an objective test: "for" is to be read as "to enable", the essential question being whether the required occupation of the property is intended to promote, *and* is reasonably capable of promoting, the better performance of the employee's duties' (paragraph 44, original emphasis). He referred to *R v Secretary of State for Foreign Affairs ex p World Development Movement* [1995] 1 WLR 386 by analogy.

52. In paragraph 46 of the judgment he considered the factors a court should take into account in this context. A court should look at all the circumstances. The reasons for the requirement and the considerations taken into account when it was imposed were relevant. The factual history would be relevant in any decision whether the occupation of the property was reasonably capable of leading to the better performance of the employee's duties. '…if occupation of the property was reasonably capable of leading to better performance, it is immaterial that the particular employee has not used the property in such a way as to produce that better performance in practice'.

53. The present tense in the Exception meant that the contractual and factual requirements must exist at the date of the service of the notice to quit. If the factual requirement was met when the contractual requirement was first imposed, then 'in the absence of a relevant contractual variation or a fundamental change in the underlying factual circumstances, it is difficult to see why it should not be satisfied thereafter…'

(judgment, paragraph 47). At paragraphs 52-54 he listed the factors which lead him to conclude that the tests were met, even though (paragraph 55) the justification for the requirement had weakened over the years.

54. I consider *Norris v Checksfield* [1991] 1 WLR 1241, a further decision of the Court of Appeal about service occupancy and the Exception, below.

The Protection from Eviction Act 1977 ('the 1977 Act')

55. The Protection from Eviction Act 1977 ('the 1977 Act') is in three parts. Part I is headed 'Unlawful Eviction and Harassment', Part II, 'Validity of Notices to Quit' and Part III, 'Supplemental provisions'. Part 1, in short, protects residential occupiers from harassment and requires anyone who seeks possession of any dwelling to get a court order. Part II contains section 5, only. Part III contains various provisions, including, at section 8, an interpretation provision.

56. Section 5 of the 1977 Act is headed 'Validity of notices to quit'. Section 5(1) provides that a notice by a landlord or a tenant to quit any premises let as a dwelling is not valid unless it is in writing, contains such information as may be prescribed and is given no later than 4 weeks before the date on which it is to take effect. Section 5(1A) provides that, subject to section 5(1B), 'no notice by a licensor or licensee to determine a periodic licence …shall be valid unless' it conforms to the same rules. Section 8(2) of the 1977 Act provides that '*for the purposes of Part 1* of the 1977 Act' [my emphasis], a person who, under the terms of his employment, had excusive possession of any premises other than as a tenant 'shall be deemed to have been a tenant and the expressions "let" and "tenancy" shall be construed accordingly'.

57. *Norris v Checksfield* [1991] 1 WLR 1241 concerned an arrangement under which an employee was allowed to occupy a bungalow near his place of work as a mechanic on condition that he would drive coaches for his employer and apply for the appropriate driving licence. The employee signed a document which described the arrangement as a 'licence'. The employer deducted £5 per week from the employee's wages in respect of his occupation of the bungalow. The employer then found out that the employee was a disqualified driver and dismissed him summarily. The Court of Appeal held that the employee's exclusive occupation of the bungalow did not create a tenancy if the employee was genuinely required to occupy it for the better performance of his duties, even if those duties had not yet started when the employee first occupied the bungalow. An employee could in some circumstances grant a licence before any employment started. The judge had been entitled to find that the employee was a service licensee and not a tenant. The licence in this case was not a periodic licence, so the requirement in section 5(1A) did not apply to it.

58. The Court of Appeal did not overlook section 8(2) of the 1977 Act in reaching its ultimate conclusion that the employer was not obliged by section 5(1) to serve a notice complying with section 5(1). Woolf LJ, giving the judgment of the court, said, at p 1248 D-F, that his interpretation was supported by section 8(2). Section 8(2), by design, only applies for the purposes of Part I of the 1977 Act. It does not apply for the purposes of section 5. He noted that Parliament had not, when enacting the Housing Act 1988, which amended the 1977 Act, amended section 8(2). It is not possible to tell from the terms of this decision whether the licence in that case

contained any provisions dealing with its termination other than the provision referred to by the Court of Appeal.

Long leases

59. In *Mexfield Housing Co-operative Limited v Berrisford* [2011] UKSC 52; [2012] 1 AC 955, the Supreme Court considered the effect of an 'occupancy agreement' between the claimant fully mutual housing association ('FMHA'), set up as part of a mortgage rescue scheme, and an 'occupier'. The claimant agreed to 'let', and the defendant 'occupier' to take, a property from month to month for a weekly rent. Clause 5 enabled the defendant to end the agreement by giving a month's notice. Clause 6 enable the claimant to end the agreement only if (among other things) the rent was in arrears or the defendant ceased to be a member of the FMHA. The agreement contained a forfeiture provision. The rent was not in arrears, but the claimant served a notice to quit on the defendant. The claimant did not rely on clause 6. The Court of Appeal held by a majority that as a lease could not be created for an uncertain term, the agreement did not create a tenancy on the terms set out in the agreement. The effect of the entry into possession and the payment of rent was that there was a monthly periodic tenancy.

60. The Supreme Court allowed the appeal. While, on their own, the words 'from month to month' were apt to create a monthly periodic tenancy, which could be ended by either side's giving the other a month's notice, the agreement provided that it could only be ended by the means provided by clause 5 (to the defendant) and by clause 6 (to the claimant). Such an agreement was an agreement for an uncertain term and could not take effect as a tenancy in accordance with its terms. It would have taken effect as a tenancy for life before the coming into force of the Law of Property Act 1925 ('the LPA'). The effect of section 149(6) of the LPA was that the tenancy was to be treated as a tenancy for a term of 90 years, determinable on the defendant's death, or in accordance with clauses 5 and 6. The defendant, accordingly, was not entitled to possession.

61. In paragraph 64, Lord Neuberger said the hallmarks of a tenancy include the grant of exclusive possession, and a fixed, or periodic term.

62. Lord Walker, agreeing with Lord Neuberger, described the policy of section 149(6) of the LPA in paragraph 84 of his judgment. It did not apply to tenancies which were capable of standing on their own two feet as legal estates without statutory help.

63. Baroness Hale, agreeing with Lord Neuberger on the first issue in the case, in paragraph 87, described periodic tenancies as posing 'something of a puzzle'. She explained how a periodic tenancy, despite the apparent uncertainty of its maximum term is, nonetheless, in law, a term certain, but how there is relevant uncertainty if either party's ability to serve a notice is restricted to circumstances which may never arise. In paragraph 92 she said that the agreement in *Mexfield* 'had all the hallmarks of a periodic tenancy with a curb on the landlord's power to determine it'. In paragraph 93, she described the rule against uncertainty as applying 'both to single terms of uncertain duration and to periodic tenancies with a curb on the power of either party to serve a notice to quit unless and until certain events occur'. The rule did not matter, however, as if the tenant was a person, the common law would automatically have turned the tenancy into a tenancy for life if the necessary

formalities were complied with, and it would be converted by the LPA into a 90-year lease (paragraph 94).

64. Hildyard J considered the *Mexfield* case in *Southward Housing Co-operative Limited v Walker* [2015] EWHC 1615 (Ch); [2016] Ch 443. The claimant was an FMHA. Paragraph 12(1)(h) of Schedule 1 to the 1985 Act is an exception which prevents the tenants of FMHAs from being secure tenants. The claimant granted the defendants a tenancy of a residential property. The agreement was described as a weekly tenancy. The rent was payable weekly. The claimant could only end it by service of a notice to quit on one of the grounds set out in clause 7 of the agreement. The defendants could end it by serving one month's written notice (clause 7(1)). By clause 7(3), the claimant agreed that before bringing proceedings for possession it would end the tenancy by serving at least one calendar month's notice in writing, and that it would not begin proceedings until the notice had expired. The agreement made no provision for forfeiture.

65. The defendants were in arrears with the rent. The claimant sought to end the agreement. The defendants argued, relying on *Mexfield,* that the agreement created a 90-year lease, and, if not, that section 3 of the HRA obliged the court to read the provisions of the Housing Act 1980 and of the 1985 Act in such a way as to make them secure tenants, on the grounds that paragraph 12(1)(h) was incompatible with article 14 of the ECHR read with article 8, but it was possible to read it in such a way as to remove that incompatibility.

66. Hildyard J rejected both arguments. He analysed *Mexfield* at paragraph 48 of his judgment. There was a clear indication in the agreement in *Mexfield* which contradicted any inference that the parties had intended to create a monthly tenancy: that is, the limits imposed by clause 6 on the claimant's right to serve a notice. That interpretation was supported by the provision for forfeiture. The agreement therefore lacked a 'hallmark' of a monthly tenancy, which is that either side can bring it to an end by giving the appropriate notice to the other. In those circumstances, the agreement was for an uncertain term. The Supreme Court considered that it was not necessary to decide whether an agreement for an uncertain term could only be interpreted as a tenancy for life if that was consistent with the parties' intentions, as deduced from what they had actually agreed, because, on the facts, it was consistent with their intentions.

67. Hildyard J held that whether the parties had created an uncertain term depended on whether the restrictions in clause 7 applied to the issue of possession proceedings, to the service of a notice to quit, or to both (paragraph 52). He held that on its true construction, the agreement did create an uncertain term, because the restriction applied to both (paragraphs 64-5). He then considered whether the agreement would have been treated, before the commencement of the LPA, as a tenancy for life. He held that it would not have been, because the parties had not intended to produce such a result (paragraphs 67-95). He concluded that what the parties had created was a contractual licence.

Convention Rights

68. Section 1(1) of the Human Rights Act 1998 ('the HRA') defines 'the Convention rights' which are (with exceptions) to have effect for the purposes of the HRA (section 1(2)). They are set out in Schedule 1 to the HRA (section 1(3)).

69. Section 2(1) requires a court 'determining a question which has arisen in connection with a Convention right' to take into account decisions and other instruments of the European Court of Human Rights, the Commission, and of the Committee of Ministers 'so far as in the opinion of the court…it is relevant to the proceedings in which that question has arisen'.

70. Section 3(1) provides 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights'. It is clear from section 3(2)(b) that section 3 does not affect the validity of any incompatible primary legislation, or the enforcement of any incompatible subordinate legislation if 'primary legislation prevents removal of the incompatibility'.

71. Section 3 was considered by the Supreme Court in *Ghaidan v Godin Mendoza* [2004] UKHL 30; [2004] 2 AC 557. The issue concerned the statutory provisions governing rights of succession to a protected tenancy. Paragraph 2 of Schedule 1 to the Rent Act 1977 provided that on the death of a statutory tenant his 'surviving spouse' became the statutory tenant. Paragraph 2 provided that a person who was living with the tenant 'as his or her wife or husband' was to be treated as the tenant's spouse. The question was whether these provisions infringed article 14 read with article 8, because they discriminated, without justification, against homosexual couples, or whether they could be read in a way which was compatible with the rights of the defendant, who had been in a long-term homosexual relationship with the deceased statutory tenant. The House of Lords had held, in *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27, that a homosexual former partner of a tenant could not succeed to the tenancy under paragraphs 2 and 3 of Schedule 1.

72. The issue was whether section 3 required the court to depart from the decision in *Sterling* (paragraph 25, per Lord Nicholls). The application of section 3 did not depend on ambiguity. Lord Nicholls referred to *R v A (No 2)* [2002] 1 AC 45. The House of Lords had read words into a statute in that case. Section 3 therefore created an obligation of 'an unusual and far-reaching character'. It could require a court to depart from 'the unambiguous meaning the legislation would otherwise bear'. It could require the court to depart from what Parliament had intended. The question was, how far. Its application did not critically depend on the actual words of legislation. Section 3 could require a compatible interpretation even if the statutory language was incompatible with a Convention right, even to the extent of reading in words which change the meaning of legislation (paragraphs 29-32).

73. Nonetheless, Parliament did not intend that the court could adopt a meaning which was inconsistent with a fundamental feature of the legislation. That would cross the line from interpretation to legislation. The HRA permits Parliament to enact non-compliant legislation. The section 3 interpretation must 'go with the grain of the legislation'. Lord Nicholls then referred to *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291, and two other decisions of the House

of Lords in which it had not been 'possible' to interpret legislation compatibly (paragraphs 33 and 34).

74. The majority of the House of Lords decided that the legislation could be read so as to be compatible with the defendant's Convention rights. Lord Millett dissented. In paragraph 122, Lord Rodger said that 'the key to what is possible for the courts to imply into legislation without crossing the border from interpretation into amendment' is 'a careful consideration of the essential principles and scope of the legislation…what matters is not the number of words but their effect'.

75. If in any proceedings in which a court decides whether a provision of primary legislation is compatible with a Convention right a court is satisfied that the provision is incompatible with a Convention right, it may (not must) make a declaration of incompatibility (section 4(1) and (2)). 'Court' includes the High Court (section 4(5)(e)). A declaration of incompatibility does not affect the validity of the provision in respect of which it is given and is not binding on the parties to the proceedings in which it is made (se 4(6)). The Crown must be given notice where a court is considering making a declaration of incompatibility (section 5(1)). I am told that the parties invited the relevant Secretary of State to intervene to no avail. I was told that the Defendant's solicitor wrote to the Secretary of State on 17 August 2016. The Secretary of State, I was told, did not reply to that letter.

76. Section 6(1) makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. Subsection (1) does not apply if as a result of the one or more provisions of primary legislation, the authority could not have acted differently, or in the case of one or more such provisions, or of provisions made under primary legislation, which cannot be read compatibly with Convention rights, the authority was acting to as to give effect to, or enforce, those provisions (section 6(2)). 'Public authority' includes 'any person certain of whose functions are of a public nature (section 6(3)(b)). In relation to 'a particular act' a person is not a public authority by virtue only of section 6(3)(b) if the nature of the act is private (section 6(5)).

77. Article 8 is one of the Convention rights in Schedule 1 to the HRA. It provides

> *"Right to respect for private and family life*
>
> *Article 8*
>
> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

78. Article 14 is also one of the Convention rights in Schedule 1. It provides

"*Prohibition of Discrimination*

Article 14

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."

79. As Baroness Hale observed in *Ghaidan*, at paragraph 133, it was common ground in that case that there are five questions in any article 14 inquiry.

i) Do the facts fall within the ambit of one or more of the Convention rights?

ii) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison?

iii) Were those others in an analogous situation?

iv) Was the difference in treatment objectively justifiable? Ie, did it have a legitimate aim and bear a reasonable relationship of proportionality to that aim?

The fifth question is whether the difference in treatment is based on one or more of the grounds proscribed whether expressly - or by inference - in article 14. The parties disagreed whether it should be asked third, or last. Baroness Hale said that the five questions were a useful analytical tool but they overlapped, especially the last three. If the situations are not truly analogous, it may be easier to decide that the treatment was not on a proscribed ground. The reasons why the situations are analogous but the treatment different will be relevant to objective justification. A rigidly formulaic approach should be avoided.

80. A tenant of an FMHA does not have security of tenure. One of the issues in *Southward* was whether this aspect of the statutory scheme produces discrimination contrary to article 14 read with article 8. At paragraphs 164-169, Hildyard J explained why that aspect of the statutory scheme was not contrary to article 8. I adopt that reasoning, apart from paragraph 169, which does not apply in this case. It was accepted in that case, as in this, that the relevant statutory provision was within the ambit of article 8. Hildyard J referred to the relevant cases and to *Larkos v Cyprus* 30 EHRR 597, in which the European Court of Human Rights held that being a Crown tenant (and, as a result, lacking security of tenure) was a status for the purposes of article 14. Hildyard J noted that the reasoning in support of 'implied' conclusion was 'somewhat brief'. He then referred to the speech of Lord Walker in *RJM v Secretary of State for Work and Pensions* [2009] AC 311, paragraph 5: 'The more peripheral or debatable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly hard to justify' (that is, the most personal characteristics which are innate and largely immutable). Hildyard J held that the differential treatment in that case was not of a type which was hard to justify. If the 'status' is chosen, the measure is subject to less scrutiny (paragraphs 189 and 190). In any event, the state has a wide margin of

appreciation in the context of social housing legislation (paragraph 200). He concluded that there was no discrimination contrary to article 14 read with article 8. See also *Watts v Stewart* [2016] EWCA Civ 1247; [2017] WLR 107, paragraphs 83 and 84 (a case about an occupier of an almshouse), approving *Southward*, and *Nicholas v Secretary of State for Defence* [2015] EWCA Civ 53; [2015] 1 WLR 2116 (a case about a service occupier).

81. One of the questions about article 14 is what material a court can take into account in considering whether or not a difference in treatment which results from provisions in primary legislation can be justified. In *Wilson v First County Trust* [2003] UKHL 40; [2004] 1 AC 816 the Court of Appeal made a declaration that section 127(3) of the Consumer Credit Act 1974, which barred the claimant from enforcing a loan agreement, was incompatible with the claimant's Convention rights. The loan agreement in question had been made before the HRA came into force. On appeal the House of Lords held that the HRA did not apply retrospectively and so the court had no power to make a declaration under section 4 of the HRA.

82. What the members of the Appellate Committee said about justification was therefore obiter, but it is, nonetheless, instructive. In short, the court should identify the policy objective of the legislation and assess whether the means used to achieve that objective were proportionate to any adverse effects. The court was entitled to look at background material, and unambiguous ministerial statements in Parliamentary debates (see paragraphs 56, 60 and 64, per Lord Nicholls), but should not treat ministerial statements as indicating Parliament's objective intention, still less as determinative (paragraph 66). It cannot be assumed that Parliament necessarily agreed with any such statement. See also paragraphs 114-188 per Lord Hope, paragraphs 139-144 per Lord Hobhouse. Lord Scott agreed with Lord Nicholls about the use of Hansard (paragraph 173). Lord Rodger agreed with what Lord Hobhouse said about the use of Hansard (paragraph 178). It is a cardinal constitutional principle that the will of Parliament is expressed in the language of an enactment (see paragraph 67, per Lord Nicholls).

> *"The proportionality of legislation is to be judged on that basis. The courts are to have due regard to the legislation as an expression of the will of Parliament. The proportionality of a statutory measure is not to be judged by the quality of the reasons advanced in support of it in the course of parliamentary debate, or by the subjective state of mind of individual ministers or other members. Different members may well have different reasons, not expressed in debates, for approving particular statutory provisions. They may have different perceptions of the desirability or likely effect of the legislation. Ministerial statements, especially if made ex tempore in response to questions, may sometimes lack clarity or be misdirected. Lack of cogent justification in the course of parliamentary debate is not a matter which "counts against" the legislation on issues of proportionality. The court is called upon to evaluate the proportionality of the legislation, not the adequacy of the minister's exploration of the policy options or of his explanations to Parliament. The latter would*

> *contravene article 9 of the Bill of Rights. The court would then be presuming to evaluate the sufficiency of the legislative process leading up to the enactment of the statute. I agree with Laws LJ's observations on this in International Transport Roth GmbH v Secretary of State for the Home Department [2003] QB 728, 775, paras 113-114."*

83. Lord Nicholls also said that the task is to identify the underlying social purpose sought to be achieved by the legislation. That will often be self-evident, but not always (paragraph 61). Whether the legislation is proportionate must be decided not at the time of enactment, but at the time when it has the impugned effect (paragraph 62). Lord Nicholls considered that it would rarely be necessary to consult Hansard in relation to compatibility (paragraph 66). In assessing the proportionality of a legislative measure, the court exercises a reviewing function. It is Parliament's responsibility to decide whether the means chosen for dealing with a social problem are necessary and appropriate. The assessment of the various available alternatives is for Parliament, not the court. The more the legislation concerns matters of broad social policy, the less ready will be a court to intervene (paragraph 70).

The Equality Act 2010 ('the 2010 Act')

84. Section 6 of the 2010 Act defines disability. A person has a disability if (a) he has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on his ability to carry out normal day to day activities. The effect of an impairment is long-term if it has lasted, or is likely to last, for at least 12 months (paragraph 2 of Schedule 1 to the 2010 Act). Paragraph 5 of Schedule 1 explains 'substantial adverse effect'. A person who manages premises must not discriminate against a person by taking steps to evict him (section 35). Discrimination may be direct, or indirect.

85. The Defendant's defence is based on an allegation of indirect discrimination. Indirect discrimination is defined in section 19 of the 2010 Act. A discriminates against B if he applies to B a provision criterion or practice ('PCP') which is discriminatory in relation to B's disability. A PCP discriminates in that way if

    i) A applies, or would apply it, to other people who are not disabled,

    ii) it puts, or would put, people who share B's protected characteristic (disability) at a particular disadvantage when compared with people who are not disabled,

    iii) it puts, or would put, B at that disadvantage, and

    iv) A cannot show that it is a proportionate means of achieving a legitimate aim.

86. Section 23(1) of the 2010 Act provides that 'On a comparison of cases for the purposes of section …19 there must be no material difference between the circumstances of each case'. I accept, on the basis of the reasoning of Baroness Hale in *Essop v Home Office* [2017] UKSC 27; [2017] 1 WLR 1343 that all that is meant by 'particular disadvantage' is a disadvantage which is in fact experienced by people who share the relevant protected characteristic as opposed to those who do not, or a

'disparate impact' (paragraph 28). There is no need to inquire, still less to prove, why a PCP puts them at that disadvantage.

87. The issue in *Aster Communities v Akerman-Livingstone* [2015] UKSC 15; [2015] AC 1399 was how a court should treat, in a possession claim brought by a housing association against a tenant, a defence based on the argument that his proposed eviction discriminated against him directly on the grounds of his disability. In that case it was agreed that the defendant had a disability. He was homeless. The local housing authority put him in temporary accommodation provided by the claimant. When the authority's main housing duty ended, the authority required the claimant to bring proceedings to evict the defendant in order to free the accommodation for another homeless person. The judge held that the defendant did not have a seriously arguable case and made a possession order. The Supreme Court held although such a defence could be dealt with summarily, that would not normally be appropriate where the claim appears genuinely to be disputed on grounds which appear to be substantial, where disclosure and expert evidence might be required. Although the judge had misdirected himself, the appeal was dismissed, because any judge at a full trial would be bound to decide the defendant's eviction would strike a fair balance between the landlord's needs and the disadvantages that would cause to the defendant.

88. Baroness Hale said, at paragraph 31,

> *"The structured approach to proportionality asks whether there is any lesser measure which might achieve the landlord's aims. It also requires a balance to be struck between the seriousness of the impact on the tenant and the importance of the landlord's aims. People with disabilities are "entitled to have due allowance made for the consequences of their disability": Lewisham London Borough Council v Malcolm [2008] AC 1399, para 61. It certainly cannot be taken for granted that the first of the twin aims will almost invariably trump that right. Even where social housing is involved, the general considerations involved in the second of the twin aims may on occasions have to give way to the equality rights of the occupier and in particular to the equality rights of a particular disabled person. The impact of being required to move from this particular place on this particular disabled person may be such that it is not outweighed by the benefits to the local authority or social landlord of being able to regain possession."*

89. 'The twin aims' are the vindication by the landlord of its property rights and its duties in respect of the distribution and management of its housing stock (which the eviction of the tenant will enable it to perform in relation to other tenants).

Section 149 of the 2010 Act

90. Section 149 of the 2010 Act requires a public authority, when it exercises its functions, to have due regard to the needs stated in section 149. Section 149 has attracted an elaborate superstructure of explanatory case law: see for example, *Bracking v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345, to

which I was referred, and more recently, in a homelessness case, *Hotak v Southwark London Borough Council* [2015] UKSC 30; [2016] AC 811. For reasons which should become clear, I do not consider that I need say any more about section 149 at this stage.

The Children Act 2004 ('the 2004 Act')

91. Section 11(2) of the 2004 Act requires a local authority to make arrangements for ensuring that '(a) their functions are discharged having regard to the need to safeguard and promote the welfare of children; and (b) any services provided by another person pursuant to arrangements made by the person or body in the discharge of their functions are provided having regard to that need.'

92. In *Nzolameso v Westminster City Council* [2015] UKSC 22; [2015] PTSR 549 the Supreme Court considered the interaction between section 11 and the duties owed by a local housing authority under Part VII of the Housing Act 1996. The Court was concerned with decisions made under Part VII and expressed in a decision letter and in a review of that decision.

93. Baroness Hale explained what 'welfare' means. She said that section 11 applies not just to the formulation of policy but also to its application in a particular case. It does not apply to making factual decisions, but to the exercise of discretions and to evaluative judgments (judgment, paragraphs 23-26). The statutory context may mean that the questions posed by section 11 will inevitably be addressed in a decision, even if a local authority does not consciously advert to section 11. Section 11 does not require the children's welfare to be a paramount or even primary consideration. A local authority should be able to explain the choices made, preferably by reference to published policies (paragraphs 27-30). On the facts, the local housing authority could not show that it had properly discharged its obligation under section 11 (paragraph 37).

94. *Mohamoud v Kensington and Chelsea Royal London Borough Council* [2015] EWCA Civ 780; [2015] HLR 38 was also a case about the functions of a local housing authority under Part VII of the 1996 Act. The Court of Appeal held that section 11 did not require an authority to conduct assessments of children in order to discover exceptional facts of which it was not aware. The onus was on the parents to tell the authority about any significant facts which might affect decisions about whether they should leave their accommodation.

95. Sharp LJ rejected an argument that section 11 only imposed a strategic obligation. It applies to the way in which a particular function should be exercised. But section 11 does not re-define or re-write a function, and its 'reach or impact' or 'sharpness of focus' will depend on the factual and statutory context (paragraph 10). In paragraphs 27-37 of her judgment, Sharp LJ described nine relevant features of that context. In that context, section 11 did not impose a duty on the local housing authorities in the two appeals to carry out assessments of the children.

96. Even if it had done, there was no basis for interfering with the possession orders in the two cases, because there was no link between the making of those orders and the failures to do the assessments, such that those failures did not give rise to a defence to

the claims for possession. She referred to *Wandsworth v Winder* and to the *Lambourne* case (see paragraph 7, above).

The issues

97. In my judgment the issues are

i) what was the legal nature of the Defendant's occupation of the Bungalow immediately before he was dismissed?

ii) is the Claimant entitled to rely on the Exception?

iii) leaving aside the HRA, what public law duties, if any, affected the Claimant in its exercise of its right to claim possession of the Bungalow, were they breached, and, if so, with what consequences?

iv) is this analysis affected by

a) the Defendant's discrimination claim or

b) the HRA?

(1) What was the legal nature of the Defendant's occupation of the Bungalow immediately before he was dismissed and after that?

98. I have described the terms of the agreement in some detail. Its language suggests strongly that the parties might have thought that they were creating a lease. That is not decisive, however. The context in which the agreement was created was that the Defendant had agreed to be employed under a contract of employment which required him (1) to occupy the Bungalow for the better performance of his duties, and (2) to enter into an agreement for the occupation of the Bungalow. As a matter of fact, such occupation was, at the inception of the agreement, for the better performance of the Defendant's duties. It was not a capricious requirement. On the basis of the cases I have referred to, the agreement, at its inception, created a service occupancy, not a lease.

99. In case I am wrong about that, and because this point has been argued, I should indicate my view about whether this agreement (if it is a tenancy) is for an uncertain period. I have no hesitation in deciding that it is not. The key point is that the provision which produces some uncertainty (that the agreement ends automatically with the employment) is not a *fetter* on the ability of either party to end the agreement. Both can determine the agreement, at any time, by giving 28 days' notice to expire on any weekday. For the reasons given by Baroness Hale in the *Mexfield* case, that feature of the agreement, albeit (perhaps) counter-intuitively, means that it is not for an uncertain term. It would not, therefore, take effect as a lease for 90 years under section 149(6) of the LPA.

100. I should consider whether the nature of the Defendant's occupation changed in 2014, and after his dismissal. The express terms of his contract of employment were not expressly varied. There was no waiver by the Claimant of those terms. The Defendant accepted in cross-examination that he could still be required to do the duties set out in section 3 of the 2014 job description. That job description is not well

expressed. Its language differs significantly from the language of the earlier job description. But I accept the evidence of Mr De La Croix that the reason for this difference was that it was the job description which was being considered, not the Defendant's contract of employment, and that it was possible that in the future, a (future) post holder might not be required to live on-site. I also accept the evidence of Mr De La Croix that in the meetings in 2014 it was made clear to the Defendant that he was still required to occupy the Bungalow. I find that, as a matter of fact, the requirement that the Defendant live in the Bungalow was intended to promote, and was reasonably capable of promoting, the better performance of the duties set out in section 3 of the 2014 job description. I also accept that there were occasions after September 2014 when the Defendant was required to attend to matters outside normal working hours. I note Mr Lane's point that the Defendant was not at work for very long after that when he became absent on sick leave. Did that change after the Defendant's dismissal? I do not consider that it did, even though two or so years have since gone by. The Claimant has done nothing to suggest that it wishes to grant the Defendant a new right to occupy and I do not infer that it did. It has served a notice to quit, issued possession proceedings and pursued them. The delay has been caused by those actions alone (cf the *Berkshire* and *South Glamorgan* cases).

101. The next question (as framed by the parties) is whether this contractual licence was a periodic licence, or not. I have not found this question an altogether easy question to answer. The agreement has all the hallmarks of a periodic licence, even allowing for the curious disjunction between the length of the notice required to end the agreement (if notice is given), and the periods over which rent fell due. But it has a feature which is not found in a periodic agreement, that is, the provision bringing it to an end automatically if the employment ended. I cannot be sure that the agreement in this case is on all fours with the agreement in *Norris*, as I have explained. This agreement is certainly not a periodic licence tout court. The parties agreed to it that, the agreement can come to an end, and will come to an end, independently of the service of a notice to quit. If the employment ends, no notice to quit is required to bring the agreement to an end. This issue matters, because if the agreement is a periodic licence, it is common ground that the notice given by the Council did not comply with section 5 of the 1977 Act. However, as I shall explain, I do not consider that the real question is whether or not this agreement creates a periodic licence. It is, rather, whether section 5(1A) of the 1977 Act applies to the mechanism by which the agreement ended in this case.

102. The period of a periodic licence or tenancy can range from a week to a year. The evident policy of section 5 is to ensure that, where a tenancy or licence is terminable by a notice to quit, a minimum period of notice is given to the tenant or licensee. That policy does not apply if the licence is terminable without the giving of a notice to quit. The language of section 5(1A) differs from that of section 5(1). Section 5(1) refers to a 'notice to quit any premises let…as a dwelling'. Section 5(1A) refers to a 'notice…to determine a periodic licence'. I consider that this difference is significant. Section 5(1A) only applies to the termination of a licence if (1) the agreement being terminated is a periodic licence and (2) the notice in question determines that licence. No notice to quit was required to terminate this agreement in the events which happened, as it terminated automatically in accordance with its terms when the Defendant was dismissed. Section 5(1A) only applies where a notice to quit is the

mechanism which is used to bring the arrangement in question to an end. There was no breach, therefore, of section 5(1A) in this case.

(2) Is the Claimant entitled to rely on paragraph 2 of Schedule 1?

103. I consider that the Exception applied at the inception of the agreement, and, for the reasons given in paragraph 100, above, that it continued to apply after September 2014, despite the reduction in the Defendant's hours of overtime and the contracting out of the alarm, security and lettings functions. I should make clear that I do not consider that anything which has happened since the Defendant's dismissal is evidence of any intention by the Claimant to enter into a new occupancy agreement or tenancy with the Defendant.

(3) Leaving aside the HRA, what public law duties, if any, affected the Claimant's right to seek possession, were they breached, and, if so, with what consequences?

104. The Defendant's pleaded challenge is only to the service of the notice to quit in this case. For the reasons I have given, service of the notice to quit was not necessary to bring the agreement to an end. The agreement had ended automatically with the Defendant's dismissal. Nonetheless, I accept that at the point when the agreement ended, the Council could have let the Defendant stay in the Bungalow with his family, and that the Council made an active decision to serve the notice to quit. In doing that, I accept that the Council was exercising a function. The decision the Council made was whether to enforce the agreement in accordance with its terms or not.

105. I also accept that this was the exercise of a function to which section 149 of the 2010 Act and section 11 of the 2004 Act could apply in theory. However, neither of those duties confers a private law right on the Defendant. That means, on the authority of *Mohamoud* and *Lambourne*, that even if the Defendant could have applied for judicial review of the decision to serve the notice to quit, on the grounds that the Claimant had not complied with those public law duties, any failure to comply with them would not provide a defence to the claim for possession. Contrast the attack on the decision to increase the rent due in *Winder's* case.

106. In case I am wrong about that point of principle, I should say something briefly about each duty. I would have held that section 11 did apply, and that the Claimant breached it in serving the notice to quit because, on the evidence, the Claimant gave no thought at all to the presence of the Defendant's children in the Bungalow or to the effect of the service of the notice to quit on their welfare.

107. I turn to section 149. This part of the defence was based on the Defendant's disability. I have no convincing evidence that the Defendant had the protected characteristic of disability at the date when the notice to quit was served. On his evidence, which I accept, Mr De La Croix knew that modifications to the bath in the Bungalow had been done, but understood that, phased return to work apart, the Defendant's ability to do his job was not affected by any disability. Mr Cosker's report expresses no opinion about whether the Defendant had a disability for the purposes of section 6 at the date of the notice to quit: his opinion concerns whether that test was met in March 2017, nearly two years later. I am not prepared to hold on that material, that, on the balance of probabilities, the Defendant has shown that he had a disability, as defined in section 6 of the 2010 Act, at the date the notice to quit

was served. But even if he had shown that, I accept Mr De La Croix's evidence that he did not know that the Defendant had a disability (and therefore consider it unlikely that the Council knew). I would not, therefore, have held that section 149 was engaged, as no regard can be due to statutory needs arising from a protected characteristic of which the decision maker is unaware.

108. I should mention briefly two further arguments. The first is based on the Defendant's dismissal. Mr Vanhegan tried to suggest that the service of the notice to quit was unlawful because there was a dispute about the Defendant's dismissal. The ET1 was presented on 10 November 2015, long after the service of the notice to quit. I do not consider this a good argument. If it were right, a local authority would not be entitled to serve a notice to quit in such a case for months, or possibly years (the Defendant's employment claim has still not been finally determined). I also reject any argument that a local authority must - somehow - take into account that there might be such a claim before serving a notice to quit. The second is that the notice to quit is unlawful because no regard was paid to the Defendant's article 8 rights. This argument is misconceived. It is inconsistent with the approach of the House of Lords in, for example, *R (SB) v Governors of Denbigh High School* [2006] UKHL 16; [2007] 1 AC 100 and *Belfast City Council v Miss Behavin' Limited* [2007] UKHL 19; [2007] 1 WLR 1420.

109. If the Defendant's disability discrimination claim were well founded, the county court could quash the notice to quit (see section 119(2(b) of the 2010 Act). The evidential point I made in the last paragraph but one is also relevant to the Defendant's indirect discrimination claim, and, in my judgment, fatal to it.

110. But had the Defendant shown that he had a disability at the date of the service of the notice to quit, I consider, in any event, that there would have been difficulties with this defence. The parties agreed that the PCP was the taking of possession proceedings against service occupiers. That is a PCP which the Claimant applies to all such occupiers whether they have a disability or not. Part of the 'particular disadvantage' to which Mr Coker refers in his report is disadvantages which would accrue to the Defendant personally, with his current disability, as compared with a hypothetical non-disabled occupant of the Bungalow. It seems to me that such an approach is not consistent with the agreed PCP. The relevant comparison (see section 23(1) of the 2010 Act) is between disabled service occupiers who are evicted from tied accommodation and non-disabled occupants who are evicted from tied accommodation, not between the Defendant, being evicted from his modified bungalow and a non-disabled person being evicted from that modified bungalow. If the correct comparison is made, I do not consider that the PCP puts a disabled occupant of tied accommodation at a particular disadvantage compared with a non-disabled occupant of tied accommodation. Both would find eviction difficult, as both would have to find another place to live at a time when there is an acute shortage of housing.

111. Finally, I appreciate that the Council no longer runs the School, so that it does not require the Bungalow for a new caretaker. However, the Defendant, like other service occupiers, always knew that he would have to leave the Bungalow when his employment ended, and the only reason why the Council did not include the Bungalow in the lease to the School was because the Defendant was still in the Bungalow. I consider that it is in the public interest that the Council should recover

the Bungalow now that the Defendant is no longer employed, so that it can decide, in conjunction with AT, how best the Bungalow can be used for public purposes. I consider that the PCP is in general justified. It is a proportionate means of achieving the legitimate aim. The legitimate aim is ensuring that the Council regains possession of dwellings occupied by service occupants when their employment ends, so that the dwelling is available for a new service occupier. There is no less intrusive way of achieving that aim than evicting dismissed service occupiers. If it is a relevant further question, I do not consider that because, at the moment, there is no requirement for the new caretaker to live on the site, the application of the PCP to the Defendant is disproportionate. The new caretaker cannot be required to live in the Bungalow because it is not vacant; it is still being occupied by the Defendant.

The HRA

112. An article 8 defence was pleaded but not pressed by Mr Vanhegan in oral argument. He rightly recognised that the threshold of establishing such a defence is a high one. Hildyard J's reasoning in *Southward* explains why. Counsel told me that there is only one case they know about in which such a defence has succeeded.

113. The questions, therefore, are whether the Defendant can establish that the Exception is incompatible with article 14 read with article 8, and if, so, whether it is possible to read it, in accordance with section 3 of the HRA, so as to comply with article 14. For several linked reasons, I do not consider that the Exception is incompatible with article 14 in this case.

114. The parties agree that this complaint falls within the ambit of article 8. I consider status together with justification below. There is a difference in treatment between occupiers of tied accommodation and (most, but not all) other local authority occupiers. I do not consider that the Exception breaches article 14, for two main reasons. First, the two types of occupiers are not in an analogous situation. The occupiers on whom the 1985 Act confers security of tenure are, in general, those who are being housed by a local housing authority in the discharge of its housing functions. Service occupiers are not so accommodated. They are accommodated for a different reason, which is that they are required to occupy accommodation as a condition of their employment. They know that that is why they are being accommodated, because their contracts of employment tell them that.

115. Second, even if being an occupier of tied accommodation owned by a local authority is a status, which I doubt, it is a very 'peripheral or debatable…suggested personal characteristic'. It is not, in my judgment, 'within the most sensitive area where discrimination is particularly hard to justify'. This is a characteristic which the Defendant chose, as he accepted an offer of a job, which, he knew, would require him to live in the Bungalow.

116. I reject Mr Vanhegan's argument that a legislative provision can only be justified if the Secretary of State attends the hearing to defend it and/or if there are quotations in Hansard which explain its purpose. That submission is inconsistent with the decision of the House of Lords in *Wilson*, which, whether or not it is binding on me, is highly persuasive. The policy of legislation can be deduced from the legislative history and from the 1985 Act. It is, clearly, to confer security of tenure on some, but not at all, tenants and licensees who occupy dwellings owned by local authorities. The

Exception is rational: if a dwelling is only let for the purposes of a service occupancy, there is no reason why the occupier should have security of tenure, and a good reason why not: if his employment ceases, the local authority employer can then house his replacement there. The legislature is entitled to a wide margin of appreciation when making provision for the allocation of scarce public resources such as housing accommodation. In my judgment, the difference in treatment is objectively justifiable (cf *Manchester City Council v Pinnock* [2010] UKSC 45; [2011] 2 AC 104 at paragraph 54). Nor does it make a difference in principle that the Council has no statutory housing functions.

117. Had I needed to decide the question, I would have held that it is not 'possible' to read paragraph 2 of Schedule 1 so as to comply with article 14. Compatibility could only be achieved by ignoring the Exception altogether. That would be to amend the statute, not to interpret it. The scheme of these provisions in the 1985 Act is to confer security of tenure with exceptions in a way which reflects, at least in this case, the position which applied in the private sector under the Rent Acts using a test which closely reflects the common law test. I do not consider that deleting the Exception (which is what would be required) so as to excise it from Schedule 1 is a 'possible' interpretation of Schedule 1. That would be to legislate, and to legislate by going against the grain of the legislation, by subtracting from the range of exceptions to security of tenure which Parliament thought appropriate. Which exceptions are appropriate is for Parliament, not for the court.

Conclusion

118. For these reasons, the various defences do not succeed. The Claimant is entitled to possession of the Bungalow. I will consider what order should follow initially, at least, on the basis of the parties' written submissions.