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CASE AND COMMENT

STATUTORY DUTIES, ADMINISTRATIVE DISCRETION AND "CIVIL RIGHTS"

SECTION 193 of the Housing Act 1996 requires local housing authorities to "secure that accommodation is available" to certain homeless persons. However, a housing authority ceases to be under such a duty if, *inter alia*, an applicant declines without good reason an offer of suitable accommodation having been warned that, if he does so, the authority will regard itself as having discharged its duty. In *Ali* v. *Birmingham City Council* [2010] UKSC 8, [2010] 2 W.L.R. 471, the claimants denied ever having received such notification. On that basis they contested the defendant's assertion that it had been statutorily relieved of its section 193 duties in respect of them. The question for the Supreme Court was whether the regime laid down by the 1996 Act for resolving such disputes was, as the claimants asserted, inconsistent with Article 6 of the European Convention on Human Rights. It provides, *inter alia*, that whenever an individual's "civil rights and obligations" are being determined, he is entitled to a hearing before an "independent" tribunal, albeit that a lack of independence at first instance can sometimes be offset by (for example) a right of appeal to an independent court. Although the 1996 Act provides such a right of appeal, it lies only on points of law – meaning, said the claimants, that the courts' involvement was incapable of injecting sufficient independence into the process for resolving factual disputes such as those which had arisen in their cases. This argument failed in the Supreme Court because, it was unanimously held, the 1996 Act did not confer upon the claimants any "civil rights", meaning that Article 6 did not apply.

In so holding, the Supreme Court broke new ground. In *Runa Begum* [2003] UKHL 5, [2003] 2 A.C. 430, the House of Lords declined to address the scope of Article 6, preferring (on similar facts) to assume its applicability and to focus on what it requires when it does apply.

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That approach was informed by a combination of what Lord Collins in *Ali* referred to as the reluctance of the European Court of Human Rights to "enunciate principles which will enable a line to be drawn" between those cases to which Article 6 is and is not applicable, and a sense, when *Runa Begum* was decided, that the scope of Article 6 was inexorably expanding. However, in *Ali*, Lord Hope said that it was incumbent upon the court to tackle head-on the scope of Article 6 in the interests of legal certainty and because the ECtHR's case law had not proven to be as expansionist as had been predicted in *Runa Begum*. The question was therefore whether, notwithstanding the ECtHR's reluctance to demarcate Article 6 in abstract terms, it was possible to deduce from its judgments a limiting principle.

Echoing views which he had expressed more tentatively in *R (A)* v. *Croydon LBC* [2009] UKSC 8, [2009] 1 W.L.R. 2557, Lord Hope, with whom Lord Brown and Baroness Hale agreed, said that it was. The key distinction, he held, was between "an individual right of which the applicant can consider himself the holder" and a benefit which is to be conferred only in the light of "a series of evaluative judgments by the provider as to whether the statutory criteria are satisfied" or which falls to be provided in a way that itself involves the exercise of discretion. On both counts, the duty under section 193 of the Housing Act falls into the latter category. Deciding whether the duty arises entails the making of judgments about compliance with statutory criteria that are not clear-cut, such as whether the applicant is homeless (which involves asking, *inter alia*, whether it would be reasonable for him to continue to occupy given accommodation) and, if so, whether he became homeless intentionally. Even if the relevant criteria are met, performance of the duty itself involves the exercise of discretion: it is, noted Lord Hope, "expressed in broad terms … which leave much" – such as the selection of the particular accommodation to be offered to the applicant – "to the discretionary administrative judgment of the authority". Lord Kerr agreed with Lord Hope that the scheme was too imbued with discretion to found a civil right, and while Lord Collins placed less emphasis on the extent of the decision-maker's discretion, the substance of his analysis shows that he regarded it is a relevant factor.

Lord Hope's approach is to be applauded for two reasons. First, while not a panacea – hard cases will still arise: how much discretion is too much for Article 6 purposes? – it represents a substantial clarification of the scope of Article 6, and so addresses what Lord Hope called the "unhealthy" uncertainty which has existed in this area for too long. Secondly, the majority's analysis is sound in constitutional terms. Ever since the ECtHR held that Article 6 is potentially applicable to administrative proceedings, the challenge has been to avoid over-judicialisation and hence the evisceration of executive discretion. If the

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agency is simply charged with applying clear rules, such that applicants can meaningfully lay claim to what the ECtHR in *Stec* v. *UK* (2005) 41 E.H.R.R. S.E. 295 called an "assertable right", there can be little objection to requiring that it be either independent itself or subject to close supervision by an independent court. However, as Lord Hoffmann noted in *Alconbury* [2001] UKHL 23, [2003] 2 A.C. 295, "many decisions … have to be made every day (for example, about the allocation of resources) in which the only fair method of decision is by some person or body accountable to the electorate". There is a powerful democratic objection to requiring such decisions to be taken (or subject to substitution) by agencies with court-like independence, thereby effectively placing administrative discretion in the hands of unaccountable judges.

It remains the case that, if Article 6 were to be held applicable to the exercise of discretion-laden administrative functions, its requirements may be met by the possibility of judicial review or appeal on a point of law: indeed, *Ali* indicates that this is so even when the disputed point is one of fact, provided that it arises in a context that also involves the making of evaluative judgments. But manipulation of the content of Article 6 is a poor substitute for squarely confronting the prior question of its proper scope. The willingness of the Supreme Court in *Ali* to address the latter question is therefore to be welcomed – as is the fact that the answer it supplies is rooted in due appreciation of the respective roles of the judicial and administrative branches.

MARK ELLIOTT

THE NEW UK SUPREME COURT, THE SEPARATION OF POWERS AND ANTI-TERRORISM MEASURES

IN our security-conscious modern world, it was perhaps unsurprising that the first judgments to be handed down by the new UK Supreme Court concerned anti-terrorism measures. One of these was in *Ahmed et al* v. *HM Treasury* [2010] UKSC 2, [2010] 2 W.L.R. 378, where the Court was faced with difficult questions concerning secondary legislation adopted to give effect to certain obligations of the UK under Article 41 of the United Nations ("UN") Charter. Section 1(1) of the United Nations Act 1946 empowers the executive, without prior Parliamentary scrutiny or approval, to make "such provision as appears necessary or expedient" for the effective application of UN decisions. The Terrorism (United Nations Measures) Order 2006 (S.I. 2006/2657) ("TO") was thus adopted to give effect to Security Council ("UNSC") Resolution 1373, which required UN member States to freeze the assets

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