Neutral Citation Number: [2023] EWCA Civ 1246

Case No: CA 2022002177

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE KINGS BENCH DIVISION
MR JUSTICE COTTER
[2022] EWHC 2328 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 October 2023

Before:

LORD JUSTICE BAKER
LADY JUSTICE SIMLER
and
LADY JUSTICE ELISABETH LAING

- -

Between:

DUDLEY METROPOLITAN COUNCIL	**Respondent** **Claimant**
- and -	
MARILYN MAILLEY	**Appellant** **Defendant**

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- -

James Stark and Tom Royston (instructed by **Community Law Partnership**) for the **Appellant**
Michelle Caney and Eloise Marriott (instructed by **Dudley Metropolitan Borough Council (Law and Governance)** for the **Respondent**

Hearing date: 11 October 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 27 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Simler:

Introduction

1. The question on this appeal is whether the statutory provisions governing succession to and assignment of secure tenancies in the Housing Act 1985 ("HA 1985") unlawfully directly discriminate against the appellant because of her status in the circumstances described below.

2. The appellant is Marilyn Mailley, the adult daughter of the late Dorothy Mailley (I shall refer to Marilyn Mailley as the appellant and to Dorothy Mailley as Mrs Mailley). On 2 May 1965, a property at 19 Uffmoor Estate, Halesowen B63 4JR ("the Property") was let to Mrs Mailley by the landlord, Dudley Metropolitan Borough Council, the respondent. The Property has three bedrooms and two downstairs living rooms, one of which could be used as a fourth bedroom. Mrs Mailley moved in with the appellant and her two other children, and both she and the appellant, now 68 years old, lived there together as their sole or principal residence until 17 October 2016, when Mrs Mailley (who had vascular dementia and required a high level of physical care) became a permanent resident in a care home with no prospect of returning to the Property.

3. Mrs Mailley's tenancy became a secure tenancy when the Housing Act 1980 came into force on 3 October 1980, and since 1 April 1986, it has been governed, as a secure tenancy, by the HA 1985. Once Mrs Mailley ceased to occupy the Property as her only or principal residence on 17 October 2016, she could no longer satisfy the "tenant condition" in the legislation. That meant that her tenancy ceased to be secure at that point. Notice to quit was given by the respondent as a result, and the tenancy came to an end at the expiry of the notice on 19 December 2016. The respondent subsequently brought these possession proceedings against the appellant, who remained living at the Property.

4. Throughout the proceedings, the respondent has accepted a responsibility to re-house the appellant, and there is no question of her being made homeless. However, the appellant does not wish to be re-housed. Her case is that if her mother had not had to move permanently into a care home and had remained living at the Property until her death on 18 January 2018, she would have been entitled to succeed to the secure tenancy as a family member living with her, under section 87(b) HA 1985. Equally, if her mother had assigned the tenancy to her before she lost capacity to do so (pursuant to section 91(3) HA 1985), she could have succeeded to it on that basis. Neither of these eventualities occurred however.

5. Cotter J rejected the appellant's defence to the respondent's possession claim in a judgment reported at [2022] EWHC 2328 (QB). He found that the appellant is not a disabled person within the meaning of the Equality Act 2010 and although moving out of the Property will cause her significant distress and anxiety, there was a reasonable likelihood that a change of accommodation may have beneficial effects on her. He rejected her argument that the respondent failed to follow its policy in pursuing possession proceedings in this case finding that proper consideration was given to the lettings policy. He also rejected her contention that her eviction from the Property would be an unjustified interference with her article 8 rights under the European Convention on Human Rights and Fundamental Freedoms ("the Convention"). In this regard, the judge recorded that there was no dispute that the respondent had legitimate

aims for bringing this claim for possession, namely the management of its pool of scarce housing stock in order to allocate the Property to those most in need of it. The judge found there was exceptionally high demand for large properties (like the Property) and that it was significantly under occupied by the appellant who was living there alone. There was and remains a dire shortage of family accommodation in the Dudley area. He recognised that the appellant, a longstanding resident of the Property whose mother would have wanted her to continue living there, would have been entitled to remain in the Property in different circumstances, but had lost that right. Suitable alternative accommodation was, however, available and the appellant would not be made homeless. Having weighed the competing factors, including the likely benefits for a family in need of suitable housing and the impact on the appellant herself, the judge concluded that eviction was proportionate and justified under article 8. None of these conclusions is challenged on this appeal.

6. I shall return to Cotter J's conclusions on the lawfulness of the legislative provisions in the HA 1985 but first it is helpful to explain the legislative scheme for secure tenancies.

Secure tenancies

7. Secure tenancies were introduced by the Housing Act 1980 in order to give security of tenure to tenants of local authorities and other public sector landlords (and also to enable secure tenants to buy their homes at a discount from market value). Unlike the concept of a statutory tenancy under the Rent Acts, a secure tenancy was a tenancy that continued until brought to an end either by the tenant or by court order. If it was a fixed-term tenancy, a periodic tenancy came into being on its expiry. It was also capable of being transferred by assignment or on death. In its original form, the Housing Act 1980 contained provisions about succession in sections 30 and 31. Section 30 dealt with succession on death of a tenant and permitted a deceased tenant's spouse or other family member to succeed to the tenancy if qualified. Such a person was qualified if he or she occupied the dwelling house as their only or principal home at the time of the tenant's death and resided with the tenant throughout the period of twelve months ending with the tenant's death (section 30(1) and (2)).

8. The HA 1985 was a consolidating Act. Sections 79 to 81 HA 1985 govern when a tenancy will be secure. Significantly, a tenancy is only secure if both the landlord and tenant condition are satisfied. The tenant condition in section 81 HA 1985 is fulfilled where:

> "the tenant is an individual and occupies the dwelling-house as his only or principal home …"

Accordingly, there are two parts to the tenant condition. First, the tenant must be in occupation of the dwelling. Secondly, that occupation must be as the tenant's only or principal home.

9. The circumstances in which a tenant is to be regarded as continuing in occupation of a dwelling as a home even though not actually living there are considered in a number of cases, including some decided under earlier Rent Restriction Acts and the Rent Acts, but the principles laid down in them remain applicable to the tenant condition in HA 1985. In *Tickner v Hearn* [1960] 1 WLR 1406, the tenant, an elderly woman, lived in a house as a statutory tenant with her adult daughter, protected by the Rent Restriction

Acts. On a temporary visit to another daughter in July 1954 she was admitted to a mental hospital suffering from paranoid schizophrenia and remained in the hospital continuously thereafter, although by November 1959, when she was 73, she had improved sufficiently to be entitled to discharge herself at short notice. Her daughter continued to live in the house as their home. In December 1959 the landlord instituted possession proceedings in light of the tenant's long absence. The medical evidence at trial was that it was most unlikely that the tenant would ever leave hospital in the light of the constant psychiatric care she required, though it was accepted that developments in potential treatment that would help her could not be ruled out, and she said many times that she regarded the house as her home and wished to go back there if better. The trial judge refused to make an order for possession and his decision was upheld on appeal. This court emphasised that the question was one of fact and degree and there must be "evidence of something more than a vague wish to return. It must be a real hope coupled with the practicable possibility of its fulfilment within a reasonable time." It was a borderline case but there was evidence to support the trial judge's conclusion in the facts just described.

10. Rights of succession were significantly curtailed by section 160 of the Localism Act 2011, but those provisions do not apply to tenancies granted before the section came into force on 1 April 2012: see section 160(6). For secure tenancies granted before 1 April 2012 (and therefore applicable in this case), section 87 HA 1985 continued to apply. It provides:

> "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."

11. As a matter of law, a statutory right of succession can only apply where a secure tenancy is continuing at the date of the tenant's death. If the secure tenancy has come to an end prior to the tenant's death, there will be nothing to succeed to.

12. Who counts as a member of the tenant's family for these purposes is defined by section 113 HA 1985 and there is no dispute that the appellant counts for these purposes.

13. Secure tenancies granted after 1 April 2012 in England are governed by section 86A HA 1985. Section 86A(1) limits the statutory right of succession to spouses and civil partners only. Other family members no longer have a statutory right of succession, irrespective of the length of time they have resided at the property.

14. In general, there is a prohibition on assignment of a secure tenancy: see section 91(1) HA 1985 which provides that a secure tenancy "is not capable of being assigned except in the cases mentioned in subsection (3)". The exceptions in subsection (3) are:

> "(a) an assignment in accordance with section 92 (assignment by way of exchange);
>
> (b) an assignment in pursuance of an order made under section 24 of the Matrimonial Causes Act 1973 (property adjustment orders in connection with matrimonial proceedings);
>
> (c) an assignment to a person who would be qualified to succeed the tenant if the tenant died immediately before the assignment."

15. Subject to the arguments she advances on this appeal, the appellant had (and has) no right to succeed to Mrs Mailley's secure tenancy under the provisions of the HA 1985 because, as a result of the statutory scheme in the HA 1985:

    i) Mrs Mailley ceased to meet the tenant condition in section 81 and it follows that her secure tenancy came to an end on 17 October 2016. From then onwards, she had no security of tenure.

    ii) Although the appellant was a potentially qualifying family member, she could not satisfy the condition in section 87(b) because she was not residing with Mrs Mailley in the Property throughout the period of twelve months ending with Mrs Mailley's death.

    iii) Mrs Mailley did not assign the tenancy to her in accordance with section 91(3)(c).

The appellant's case before Cotter J and how he addressed it

16. The appellant's case is that section 87(b) HA 1985 unlawfully directly discriminates against her pursuant to article 14 of the Convention: if her mother had died at the Property rather than in a care home, and/or if her mother had retained capacity and assigned the tenancy to her at any time before her death, she would have succeeded to this tenancy. Comparing her position with the potential successor of a tenant who dies at home, and the potential successor of a tenant who is permanently removed from her home as a result of ill-health but is capable of assigning her tenancy to a qualifying successor, she has suffered less favourable treatment. She contends that this difference in treatment engages respect for home and family/private life, protected by article 8 of the Convention.

17. Relying on article 14 which prohibits 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"

the appellant's case before Cotter J was that the discrimination in this case was because of her "other status" as:

> "the daughter of a tenant who was permanently removed from her home as a result of her ill-health and who did not have capacity to assign her tenancy to her potential successor".

18. On that footing, she contended that she has been unlawfully discriminated against because of her status. If section 87(b) HA 1985 is properly interpreted in accordance with section 3 of the Human Rights Act 1998 ("HRA"), she should have been treated as entitled to succeed to her mother's secure tenancy when Mrs Mailley was removed permanently from the Property. If section 87(b) HA 1985 cannot be read as including within those entitled to succeed, otherwise qualifying members of the family of those removed from home by reason of their ill-health (and who due to mental incapacity cannot assign their secure tenancies under section 91(3) HA 1985 to qualifying successors when they are removed from home due to ill-health), then section 87(b) HA 1985 is incompatible with article 14 read with article 8. There is no rational connection with a legitimate aim for a qualifying successor whose parent has been required to cease to occupy a property in such circumstances to be treated any differently from a qualifying successor whose parent dies at home or retains the capacity to assign the secure tenancy, and a declaration to that effect should have been made under section 4 HRA.

19. It is not controversial that the questions to be asked and answered in considering whether there has been unlawful discrimination under article 14 were set out in *R (Stott) v Secretary of State for Justice* [2018] UKSC 59, [2018] 3 WLR 1831 by Lady Hale at paragraph 207:

> "In article 14 cases it is customary in this country to ask four questions: (1) does the treatment complained of fall within the ambit of one of the Convention rights; (2) is that treatment on the ground of some "status"; (3) is the situation of the claimant analogous to that of some other person who has been treated differently; and (4) is the difference justified, in the sense that it is a proportionate means of achieving a legitimate aim?"

It was conceded by the respondent and accepted by the judge that the answer to the first question is "yes": the treatment complained of potentially fell within the ambit of article 8.

20. The answers to the remaining questions were in issue before the judge. Cotter J answered them, in summary, as follows:

i) **Status:** He started from the position that a court must take a broad view of status. However, the concept "is not wholly redundant" (see *R (A) v Criminal Injuries Compensation Authority* [2021] UKSC 27, [2021] 1 WLR 3746). The appellant's formulation failed because it relied on the capacity of a third party as an essential defining characteristic notwithstanding that capacity had been held not to be a sound foundation for a status as it may change from time to time and may do so quickly (see *MOC (by his litigation friend, MG) v Secretary of State* [2022] EWCA Civ 1, [2022] PTSR 576 ("*MOC*")). Cotter J rejected the appellant's attempt to distinguish the present case from *MOC*. Since the assessment of capacity here only needs to take place when the secure tenant ceases permanently to reside at the Property, the possibility that capacity might be regained cannot be ignored. If the tenant later regains capacity, not having wished to assign, and decides to return to the property, this would cause difficulty and lead to uncertainty. The appellant did not have the necessary status accordingly.

ii) **Analogous situation:** Further, the appellant's situation was not analogous either to that of (a) the potential successor of a tenant who dies at home or (b) the potential successor of a tenant who is permanently removed from her home as a result of her ill-health but is capable of assigning her tenancy i.e. retains capacity, as the appellant's right to succeed would be comparatively uncertain and possibly temporary due to the possibility of the secure tenant regaining capacity.

iii) **Justification:** Further, even if he was wrong and the appellant had a relevant status and could properly compare her position with that of the comparators relied on, the difference in treatment would be justified. It pursued, by proportionate means, the legitimate aim of avoiding uncertainty and conflicts of interest between the tenant and co-habitee by means of a bright line rule so that everyone, including the landlord, knows where they stand. It also pursued the legitimate aim of incrementally reducing succession rights in order to ensure that scarce social housing returns to the pool and can be allocated to those who are most in need of it. This aim was also achieved by proportionate means.

iv) **Compatible reading:** Finally, even if Cotter J had found that any adverse difference in treatment was not justified, to read the appellant's proposed words into section 87(b) HA 1985 would cross a constitutional boundary. The proposed words were those underlined below:

> "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 <u>or the date at which the tenant permanently had to cease to reside at the dwelling-house due to ill-health and was incapable of assigning the tenancy to the member of the family at that date</u>."

21. Each of these conclusions is challenged on this appeal. There are five grounds, in summary as follows:

i) Ground 1 is that Cotter J erred in law by finding that the appellant had no relevant status for article 14 purposes.

ii) Grounds 2 and 3 were taken together. They argue that the judge erred in law in finding that the appellant and those whose members of the family die at home or who assign to their qualifying successors are not in analogous or relevantly similar situations.

iii) Ground 4 challenges his conclusion on the issue of justification. First, it is argued that there was no evidential basis for it. Secondly, his reasons do not stand up to scrutiny.

iv) Ground 5 challenges Cotter J's conclusion that even if unlawful discrimination in violation of article 14 had been found, it would be overstepping a constitutional boundary to read the words proposed into section 87(b) HA 1985.

22. The respondent has filed a Respondent' Notice seeking to uphold Cotter J's decision on additional grounds. I shall address these as relevant below.

23. Finally, the appellant seeks to refine the proposed status relied on in the following terms. She now contends that her status should be defined as:

> "the qualifying successor daughter of a disabled person such that at the material time, namely when she permanently ceased to occupy as her only or principal home, she was unable to assign the tenancy to her daughter as a consequence of her illness/disability".

24. The respondent contends that this is not the way the appellant's case was pleaded or advanced at trial, and is impermissible because the proposed "refinement" is not a pure point of law, and by introducing the concept of "disability", introduces entirely different questions of fact and evidence not explored at trial. Moreover, no cogent reason has been presented as to why the point was not advanced at trial. I shall return to consider this aspect of the appeal below.

25. Against that background, I will address each of the grounds of appeal in turn.

Ground 1: other status

26. Recent jurisprudence in Strasbourg and the Supreme Court has shown a significant shift towards taking a wide (albeit not unlimited) view of "other status" under article 14, and some doubt has been expressed in the case law about the utility of the concept of status as an independent element in determining whether there has been a breach of article 14.

27. In *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2022] AC 223, Lord Reed PSC held at paragraph 71:

> "…. I would add that the issue of "status" is one which rarely troubles the European court. In the context of Article 14, "status" merely refers to the ground of the difference in treatment between one person and another. Since the court adopts a stricter approach to some grounds of differential treatment than others when considering the issue of justification, as explained below, it refers specifically in its judgments to certain grounds, such as sex, nationality and ethnic origin, which lead to its applying a strict standard of review. But in cases which are not concerned with so-called "suspect" grounds, it often makes no reference to status, but proceeds directly to a consideration of whether the persons in question are in relevantly similar situations, and whether the difference in treatment is justified. As it stated in *Clift v United Kingdom*, para 60, "the general purpose of article 14 is to ensure that where a state provides for rights falling within the ambit of the Convention which go beyond the minimum guarantees set out therein, those supplementary rights are applied fairly and consistently to all those within its jurisdiction unless a difference of treatment is objectively justified". Consistently with that purpose, it added at para 61 that "while … there may be circumstances in which it is not appropriate to categorise an impugned difference of treatment as one made between groups of people, any exception to the protection

> offered by article 14 of the Convention should be narrowly construed".

28. The position remains that the language of article 14 states that there must be discrimination on a ground "such as" those specified, including "other status", and this requirement cannot simply be ignored or subsumed in the question whether any discrimination is unjustified. This point was restated by the Supreme Court in *R (A) v Criminal Injuries Compensation Authority*. Having cited the judgment of Lord Reed PSC in *SC*, Lord Lloyd-Jones JSC said:

> "66. Article 14 draws a distinction between relevant status and difference in treatment and the former cannot be defined solely by the latter. There must be a ground for the difference in treatment in terms of the characteristic which is something more than a mere description of the difference in treatment. …However, I agree with Lord Reed PSC that there is no requirement that the status should have legal or social significance for other purposes or in contexts other than the difference in treatment of which complaint is made."

29. Mr Stark relied on *Jwanczuk v Secretary of State for Work and Pensions* [2023] EWCA Civ 1156 to support his case that a status raising factual questions to be answered in a particular case does not render the status unduly vague. In *Jwanczuk* the status relied on was "being the spouse of a deceased person who was severely disabled so that she was unable to work and therefore unable to pay Class 1 or Class 2 national insurance contributions". Underhill VP rejected an argument that a status formulated by reference to "inability to work" could not satisfy the requirement of being objectively determinable. He held that many characteristics which are well recognised as potential grounds of discrimination under article 14 are not absolute in character and can typically only be identified by an evaluative exercise. He gave some examples:

> "56. … One example is disability (recognised as an "other status" in *Guberina v Croatia*,23682/13, (2018) 66 EHRR 11): there are degrees of disability, and it may be necessary in a particular case to carry out an evaluative exercise in order to establish whether a claimant was indeed disabled in the sense relevant to that claim. Another example is what Ms Callaghan referred to as the status of cohabitation, recognised by the Supreme Court in *Re McLaughlin* [2018] UKSC 48, [2018] 1 WLR 4250: in a particular case it may well be necessary to make a judgment whether the relationship in question was sufficiently close to amount to cohabitation. In my view an evaluative exercise of the necessary kind can properly be described as objective as long as it consists of a rational evaluation of objectively established facts. There is nothing in *Clift* that contradicts that approach, which seems to me plainly consonant with the overall purpose of article 14. The issue about status in *Clift* had nothing to do with objective determinability …"

Underhill VP (with whom the other members of the court agreed) concluded that in the case of a status based on inability to work as a result of disability, there was no

conceptual difficulty about making an evaluative determination of that kind. To that extent, I accept Mr Stark's submission.

30. It is generally the case that a person's health status, including a disability and various health impairments, can fall within the term "other status". Likewise, it is not in doubt that article 14 of the Convention also covers instances in which an individual is treated less favourably on the basis of another person's status or protected characteristics: see *Guberina* (referred to above). An example would be where a complainant does not allege unfavourable treatment related to his or her own disability but rather on the basis of the disability of a close family member with whom they live and/or to whom they provide care.

31. The status advanced by the appellant below was not rejected by Cotter J as too vague or because it required evaluative determination. Cotter J rejected it because a defining element involved Mrs Mailley's capacity and capacity is not a sound foundation for a status because it is too uncertain and may change from time to time, and could be regained in circumstances that would lead to real problems if the original tenant wished to return to the property as the secure tenant. Cotter J relied on *MOC* in reaching that conclusion.

32. The claimant in *MOC* suffered from complex medical conditions and disabilities including cognitive, mental capacity and mental health issues and was entitled to disability living allowance. He relied on article 14 to contend that the relevant rule unlawfully discriminated against him as a "severely disabled adult in need of lengthy in-patient hospital treatment, who for the time being is being treated as unable to make decisions as to care or medical treatment". The claim having been dismissed by the lower tribunals, this court addressed the issue of status for article 14 purposes. At paragraphs 64 to 65 Singh LJ (who gave the lead judgment) held:

> "64. The first issue on this appeal is whether there is a relevant 'status'. Speaking for myself, I was attracted at one time during the hearing to the possibility that the relevant status is a severely disabled person who needs hospital treatment and has a deputy appointed by the Court of Protection. [Counsel for the claimant], however, was not prepared to accept that that was the relevant status.
>
> 65. I have reached the conclusion that the Judge cannot be criticised for reaching the conclusion which he did on the question of status. He was right to observe that the question of capacity as such is not a status. First, the scheme of the 2005 Act was designed to move away from a status-based approach to a functional approach, in other words to focus on particular decisions at a particular time. Secondly, there needs to be reasonable certainty: a person's capacity may change from time to time and may do so quickly. That is not a sound foundation for the 'status' required by Article 14."

33. Peter Jackson LJ in his short concurring judgment at paragraph 76 noted that the appeal did not turn on the issue of status, but said:

> "I agree with Singh LJ (see paragraph 65) that there are good reasons of principle and practicality why decision-making capacity does not provide a sound foundation for an Article 14 status. In my view, status is likely to be found in the disability itself, and not in the separate matter of capacity, and that is the conclusion to be reached in the present case."

34. While I accept, as Mr Stark submits, that the ratio of *MOC* is not that capacity can never form part of a status, it seems to me that the uncertainty which Singh LJ regarded as fatal in *MOC* applies equally to the capacity element of the status as advanced by the appellant below. This is not a mere question of having to answer legal and factual questions as Mr Stark submits. The Mental Capacity Act 2005 makes clear, capacity is assumed, and further, proof of loss of capacity is to be judged by reference to a person's capacity to take particular kinds of decision at a particular time. Treating capacity as an important element of status leads to potentially significant conceptual uncertainty just as it did in *MOC*. In both cases the capacity issue was decision-specific – here in relation to a permanent assignment of a secure tenancy and in *MOC*, decisions (no doubt with potentially serious consequences) in relation to care and medical treatment; both related to a specific capacity at a material time (here when Mrs Mailley left the Property permanently), and in *MOC* "for the time being"; and in both cases capacity formed only one aspect of the status contended for. The context in which status linked to capacity is being considered in this case is one in which reasonable certainty is required given that at stake is the ability to make a permanent assignment of a protected (or secure) tenancy. I therefore reject Mr Stark's attempts to distinguish the facts in *MOC* from the facts in this case.

35. Although in the appellant's particular case, once her mother lost capacity as a result of her vascular dementia, she was extremely unlikely ever to regain it, that will not always be the case, and we are concerned in this case with legislation that has a wide application. Capacity can be impaired by head injury, psychiatric diseases, delirium, depression, and dementia. The impact of such a variety of different events on the proper functioning of the mind or brain can vary in terms of severity and duration. Mental capacity can change over the short and long term, and loss of capacity might be fully or partially reversed (depending on its cause), leading to the capacity to take certain decisions being regained. It is possible to envisage situations where a temporary deterioration in symptoms leads to loss of capacity at a particular time, which is subsequently regained, and this might also give rise to the risk of manipulation. Coma cases where the patient comes out of the coma with some (or full) capacity are another example. These are not technical or merely theoretical possibilities, as Mr Stark submits. They are real and perfectly likely to occur. Unlike death (which is certain in terms of its occurrence and timing), there is a penumbra of uncertainty surrounding capacity and its loss that risks people moving in and out of capacity, and contributes to the uncertainty regarded as fatal in *MOC*.

36. I do not accept Mr Stark's submission that the tenant's position is protected by the fact that they must also have permanently ceased to occupy the property as their only or principal home (for whatever reason). There is also uncertainty in defining the point at which a person permanently ceases to reside at the property in question (and the scope for manipulation in this regard arises too). This is a case in point. Although Mrs Mailley was permanently resident in the care home from 17 October 2016, the appellant

maintained in her defence (served in March 2018 and for two years afterwards) that it was not admitted that the Property ceased to be Mrs Mailley's only or principal residence at the date of the notice to quit or at the date of her death.

37. We were also referred to the facts of *London Borough of Islington v Boyle* [2011] EWCA Civ 1450, [2012] PTSR 1093 as an exemplar of the difficulty in establishing when a tenant ceases permanently to reside in a property in disputed possession proceedings. The London Borough of Islington alleged that the tenant had lost her security of tenure because she had failed to occupy her flat as her sole or principal home in circumstances where she was effectively forced to leave her home with her daughters because of the increasingly aggressive behaviour of her son towards them. Her initial intention was to move out temporarily (and she left furniture there) but her absence became prolonged. The trial judge's conclusion that she nonetheless continued to satisfy the tenant condition was overturned by this court. The scope for argument and uncertainty is clear.

38. Another example is *Hammersmith & Fulham LBC v Clarke* (2001) 33 HLR 26 where Mrs Clarke, a secure tenant of a house, suffered a severe stroke in 1996 and the defendants, her grandson and his wife, moved into the house with her. In 1997 Mrs Clarke spent five months in a nursing home, after which she returned to live in the house with the defendants. By November 1998 she was suffering from a number of physical difficulties and depression and was re-admitted to the nursing home. In January 1999, Mrs Clarke signed a note prepared by a social worker which stated that she had decided to become a permanent resident of the nursing home and no longer intended to live in the house. In February 1999, relying on that note, the claimant local authority served a notice to quit. The defendants remained in the house, and the claimant commenced possession proceedings. At the time of the trial Mrs Clarke was again living in the house. She gave evidence that she had been depressed at the time she signed the note because of difficulties with her medication. She said that she had always intended to return to the house once she was able to do so. The judge dismissed the possession claim on the ground that Mrs Clarke was a secure tenant and this court dismissed the claimant's appeal.

39. Even if this point in time is capable of being established with certainty, to assess capacity at this point ignores the potential for a person to regain capacity in a potentially wide variety of cases.

40. I also agree with Cotter J that the lack of certainty has practical significance. Unless a notice to quit had been served, and the relevant time period expired, the tenant (who had previously lost capacity but regained it) could resume occupation even if the relevant property had ceased to be their principal place of residence for a period of time. There could be direct conflict with a relative who wishes to succeed to the tenancy (and might not agree with the tenant's return to the property). The conflict is liable to put local authorities in a difficult position as Ms Caney submitted. Given the advances in medical treatment and the increasing number of older people requiring temporary or respite care, the potential for problems is real, as the judge held.

41. Mr Stark submits that any difficulties relating to the concept of capacity can be met by refining the status relied on so that it is: "the qualifying successor daughter of a disabled person such that at the material time, namely when she permanently ceased to occupy as her only or principal home she was unable to assign the tenancy to her daughter as a

consequence of her illness/disability". He submits that this status is "doubly associative of her mother's disability –being so disabled that she could no longer occupy 19 Uffmoor Estate as her only or principal home and so disabled that in consequence of that disability she was incapable of assigning the tenancy at the material date." He submits that it is always open to the court to refine and reconsider the question of status as Singh LJ did in *MOC.* Accordingly, if capacity alone is thought to be too wide, the proposed status can be refined to incapacity to assign the tenancy arising as a result of disability.

42. I regard this amendment (or change of approach) as impermissible. In *Prudential Assurance Co Ltd v HMRC* [2016] EWCA Civ 376, [2017] 1 WLR 4031, Lewison LJ (with whom the other members of the court agreed) observed:

> "23. In our procedural law a trial is intended to be the final resolution of all matters in dispute between the parties. Although a party who is dissatisfied with the outcome of a trial may appeal to this court (usually with permission) the appellate process is, in general, limited to a review of the first instance decision. It is thus the starting point that parties are expected to put before the trial judge all questions both of fact and of law upon which they wish to have an adjudication.
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> 24. There are a number of reasons for this. First, parties to litigation are entitled to know where they stand and to tailor their expenditure and efforts in dealing with (and only with) what is known to be in dispute…. Second, it is a disproportionate allocation of court resources for the Court of Appeal (which usually sits in panels of three judges) to consider for the first time a point which could have been considered, and correctly answered, by a single judge at first instance. Moreover if the Court of Appeal deals with a point for the first time, it is neither a review nor a rehearing; which are the two processes contemplated by the CPR. Third, if resolution of a new point entails the re-opening of the trial it not only entails inevitable further delay, which is itself a reproach to the administration of justice, but is also wasteful of both the parties' and the court's resources and unfair to a party who conducted a trial on what has turned out to be a false basis. Fourth, there is a general public interest in the finality of litigation. It is for similar reasons that the Court of Appeal applies stringent criteria for the reception of fresh evidence on appeal."

(See too *Brent LBC v Johnson* [2022] EWCA Civ 28, [2022] 1 WLUK 139 where this reasoning was quoted with approval, and similar difficulties with the proposed reformulation of status on appeal were identified in *MOC).*

43. These points apply with force in this case. It is very important in an article 14 case to know precisely what is the alleged status that is relied on. The question of status affects the nature of the evidence to be adduced, both by the claimant and the respondent. The appellant's defence was originally served on 6 March 2018. It was amended on 18 July 2018 to plead the status she relied on and advanced at trial, namely the mental

incapacity of Mrs Mailley to assign the tenancy to her. On 12 November 2018, the defence was re-amended without any change to the status on which she relied. The trial took place on various dates between 29 March and 7 June 2022. Meanwhile *MOC* was heard in December 2021 and judgment handed down on 11 January 2022, well before the start of the trial, and at a point where an application to amend could have been made.

44. The principles of proportionality and finality are both in play. I accept, as Ms Caney submits, that the question of disability is different from the concept of capacity. It introduces different questions of law and fact, none of which was explored at trial. There was no consideration or determination of the question as to how disability should be determined, and no evidence about whether Mrs Mailley was a disabled person, still less whether any such disability caused her lack of capacity to assign the tenancy. I note in relation to this last point that the judge made a finding at paragraph 22 as follows:

> "22. There were concerns that her dementia may deteriorate more quickly were she to return home, but the primary reason was that to avoid pressure sores she required to be turned every two hours and there was no prospect that a care package in the community would be provided to enable this to take place. This was reluctantly accepted by the defendant who at the time was on jobseekers' allowance and was in no position to fund the necessary level of care at home privately. In consequence the care home became Mrs Dorothy Milley's home… "

Nor has any cogent explanation been given for the failure to reformulate status in this way at trial.

45. In any event I am far from persuaded that the alternative formulation assists the appellant. It relies on "lack of capacity as a result of a disability" and Mr Stark must inevitably continue to rely on capacity as a fundamental feature of it, with all the uncertainty that brings.

46. Capacity and disability are distinct and different concepts: section 6 of the Equality Act 2010 defines disability by reference to a physical or mental impairment that has a "substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities"; capacity relates to a "material time" and may be temporary: see section 2(1) and (2) of the Mental Capacity Act 2005. The reasoning in *Jwanczuk* relied on by Mr Stark does not apply or meet the factually different situation in this case. *Jwanczuk* concerned a lifelong disability and inability to work (viewed in retrospect), where the potential for fluctuation in condition, significant change over time, and potential recovery were not realistically present. As Underhill VP explained, the uncertainty regarded as fatal in *MOC* was the conceptual uncertainty arising from the fact that under the Mental Capacity Act 2005, capacity has to be judged by reference to the capacity to take particular kinds of decision at a particular time; but the claimant's case in *Jwanczuk* required the application of the single criterion of whether the disabled person was unable to work at any point in her working life: if she was able to work for some part of the period but not others, that would cause no difficulty because the criterion was binary and she would fall outside the group. The same is not true here.

47. More fundamentally, it is impermissible for the status relied on to be defined entirely by the discrimination alleged. In other words, there must be a ground for the difference

of treatment in terms of a characteristic that is more than a mere description of the difference in treatment. The way in which Mr Stark originally formulated the status relied on seems to introduce the question of discrimination into the definition of the "other status" itself. So, too, does the refined "other status" which is defined by the aspects of the statutory scheme that the appellant seeks to challenge. That is impermissible as the authorities make clear.

48. It is also necessary in a direct discrimination case that the status and the difference in treatment on which the alleged discrimination is founded must not be the result of the operation of the legislation itself. In *R (Gangera) v Hounslow London Borough Council* [2003] EWHC 794 (Admin), [2003] HLR 68 (which concerned a challenge to the one succession rule) Moses J said at paragraph 26:

> "But however widely "status" 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."

(See also Lewison LJ's discussion of this point in *Simawi v London Borough of Haringey* [2019] EWCA Civ 1770, [2020] 2 All ER 701at paragraph 47).

49. Whichever formulation of status is adopted in this case, the question that must be answered is whether the difference in treatment complained of is in fact on the ground of that "other status". I do not think it was. The reason why the appellant is not entitled to succeed to her mother's tenancy does not depend on her purported status (whether by reference to capacity or disability or at all). Section 81 HA 1985 requires a secure tenant to occupy the property as their only or principal home. Where that condition is no longer met, their secure tenancy lapses and their tenancy can be terminated by a notice to quit. The further consequence is that the appellant is not and could not be a "qualifying successor" under section 87. The appellant's inability to succeed was a consequence of the operation of the legislation and not otherwise. Mr Stark had no satisfactory answer to this point.

50. For all these reasons I detect no error in Cotter J's judgment on this point below.

Grounds 2 and 3: analogous position

51. The next of the questions identified in *Stott* (the answer to which is challenged on this appeal) overlaps with the question of status to some extent, and does not strictly arise. However, I will deal with it briefly.

52. In a direct discrimination case, such as this, it is necessary to compare the circumstances of the person treated less favourably with those of a person in a materially similar situation, in order to test whether there is differential (or discriminatory) treatment on the ground of the status relied on. The judge held that the two comparators relied on by Mr Stark (the potential successor of a tenant who dies at home and the potential

successor of a tenant who is permanently removed from her home as a result of her ill-health but retains capacity to assign the tenancy) were not analogous because a right to succeed on a certain and permanent occurrence (death) is not analogous to a right to succeed on an uncertain and possibly temporary basis.

53. Mr Stark attacks that reasoning. He submits that it is not his case that ceasing to occupy the dwelling house as the departing tenant's only or principal home is the relevant test. That may happen as a matter of choice. The analogous or relevantly similar situation referred to is that of the qualifying successor and the tenant permanently ceasing to reside there either by death or by reason of ill-health disability, and in the latter case either with capacity to assign or without capacity to assign. He submits that each of these three events are relevantly similar – in each the tenant ceases to occupy permanently and in each there is a qualifying successor – and the judge was wrong to find otherwise. Section 87(b) HA 1985 protects those residing with the tenant for 12 months before the tenant's death as their only or principal home. Section 91(3) allows a tenant to assign to a qualifying successor when they leave. The impugned measure seeks to protect qualifying successors and its aim cannot be to exclude those who may be long qualified to succeed but whose family member must leave permanently by reason of illness/disability and cannot assign.

54. In my judgment the situations relied on as comparable by Mr Stark are not so. In each of the proposed comparator cases, the legislative conditions for having and retaining a secure tenancy are met. By contrast, in the appellant's case they are not met by virtue of Mrs Mailley having left the Property permanently so that the section 81 tenancy condition was no longer fulfilled in the period that followed. The two groups are not in materially similar situations despite Mr Stark's protestations to the contrary.

55. The correct comparator is a secure tenant who is forced to leave his or her home permanently for a reason other than illness or disability and does not assign the tenancy before doing so. Such a secure tenant would be treated in precisely the same way as the appellant – there would be no succession because the secure tenancy would have come to an end. I can see that the case might have been better formulated as one based on indirect discrimination, but that was not done, and the question of disparate impact was never explored. This case was run as a direct discrimination case only. I do not consider that the treatment complained of amounts to direct discrimination in this case.

Ground 4: justification

56. My conclusions thus far are sufficient to dispose of the appeal. In case I am wrong, and because the issue was fully argued, I will go on to consider the challenge to the judge's decision that the alleged discrimination can be justified.

57. The parties do not agree about the appropriate test that should have been applied in considering justification in this case. Mr Stark relies on what Lord Reed said at paragraph 98 in *SC* that the question whether there is an "objective and reasonable" justification for a difference in treatment is to be judged by whether it pursues a "legitimate aim" and there is a "reasonable relationship of proportionality" between the aim and the means employed to achieve it, while acknowledging the margin of appreciation to be accorded in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. By contrast, Ms Caney submits

that the appropriate test to apply is whether the legislation is without manifestly reasonable foundation.

58. I agree with Mr Stark. The proper approach to questions of justification was authoritatively explained by Lord Reed PSC in *SC*, in particular at paragraphs 97 to 130. In summary, while Lord Reed concluded that the "manifestly without reasonable foundation" formulation still has a part to play, a more nuanced approach is required, avoiding a mechanical approach based on categorisation of the grounds for the difference in treatment. The more flexible approach identified by Lord Reed gives appropriate respect to the assessment of democratically accountable institutions, but also takes appropriate account of such other factors as may be relevant. Thus for example, he made clear that while as a general rule, differential treatment on suspect grounds (sex, race and disability for example) requires cogent justification, the courts should generally be very slow to intervene in areas of social and economic policy such as housing and social security. This is the approach I shall apply.

59. The first two points of challenge to Cotter J's decision that justification would have been established for any discrimination made out in this case, concern the alleged absence of any evidence to support it. Mr Stark relies on the fact that the Secretary of State was notified as a potential intervenor but has never sought to intervene to advance any legitimate aim or justification for the difference in treatment; nor is there any Hansard or other publicly available material that illuminates the issues that arise. Mr Stark does not suggest that a difference in treatment on the grounds of status of those in relevantly similar situations cannot ever be justified in the absence of evidence from the Secretary of State. He recognises that there are many cases where this can be gleaned from the underlying statutory purpose. However, here, Mr Stark submits that in the absence of evidence, the judge's approach amounted to impermissible speculation about the reasons for the difference and the legitimate aims. He relies on *Gilham v Ministry of Justice* [2019] UKSC 44, [2019] 1 WLR 590 (Baroness Hale) at paragraph 37:

> "37. As no legitimate aim has been put forward, it is not possible to judge whether the exclusion is a proportionate means of achieving that aim, whatever the test by which proportionality has to be judged. I conclude, therefore, that the exclusion of judges from the whistle-blowing protection in Part IVA of the 1996 Act is in breach of their rights under article 14 read with article 10 of the ECHR."

He also relies on *In re Brewster* [2017] SC 8, [2017] 1 WLR 519 at paragraphs 62 to 65 as to the correct approach to the scrutiny of justification when there is no evidence that the reasons advanced formed any part of the justification for the difference in treatment when the measure was enacted.

60. I do not accept these submissions. First, there is no legal requirement that the reasons put forward by way of justification for a legislative provision must have been present in the mind of policy makers at the time when it was introduced, and it is open to policy makers, in any event, to advance new or additional reasons or retrospective justification.

61. Secondly, as Mr Stark accepts, there will be many cases where the aims and reasons for an impugned legislative provision (particularly where it is in primary legislation) can

be gleaned from a proper understanding of the provision in question (including the mischief it is intended to address) in the context of the legislative scheme read as a whole.

62. Thirdly, there is no doubt that, in general, public sector housing is a scarce resource, and there was evidence in relation to the Dudley area demonstrating that it is no exception. As Cotter J found at paragraph 97:

> "97. The Claimant is trying to cope with an extremely high demand for three-bedroom properties and there is a dire shortage of family accommodation available. As at 16th March 2022, 866 families were in need of three-bedroom accommodation with 512 of those families on the waiting list/homeless. This represented a significant increase in demand from January 2020 (583 families in need of three-bedroom properties). Over the last 12 months, 464 three-bedroom properties became available to let in Dudley. Each property attracted an average of 65 bids. Those applicants had been waiting an average of 16.2 months. In Halesowen, only 20 three-bedroom properties became available to let in the last 12 months. Each attracted an average of 71 bids. On the Uffmoor Estate, the last three-bedroom property to become available was on 13 February 2017. The top applicant in band 1 had been on the waiting list since April 2014."

Accordingly, while housing authorities select tenants from their waiting lists on the basis of their housing needs, where a qualifying successor is entitled to succeed to a secure tenancy, they do so by virtue of their relationship to the deceased tenant rather than as a result of any particular housing need. This is a case in point. The property had three or four bedrooms and the appellant occupied it on her own.

63. It follows that the broad aim in limiting succession (and assignment) rights to qualified successors, is to strike a balance between the interests of different groups: members of the deceased tenant's family who have lived in the dwelling house as their home and are recognised as having some limited succession rights; those on the housing waiting list recognised as being in need of housing; and the interest of the local authority in allocating its housing stock in a fair, efficient and effective way. Inevitably, the operation of succession and assignment rights has the effect of removing a dwelling house from the pool of housing stock, preventing its allocation to someone with greater housing needs, and that has been held to justify the one succession rule (see *Gangera* and *Simawi* for example). It seems to me to follow that it also provides justification for restricting those who qualify as successors and when and how that is done.

64. Also inherent in the legislative scheme are bright-line rules aimed at ensuring that succession legislation can be operated and applied by tenants, their families and local authorities with certainty, without extensive and/or time-consuming investigation, and without creating difficult conflicts of interest.

65. Mr Stark submits that the uncertainty identified by the judge does not meet the test of objective and reasonable justification any more than it does for denying the appellant a status under article 14. He submits that all of the criteria proposed in his proposed read

down of section 87B HA 1985 are legal and factual questions which courts and local authorities are more than capable of answering, and have long been doing so.

66. I disagree. In my judgment certainty is also a justification as the judge found, provided a fair balance has been struck between the administrative convenience of certainty and the discrimination suffered. The legislative scheme as drafted has the legitimate aim of certainty which it achieves by proportionate means. It sets a bright-line rule so that the tenant, the landlord and any potentially qualifying successor know where they stand. Potential injustice (if capacity were regained) and conflicts of interest between tenant and cohabitee (and between cohabitees) are avoided.

67. I accept that there are some uncertainties inherent in sections 87 and 91(3) HA 1985 as enacted, and there may be cases that raise difficult factual enquiries as the exemplar cases referred to above demonstrate. However, a balance had to be struck between the different interests of tenant, family members, landlord and those in need of social housing so as to allow for some limited security being given to family members while preserving the ability of local authorities to allocate their housing resources on an appropriately fair and effective basis in circumstances where those housing resources are scarce. Parliament struck that balance in the legislative scheme as enacted. Doing so was a matter of policy for the legislature. Choices about welfare systems involve policy decisions on economic and social matters which are pre-eminently matters for national authorities. In *R (Turley) v Wandsworth LBC* [2017] EWCA Civ 189, [2017] HLR 21 this court held that where a provision relating to succession to secure tenancies had to be justified, there was no difference in principle between access to social housing and access to welfare benefits. For all these reasons, the legislative choice or judgment made by Parliament is to be accorded a wide margin of appreciation.

68. Further, as Lewison LJ observed in *Simawi* in the context of justification for the legislative exceptions to the one succession rule:

> "85. It may well be possible to improve the list of exceptions to the one succession rule in a way that would tilt the balance more in favour of family members, and against those who are on the housing list. From the perspective of the family members that would, no doubt, be a fairer outcome. But in this respect, as in many areas of life, the best should not be the enemy of the good."

Lewison LJ referred to what Lord Dyson MR said in *Swift v Secretary of State for Justice* [2013] EWCA Civ 193, [2014] QB 373 at [35]:

> "But the question is not whether the existing law is unfair and could be made fairer. Nor is it whether the existing law is the fairest means of pursuing the legitimate aim … Rather, the question is whether the existing law pursues that aim in a proportionate manner. The Strasbourg jurisprudence does not insist that a state pursues a legitimate aim in the fairest or most proportionate way. It requires no more than that it does so in a way which is proportionate. There may be a number of ways in which a legitimate aim can be pursued. Provided that the state has chosen one which is proportionate, Strasbourg demands no more."

These points apply with equal force here and I adopt them.

69. Further, I can see no error in the judge's consideration of the fact that there has been a progressive reduction in succession rights for tenancies entered into after 2012, including under the Localism Act 2011, as part of his analysis of the question of justification. This is not a question of using subsequent legislation to interpret earlier legislation; nor was it advanced or treated as a legitimate aim for the difference in treatment of qualifying successors under section 87(b) HA 1985. It was simply part of the factual circumstances to be borne in mind.

70. Accordingly, and in the absence of any manifest error in the judge's reasoning, this ground of appeal must also fail. It was for Cotter J to make an evaluative judgment on the question of justification and I can see no basis on which this court can or should interfere with the judgment he made.

71. If Cotter J had accepted the arguments on unlawful discrimination, he made clear that he would not have accepted the further submission that section 3 Human Rights Act 1998 allowed words to be read into section 87(b) HA 1985 to remedy the breach. I agree with his conclusion. To read the legislation in the terms proposed does indeed go against the grain of the legislation. The relevant fundamental feature of the legislation is the tenant condition in section 81 HA 1985. This is a clear and certain condition that is capable of being understood and applied without creating difficult conflicts of interest and or giving rise to significant scope for uncertainty, dispute and litigation. It would cross the constitutional boundary for the court to create a new right of succession. Such a fundamental change to the legislative scheme, with all the unintended consequences it might entail, is for Parliament and not the courts.

Conclusion

72. For all these reasons, I would dismiss this appeal. To the extent that the appellant was treated differently, it was not on the ground of an "other status". Even if it was, sections 87(b) and 91(3)(c) HA 1985 are amply justified having regard to the legitimate aims and needs of the different interest groups identified. The court could not, in any event, read down the legislation in the manner proposed. The judge was right to conclude that the appellant had not succeeded to her mother's secure tenancy on 16 October 2016, and to order possession of the Property accordingly.

73. The judge appreciated that his decision would come as a blow to the appellant, but hoped that she could move forward in her life as she has much to offer others. I share that hope.

Lady Justice Elisabeth Laing:

74. I agree.

Lord Justice Jonathan Baker:

75. I also agree.