Neutral Citation Number: [2018] EWHC 2733 (QB)

Case No: HQ15X03584

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 October 2018

Before :

MR JUSTICE MURRAY

- -

Between :

THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF HARINGEY	**Claimant**
- and -	
MULKHIS SIMAWI	**Defendant**
- and -	
SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**Interested Party**

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- -

Mr Sam Phillips (instructed by **LB Haringey, Legal Services**) for the **Claimant**
Mr Toby Vanhegan and **Ms Hannah Gardiner** (instructed by **Burke Niazi Solicitors**) for the **Defendant**
Mr Ben Lask (instructed by **Treasury Solicitor**) for the **Interested Party**

Hearing dates: 2 and 3 October 2018

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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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Mr Justice Murray :

1. Mr Mukhlis Simawi, the defendant in these proceedings, is seeking declaratory relief in relation to the "one succession rule" set out in sections 87-88 of the Housing Act 1985. He asks that the Court either:

   i) exercise its power under section 3 of the Human Rights Act 1998 ("the 1998 Act") to "read down" or interpret sections 87-88 of the Housing Act 1985 in the manner for which he contends, as discussed further below; or

   ii) declare under section 4 of the 1998 Act that sections 87-88 of the Housing Act 1985 are incompatible with the rights and fundamental freedoms ("the Convention rights") in article 14 in conjunction with article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") as set out in Schedule 1 to the 1998 Act.

2. This matter arises out of a claim brought by the London Borough of Haringey ("LB Haringey") for possession of a two-bedroom maisonette at 25 Chettle Court, Ridge Road, London N8 9NU ("the Property"). The original claim for possession was issued in the Clerkenwell & Shoreditch County Court on 3 June 2014. The defendant defended the claim on two grounds, namely, that:

   i) the one succession rule is incompatible with articles 14 and 8 of the Convention ("Ground 1"); and

   ii) LB Haringey's decision not to grant a discretionary tenancy to Mr Simawi was unlawful, inter alia, by reason of LB Haringey's failure correctly to apply its own policy ("Ground 2").

3. On 21 October 2014, District Judge Manners made a possession order. On 19 November 2014 Mr Recorder Cohen QC granted permission to appeal, and on 3 July 2015 Mr Recorder Bowdery QC allowed the appeal. In light of Ground 1, by order dated 4 August 2015 District Judge Bell transferred the claim to the High Court. By order dated 26 June 2016 Mr Justice Singh vacated the trial listed for a window in July 2016 and ordered that the Crown be notified of Mr Simawi's application for a declaration of incompatibility, as required by CPR 19.4A.

4. At a hearing on 25-26 October 2016 Mr Justice Supperstone heard submissions from each of LB Haringey and Mr Simawi on Ground 1 and Ground 2. Mr Simawi succeeded on Ground 2. Accordingly, LB Haringey's decision was unlawful, and the claim for possession fails. Mr Simawi, however, continues to pursue Ground 1, seeking the relief I have described above. On 10 November 2016 Supperstone J, noting that it did not appear that Singh J's order of 26 June 2016 had been served on the Crown, ordered that it be served on the Government Legal Department for the Secretary of State for Communities and Local Government and directed that, if the Secretary of State gave notice of his intention to be joined as a party to the proceedings, that he had permission to file a position statement by 4:00pm on Friday, 9 December 2016.

5. On 27 January 2017 Supperstone J made an order that the Secretary of State be joined to the proceedings as an interested party and that the Secretary of State serve a

position statement on the claimant and defendant forthwith. On 7 September 2017 Supperstone J ordered that there be a hearing to determine whether the Ground 1 issue was "academic" and, if not, for further directions to be made for the conduct of the case. By consent order dated 7 November 2017 the parties recorded their agreement that if Mr Simawi were offered and accepted a new secure tenancy, Ground 1 would become academic, and if he refused to accept a new secure tenancy, it would not become academic.

6. At a hearing before Mr Justice Nicklin on 8 February 2018, Ground 1 remained "live" (that is, not academic) as a new secure tenancy had not been offered to and accepted by Mr Simawi. Directions were agreed at the hearing for the service of evidence and skeleton arguments, with a hearing for up to two days fixed for 2 October 2018. Nicklin J was also asked to determine whether the hearing on 2 October 2018 should go ahead even if Ground 1 became academic at some stage. The defendant urged Nicklin J to make such an order, the issue being one of public importance. LB Haringey and the Secretary of State opposed the making of the order. In a considered judgment handed down on 19 February 2018, Nicklin J concluded that the circumstances were exceptional and that Ground 1 raises a real point of some general importance potentially affecting a significant number of people, possibly for years to come: *LB Haringey v Simawi* [2018] EWHC 290 (QB). He therefore made an order that the hearing on 2 October 2018 should proceed even if the claim between LB Haringey and Simawi was otherwise resolved. This is my judgment in relation to Ground 1 as considered at that hearing.

Background facts

7. Mr Simawi was born on 2 February 1969. By an agreement dated 25 July 1994, LB Haringey granted to his parents, Mr Aziz Simawi and Mrs Fatima Hussein, a joint secure tenancy of the Property, which commenced on 8 August 1994. In June 2001 Mr Aziz Simawi passed away. By an agreement dated 28 January 2002, Mrs Hussein was recognised as the sole tenant by succession from 11 June 2001. On 27 October 2013 Mrs Hussein passed away.

8. On 10 December 2013 LB Haringey served a Notice to Quit, expiring on 13 January 2014, in respect of the Property.

9. Mr Simawi applied for a discretionary tenancy. LB Haringey refused the application, setting out in a letter dated 31 March 2014 as their principal reason that the evidence provided did not corroborate a continuous five years residence at the Property. In a separate letter dated the same day, LB Haringey advised Mr Simawi that he was occupying the Property without their permission, and that he must therefore leave the Property immediately, failing which legal proceedings to evict him would be taken without further notice.

Sections 87 and 88 of the Housing Act 1985

10. Sections 87 and 88 of the Housing Act 1985 as in effect at the relevant time for the purposes of this case were:

> "**87. Persons qualified to succeed tenant.**

A person is qualified to succeed the tenant under a secure tenancy if he occupies the dwelling house as his only or principal home at the time of the tenant's death and either —

(a) he is the tenant's spouse; or

(b) he is another member of the tenant's family and has resided with the tenant throughout the period of 12 months ending with the tenant's death;

unless in either case, the tenant was himself a successor, as defined in section 88.

88. Cases where the tenant is a successor.

(1) The tenant is himself a successor if —

(a) the tenancy vested in him by virtue of section 89 (succession to a periodic tenancy), or

(b) he was a joint tenant and has become the sole tenant, or

(c) the tenancy arose by virtue of section 86 (periodic tenancy arising on ending of term certain) and the first tenancy there mentioned was granted to another person or jointly to him and another person, or

(d) he became the tenant on the tenancy being assigned to him (but subject to subsections (2) to (3)), or

(e) he became the tenant on the tenancy being vested in him on the death of the previous tenant, or

(f) the tenancy was previously an introductory tenancy and he was a successor to the introductory tenancy.

(2) A tenant to whom the tenancy was assigned in pursuance of an order under section 24 of the Matrimonial Causes Act 1973 (property adjustment orders in connection with matrimonial proceedings) or section 17(1) of the Matrimonial and Family Proceedings Act 1984 (property adjustment orders after overseas divorce, &c.) is a successor only if the other party to the marriage was a successor."

11. Nicklin J helpfully commented on these provisions at [6] to [9] of his judgment in this case:

> "6. The effect of ss.87-88 HA 1985 is, so far as material:
>
> i) Section 87 identified the persons who were qualified to succeed a secure tenant pursuant to s.89. It provided that a person was qualified to succeed a secure tenant if he occupied the dwelling-house as his only or principal home at the time of the tenant's death and (a) he was the tenant's spouse or civil partner; or (b) he was another member of the tenant's family (as defined in s.113) and had resided with the tenant throughout the period of 12 months ending with the tenant's death, unless, in either case, the tenant was himself a successor, as defined in s.88.
>
> ii) Section 88 defined the circumstances in which the tenant was himself a successor. It provided that a person in whom a secure tenancy had vested on the death of a previous tenant was himself a successor (s.88(1)), but that a person to whom a secure tenancy had been assigned following a breakdown in marriage was not (unless the other party to the marriage was a successor) (s.88(2)).
>
> 7. Section 160 of the Localism Act 2011 ('LA 2011') inserted a new s.86A into the HA 1985. The effect of s.86A is to limit the statutory right of succession to spouses and civil partners. s.86A(3) continues to limit that right to one statutory succession. Other family members, such as children, no longer enjoy a right of succession. However, s.86A applies only to England and only in relation to secure tenancies granted on or after 1 April 2012 ('new STs'). Secure tenancies granted before 1 April 2012 ('old STs') remain governed by s.87 as described at paragraph 6(i) above. The LA 2011 did not amend s.88.
>
> 8. When brought into force, the Housing and Planning Act 2016 ('HPA 2016') will introduce further amendments to the HA 1985. So far as material, schedule 8 renumbers s.86A as s.86G and inserts a new subsection (8): paragraph 3 of schedule 8. The effect of s.86G(8), once it comes into force, will be to align the succession criteria for old and new STs. Thus, the removal of the statutory right of succession from other family members such as children will apply

> to old STs as well as new STs. However, this change will apply only in cases where the tenant dies after the amendment comes into force: paragraph 15 of schedule 8."

12. At [9] of his judgment, Nicklin J noted that a commencement date for schedule 8 of the Housing and Planning Act 2016 had not yet been appointed, which remains the case.

13. Section 86A of the Housing Act 1985, referred to by Nicklin J in his judgment at [7], is of no application in the present case, the tenancy in question having commenced on 8 August 1994 and having been succeeded to by Mr Simawi's mother on 11 June 2001. The Housing and Planning Act 2016 equally does not alter the position in the present case, since the amendments in schedule 8 to that Act will apply only to cases in which the secure tenant dies after the amendments come into force.

14. It appears to be common ground that Mr Simawi's mother could have been treated as a successor under any of clauses (a), (b) or (e) of section 88(1) of the Housing Act 1985, and that it is immaterial which one applies. In each case, by virtue of his mother having become a successor, the "one succession rule" applies, thus preventing a further statutory succession in his favour.

15. It is worth noting at the outset that, quite rightly, Mr Simawi does not allege that the "one succession rule" is in itself incompatible with article 14 of the Convention, read with article 8. He makes the more limited argument that the manner in which the relevant provisions operate constitutes unlawful discrimination. In the case of *R (Gangera) v Hounslow London Borough Council* [2003] EWHC 794 (Admin), [2003] HLR 68, which also concerned a challenge to sections 87 and 88 of the Housing Act 1985 in reliance on articles 14 and 8 of the Convention, Mr Justice Moses (as he then was) noted at [23] that in formulating the rules of succession in the Housing Act 1985:

> "Parliament had to strike a balance between security of tenure and the wider need for systemic allocation of the local authority's housing resources in circumstances where those housing resources are not unlimited. The striking of such a balance is pre-eminently a matter of policy for the legislature. The court should respect the legislative judgment as to what is in the general interest unless that judgment was manifestly without reasonable foundation …. There is no basis for contending that the statutory scheme, which seeks to allocate public resources for the provision of local authority housing to those most in need, amounts to a disproportionate interference with a person's right to respect for his home."

16. I will return to *Gangera* in due course.

The relevant legal principles

17. Article 14 of the Convention is headed "Prohibition of discrimination" and provides:

> "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."

18. Article 14 was considered by the Supreme Court recently in the case of *Re McLaughlin* [2018] UKSC 48, a case that concerned the alleged incompatibility of legislation in Northern Ireland providing for a widowed parent's allowance with an unmarried mother's rights under article 14 of the Convention, read with article 8 of, or article I of the First Protocol to, the Convention. She was denied the allowance as she had never married the deceased father of her children. The judge at first instance in Northern Ireland had made a declaration of incompatibility and had been reversed by the Court of Appeal in Northern Ireland. The Supreme Court allowed the appeal (Lord Hodge dissenting), with Baroness Hale of Richmond PSC giving the leading judgment. At [15], Baroness Hale noted that article 14:

> "[a]s is now well known … raises four questions, although these are not rigidly compartmentalised:
>
> (1) Do the circumstances 'fall within the ambit' of one or more of the Convention rights?
>
> (2) Has there been a difference of treatment between two persons who are in an analogous situation?
>
> (3) Is that difference of treatment on the ground of one of the characteristics listed or 'other status'?
>
> (4) Is there an objective justification for that difference in treatment?"

19. Baroness Hale's approach is based on that taken by Lord Justice Brooke in *Wandsworth London Borough Council v Michalak* [2002] EWCA Civ 271, [2003] 1 WLR 617 (CA) at [20], where he formulated a similar list of questions as an approach to analysing an article 14 claim in relation to succession to a secure tenancy under section 87 of the Housing Act 1985. In an earlier case dealing with article 14, Baroness Hale had expanded on the proper use of the foregoing test and the importance of the questions not being rigidly compartmentalised. In *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 3 WLR 113 (HL(E)) at [134], she said:

> "In my view, the *Michalak* questions are a useful tool of analysis but there is a considerable overlap between them: in particular between whether the situations to be compared were truly analogous, whether the difference in treatment was based on a proscribed ground and whether it had an objective justification. If the situations were not truly analogous it may be easier to conclude that the difference was based on something other than a proscribed ground. The reasons why their situations are analogous but their treatment different will

> be relevant to whether the treatment is objectively justified. A rigidly formulaic approach is to be avoided."

That is therefore the approach I must adopt.

20. In this case, Mr Simawi says that his relevant "rights and freedoms" under the Convention that have been affected are his rights under article 8 of the Convention, which is headed "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 well-being 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."

21. It is common ground between the parties that because this is a claim for possession of the Property, which Mr Simawi has occupied as his home for some years, it falls within the ambit of article 8 of the Convention. I agree.

The issues

22. The issues for me to resolve, therefore, are:

i) the remaining three questions set out by Baroness Hale in *Re McLaughlin* at [15], as they apply in this case, looking at them holistically;

ii) whether, as Mr Simawi contends, section 88 of the Housing Act 1985 is indirectly discriminatory on gender grounds; and

iii) if I find in favour of Mr Simawi's claim, whether I should grant one of the remedies sought by the defendant.

23. The remedies sought by the defendant are:

i) for the Court to exercise its power under section 3 of the Human Rights Act 1998 to read and give effect to section 88 of the Housing Act 1985 as though section 88(1)(e) included the words italicised below:

> "(e) he became the tenant on the tenancy being vested in him on the death of the previous tenant *save where he was the spouse or civil partner of the deceased previous tenant,* or"; or

ii) if the Court does not consider that it is possible to use its power under section 3 of the Human Rights Act 1998, for the Court to make a declaration of incompatibility under section 4 of the Human Rights Act 1998.

24. The claimant says that, even if I reach that stage, I retain a discretion not to grant either of those remedies, and that I should not grant either for good public policy reasons having to do with the serious negative impact the grant of either remedy would have on the ability of local authorities to manage their social housing stock.

Difference in treatment between two persons in an analogous situation

25. Mr Simawi says that the legislation treats differently a person who became a sole tenant consequent upon the death of a former tenant and a person who became a sole tenant consequent upon a judicial assignment of the tenancy following divorce, and yet these two persons are in an analogous situation. Mr Toby Vanhegan, counsel for Mr Simawi, refers to this as the "death-divorce dichotomy".

26. By extension, if a person who succeeds to the tenancy upon the death of a former tenant remarries, the new spouse cannot succeed, whereas the new spouse of the person who succeeds by judicial assignment following divorce can succeed. Mr Simawi submits that the new spouses, following death and divorce respectively, are in analogous situations.

27. Similarly, a qualifying family member cannot succeed to the tenancy upon the death of the widowed tenant, but a qualifying family member could succeed upon the death of the divorced tenant. A "qualifying family member" for this purpose is a family member falling within section 87(b) of the Housing Act 1985. Mr Simawi submits that the qualifying family members, following death and divorce respectively, are in analogous situations.

28. It is common ground that Mr Simawi is a qualifying family member, relative to his mother, who was the successor to the secure tenancy at the Property upon the death of her husband, Mr Simawi's father.

29. Mr Simawi says that a qualifying family member who is barred from succession under the one succession rule following the death of a widowed parent is in an analogous position to a qualifying member who is entitled to succeed following the death of a divorced parent. Yet, assuming that the divorced parent was not a "successor" for the purpose of section 87 of the Housing Act 1985 by virtue of the final words of section 88(2) of the Housing Act 1985, the qualifying family member is treated differently. There is, therefore, a difference in treatment of persons in an analogous position. That is this case.

30. LB Haringey and the Secretary of State say that the position of a qualifying family member following the death of a widowed tenant is not analogous to the position of a qualifying family member following the death of a divorced tenant. This is because the divorced tenant became a tenant following judicial intervention under one of the statutory provisions referred to in section 88(2) of the Housing Act 1985. That judicial intervention means that the situations are not analogous.

31. Whether one person is in an analogous situation to another can only be considered in light of the relevant statutory scheme: *R (Mahoney) v Secretary of State for Communities and Local Government* [2015] EWHC 589 (Admin) at [58]. I will look at the statutory scheme more closely in due course. More generally, as the questions I am considering are not rigidly compartmentalised, I do not think that I can reach a

definitive view on whether the situations are "analogous" in a relevant way until I have also considered the questions of status and objective justification.

32. My view is that the position of a qualifying family member following the death of a widowed tenant under a secure tenancy is arguably analogous to the position of a qualifying family member following the death of a divorced tenant. There is, of course, a difference in the position of the deceased, which arises by operation of sections 87 to 88, but that is why the positions of the qualifying family members are merely analogous and not, in essence, the same. That difference results in the difference of treatment that is at the heart of Mr Simawi's case. It is safer, therefore, to proceed, albeit tentatively, on the basis that the positions are analogous, and to consider questions 3 and 4 of Baroness Hale's four-stage test in *McLaughlin*.

Difference of treatment on the ground of relevant status

33. Article 14 sets out a list of prohibited grounds for discrimination and then makes it clear that it is a non-exhaustive list by use of the words "such as" and "or other relevant status". What counts as a relevant ground or status for this purpose?

34. This is a matter for determination by a court on the basis of specific facts. To draw an example from an English case, in *R (Carson) v Work and Pensions Secretary* [2006] 1 AC 173 at [13], Lord Hoffmann was "willing to assume" that a person's foreign residence was a ground falling within article 14. In *McLaughlin*, Lady Hale found at [31] that not being married can be a relevant status, just as being married can be.

35. The European Court of Human Rights ("ECtHR") has interpreted "other status" in article 14 to mean "personal characteristic": *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) I EHRR 711, 732-733, para 56 (cited by Lord Steyn in his speech in *R (S and Marper) v Chief Constable of the South Yorkshire Police* [2004] UKHL 39, [2004] 1 WLR 2196 (HL(E)) at [48]).

36. Guidance on the determination of what constitutes a "personal characteristic" for this purpose was given by Lord Walker in *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63; [2009] 1 AC 311 at [5], in a well-known passage approved by the full court in a judgment accepting that homelessness is a relevant status within article 14 and which has come to be referred to as the "concentric circles" analysis. I bear it in mind, but it is not necessary for me to set out that passage here. It is, however, helpful for present purposes to quote the following passage from Lord Neuberger's speech in the same case at [42]:

> "[I]t seems clear that 'a generous meaning should be given to the words "or other status" ', per my noble and learned friend, Lord Hope of Craighead, in *Clift* [2007] 1 AC 484, para 48. To similar effect, at para 4.14.21 of *Lester & Pannick, Human Rights Law and Practice*, 2nd ed (2004), it is stated that the ECtHR applies 'a liberal approach to the "grounds" upon which discrimination is prohibited.' That appears to me to be entirely in accordance with the approach one would expect of any tribunal charged with enforcing anti-discrimination legislation in a democratic state in the late 20th, and early 21st centuries."

37. The proscribed grounds in article 14 cannot, of course, be unlimited, but a liberal or generous approach to determining status for purposes of discerning the scope of article 14 is appropriate.

38. It seems to me that whether a person is widowed or divorced is capable of being a personal characteristic or status for purposes of article 14. I accept that whether a person is a child of someone who is widowed or a child of someone who is divorced is more "peripheral or debateable", in the words of Lord Walker in the *RJM v SSWP* case at [5], as a personal characteristic for article 14 purposes, but in my view it is capable of being so in appropriate circumstances. I think that puts Mr Simawi's case, on this aspect of the four-stage analysis, at its highest.

39. Mr Ben Lask for the Secretary of State says that Mr Simawi is seeking to define his personal characteristic by the very difference of treatment of which he complains, namely, the fact that his mother became the tenant or sole tenant upon her husband's death and was therefore herself a successor. That is an impermissible approach: *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484, Lord Bingham at [28], Lord Hope at [47]. With respect, I think that mischaracterises Mr Simawi's argument. The relevant personal characteristic alleged is that he is the child of a widowed parent, rather than the child of a divorced parent, and he is discriminated against on that basis.

40. Mr Lask also argues that in this case there is no difference of treatment of Mr Simawi relative to his chosen comparator, the child of a divorced tenant, based on a personal characteristic of Mr Simawi. Article 14 does not apply to differences arising merely from historical fact: *S and Marper*, per Lord Steyn at [50]. While one can see the force of that observation in the context of the facts of *S and Marper*, which are quite different to this case, it is of limited use for present purposes. Whether someone is married is a matter of historical fact. Whether someone is homeless is a matter of historical fact. And yet married status and homelessness have been recognised as personal characteristics for purposes of article 14.

41. In *Gangera*, as in this case, Mr Gangera was the child of joint secure tenants. His father died in December 1995, and his mother succeeded to the secure tenancy as sole secure tenant. She died in November 2001, and Mr Gangera was blocked from succession to the secure tenancy by virtue of section 87. Mr Gangera's chosen "comparators", however, were different to the chosen comparator in this case. Mr Gangera alleged that he was discriminated against relative to:

    i) a person whose mother had always been a sole secure tenant of the property; and

    ii) a nephew by marriage of a sole secure tenant with no spouse who had resided with the tenant for at least a year.

42. Mr Justice Moses (as he then was) refused the claim on the basis that neither of Mr Gangera's chosen comparators were in an analogous situation to Mr Gangera's. At [26] in that case, Moses J said:

> "[H]owever widely 'status' [under article 14 of the Convention] may be interpreted it is clear to me that there has been no

> discrimination on the grounds of status whatsoever. The reason why the claimant is not entitled to succeed to his mother's tenancy does not depend upon his status at all. It is because his mother had become the sole tenant and therefore, by virtue of the operation of s.88(1)(b) of the 1985 Act, she was herself a successor. The difference in treatment follows from the fact of a previous succession not because of the status of the claimant. His chosen comparisons are not true comparisons at all. In his two examples the comparators were succeeding to a secure tenant who was not himself a successor within the meaning of s.88(1)."

43. This reasoning would appear to provide an answer also to Mr Simawi's claim. Like the comparators in *Gangera*, Mr Simawi's comparator, the child of a divorced tenant, succeeds to a secure tenant who was not herself a successor within the meaning of section 88. Nicklin J notes at [36] of his judgment that Moses J did not consider the effect of section 88(2), and he therefore concluded that the comparators offered by Mr Gangera do not illuminate the point advanced by Mr Simawi in this case. In *Gangera*, the one succession rule would simply not have been engaged in relation to his comparators. In this case, the one succession rule is specifically disengaged by virtue of a specific provision, section 88(2), that Mr Simawi contends has a discriminatory effect relative to someone in his position. So, it is perhaps correct to conclude that *Gangera* does not provide a "complete" answer to the claim, although, in my view, it comes close to doing so.

44. Mr Lask submitted that it is not the status of a person (C) as the child of a widow or the child of a divorcee that determines whether he can succeed as a secure tenant. It is the legal mechanism by which the person from whom he would succeed (P) acquired the secure tenancy that determines whether the one succession rule is engaged. If P acquired the secure tenancy upon the death of a joint secure tenant, then P is a successor under section 88(1) and C cannot succeed to the secure tenancy. If P acquired the secure tenancy upon a judicial assignment under one of the statutory provisions referred to in section 88(2), then P is not a successor and C can succeed to the secure tenancy. Mr Simawi's contention that the one succession rule is disengaged in relation to his chosen comparator, namely, where C is the child of a divorced parent, by virtue of C's status is artificial. I am inclined to agree.

45. Arguably, this closes any remaining gap between this case and *Gangera*, and Mr Simawi's claim must fail. I go on, however, to consider whether there is an objective justification for the difference of treatment complained of by Mr Simawi, arising as a result of section 88(2), given the need to approach the four-stage test holistically.

Objective justification for difference of treatment

46. In relation to objective justification, the ECtHR set out the correct approach to determining whether a difference of treatment constitutes impermissible discrimination in *Carson v United Kingdom* (2010) 51 EHRR 13 at [61]:

> "[I]n order for an issue to arise under art. 14 there must be a difference in the treatment of person in analogous, or relevantly

> similar, situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background. A wide margin is usually allowed to the state under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the general interest on social and economic grounds, and the Court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'." (footnotes omitted)

47. As already noted, sections 87 and 88 of the Housing Act 1985 are concerned with a local authority's ability to manage and distribute its social housing stock fairly. This, in my view, clearly comes within the scope of "general measures of economic or social strategy" for which a wide margin of appreciation is usually allowed to the state. As noted by Brooke LJ in *Michalak* (a case which, as I have already noted, concerned the one succession rule under sections 87 and 88 of the Housing Act 1985) at [41]:

> "It appears to me that this is pre-eminently a field in which the courts should defer to the decisions taken by a democratically elected parliament, which has determined the manner in which public resources should be allocated for local authority housing on preferential terms"

48. Accordingly, the proper test to apply in considering the compatibility of the scheme for succession set out in sections 87 to 88 of the Housing Act 1985, and specifically the differential treatment of succession via death versus obtaining a sole tenancy via judicial assignment in the context of divorce, is whether it is "manifestly without reasonable foundation" ("the MWRF test").

49. This is not a case involving a suspect ground, such as race or gender, which as explained by Lord Hoffmann in the House of Lords case of *Carson* at [15]-[16] would require a much more rigorous standard of review. The status or ground relied on by Mr Simawi is, if anything, towards the outer edge of the concentric circles referred to by Lord Walker in *RJM* at [5]. The MWRF test is therefore the appropriate test. It is the test that was applied by Moses J in *Gangera*.

50. The MWRF test is a "stringent" test, requiring a wide margin of discretion to be accorded to the decision-maker: *R (SG) v Secretary of State for Work and Pensions* [2014] EWCA Civ 156, [2014] HLR 20 at [27].

51. As noted by Ms Frances Walker, a Senior Policy Adviser on Social Housing in the Ministry of Housing, Communities and Local Government ("the Department"), in her evidence, social housing is a scarce and finite resource. It is a valuable, publicly funded social asset. As of 2017, local authority housing stock in England stood at 1.6 million dwellings, with 1.16 million households on local authority waiting lists. A secure tenancy confers on the tenant the right to occupy a home held as part of social housing stock and confers on the tenant substantive security of tenure. The primary objective of the statutory framework governing how such tenancies are granted and succeeded to is to ensure that social housing is distributed fairly.

52. Against that background, the one succession rule is unimpeachable. I have already noted that Mr Simawi does not challenge the one succession rule per se. So the question resolves to whether section 88(2), which, when considered in relation to section 88(1), creates the differential treatment of which Mr Simawi complains, is itself manifestly without reasonable foundation.

53. Ms Walker in her evidence explained why it was necessary for a person who became a tenant or sole tenant upon the death of the previous tenant, or as a result of an assignment other than a judicial assignment, to be treated as a successor under section 88(1). She noted that the papers relating to the Housing Act 1985 and the predecessor provisions in the Housing Act 1980 do not provide an explicit explanation as to why obtaining a sole tenancy via judicial assignment under the provisions referred to in section 88(2) is excluded from the effect of the one succession rule. In her evidence, Ms Walker offered the rationale of the Department why it is legitimate and reasonable to draw such a distinction. First, section 88(2) ensures that the one succession rule does not act as a deterrent or disincentive to divorce, which is particularly important in the context of a marriage where there has been domestic abuse. Secondly, a judicial assignment occurring under one of the provisions in section 88(2) follows a fact-sensitive assessment and considered judicial decision. It is therefore akin to a fact-sensitive allocation decision by a local authority, and quite different from the automatic statutory succession that would occur, for example, on the death of a secure tenant who was not himself a successor under section 88(1).

54. Although Ms Walker provided a justification for both section 88(1) and section 88(2), Mr Vanhegan focussed his submissions on the reasons given by Ms Walker in justification of section 88(2). He criticised those reasons on the following grounds:

    i) no evidence has been provided that these were the reasons actually motivating Parliament to introduce section 88(2) (or its predecessor provision in section 31 of the Housing Act 1980), this is an *ex post facto* justification, long after the original legislation and given by the current government, when what matters is Parliament's intent at the time the statute is enacted;

    ii) it is unrealistic to suggest that succession rights are a serious consideration of victims of domestic violence;

    iii) there is no such thing as an "automatic statutory succession", given the need to fulfil certain criteria, the fulfilment of which will require investigation, and therefore the contrast with the position in relation to judicial assignment following divorce is unhelpful.

55. Mr Vanhegan went further and argued that the difference in treatment between the child of a widowed tenant and the child of a divorced tenant is "completely arbitrary and capricious". There is no sensible housing policy reason for treating the two cases differently. From the local authority's perspective, the widow and her potential successors do not place greater pressure on the local authority's social housing stock than the divorcee and her potential successors. So why, he asked, are they treated differently?

56. Finally, Mr Vanhegan submitted that as no evidence has been presented in this case that Parliament gave any consideration to the difference in treatment between a widowed tenant and a divorced tenant, or their respective children, it is not clear how one can give the UK a margin of appreciation in relation to the provisions of section 87 and 88. In this regard, he referred to a passage in the judgment of the Grand Chamber of the ECtHR in *Hirst v United Kingdom* [2006] 42 EHRR 41 at [79]:

> "As to the weight to be attached to the position adopted by the legislature and judiciary in the United Kingdom, there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote. …[I]t cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote."

57. Mr Vanhegan submitted that in this case there is equally no evidence that Parliament produced its differential treatment of widows and divorcees for succession purposes under sections 87 and 88 of the Housing Act 1985 on a carefully reasoned basis. Mr Vanhegan referred to Lord Hoffmann's encapsulation in *Carson* at [31] of the analytical test in a single question: "is there enough of a relevant difference between X and Y to justify different treatment?"

58. I am not persuaded by these submissions of Mr Vanhegan. Dealing first with the absence of evidence before me of a specific contemporaneous Parliamentary justification for section 88(2) of the Housing Act 1985, or its predecessor in section 31 of the Housing Act 1980, that absence is not, in my view, fatal. To require that in this context sets too high a standard. Section 88(2) is a provision of primary legislation that clearly and, quite obviously, deliberately creates an exception to the rule under section 88(1)(d) that a person who becomes a tenant on the tenancy being assigned to him is a successor. The presumption must be that it was considered by Parliament, particularly where it is clear from the terms of the provision itself that it is predominantly motivated by policy considerations relating to matrimonial proceedings rather than housing policy.

59. The Department's justification for the provision, while admittedly *ex post facto*, strengthens the presumption that section 88(2) has a rational and legitimate purpose and is therefore neither arbitrary nor capricious. In other words, the provision cannot be said to be manifestly without reasonable foundation. Moreover, in paragraph 48 of her witness statement, Ms Walker refers to the Instructions to Parliamentary Counsel at the time the Housing Act 1980 was being drafted and to the Housing Bill 1980

Notes on Clauses (House of Lords), copies of which are exhibited with her witness statement, where express reference is made to the proposed exception where assignment occurs by judicial assignment by order made under section 24 of the Matrimonial Causes Act 1973.

60. As to Mr Vanhegan's submission that it is unrealistic to suggest that succession rights are a serious consideration to a victim of domestic violence, it seems to me that it depends entirely on the circumstances. There is generally an acute stage of relationship breakdown involving domestic abuse where the key consideration is getting the victim and any children to a place of safety away from the abuser. Clearly succession rights are unlikely to be a consideration then. But matrimonial proceedings often follow, over subsequent weeks, months and even years. Housing will be a critical issue then. It is reasonable to suppose that Parliament had this firmly in mind when enacting section 31 of the Housing Act 1980, enacting section 88(2) of the Housing Act 1985 and, under the Housing Act 1996, expanding the scope of section 88(2) (with effect from 1 October 1996 to add reference to section 17(1) of the Matrimonial and Family Proceedings Act 1984). The fact that reference to judicial assignment under matrimonial proceedings is also carefully set out in section 91(3) of the Housing Act 1985 as an exception to the general prohibition on voluntary assignment of a secure tenancy set out in section 91(1) of the Housing Act 1985 is further internal evidence from the statute that these provisions are carefully considered and not arbitrary or capricious.

61. There is, in my view, no force in Mr Vanhegan's criticism of Ms Walker's distinction between automatic statutory succession and judicial assignment following a fact-sensitive analysis by the court in matrimonial proceedings. If relevant statutory criteria are fulfilled, a secure tenancy passes automatically by statute. The fact that, in theory, a question could arise as to whether a statutory criterion had been fulfilled, requiring investigation or leading to a dispute, does not make this less true.

62. Mr Vanhegan's argument that there is no sensible housing policy reason for treating the child of a widowed tenant differently from the child of a divorced tenant can be met simply by the observation that the differential treatment is clearly not motivated only, or even primarily, by housing policy. By creating the exception in section 88(2), Parliament is clearly intending to address a different policy objective relating to the adjustment of property in matrimonial proceedings.

Indirection discrimination on the basis of gender

63. Since, in my view, section 88(2) is objectively justified, there is no unlawful discrimination engaging Mr Simawi's article 14 and article 8 rights under the Convention. For essentially the same reasons, there is no indirect unlawful discrimination on the basis of gender. Baroness Hale makes it clear in *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18 at [15]-[21] that the MWRF test also applies where it is alleged that legislation indirectly discriminates on the basis of gender where, as in this case, the legislation is concerned with a general measure of economic or social strategy.

Conclusion

64. I have found no basis on which it would be appropriate for me to grant the relief sought by Mr Simawi based on Ground 1 of his Defence, either under section 3 or under section 4 of the Human Rights Act 1998. Accordingly, his application for that relief is dismissed.