R (on the application of Turley) v Wandsworth London Borough

[2014] EWHC 4040 (Admin)

Queen's Bench Division, Administrative Court (London)

Knowles J

08 December 2014

Iain Colville (instructed by TV Edwards) for the Claimant

Wayne Beglan (instructed by the Solicitor to London Borough of Wandsworth) for the Defendant

Ben Lask (instructed by the Treasury Solicitor) for the Interested Party

Hearing dates: 27 October 2014

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Approved Judgment

Mr Justice Knowles:

Introduction

1. This case concerns social housing. Where two people are married or are civil partners and one is the tenant under a (periodic) secure tenancy of a dwelling-house but the other is not, then (subject to an exception which is not material for present purposes) the person who is not the tenant will be qualified to succeed the person who is, if he or she occupies the dwelling-house as his or her only or principal home at the time of the tenant’s death.

2. However, in the case of secure tenancies granted before 1 April 2012 in England, and secure tenancies granted even after that date in Wales, where those two people are not married or civil partners but live together as if they are, then the person who is not the tenant has to meet an additional condition. In order to succeed the tenant, the person living with the tenant as if a spouse or as if a civil partner must also have resided with the tenant throughout the period of twelve months ending with the tenant’s death (“the additional condition”). This is what, on the face of it, is provided by section 87 of the Housing Act 1985, before the introduction, so far as England is concerned, but not Wales, of section 86A of the Housing Act 1985 by the Localism Act 2011 (“the Localism Act”).

The challenge by way of judicial review

3. It is the presence of the additional condition that has led to this hearing. The Claimant, Ms Turley, challenges by way of judicial review the decision of her council, London Borough of Wandsworth (“the Council”), that she does not succeed Mr Doyle, a secure tenant, on his death. Ms Turley’s challenge goes to the additional condition and thus to the legislation itself. Accordingly the Secretary of State for Communities and Local Government (“the Secretary of State”) has participated as an interested party.

4. Permission to bring this judicial review was granted by Foskett J on 19 March 2014. I mention for completeness that there was arguably delay on Ms Turley’s part before bringing the challenge. This was a matter also reserved by Foskett J to this substantive hearing. In all the circumstances of the case I consider the matter better decided on its merits, notwithstanding the arguable delay.

Essential Facts

5. For the purpose of this decision I take the essential facts to be as follows:

(1) Mr Doyle was the secure tenant of a flat in Battersea Park Road, London SW8 (“the flat”). The tenancy was granted before 1 April 2012.

(2) Mr Doyle was the long-term partner of Ms Turley, the Claimant. They have four children and they occupied the flat with their children since 1995, moving there from an earlier shared address.

(3) There was a period of breakdown in the relationship, and between December 2010 and January 2012 Mr Doyle lived elsewhere. Ms Turley remained at the flat with some of the children.

(4) However by January 2012 the relationship was restored and Mr Doyle returned to the flat.

(5) Sadly, Mr Doyle had become increasingly unwell. On 17 March 2012 Mr Doyle died after a very short stay, of a matter of days, at a hospice.

6. I record that the Council, appearing by Mr Wayne Beglan of Counsel, does not accept that Mr Doyle was still a secure tenant at the date of his death. It is not necessary for me to resolve that question, and I do not enter into the facts said to be behind it. For the purposes of this decision I will assume, without deciding, that he was still a secure tenant.

Housing Legislation

7. Section 87 in Part IV of the Housing Act 1985 originally provided, so far as material:

“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 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;

….”

8. Section 86A was added to the Housing Act 1985 by the Localism Act, so as to apply to secure tenancies granted in England from 1 April 2012. It provides so far as material:

“86A. Persons qualified to succeed tenant: England

(1) A person (“P”) is qualified to succeed the tenant under a secure tenancy of a dwelling-house in England if –

(a) P occupies the dwelling-house as P’s only or principal home at the time of the tenant’s death, and

(b) P is the tenant’s spouse or civil partner.

(2) A person (“P”) is qualified to succeed the tenant under a secure tenancy of a dwelling-house in England if-

(a) at the time of the tenant’s death the dwelling-house is not occupied by a spouse or civil partner of the tenant as his or her only or principal home,

(b) an express term of the tenancy makes provision for a person other than such a spouse or civil partner of the tenant to succeed the tenancy, and

(c) P’s succession is in accordance with that term.

…

(5)For the purposes of this section –

(a) a person who was living with the tenant as the tenant’s wife or husband is to be treated as the tenant’s spouse, and

(b) a person who was living with the tenant as if they were civil partners is to be treated as the tenant’s civil partner.

…”

9. As a result of amendment by the Localism Act, section 87 of the Housing Act 1985 provides, so far as material, for secure tenancies granted from 1 April 2012 in Wales:

“87. Persons qualified to succeed tenant: Wales

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

(a) he is the tenant’s spouse or civil partner, or

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

…”

10. At all material times the Housing Act 1985 has defined “member of a person’s family” within the relevant Part of the Act as follows:

“113. Members of a person’s family.

(1) A person is a member of another’s family within the meaning of this Part if –

(a) he is the spouse or civil partner of that person, or he and that person live together as husband and wife or as if they were civil partners, or

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

(2) For the purpose of subsection (1)(b) –

(a) a relationship by marriage or civil partnership shall be treated as a relationship by blood,

(b) a relationship of the half-blood shall be treated as a relationship of the whole blood,

(c) the stepchild of a person shall be treated as his child, and

(d) an illegitimate child shall be treated as the legitimate child of his mother and reputed father.”

The reference in section 113(1) to living “together as husband and wife” is today to be interpreted in accordance with Part 1 of Schedule 3 to the Marriage (Same Sex Couples) Act 2013 (“the 2013 Act”). It includes a couple of opposite sex or of the same sex who are not married but are living together as if married; as if each other’s spouse.

11. The additional condition is not to be found in certain legislation concerning private sector tenancies. The Rent Act 1977 when dealing with succession to statutory tenancies and the Housing Act 1988 when dealing with succession to assured tenancies each contain a short provision in these terms: “a person who was living with the tenant as his or her wife or husband shall be treated as the tenant’s spouse” (see paragraph 2(2) of Schedule 1 to the Rent Act 1977 and section 17(4) of the Housing Act 1988).

The Convention

12. Through her counsel, Mr Iain Colville, Ms Turley seeks to ground her challenge on the Human Rights Act 1998 (“the Human Rights Act”). In particular, reliance is placed on Articles 8 in conjunction with 14 of the European Convention on Human Rights (“the Convention”) as scheduled to the Human Rights Act. These are in the following terms:

“Article 8: Right to respect for private and family life

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.

…

Article 14: Prohibition of discrimination

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.”

13. Counsel for the Secretary of State, Mr Ben Lask, accepts that the facts fall within the ambit of Article 8 of the Convention. He also accepts that what he terms “marital status” is a status for the purposes of Article 14. He does not however accept that the partner of a deceased secure tenant, where they were not married or civil partners, is in an analogous position to the spouse or civil partner of a deceased secure tenant.

14. From the decisions cited to me by the parties the main principles that are applicable may be summarised as follows, including by taking into account (in accordance with section 2 of the Human Rights Act) judgments of the European Court of Human Rights:

(1) “… [I]n order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations”: Carson v United Kingdom (2010) 51 EHRR 13 at [61] and [83] (ECHR).

(2) “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 …”: Carson (above) at [61] (ECHR).

(3) “… [T]he nature of the status upon which differential treatment is based weighs heavily in determining the scope of the margin of appreciation to be accorded to Contracting States.”: Bah v United Kingdom (2012) 54 EHRR 21 at [47] (ECHR), and see R(Carson) v Secretary of State for Work and Pensions [2005] UKHL 37; [2006] 1 AC 173 at [15]-[16] (HL).

(4) “… [A]dditional respect … is customarily afforded to judgments about social policy which find expression in legislation …”: R(SG and Others) v Secretary of State for Work and Pensions [2014] EWCA Civ 156; [2014] HLR 20 at [28] (CA) per Lord Dyson MR; and see R(MA and Others) v Secretary of State for Work and Pensions [2014] EWCA Civ 13; [2014] HLR 19 at [57] (CA) per Lord Dyson MR.

(5) “National housing policy is a field where the court will be less ready to intervene. Parliament has to hold a fair balance … taking into account broad issues of social and economic policy”: Ghaidan v. Godin-Mendoza [2004] UKHL 30; [2004] 2AC 557 at [19] (HL) per Lord Nicholls; and see also Wandsworth London Borough Council v Michalak [2003] 1 WLR 617 at [41] (CA) per Brooke LJ.

Analogous position

15. Given the conclusions that I reach below, on the question of justification, it is not essential to reach a conclusion on the question whether, and if so where, those who are not married or civil partners but live together as if they are, are for the purpose of the Convention in an analogous position to those who are married or civil partners. I am confident that the question is better left to cases in which it is essential to the outcome.

The justification for the additional condition

16. Plainly the additional condition amounts to a difference of treatment between a spouse or civil partner and a person who was not married or in a civil partnership but lived together with another person, as if the spouse or civil partner of that person. As Mr Iain Colville, Counsel for Ms Turley, summarises the heart of the matter, “… if she had been married to Mr Doyle she would have succeeded automatically on his death … regardless of the length of their marriage”.

17. The evidence on behalf of the Secretary of State is given in these terms by Ms Frances Walker, a Senior Policy Adviser in the Department for Communities and Local Government, in a witness statement she made on 22 May 2014 with the authority of the Secretary of State:

“Social housing is a scarce and finite resource and the primary objective of the statutory framework governing how secure tenancies are granted and succeeded to is to ensure that it is fairly distributed. As will be obvious, a social home which passes to a member of the deceased’s household is a home which cannot be allocated to someone on the housing waiting list and there are currently 1.69 million households on local authority waiting lists in England.

In proposing to Parliament the rules which should govern who has a statutory right to succession, the Government sought to strike a balance between the genuine management needs of the landlord authority and the legitimate needs of those members of the tenant’s family who may have considered the dwelling as their home.”

18. I mean no disrespect in any way when I say that I am not convinced that this explains why the additional condition exists for an unmarried couple (living as if married) but not for a married couple; for a couple living as if they were civil partners but not for the couple who were civil partners.

19. The starting point for the particular legislative provisions with which this case is concerned seems more the question of who should be entitled to continue to enjoy property than the question of what property should be available to the Council as the landlord authority to meet the needs of others. I fully appreciate that these are different sides of the same coin. Nonetheless identification of the starting point makes a contribution in understanding the provisions, including the additional condition.

20. For two people to be treated as living together as if married or as if civil partners already requires more to be proved than that those two people simply live together (see, for example, City of Westminster v Peart (1991) 24 HLR 389 at 397 (CA) per Sir Christopher Slade). It is therefore perfectly fair to ask why the additional condition is there, when there is already the requirement for proof that the two people must be living together as if married or as if civil partners.

21. The authorities cited to me established the following propositions:

(1) If two people are living together in the same household that may raise the question whether they are living together as if married or as if civil partners. Indeed, in many circumstances that fact may be strong evidence that they are living together as if married or as if civil partners; but in each case “it is necessary to go on and ascertain, in so far as this is possible, the manner in which and why they are living together in the same household; …”: see Crake v Supplementary Benefits Commission [1982] 1 All ER 498 at 502 per Woolf J.

(2) “Working out whether a particular couple are or were in such a relationship is not always easy. It is a matter of judgment in which several facts are taken into account. … What matters most is the essential quality of the relationship, its marriage-like intimacy, stability, and social and financial inter-dependence”: Ghaidan (above) at [139] (HL) per Baroness Hale.

(3) Where the facts show that the two persons have been living together without being married or civil partners “their intentions, as demonstrated by their conduct, are … of great importance”: see City of Westminster v Peart (above) at 398 (CA) per Sir Christopher Slade. The case cited itself illustrates, albeit on “rather unusual particular facts”, that where the “relationship was obviously an unsettled one and not apparently regarded by either of them as having any degree of permanence” a conclusion that the two people did not live as if married throughout a period of twelve months can be reached more confidently than a conclusion simply that they did not live as if married.

(4) In context, the question is “whether a sufficient state of permanence has been reached so that the surviving party can fairly be said in all the circumstances to be a member of the original tenant’s family”: Helby v Rafferty [1979] 1 WLR 13 at 23 (CA) per Roskill LJ. This “must be a question of fact and degree in each case”: Helby v Rafferty (above) at 23. It has been observed judicially that “the longer the relationship, the easier it will be to infer permanence” (Chios Property Investment Co Ltd v Lopez (1987) 20 HLR 120 at 122 (CA) per Sir George Waller).

22. Against the background of those propositions, to require a state of affairs to be demonstrated for a period of time serves a legitimate aim. The aim is reliability in the assessment of whether two people are living together as if they were spouses or as if they were civil partners.

23. The additional condition is perhaps a blunt instrument, and that is perhaps why the additional condition will not always feature as a specific requirement in particular legislation. But that does not mean it lacks an objective and reasonable justification. Further there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. In context, the 12 month period selected is not an unduly long period.

24. There is at least a close parallel to the explanation identified in the Court of Appeal when addressing a two-year cohabitation requirement before unmarried partners would have a statutory right to claim damages for loss of dependency under section 1(3) of the Fatal Accidents Act 1976. In Swift v Secretary of State for Justice [2013] EWCA Civ 193; [2014] QB 373 at [36] (CA) Lord Dyson MR put things in this way (the case was decided before the 2013 Act was enacted):

“In my view Parliament was entitled to decide that there had to be some way of proving the requisite degree of permanence and constancy in the relationship beyond the mere fact of living together as husband and wife. It was entitled to take the view that there cannot be a presumption in the case of short-term cohabitants, unlike that of married couples (section 1(3)(a)) or parents and their children (section 1(3)(e)) that the relationship is or is likely to be one of permanence and constancy. It was entitled to decide that it was therefore necessary to have a mechanism for identifying those cases in which the relationship between cohabitants is sufficiently permanent to justify protection under the 1976 Act.”

25. I do not think that the conclusion reached is disturbed by the fact that the additional condition is not to be found, for example, in legislation concerning private sector tenancies. We are in territory in which it is legitimate to leave the matter either to be addressed as section 86A(5) of the Housing Act 1985 requires, or to be addressed as section 87 of that Act required and (in Wales) still requires. As observed, the additional condition is not essential, but that does not mean it cannot properly be used.

26. Although like Ghaidan (above) the present case concerns succession to tenancies, unlike Ghaidan the present case is not “a case in which the right to respect for the individuality of a human being is at stake” (to use the language of Lord Hoffman in R (Carson) (above) at [17]). A difference in treatment based on sexual orientation (as successfully challenged in Ghaidan) is not comparable to the presence of an additional condition based on the presence or absence of the formalisation of a relationship through marriage or civil partnership.

27. Mr Colville submits that it is a rational and a reasonable choice in today’s society for a couple to live together as if married or as if having entered into a civil partnership. He adds that “formalities [of marriage or civil partnership] should not be a prerequisite to the benefits of a democratic society”. However in my judgment the legislation in fact works to confer, rather than deny, rights of succession where a couple live together as if married or as if having entered into a civil partnership. The additional condition is directed to achieving a reliable conclusion on the question whether the couple are so living.

The removal of the additional condition in England

28. What of the decision to remove the additional condition from section 87 prospectively but not retrospectively? In context, it is enough to say that it would have been a considerable thing to alter property rights retrospectively. That point is reinforced when one bears in mind that whilst section 87 removed the additional condition it did so at the same time as narrowing the circumstances in which others would enjoy a right of succession.

29. What of the decision to remove the additional condition in England but not Wales? It is for the Welsh Assembly to decide at least when (and, on the face of it, whether, but I do not need to form a view on that) that change (or some other equalising change) should apply in Wales. In line with the principles summarised at paragraph 14 above, a judgment about social policy that has been expressed in legislation, is a judgment to which additional respect is customarily afforded.

30. There is some particular parallel with the decision of the Court of Appeal in dealing with a new scheme for war pensions in Ratcliffe v Secretary of State for Defence [2009] ICR 763 at [89], where Hooper LJ concluded:

“The decision from what point in time unmarried partners are put in an analogous position to spouses in the field of pensions, is a decision for the government and is a decision with which the courts will not normally interfere …”

Interpretation and compatibility

31. Ms Turley argues that words should be read into section 87 of the Housing Act 1985 so as to remove the additional condition. But the wording does not bear that construction and the duty of interpretation in section 3 of the Human Rights Act does not engage, in the circumstances considered above. So also in those circumstances the power to make a declaration of incompatibility with Article 14 of the Convention does not engage.

Irrationality and unreasonableness

32. A remaining limb of Mr Colville’s argument for Ms Turley was the suggestion that it was irrational and unreasonable for the Council to invoke the additional condition when it has subsequently been removed, at least in England and from secure tenancies with later commencement dates. I do not believe this suggestion falls within the permission to bring a judicial review that was granted to Ms Turley. In any event the suggestion has no merit. The Council properly took the course of applying the law in accordance with its terms.

Conclusion and endnote

33. Applying statute and on authority and taking into account the judgments of the European Court of Human Rights, in my judgment the Secretary of State and the Council are correct that Ms Turley is not entitled to the orders she seeks.

34. Many are the systems that can give rise to hard decisions on particular sets of facts. The set of facts in Ms Turley’s case will perhaps not be common. As it happened, as a matter of record in the present case there was a safety net for Ms Turley. Before Mr Doyle died Ms Turley had asked the Council to grant a joint tenancy to her and Mr Doyle in place of the sole tenancy in Mr Doyle’s name. The Council did not accede to her request but later conceded that it should have done so. Had it done so, the Council reasoned, she would have been a secure tenant in her own right. In the circumstances the Council offered her another, but smaller, home.

35. I am grateful to all Counsel, and those assisting them, for their argument.