R (on the application of Turley) v Wandsworth LBC & The Secretary of State for Communities and Local Government

Elizabeth Kelsey, Barrister, Monckton Chambers

The Appellant, Susan Turley, was the long-term partner of the sole tenant of a four-bedroom house in Battersea Park. The tenancy was a secure tenancy under the Housing Act 1985 ('the Act'), and the landlord was the London Borough of Wandsworth, the First Respondent. In 2010 there was a breakdown in the relationship between the Appellant and the tenant, and in December of that year he moved out of the property. He returned in January 2012 but by then he was seriously ill, and he died in March 2012. In his absence from the property the tenant did not give up the tenancy, leaving the Appellant and their younger children living there.

Under the provisions of the Act (as it stood at the relevant time in 2012), family members who were residing with a secure tenant at the time of his or her death were in certain circumstances entitled to succeed to the tenancy. Since the Appellant did not meet one of the relevant conditions, the Council required her to vacate the property. The Appellant's challenge to that decision was based on articles 8 and 14 of the European Convention on Human Rights ('ECHR'): the right to respect for private and family life, and the prohibition on discrimination.

The Appellant's appeal was dismissed by the High Court (Knowles J), and she appealed to the Court of Appeal.

The relevant domestic legislation: the Housing Act 1985 ss.87 and 113

Section 87 governs the right of succession to a secure tenancy. In relevant part, it provides as follows:

> *"A person is qualified to succeed the tenant under a secure tenancy if he occupies the dwelling-house as his only or principle home at the time of the tenant's death and either –*
>
> *(a) he is the tenant's spouse or civil partner, or*
>
> *(b) he is another member of the tenant's family and has resided with the tenant throughout the period of twelve months ending with the tenant's death.*

Section 113 goes on to define who is a 'member of the tenant's family' for the purposes of this Part of the Act. This includes, in subsection (1)(a), a spouse

or civil partner of the tenant; and a person who lives with the tenant together as husband or wife or as if they were civil partners. The latter are colloquially described as 'common-law spouses'.

The Appellant's appeal

The Appellant contended that, in the context of succession to a secure tenancy, there was no material difference between the status of spouses and that of common law spouses. As such, the fact that the latter had to fulfil a 12-month residency condition under s.87(b) in order to succeed to the tenancy, while the succession rights of the former were unconditional, constituted discrimination contrary to art. 14 ECHR in an area affected by Convention rights (namely occupation of the home, which falls within the scope of art.8). The Appellant contended that no justification for the different treatment could be shown.

The Appellant's primary case was that in order to avoid breach of her ECHR rights, the provisions of the Act could be construed in accordance with s.3 of the Human Rights Act 1998, so as to accord her a right to succeed to the tenancy. Alternatively, the Appellant contended the Council was in any event obliged by s.6 of the 1998 Act to grant her a fresh secure tenancy of the property. In the final alternative the Appellant sought a declaration of incompatibility under s.4 of the 1998 Act.

Both the First and Second Respondents contended the Appellant's position was not analogous to that of a spouse; or alternatively that – in accordance with the judgment of Knowles J at first instance – if the positions of spouses and common-law spouses were analogous, any discrimination arising from the 12-month condition was justified.

The Court of Appeal's judgment

The judgment of the Court of Appeal was given by Lord Justice Underhill, with whom Sir Stephen Tomlinson and Lord Justice Jackson agreed.

Underhill LJ began by considering the issue of justification; that is, even if the Appellant's position was analogous to that of a spouse, whether the 12-month condition imposed by s.87(b) of the Act was justified. Underhill LJ addressed first whether the 12-month condition served a legitimate aim, before turning to whether it was a proportionate means of achieving that aim.

It was not contested that the aim behind the 12-month period was to achieve reliability in the assessment of whether two people were living together as if they were spouses or as if they were civil partners. The public policy was to require a degree of permanence in the relationship before a right to succession to a secure tenancy was granted. Such permanency was inherently satisfied in the case of spouses and civil partners who had formally committed themselves

to a relationship characterised by "permanence and constancy" (the language of Lord Dyson MR in *Swift* [2013] EWCA Civ 193, [2014] QB 373). In the case of common-law spouses where there was no such formal commitment, the 12-month condition was taken to demonstrate the same element of permanence and constancy. Underhill LJ had no doubt that the aim of the condition in this way was a legitimate one.

As to whether the 12-month condition was a proportionate means of achieving this aim, a preliminary question arose as to the appropriate standard of review. The Second Respondent contended the difference in treatment between spouses and common-law spouses represented a legislative choice where the legislature enjoys a wide margin of appreciation, of a kind with that at issue in the domestic decision in *Michalak* [2002] EWCA Civ 271, [2003] 1 WLR 617, and in accordance with the approach of the Strasbourg court in *Carson v UK* (2010) 51 EHRR 13.

Underhill LJ found there was no fundamental difference between access to social housing and access to welfare benefits in this context, concluding that the observations of Brooke LJ in *Michalak* were equally applicable in the instant case. The Court of Appeal also rejected the Appellant's submission that the 12-month condition was an evidential requirement only, rather than a substantive condition, and as such would not require the same degree of deference to be given to the legislator. The substantive requirement – that the relationship have sufficient degree of permanence and constancy – was undefinable save by adoption of an objective measure of some kind, and the choice of that measure was therefore an essential part of the legislative task. Accordingly, the relevant standard of review was whether the measure was *'manifestly without reasonable foundation'*.

Applying that standard, the Court of Appeal concluded it was impossible to say the imposition of the 12-month condition was manifestly without reasonable foundation as a criterion for demonstrating the necessary degree of permanence and constancy. Underhill LJ considered that the fact that a couple had been living together for a period of time *"is plainly the best available objective demonstration that their relationship has the necessary quality of permanence and constancy"* (para 28); the choice of 12 months as the relevant period could not be said to be without reasonable foundation.

The Court next considered whether, as the Appellant contended, subsequent changes to the statutory regime governing succession to secure tenancies – which removed the 12 month residency condition for new tenancies only – meant the former regime, which continued to apply in the Appellant's case, had always been unjustifiable. Similar arguments had been rejected by the House of Lords in *R v Secretary of State for Work & Pensions ex parte Hooper* [2005] UKHL 29, [2005] 1 WLR 1681 and by the Court of Appeal in *Ratcliffe v Secretary of State for Defence* [2009] EWCA Civ 39, [2009] ICR 762. Underhill

LJ adopted that approach, accepting that changes to the 12-month condition were part of a package of changes to succession rights and that it was not manifestly without reasonable foundation to draw a bright line between existing and new tenancies.

Underhill LJ thus found Knowles J had been right to conclude that even if spouses and common law spouses were in an analogous position for the purpose of art. 14 ECHR, the difference in treatment between them was justified. Underhill LJ noted that in reaching his conclusion, Knowles J had placed considerable weight on the Court of Appeal's decision in *Swift*, a case concerning the treatment of spouses and common law spouses in the context of the Fatal Accident Act 1976. Dealing as it did with a different legislative context, Swift was not binding, but Underhill LJ nonetheless considered it very closely analogous, and strongly reinforcing the conclusion he had reached.

Having found that any prima facie discrimination resulting from the 12-month condition was justified, the Court of Appeal did not go on to consider whether the position of the Appellant as a common law spouse was analogous to that of a married spouse or civil partner for the purpose of art.14.

Comment

Turley follows Michalak and R (Carson) v Secretary of State or Work and Pensions [2005] UKHL 37, [2006] 1 AC 173 in recognising the considerable margin of appreciation afforded to the legislature in the realm of socio-economic matters. It is of interest in that it clarifies the standard of review that applies when a court is considering a challenge based on Article 14 of the ECHR in such context, confirming the applicable standard is whether the measure in question is *'manifestly without reasonable foundation'*. Whilst this does not represent a "get out of jail" free card for respondents, it is a strict test and is, perhaps, more akin to the familiar scrutiny of judicial review than the traditional proportionality analysis.

Ben Lask represented the Secretary of State for Communities and Local Government.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.

Monckton Chambers
1 & 2 Raymond Buildings
Gray's Inn
London, WC1R 5NR

Tel: +44 (0)20 7405 7211
Fax: +44 (0)20 7405 2084
Email: chambers@monckton.com
www.monckton.com