The A to Z of Housing Discrimination Case Law

Akerman-Livingstone

Iris Ferber KC & Karolina Zielinska

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

My name is Iris Ferber KC.

Karolina Zielinska: And I'm Karolina Zielinska.

Iris Ferber KC: And this series is all about housing discrimination case law.

Karolina Zielinska: We will review 15 key cases and resulting principles that have guided housing discrimination law over the last decade or so.

Iris Ferber KC: And we're calling it the A to Z of Housing Discrimination Case Law because we're starting with a case of *Akerman-Livingston and Aster Communities*.

And we're ending with Z and Hackney London Borough Council.

And between those two, we're going to cover topics from procedural law to Section 15 and Section 19 cases, reasonable adjustments cases, the public sector equality duty and positive discrimination.

Karolina Zielinska: Today we will start by talking about the case of *Akerman- Livingston and Aster Communities*, which was a decision of the Supreme Court from 2015.

Akerman-Livingston established a particularly key principle in relation to the way in which courts ought to approach Equality Act 2010 defences, including when they raised at first possession hearings.

Iris Ferber KC: Okay, Karolina, so first, let's go through the facts, shall we?

Karolina Zielinska: If we start at the beginning, Mr. Akerman-Livingston had a mental disorder that was classed as a disability in accordance with Section 6 of the Equality Act 2010.

He had CPTSD and that was not in dispute between the parties in this case. The local authority had secured him temporary accommodation as part of their homelessness duties, with a housing association called Aster Communities, and that meant that he was under a non-secured tenancy in a property that was owned by them. He had no security of tenure there.

Then, as is often the case, the local authority began making him offers of permanent accommodation, and Mr. Akerman-Livingston refused all of those offers, as and when they came along, because of his disability. So ultimately, the local authority said, well, we'll be discharging our homelessness duty towards you, on the basis that you've been refusing all these offers of suitable accommodation.

This is where, of course, Iris, the possession proceedings began. So, Aster Communities began their possession proceedings in respect of the temporary accommodation against Mr. Akerman-Livingston because he no longer had a right to live there, the local authority having discharged their duties towards him.

And he brought a defence to that claim based on both a human rights defence, an Article 8 defence, and also under Section 15 of the Equality Act, which is a discrimination arising from disability issue. So his refusal of the other accommodation was because of something arising

from his CPTSD and it was not justified to take possession action as a result.

Iris Ferber KC: Okay, so that's what happened to Mr. Akerman-Livingston in the case. And now, you mentioned Article 8, Human Rights, Karolina, and that's important, isn't it? So let's start with a very, very quick recap of the Article 8 Case Law, as it ended up in 2011, 4 years before the Akerman-Livingston decision reached the Supreme Court.

In 2010 and 2011 the two cases of Pinnock and Powell were decided by the Supreme Court. Those were cases where defences had been raised to possession claims based solely on Article 8, respect for private and family life by tenants with no other right to remain in the property other than the possible Article 8 defence.

And the Supreme Court stated very shortly, the Supreme Court held that these types of Article 8 defences should be dealt with summarily at the first possession hearing. And the main reason for that was because the proportionality test in an Article 8 defence will almost always fall on the side of a local authority seeking to enforce its property rights and its rights to manage its housing stock except an exceptional circumstances.

Karolina Zielinska: So broadly, the point there is that there's no point taking that defence all the way to a final hearing when it's almost inevitable that the outcome is going to go a certain way in those sorts of cases, and simply the time and cost spent on litigating it just isn't worth it in that very specific scenario.

Iris Ferber KC: That's right. And that's why in Pinnock and in Powell the Supreme Court said, when that sort of defence is raised, it's going to almost always be decided summarily in favour of a landlord at a five minute initial possession hearing. And that's been the law ever since. And as a result, we see very few of these Article 8 defences anymore.

Well, in Akman-Livingston, the judge at the first possession hearing had somebody raising an Article 8 defence, and also, as you said in the facts section of this conversation, also raising a Section 15 defence, and the judge said that they were going to deal with the Article 8 Defence summarily.

And also the Section 15 defence summarily, and the basis that the judge gave was that there was a proportionality assessment in both defences, Section 15 and Section 8, and they were the same proportionality assessment and therefore it was capable of summary decision.

Ao Mr. Akman-Livingston lost initially. Then he lost in the first appeal to a circuit judge. Then he lost in the Court of Appeal. They all said the same thing. It's the same proportionality assessment as Article 8. It should be dealt with summarily. And then eventually, after some years, he ended up in the Supreme Court in 2015...

Karolina Zielinska: ...and we had a shock reversal.

Well, I suppose it wasn't that much of a shock to housing practitioners at the time, was it?

Iris Ferber KC: No. To us it seemed perhaps the right decision and amazing that it took that long to get there. He won in the Supreme Court and what did they do? The Supreme Court highlighted that, of course, there are very significant differences from Article 8, and the decision is a very easy to read decision.

It's genuinely one of those cases that is, can I say quite fun to read because it's well-structured and interesting. And it particularly goes through the differences between a case under Article 8 and a case under the Equality Act, and particularly Section 15, which is the section that his defence was about.

So the most obvious difference, which the judgment starts with of the Supreme Court is that tenants who bring defences under Section 35 of the Equality Act, that is to say part four, the section that deals with premises discrimination, are entitled to those rights as against any landlord. Not just a public landlord, which would be an Article 8 defence situation, but a landlord, public or private. If an individual or company is a landlord, then they are susceptible to a Section 15 defence. So that's the first point.

Karolina Zielinska: So right at the outset, really, the scope of the Equality Act defences you can get any sorts of claims, is just so much wider than Article 8.

And that was the first key point of difference that had been overlooked up to that point.

Iris Ferber KC: That's right. Essentially, if we want to put it in a sentence, an Article 8 defence is a public law defence and a Section 15 defence is a private law defence. Absolutely.

Now, second one, second point of difference is of course, that under the Equality Act, disabled tenants in particular have greater rights than non-disabled tenants because of Section 15 and because of the reasonable adjustments sections 20 and 21.

And that is not like Article 8. Article 8 is a principle that applies equally to anybody who raises it, whether or not they're disabled.

Karolina Zielinska: And presumably that's given the purpose of anti-discrimination legislation as opposed to the purpose of human rights legislation, they come from very different backgrounds.

Iris Ferber KC: Yes, that's right. I mean, one of the things that the Supreme Court said is that, yes, discrimination legislation ultimately comes from European case law and European jurisprudence, but it is not the same as human rights legislation and anti-discrimination

rights are different from Article 8 rights. Not least that Article 8 rights are all about your home, your right to a private life and your home.

And therefore, a local authority's own property rights are particularly important when considering the competing property rights of the tenant and the landlord. The Equality Act, anti-discrimination legislation generally, has a completely separate purpose from that. It's not related to property in particular.

It's a principle of equal treatment for all people, and the Supreme Court made the, perhaps the obvious point, that that is considered by Parliament to be an important aim.

Karolina Zielinska: Absolutely.

Iris Ferber KC: And that means, doesn't it, that when a court is considering the effect on a tenant of particular conduct in the light of a particular protected characteristic and weigh that up against the property and housing management's rights of a landlord, the rights of that tenant are going to be more important than they would be if this was a pure Article 8 case.

Karolina Zielinska: Absolutely, yes.

Iris Ferber KC: So we've got different considerations for discrimination legislation from the considerations we have on Article 8 and the Supreme Court gave an example of this, which is a really nice example in the sense that it just makes it so clear how very different the two regimes are.

And the example they gave was about direct discrimination. If there were a genuine defence, probably quite a rare thing to see in our practices, but if there were a genuine defence that an eviction was an act of direct discrimination, so being evicted on the grounds of being a woman rather than a man, being evicted on the grounds of being black rather than white, clearly that would be completely incapable of

being resolved on a summary basis in a five minute possession hearing.

That would require findings, really serious findings of fact at a trial. And that's just so different from the way Article 8 would be approached. The Supreme Court gave it as a good example of the differences in the approach and the purpose of the legislation as between anti-discrimination and Article 8.

Karolina Zielinska: Yes. And I suppose that approach and purpose also is reflected in the approach that ought to be taken when considering proportionality in the Article 8 context and in the Equality Act context. Is that right?

Iris Ferber KC: Absolutely. And this is the key point that the judges all got wrong all the way up to the Supreme Court in Akman-Livingston. The proportionality test in a Section 15 case, so we remember, just to remind ourselves, it's unfavourable treatment because of something arising in consequence of disability - the first part, and then the second part of Section 15 is, can the landlord establish that it's a proportionate means of achieving a legitimate aim, even if it is otherwise unfavourable treatment?

That type of proportionality assessment is what we now call the structured approach to proportionality, which comes from the 2013 case of *Bank Mellat v the Treasury*. That's a completely different proportionality assessment than the human rights type proportionality assessment in an Article 8 case, and that's really specific to the way that Section 15 cases work.

Another element of Akerman-Livingston that was really specific to the Equality Act was the burden of proof and the difference between the burden of proof in an Article 8 defence and an Equality Act defence.

Karolina Zielinska: Absolutely. So it's a key feature of the Equality Act that because some equality claims are quite difficult to prove.

So for example, we've talked there about potential case where somebody is evicted because they're black and not white. These things are not often stated by the landlord as being their intention...

Iris Ferber KC: Maybe never these days.

Karolina Zielinska: Yes absolutely, really these are conclusions that need to be drawn from circumstances or other actions, or they're inferences that could be drawn.

And as a result, we have the slightly altered burden of proof at section 136 of the Equality Act...

Iris Ferber KC: Well you say slightly altered, very different!

Karolina Zielinska: Significantly altered. Significantly different!

Iris Ferber KC: Because you remember what I said about Article 8 and the way that that operates in practice based on the Pinnock and Powell decisions.

Well, the way that the burden of proof effectively works in an Article 8 defence is that although there's a burden on the local authority and principle to prove justification of an interference with the property, right, the reality from Pinnock and Powell is that the local authority will always be able to prove that justification because their existence of their property rights and the existence of their housing management rights, which is always going to be in play and never needs to be proved, will always discharge that burden of proof. That's the Article 8 burden of proof. Very easy for a local authority to discharge, essentially automatically discharged.

Section 136, which you mentioned Karolina - completely different. As you said, it's really all about inferences because it is so rare for there to be direct evidence about discrimination.

The way Section 136 works is that you as a tenant have to establish facts that could give rise to the particular form of discrimination that you are alleging in the absence of some other explanation. That's the primary burden of proof. Once you've done that, if you as a tenant can establish facts which could give rise to discrimination, in the absence of other explanation, the burden then shifts to the landlord to positively prove some other reason that is not discriminatory.

Karolina Zielinska: Yes.

Iris Ferber KC: So it's a very, very different process.

Karolina Zielinska: And I suppose then the real next question is what all of this means when we consider the procedure at a first possession hearing in particular.

Iris Ferber KC: Right. And you know, we talk there about the substance and all the grand reasons behind the difference. But in the end, of course, Akerman-Livingston has established a principle which is now operated routinely, day in, day out of allowing these sorts of defences to proceed.

Karolina, what does that actually mean in practice?

Karolina Zielinska: Well, at a first possession hearing, if a claim for possession is genuinely disputed on grounds, that appears to be substantial, so that's a test set out in the civil procedurals at 55.82, then the court must allocate the claim to a track and give directions towards a trial.

Now the Supreme Court said in Akman-Livingston, realistically, in particular in Section 15 cases, there are three things that are always very likely to be substantially disputed, whether one or the other in cases that that raise these sorts of defences. Whether that's the fact of a disability, whether or not the tenant has one, whether their reason

for seeking possession is a consequence of something arising from that person's disability, whether or not it's linked.

And then finally whether or not the action that's being taken, the proceedings are a proportionate means of achieving a legitimate aim.

All of these three things, whether individually or cumulatively, are almost certainly likely to be substantially disputed in these cases, and so it will be necessary to make directions towards the final hearing and consider all of those matters on a much longer time scale at a final hearing, rather than deal with those there and then.

Iris Ferber KC: And essentially what that comes down to, doesn't it, Karolina, is that Section 15 defences or Section 20 reasonable adjustments defences, or any other defences under the Equality Act that a tenant may raise, they are treated like any other ordinary private law defence to the possession claim? They are subject to directions for evidence, for disclosure, for sometimes for expert witnesses and then a contested trial.

Karolina Zielinska: Absolutely. It's by no means a slam dunk to just turn off and say, well I need this property back for all these good allocation related reasons, or, you know, I have statutory duties that I need to fulfil by getting this property back.

Iris Ferber KC: The other side of the coin is potentially in a Section 15 case, the disability of the tenant and what effect that has on the landlord's rights to regain possession.

Karolina Zielinska: Absolutely.

Iris Ferber KC: It's good to go back and look at that, particularly as it's something that perhaps we take for granted nowadays, but it's good to get back and see where it comes from.

Thank you for joining us on this bite-sized journey through housing discrimination law, starting at a Akerman-Livington, and going right through to Z, Z v Hackney Borough Council.

Karolina Zielinska: 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.

Iris Ferber KC: Bye.