

## Case Briefing

### **Validity of tenancies allocated unlawfully – Birmingham CC -v- Qasim & others [2009] EWCA Civ 1080 (Lord Neuberger MR, Sedley LJ & Owen J)**

#### Background

A local housing authority's power to dispose of residential property, including to grant a tenancy, is contained in Part II of the Housing Act 1985.

Under s.159(2) of the Housing Act 1996, an allocation occurs when a local housing authority select a person to be their tenant or nominate them to be the tenant of another social landlord. Under s.167(1), the authority must have an allocation scheme. Under s.167(8), the authority may not allocate housing other than in accordance with their allocation scheme.

A council tenant is a secure tenant under Part IV of the Housing Act 1985 (subject to exceptions which do not apply in this case). Schedule 2 to the Housing Act 1985 sets out an exclusive list of circumstances in which a secure tenant may be evicted so that common law methods of termination are not available to the landlord – *LB Islington -v- Uckac* [2006] 1 WLR 1303 (CA).

#### Facts

A Council officer abused his position to grant tenancies to people who would not otherwise have been allocated housing at that time. In most of the cases, he made it look as if there had been a mutual exchange with another council tenant. The Council carried out an extensive audit but could not find any wrongdoing on the part of any of the tenants. Nevertheless, the Council took possession proceedings against 15 of the tenants (who held eight tenancies between them) on the same grounds:-

- Ground 1 of Schedule 2 to the Housing Act 1985, namely that a term of the tenancy had been broken or not performed. The Council relied on wording in their standard tenancy terms and conditions which stated that they may repossess a property if the tenant had given false information to get the tenancy.
- Ground 6, namely that a premium had been paid for an assignment by way of exchange.
- The Council alleged that each grant was a nullity in public law for having been made following an unlawful allocation so that they were entitled to possession without more.

Two of the original 15 Defendants dropped out of the proceedings at an early stage. Two (the 5<sup>th</sup> & 10<sup>th</sup> Defendants) were represented by myself and Tyndallwoods solicitors. An application was made on behalf of the 10<sup>th</sup> Defendant to strike out the claim and/or for summary judgment, to which the other Defendants joined. The application was taken as a preliminary matter at the commencement of the trial of the action.

The county court judge, Matthew Brunning, Deputy Circuit Judge, granted summary judgment on the first two grounds and struck out all three. The Council appealed to the Court of Appeal on the last issue only.

Held

The Court of Appeal rejected the appeal and upheld the county court judgment. Both Lord Neuberger MR and Sedley LJ gave judgments, making the following points:-

1. Lord Neuberger MR defined the issue: “The appeal raises the question whether a tenancy granted by a local housing authority, which, at least on the face of it, is a secure tenancy under section 79 of Part IV of the Housing Act 1985, is nonetheless void, because it was granted to someone who had not been selected in accordance with the authority’s housing allocation scheme, pursuant to Part VI of the Housing Act 1996.” [1]
2. The Council argued that housing authorities are only empowered to grant tenancies strictly in accordance with their allocation scheme and, therefore, had no capacity or power to grant a tenancy outside that scheme. Lord Neuberger held that, if that were correct, he would be of the opinion that such a tenancy could not survive by reason of the fact that secure tenancies may only be determined in accordance with Part IV of the Housing Act 1985. However, he further held that it was not necessary to decide this point on this appeal. [12, 13]
3. Lord Neuberger MR also held that it was unnecessary to decide whether the tenancies survived as licences or whether they should be treated as valid because of the Defendants’ human rights under ECHR Art.8 and/or Art.1 of the First Protocol. [13]
4. Part II of the Housing Act 1985 and Part VI of the Housing Act 1996 are concerned with different, if in practice often closely connected, activities. The former addresses the issue of grants of tenancies and gives a pretty free hand to a local authority. The latter is not concerned with disposals or the grant of tenancies but with policy and management decisions relating to the identification of priorities between competing prospective tenants. [18, 19]
5. What happened in each of the present cases was a breach of the statutorily prescribed procedure for selecting an applicant to be a secure tenant, not a purported disposal by way of the grant of a secure tenancy other than in accordance with statutory requirements. The Council’s submission that an allocation includes the grant of the relevant tenancy must be rejected. [14, 24]
6. The Council’s failure related to allocation, which is a purely public law obligation and is essentially procedural in nature, and the allocation remained effective at least unless and until it was set aside by the court. Therefore, the subsequent grant of the tenancy, although effected pursuant to a defective allocation, was not *ultra vires* (i.e. outside the Council’s capacity or power). [27, 48]

7. The Court of Appeal's reasoning in *LB Islington -v- Uckac* does not apply to a claim, such as this one, which is based on lack of capacity, but it is inconsistent with the Council's arguments. [32, 33, 40] Similarly, the Council's arguments do not sit well with the Court of Appeal's decision in *Akinbolu v Hackney LBC* (1996) 29 HLR 259 which rejected the argument that a tenancy was void when granted to an illegal immigrant.
8. A further reason for rejecting the Council's analysis is its impracticality and unattractiveness, i.e. on their arguments a tenancy could be void even if the failure had been minor and had arisen out of an honest misunderstanding and even if the tenant had been innocent and had lived at the accommodation for many years. [34]
9. The Court of Appeal's conclusion means that the grant of a secure tenancy to an ineligible person would be effective but, if the tenant had concealed their ineligibility, Ground 5 (grant induced by false statement) could normally be relied on. [35]
10. An unlawful allocation does not render the subsequent grant of a tenancy void or ineffective. [37, 49]
11. The rejection of the Council's arguments does not deprive s.167(8) of any effect. An unlawful allocation may be challenged in the Administrative Court, albeit that the applicant would have to act quickly if they wanted to stop a specific tenancy being granted. [39]
12. Lord Neuberger MR supported the comments of the Court of Appeal in *LB Islington -v- Uckac* that Ground 5 of Schedule 2 to the Housing Act 1985 may benefit from further scrutiny.
13. Neither *LB Islington -v- Uckac* nor this decision necessarily imply that, where the applicant and a council officer are involved in dishonestly enabling the applicant to obtain a tenancy, the authority would be precluded from setting aside the tenancy or treating it as void. [42]
14. Further, this case concerned a person to whom the Council had properly delegated the task of granting tenancies. Different considerations may apply where a tenancy is granted by a person with no such authority. [43]

### Analysis

The Council's arguments were based on a fundamental misunderstanding of public law. An authority's decision which is unlawful has been termed by the courts as "void". In many cases, the courts have warned against using this word and against importing its meaning from the context of contractual disputes. The Council fell foul of this warning, assuming that "void" in the public law context meant exactly the same as "void" in the context of contract law, i.e. "void" means it is treated as never having existed. However, in the public law context, as Lord Neuberger MR and Sedley LJ both explained, a decision which is valid on its face continues to have effect unless and until a court holds otherwise, even if that decision may be termed "void".

Therefore, in this case, the allocations were void but remained valid at the time of the grant of each tenancy because no court had yet held them to be void.

However, Lord Neuberger MR also sought to limit the extent of this judgment (see paragraphs 13 and 14 above). It is doubtful that he is right, at least for all but a very exceptional and rare case. In any case where an applicant has acted dishonestly, the chances of their actions not falling within Ground 5 of Schedule 2 to the Housing Act 1985 are remote to non-existent. The dishonesty would involve misleading the local authority which must, by definition, involve making a false statement at some point.

Where a local authority officer acts outside their authority in granting a tenancy, the circumstances could only fall outside this judgment if it were clear to the applicant that the officer had no authority (Sedley LJ referred to a “doorkeeper”). Otherwise, if they appear to have authority, it is difficult to see why such a tenancy would be treated any differently from those in this case.

The Council pointed out, and the Court of Appeal effectively accepted, that a tenancy granted to a person who is ineligible is nevertheless valid (see paragraph 9 above). This means that, if a person who is ineligible due to their immigration status does manage to obtain a council tenancy, its validity is unaffected by their ineligibility.

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