



Neutral Citation Number: [2015] EWCA Civ 53

Case No: A3/2013/2615/CHANF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT

Mr Justice Burton
[2013] EWHC 2945 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 February 2015

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE PITCHFORD
and
LORD JUSTICE LEWISON

Between:

MRS HELEN NICHOLAS	<u>Appellant</u>
- and -	
SECRETARY OF STATE FOR DEFENCE	<u>Respondent</u>

Stephen Knafler QC and Toby Vanhegan (instructed by Arkrights Solicitors) for the
Appellant
Jonathan Davey (instructed by Treasury Solicitor) for the Respondent

Hearing date: 26th January 2015

Approved Judgment

Lord Justice Lewison:

Introduction

1. Mrs Nicholas and her then husband Squadron Leader Nicholas moved into 4 Thorn Avenue, Bushey Heath in May 2005. They did so under the terms of a licence granted to Squadron Leader Nicholas by Defence Estates, acting on behalf of the Secretary of State for Defence. The licence ended with the following acknowledgement by Squadron Leader Nicholas:

“I have read and agree to the terms of this Licence. I understand that this Licence is to be granted because my occupation of the Property is required for the better performance of my service with the Crown and that this Licence is not a tenancy.”

2. The licence was terminable by the licensor on 93 days’ notice in certain events, including the vacation of the property by Squadron Leader Nicholas on marital breakdown. Unfortunately the marriage did break down and Squadron Leader Nicholas moved out some time before April 2008. On 22 May 2008 Defence Estates gave notice (the validity of which is disputed) requiring Mrs Nicholas to vacate the property by 24 August 2008. Over six years later, she is still there.
3. She argues that the fact that Crown licensees have no security of tenure amounts to unlawful discrimination as a result of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms taken in combination with Article 14; and that the MoD is acting unlawfully, and in breach of section 6 of the Human Rights Act 1998, in seeking possession. Additionally she argues that the notice which purported to terminate the licence was invalid. Burton J rejected her arguments on both points; and so would I.

The facts

4. The licence contained the following relevant provisions:

“1.1 In this Licence:

1.1.1 The Licensor is referred to as ‘We’. The words ‘Us’, ‘Our’ and ‘Ourselves’ are also used in relation to the Licensor.

1.1.2 The Licensee is referred to as ‘You’. The words ‘Your’ and ‘Yourself’ are also used in relation to the Licensee.

...

2. PERMISSION TO OCCUPY THE PROPERTY

2.1 The Licence gives You the right to occupy the Property for the duration of this Licence. Other persons, such as Your children and Your spouse, may only occupy the Property in accordance with MoD's current policy ...

2.2 Permission to occupy the Property is personal to You only.

2.3 Your right to occupy the Property commences on the Start Date.

2.4 Your right to occupy the Property under this Licence will cease if the Licence is terminated, either in accordance with the relevant provisions of the Licence, or in any other way permitted by law.

3. PAYMENT OF THE FAMILY QUARTER CHARGE

3.1 You are responsible for and agree to the Family Quarter Charge ... being deducted from Your pay.

...

5. HOW WE CAN END THIS LICENCE

5.1 We shall only end this Licence by providing You with written notice of termination. The period of notice of termination that We will give You will vary depending on the circumstances. These circumstances are set out in paragraphs 5.2 and 5.3 below. On or before expiry of the notice of termination, You must leave the Property and have complied with Your other obligations under this Licence.

5.2 We will give You 93 days' written notice of termination in the following cases:

5.2.1 Your marital status changes, resulting in loss of entitlement to Service Family Accommodation.

...

5.2.3 You vacate the Property on matrimonial breakdown. What constitutes marital breakdown for the purposes of this Licence is set out in JSP 464.

5.2.4 Your spouse vacates the Property on matrimonial breakdown and You are no longer entitled to occupation of Service Family Accommodation as set out in JSP 464.

...

10.1 We will serve any written notice on You at the Property.

...

10.4 Any notice (other than notices in legal proceedings) will be treated as having arrived 48 hours after posting."

5. It continued with the acknowledgement I have already quoted.
6. On 7 April 2008 Squadron Leader Nicholas wrote to Defence Estates saying that he had begun divorce proceedings against Mrs Nicholas and that he had moved out of the property “a while ago”. He also told them that he had found accommodation at RAF Bentley Priory. On 22 May 2008 Defence Estates wrote a letter addressed to both Squadron Leader and Mrs Nicholas. One copy was sent to Mrs Nicholas at the property and another to Squadron Leader Nicholas at RAF Bentley Priory. The letter was headed “NOTICE TO VACATE SERVICE FAMILIES ACCOMMODATION” and began:

“We are sorry to learn of the breakdown of your marriage. Unfortunately this means that your entitlement to live in Service Families Accommodation has come to an end. The first step is a notice to vacate, which is issued to you and we enclose your notice with this letter.”
7. The enclosed notice (also sent to both Squadron Leader and Mrs Nicholas) was addressed to Mrs Nicholas alone. That notice began:

“You are hereby required to vacate the Service Families Accommodation at 4 Thorn Avenue on or before 24 August 2008 due to your Marital Breakdown.”
8. Mrs Nicholas did not vacate and in due course Defence Estates sent her a questionnaire about her personal circumstances in order to conduct what they described as a “Proportionality Exercise” which, they said, was required by the Human Rights Act 1998. It does not appear that Mrs Nicholas replied to that questionnaire, or indeed to a subsequent questionnaire that was sent to her. In due course the MoD began possession proceedings against her. Because she raised the question whether there was an incompatibility between primary legislation and a Convention right, the action (together with another similar action) was transferred to the High Court.

The legislative framework

(a) The Human Rights Act

9. Section 6(1) of the Human Rights Act 1998 provides:

“It is unlawful for a public authority to act in a way which is incompatible with a Convention right.”
10. The Convention rights in issue in our case are those contained in Article 8, taken together with Article 14. Article 8 provides:
 - “1. Everyone has the right to respect for his private and family life, his home and his correspondence.
 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of

national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

11. Article 14 provides:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

12. Section 4 of the Act provides:

“(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.”

(b) Security of tenure

13. The two principal systems of security of tenure in England and Wales for short term tenants are assured shorthold tenancies (in the private sector) and secure tenancies (in the public sector). Almost all private sector short term tenancies granted after February 1997 are assured shorthold tenancies rather than assured tenancies: Housing Act 1988 s. 19A. In order for there to be security of tenure as an assured shorthold tenancy there must, in the first instance, be a tenancy rather than a licence: Housing Act 1988 s. 1 (1). If a tenancy is an assured shorthold tenancy then after the first six months of the tenancy it may be terminated on two months’ notice: Housing Act 1988 s. 21. Once the tenancy has been validly terminated the court must order possession. This necessarily abbreviated summary ignores changes made by the Localism Act 2011.
14. However, paragraph 11 of Schedule 1 to the Act provides that (except in the case of land under the management of the Crown Estate Commissioners) a tenancy cannot be an assured tenancy if the interest of the landlord belongs to Her Majesty in right of the Crown or to a government department. Thus even if the licence in our case had been a tenancy, it could not have created an assured shorthold tenancy.
15. In the case of the public sector the principal system of security of tenure is via a secure tenancy. This applies to a tenancy or a licence to occupy a dwelling-house: Housing Act 1985 s. 79. If a secure tenancy is granted, the court may only make an order for possession on one or more of the grounds specified in Schedule 2 to the Act. In some cases the landlord must also show that it is reasonable to make an order for possession. In other cases the landlord must show that suitable alternative accommodation is available for the tenant and in yet other cases the landlord must show both that it is reasonable to make an order for possession and also that suitable

alternative accommodation is available for the tenant. However, paragraph 2 of Schedule 1 to the Housing Act 1985 provides that a tenancy is not a secure tenancy if it is one of a number of different arrangements under which the dwelling house is made available to an employee of the landlord. These include cases where:

- i) The tenant is an employee of the landlord and his contract of employment requires him to occupy the dwelling for the better performance of his duties. This exclusion extends to cases in which the tenant is not employed by the landlord itself but by one of other specified authorities or bodies;
- ii) The tenant is a member of the police force and the dwelling is provided to him rent and rates free under Police Regulations; and
- iii) The tenant is an employee of a fire and rescue authority whose contract of employment requires him to live in close proximity to a particular fire station and the dwelling was provided to him in consequence.

16. In addition in order for a tenancy to be a secure tenancy, the landlord must be one of the authorities or bodies listed in section 80 of the Housing Act 1985. The Crown is not among them.

The question to be decided

17. The major difference between the parties on this appeal was about the question to be decided. Mr Knafler QC on behalf of Mrs Nicholas characterised the question thus:

“In this appeal, the Court of Appeal must decide whether tenancies granted by the Crown should continue to be exempt from any form of security of tenure.”

18. He thus posed the question at a high level of generality, which in the shorthand used before us, was dubbed the “macro-level”. Mr Davey, on the other hand, said that the question was whether on the facts of this particular case Mrs Nicholas’ Convention rights had been infringed. If they had not then the question at macro-level either did not arise at all, or should not be answered.

19. There is considerable guidance in the case-law about the approach that the court should adopt in cases where the question of incompatibility arises. In *R (Nasseri) v Secretary of State for the Home Department* [2009] UKHL 23; [2010] 1 AC 1 Mr Nasseri argued that a decision to send him to Greece to determine his asylum application would be in breach of his rights under Article 3 of the Convention because of the risk that he might be removed from Greece to Afghanistan, his country of origin; and that a conclusive presumption contained in Asylum and Immigration (Treatment of Claimants, etc) Act 2004 that there was no such risk was incompatible with his Convention right. The Secretary of State argued that on the facts there was no such risk, although on other facts there might be an incompatibility. Lord Hoffmann said at [17]:

“McCombe J said, in para 36, that the legislation is “either compatible with Convention rights or it is not”. It cannot, he said, be incompatible if there is in fact a risk that Greece will

return asylum seekers in breach of article 3 rights but compatible if there is no such risk. I do not agree. Section 4 of the 1998 Act provides that a declaration of incompatibility may be made if a provision is “incompatible with a Convention right”. That will normally mean a real Convention right in issue in the proceedings, not a hypothetical Convention right which the claimant or someone else might have if the facts were different.”

20. He continued in the following paragraph:

“The structure of the 1998 Act suggests that a declaration of incompatibility should be the last resort in a process of inquiry which begins with the question raised by section 6(1), namely whether a public authority is acting in a way which is incompatible with a Convention right. If the answer is no, that should ordinarily be the end of the case. There will be no need to answer the hypothetical question of whether a statutory provision would have been incompatible with a Convention right if the public authority had been infringing it.”

21. It will be noted that Lord Hoffmann said that if an authority is not infringing a particular claimant’s Convention right that will “ordinarily” be the end of the case: not that it will always be the end of the case. Thus in paragraph [19] he did not exclude the possibility that a declaration of incompatibility might be made even if there were no breach on the particular facts. Baroness Hale took the same approach in *R (Chester) v Secretary of State for Justice* [2013] UKSC 63; [2014] AC 271. At [100] she said that when the court was considering remedies under the Human Rights Act 1998 it should adopt the “sensible practice” of asking in what way the particular claimant’s Convention rights had been violated. She continued at [102]:

“That leaves the possibility of a declaration of incompatibility under section 4(2) of the Human Rights Act 1998. This applies “in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right”: section 4(1). This does appear to leave open the possibility of a declaration in abstracto, irrespective of whether the provision in question is incompatible with the rights of the individual litigant. There may be occasions when that would be appropriate. But in my view the court should be extremely slow to make a declaration of incompatibility at the instance of an individual litigant with whose own rights the provision in question is not incompatible. Any other approach is to invite a multitude of unmeritorious claims.”

22. These observations were echoed by Lord Wilson in *R (T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35; [2015] AC 49 at [51]:

“Under article 34 of the ECHR the jurisdiction of the ECtHR is to determine an application from a person claiming to be the victim of a violation by a member state of his Convention

rights. So its inquiry is into violation in the individual case before the court. When it concludes that the legislation of a state is incompatible with the Convention, the ECtHR is understood to mean not that the legislation will always operate incompatibly but that it operated incompatibly in its application to the individual case. In the *Hirst* case ...the ECtHR appeared to depart from this understanding: it appeared to consider whether the disenfranchisement of prisoners was compatible with the Convention irrespective of the fact that the applicant was a life prisoner to whom denial of the vote could in any event scarcely amount to a violation. The court's approach was criticised first in a minority judgment of the court in that case and then by this court in ... *Chester* ... Baroness Hale of Richmond DPSC observed ... that "it would have been in accordance with the consistent practice of the court for the majority to indicate in precisely what way Mr Hirst's rights had been violated by the law in question". Then, relevantly to the present appeals, she added "it seems to me that the courts of this country should adopt that sensible practice when considering the application of the various remedies provided by the Human Rights Act 1998". Finally, in addressing the apparent width of the power to make a declaration of incompatibility under section 4 of the 1998 Act, she stated ... that "the court should be extremely slow to make a declaration of incompatibility at the instance of an individual litigant with whose own rights the provision in question is not incompatible"."

23. This approach is not in any way contrary to that of Lord Nicholls in *Bellinger v Bellinger* [2003] UKHL 21; [2003] 2 AC 467. The House of Lords made a declaration of incompatibility in that case because, as Lord Nicholls put it at [50], the legislative provision in question continued to have adverse practical effects on the particular claimant. Lord Wilson cited *Bellinger v Bellinger* in *T*, without any suggestion that it adopted an approach contrary to the one that he had just described. Nor is it contrary to the decision of Maurice Kay J in *R (M) v Secretary of State for Health* [2003] EWHC 1094 (Admin) where there was an admitted violation of a Convention right.
24. In my judgment, therefore, Mr Davey is right in his suggested approach to the issue before this court. We should begin by asking whether Mrs Nicholas' particular Convention rights have been violated. If they have not, then there is no need to answer the macro-question and we should be slow to do so.

Mrs Nicholson's Convention rights

25. The question under this head is whether the primary legislation discriminates against Mrs Nicholas on the ground of her status. The status that she can potentially rely on is that of the spouse or former spouse of a Crown licensee. Although Mr Knafler did at some points say that the relevant status was that of the spouse or former spouse of a Crown *tenant*, since Squadron Leader Nicholas was not a tenant that submission is not open to her. Although Mr Davey did not concede that there was a relevant status, he did not strenuously argue the point. I will proceed, therefore, on the basis that Mrs

Nicholas' status as the spouse or former spouse of a Crown licensee potentially engages Article 14.

26. What Article 14 prohibits is discrimination. What this means is that if there is a prejudicial difference in treatment of persons in relevantly similar situations on the facts of the particular case, the difference in treatment must have an objective and reasonable justification. In deciding whether there has been discrimination in this sense the position of the claimant must be compared with those in "relevantly similar or analogous" situations: *Larkos v Cyprus* [1990] 30 EHRR 597 at [30]. If there is a prejudicial difference in treatment that difference in treatment must pursue a legitimate aim, and bear a reasonable relationship to the aim sought to be realised: *Belgian Linguistics Case (No 2)* (1979-80) 1 EHRR 252 at [10]. There are, therefore, two distinct questions (i) has there been disadvantageous treatment of persons in relevantly similar situations and (ii) if so, does it have reasonable and objective justification?
27. The first potential comparator is to imagine that Squadron Leader Nicholas took his licence from a private sector provider. In that situation he would have had no security of tenure because licences do not attract security. He would have had no more than a service occupancy, which once terminated according to its terms would have led inevitably to the making of a possession order. But, even if he had had an assured shorthold tenancy, more than six months had elapsed before the notice of termination was served, and the notice itself was longer than the two months required in the case of an assured shorthold tenancy. The second potential comparator is to imagine that the Crown had been added to the list of bodies that satisfy the landlord condition in section 80 of the Housing Act 1985. In that situation, although the distinction between a licence and a tenancy does not matter, there could have been no secure tenancy as a result of paragraph 2 of Schedule 1. So once again Squadron Leader Nicholas would have had no more than a service occupancy, which once terminated according to its terms would have led inevitably to the making of a possession order. There is a further obstacle in Mrs Nicholas' way. Although in some cases a spouse is entitled to continue to occupy the matrimonial home if the property-owning spouse leaves, the statutory codes of security of tenure give no protection to former spouses (unless the marriage ends on death, and even then only if the successor spouse has been living with the deceased spouse). Either way, therefore, there has been no violation of Mrs Nicholas' Convention rights on the facts of this case, because there has been no relevant difference in treatment which has had an adverse effect on Mrs Nicholas.
28. Since there has been no disadvantageous treatment of Mrs Nicholas as compared with persons in relevantly similar or analogous situations, the question of objective and reasonable justification does not arise. We do not, therefore, need to answer the macro-question; and I would decline to do so.
29. I simply record that the MoD said that it could justify disadvantageous treatment on the basis that security of tenure for service personnel would interfere with military effectiveness (especially if it prevented rapid redeployment of personnel); would inhibit the MoD in its function of providing housing for service personnel; and would require it to rent accommodation locally from the private sector, which would be an unnecessary drain on the public purse.

Was the licence validly terminated?

30. There is a distinction, recognised in cases such as *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, between the formal requirements of a notice terminating a contract and the information that such a notice must convey. If there is a formal requirement it must be complied with strictly (e.g. if it must be served on blue paper it is no good serving it on pink paper). If on the other hand it is a question of conveying information, then the question is how a reasonable recipient would have understood it.
31. In our case the formal requirements of the notice were that it had to be (a) written (b) provided to Squadron Leader Nicholas (c) 93 days in duration and (d) served at the property. All these formal requirements were complied with. As Mr Knafler accepted there was no formal requirement that the notice had to be *addressed to* Squadron Leader Nicholas as well as given to him. If the notice (as opposed to the covering letter) had not been addressed to anyone but simply handed to Squadron Leader Nicholas, he accepted that it would have been valid. But if that is so, then the fact that Mrs Nicholas' name was added to the notice was not a failure to comply with some formal requirement. At best it might cause a reasonable recipient to wonder whether it applied to Squadron Leader Nicholas too. But the reasonable recipient would also have received the covering letter which made it plain that the requirement to vacate applied both to Squadron Leader Nicholas and also to Mrs Nicholas. Read together there is no ground for perplexity.
32. Accordingly in my judgment the notice validly terminated the licence.

Result

33. For these reasons, which are in substance the same as Burton J's, I would dismiss the appeal.

Lord Justice Pitchford:

34. I agree.

Lord Dyson MR:

35. I also agree.