

2. The Human Rights (Bailiwick of Guernsey) Law, 2000, section 6(1) and Article 8 of the Convention
3. Ward v States Housing Authority (Guernsey Court of Appeal) 20 GLJ 79
4. Perkins v States Housing Authority (Guernsey Court of Appeal) 20 GLJ 66
5. Matheson v States Housing Authority (Guernsey Court of Appeal) 24 July 1998
6. Gillow v United Kingdom (1986) 11 EHRR 335
7. Pretty v United Kingdom (2007) 35 EHRR 1
8. Connors v United Kingdom (2005) 40 EHRR 335
9. Thomas v States Housing Department Royal Court 26 February 2008
10. Walters v States Housing Authority (Guernsey Court of Appeal) 24 GLJ 32
11. Human Rights Law and Practice, Second Edition, by Lester and Pannick, paragraph 4.8.2.

The Appeal

1. Karen Leslie Jolly (“the Appellant”) has appealed under Section 56 of The Housing (Control of Occupation) (Guernsey) Law, 1994 (“the 1994 Law”) against decisions of the Housing Department (“the Department”) in relation to applications made by the Appellant:
 - for a housing licence; and
 - under section 10(2)(j)(iii) of the 1994 Law, that she be treated as if she had held a housing licence whilst living with her parents in their Open Market house.

This is the judgment of the Court in accordance with Section 16 of the Royal Court (Reform) (Guernsey) Law 2008.

Background

2. The Appellant was born on 24th January 1967. Her parents moved to Guernsey in February 1988 with the Appellant and her sister. Her parents are not residentially qualified and have always occupied Open Market property. It is accepted by the Department that the Appellant has been ordinarily resident (as that term is defined in section 71(3) of the 1994 Law) in Guernsey since February 1988.
3. In February 1988, the Appellant was studying at university in England and after graduating she took up employment in Guernsey. She qualified as a Chartered Secretary in 1997, she has a Masters Degree in Corporate Governance and in February 2008 she was elected a Fellow of the Institute of Chartered Secretaries. She has held a number of jobs in Guernsey and since 2000 she has been employed by the Bacon and Woodrow (now BWCI) Group.
4. The Appellant lived with her parents until she was granted a housing licence to live elsewhere.

5. The Appellant's sister, her only sibling, has remained in Guernsey where she is married to a locally qualified resident and they have a five year old child. So, the Appellant has strong familial connections with Guernsey.

Housing Licence Applications

6. On 13th December 2001, Advocate Ferbrache wrote to the then States of Guernsey Housing Authority (which for convenience we will refer to as "the Department") requesting a housing licence on behalf of the Appellant, largely on the basis of her connections with the Island. The Department asked for details of her employment before considering the application which it then decided to reject. Its reasons were given in a letter dated 19th April 2002. In summary, they were that the Appellant's employment did not justify an "essential" licence and her personal circumstances did not justify the grant of a licence on other grounds.
7. On 10th May 2002, Advocate Ferbrache wrote again with further arguments in support of her application and asked that it be reconsidered.
8. By letter dated 5th August 2002, the Department rejected the application, but advised that it would consider the grant of a licence if she applied for a licence conditional on a specific post of employment or if she applied after completing sixteen years of ordinary residence in Guernsey.
9. The Appellant's employer then wrote on 30th August 2002 requesting that a housing licence be issued to her in connection with her employment.
10. By letter dated 18th December 2002, the Department informed the Appellant's employer that it had agreed in principle to grant a five year licence. It imposed restrictions on the accommodation she could occupy, one of which was that it must have a Rateable Value above a specified minimum to be determined by reference to her remuneration package.
11. A housing licence was then issued for five years from 18th February 2003 in respect of a house called Pied Des Monts, Delancey, St Sampson's.
12. On 6th February 2007, Advocate Ferbrache wrote to the Department advising that the Appellant would be applying for a further licence to be issued upon the expiry of the five year licence. He asked, "*if there are any material documents, policies or considerations that I, on behalf of my client, should bear in mind, I would be grateful if you would draw those to my attention now, including the current thinking of the Department in respect of such a Licence application or similar ones*".
13. The Department replied on 10th April 2007 indicating that it would be willing to grant her a further licence which, it said, would be subject to restrictions that would require her to live either in lodgings or in her own property provided she shared it with a qualified resident or a licence holder. It also informed her that, by virtue of section 10(2)(j) of the 1994 Law, she would achieve qualified residential status on 18th February 2023 if she

continued to hold valid licences and remained ordinarily resident in Guernsey until that date.

14. On 20th June 2007, the Appellant e-mailed the Department in anticipation of the change from rateable values to the new regime of Tax on Real Property and asked what would be the new restriction equivalent to a rateable value of £60. In its reply, the Department drew attention to the fact that her current licence would expire in February 2008 and that the Department had not agreed a licence beyond that date.
15. We now turn to the correspondence which is directly relevant to the Appeal.

The Relevant Decisions

16. On 21st January 2008, Advocate Ferbrache wrote to the Department requesting a housing licence to take effect on the expiry of her five year licence. He asked that “*if she wants, (which is not her current intention, but who knows where life will take one), she can leave Guernsey and return and still be regarded as a Local Market person*”. He said that she was seeking to enjoy the same rights as are enjoyed by a qualified resident.
17. The Department, in its reply dated 12th February 2008, advised that it had decided to grant a housing licence to the Appellant which was to be valid for one year only. The letter stated: “*At the end of this period due consideration will be given to the renewal of the licence. If [the Appellant’s] circumstances remain unchanged, the licence will be renewed upon written request*”. The Department said it would not consider a hypothetical possibility of her leaving the Island but, if the possibility of a move became a more serious consideration, the Appellant should approach the Department at that time.
18. Advocate Ferbrache replied on 4th March 2008. He said the licence was unsatisfactory in requiring the Appellant to apply again at the end of the year if her circumstances remain unchanged. He asked what was meant by her “*circumstances remaining unchanged*”. He said it was unfair for her to have to continue in that way for the next fifteen years as it was an unreasonable interference with her private life and generally, as well as being an administrative encumbrance. He sought to clarify whether the licence was subject to accommodation restrictions. He submitted that her career would be disadvantaged because an employer in the finance industry would look unfavourably upon the fact that she has effectively only a one year licence. He asked again what would happen if she worked outside the Island, or otherwise left the Island, for a two year period.
19. In that letter, Advocate Ferbrache also asked the Department to issue a notice under Section 10(2)(j)(iii) of the 1994 Law, the effect of which would have been to confer qualified residential status on the Appellant. The section provides:

“(2) The following persons are qualified residents-

(j) a person who has been ordinarily resident in Guernsey for a period of not less than 20 consecutive years and who throughout that period has been in occupation of a dwelling or dwellings-

(i)[under a housing licence];

(ii) under or by virtue of successive such licences; or

(iii) otherwise than under or by virtue of such licences but in circumstances which, in the [Department's] opinion stated in a notice served on that person, are such that his period of occupation should be treated as being occupation under or by virtue of such licences."

20. The Department's reply was dated 7th April 2008. In relation to the request for a notice under Section 10(2)(j)(iii) of the 1994 Law, it had looked at the request by considering whether the Appellant would ever have been granted a housing licence. It decided first that her circumstances would not have justified the grant of a licence that was not related to her employment during any of the period prior to the grant of her licence in 2003. It said that decision had been "*informed by the fact that such an application*" had been rejected by the Department on 19 April 2002 and 5 August 2002 when it dealt with her applications dated 13th December 2001 and 10th May 2002 respectively.
21. The Department also reviewed the various jobs the Appellant had held and concluded that, during most of the time that she had been employed in Guernsey, the nature of her employment would not have justified an employment related housing licence. However, since January 2002 the Department accepted that she had been employed in a post which merited such a licence. So the Department was prepared to treat the period of occupation since January 2002 as if it were occupation under a housing licence. Consequently, if she continues to be ordinarily resident and lawfully housed in the Island, she will attain qualified residential status in January 2022, one year earlier than the Department had previously indicated. By that date, she will have been resident in Guernsey for 34 years.
22. Regarding the current licence issued, the Department said it would be prepared to communicate with any employer to inform the employer that the licence will be renewed if her circumstances do not change, provided the Department has the Appellant's permission to do so. However, for the first year, the Department was keen to ensure stability in her living arrangements. Advocate Ferbrache described that latter remark as unnecessary when she had already been living in the house for five years under the earlier housing licence.
23. The Department advised that upon expiry of her current one year licence, a further licence will be issued for a longer period although it did not indicate how long that period would be.

24. The Department also said that if the Appellant wishes to move from her current home she should contact the Housing Department with details of the exact dwelling, or type of dwelling (i.e. size and value) that she is seeking to move to. Advocate Ferbrache described that requirement as amounting to a condition on her licence.
25. The Department declined to make a binding statement about what licence might be available to the Appellant at some later date if her circumstances were to change or if she should spend time away from the Island and then request a housing licence upon her return.

Legal Issues

26. This section of the judgment and the next section entitled “Article 8 of the Convention” contain the Deputy-Bailiff’s considerations of the legal issues in the case and his directions thereon in his capacity as the sole judge of matters of law.
27. Section 56 (1) of the 1994 Law provides that (subject to certain provisions which are not relevant in the present case) “*a person aggrieved by any decision of [the Department] under any provision of this Law may appeal therefrom to the Royal Court on the grounds that the decision was ultra vires or was an unreasonable exercise of the [Department’s] powers*”. The burden of proof is on the Appellant and the standard of proof is the normal civil standard of the balance of probabilities. To prove something on the balance of probabilities means to prove that it is more likely so than not so.
28. Advocate Ferbrache reviewed a number of Housing Appeal decisions of the Court of Appeal and the Royal Court, from which he drew a number of general observations and conclusions, which I accept and adopt.
29. The Housing Law is “*a very formidable enactment..... under its provisions [the Department] yield unusually extensive powers of control over the rights of many ordinary people..... It places great and unusual power in the hands of [the Department]Such drastic power calls for meticulous care in its exercise and scrupulous balancing of the conflicting interests which it affects*” (Ward).
30. Also “*the existence of powers such as these is unusual in a democratic society and must be exercised with care and sensitivity to avoid any abuse of those powers*” (Perkins).
31. Advocate Ferbrache placed particular reliance upon Matheson where at page 4C, Beloff J A, giving the decision of the Court of Appeal, said:

“I recognise that it is a well established principle of public law, applicable to Guernsey, that a public authority such as the [Department], can have a policy as long as two conditions are satisfied. The first is that the policy conforms with the law; the policy cannot modify, extend, still less contradict such law. The second is that those who apply the policy are prepared to listen to reasons why it

should not be applied in a particular case and in consequence, in appropriate circumstance, to make exceptions to it”.

32. I have considered first the Department’s decision under section 10(2)(j)(iii) of the 1994 Law.
33. The Department explained in its letter of 7th April 2008 that it had approached the request by considering whether there was any period of time prior to 2003 in respect of which the Appellant’s personal circumstances, or the nature of her employment, would have justified the grant of a licence if she or her employer had applied at that time.
34. H M Comptroller defended the Department’s interpretation of section 10(2)(j)(iii) by drawing attention to the material wording *“ordinarily resident ...for...20 ...years...in occupation of a dwelling...in circumstances which...are such that his occupation should be treated as being occupation under or by virtue of such licences”*.
35. He submitted that the Department was required to look at her historic circumstances. He stressed that the Department had to consider whether the Appellant’s occupation had been **“in circumstances which are such that”** she should be deemed to have held a housing licence. The question was not whether **“her circumstances now are such that”** she should be deemed to have held a housing licence.
36. It is a powerful and attractive submission but I am concerned that it may lead to an unduly narrow interpretation. The Department’s approach will be sufficient if it leads to the conclusion that an applicant should be treated as if he or she had held a licence. In other cases, the Department will have to go further.
37. In my opinion, “circumstances” includes **all** relevant circumstances. That is, in this case, all the circumstances relevant to the Appellant’s occupation of a dwelling in Guernsey throughout her period of residence. The Department said it looked at her circumstances during the period prior to the grant of a housing licence in 2003. It therefore did not look at her circumstances at the date of its decision in 2008 or in the period 2003 to 2008.
38. The Department must also have regard to the Appellant’s rights under the Convention. Section 6(1) of the Human Rights (Bailiwick of Guernsey) Law, 2000 provides that:

“6 (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.”
39. Advocate Ferbrache argued in the Appeal that the Appellant’s right to respect for private and family life which is protected by Article 8 of the European Convention on Human Rights (“the Convention”) has been infringed in this case. One of the facts he had asked the Department to take into account was the possibility that she might wish to leave the Island for,

say, two years and upon her return to be able to continue to occupy a local market dwelling.

40. The Department's response was that they would not consider the possibility that she might leave the Island whilst it is only a hypothetical possibility. The Department said:

“The Department is unable to make binding statements about what licence might be available to [the Appellant] at some later date should there be a significant change in her personal circumstances. As you have rightly pointed out, we do not know what law or regime will be in place in the future and so it would be inappropriate to make commitments now for events that might or might not take place in the future. This applies both in relation to a licence for a different address and the ‘reactivation’ of a licence should [the Appellant] opt to spend time away from the Island to the extent that she can no longer be considered to have been ordinarily resident in Guernsey during that absence.”

41. The Department does not know what law or regime might be in place in the future because the 1994 Law is in force for a limited duration only. It was initially to remain in force only for ten years. It has been extended on three occasions and at the November meeting of the States of Deliberation, the States will be asked to extend it again, from 30 June 2009 to 31 December 2011. It is not known what will happen thereafter. There may be a completely new law that might be radically different from the present.
42. If the Appellant leaves the Island for a period of two years and, during that period, establishes a home elsewhere she will cease to be ordinarily resident in Guernsey, she will lose her housing licence, she will not know where she will be able to live upon her return and (if the requirements for qualified residential status have not changed) she will lose the benefit of the years that she has accrued and will have to be ordinarily resident under a housing licence (or in circumstances that are deemed to be under a licence) for another twenty years after her return before becoming a qualified resident.
43. Whereas, if she is granted the status of a qualified resident she would not lose that status if she leaves the Island and she would be able to live in a local market property on her return.
44. It is to be noted that if she had been a minor when her parents moved to Guernsey, she would have qualified as a local resident after twenty years i.e. in February 2008. Instead, she was too old by three years and one month.

Article 8 of the Convention

45. In administering the 1994 Law, the Department must have regard to any rights protected by the Convention, as the European Court of Human Rights made clear in *Gillow* and the Court of Appeal and Royal Court have since repeated on a number of occasions. That is especially so following the incorporation of Convention rights into our domestic law.

46. Article 8 of the Convention provides:

“Right to respect for private and family life

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *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.”*

47. By reference to a number of decisions, including *Pretty v United Kingdom (2007) 35 EHRR* and *Connors v United Kingdom (2005) 40 EHRR 335* as well as the Royal Court decision in *Thomas v Housing Department*, Advocate Ferbrache submitted that “private life” is to be given a wide interpretation. He relied upon *Pretty* at paragraph 61:

“The concept of private life is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person..... Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside worldthe Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.”

48. He also quoted from *Human Rights Law and Practice*, Second Edition, by Lester and Pannick, at paragraph 4.8.2:-

“Article 8 protects far more than privacy simpliciter. Like other international human rights guarantees, it demands respect for a broad range of loosely allied personal interests: physical or bodily integrity; personal identity and lifestyle, including sexuality and sexual orientation; reputation; family life; the home and home environment; and correspondence, embracing all forms of communication. The closest to a unifying theme for such diverse subjects is the liberal presumption that individuals should have an area of autonomous development, interaction and liberty, a “private sphere”, with or without interaction with others and free from state intervention and free from excessive, unsolicited intervention by other uninvited individuals. Viewed in this way, the notion of privacy is something of a continuum, starting from an inviolable core of personal autonomy and radiating out (yet becoming more subject to qualification or justified interference) into personal and social relationships”

49. The Department had to ensure it was acting in a way that was compatible with the Appellant’s rights or its decision would have been rendered unlawful (section 6 of the Human Rights Law).

50. The Appellant alleges that the Department failed to have regard to the Appellant's right to respect for her private life. The burden is on the Appellant to show that interference has occurred. The Department must then justify any interference under Article 8(2) (see *Thomas*).
51. The Court of Appeal and the Royal Court have previously said that the Department must state in writing the basis on which it reached its decisions (see, for example, the judgment of Carey, B. in *X*). The written decision communicated to the Appellant via her Advocate should have demonstrated that the Department had considered whether its decision under section 10(2)(j)(iii) of the 1994 Law was compatible with Article 8
52. In my view, in considering whether the decision was compatible, the Department was required to look at all the Appellant's circumstances as at the date of its decision in 2008. It was not sufficient to refuse the application on the grounds that it would not have granted a housing licence prior to 2002 if, at any time prior to that date the Appellant had applied for a licence.
53. The Department failed to consider all the circumstances, in the round, of the Appellant's occupation of Guernsey dwellings prior to the date of the decision. It is also unable to demonstrate that it had properly considered whether its decision was compatible with the Appellant's Convention rights. I have therefore concluded that the appeal must be allowed and the matter must be referred back to the Department for fresh consideration.

Factual Issues

54. There is strictly no need to go further in this judgment but the Jurats have heard argument in relation to Article 8 and they have unanimously formed a view that the Appellant's right to respect for her private life may have been infringed. They therefore wish to state their view in the hope that it may assist the Department when the Department comes to assess whether any fresh decision will be compatible with such right. As Beloff J A said in *Walters*:

"We can see the good sense of the States of Guernsey in allowing the Jurats to provide a check against unreasonable decisions in this complex and emotive area."

55. The Jurats have found, as a fact, that the Department's decision amounted to an interference with the Appellant's right to respect for her private and family life under Article 8(1). In its reconsideration, the Department must decide whether its fresh decision could also be an interference and, if so, whether such interference with her rights can be justified under Article 8(2).
56. The Jurats do not wish to pre-empt that decision because they may not have all the relevant facts before them. However they wish to draw attention to the fact that if the Appellant had been three years and one month younger when she and her parents moved to Guernsey, she would now have qualified as a resident under section 10(2)(k); the Department is currently advising that

she will not qualify as a local resident until she has been here for 34 years. The Jurats do not know how many other professionally qualified people may be in a similar position to the Appellant but they suspect it is unlikely that large numbers of such people aged in their thirties or forties are still living with their parents in Open Market properties. The question of proportionality is one for the Department to consider and the Court expects that it will do so with the scrupulous care required.

57. The relevant circumstances that must be considered include the following. The Appellant has been ordinarily resident in Guernsey since the age of 21. Guernsey is home to her and to members of her family. She has worked, and studied, hard to improve her position. She is professionally qualified and in 2008 was elected a Fellow of the Institute of Chartered Secretaries. She is employed in a post in the finance industry which, the Department has accepted, is of sufficient essentiality to justify a housing licence. She lived at home until she was 36 years old. She has indicated it is her desire to continue to have her permanent home in Guernsey. In all likelihood she will occupy a dwelling in Guernsey for the rest of her life and the Department have already accepted she may occupy a local market dwelling. The Department have said that she could achieve local residential status in 2022, after 34 years' residence when she will be 55 years old. The Appellant has argued she would like to be able to leave the Island and to return to her home; the only reason why she would do so would be to enable her to work away, or to travel for, say, two years. If she did so the Jurats are satisfied that it is more likely than not she would widen her horizons, improve her intellect and broaden her experience in a manner that is likely to be beneficial to her and, ultimately, to the Island. She says she has no present desire to do so but it is a possibility that she has asked the Department to take into account. The right to personal development and the right to establish and develop relationships with other human beings and the outside world are protected under Article 8.

58. Advocate Ferbrache has tended to emphasise the possibility that the Appellant might wish to leave the Island for two years. Even if that possibility had not been raised, the Department would have to look at all her circumstances in deciding whether to apply the provisions of section 10(2)(j)(iii) of the 1994 Law and in deciding whether its decision is compatible with her Convention rights. Granting local market status to the Appellant will not deprive a local family of a home as she is already in local market accommodation. Yet, denying her such status will deprive her of the opportunity to better herself by moving away for a period of time if she wishes or if she is requested to do so by her employer (who has offices in other jurisdictions). It also leaves her with the constant worry that at the end of her licence period she will have to disclose her circumstances to the Department which may form the view that her circumstances have changed to an extent that the licence cannot be renewed. If so, she would have to move out of her home and find alternative accommodation in the Island or elsewhere. The Department have not explained what would amount to a change of circumstance and even during the hearing of this Appeal, H M Comptroller was unable to say what changes in her circumstances would be

regarded as relevant and could result in the loss of her licence. The Department has not said for what period it will renew the current licence if it decides that the Appellant's circumstances are unchanged when it expires in 2009. If the licence is renewed for a further period on one or more occasions, the Appellant will always have the worry that something may happen to her that will result in the loss of her home at the end of the period.

Conclusion

59. The Appellant asked the Department to consider the circumstances in which she had been ordinarily resident and in occupation of dwellings in Guernsey from 1988 to 2008 and then to exercise in her favour its discretion under section 10(2)(j)(iii) of the 1994 Law to regard her occupation as being under a housing licence so that she could be deemed to be a qualified resident. The Department looked to see whether at any time prior to 2003 it would have granted her a housing licence if she had applied (she had held a licence from 2003 to 2008). In the view of the Deputy-Bailiff, that was an incorrect interpretation of the section as it failed to take account of the totality of all her relevant circumstances, viewed in the round, and her Convention rights at the date of the Department's decision. The Department failed in its duty to approach the application with the meticulous care that was required in balancing the conflicting interests affected. The Appeal must therefore be allowed and the matter remitted to the Department for reconsideration.
60. When reconsidering the application, the Department must have regard to the Appellant's Convention rights and decide whether its decision is compatible with her rights, especially the Article 8 right to respect for private and family life. If any of her rights might be infringed, it must then decide whether such interference can be justified; in the case of her Article 8(1) rights, that would mean justification under Article 8(2).