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## (2013 – forthcoming ) *Conveyancer and Property Lawyer*

### **Second successions to secure tenancies**

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One of the lower profile elements of the Localism Act 2011 is found in s.160. This provision alters (in England but not Wales) the previous rules relating to succession rights to secure tenancies. With respect to tenancies entered into since April 1 2012, succession rights are now limited to a tenant's co-resident spouse/partner/civil partner. The previous provisions made for succession by various family members in the Housing Acts 1980 and then 1985 have been removed (although local authorities may create such rights contractually).<sup>1</sup> Since the provisions of the Localism Act 2011 are not retrospective, most succession cases will (for quite a few years) fall under the previous statutory scheme.<sup>2</sup> This paper explores an ostensibly capricious anomaly within that scheme, and offers an analysis rooted in the HRA 1998 to overcome it.

#### **The statutory scheme under the Housing Act 1985**

A familiar problem which arises for lawyers acting for defendants in possession cases is thrown up by the 'one succession rule' for secure tenancies. The Housing Act 1985 permits (in respect of tenancies granted before April 1 2012) succession to spouses/partners/civil partners of the original tenant<sup>3</sup> and (if the person concerned has been residing with the deceased tenant for at least twelve months prior to her death) to certain family members.<sup>4</sup> (The succession rights of an entitled family member are

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<sup>1</sup> Now the Housing Act 1985 s.86A.

<sup>2</sup> The amended text of the Housing Act 1985 offers no obvious indication that the previous rules remain in place for pre-April 2012 tenancies. One might wonder if that omission was designed to mislead the novice reader. This perhaps raises a broader question about the nature of legislative drafting. S.86A might for example simply have reproduced the old s.87 with the opening caveat that it applies only to tenancies entered into before 1<sup>st</sup> April 2012. S.86A could then have been rendered as s.86B, introduced by the caveat that it applies in respect of tenancies entered into on or after 1<sup>st</sup> April 2012.

#### **3 Housing Act 1985 s.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;

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

#### **4 Housing Act 1985 113.— Members of a person's family.**

somewhat qualified by a ground of possession which enables the local authority in some circumstances to regain a property which is too large for the successor's needs and reallocate the successor another property).<sup>5</sup> There is however no statutory right to a 'second' succession.<sup>6</sup>

Some local authorities mitigate the rigour of the rule by making provision for 'discretionary' second successions in some circumstances within their housing allocation schemes and/or by making provision for (some) second successions in their tenancy agreements. Councils are under no obligation to do so.

It is now post-*Pinnock*<sup>7</sup> conceivable in principle (if unlikely to succeed in practice)<sup>8</sup> that a putative second successor might mount an Art 8 proportionality defence against eviction if her personal circumstances would make eviction 'particularly harmful'<sup>9</sup> to her or if the council has failed to follow its own policies towards such persons or otherwise acted unlawfully in a procedural sense.<sup>10</sup> Success on the latter basis would likely prove short-lived, since it would be open to the authority to reach the same substantive conclusion once it has adjusted its decisionmaking process. Success on the former basis might be rather precarious as well. The defendant would not thereby become a tenant; her occupancy status would be very unclear and it would always be open to the council to begin new proceedings if circumstances changed to a degree that would make eviction a proportionate response.<sup>11</sup> For some such clients, there may however be an alternative and more effective line of defence.

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(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.

<sup>5</sup> Housing Act 1985 Sch. 2 ground 16.

<sup>6</sup> It should be recalled that if the tenancy (and the first death) pre-date the coming into force of the Housing Act 1980 then the surviving tenant succeeded only to a common law tenancy. He/she would have become a secure tenant de novo in 1981; see *Birmingham CC v Walker* [2007] UKHL 22; [2007] 2 A.C. 262.

<sup>7</sup> *Manchester City Council v Pinnock* [2010] UKSC 45; [2011] 2 A.C. 104.

<sup>8</sup> For a forceful suggestion from very experienced counsel that few such defences should even be seriously entertained by the county courts see J. Holbrook, "Valuable possession" (2011) *New Law Journal* 425 (25 March).

<sup>9</sup> The phrase is taken from Lord Neuberger's post-*Pinnock* Court of Appeal judgment in *Corby BC v Scott* [2012] EWCA Civ 276 at para 24. The concept obviously relates only to the 'personal circumstances of the defendant' strand of proportionality.

<sup>10</sup> *Pinnock* proportionality and the so-called public law defences to possession proceedings which preceded it (see *Kay v LB Lambeth* [2006] UKHL 10; [2006] 2 A.C. 465; *Birmingham City Council v Doherty* [2008] UKHL 57; [2009] 1 A.C. 367) are remarkably opaque legal principles. See especially the critique by D. Cowan and C. Hunter, "Yeah but, no but: *Pinnock* and *Powell* in the Supreme Court" (2012) *Modern Law Review* 78.

<sup>11</sup> *Barber v Croydon LBC* [2010] H.L.R. 26 addresses this point squarely in relation to public law defences. There can be no good reason for the principle not also applying to Art 8 defences: per Patten LJ at para 47:

The defendant in such circumstances is often the adult child (C) of parents who went into occupation as joint tenants. One of the parents (H) died, and under the scheme of the Housing Act 1985 the surviving parent (W) becomes a sole tenant. When W then dies, C cannot succeed as she would be a second successor. But if H and W had entered into occupation with W as sole tenant, then C could succeed so long as she had been living in the premises for the requisite twelve months prior to W's death.

There is an element of caprice about that result of course. The scheme of the Act obviously envisages inter-generational succession, from a single tenant parent to a child or grandchild for example, but the treatment of joint tenancy succession can lead to quite different results for no obviously good reason. The stark illustration of this provided by comparing two hypothetical households in adjacent properties. The Smith parents take as joint tenants. H dies, W succeeds, and C cannot succeed when W dies. The Jones parents take with W as sole tenant. H dies and there is no succession. C succeeds when W dies. Even if W Smith and W Jones die on the same day, the flats are identical, and C Smith and C Jones have identical housing needs, C Jones is a secure tenant and C Smith is a trespasser.<sup>12</sup>

The distinction appears to make no sense at all. Apparent silliness in legislative schemes (perhaps unhappily) does not provide a ground of challenge to that scheme in an art 8 HRA 1998 'gateway A' sense. Discrimination does however provide a root for an Art 14 challenge.<sup>13</sup> And at least in some circumstances, the 'no second succession' rule raises an Art 14 problem.

### **An Art 14 analysis**

S.87 and s.88 of the Housing Act 1985 treat a person who becomes a tenant on the death of her/his spouse or civil partner as a successor to the tenancy. This consequence applies if the partners were joint tenants or if the deceased partner was the sole tenant. However, per Housing Act 1985 s.88(2) a person who becomes the tenant following an assignment by the court consequent on the breakdown of a marriage/civil partnership/cohabitation relationship becomes a tenant de novo unless the other tenant was him/herself a successor.<sup>14</sup>

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"The consequence of Mr Barber having established a gateway (b) defence is that the action fails and should be dismissed. It was suggested...that this might have the consequence that the Council would either be issue-estopped or prevented on *Henderson v Henderson* [(1843) 67 E.R. 313] principles from seeking a possession order in a second action were it to carry out the consultation process I have identified but nevertheless ultimately conclude that the recovery of possession was, in all the circumstances, the appropriate remedy. I do not accept that. If *Wednesbury* -type public law defences are to be permitted to be run in private law proceedings for possession then an exception to the private law rules against re-litigating previously decided issues has to be recognised. In such cases, the court will not treat the second action as an abuse of process when it has been necessitated by the Council having to take further administrative steps (including reconsideration) in order to satisfy its public law obligations. In such cases, the second action will fall to be considered on its merits alone."

<sup>12</sup> The element of caprice arises in respect of sole tenant couples as well. The child of such a couple is better placed for succession purposes if the non-tenant parent predeceases the tenant parent.

<sup>13</sup> 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.

<sup>14</sup> **Housing Act 1985 s.88. — Cases where the tenant is a successor.**

A person (W1) whose spouse/partner ‘leaves’ her/him because of death is therefore treated less favourably within the ambit of Art 8<sup>15</sup> for succession purposes under the scheme of the Housing Act 1985 than a person (W2) whose spouse/partner ‘leaves’ her/him because of relationship breakdown. The less favourable treatment to W1 arises because W1’s home is no longer a familial asset which will pass as a matter of law on W1’s death either to a qualifying family member or a new spouse. Relatedly, while W2 could assign her de novo tenancy to a qualified potential successor, W1 cannot do so.<sup>16</sup>

Less (indeed much less) favourable treatment (within the ambit both of Art 8 and Art 1 of the First Protocol) also extends consequentially to a child (or new spouse/partner/civil partner) who satisfies the succession requirements of Housing Act 1985 s. 87 (and for non-spouses s.113) if her/his parent/new partner was a sole tenant by death than if the parent/new partner was a sole tenant by relationship breakdown. In the latter case, the child/new partner is herself a secure tenant. While she cannot assign the tenancy and cannot pass it by succession on her death, she enjoys the legal right to significant security of tenure, the right to buy, and a rent set at significantly less than those prevailing in the private sector. In the former case, the child/new partner has no legal rights at all in her home, save the dubious benefit of being protected against ‘disproportionate’ eviction.

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

(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).....is a successor only if the other party to the marriage was a successor.

(2A) A tenant to whom the tenancy was assigned in pursuance of an order under Part 2 of Schedule 5, or paragraph 9(2) or (3) of Schedule 7, to the Civil Partnership Act 2004 (property adjustment orders in connection with civil partnership proceedings or after overseas dissolution of civil partnership, etc.) is a successor only if the other civil partner was a successor.

S.88(2) is confined to transfers under the Matrimonial Causes Act 1973 s.24 and Civil Partnerships Act 2004. However the same rule is contained in the Family Law Act 1996 s.532 and Sch.7 para 7 for transfers under that regime (between non-married opposite gender partners).

<sup>15</sup> Art 14 is not a free standing entitlement, either under the Convention or under the HRA, but can be relied upon only when the impugned discrimination affects (or ‘engages’ another Convention Right).

**16 Housing Act 1985 s.91.— Assignment in general prohibited.**

(1) A secure tenancy ....is not capable of being assigned except in the cases mentioned in subsection (3)....

(3) The exceptions are—

(a) an assignment in accordance with section 92 (assignment by way of exchange);

(b) an assignment in pursuance of an order made under—

(i) section 24 of the Matrimonial Causes Act 1973 (property adjustment orders in connection with matrimonial proceedings)....,

(iv) Part 2 of Schedule 5, or paragraph 9(2) or (3) of Schedule 7, to the Civil Partnership Act 2004 (property adjustment orders in connection with civil partnership proceedings or after overseas dissolution of civil partnership, etc.);

(c) an assignment to a person who would be qualified to succeed the tenant if the tenant died immediately before the assignment

The joint tenant or non-tenant spouse would - as her partner lies on his death bed – therefore be well-advised to begin (amicably one assumes) divorce/separation proceedings before the partner dies to become a tenant de novo through judicial assignment, thereby preserving her child’s entitlement to succeed to a secure tenancy of the family home. That is not an especially attractive - nor indeed practical - prospect. But it is the obvious route through which such a person could protect her/his and her/his family’s interests in their home.

Why might this differential treatment be thought problematic in an Art 14 sense?<sup>17</sup> The difficulty becomes apparent when one considers the ECtHR’s current understanding of Art 14, articulated recently in *Serife Yigit v Turkey*:<sup>18</sup>

“Relevant general principles

67 According to the Court’s settled case law, discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations.<sup>22</sup> [See *DH v Czech Republic* (2008) 47 E.H.R.R. 3 at [175]].

A difference in treatment has no objective and reasonable justification 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.<sup>23</sup> [See *Larkos v Cyprus* (2000) 30 EHRR 597 at [39]].

The provisions of the Convention do not prevent, in principle, contracting states from introducing general policy schemes by way of legislative measures whereby a certain category or group of individuals is treated differently from others, provided that the difference in treatment which results for the statutory category or group as a whole can be justified under the Convention and its Protocols.<sup>24</sup> [See, *mutatis mutandis*, *Ždanoka v Latvia* (2007) 45 E.H.R.R. 17 at [112]].

68 In other words, art.14 does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest, strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention.<sup>25</sup> [Unal *Tekeli v Turkey* (2006) 42 E.H.R.R. 53 at [51]].”

71 As to the burden of proof in this sphere, the Court has established that once the applicant has shown a difference in treatment, it is for the Government to show that it was justified.<sup>30</sup> *DH* (2008) 47 E.H.R.R. 3 at [177]; *Timishev v Russia* (2007) 44 E.H.R.R. 37 at [57]; and *Chassagnou v France* (2000) 29 E.H.R.R. 615 at [91]–[92].

There is no obligation arising under the Convention in international law or under the HRA in domestic law for Parliament to have created any rights of succession at all.<sup>19</sup> Having enacted such rights for some persons however, Parliament has created both

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<sup>17</sup> I assume here that the meanings of Art 14 ECHR and Art 14 of Sch.1 of the HRA 1998 are identical and that a domestic court would regard the practical effect of HRA 1998 s.2 on this point as a requirement to apply ECHR jurisprudence. On this point generally (and with specific reference to housing law) see *Manchester City Council v Pinnock* [2010] UKSC 45; [2011] 2 A.C. 104. at para 48:

“...[S]ection 2 of the HRA requires our courts to “take into account” EurCtHR decisions, not necessarily to follow them. Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line.”

<sup>18</sup> (2011) 53 E.H.R.R. 25.

<sup>19</sup> Either for the purposes of Art 8 or Art 1 of the First Protocol. On Art 8 see *Buckley v United Kingdom* (1997) 23 E.H.R.R. 101. n art 1 of the First Protocol see *Carson v United Kingdom* (2010) 51 E.H.R.R. 13.

an international and domestic law obligation to ensure that those rights are applied consistently with Art 14.<sup>20</sup>

For the issue considered in this paper, three questions would seem to arise from an Art 14 perspective. The first is whether a person who becomes a successor tenant through ‘widowhood’ thereby has as such a ‘status’ for the purposes of Art 14.<sup>21</sup> If yes, the second question is whether ‘widowhood successors’ and their potential successor children/new partners are in an ‘analogous situation’ with ‘divorce successors’ (and their potential successors) for the purposes of Art 14.<sup>22</sup> If yes, the third issue is whether there is any rational justification for the less favourable treatment accorded by the Housing Act 1985 to ‘widowhood successors’ and their putative successor children/new partners.

### *The ‘status’ issue*

Although Art 14 does list various types of ‘status’, the specific matters listed are clearly not intended to be exhaustive. The list begins with ‘such as’ and ends with ‘other status’. It is hardly surprising therefore that the ECtHR has identified many other statuses as falling within Art 14. In 1976, in *Kjeldsen, Busk Madsen and Pedersen v Denmark*,<sup>23</sup> the ECtHR indicated that ‘any other status’ would embrace the ‘personal characteristics of the complainant. But it rapidly became apparent that this notion of ‘personal characteristics’ was not limited either to physiological or otherwise ‘given’ aspects of one’s identity. It can also extend to choices one makes about how (or where) one lives one’s life. One’s place of residence can be a status for this purpose,<sup>24</sup> as can the particular legal tenure under which one occupies one’s home.<sup>25</sup> Being employed in the military forces,<sup>26</sup> being a member of a trade union<sup>27</sup> or owning very small rather than large pieces of land<sup>28</sup> can all satisfy this element of the Art 14 test. In the context of family law, being a child born outside of marriage<sup>29</sup>

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20 The potential significance of Art 14 for all sorts of what we might broadly term ‘welfare provision’ has perhaps not yet been fully appreciated by housing lawyers, the tool having been used primarily by employment and more latterly social security benefits. See especially M. Cousins, “The European Convention on Human Rights, non-discrimination and social security: great scope, little depth?” (2009) *Journal of Social Security Law* 120.

21 That question may be too narrowly drawn. A more apposite question may simply be whether widowhood per se is a status.

22 For rhetorical reasons, I use the term ‘divorce’ throughout this paper to include relationship breakdown between civil partners and/or non-married opposite gender partners and ‘widowhood’ to include persons of either gender be they formally the spouse, civil partner or opposite sex cohabitee of the deceased tenant.

23 (1976) 1 EHRR 711.

24 *Carson v United Kingdom* [2010] 51 E.H.R.R. 13.

25 *Larkos v Cyprus* [2000] 30 E.H.R.R. 597

26 *Engel v Netherlands* (1976) 1 E.H.R.R. 647.

27 *National Union of Belgian Police v Belgium* (1979) 1 E.H.R.R. 578.

28 *Chassagnou v France* (1999) B.H.R.C. 15.

or the parent of such a child<sup>30</sup> is also an Art 14 status. The status in issue in *Serife Yigit* was being a person who had undergone only a religious as opposed to a civil marriage ceremony. The ECtHR appears to take such a generous view of this element of its Art 14 analysis that there is little scope to doubt that being a widow (rather than a divorcee crosses the threshold.

### *The analogous situation issue*

The leading domestic authority on the point is the House of Lords' judgment in *R (on the application of Carson) v Sec of State for Work and Pensions*.<sup>31</sup> The issue before the court was the differential treatment of retirement pensions received by retirees who lived in the UK and those who lived abroad. The former's pensions were updated in line with inflation; the latter's were not.

The court held that the way in which the notion of 'analogous situation' is defined for Art 14 purposes is broad; per Lord Hoffman:

"15 Whether cases are sufficiently different is partly a matter of values and partly a question of rationality. [Article 14](#) expresses the Enlightenment value that every human being is entitled to equal respect and to be treated as an end and not a means. Characteristics such as race, caste, noble birth, membership of a political party and (here a change in values since the Enlightenment) gender, are seldom, if ever, acceptable grounds for differences in treatment. In some constitutions, the prohibition on discrimination is confined to grounds of this kind and I rather suspect that [article 14](#) was also intended to be so limited. But the Strasbourg court has given it a wide interpretation, approaching that of the Fourteenth Amendment, and it is therefore necessary, as in the United States, to distinguish between those grounds of discrimination which prima facie appear to offend our notions of the respect due to the individual and *those which merely require some rational justification*: *Massachusetts Board of Retirement v Murgia* (1976) 427 US 307"; (emphasis added).

16 There are two important consequences of making this distinction. First, discrimination in the first category cannot be justified merely on utilitarian grounds, eg that it is rational to prefer to employ men rather than women because more women than men give up employment to look after children. That offends the notion that everyone is entitled to be treated as an individual and not a statistical unit. On the other hand, differences in treatment in the second category (e g on grounds of ability, education, wealth, occupation) usually depend upon considerations of the general public interest. Secondly, while the courts, as guardians of the right of the individual to equal respect, will carefully examine the reasons offered for any discrimination in the first category, decisions about the general public interest which underpin differences in treatment in the second category are very much a matter for the democratically elected branches of government.

The claimant in *Carson* actually failed (both before the House of Lords and subsequently before the Grand Chamber of the ECtHR)<sup>32</sup> because she was not in an analogous situation with her chosen comparators. Carson was a retiree UK citizen who lived abroad. Because she lived abroad her retirement pension was not subject to annual inflation-liked increases as were the pensions of pensioners who lived in the

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<sup>29</sup> *Marckx v Belgium* (1979–80) 2 E.H.R.R. 330 ; *Mazurek v France* (2006) 42 E.H.R.R. 9 ; and *Inze v Austria* (1988) 10 E.H.R.R. 394

<sup>30</sup> *Sahin v Germany* (App. No 30943/96) 8<sup>th</sup> July 2003.

<sup>31</sup> [2005] UKHL 37; [2006] 1 A.C. 173. For a sophisticated and enlightening critique of the judgment and of Art 14 analysis more broadly see A. McColgan, "Cracking the comparator problem: discrimination, "equal" treatment and the role of comparisons" (2006) *E.H.R.L.R.* 650-677

<sup>32</sup> [2010] 51 E.H.R.R. 13.

UK. The position of overseas residents was not considered to be analogous to that of domestic residents in part because of the complex, interlocking nature of welfare benefit provision overall and in part because of the wide variations in living costs experienced by pensioners in different countries. Strictu sensu therefore, it was not even necessary for the government to convince the court that the legislative scheme was underpinned by a rational basis.<sup>33</sup>

The differences between groups which were at play in *Carson* do not arise in the ‘succession by death or divorce’ comparator groups. The comparator groups obviously do not live in different jurisdictions: they might very well live next door to each other. The Convention Right in issue is not part of a complex network of benefits: succession rights are not contingent at all on eligibility for any other welfare provisions or tax liabilities. The comparison is direct, immediate and simple.

*Is there a rational basis for differential treatment ?*

There is certainly no reason to think that the differential treatment raises a ‘due respect’ problem in the *Carson* sense. It is not stigmatising of widowhood, or in any way attributing second class status to persons whose relationships end through death rather than divorce. Thus it would seem that the distinction drawn in the Housing Act 1985 between ‘successors by death’ and ‘successors by relationship breakdown’ is a general social policy distinction in the *Carson* sense. As such, it need not be subjected to intense scrutiny. It must however have - per Lord Hoffman in *Carson* - ‘some rational justification’ if it is to pass Art 14 inspection.

The *Carson* ‘rational justification’ test is perhaps a little tougher than the approach endorsed by the ECtHR when dealing with laws which enact general social or welfare policies. The formula offered in *Stec v United Kingdom*<sup>34</sup> was that differential treatment would infringe Art 14 only if the difference was ‘manifestly without reasonable foundation’:

“The scope of this margin will vary according to the circumstances, the subject-matter and the background. As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention. On the other hand, 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 public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is “manifestly without reasonable foundation”.<sup>35</sup>

But it is very hard to see any ‘rational justification’ (per *Carson*) or ‘reasonable foundation’ (per *Stec*) at all for the distinction drawn by the Housing Act 1985 between widows and divorcees for succession purposes. The distinction is completely

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<sup>33</sup> The analysis has been characterised as something of an analytical sleight of hand, essentially on the basis that it enables |States to avoid having to defend a policy which may prove rationally indefensible; see for example M. Cousins, “Comparison v justification: sidestepping proportionality” (2010) *European Journal of Social Security* 156.

<sup>34</sup> (2003) 43 E.H.R.R. 47. The policy in issue in *Stec* was the differential entitlement of men and women to a disability benefit, the ‘reduced earnings allowance’.

<sup>35</sup> *Ibid* at para 52.

arbitrary and capricious. There is simply no sensible reason for treating a person (and her putative successors) who becomes a sole tenant following widowhood less favourably than a person who becomes a sole tenant consequent upon divorce. Both stand in exactly the same position vis a vis the local authority. Both have the same housing needs. Nor does any reason appear if one views the matter from the local authority's perspective. The pressures placed on its housing stock by the widow's and her child/new partner are no greater than those placed by the divorcee's child/new partner. So why are the widow and divorcee (and their potential successors) treated differently?

It is perhaps conceivable that an exacting actuarial analysis might tell us that there is a statistically significant difference between the longevity of remaining life expectancy of children of widows and those of divorcees, or that widows have more children than divorcees, or that widows' financial means are greater than those of divorcees, or that losing a partner through divorce engenders far greater emotional trauma than losing him/her through divorce and such trauma can be assuaged by living in one's home as a tenant *de novo* rather than tenant by succession. But clearly no such calculation underlies this differential treatment within the scheme of the 1985 Act.

It might also be argued – although the contention seems bizarre – that widows are in some sense less worthy or deserving of becoming tenants *de novo* rather than as successors than are divorcees, and that such unworthiness should also be attributed to their potential successors. Again, there is no indication that such sentiments informed legislative decisions about the secure tenancy regime.

Much the likely explanation is that no legislators ever gave the matter a thought. There is no indication in Hansard of the point having been addressed in 1980 when the secure tenancy scheme was introduced, not at any point thereafter. What is however clear from Michael Heseltine's speeches in support of the bill that became the Housing Act 1980 is that the secure tenancy (then often referred to as the 'Tenant's Charter') was seen as an innovation to benefit and protect tenants *and* their families:

“...The tenants' charter gives a comprehensive framework of statutory rights. For the first time in the history of public sector housing in this country, tenants will have the protection of a statutory code of rights in their dealings with the local housing department....

The charter will make a profound difference to public sector housing in this country, first and foremost to the tenant and his family. It will give them not only statutory security in their own home but the legal rights to make full use of that security, to enjoy their home as they want, to improve it to meet their needs, to paint it in the colour they choose, to put their own ideas, skills and personality into it and, if they decide to do so, to bring another member of their family into the home, or to take a lodger, thus making better use of the accommodation”.<sup>36</sup>

The ECtHR has latterly indicated (admittedly in a different context, that of voting rights for prisoners) that careful legislative consideration of a particular issue may incline the court to accept that a particular outcome falls within a State's margin of appreciation.<sup>37</sup> Similarly, the Supreme Court's Art 8 jurisprudence in a housing law

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<sup>36</sup> Per Rt Hon. Michael Heseltine MP, *HCD* 15<sup>th</sup> January 1980 c.1452; 1453-554. Heseltine was then Secretary of State for the Environment in the first Thatcher administration.

<sup>37</sup> *Hirst v United Kingdom* (2006) 42 E.H.R.R. 41 at para 79:

“ [T]here is no evidence that Parliament has ever sought to weigh the competing interests or to assess

context contains clear indications that proportionality review means little than *Wednesbury* unreasonableness in relation to the application of statutory schemes which obviously manifest a considered legislative evaluation of the scheme's substantive content.<sup>38</sup>

Both principles point towards a conclusion that in the absence a lack of legislative evaluation of the relevant differential treatment then the treatment is *prima facie* suspect for Art 14 purposes. This does not preclude the possibility that what would essentially be an *ex post facto* rationalisation of an initially overlooked differentiation will suffice to save such differentiation in an Art 14 sense. But such a rationalisation may be elusive, especially when one recalls the claimant in a possession case - on which the burden of proof as to rationality lies - will be a local authority rather than, as in a case before the ECtHR, central government.

### *Conclusion*

It may be that housing lawyers are still viewing Art 14 succession issues through the prism of the complex analytical structure deployed by the Court of Appeal in *Wandsworth LBC v Michalak*.<sup>39</sup> That would be unfortunately restrictive in two senses. Firstly, as Lord Hoffman made clear in *Carson*, expressly rejecting the *Michalak* approach, the analytical question is really quite straightforward:

“There is a single question: is there enough of a relevant difference between X and Y to justify different treatment?”<sup>40</sup>

Secondly, the defendant did not succeed in *Michalak* because his relationship with the deceased tenant was simply too remote and amorphous for him to be regarded as a family member. He was in effect arguing that the s.113 definition of family was *per se* contrary to Art 14 because it was too restrictive to include someone in his position.<sup>41</sup> But in a *Carson* sense such differentiation is demonstrably rational. The succession provisions in the Housing Act 1985 are designed to bestow a benefit on a moderately extended definition of a nuclear family. Whilst one might take issue in broad political

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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.”

<sup>38</sup> *Mayor and Burgesses of the London Borough of Hounslow v Powell* [2011] UKSC 8; [2011] 2 AC 186 per Lord Hope at para 10; Lord Phillips at paras 73-74.

<sup>39</sup> *Wandsworth LBC v Michalak* [2002] EWCA Civ 271; [2003] 1 W.L.R. 617.

<sup>40</sup> [2005] UKHL 37; [2006] 1 A.C. 173 at para 31.

<sup>41</sup> His argument was extravagant. His relationship with the deceased tenant was thin both in a blood and emotional sense; [2003] 1 W.L.R. 617 per Brook LJ:

[4].. “The defendant came to England in 1981. His grandfather had a sister whose son had married Mr Lul's sister. In English parlance, Mr Lul was the brother-in-law of the defendant's first cousin once removed...”

[6]... This was in no sense a loving or a caring relationship. The defendant merely had a relationship of respect for the older man, and he was willing to help somebody who had helped him and had shown him kindness when he first came to England”.

terms with that notion of ‘family’ being a key driver of social policy, it is a perfectly legitimate aim. In respect of the differential treatment accorded to secure tenants losing their partners through death and divorce however, the answer to Lord Hoffman’s question is manifestly ‘No’.

### **Using HRA 1998 s.3 to remove the incompatibility**

It would not be difficult for a court - in accordance with the Human Rights Act 1998 s.3<sup>42</sup> – to lend the succession provisions of the Housing Act 1985 a meaning which is compatible with Art 14. The obvious analytical starting point here is the House of Lords’ judgment in *Ghaidan v Mendoza*,<sup>43</sup> which by happy coincidence was also a housing succession case. In *Mendoza*, the issue before the court was whether the succession provisions of the Rent Act 1977 (Rent Act 1977, Sch 1, para 2(2)) which allowed for a person living with a deceased tenant ‘as the tenant’s husband or wife’ could be construed via HRA s.3 to include same sex partners.<sup>44</sup> The House of Lords concluded such interpretation was ‘possible’ in the s.3 sense. In his leading judgment, Lord Nicholls reviewed and sought to clarify the body of principle which had built up around the use of s 3.

‘[27]...What is the standard, or the criterion, by which “possibility” [in s 3] is to be judged? A comprehensive answer to this question is proving elusive. The courts, including your Lordships’ House, are still cautiously feeling their way forward as experience in the application of s 3 gradually accumulates.’

*Mendoza* is authority for the proposition that courts should not use HRA s.3 to lend Convention compliant meanings to statutory terms if to do so would produce a meaning ‘inconsistent with a fundamental feature of [the] legislation’.<sup>45</sup> What this notion of ‘fundamental’ appears to mean is that the court should satisfy itself that the meaning it might give to a statutory provision is not inconsistent with the policy objectives that Parliament was seeking to achieve when the term was enacted. As suggested in the extract from Hansard reduced above, there is no basis for assuming that according equal treatment for succession purposes to widows and divorcees would run counter to a fundamental feature of the Act. In addition to introducing this ‘fundamental feature’ barrier to an expansive use of s.3, Lord Nicholls also indicated

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<sup>42</sup> 3 (1) 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 the Convention rights.

<sup>43</sup> [2004] UKHL 30; [2004] 2 A.C. 557

<sup>44</sup> To not so construe would likely create an incompatibility with Art 8 HRA 1998, as the ECtHR had recently decided, in *Karner v Austria* (2004) 38 E.H.R.R 24, that sexual orientation discrimination in tenancy succession provisions did breach Art 14 ECHR. See the discussion Wintemute R (2003) Same-sex partners, "living as husband and wife", and section 3 of the Human Rights Act 1998 *Public Law* 621-631. The pre-*Mendoza* position in domestic law was that that same sex partners could be family members for Rent Act succession purposes, but not spouses. This was per se discriminatory as family members succeed only to a less valuable assured tenancy while spouses succeed to a Rent Act statutory tenancy; see *Fitzpatrick v Sterling Housing Association* [2001] 1 A.C. 27.

<sup>45</sup> *Ibid* at para 45.

it was not constitutionally appropriate for courts to deploy s.3 to produce results that would have far-reaching systemic implications.

Lord Nicholls suggested that if neither a fundamental nor systemic matter was in issue, s.3 could properly be used to produce results which might seem quite startling when viewed from a traditional understanding of the sovereignty of Parliament and the separation of powers:

‘[32]. . . . Section 3 enables language to be interpreted restrictively or expansively. But s 3 goes further than this. *It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it convention-compliant.* In other words, the intention of Parliament in enacting s 3 was that, to an extent bounded only by what is “possible”, a court can modify the meaning, and hence the effect, of primary and secondary legislation.’; (emphasis added).

Lord Nicholls saw no systemic implications for a modification of the previously accepted meaning and effect of the Rent Act provision in issue in *Mendoza*. Nor did he consider that construing that provision to include same-sex partners ran counter to the social policy purpose underlying the legislation, which policy he took to be extending the benefit of succession to; ‘couples living together in a close and stable and relationship’.<sup>46</sup> It would therefore be appropriate for the court to change the original meaning of para 2.2 by reading in additional words.

As suggested in the extract from Hansard reproduced above, to treat successors by death in the same way as successors by relationship breakdown cannot credibly be said to undermine a fundamental feature of the Housing Act 1985 nor to contradict the policy of the Act. The implications of redressing the inequality between widows and divorcees cannot be thought to have any more systemic a character than redressing that between opposite and same sex couples.

In *Mendoza*, Lord Nicholls did not think any particular degree of linguistic precision was needed in the way in which s.3 could be used: “‘The precise form of words read in for this purpose is of no significance. It is their substantive effect which matters’”. A similarly relaxed view of the way that s.3 could be deployed (at least in housing cases) was offered by Lord Phillips in *Powell*:

“....As to the syntactical argument, the precise formulation of the proviso required by article 8 is of no significance. Compatibility can be achieved in the case of either subsection by implying the phrase “provided that article 8 is not infringed”.”<sup>47</sup>

From a judicial perspective, such a relaxed approach to the curative dimension of s.3 has the obvious benefit of enabling the court to say – in effect – we are simply doing what Parliament told us to do in the HRA 1998 s.3. One might however expect a judge at first instance - and since there is no binding authority telling us that the Housing Act 1985 succession provisions are compatible with Art 14 - s.3 can here be used at first instance might wish to be offered a rather more specific linguistic formula. The tidiest route is perhaps to add a few words (in italics below) to s.88(1), so that it reads:

88 (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...

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<sup>46</sup> *Ibid* at para 35.

<sup>47</sup> [2011] UKSC 9; [2011] 2 A.C. 186 at para 98.

(e) he became the tenant on the tenancy being vested in him on the death of the previous tenant... unless, in any such case, the successor tenant was the spouse or civil partner or opposite gender partner of the deceased tenant’.

This formulation has a modest effect. All that it adds to the existing understanding of the succession provisions is one inter-familial succession. It does not raise the spectre of a never-ending chain of successions through multiple generations of the same family. Indeed, multiple ‘successions’ are actually possible under the existing scheme: H1 and W1 are married couple joint tenants. They divorce. The court transfers the tenancy to W1 as tenant de novo. W1 marries H2. They divorce. The court transfers the tenancy to H2 as tenant de novo. H2 marries W3. They divorce... and so on. That might be thought a very peculiar result. There is nothing in the least peculiar about allowing the child of deceased council joint tenants to continue to live in her family home as a tenant following her remaining parent’s death.

## Conclusion

This analysis was triggered by a case in which I was briefed by a London law centre to act for a Mr Williams. Mr Williams was 55 years old. He had lived almost his entire life in the (four bedroom) council house originally leased by his parents as joint tenants from the London County Council in 1961. Their tenancy became secure almost twenty years later when the Housing Act 1980 came into force. For the best part of thirty years, Mr Williams had effectively been a recluse in the house as a result of a psychiatric condition consequent upon an assault. He did not work, had never claimed any benefits and had no meaningful life beyond the confines of his home and his immediate family. His father died in 1995. His mother then succeeded to the tenancy. She died in 2010. He lived in the house with his niece, who acted as an informal carer support to him.

This was perhaps the rare case in which a proportionality defence would have succeeded. The client’s brother had pushed him to seek legal representation well in advance of the initial hearing so that we had a reasonable evidential basis to present to the court to justify the giving of directions for a contested trial.<sup>48</sup> On these particular facts, an oft-quoted observation of the Supreme Court in *Pinnock* seemed particularly apt:

“[64]...[T]he suggestions put forward on behalf of the Equality and Human Rights Commission, that proportionality is more likely to be a relevant issue "in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty", and that "the issue may also require the local authority to explain why they are not securing alternative accommodation in such cases" seem to us well made”.

One could see why the council wanted to regain possession of the house. It was far too big for Mr Williams’ housing needs, and could be used to accommodate a family

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<sup>48</sup> Under the procedural regime relating to county court possession proceedings (CPR Part 55 and CPR PD 55) a court may dispose of the case on a summary basis at the first hearing unless it appears to the court that the claim can be “genuinely disputed on a ground which appears to be substantial”; CPR Part 55.8. Had Mr Williams and/or his family pitched up at court without having sought legal advice and knowing nothing – as one would expect – about HRA-based defences to the claim, the likely result would have been a summary order for possession. A trial court is under no obligation – even when faced with a defendant who appears ‘vulnerable’ in a *Pinnock* sense – to adjourn proceedings so that he/she can seek legal advice; see *Viridian Housing v O’Connell* [2012] EWHC 1389 (QB).

of perhaps five or six people. The council had up to the morning of the trial however given no indication that it was willing to offer Mr Williams and his niece any alternative accommodation.

The precarious nature of a successful proportionality defence has been alluded to above. And for a person such as Mr Williams a precarious status in his home was far from ideal. The Art 14 argument was framed in order to keep him in his home as a tenant. As often happens when one is able to attach a novel legal argument to a client whose moral merits seem very strong, the matter was never put to the test because the claimant offered a very acceptable compromise; in this case Mr Williams and his niece were offered a de novo joint secure tenancy of a newly built two bedroom house.<sup>49</sup>

Few putative 'second successors' will present a court with such a 'meritorious' case. One of the complaints made from a claimant's perspective about the thus far ill-defined nature of HRA defences is that they are pleaded by defendants whose cases have no substantive merit:

"...[T]he great majority of public law and proportionality cases that practitioners have taken through the courts have been hopeless. Writing extra-judicially HHJ Madge has noted how "it is likely that the defences in all the recently reported Gateway (b) cases would have been summarily dismissed" and that "the merits of these cases were truly appalling" (The game of ping pong is over, 26 March 2011, [www.nicmadge.co.uk](http://www.nicmadge.co.uk)). And the Supreme Court in *Pinnock* (which remained live) and in *Powell* (where one case remained live) found on the facts that the proportionality defences were not seriously arguable".<sup>50</sup>

It may well be of course that the reason that the defendants in contested cases have little obvious merit is because the claimant has either given up or (as in Mr Williams' case) offered an acceptable settlement in all those cases where the merits are very strong.<sup>51</sup>

The compatibility of the no-second succession rule however stands or falls independently of the merits of particular defendants. There is a merits issue in play here to be sure: but it is systemic rather than individuated; it is a legislative not an administrative problem; it turns on the capricious nature of the succession provisions in the Housing Act 1985 and on Parliament's evident failure at the time of their enactment or at any point since to address their arbitrary effect. It would be no

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<sup>49</sup> Which they thought (especially as it had two bathrooms rather than one) would be 'much nicer' than their existing home.

<sup>50</sup> Holbrook op. cit, fn 8 supra at 426.

<sup>51</sup> So for example, in *LB of Harrow v Wilson* [2010] EWHC 1574 the Court of Appeal granted permission to the defendant to pursue an appeal challenging the compatibility of the rule in *Hammersmith v Monk* ([1992] A.C. 478 with Art 8; per Lloyd LJ:

"[T]here is a compelling reason why the appeal should be heard because it may be thought appropriate for the Supreme Court of the United Kingdom to consider the point. The law in respect of article 8 is fast developing, both in Strasbourg and Parliament Square, and it would be right to allow this ground to be brought to a point where if the Supreme Court of the United Kingdom thinks fit, they can reconsider the decision in *Hammersmith v Monk*". REF; B5/2010/1879.

The rule in *Monk* allows one joint tenant to determine a tenancy by notice to quit without approval or knowledge of the other joint tenant. The underlying merits of the defendant's case in *Wilson* were remarkably strong. The council's response to the grant of permission was to offer the defendant a new secure tenancy of her home.

usurpation of the legislative function for the courts to remove this anomaly,<sup>52</sup> but rather a perfectly straightforward application of the principles which Parliament enacted in s.3 of the Human Rights Act 1998.<sup>53</sup>

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<sup>52</sup> The soundbite comes from Lord Simonds in *Magor and St Mellens Rural DC v Newport Corp* [1952] A.C. 189 at 191. It is targeted here at the curious suggestion made by some commentators who disapprove of the principles expressed in *Doherty* and *Pinnock* that the courts in those case are overstepping the boundaries of their constitutional authority: cf Holbrook fn. 8 above at 425.: “These cases are perplexing for deciding that County Courts have powers to trump the will of Parliament”

<sup>53</sup> See for example the analysis of s.3 offered by Lord Phillips in *Powell* at para 98:

“...[S]ection 3 of the 1998 Act applies to all legislation, whether enacted before or after the 1998 Act came into force. In so far as this alters the construction given to legislation before the 1998 Act came into force, the 1998 Act has the effect of amending legislation: see *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 “.