

## The right to housing in the UK (\*)

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### *Abstract*

*L'articolo esamina la natura dei diritti alla casa nel Regno Unito. L'Autrice sostiene che nonostante questi diritti appaiano formalmente coerenti con gli obblighi internazionali e comunitari, in effetti essi non sono stati strutturati avendo in mente questa prospettiva. Il sistema di protezione di questi diritti è complesso e se è vero che esso non equivale a fissare un "diritto alla casa" in senso stretto, nel complesso è prevista una serie di diritti azionabili per proteggere chi è privo di casa, per supportare i pagamenti per l'acquisto della casa, per riconoscere il diritto di proprietà e individuare standard minimi di tutela.*

### **1. Introduction**

Before I turn in detail to ideas about the right to housing, I thought it would be useful to provide some contextual background about the UK; first in relation to social and legal rights in the UK and secondly in relation to housing provision. I should also add that the detail of my talk relates to England, rather than the other constituent parts of the UK.

It is important to point out that the UK has no written constitution. It is not possible therefore to point to a "right to housing" which is set down in some constitutional form. Indeed even if we were to have a written constitution, it seems unlikely that we would include within it detailed social or economic rights. Indeed amongst some politicians and perhaps the public at large, there is a distinct suspicion of giving legal effect to broad social rights, as the UK opts out from

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the Charter of Social Rights of Workers illustrated. Indeed at the time that the Charter of Fundamental Rights was being adopted by the EU in 2000 our then Attorney-General Lord Goldsmith wrote of it that economic and social rights are different because they are “usually non-justiciable” and by implication are less important than civil and political rights<sup>1</sup>.

However, in relation to the European Convention on Human Rights we have made a considerable change constitutionally. The *Human Rights Act 1998* effectively incorporated the convention into UK law and made breach directly justiciable in the UK courts. I will return to the impact of this later.

It is a truism that most social policy is a product of the (long) history of that policy. This is particularly true of housing where policy decisions have long-term impacts in terms of houses built and the rights of people living in them, which governments are often reluctant to alter, particularly to reduce. Accordingly, tenure structures are very much a product of the existing history. In the UK there has been a substantial change over the last one hundred or so years, but we can still see the history of that change in where we are now, which is a country where owner-occupation predominates, although this has probably peaked for the moment.

Historically we had a large public or social rented sector. This was initially primarily provided by local authorities. However there have been two trends over the last 30 years which have meant that the proportion of tenants in local authority housing has decreased from a high of about one-third down to the current 10%. This is first the right to buy which was given to tenants of local authority properties in 1980, and secondly the quasi-privatisation of their stock through transfers to housing associations (not-for-profit, often charitable landlords). Within the next few years it is likely that housing associations will provide a greater percentage of housing than local authorities.

Finally we also have a small private rented sector, which provides for some very different markets – from students to young professionals,

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(1) Lord Goldsmith, *A Charter of Rights, Freedoms and Principles*, in *Common Market Law Review*, 38, 2000, p. 1201.

but also at the bottom of the market for those who are unable to access social renting.

Having given that background I want to turn to the substance of the paper which will cover the following issues:

- discussion of the nature of housing rights;
- housing rights in the UK;
- rights for the homeless;
- protection from eviction.

## *2. The nature of housing rights*

Housing rights have been recognised at an international level through a number of international treaties. Most obviously at the international level we have art. 11 of the Covenant on Economic, Social and Cultural Rights which provides for a:

Right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

At a European level there is also the revised European Social Charter which in article 31 sets an obligation on the state:

With a view to ensuring the effective exercise of the right to housing, the parties undertake to take measures designed: to promote access to housing of an adequate standard, to prevent and reduce homelessness with a view to its gradual elimination, to make the price of access accessible to those without adequate resources.

To a certain extent this also plays out at an EU level with article 136 of the EU Treaty making direct reference to the Social Charter. Further the more recent Charter of Fundamental Rights, at article 34:

recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources.

However, the EU level commitments are not subject to legislative powers, and can only be enforced through what we in the UK would refer

to as “soft law”. Further, in order to translate these broad aspirations into legal rights we need to break them down further to see what they might encompass. The UN Committee on Economic, Social and Cultural Rights, which is responsible for monitoring the implementation of the Covenant, has<sup>2</sup> interpreted the right to adequate housing as incorporating a number of core elements:

- legal security of tenure;
- availability of services, materials, facilities and infrastructure;
- affordability;
- habitability;
- accessibility;
- location;
- cultural adequacy.

### ***3. Housing rights in the UK***

Even at this level of specificity, how far can it be said that the UK law encompasses a full enough set of housing rights, that it could be argued that there is a right to housing? I think it is important to recognise that housing is often referred to as the “wobbly pillar” of the welfare state<sup>3</sup>. Unlike, for example, education or health, we do not provide a universal service for all citizens. Housing rights therefore have to be considered not just in terms of a positive right to receive a service from the state, but also in terms of state interventions in the private market, for example to limit the rights of landlords or mortgage lenders to recover possession. The other point I would want to make before we turn to the construction of housing rights in the UK is that none of the UK policy documents over the last 30 years or so make reference to either international or EU obligations on housing. I think it is true to say that they have not driven the legal position as it has emerged in the UK.

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(2) General Comment No. 4.

(3) See U. TORGERSON, *Housing: The Wobbly Pillar under the Welfare State*, in B. TURNER, J. KEMENY, L. LUNDQVIST (eds.), *Between State and Market: Housing in the Post-Industrial Era* (1987).

How, therefore, is what we might term the suite of housing rights constructed in the UK? What we see is a great deal of legal complexity:

- we have a law which imposes duties directly on the state towards the homeless;
  - we have, falling within our social assistance, various rights to help towards payment (rent or mortgage) for those who are unable to afford to pay;
  - protection from eviction is provided for nearly all occupiers of housing through a requirement for due process. Some occupiers gain form of security which prevent the landlord/lender from evicting at will – thus giving additional security;
  - for tenants the law imposes certain minimum standards for the home as to repairs, overcrowding, freedom from risk in the home – the law imposes these whether the landlord is the state or private.
- Finally it is worth noting that those rights which come directly from the state are not open to everyone who is lawfully in the country. There are complex laws (interacting with EU provisions) as to who has the right to assistance.

I am now going to focus on two of these to examine how far they can be said to provide a “right to housing”.

#### *4. Rights for the homeless*

Notwithstanding all my initial comments about a dislike of constitutional and particularly social rights, the UK has probably one of the most comprehensive sets of laws in Europe imposing duties on the state towards the homeless. This first became law as the *Housing (Homeless Persons) Act 1977*, and it is now contained in the *Housing Act 1996*, Part 7.

In order to qualify to assistance applicants have to satisfy a number of criteria. In brief these are:

- eligibility (immigration status);
- homelessness (quite a broad definition);
- priority need (generally not single people without vulnerability);
- not intentionally homeless.

If an applicant satisfies the criteria, *i.e.* the applicant is eligible, homeless, in priority need and not intentionally homeless, the local author-

ity is under a duty to secure that accommodation is made available for the applicant and his or her family. This may initially be some form of temporary accommodation, but it can be long-lasting as the duty does not come to an end until the applicant has found some form of permanent housing. For most people who apply as homeless that permanent housing is an offer of accommodation of social housing, allocated through the local authority's waiting list (which generally gives access also to housing association properties). Under Part 6 of the *Housing Act 1996* which governs the allocation of permanent housing, those who have been accepted as homeless must be given a "reasonable preference" when housing is allocated.

What is perhaps the most important element of the homelessness laws and makes them closest to a "right to housing" is as Fitzpatrick and Stephens put it in their international review of homelessness law and policy<sup>4</sup>.

England was highly unusual amongst the surveyed countries in providing, for some homeless groups, a legally enforceable right...

Thus if an applicant applies to an authority and the authority has "reason to believe" the applicant is homeless, the authority cannot refuse to investigate and make a decision. If they make a favourable decision on all the criteria, the authority cannot refuse to secure accommodation for the applicant. In cases of a failure to act the applicant can obtain an order from the court requiring the authority to do so.

This, however, is less advantageous to the homeless than might first appear. The various criteria have a lot of discretion built in to them. It is for the authority to decide if a single applicant is "vulnerable" or if they have accommodation "which it is reasonable to continue to occupy" in deciding whether they are homeless. Thus the problem is not usually that authorities make no decision at all, it is that they make a negative decision based on the Act. In those circumstances

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(4) S. FITZPATRICK, M. STEPHENS, *An International Review of Homelessness and Social Housing Policy* (2007).

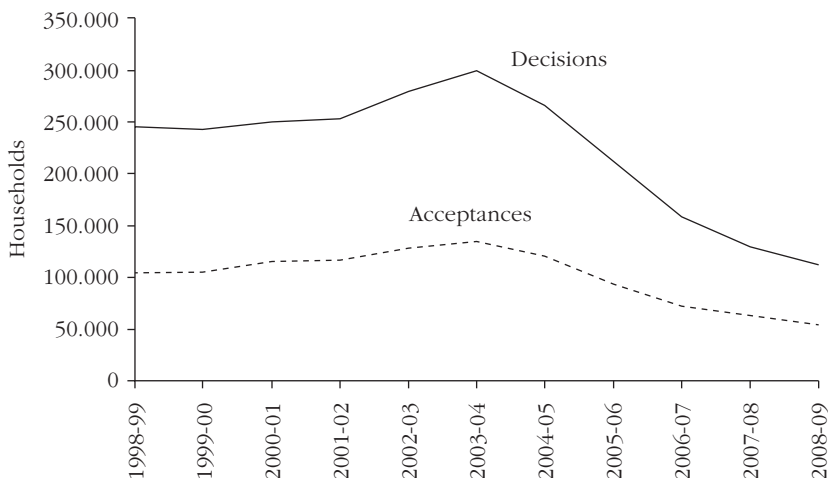


Fig. 1. *Decisions taken by local authorities on applications received from eligible applicants and the number of those applicants accepted as owed a main duty each year, England*

an applicant may seek an internal review of the decision and if still unsatisfied may appeal the decision to the county court, but only on a “point of law”. The courts have on a number of occasions stated that it is not their role to substitute their decision-making for that of local authorities.

I want to ask one final question relating to the rights of the homeless: how important are legal rights? I ask this in the context where the numbers applying as homeless have dropped dramatically over the last 7 years or so. We can illustrate this with a graph taken from the government’s own homelessness statistics<sup>5</sup>.

What we see from this graph is that the number of applicants rose significantly in 2002/03. This was in the wake of the expansion of the priority need categories, in particular to encompass all homeless 16 and 17 year olds. However, since then there has been a strong govern-

(5) CLG Table 638: [www.communities.gov.uk/housing/housingresearch/housingstatistics/housingstatisticsby/homelessnessstatistics/livetables/](http://www.communities.gov.uk/housing/housingresearch/housingstatistics/housingstatisticsby/homelessnessstatistics/livetables/).

ment policy to try and reduce homelessness, in particular by getting local authorities to focus on prevention. Thus we see both the number of applications and the number of acceptances declining at about the same rate. If a government policy drive can have this effect on the numbers asserting their rights, it raises the question of how important the legal rights are.

### *5. Protection from eviction*

Turning now to protection from eviction, as I mentioned earlier, nearly all eviction from residential accommodation requires a court order to be made legally. However, a court order is not much protection if the court must make the order if requested. So grafted on to this we have a system of “security” across different tenures. For owner-occupiers who have a mortgage, the court has power to suspend or postpone possession if the owner can show that he or she can pay the arrears within a reasonable period. For private tenants the security is much less. All tenants have a minimum security of six months, but unless the landlord offers a longer term (and many do not) then after this period the landlord is absolutely entitled to possession provided he serves the appropriate notice. This is in stark contrast to the position prior to 1989 where tenants of private landlords had a high degree of security.

For most tenants of social landlords, there is still a relatively high degree of security for the majority. They can only be evicted if they are at “fault” (for example non-payment of rent) and then only if the court considers it reasonable to do so. The court may also postpone the possession on condition that for example arrears are paid. However, we have also seen the erosion of this security over the last 15 years or so. A number of new forms of tenancy have been introduced. These include for example the “introductory tenancy”. Under this all new tenants of a local authority have no security during the first 12 months of the tenancy. Although the local authority has to give reasons for evicting a tenant, when the case goes to court provided the procedural requirements have been met, the court, must grant possession. Other examples of a lack of security include a new demoted tenancy and tenancies for the homeless.



It is in cases fighting this erosion and lack of security that it has seen arguments under the ECHR deployed. Article 8 provides that everyone has the right to “respect for his private and family life, his home and his correspondence”. The right is not absolute and art. 8(2) provides:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The House of Lords (recently reconstituted as the Supreme Court) in a series of cases has held that Article 8 leaves open two possible challenges to decisions to evict (known as Gateway (a) and Gateway (b)): see *Lambeth LBC v Kay*; *Leeds City Council v Price* [2006] 2 AC 465; UKHL 10; [2006] 2 WLR 570 and *Doberty v Birmingham City Council* [2009] 1 AC 367; [2008] UKHL 57; [2008] 3 WLR 636. Gateway (a) is a challenge to the compatibility of the legislation itself with the convention. Gateway (b) is a challenge to the individual decision if it is made by a “public body”. However, such individual challenges are to be made by judicial review, and therefore only on limited grounds. In relation to Gateway (a) we see a split developing between the UK courts and the Strasbourg court. The UK courts have been very reluctant to intervene with the balance struck by Parliament between security and the right to possession. Lord Brown said in *Kay*:

...where under domestic law the owner's right to possession is plainly made out (whether at common law or, for example, under the legislation providing for assured short-hold tenancies or introductory tenancies), the judge in my opinion has no option but to assume that our domestic law properly strikes the necessary balances between competing interests ... and that in applying it properly he is accordingly discharging his duty under section 6 of the *Human Rights Act 1998*. ... Where no statutory protection is afforded to occupiers that should be assumed to be Parliament's will: sometimes that will be clearly evident from the terms of the governing legislation...;

By contrast the European Court of Human Rights has increasingly found that a residential occupier should have the right to challenge in court the fact that the decision to evict is not proportionate. Thus in *Qazi v. UK* [2008] 47 EHRR 40; [2008] HLR 40 it was held that:

Judicial review procedure is not well adapted for the resolution of sensitive factual questions which are better left to the County Court responsible for ordering possession. In the present case, the judicial review proceedings, like the possession proceedings, did not provide any opportunity for an independent tribunal to examine whether the applicant's loss of his home was proportionate under Art. 8(2) to the legitimate aims pursued.

So what is emerging here is a jurisprudence which suggests that even where there are no legal rights of security there should be the right to challenge the eviction as disproportionate in the court of first instance deciding whether or not to order the eviction. Whether the UK court will be willing to go down this route will become clearer in the next few months as the Supreme Court reconsiders again a number of cases of "insecure" tenants, but I would suggest the Court will be unwilling to upset the balance struck by Parliament.

Turning to Gateway (b), here the argument turns on the facts of the individual case being challengeable in public law. Under the *Human Rights Act 1998*, s. 6 it is "unlawful for a public authority to act in a way which is incompatible with a Convention right". Lord Scott in *Doherty v Birmingham City Council* put the nature of the defence thus:

An article 8 defence requires the judge to review the lawfulness of the local authority's decision to recover possession of the property in question and, in doing so, to review the factors that a responsible local authority ought to have taken into account in reaching its decision. The proportionality of the decision in all the circumstances of the case would be central to the review and if the local authority's decision could be shown to be outside the range of reasonable decisions that a responsible local authority could take, having regard both to the circumstances of the defendant as well as to all the other relevant circumstances, the decision would be held to be unlawful as a matter of public law.

However, it is only “public bodies” which can be challenged in this way. This raises an issue relating back to the very beginning of the paper, the quasi-privatisation of local authority housing. Are housing associations, as they increasingly take over local authority stock, and become the major provider of social housing, to be considered a public authority? The statute states:

(3) In this section “public authority” includes – ...

(b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament...

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

This too has been the subject of recent litigation. In the case of the *R (Weaver) v London and Quadrant Housing Trust* [2009] EWCA Civ 5, the Court of Appeal held that eviction was a housing management function and that such functions when carried out by a housing association were functions of a public nature. The decision has been subject to much criticism (particularly from housing associations themselves who do not wish to be seen as part of the public sector) and it is likely to be considered by the Supreme Court fairly soon. Should the Supreme Court take a different approach (which has been suggested, is quite likely), it will indicate the limits of protection given by the *Human Rights Act*. With increasing “quasi”-privatisation of the provision of housing there will be no basis for a gateway (b) challenge.

## 6. Conclusions

In this paper I have sought to examine the nature of housing rights in the UK. I would argue that although they largely indicate compliance with our international and European obligations, they are not constructed with such compliance in mind. The system of protection is complex, and while it cannot be said to amount to a “right to housing” in a simplistic sense, it does on the whole provide a set of justiciable rights to protect the homeless, to assist in payment towards housing, to give security of tenure and to provide minimum standards.

The peak is probably the rights of the homeless. Here I would suggest that, despite the legislation's limitations, the UK probably goes further than most other European states in providing a right enforceable against the state to the provision of accommodation. Nonetheless the limitations in terms of the discretionary decision-making must be acknowledged. Further recent changes in policy, with a move away from a reactive rights-based approach towards a preventative agenda, may lead one to question whether the legislation is the most effective way of providing assistance to the homeless.

In relation to security of tenure, a key component of a right to housing, the UK law provides a minimum level of protection. Some tenants, particularly of social landlords, have considerable security. As with the private rented sector two decades ago this is now being eroded. Because the European Convention on Human Rights has been incorporated into UK law, we have seen this used to try and defend against the erosion of such rights. In the UK this has been of limited success, although it remains to be seen how the clash with Strasbourg resolves itself. It has also thrown up the question of the nature of public authorities, in an era of "quasi"-privatisation.

I just want to finish with a question to ponder coming out of the use of the ECHR to defend security. Should social rights become incorporated as "hard" law in the EU, would we similarly see them used to attack erosions of security?