



Is housing allocation “within the ambit” of Article 8?

[Matt Hutchings QC](#), Cornerstone Barristers, concludes that the jury is still out on this question, which may well need to be decided in the not too distant future.

Why does it matter?

The prohibition on discrimination in Article 14 of the European Convention of Human Rights ("ECHR") only applies to housing allocation if it is "within the ambit" of another convention right. Article 14 is said to "complement" the substantive Convention articles. Here, the obvious candidate is Article 8, the right to respect for the home.

Given the potential difficulty of the question: is housing allocation within the ambit of Article 8?, a pragmatic first response might be: does it matter? Unfortunately, in many cases it does.

Section 27(6) of the Equality Act 2010 ("EA") provides that it is unlawful to discriminate when exercising a public function. However, discrimination for the purposes of the EA constitutes either treating a person less favourably because of a protected characteristic (direct discrimination) or an apparently neutral provision, criterion or practice putting people who share a protected characteristic at a group disadvantage (indirect discrimination).

In either case, the relevant protected characteristics and hence groups are defined as age (but not children: see s.28(1)(a)), disability, gender reassignment, race, religion or belief, sex and sexual orientation. There is a certain elasticity in what amounts to a group disadvantage for the purposes of section 19 (indirect discrimination) and in particular, there is no requirement that every member of the group is disadvantaged: see, for example, *Essop v Home Office* [2017] 1 WLR 1343, in which BAME civil servants were statistically less likely to pass the Home Office's test for promotion. Nevertheless, the relevant forms of discrimination are limited by reference to the groups protected under the EA.

By contrast, Article 14 is a more wide-ranging anti-discrimination tool. It prohibits discrimination on a number listed grounds but also "other status" and is thus open-ended. In *R(H) v Ealing LBC* [2018] PTSR 541, Article 14 was deployed to challenge aspects of Ealing's allocation scheme that were alleged to put children and non-council tenants at a disadvantage. In particular, it was harder for single mothers and hence their children to be rehoused under its working household priority scheme and its model tenant priority scheme was open to existing council tenants seeking to move but not to other tenants. These discrimination arguments were only available to the claimants if Ealing's allocation scheme, or the relevant parts of it, fell within the ambit of Article 8.



The ambit test

It is well established that it is not necessary to prove a breach of, for example, Article 8 in order for the relevant provision to come "within its ambit" so that Article 14 applies. On the other hand, as Lords Bingham and Walker stated in *M v Secretary of State for Work and Pensions* [2006] 2 AC 91, a tenuous link with Article 8 is not enough.

The difficulty lies in defining at what point between these two parameters Article 8 is sufficiently engaged so as to bring Article 14 into play. Strasbourg caselaw uses the phrase "a modality of the state's respect for" family life or the home. In *M* (above), Lord Bingham suggested that it was necessary to "identify the core values which the provision is intended to protect."

Article 8 confers a "right to respect for [everyone's] private and family life, his home and his correspondence". The European Court of Human Rights' published guide on Article 8 is subtitled "Right to respect for private and family life", and this provides a pointer to the essence of its core values. As the guide makes clear at section IV, para 302 ff, the concept of home under Article 8 is limited to an existing home, a "specific place" with which an individual has "sufficient and continuous links".

Hence, it is commonly said that Article 8 does not confer a right *to* a home. The debate in the domestic caselaw has therefore concerned whether the provision challenged as discriminatory was intended to promote private or family life.

Domestic caselaw

In *R (Morris) v Westminster City Council* [2006] 1 WLR 505, the Court of Appeal held that provisions in the homelessness legislation that conferred priority need on a family with children did fall "within the ambit" of Article 8. Sedley LJ stated that: "*we find ourselves looking at measures which are designed specifically to keep families together*".

In *R(HA) v Ealing LBC* [2016] PTSR 16, Goss J stated that: "*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.*"

Goss J's above dictum seemed to say that any allocation scheme, or at least any such scheme benefitting families, would automatically come within the ambit of Article 8. Ealing challenged this in the second Ealing case [2018] PTSR 541.

All three judges in the Court of Appeal, Etherton MR, Davis and Underhill LJJ, agreed that Ealing's model tenant priority scheme did not fall within the ambit of Article 8. That was because this scheme applied to people already living in social housing, who were applying for a transfer to another unit of social housing. At para 101 Etherton MR stated: "*I cannot see that this has anything to do with a core value which Article 8 is*



intended to protect." Davis and Underhill LJ agreed on this point, at paras 127 and 131.

On the other hand, the MR was of the view that the working household priority scheme did fall within the ambit of Article 8, since it concerned families "*not already in secure accommodation or indeed not accommodated by Ealing at all*" and therefore "*their right to permanent accommodation falls within the scope of family life*" (see para 102).

Davis and Underhill LJ disagreed with him on this issue. However, their views were expressly provisional, given that the whole court upheld Ealing's appeal on the issue of justification. Davis LJ stated at para 128 as follows: "*I do not, as at present advised, accept that there is, for these purposes, a 'right' to settled or permanent accommodation protected by or within the reach of Article 8*".

Underhill LJ reasoned that, whereas the homelessness legislation might fall within Article 8, the provision of permanent social housing to those already housed, albeit in temporary accommodation, did not. He stated at para 132: "*The purpose of Part VI of the Act, or of schemes made under it, is not to ensure access to settled, as opposed to precarious, accommodation: after all most private-sector tenancies will also be 'settled' in the relevant sense.*"

Conclusion

The second Ealing case establishes that transfer schemes do not fall within the ambit of Article 8, but raises more questions than answers as to whether other aspects of allocation schemes fall within its ambit.

For the time being, it is likely that judges at High Court level will continue to hold or assume that Article 14 does apply in these circumstances. Like Mostyn J in the recent case of *R(YG) v Hillingdon LBC* [2018] EWHC 1937, when they can, they are likely to avoid deciding this "interesting question". However, the point will need to be decided sooner or later, in a case where it matters.
