IN THE HIGH COURT OF JUSTICE (ADMINISTRATIVE COURT) **Claim no. CO/598/2018**

BETWEEN:

THE QUEEN, ON THE APPLICATION OF
THE JOINT COUNCIL FOR THE WELFARE OF IMMIGRANTS

Claimant

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

-and-

(1) THE NATIONAL COUNCIL FOR CIVIL LIBERTIES
(2) THE RESIDENTIAL LANDLORDS ASSOCIATION
(3) THE EQUALITY AND HUMAN RIGHTS COMMISSION

Interveners

Claim no. CO/272/2018

AND BETWEEN:

THE QUEEN, ON THE APPLICATION OF
MS KHATUNA GOLOSHVILI

Claimant

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

-and-

THE NATIONAL COUNCIL FOR CIVIL LIBERTIES

Intervener

WRITTEN SUBMISSIONS ON BEHALF OF THE
THE NATIONAL COUNCIL FOR CIVIL LIBERTIES

[References in bold, square brackets are to page numbers in the relevant bundle]

INTRODUCTION

1. The National Council for Civil Liberties ("Liberty") is grateful for the Court's permission, granted by Lang J on 8 November 2018 **[A103-104]**, to intervene in the present claims for judicial review brought by the Joint Council for the Welfare of Immigrants ("JCWI") (CO/598/2018) and Ms Khatuna Goloshvili (CO/272/2018) in relation to the "Right to Rent" scheme ("the Scheme") contained in Part 3, Chapter 1 of the Immigration Act ("IA") 2014 (as subsequently amended by the IA 2016).

2. Liberty is a non-governmental organisation which has been at the heart of the movement for fundamental rights and freedoms in the United Kingdom for over eighty years. Founded in 1934, it is an independent, cross-party organisation which promotes the values of individual human dignity,

equal treatment and fairness as the foundations of a democratic society. Liberty works to protect basic rights and freedoms through a combination of public awareness campaigns, Parliamentary outreach (including briefings, expert evidence to parliamentary committees, and participation in public consultations), and the provision of free legal advice and information.

3. The Scheme forms part of the Government's wider "Hostile Environment" policy, announced by the then Home Secretary, Theresa May, in 2013. Under the policy, the Government has sought to delegate, in part, to landlords and others (e.g. health providers) its responsibility for ensuring effective immigration control, by creating a "really hostile environment" for those without leave to remain in the UK and thereby forcing them to leave the country.

4. The Scheme clearly touches directly upon the rights, freedoms and dignity of individuals which Liberty seeks to promote, as well as raising issues of potential wider significance in these regards.

5. From the outset, Liberty highlighted its concerns as to the likely discriminatory effect of the Scheme and of the dangers of outsourcing of immigration enforcement to citizens and businesses.

6. Liberty does not seek to make submissions on the facts of the respective claims or on all of the issues raised in them. Its intervention is limited to developing argument on the specific points identified below.

THE JCWI CASE

Introduction

7. Liberty's submissions in relation to the JCWI case focus on the following issues:

    a. Whether the subject matter of the claim falls within the "ambit" of a substantive right under the European Convention on Human Rights ("ECHR" or "Convention") such that Article 14 ECHR is engaged.

    b. Whether the SSHD is liable under Article 14 for any discriminatory impact of the Scheme notwithstanding that this operates through the actions of third-party landlords who are unlikely themselves to be public authorities.

    c. Whether, if JCWI's first ground is made out, it is open to the Court to make a declaration of incompatibility in respect of the whole of Chapter 1 of Part 3 IA 2014.

8. Liberty no longer proposes to address the approach to justification of any discrimination, as this has been comprehensively addressed by JCWI in its skeleton argument.

Ambit

9. The SSHD submits that: "*Article 8 does not recognise a right to be provided with a home at all (still less the right to acquire a particular home)*" (citing *Codona v UK* (485/05), ECtHR, 7 February 2006; and *Demopoulos and others v Turkey* 50 EHRR [2010] SE14) (DGR, para 9 **[A89]**); the Scheme is not analogous to schemes providing benefits, which have been said to constitute "modalities" of Article 8 (citing *Petrovic v Austria* (2001) 33 EHRR 14) (DGR, para 11 **[A90]**); and that the ability of a secure tenant to transfer from one council property to another is not within the ambit of Article 8 (citing *R (H) v Ealing LBC* [2017] EWCA Civ 1127, per Sir Terence Etherton MR at para 101) (DGR para 12 **[A90]**).

10. Each of these submissions, however, fails to address the key features of the present challenge.

11. A claimant does not need to show a violation of Article 8 or even an "interference" in order to show that a matter is within its ambit. They need only show that "*the suspension is linked to, or (as it is usually described) within the scope or ambit of [the Article]*" (*Mathieson v SSWP* [2015] UKSC 47; [2015] 1 W.L.R. 3250 per Lord Wilson at para 17).

12. Article 8 protects the right to respect for a person's home and their private and family life. The features of the Scheme in issue in this challenge bear on a person's ability to establish a home at all and engage each of these aspects of the Article.

13. Specifically, Article 8 "*secure[s] to the individual a sphere within which he can freely pursue the development and fulfilment of his personality*", and concerns "*rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community*" (*A-MV v Finland* (2018) 66 E.H.R.R. 22 at para 76). These rights cannot be enjoyed without access to settled accommodation.

14. In *R (HA) v Ealing LBC* [2015] EWHC 2375 (Admin); [2016] P.T.S.R. 16, a provision of the local authority's housing allocations scheme was held to fall within the ambit of Article 8. Goss J explained (at para 29, cited by Sir Terence Etherton MR in *H*[1]):

> *29. … The link here is said to be home and family life. There is no enshrined right to a physical home; the right is to the enjoyment of a family life. However, this can, in reality, only be enjoyed in settled accommodation. Accordingly, I am satisfied there is a sufficient link.*

15. Clearly, then, the ability of an individual, in general terms, to acquire settled accommodation in which to enjoy a private and family life (as opposed to the ability of an individual to obtain any particular unit of accommodation) is a matter falling within the ambit of Article 8.

[1] Although Underhill LJ declined (at para 133) to endorse Goss J's reasoning (and Davis LJ commented, at para 128, that it "*may be altogether too broad*"), this was clearly in relation to the context of a claim to the provision by the state of *social housing* ("*In my provisional view, therefore, the provision and allocation of social housing is a social welfare benefit of a kind which does not, without more, fall within the ambit of article…*")

16. It is also relevant that the Scheme in issue here is part of a series of measures directed at making it more difficult for people without the right to remain to establish a settled lifestyle. By way of comparison, in *Aristimuño Mendizabal v France* (2010) 50 E.H.R.R. 50, the refusal to grant the applicant a long-term residence permit interfered with her rights under Article 8 on the basis that it left her in a precarious situation, on successive short-term permits. The Court commented (at paras 70-72):

> *71. The applicant states in fact—and the Government has not contradicted her on this point—that the precariousness of her situation and the uncertainty as to her fate had a significant moral and financial impact on her (casual and unskilled jobs, social and financial difficulties, impossibility, as a result of not having a residence permit, of renting premises and carrying on the professional activity for which she had undertaken training).*
>
> *72. The Court considers that, in the circumstances of the case, the failure to issue the applicant with a residence permit for such a long period of time, even though she had already been lawfully resident in France for over 14 years, constituted an undeniable interference with her private and family life.*

17. The more severe impact of the "hostile environment" is an *a fortiori case*. That being so, the Court should lean against finding that particular aspects of the policy are outside the ambit of Article 8. Each of the elements furthers the overall aim and cannot realistically be separated from it.

18. In this regard, it is noted that the SSHD's own memorandum on the ECHR implications of the IA 2016 dated 17 September 2015 **[C917-965]** accepted, in relation to those who do not have the right to rent, that:

    a. "*The restriction on establishing a residence in the private rented sector as one's only or main residence prevents the individual living his own personal life as he chooses and potentially prevents him from living with members of his family and in that respect engages his right to respect for private and family life*" (para 98 **[C945]**); and

    b. "*The restriction will also impact on the right to respect for family life enjoyed by both the individual themselves, and also British citizens, EEA Nationals, and those with an unlimited right to reside in the United Kingdom who will be prevented from arranging accommodation for themselves and any adult family member who is disqualified from occupation. This engages Articles 8 and arguably Article 14*" (para 99 **[C945]**).

19. As noted above, in order to engage Article 14, it is not necessary for the effects of a scheme to be so severe as to amount to a *breach* of the rights contained in Article 8, nor even to an *interference* with those rights; it is sufficient that the effects of the scheme be *linked* to them. Accordingly, it is not necessary that the effects be such as to prevent an individual from being able to rent accommodation at all (as is intended to be the case for those without the right to rent); it is sufficient that they impair the individual's ability to do so (as in *HA*).

20. Consequently, the SSHD's other submissions under the heading of ambit (DGR, paras 10 and 13 **[A90]**) do not in fact amount to submissions that the alleged effect of the Scheme (i.e. a disproportionately prejudicial effect on the ability of certain groups of individuals successfully to obtain a residential tenancy) does not fall within the *ambit* of Article 8. Instead they amount to submissions that the alleged effect is not created (or not sufficiently directly created) by the Scheme, which goes instead to the questions of whether there is a *breach* of Article 14, addressed below.

21. Even if the Scheme did not fall within the ambit of Article 8, it is submitted that it would fall within the ambit of Article 6, on the basis that the right to enter into a tenancy agreement is a "civil right" within the meaning of Article 6(1) (see, by analogy: (1) *Kaplan v United Kingdom* (1982) 4 E.H.R.R. 64 at para 136, concerning the right to enter into insurance contracts; (2) *Dewicka v Poland* (4 April 2000) (Application no. 38670-97) at para 40, concerning the right to enter into a contract to provide telecommunications services; and (3) *Ringeisen v Austria (No 1)* (1979-80) 1 E.H.R.R. 455 and *Yanakiev v Bulgaria* (10 August 2006) (Application no. 40476-98), concerning the right to sell and buy land, respectively), such that Article 14 would be engaged in any event.

Liability for acts of private landlords

22. The SSHD submits that: "*any substantive disparate impact, if it exists, is not caused by the provisions under challenge. It is caused by the acts of individual third parties (landlords), either (at best for the Claimant) misapplying or misunderstanding the legislation, or entirely independently of the legislation*" (DGR, paras 17 **[A91]** and 26-38 **[A93-95]**).

The starting point: *DH v Czech Republic*

23. The leading authority on indirect discrimination in the context of Article 14 is the decision of the Grand Chamber of the European Court of Human Rights ("ECtHR") in *DH v Czech Republic* (2008) 47 E.H.R.R. 3, which defines indirect discrimination in the following terms: "*a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group*" (para 175).

24. Although not "aimed at" people of specific ethnicities or nationalities (as opposed to people with particular immigration statuses), JCWI's analysis of the evidence – and, indeed, the evidence and submissions of the Residential Landlords' Association ("RLA") – show that the Scheme nonetheless places these groups at a higher risk of landlords deciding not to let a property to them. This clearly constitutes "disproportionately prejudicial effects on a particular group", in accordance with the plain meaning of that phrase.

25. The definition in *DH* does not, on its face, require any particular causal mechanism between the policy or measure and the disproportionately prejudicial effects. Nor has the SSHD pointed to any authority to suggest a principle that the involvement of a private third party (or indeed any other

external factors) should be taken somehow to break the chain of causation. Indeed, such a principle would be inconsistent with the approach set out in *DH*, under which there are no "*pre-determined formulae*" for the assessment of evidence and the Court "*adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions*" (para 178).

26. Accordingly, it is submitted that the Court must simply examine whether the Scheme has the disproportionately prejudicial effect alleged.

27. There is nothing surprising in this reading of *DH*. It is consonant with other areas of ECHR jurisprudence recognising that state responsibility can be engaged by the acts of private persons.

Delegation of state functions

28. In *YL v Birmingham City Council* [2007] UKHL 27; [2008] 1 A.C. 95, Baroness Hale summarised the bases on which the ECtHR has held states to be responsible for the acts of third parties, effectively as agents of the state (para 56; emphasis added):

> *56. Strasbourg case law shows that there are several bases upon which a state may have to take responsibility for the acts of a private body. The state may have delegated or relied upon the private body to fulfil its own obligations under the Convention: as in Van der Mussele v Belgium (1983) 6 EHRR 163, in which the provision of legal aid was delegated to the Belgian bar which required young advocates to provide their services pro bono; or, perhaps, in Costello-Roberts v United Kingdom (1993) 19 EHRR 112 where the fact that education is itself a Convention right was influential in engaging the state's responsibility for corporal punishment in private schools. The state may have delegated some other function which is clearly a function of the state to a private body: as in Wos v Poland (Application No 22860/02) (unreported) 1 March 2005, where the Polish Government delegated to a private body the task of allocating compensation received from the German Government after World War II. The state may itself have assisted in the violation of Convention rights by a private body: as in Storck v Germany (2005) 43 EHRR 96, where the police had assisted in the illegal detention of a young woman in a private psychiatric hospital by taking her back when she ran away.*

29. As set out in the case of *Hirsi Jamaa v Italy* (2012) 55 E.H.R.R. 21 (in the opinion of Judge Pinto de Albuquerque, concurring with the majority of the Grand Chamber, at O-I33):

> *O-I33. Immigration and border control is a primary state function and all forms of this control result in the exercise of the state's jurisdiction. Thus, all forms of immigration and border control of a state party to the European Convention on Human Rights are subject to the human rights standard established in it and the scrutiny of the Court, regardless of which personnel are used to perform the operations and the place where they take place.*

30. Thus "*the full range of conceivable immigration and border policies … remain subject to the Convention standard. They all constitute forms of exercise of the state function of border control and a manifestation of state jurisdiction, wherever they take place and whoever carries them out*" (including where they are carried out by third party international organisations, on behalf of the state) (*ibid*, para O-I36).

31. In the present proceedings, as is clear from the SSHD's impact assessment dated 25 September 2013 **[C21-58]**, the Scheme clearly has always been intended to be and/or to be part of an "immigration policy" (the so-called "hostile environment" policy, since re-branded as the "compliant environment"):

    a. The stated aim of the Scheme is "*to discourage those who stay illegally and encourage those who are resident in the UK illegally to leave by making it more difficult to establish a settled lifestyle through stable housing*" **[C21]**.

    b. The policy is identified as "*part of a coordinated package of legislative and administrative measures that are designed to have the effect of reducing the attraction of the UK as a destination for prospective illegal residents and to encourage those that are residing in the UK illegally to leave voluntarily*" **[C25]**.

    c. Further, although the Scheme transfers the majority of the burden to landlords, the SSHD (necessarily) retains an important role: "*The scheme will be administered by the Home Office. Landlords will be able to seek advice from the Home Office where they are unsure of a prospective tenant's status in the United Kingdom, or where document verification is required. Investigations and enforcement work will be undertaken by Home Office Immigration Enforcement Officers*" **[C27]**. (This is all the more so following the introduction of the additional role for the SSHD in the NLDP procedure, as part of the 2016 amendments).

Positive duties under Article 14

32. Article 14 requires that "*the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as [those listed in the Article]*" (emphasis added).

33. Accordingly: "*in its terms it imposes on the state not merely a duty to refrain from certain conduct in relation to its citizens, but also a positive obligation to 'secure' to those citizens the enjoyment of Convention rights without discrimination*" (*Ghaidan v Godin-Mendoza* [2002] EWCA Civ 1533; [2003] H.L.R. 35 per Buxton LJ at para 5; the point was not considered in the House of Lords [2004] UKHL 30; [2004] 2 A.C. 557).

34. It is in the nature of such a positive obligation that it applies not in relation to the actions of the state or its agents, but rather to the actions of third parties. Thus, for example, Article 14 "*places a positive duty on states to combat racism and racial violence; to protect victims of domestic violence; to protect LGBT people from homophobic hate speech and allow them to participate in a march; and to ensure that members of trade unions have real and effective protection against anti-union discrimination*" (*Human Rights Practice*, para 14.020).

35. In the present case, therefore, even if landlords implementing the Scheme cannot be said to constitute agents of the state in the sense discussed above – such that the state is responsible for any conduct amounting to a breach of a Convention right – the state is nonetheless under a more general, positive duty to "secure" to individuals the enjoyment of their rights under Article 8 (which "*can, in reality, only be enjoyed in settled accommodation*": see *HA*, above) without discrimination, including by landlords.

Creation of risk of discrimination

36. Between these two poles, the state may also be liable where it has *created* the risk of discrimination by third parties.

37. In *Sofianopoulos v Greece* (1977/02, 1988/02 and 1997/02) ECHR 2002-X, the ECtHR suggested that the inclusion of information as to religious beliefs on state ID cards "*exposed the bearers to the risk of discriminatory situations in their relations with the administrative authorities or even in their professional relations*" (*Sofianopoulos*, p8). In *Sinan Isik v Turkey* (21924-05), 2 February 2010, the Court held, citing *Sofianopoulos* (at para 43), that such a situation breached the right to respect for freedom of religion under Article 9 but, in light of this finding, declined to go on to consider Article 14.

38. This reasoning was, however, applied in the context of Article 14 in the case of *Grzelak v Poland* (7710/02) 15 June 2010, concerning the inclusion on Polish school reports of a mark for "religion/ethics".

39. In *Grzelak*, the Polish Ombudsman had challenged the relevant legislation in the Polish Constitutional Court "*arguing that the insertion of a mark for 'religion/ethics' on school reports ... created the risk of intolerance*" (para 35). The Polish Court had acknowledged the risk but pointed to the fact that the mark recorded on the report did not specify a particular religion or even whether the mark was for a class in religion or ethics (para 41). However, as the third party intervener (Helsinki Foundation for Human Rights) before the ECtHR pointed out, there nonetheless remained a risk of discrimination, given that many schools did not provide courses in ethics (paras 81-82).

40. Finding that Poland had breached the applicant's rights under Article 14 read in conjunction with Article 9, the ECtHR cited *Sofianopoulos* and *Sinan Isik*, commenting that: "*Although the above cases concerned identity cards, documents of arguably greater significance in a person's life than school reports for primary and secondary education, the Court nonetheless finds that similar considerations apply to the present case*" (para 93). The Court continued (at paras 95 and 99):

> *95. ... The fact of having no mark for "religion/ethics" inevitably has a specific connotation and distinguishes the persons concerned from those who have a mark for the subject (see, Sinan Işık, cited above, § 51). This finding takes on particular significance in respect of a country like Poland where the great majority of the population owe allegiance to one particular religion.*

...

99. Having regard to the foregoing, the Court finds that the absence of a mark for "religion/ethics" on the third applicant's school certificates throughout the entire period of his schooling amounted to a form of unwarranted stigmatisation of the third applicant.

41. The finding of violation was notwithstanding the fact that the legislation did not permit or encourage intolerance of those without a religious belief and the duties on the authorities to prevent such intolerance (para 75); the legislation nonetheless inevitably had such an effect.

42. This is also consistent with the position in domestic law, as set out in the case of *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55; [2005] 2 A.C. 1. In that case, the claimant contended that the system of extra-territorial immigration control by UK officers at Prague Airport, "*carried with it a very high risk of racial discrimination*" against Roma individuals, contrary to the Race Relations Act 1976 (per Baroness Hale at para 85). In finding that the claimant was entitled to declaratory relief, Baroness Hale (with whom Lords Bingham, Steyn, Hope and Carswell agreed) held (at para 97):

It is not the object of these proceedings to make a finding of discrimination in any individual case. The object, as Burton J pointed out (Judgment, para 53(iv)), is to establish a case that the Prague operation was carried out in a discriminatory fashion. All the evidence before us, other than that of the intentions of those in charge of the operation, which intentions were not conveyed to the officers on the ground, supports the inference that Roma were, simply because they were Roma, routinely treated with more suspicion and subjected to more intensive and intrusive questioning than non-Roma. There is nothing surprising about this. Indeed, the Court of Appeal considered it 'wholly inevitable'. This may be going too far. But setting up an operation like this, prompted by an influx of asylum seekers who are overwhelmingly from one comparatively easily identifiable racial or ethnic group, requires enormous care if it is to be done without discrimination. That did not happen. The inevitable conclusion is that the operation was inherently and systemically discriminatory and unlawful.

43. Of course, the discrimination in individual cases would ultimately have been perpetrated by individual immigration officers who, unlike in the present case, were state employees. However, it is clear from the above passage that the case was not decided on the basis of the actions and status of the individual officers, but rather on the state's responsibility for setting up a system carrying an inherent risk of discrimination. The state should not be allowed to avoid such responsibility simply by outsourcing the discrimination element to private third parties.

44. Notably, in the *European Human Rights Centre* case it was held that the operation "*was not only unlawful in domestic law but also contrary to our obligations under customary international law and under international treaties to which the United Kingdom is a party*", including Article 14 ECHR, which make clear that: "*A scheme which is inherently discriminatory in practice is just as incompatible as is a law authorising discrimination*" (per Baroness Hale at paras 98 to 103).

45. In the present case, the SSHD has been aware of the risks inherent in the Scheme since before it was introduced, in its first iteration, by the IA 2014 (see for example the SSHD's impact assessment of 25 September 2013 (**[C39]**)).

Declarations of incompatibility

46. The substance of the argument that the statutory provisions are incompatible with Convention Rights is addressed in the JCWI skeleton argument and Liberty does not seek to address that aspect.

47. The SSHD argues that no declaration can be granted because the relief claimed is "*over-broad*", that "*[i]t cannot be said that it is the whole scheme (ss.20-37) that is incompatible*" and that JCWI "*must identify that part of the legislation which causes the incompatibility*" (DGR para 60 **[A98]**). However, Liberty maintains that that is not the case and that the Court can grant the declaration sought.

48. Section 4(1) of the Human Rights Act 1998 provides that: "*subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right*". Section 4(2) then provides that "*[i]f the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility*".

49. Nothing in section 4 prevents a declaration being made in respect of a scheme such as the present and there is nothing in it to require JCWI to identify a particular part of it where the complaint is that the entire Scheme cannot be operated compatibly with Convention rights. It will often be the case that a claimant will seek to identify a specific provision but this is not a requirement where, as here, the objectionable features of the scheme are all interlinked and are inherently products of the disincentives and penalties created by the scheme. In such a case, a broad declaration can be made under section 4. Unlike section 3, which must obviously be applied very specifically to legislative provisions, section 4 should in certain cases be used to make broad declarations of incompatibility so as to give Parliament sufficient scope to amend the relevant legislation. This is illustrated by the case of *International Transport Roth GmbH and others v SSHD* [2002] EWCA Civ 158; [2003] QB 728, which also concerned a challenge to an elaborate legislative scheme imposing penalties on persons other than migrants in the pursuit of immigration control (the scheme was set out in Part II of the Immigration and Asylum Act 1999 and is summarised at para 4-6 of the judgment). The Court of Appeal upheld (by majority) the High Court's declaration that the scheme was incompatible with the ECHR (para 54, 189 and 193).

50. In reaching his decision, Simon Brown LJ rejected the SSHD's contention that the Court should use section 3 of the Human Rights Act 1998 to render the scheme compatible, and in doing so emphasised how the scheme *as a whole* was incompatible with the ECHR and that it was

appropriate for the Court to declare the scheme incompatible and give Parliament the opportunity to remedy it rather than to re-create the scheme itself:

> *…it appears to me quite impossible to recreate this scheme by any interpretative process as one compatible with Convention rights. As I have more than once endeavoured to explain, the troubling features of the scheme are all inter-linked: to achieve fairness would require a radically different approach. Mr Barling, of course, invokes section 3 only as his final fall-back position. But in asking us to apply it he is, in my judgment, necessarily inviting us to turn the scheme inside out, something we cannot do. As the authorities clearly dictate, the court's task is to distinguish between legislation and interpretation, and confine itself to the latter. We cannot create a wholly different scheme (perhaps of the sort envisaged by Sullivan J below) so as to provide an acceptable alternative means of immigration control. That must be for Parliament itself. As Lord Lester of Herne Hill pointed out, were we ourselves to create a fresh scheme purportedly under section 3, then indeed we should be failing to show the judicial deference owed to Parliament as legislators.* (para 66)

51. Following this decision, Parliament extensively amended the scheme through section 125 of and schedule 8 to the Nationality, Immigration and Asylum Act 2002.

THE GOLOSHVILI CASE

52. Liberty's intervention in this case is limited to the challenge to the procedure for giving notice of letting to a disqualified person ("NLDP"). Liberty supports the argument that common law fairness requires notice and an opportunity to make representations *before* an NLDP is given. It also contends that the procedure engages Article 6 is engaged and this lends support to the argument that a fair procedure must be followed before an NLDP is given.

<u>The statutory scheme and the SSHD's practice</u>

53. Section 21 IA 2014 disqualifies certain persons from occupying premises under a "residential tenancy agreement" ("RTA" - defined in section 20). It does not, however, invalidate any such agreement, which remains enforceable as between the parties according to its terms and any associated statutory protections except where (so far as relevant to this case) they are excluded or modified by the IA 2014 or the IA 2016. Where the agreement ends, the general position remains that by section 3 of the Protection from Eviction Act 1977 the owner may not evict the occupier "*otherwise than by proceedings in the court*". As explained below, this protection is excluded in some cases where an NLDP has been given.

54. The Scheme provides for two new routes through which landlords may terminate an RTA and evict the occupiers. The first route is set out in section 33D IA 2014 and applies where the SSHD has given an NLDP (or more than one NLDP) identifying *all* of the occupiers of the property as disqualified from renting. The second is set out in section 33E (which refers to a range of provisions that have been inserted into housing legislation by the IA 2016) and applies where the SSHD has given an NLDP identifying at least one (but not necessarily all) of the occupiers as disqualified from renting. Although these routes are described in permissive terms it is in practice mandatory

for a landlord to use one or other of them because in any case where they apply the landlord will have reasonable cause to believe that the premises are occupied by a disqualified person and so will risk committing an offence under section 33A unless they take "*reasonable steps to terminate the residential tenancy agreement*".

The first route to eviction: section 33D (all occupiers disqualified)

55. A landlord can terminate a RTA in accordance with section 33D IA 2014 if the SSHD gives an NLDP which identifies (or more than one NLDP which, taken together, identify) *all* of the occupiers of the property and states that they are *all* disqualified from renting (section 33D(2)). Once a landlord is given such an NLDP, they can give notice to the tenant, which must give 28 days' notice to leave the property, and which will upon the expiry of that 28 day period automatically terminate the RTA (section 33D(3)-(6)).

56. The options open to a landlord at this stage are:

    a. To evict the occupiers without recourse to the courts. This is possible because by amendments introduced by section 40 IA 2016 an RTA is excluded from the protection of the Protection from Eviction Act 1977 following service of an NLDP and because section 40 also amends section 5 of the Housing Act 1988 so that an assured tenancy can be ended by a notice given by a landlord under section 33D IA 2014 (and not, as is normally the case, by a court order).

    b. To evict the occupiers with the assistance of High Court bailiffs, which is possible because the landlord's notice is enforceable as if it were an order of the High Court (section 33D(7) IA 2014).

    c. To bring proceedings for possession on the basis that the RTA has ended and the occupier is a trespasser. On hearing such a claim the court would be obliged to order possession (subject to any argument about the validity of the NLDP – as to which see below).

57. As an alternative to serving a notice to end the RTA under section 33D, the landlord can use the second route to termination and eviction, set out below. Although this route applies where not all of the occupiers are disqualified nothing prevents its use where all occupiers are disqualified.

The second route to eviction: section 33E and associated provisions (at least one occupier disqualified)

58. Section 33E IA 2014 creates an implied term for all RTAs that the landlord may terminate the RTA if the property is occupied by an adult who is disqualified.

59. This implied term does not apply where the RTA is assured or protected, but section 33E also refers to provisions that have been inserted into the relevant housing legislation by section 41 IA 2016,

which enable a landlord to bring proceedings in the county court to end such an RTA where at least one of the occupiers of the property does not have the right to rent. The vast majority of private sector tenancies are assured shorthold tenancies, which are regulated by the Housing Act 1988, and so the most relevant provisions for these purposes are those in ground 7B of schedule II to that Act, which was inserted by section 41(2) IA 2016 (and an equivalent of which was inserted into the Rent Act 1977 by section 41(6) IA 2016).

60. Ground 7B is a mandatory ground and therefore obliges the court to make a possession order if its conditions are met. Its conditions are essentially that the SSHD has given an NLDP to the landlord identifying at least one of the occupiers as a disqualified person and that one of the persons named in the NLDP is in fact disqualified. The ground explains who is disqualified in terms similar to those in the Scheme and it confirms that a person is to be treated as having a right to rent if they have been granted permission to rent by the SSHD.

61. Under this ground the court cannot order possession if the person named in the notice is not actually disqualified or if they actually have permission to rent. The court cannot, however, refuse to grant possession on the basis that the person *ought* to have been granted permission to rent.

The SSHD's practice

62. The SSHD's practice is not to notify the occupier or to seek representations from them until after an NLDP has been given by the SSHD to the landlord. The SSHD maintains that in general he writes a letter to the tenant explaining that an NLDP *has been* issued to the landlord and explaining that "*[i]f you believe our records are incorrect and that you are here lawfully, please contact us with any evidence you have*" (see the standard form letter at **[161]**). The letter does not give any further detail as to the possibility of an internal review or explain that a person who does not have a right to rent can in certain circumstances nonetheless be granted permission to rent. In addition, the tenant is not always sent this letter by the SSHD (see para 24 of Ms Barton's statement **[80]**, and the SSHD's guidance at **[140-142]**, which confirms that if people without a right to rent are encountered by the SSHD's Immigration Compliance and Enforcement (ICE) team, and an NLDP is given to the landlord as a result, the ICE team will merely "*explain the implications of the notice to the migrant if they are present*" rather than write to them).

63. The landlord's notice under section 33D (which must be given in the prescribed form) includes "notes for the tenant/occupier", which advise that "*[i]f you dispute that you and/or the other occupiers listed in the Landord's Notice(s) are all disqualified from renting because of your immigration status, you should contact the Home Office immediately*" and that "*[t]his notice can only be withdrawn if the landlord receives, before the end of the specified date, written confirmation from the Home Office that you or one of the other occupiers named in the notice are not disqualified from renting*" (see the prescribed form of the notice at **[166]**). Again, the notes do not give any

further detail as to the possibility of an internal review and do not explain that a person who does not have a right to rent can in certain circumstances nonetheless be granted permission to rent.

64. If the tenant contacts the SSHD following receipt of the above letter from the SSHD or the landlord's notice, the SSHD will review the decision to give the NLDP, but the commencement of this review will not prevent the landlord from acting on the NLDP or their own notice. The landlord can and is likely to act upon the NLDP immediately by serving their notice on the tenant (or, if not all occupiers are disqualified, serving a notice of seeking possession under Ground 7B).

The present case

65. In Ms Goloshvili's case her landlord was apparently entitled to proceed under the first route to eviction under section 33D because Ms Goloshvili was the only person occupying the property. However her landlord proceeded instead under the second route, set out in section 33E, and gave notice under Ground 7B of the Housing Act 1988. The submissions below relate primarily to the fairness of the process under section 33D, but short submissions are also made about section 33E in the final paragraphs.

Common law fairness

66. Liberty supports the submissions made at paragraphs 47 to 51 of Ms Goloshvili's skeleton argument about the timing of the opportunity for an occupier to make representations to the SSHD. An occupier should be heard before an NDLP is given to the landlord by the SSHD, or at least before the NLDP can be acted on by the landlord. No such right is expressly given by the statute but it is well established that the common law will "supply the omission of the legislature" where necessary to ensure fairness (*Citizens UK v SSHD* [2018] EWCA Civ 1812; [2018] 4 W.L.R. 123, para 68 per Singh LJ).

67. It is obvious that a decision to give an NLDP is the kind of decision in relation to which the affected occupier ought to be permitted to make representations. It vitally affects the occupier's interests and is part of a process whereby their contractual right to occupy may be terminated and they may lose protection against being evicted without a court order. The SSHD suggests that the decision-making process is intended to be a simple one and that disqualified status can easily be determined (DGR para 22 **[53]**[2]), but it cannot be suggested that an occupier might not be able to challenge the SSHD's conclusions about their immigration status. Moreover, where the occupier wishes to seek permission to rent much of the information will be likely to come from them and not from the SSHD's records.

[2] The RLA's submissions and the facts of Ms Goloshivili's case show that this is an optimistic assumption.

68. The SSHD does not appear to dispute that fairness requires him to hear what an occupier has to say, but he considers that this requirement is met by allowing an opportunity to make representations *after* the NLDP is given. There are several reasons why this is inadequate:

    a. As a matter of principle the decision that affects the occupier's rights is the decision to give the NLDP and not the subsequent non-statutory willingness to consider further representations. Willingness to reconsider an adverse decision is "*not a substitute for proper and fair primary decision-making*" (*R (Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364; [2004] QB 36, para 91; see also *Citzens UK*, para 76 and 94). This is all the more so here where the form of the notice given to the occupier does not expressly refer to any right to review and does not invite representations about permission to rent.

    b. As a matter of practice the opportunity may be too late. There is an imperative for landlords to act immediately if given an NLDP and any reconsideration may happen only after the RTA has ended, the tenant has been evicted, or the property has been re-let.

69. Morever, it is far from clear from section 33D what the effect of a reconsideration will be as a matter of law. Representations after an NLDP has been given may be incapable of undoing the landlord's notice or its consequences.

70. Under section 33D a landlord may give notice in the prescribed form once the SSHD has given one or more NLDPs within section 33D(2). It is not a requirement that the occupier is *actually* a disqualified person; it is merely required that the NLDP *identifies* the occupier and *states* that they are disqualified. If, at the time it is given the NLDP is affected by public law error then it will be void. Liberty's primary position is that in such a case any consequent landlord's notice will be ineffective since it will then be premised on a nullity. But *R (Shoesmith) v Ofsted and others* [2011] EWCA Civ 642; [2011] P.T.S.R. 1459 suggests that that does not necessarily follow. Maurice Kay LJ, giving the leading judgment, reached the following conclusion (at para 119):

    > *It seems to me that there is an area, admittedly ill-defined but left open by Lord Steyn in the Boddington case [1999] 2 AC 143 and Lord Phillips PSC in the Mossell case [2010] UKPC 1, in which the act of a public authority which is done in good faith on the reasonably assumed legal validity of the act of another public authority, is not ipso facto vitiated by a later finding that the earlier act of the other public authority was unlawful. I consider the present case, which involves the termination of an employment relationship, is within that ill-defined area.*
    >
    > (See also Stanley Burnton LJ at para 136-138 and Lord Neuberger at para 143.)

71. If the initial decision to give the NLDP is not void (as it may well not be if the SSHD does not give prior notice to the tenant and so works only from his own records), but the occupier makes representations to the SSHD containing new information, then there are at least the following possibilities:

a. The SSHD decides to withdraw the NLDP either because he is satisfied that the occupier does have the right to rent or because he grants the occupier permission to rent. The statute does not expressly permit such withdrawal but it is suggested that a power to do so must be implied. If by the time of the withdrawal of the NLDP the landlord has not given their own notice then they will not be able to do so because it can no longer be said that the SSHD has given notice. But if by then the landlord has given their own notice it is not clear whether that notice will be invalidated by the SSHD's subsequent withdrawal of the NLDP. This is all the more so where the landlord's notice has already expired such that the RTA has ended or the landlord has evicted the occupier and possibly re-let. The SSHD's exercise of his extra-statutory discretion to reconsider his decision may not be capable, as a matter of principle, of reviving contractual arragements between private parties when they have already come to an end. Still less can it undo a fresh letting. In these cases the occupier would be without a remedy against their landlord or against the SSHD.

b. The SSHD refuses unlawfully to reconsider or to grant permission to rent. This cannot affect the validity of the NLDP and the landlord would therefore remain free to act on it (indeed they would, in practice, be obliged to do so since they could not assume it was invalid and risk prosecution). Once again, the occupier would be left without any remedy.

72. Not all of the problems identified above would be solved by the SSHD giving the occupier prior notice of his intention to give an NLDP and an opportunity to the occupier to make representations, but they show how hazardous it is to leave the operation of the Scheme to representations made after the giving of an NLDP by the SSHD.

Article 6

73. Liberty's submissions about the content and timing of the duty to act fairly are supported by reliance on Article 6. Ms Goloshvili has not relied on this Article and accordingly Liberty does not invite the court to find that the section 33D procedure is incompatible with it. However, it does support the argument that the procedure adopted by the SSHD is inadequate.

The first route to eviction

74. The service of an NLDP involves the determinaton of the occupier's civil rights and obligations. The contract of tenancy is a civil right, as is the occupier's entitlement to enter into and hold such an agreement (see the cases cited at para 21, above).

75. The decision of the SSHD to give an NLDP is an administrative decision that "*directly affects civil rights and obligations and is of a genuine and serious nature*" and so engages Article 6 (Lord Clyde in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 A.C. 295 per Lord Clyde at para 150, applied in *R (McLellan)*

v Bracknell Forest BC [2001] EWCA Civ 1510; [2002] Q.B. 1129). Under section 33D the NLDP is effectively decisive of the issue whether the occupier is a disqualified person and it further has the effect that any notice given by the landlord is automatically treated as if it had the force of a court order. The landlord's notice is therefore not simply "*a decision by one party to seek termination of a contract or tenancy*" (see *McLellan* at para 69) but has the character of an authoritiative and enforceable determination that the tenancy has been validly terminated.

76. The SSHD is neither independent of the executive nor a tribunal for the purposes of Article 6. Morever, he is making a decision about whether he should exercise his own discretion in serving an NLDP and/or in granting permission to rent (which, it is asserted in paragraph 22 of the DGR, is "built into" the system **[53]**).

77. Nonetheless, the requirements of Article 6 may still be met if the decision is subject to review by a court having full jurisdiction, as explained by Baroness Hale in *R (Wright) v Secretary of State for Health* [2009] UKHL 3; [2009] 1 A.C. 739 (at para 23) :

> *It is a well-known principle that decisions which determine civil rights and obligations may be made by the administrative authorities, provided that there is then access to an independent and impartial tribunal which exercises 'full jurisdiction': Bryan v United Kingdom* (1995) 21 EHRR 342 *... It does not always require access to a court or tribunal even for the determination of disputed issues of fact. Much depends upon the subject-matter of the decision and the quality of the initial decision-making process. If there is a 'classic exercise of administrative discretion', even though determinative of civil rights and obligations, and there are a number of safeguards to ensure that the procedure is in fact both fair and impartial, then judicial review may be adequate to supply the necessary access to a court, even if there is no jurisdiction to examine the factual merits of the case.*

78. In determining whether judicial review is sufficient and whether any reviewing court needs to have full fact finding jurisdiction, three features are relevant to the present case:

    a. First, the nature of the issue. In *Begum v Tower Hamlets* [2003] UKHL 5; [2003] 2 AC 430 Lord Hoffmann noted that "*certain decisions, of which the paradigm examples are findings of breaches of the criminal law and adjudications as to private rights*, *should be entrusted to the judicial branch of government*" and that the possibility of an appeal is not "*sufficient to compensate for lack of independence and impartiality on the part of the primary decision maker*" (para 42). In contrast where the case involves specialised issues requiring professional knowledge or experience or the exercise of administrative discretion, Article 6 may be satisfied by access to a level of jurisdiction that does not substitute its opinion for the administrative body (*Ali v United Kingdom* (2016) 63 EHRR 20, para 77-8).

    b. Secondly, the procedure followed at the first stage. Even where the subject matter is not such as to require judicial fact-finding the process must be lawful and fair. There must be sufficient procedural safguards to ensure that the process is fair (see for example *Begum* per Lord Bingham at paras 9(3), Lord Hoffman at paras 26 and 47 and Lord Millet at para 100).

c. Thirdly, whether the review is effective.

79. These three features are addressed in turn below.

80. First, as regards the nature of the issue, it is doubtful that the issue as to whether a person has the *right* to rent is one that can be disposed of other than by a full merits hearing. It is not a question that involves the exercise of any discretion because it depends on the occupier's nationality and immigration status. Moreover, it is treated as a matter for determination by the County Court in proceedings brought under Ground 7B and it is therefore difficult to see why, if judicial determination is needed there, it is not also needed under section 33D. It is not necessary to resolve this issue for the purposes of this claim since no freestanding argument about breach of Article 6 is pursued.

81. Secondly, assuming that judicial review is in principle sufficient to amount to review by a court of full jurisdiction, the procedures adopted by the SSHD are insufficient for the process overall to be described as fair or effective because occupiers are not given a sufficient opportunity to be heard at a point when their representations can make a difference. Before an NLDP is given occupiers should be given notice of the decision that the SSHD is minded to make and invited to address that decision and also whether, if there is no right to rent, they should be given permission to rent. Otherwise the decision at the point it is made will fail fairly to address the issues that the SSHD accepts are relevant. It is not sufficient for these representations to be made after the decision has been made. The practical reasons for that have been examnined above under fairness.

82. There is, moreover, a fundamental difference for the purposes of Article 6 between a fair procedure at the point that a person's civil rights are being determined and a later opportunity to try and persuade the decision-maker to change their mind after a decision has been made. In the former case, the requirements of Article 6 can (at least in principle) still be fulfilled because the initial decision and that of the reviewing court both address the same decision and so both relate to the same determination. In the latter case this is not possible because the target of any judicial review will be the separate decision not to consider further representations.

83. Finally, and for the reasons given above under common law fairness, judicial review, if it addresses submissions made after the decision has been given, is unlikely to be effective. It will be difficult to access, too slow to make a difference, and of doubtful utility because it is unlear whether it can invalidate a landlord's decision to give notice based on an NLDP.

<u>The second route to eviction</u>

84. Under the procedures envisaged by section 33E (including Ground 7B in Schedule II to the Housing Act 1988) an NLDP still engages the same principles discussed above so that fairness requires prior notice and Article 6 is engaged.

85. By giving an NLDP the SSHD has made a decisive determination about a change in the rights that the occupier enjoys under their tenancy agreement: the occupier moves from full protection as an assured tenant (or protected tenant as the case may be) to somebody whose tenancy is subject to termination on a mandatory ground. The occupier is entitled to a fair procedure *before* that decision is made and not simply by way of later review.

86. Although the county court may determine both whether the notice was given and whether the person subject to it is in fact disqualified it is doubtful whether its powers go beyond that to determine, for example, whether a person ought to have been granted permission to rent. If that decision arguably bears on the decision to give the NLDP so as to invalidate it then it may be that the County Court could adjudicate on that issue as part of asking whether the NLDP was given. Alternatively it could adjourn proceedings to allow judicial review of that question (compare *McLellan* at para 55).

87. However, where the complaint is that the NLDP ought to have been withdrawn or permission granted in the light of *further representations* then the County Court cannot dismiss the possession claim on that basis because those claims cannot go to the validity of the NLDP that was given and is the basis for the proceedings. It is also doubtful whether the County Court could, in that case, adjourn the proceedings to allow judicial review of the failure to grant permission to rent because the complaint would be about a public law error by a third party public authority which does not afford a defence and for which the claimant private landlord is not responsible. By analogy in *North British Housing Association v Matthews* [2004] EWCA Civ 1736; [2005]1 WLR 3113, it was held that the court could not adjourn possession claims brought by landlords on Ground 8 of Schedule II to the Housing Act 1988 (which relates to rent arrears) in order to give defendants the opportunity to challenge failures by third party local authorities to pay them housing benefit.

88. It follows that the same issues arise as in connection with section 33D and that an opportunity to raise matters going to issues such as permission to rent must be given before the NLDP is given. After that it may be too late both in practical terms and in terms of the legal impact of any submissions.

Martin Westgate QC
James Kirk
Daniel Clarke

Doughty Street Chambers
30 November 2018