

The A-Z Of Housing Discrimination Case Law

FG v Kensington and Chelsea Council

Iris Ferber KC & Carolina Bax

Iris Ferber KC: Welcome to the latest series of *Home Truths - the 42BR Housing Podcast*.

My name is Iris Ferber KC.

Carolina Bax: And I'm Carolina Bax.

Iris Ferber KC: This series is all about housing discrimination case law. We will review 15 key cases and principles that have guided housing discrimination law over the last decade. We're calling it the *A - Z of Housing Discrimination Case Law*.

Carolina Bax: That's because we're starting with the case of *Akerman-Livingstone v Aster Communities*, and we're ending with *Z v Hackney London Borough Council*.

Iris Ferber KC: We're going to be covering topics from procedural law to Section 15 and Section 19 claims, reasonable adjustments claims, public sector equality duty, and positive discrimination.

Carolina Bax: Today we're going to be talking about the anonymised case of *FG v Kensington and Chelsea Council*, which was a decision of the High Court in April 2024.

Iris Ferber KC: Now, Carolina, although this was only a High Court case and not an appeal, and most of the cases in this podcast are either appeals or second appeals, this is actually a very important authority about reasonable adjustments claims, which is why we've included it, and the reason that it is so important, is that it has cleared

up an issue which has worried housing lawyers ever since the Equality Act came into force back in 2010.

And the question is this - does the local authority, which has both public functions as the local authority and also private functions as the landlord of individual tenants, have to comply with Part 3 of the Equality Act or Part 4 of the Equality Act?

In other words, in relation to its own tenants, is the local authority a provider of public functions or a landlord?

Now, Carolina, we're going to talk about why that distinction is so important in a bit but first let's look at the facts.

Carolina Bax: Yes, this is a claim for judicial review that we're looking at today, and the claimant is anonymised in this judgment as *FG* as we've mentioned and that's because of the specific details of the medical conditions that she had.

She suffered from disabilities, namely paranoid schizophrenia, anxiety disorder and severe major depression with psychotic features, and what that meant was that there were symptoms that stemmed from those disabilities, and those included auditory hallucinations, that is noise, and olfactory hallucinations, smells.

Now, *FG* was housed by *Kensington and Chelsea* under its allocation scheme, and in other words she was therefore not housed as homeless but had successfully made a bid for a permanent home and had been allocated a secure tenancy.

She was moved from one property to another at some point, and by the time she made her claim she was living in a council flat on the third floor of a block in Kensington.

FG made complaints to the council about noise that was coming from the flat below her own, which was on the second floor.

She also had made complaints about a perceived bad smell in her own flat, particularly within the kitchen and that had at one point been confirmed by a council surveyor before she moved in.

Later on, there were experts instructed in this case and a variety of works were carried out, which effectively led to work on the drains being done and no issues being identified.

There was the involvement of an environmental health consultant who thought that whilst the smell wasn't a sewage smell it could be pinpointed to what he called 'new white electrical goods'.

The acoustics expert in this case also found that there was some noise from the flat below but he found it to be within an acceptable, normal range. He also put together a schedule of works on request from *FG*'s solicitors so that he could reduce the noise heard from the flat below.

So, looking at all of that, Iris, how does that translate into a judicial review claim?

Iris Ferber KC: Well, this was a judicial review of the council's actions, Carolina, and three grounds were argued.

The first one, ground one, was that in refusing or failing to upgrade the sound insulation in the flat as set out in that schedule of works that you mentioned from the acoustic expert and failing to get a report from some other expert with another schedule of works attached to it and in refusing to move *FG* to another property, the council was failing to make reasonable adjustments, in breach of Sections 20 and 21 of the Equality Act and that that was a detriment in the provision of a service under Part 3 of the Equality Act.

That's important, that she was arguing in the judicial review that it was Part 3 that was engaged, provision of a service. That was ground one.

Ground two, that in refusing or failing to carry out further work to remove smells from the flat, various works that *FG* wanted carried out that weren't being carried out, the council also failed to make reasonable adjustments, again in breach of Sections 20 and 21 of the Equality Act and again as a detriment in the provision of a service under Part 3 of the Equality Act.

And then ground three was about an alleged breach of the public sector equality duty.

So that's the three grounds that were raised for judicial review.

Carolina Bax: As you highlighted at the beginning, Iris, this wasn't an appeal that the court was dealing with, this was in fact a judicial review trial, and it was heard at first instance by a single High Court Judge and that was Mr Justice Murray.

So, looking at the issues he had to decide on, firstly he had to decide whether the issues the claimant was complaining about fell under Part 3 of the Equality Act which is headed 'Services and Public Functions', or whether in fact it fell under Part 4 of the Equality Act, which is simply headed 'Premises'.

There were a number of other issues that Mr Justice Murray had to deal with, which weren't as crucial as the distinction between Part 3 and Part 4 but that first distinction was particularly important in this case because the duty to make reasonable adjustments in Section 20 of the Equality Act is different depending on whether or not the claim falls under Part 3 or indeed Part 4.

Iris Ferber KC: Okay, so, what did the judge decide then about the correct provisions that applied under the Equality Act?

Well, although there was a great deal of argument about the point and several pages of the judgment are filled with the arguments made by each party in relation to whether Part 3 or Part 4 should apply, in the end the judge thought the answer was pretty clear and straight forward, and it was this:

'Although the allocation of housing to people on the councils housing register is a public function', so allocation of housing falls under Part 3, 'the actual provision of a house or a flat to a particular person by the council, makes the council a controller of let premises', which is the definition for the scope of Part 4.

In other words, the provision of a house or a flat with a particular person by the council, makes the council the landlord of that house or flat, and as the landlord the council has contractual obligations to the tenant under the tenancy agreement, the landlord has statutory obligations to the tenant under the Housing Act, and this was a big part of *FG's* claim, a big part of the submissions made on behalf of *FG* in the judicial review, even though Part 4 contains a particular section, Section 32(3)(B), which explicitly states that Part 4 will not apply to the provision of accommodation, if the provision of that accommodation is solely for the purpose of exercising a public function, even though Part 4 contained a section that said that, the judge decided that the council was not providing the flat to *FG* only for the purpose of exercising a public function, but also as a matter of private law it was her landlord, and that was an additional function apart from the public function.

Carolina Bax: That makes sense, and in fact looking at one point of the judgment, *Iris*, paragraph 98 to be precise, Mr Justice Murray in fact explains it quite straightforwardly and I think, don't you, that it's worth quoting from that section?

Iris Ferber KC: Yes, absolutely.

Carolina Bax: I'm quoting directly from the judgment, paragraph 98 if you missed it. *'In this case, we are concerned with a local authority's obligations as a controller of let premises. Section 32(3) is too slender a basis for the proposition that all of a local authority's activities as social landlord are subject to Part 3 rather than Part 4 of the Act. There is no good policy reason for bringing all those activities under Part 3 and doing so would lead to some difficulties.'*

Iris Ferber KC: Now, Carolina, that last bit *'leading to some difficulties'*, that brings us onto the really important part of this podcast.

Why does it matter?

Why does it matter to a claimant whether their claim for failure to make reasonable adjustments is under Part 3 or Part 4?

Carolina Bax: Well, it's really because the differences between the law on reasonable adjustments in Part 3 and Part 4 are rather big, and the first big difference is that in Part 3 the providers of services and public functions have to comply with all three types of requirements set out in Section 20.

That first requirement is making adjustments to PCPs, so policies and practices.

That second requirement is making adjustments to physical features.

And the third one is providing auxiliary aids.

However, when looking at Part 4 there is in fact never a duty to make adjustments to physical features of a premises, and that means that the second requirement doesn't apply at all.

Iris Ferber KC: Exactly, in Part 4 the definition of the duty to make reasonable adjustments is explicitly limited to the first requirement and the third requirement only, not the second requirement.

So, that's a big one, because tenants often want physical features of their home or the building in which they live changed or adjusted for their disability, and under Part 4 that simply is not a part of the duty at all.

Now the second thing that is different between Part 3 and Part 4, and this is just as important, providers of services and providers of public functions have an anticipatory duty in respect of reasonable adjustments.

Now you see that phrase a lot in this judgment, and you see it elsewhere, an anticipatory duty, what does that mean?

That means they have to anticipate likely future disadvantages to disabled people generally and then make reasonable adjustments for that.

An example of this, Carolina, is if you have a shop with a step at the front, it is a generally obvious possible disadvantage that someone in a wheelchair would need a ramp to get into the shop and so you've got to make arrangements, so far as reasonable, to have a ramp available, you don't need to wait for someone to come along and ask for a ramp, it's obvious that there's an anticipatory, likely future, disadvantage. That's the very commonly given example of the way that the services anticipatory duty operates.

Now controllers of premises, landlords in Part 4, have a completely different sort of duty. They have only what's called a responsive duty to make reasonable adjustments and that means the landlord has to first receive a specific request for adjustments from a particular tenant

before the duty can potentially arise and even once the tenant has made a particular request for adjustments to the particular landlord, the duty only arises in respect of that tenant and the disadvantage to that particular tenant, not disabled people generally.

Carolina Bax: So, looking at *FG's* case Part 4 did apply, in that there was no duty to make any changes to the physical feature of *FG's* flat or in fact the block that it was in, which meant that her claim failed, but perhaps we should complete the picture by explaining what the judge did also look at in the event that Part 3 did apply.

So, Mr Justice Murray decided that in the alternative that the anticipatory duty to make adjustments under Part 3 would've in any event not have covered this claim either, and that's because it's an anticipatory duty which relates to the general disadvantage to all disabled people from the provision of the service.

Now, on the evidence in *FG's* claim, the problems that were caused by her flat to *FG* were in fact very individual to her, and they were not the sort of problems, were they, that disabled people could generally be anticipated to experience?

Iris Ferber KC: No, exactly right, it was just too specific and too narrow a disadvantage to be a general disadvantage of the kind that the anticipatory duty could apply to, but it's also worth saying, isn't it, Carolina, this was very much the secondary element, the secondary limb of the judgment, the main part of the judgment which most of the report is taken up with is the decision that actually Part 3 simply doesn't apply to the management of the premises, it's Part 4 and therefore it simply wasn't the duty to make all of the various adjustments that *FG* sought which were all relating to physical features, they were all about making changes to either her flat, or the flat below, or the building that the flat was in, and all of that was

second requirement type adjustments which simply didn't apply, full stop, because Part 4 doesn't include the second requirement.

So, presumably just coming back to that secondary case about what if Part 3 did apply, we can sort of guess that the judge included an answer to the case under Part 3 just in case there was an appeal against his judgment, as far as we know there wasn't an appeal, that means as a matter of the way that legal precedent works, that the legal principle that is binding from this case of *FG v Kensington and Chelsea* is the primary decision, the decision of the judge that Part 4 applies to managed let premises, even when the landlord is the local authority, not Part 3 even though the allocation of that accommodation started as a public function, and so that means that discrimination claims against local authorities as landlords come under Part 4.

Carolina Bax: Precisely, and perhaps a good way to round off today might be to look at what some good takeaways are for housing practitioners with issues that might mirror those in *FG's* case.

We've set out four main ones that we think will be useful.

Firstly make sure you classify your claim before drafting it, and by that we mean don't assume that because you have a defendant who is a council or because the housing is publicly funded that must mean that the dispute falls within Part 3.

In fact what you need to be doing is asking yourself about whether there is an allocation or homelessness policy, or whether there indeed is a letting and property management element to it, in which case it will fall under Part 4.

Iris Ferber KC: Right so in other words, if it's purely about the workings of an allocation scheme or the workings of a homelessness scheme, that could well be Part 3 but as soon as you've got a particular

piece of accommodation allocated and let and managed, you're into Part 4.

And then the second, which we've touched on a bit as we've been chatting, do not overstate the anticipatory duty, don't make the mistake of thinking the anticipatory duty is as wide as it sounds.

Yes, the anticipatory duty doesn't require there to be a specific request for an adjustment, but that isn't the end of the story in the context of the narrow provision of a particular service to the public or a particular public function, it might not actually be a particularly meaningful adjustment that is caught by the anticipatory duty, because it is only applicable to the sorts of disadvantages that the general public who might be disabled may suffer from.

So yes, it's a wide duty but it is so general that quite often the specific problems that your own claimant may have may not be covered by it.

Carolina Bax: The third point to think about is that there is a distinction to be made between an adjustment and a repair, even if we are talking about a claim that falls under Part 3, and they are physical features that do form part of the local authorities duty, that duty isn't necessarily enough to get a claimant what they need and in that sense practitioners need to be looking beyond the Equality Act. They need to be perhaps examining the statutory limits and thinking about repair, disrepair, nuisance and housing standards as perhaps providing a more direct route.

Iris Ferber KC: And fourth, finally, importantly, evidence, evidence, evidence.

As we keep saying in this podcast series, almost in every podcast, the tenant has to provide good evidence of all of the elements of their claim, the disability itself, the disadvantage that the tenants say they

suffer from, often causation issues are poorly evidenced, practical benefit of the measures sought, there are all sort of elements in any claim, reasonable adjustments in particular has a lot of elements that have to be proved by the tenant, and how are you going to prove all the elements of your reasonable adjustments claim without evidence?

This was a case in which there was insufficient evidence from the tenant about various elements and that in great part led to the way that the judge reached his decision.

And then of course let's look at it from the other point of view as well, this case went well for the landlord, *Kensington and Chelsea* got a very good result here because not only on their primary case but even on the secondary case the judge said that they had done everything they could do to make adjustments for this claim, and even if a duty to make reasonable adjustments arose and the reason they did so well was that they produced a large volume of high quality evidence about their investigations, the options they had considered, the work they had done, the full chronology of work, the costs of works, the feasibility of future work, communications with the tenant, communications with the solicitors, reasons for all of the decisions they had reached from one point to the next as they did or didn't make particular changes to these flats.

So, all of that is so important, you only get to a good result when you pull the evidence together well and present it in the right way.

Carolina Bax: So, keep that evidence as thorough as you possibly can.

Iris Ferber KC: That's it.

Carolina Bax: Thank you very much for joining us on this bitesize journey through housing discrimination case law, starting at A, that's

A for *Akerman-Livingstone v Aster Communities* and going through to Z, which stands for *Z v Hackney Borough Council*.

Iris Ferber KC: We do hope you're enjoying this podcast series. For more episodes you can find us on Spotify, Apple Podcasts and the 42BR Chambers website.

Thank you for listening.