Judgment 24/2013

Forrest v The Minister of the States of Guernsey Housing Department
Royal Court
1st August, 2013

Appeal under Section 56 of the Housing (Control of Occupation) (Guernsey) Law 1994 against a decision of the Housing Department

Approved Judgment
01.08.2013

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between

CHRISTOPHER GERARD FORREST

Appellant

-v-

THE MINISTER OF THE STATES OF GUERNSEY HOUSING DEPARTMENT

Respondent

Date of hearing: 26th & 27th June 2013

Judgment handed down on: 1st August 2013

Before: Her Honour Hazel Marshall QC, Lieutenant-Bailiff
and
Jurats, S E I Mowbray, C H Le Pelley and P S T Girard

Advocate for the Appellant: **A L Lund**
Advocate for the Respondent: **K E Hill-Tout**

Cases texts and statutes referred to:
Cases:
Guernsey Cases

*Matheson v States Housing Authority (*1988) *(*Guernsey CA 24 July 1998),
Ward v Housing Authority (1989) (Guernsey CA 28 November 1989);
Perkins v President of the States Housing Authority (1995) (Guernsey CA, 2nd August 1995); 20 GLJ 66
Walters v States Housing Authority (1997) Civil Appeal No 231; 24 GLJ 32
Campbell v States Housing Authority (2002) Royal Court, 5th July 2002
Bate v Minister of Housing (2008) Royal Court, 8th February 2008
*Thomas v Minister of Housing Department (*2008) Royal Court 26 February 2008

Kinley v Minister of Housing Department (2009) Royal Court, 28 May 2009

European Court cases

Gillow v UK ECHR judgment, 24 November 1986 (App No 9063/80)
Loizidou v Turkey (1996) 23 EHRR 513
Pretty v United Kingdom (2002) 35 EHRR 1
Moreno Gomez v Spain (2005) ECHR judgment,16 February 2005
Connors v United Kingdom (2005) 40 EHRR 9
Bugajny v Poland ECHR (2007) judgment, 6 November 2007

UK Cases

Harrow London Borough Council v Qazi [2004] 1AC 983
Secretary of State for Work & Pensions v M [2006] UKHL 1
Cusack v London Borough of Harrow [2013] UKSC 40
Stevens v Secretary of State for Communities and Local Government [2013] EWHC 792 (Admin)

Statutes:

Housing (Control of Occupation) (Guernsey) Law 1994 ss. 1-8, 10, 56 and 64
Human Rights (Bailiwick of Guernsey) Law 2000 ss 2 and 3
Royal Court (Reform) (Guernsey) Law 2008 ss 14 and 16

Texts:

Human Rights Law & Practice (Lester & Pannick) 4th Edition
Human Rights Practice (Fottrell & Khan)

Introduction

1. This is an appeal under Section 56 of the Housing (Control of Occupation) (Guernsey) Law 1994 ("the 1994 Law") against a decision of the Housing Department ("the Department") whereby it refused to grant a housing licence to the Appellant, Mr Christopher Gerrard Forrest. The decision was taken at officer level, pursuant to powers contained in s. 64(1)(b) of the 1994 Law. No point is taken against its validity on that ground.

2. The decision was communicated to the Appellant in a letter ("the Decision") dated 22nd October 2012, signed on behalf of the Department by Mrs E P Ingrouille, the Director of Housing Control. The Decision is at pp 107-120 of the Consolidated Documents Bundle supplied to the court by the Appellant. Throughout this judgment any references to page numbers are to pages in that bundle.

3. Section 56(1) of the 1994 Law provides for an appeal to the court against a decision by the Department on the grounds that the decision was *ultra vires* or was an unreasonable exercise of the Department's powers. Both grounds are relied on in this Appeal. The Appellant also challenges the decision on the grounds that it is an unjustified interference with his and his family's rights under Article 8 of the European Convention on Human Rights and Fundamental Freedoms ("the Convention"), namely their right to respect for their private and family life and their home. The Convention was directly incorporated into Guernsey law by the Human Rights Law 2000, which was brought into force in 2006. The result is that the courts must interpret and apply any Guernsey Law so as to be, so far as possible, compliant with the Convention, (s.3) and in doing so must have regard to the jurisprudence of the European Court of Human Rights (s. 2).

4. This is a decision of the Court, and this written judgment has been prepared in accordance with Section 16(5) of the Royal Court (Reform) (Guernsey) Law 2008. Pursuant to Section 14(2) of the 2008 Law, the Lieutenant-Bailiff ("the LB") did not sum up to the Jurats in open court, but instead retired with the Jurats. The LB reminded the Jurats of their respective roles, namely that the LB is the sole judge of matters of law and procedure and the Jurats must follow her directions on such matters, but that the Jurats are the sole judges of questions of fact. The LB directed the Jurats that insofar as she might herself appear to express any views on the facts in the course of their deliberations, the Jurats should ignore these and form their own independent judgment.

5. The LB further directed the Jurats that the burden of proof of matters of fact is on the Appellant (see s. 56 (3) of the 1994 Law), except in respect of any issue of justification under Aticle 8 (2) of the Convention. The LB explained that whilst it was initially for the Appellant to satisfy the court that there had been an interference with his rights under Article 8(1) thereby engaging that Article, thereafter the burden of proof moved to the Department to satisfy the court (specifically the Jurats, as a question of fact) that such interference was justified in terms of Article 8(2) of the Convention (see later). The LB further directed the Jurats that the burden of proof in each instance was the ordinary civil standard of proof, namely proof "on balance of probability", and that this meant simply that they must be satisfied that the fact in issue was more likely than not to be so.

Background – the Guernsey Housing Law

6. Guernsey has had a law controlling the occupation of houses since 1945, although it has been through several amendments. The current such law is the 1994 Law. The general operation of the law is clearly and economically explained in a decision of Day DB in *Campbell v States Housing Authority* [Royal Court, 5th July 2002] at page 2A to 3C of the approved judgment.

> "The general thrust of all that legislation, namely that the occupation of any dwelling is only permitted by licence of the appropriate States Committee, Authority, or any such other body, continues to be reflected in the 1994 Law, which, in its very first section, states:-
>
> > *'1. Subject to the provisions of this Law, no person shall occupy or cause or permit another person to occupy a dwelling in Guernsey otherwise than under and in accordance with the conditions of a licence (a "Housing Licence") granted by the Authority under section 3.'*
>
> "There are now two broad, automatic, statutory exemptions to this requirement for a housing licence, the first of which relates to the status of the individual, and the second to the status of the dwelling. Thus, with regard to the first, qualified residents, as they are described and defined in the Law (principally s.10), do not require a licence to occupy any dwelling. It is not necessary, for the purposes of this appeal, for me to examine the intricacies of how residential qualifications may be obtained, save to say, in simplistic terms, that they are based upon a person's connection with Guernsey, by birth, family, etc., and thus can extend to children and spouses. Those who originally take up occupation by virtue of a housing licence can also achieve residential qualifications, so that they are thereafter free to occupy any dwelling in the Island, which ability also extends to their children and spouses. Various conditions are prescribed, largely relating to period(s) and circumstances of residence, in respect of all the routes to obtaining residential qualifications.

> "The second automatic exemption from the requirement for a housing licence is, as I have said, the status of the dwelling concerned, namely because it is what we know as "Open Market", that is to say it is inscribed on the Housing Register maintained under the Law for that purpose. There are some 1,600 dwellings of that nature; the Register basically is closed, and has been for a number of years, so that it cannot generally be added to, for example by the inscription of new houses, regardless of size or rateable value. There are four different types of dwellings which may be inscribed in the four different parts of the Register. For present purposes I need only say that a dwelling inscribed in Part A of the Register can be occupied by anybody without a housing licence and without any further conditions imposed. I should also add, again relevant to present purposes, that the Law does not provide any way in which a person who comes to the Island as an adult to occupy an "Open Market" dwelling can ever achieve the prescribed residential qualifications (in contrast to licence holders). Children, however, of such adults who occupy open market accommodation in the prescribed circumstances, which essentially relate to length of residence and arrival in the Island as a minor and as a member of the household of such adult, can acquire residential qualifications in their own right. The foregoing, is the basic framework of the 1994 Law, ignoring its intricacies.
>
> "Anyone, without exception save for those with residential qualifications, who wishes to occupy local market accommodation (i.e. not inscribed on the Housing Register) must obtain a housing licence from the Housing Authority in order to do so. Section 6 of the 1994 Law provides the procedure for consideration of applications....."

7. Advocate Hill-Tout, appearing for the Department in this appeal, guided the court through the material sections of the 1994 Law, to demonstrate the scheme and procedure under it.

8. Section 1 has already been quoted above. Section 2 provides for the making of an application for a housing licence to the relevant Authority, and that an application may be made by either the owner of the relevant dwelling, or by the person (or his employer or prospective employer) wishing to occupy such dwelling.

9. Section 3 lays down the power of the Authority to issue, refuse, vary, or withdraw housing licences, and to impose conditions. The detail is not material. The Authority may issue a licence for such period as it may, in its absolute discretion think fit. Section 4 makes special provisions as to short term housing licences, issued in respect of seasonal work, or work which is not regarded as of long term essentiality to the community. Section 5 requires notice of any decision by the Authority with regard to the grant, refusal or any other aspect of a housing licence to be notified to the applicant or licence holder, giving reasons for any adverse decision. The Decision was issued under this section.

10. Section 6 is central to the Appeal and must be set out more fully. It is headed "Procedure for consideration of Applications" and reads:

> "6. (1) The Authority, upon receipt of an application under section 2 shall ... proceed to decide whether or not to grant a housing licence or to grant a housing licence subject to conditions in accordance with the provisions of this section
>
> (2) The Authority shall firstly consider -

(a) where the application is made in order to enable a person to occupy a dwelling so that he may undertake employment in Guernsey, all or any of the following matters –

(i) whether the employment of that person, by reason of his qualifications, skill or experience, or whether that employment, is of sufficient essentiality to the community to justify the grant of a housing licence,

(ii) the number of people appearing to the Authority to be resident in Guernsey and lawfully available to undertake employment of the type concerned,

(iii) the number of people for the time being entitled to occupy a dwelling under a housing licence of the type concerned, or

(b) in any other case, all or any of the following matters –

(i) whether the person who would be permitted by the housing licence to occupy a dwelling has familial or like connections with Guernsey of sufficient strength to justify the grant of a housing licence

(ii) without prejudice to the generality of subparagraph (i), the period during which and the circumstances in which that person has been resident in Guernsey or elsewhere"

(3) The Authority, having considered the appropriate matter set out in subsection (2) (a) or (b), may decide to refuse to grant a housing licence

(4) If the Authority does not so decide, it shall proceed to consider the application further, and in doing so may take into account whether the number of dwellings (similar by reason of [size rateable value, assessable units or plan area] to the dwelling in respect of which the application is made) available for occupation is, in the Authority's opinion, sufficient to meet the housing requirements of qualified residents and persons who have been granted housing licences other than short-term housing licences.

(5) Notwithstanding the provisions of subsections (2) and (4) the Authority may, at any stage of its consideration of an application under section 2, take into account all or any of the following matters

(a) *[criminal convictions]*

(b) any population objective set out in the most recent Policy Planning Report or Strategic and Corporate Plan,

(c) any other objective, policy or provision of the most recent Policy Planning Report or Strategic and Corporate Plan

(d) the likely effect upon any objective policy or provision mentioned in paragraph (b) or (c) of any decision to grant the application

(e) such other factors as it may deem necessary or expedient."

11. Section 6A, introduced by amendment in 2007, is an anti-abuse provision. If provides that the Department need not consider a further application made by or in respect of the same person which either discloses no material change of circumstance, or is made during an appeal or within 12 months of the final determination of the previous application. Section 7 makes provisions with regard to the cessation or revocation of a housing licence, and section 8 provides that a licence is personal and not assignable.

12. The only other provision of the 1994 Law which needs to be noted is s. 10 (2) which contains intricate provisions for determining who is a "qualified resident", the general compass of which was described by Day CB in his judgment in *Campbell* , cited above. They presently embrace 13 separate classes of person, specifically described.

13. The following points are to be noted. First, the logic of the 1994 Law is this. Priority of access to occupy controlled local market housing is given to "qualified residents", ie those whose familial or historic residential connections with Guernsey meet objective criteria (laid down in s. 10(2)), recognised to make them overwhelmingly strong. Others are admitted by way of exception and permission, namely the grant of a licence, if they are either coming for seasonal or a very short period of work (s.4), or are judged to be (a) persons whose scarce employment skills are essential, in the medium or longer term, to promote the prosperity of the island or its community, or (b) persons whose familial, residential and suchlike connections, whilst falling short of "qualified resident" status, are sufficiently strong, or of a sufficient quality, to justify an exception in their particular case: s. 6(2)). These are the only gateways to the grant of a housing licence to occupy local market, generally less expensive, housing, as distinct from open market housing.

14. Second, the state of availability of local market housing is a factor which only becomes material if the applicant passes the stipulated test in s.6(2), so that the Authority would not refuse a licence upon initial consideration under s.6(2): see s. 6(3). Implicitly, therefore, this is seen as a negative reason for refusing or limiting a licence which would otherwise be granted; it is not a reason for granting a licence which would otherwise be refused for failure to meet the criteria in s.6(2).

15. Third, since matters mentioned at s.6(5) may be considered by the Authority "at any stage" they are not necessarily so directed, and s.6(5)(e), in particular, provides the ultimate flexibility which would enable the "right" decision to be made in any really exceptional case. In practice, it is this final, overarching power which provides the mechanism under the 1994 Law itself, by which account can, and indeed now must, be taken of Article 8 "human rights" considerations, insofar as these might extend the matters which the authority would otherwise naturally take into account in exercising its discretionary power . In this regard, the power contained in s.6(5)(e) has effectively been converted into a duty.

16. Fourth, the Housing Law is not intrinsically incompatible with the Convention. This was decided by the European Court in *Gillow v UK* ECt HR 24 November 1986 (App No 9063/80), in relation to the previous law, The Housing (Control of Occupation) (Guernsey) Law 1982. However, any individual exercise of the States' powers conferred by the 1994 Law is the act of a public authority which must therefore also comply with the Convention's principles. This means that it must, on an individual basis, be reasonable and justified in the

sense of being proportionate, ie having regard to the nature and importance of the legitimate aims of the power being exercised and the nature, extent and importance of any interference thereby caused to any recognised human right of the individual affected. It is not necessary to consider the relevant jurisprudence here in detail. It is sufficient to note, and recognise, the unsurprising principle that the more fundamental or "key" the human right which is being interfered with, the less the degree of intrusion or interference which is likely to be reasonably regarded as proportionate or "necessary in a democratic society". The less, also, will be the ultimate "margin of appreciation" - or degree of latitude and discretion - which the European Court itself will give the state, by way of deference to the state's better knowledge and ability to judge social "necessity" in its own local circumstances.

The Appellant and the circumstances of his application

17. Mr Forrest was born in 1965 and is now 48 years old, and married with two children. He was born and brought up in Bolton in the UK. He obtained a first degree in Physical Electronics & Information Systems from Warwick University. He has subsequently obtained an MSc in Telecommunications and Information Systems (Essex University and ESNT Paris), and Diplomas in Japanese Language and Economics (SOAS) and Business Administration (Henley College of Management).

18. In 1988 he moved to Reading and began work for a wholly owned subsidiary of Cable & Wireless plc. After five years, which included a six months' secondment to Paris, he took up employment with Cable & Wireless plc as an expatriate, with the intent that he would travel on short/medium contracts usually of 2/3 years duration. After being sponsored to obtain qualifications in Japanese, he went first to Tokyo, from April 1994 – March 1996. He met and married his wife, Tomoko, at that time. He then continued to work in the same way for Cable & Wireless under a further series of such expatriate employments, leading what he described as a "nomadic" existence. From April 1996 – April 1998 he lived and worked in Dusseldorf. He returned to London for seven months, and was then deployed to Fairfax, (USA) for three years, from December 1998 to December 2001. Both his children, Natalie and Nicole, were born during this period. As a result they apparently have triple nationality, holding UK, Japanese and US passports. After a month back in the UK, he was sent to Barbados from January to June 2002 and then went to St Lucia on a three year contract. This was extended upon a further two year contract, until August 2007.

19. Neither he nor his family, nor any wider members of his or his wife's families (who remained, respectively, in the UK and Japan) had, up to that time, any connection at all with Guernsey. The Forrest family came to Guernsey in August 2007, when the two children were aged eight and six, because Mr Forrest then took a three year employment contract with Cable & Wireless Limited in Guernsey. They (or at least Mr Forrest) actually commenced residence on 25th August 2007, but Mr Forrest made an application, dated 11th September 2007, to occupy a local market property. We have not seen this application, but it was plainly made and granted on employment related grounds.

20. Mr Forrest was granted a three year housing licence dated 11th October 2007 to occupy a rented house at "The Firs", Calais Lane, St Martins. The licence, a one page document, was expressed to be valid until 11th September 2010, unless terminated earlier under the provisions of the Housing Law, and to be conditional upon Mr Forrest's continuing to be employed on a full-time basis as a Product Pricing Analyst by Cable & Wireless Limited in Guernsey. It stated in bold type that Mr Forrest should have no expectation that it would be renewed after its expiry.

21. The accompanying letter repeated the above points, including the warning that there should be no expectation of renewal. It gave further information as to the position of Mr Forrest's wife and children, his (and his wife's) right to work, and what to do if they wished to change either employment or accommodation. It also drew attention to Mr Forrest's option to occupy an open market dwelling, and that doing so would enable him to remain in residence in Guernsey after expiration of the housing licence being granted.

22. In March 2010, Cable & Wireless made an application to the Housing Department to extend Mr Forrest's housing licence for two years, to enable him to continue to work, now as Head of Product Pricing Analysis. This application was approved. A further licence was granted to Mr Forrest on 26 May 2010, with an expiry date of 24th August 2012, marginally less than a further two years and a date which coincided with the end of his second employment contract. The new licence contained the same condition as to Mr Forrest's employment, and the emphatic warning as to its expiry date and that there should be no expectation of renewal. The covering letter again repeated these terms and pointed out the "Open Market" option.

23. In June 2010 Mr Forrest's landlord apparently gave notice to recover "The Firs", and Mr Forrest applied for, and was immediately granted, a replacement housing licence in respect of a local market four bedroom house called "The Barnacle", in Icart Road, St Martins. In all other respects, including the expiry date and warnings as to no expectation of renewal, the replacement licence was in the same terms as before.

24. On 17th July 2012, Mr Forrest met with Mrs Ingrouille at the Housing Department. It is common ground that he was not accompanied by any legal representative. There is no record of what took place at their meeting apart from an email which Mrs Ingrouille sent to Mr Forrest later that day. This states that they had

> ".....discussed the various housing licence application options open to you as you seek to secure a further period of residence in the island in anticipation of the expiry of your employment-related housing licence next month."

25. The email gave an internet link to a website which set out the kind of information which the Department would routinely seek from an applicant for a housing licence not connected with employment, but the email emphasised that the questions were not exhaustive and Mr Forrest should provide any other information which he thought might be relevant. It went on to indicate that if an application were made, then whilst Mr and Mrs Forrest would have no housing licence after the expiry of their present licence, they could nonetheless work, and no enforcement proceedings would be taken against them during the currency of the application process, or any subsequent appeal.

26. Mr Forrest was made redundant from his employment with Cable & Wireless on 24th August 2012, that date coinciding with both the termination of his employment contract and the expiration of his housing licence. Although this is a notably short time after the 17th July meeting, the evidence does not disclose whether that prospect was known to Mr Forrest at the time of the meeting; it was not mentioned in Mrs Ingrouille's email.

27. Mr Forrest's employer, Cable & Wireless, had undergone a reconstruction in March 2010, splitting into two companies. The "Monaco and Islands" business, which included Guernsey and employed Mr Forrest, had been sold on, on 30th July 2012. Mr Forrest had become redundant to C&W, with effect from the end of his contract on 24th August 2012. Because of the company restructuring, there was now no opportunity of an alternative post in any other part of the C&W group, as there previously might ordinarily have been.

28. On that same day, ie 24th August 2012, Mr Forrest submitted an application for a housing licence, (p. 29-30). He used a printed application form headed "Application for Housing Licence (other than on grounds of employment)". His application was expressed to be initially in respect of his current rented house but generally for a15 year/indefinite licence to occupy a local market dwelling "with a TPR or rent level set at the minimum for a minimum three bedroom house".

29. The application was made by reference to an accompanying 10 page document (pp 31 – 40) headed "Supplementary information for a Non-Employment Related (compassionate) Housing Licence". This detailed Mr Forrest's background (mentioned above) and circumstances, and those of his wife, who had become a naturalised British Citizen in November 2011, and of his daughters, including their good progress at school and their involvement with the community. It stated that the family could not remain in Guernsey if the application were unsuccessful, because they would not be able to afford to buy or rent an open market dwelling, although their finances (their savings, Mr Forrest's redundancy payment and Mr and Mrs Forrest's anticipated earnings) would, it was calculated, enable them to *buy* a local market property. It stressed the adverse impact on the family if the application were refused, particularly as regards the daughters' schooling and emotional, educational and social development, as they had "settled" in Guernsey after "a period of Nomadic existence tied to employment with C&W", and now regarded Guernsey as their home. The detail of the above is referred to further below.

30. The application was accompanied by an appendix of documents and letters of support (pp 41 – 66). They were from: Mr Forrest's line manager at Cable & Wireless, (explaining the circumstances of his redundancy); the Chairman and Senior Support Coach of the Guernsey Lawn Tennis Association, and the Chairman of the St Martins Tennis Club, (Mr Forrest having become a fully licensed LTA tennis coach, and being heavily involved in both tennis coaching and umpiring, and also his daughters as players); the Forrest family's GP and a paediatrician (explaining the family's health problems, apparently likely to be stress-related); warm references from two managers at the Beau Sejour Leisure Centre, where Mrs Forrest worked part-time as a fitness instructor; head teachers at each of the daughters' schools, Guernsey Grammar School and St Martins Primary School, attesting to their attainments and involvements at school, academic, social, musical and sporting, and to the possible adverse effects on them of having to move away.

31. Following receipt of the application, the Department issued a Temporary Exemption Certificate to Mr Forrest to regularise his right to work until 21st October 2012. It received the final parts of the supporting documents on about 10th September 2012, and considered the application.

32. On 18th October 2012, Mr Forrest informed the Housing Department by email that his landlord required possession of The Barnacle at the end of October 2012, and that therefore he and his family would then move to a "winter let" at "Honeysuckle", Les Piques Cottages, in St Saviour. The Department quickly issued an extension of the Temporary Exemption Certificate for The Barnacle until 1st November 2012, but stated it would require a further application in respect of any change of address, and would supply Mr Forrest with the relevant form, which it later did.

33. On 22nd October 2012, the Department, having considered Mr Forrest's application, issued the refusal which is the Decision, the subject of this appeal.

The Decision in summary

34. The Decision is a 13 page letter, at pp 107 – 120 of the Bundle. It is summarised here, to give an idea of is structure and tenor.

35. It first noted and listed all the information submitted by Mr Forrest and indicated that the decision was to be a refusal. It stated that the application had not been understood to be (nor considered as) an application for an employment-related housing licence, but had been treated as an application under s. 6(2)(b) of the Law. It then turned to the reasons for the actual decision.

36. Having taken into account all the material submitted by Mr Forrest, the Department noted his total lack of any familial connection, past or present, with Guernsey apart from his own family residing with him. It recognised the network of friendships and acquaintances which the family would have built up through work, social, educational and sporting activity but, whilst granting these some significance, it also noted that these connections did not pre-date their arrival in Guernsey and were therefore of no more than about 5 years' duration. It expressed the view that similar connections could be forged elsewhere, noting that this had been done in the past. It noted that Mr Forrest's redundancy coincided with the date of expiration of his latest housing licence, and that it had been made clear to him, at all times, that there should be no expectation of any renewal after that expiration. It expressed the view that in those circumstances, Mr Forrest ought to have managed his family's expectations, and commitments, with the time-limited nature of his licence to occupy a controlled dwelling in Guernsey in mind.

37. Acknowledging the grant of Mr Forrest's two employment-related, housing licences, which had enabled him to occupy local market housing, the Department once again noted their time limits, and that no residence qualification could have been expected on their expiry. It observed that their total duration amounted only to 25% of the length of residence under licence required to acquire Qualified Resident status under the 1994 Law. It noted Mr Forrest's residence history, and its itinerant nature being a consequence of his choice of employment, over which he had therefore had some control. It accepted that relocation meant upheaval, but suggested that, with its background, the Forrest family might "perhaps" be better equipped than others to manage this. It felt that this reduced the weight of that factor.

38. Having weighed all these matters, the Department stated that it had concluded that Mr Forrest's "familial and like connections" were not of sufficient strength to outweigh the fact that his period of residency had been short, in context, at five years, and had carried no legitimate expectation of being able to continue to occupy local market property, beyond that time.

39. The Department then referred to matters which it had considered under its power to do so in s. 6(5)(e). These were: Mr Forrest's redundancy and its date coinciding with the known expiration of his housing licence; the apparently transferable nature of his and his wife's working skills; his tennis coaching skills and the supporting evidence of their relative scarcity and their value in the community; the evidence as to the health problems of him and his family members; and the suggested possible adverse effects of a relocation on his children's education and social and emotional development (which it considered, in quite some detail, noting that the timing of Mr Forrest's application had exacerbated any problem of educational disruption).

40. Since Mr Forrest's case appeared to rest largely on his proposition that he and his family could not afford to remain in Guernsey if they could not occupy local market accommodation, the Department then turned to consider Mr Forrest's options.

41. It reviewed the financial information supplied by him, and his reasoning that he could afford to buy an adequate local market house, but could not afford to buy or rent in the open market. However, it disagreed with his propositions and concluded that, in practice, (and based on evidence of currently available open market rental properties from Estate Agents which it recorded on file), if Mr Forrest were prepared to use his savings appropriately, he would be able to afford to rent in the open market in the medium to long term – certainly for some 5 – 7 years – sufficient to complete his children's education and up to about the time when he would receive his accrued pension from C&W, which would give him security. It recognised that this would require him to re-evaluate his stated priorities for the use of his assets and resources, but considered this to be reasonable. It further considered the children's accruing rights towards qualified resident status in their own right, and noted that these would not be affected by a move to the open market.

42. The Department noted Mr Forrest's statement that the 2011 Guernsey Housing Bulletin, and evidence of the number of properties on estate agents' websites, suggested that there was "no shortage" of three and four bedroom local market houses available, and his analysis of his finances. It commented that the wish to <u>buy</u> a house had apparently not arisen until expiry of his housing licence. It referred to the 2007 States of Guernsey Housing Needs Survey and its predicted need for an average of 340 new homes (net) each year for five years, and observed that whilst the 2011 Housing Bulletin showed a further 230 new homes coming on to the market in 2011, that was still significantly below this figure. It said that Mr Forrest's analysis did not take account of either the real level of demand, or of housing need, as to which the Department considered that the limited supply of housing in the local market needed to be prioritised for new households of qualified residents and fully qualified housing licensees. It took the view that even if homes of the size sought by Mr Forrest were not those most in demand, they needed to be kept available to enable households to move "up" the housing chain, thereby freeing up the more popular smaller properties. The grant to Mr Forrest of a licence to occupy a three bedroom property would therefore not serve to relieve any existing pressure on the Local Market Housing stock.

43. The Department also had regard to the number of people potentially in a similar very situation to Mr Forrest, noting that there were currently 700 persons in occupation of local market accommodation under employment related licences of 5 years' duration and a further 170 holding licences of between 5 and 15 years' duration. It took into account the likely damaging effect of setting a precedent in respect of such a considerable potential number of households.

44. It concluded that, weighing all the foregoing factors in the balance, the grant of a licence to Mr Forrest to occupy a three bedroom local market residence was not justified.

45. It then went on to consider specifically the impact of the refusal decision on the Forrest family's Convention rights, and in particular Article 8, which it set out. It stated, first, that it did not consider that Article 8 was engaged in respect of "home" where the family was about to vacate their home in any event, for a reason unconnected with the Department's decision. It nonetheless went on to consider whether any interference with the family's right to respect for their "home" was justified under Article 8 (2), and listed the considerations (among those already mentioned) which caused it to conclude that the refusal of a housing licence to Mr Forrest, in his and his family' particular circumstances, was proportionate and justified for being necessary to protect the rights and freedom of others, namely those with a stronger priority right of their own to occupy local market housing.

46. It then considered the family's Article 8 rights in respect of their private and family life. Repeating its view previously explained, that Mr Forrest and his family could in fact afford to rent in the open market and thereby remain living in Guernsey if they were prepared to deploy their resources to that end, it argued that there was therefore no interference with the Forrest family's right to respect for its private and family life as such, because this would continue as before. However, even if that were not the case, the Department relied on the same factors as above as demonstrating that any interference in fact found to be caused by the refusal was proportionate and justified, as above.

47. The letter then concluded by informing Mr Forrest of his right of appeal, and otherwise granting Mr Forrest a Temporary Exemption Certificate until 2nd January 2013, so that if he opted to leave the Island, he would not have to do so during an academic term.

48. At the appeal hearing, it was noted that there had been at least three factual errors in the Decision, two on page 114 where Mr Forrest's savings had been stated to be £193,000 rather than £143,000 and his prospective pension £41,750 rather than £42,750, and one on page 118 with regard to the date of Mr Forrest's occupation of The Barnacle being 2012 rather than 2010. Such careless errors are obviously to be deprecated. However, although in his Cause Mr Forrest suggested that the Department had "incorrectly stated the level of his assets", by the time of the hearing it was fairly and realistically accepted on his behalf that these had merely been typing errors and were not evidence of any vitiating misapprehension by the Department in considering his application. Neither was it alleged that these errors should be taken to be evidence of any general lack of the appropriate care on the Department's part in considering the substance of his application. Corrections were duly made.

Further history

49. Further events are not material, except to record for completeness that this Appeal was initiated on 18th December 2012, towards the end of the two month time limit, and that the Forrest family have continued to reside and (presumably) work in Guernsey, under Temporary Extension Certificates, until this hearing which took place on 26th and 27th June 2013. Mr Forrest was then represented by Advocate Abby Lund, and the Department was represented by Advocate Karen Hill-Tout. The court is grateful to both advocates for their helpful and effective skeleton arguments and oral submissions.

The issues in the appeal

50. The Cause states Mr Forrest's grounds of appeal to be threefold, namely that the Decision was

    (a) an unreasonable exercise of the Department's powers, and/or

    (b) a breach of Mr Forrest's rights under Article 8 of the Convention, and further that

    (c) it was *ultra vires.*

    The court examined the facts and matters relied upon in support of these propositions in the Cause and the skeleton arguments, in order to identify the relevant issues, and whether these are issues of fact or law (or indeed a mixture). The following broad issues were identifiable:

    (1) Was the Decision *ultra vires* the Department on the grounds that the Department failed to consider the Application under Section 6(2)(a) of the 1994 Law, but only under Section 6(2)(b)?

(2) If not, was the Decision *ultra vires* for being, in all the circumstances, irrational or "Wednesbury unreasonable"?

(3) Even if not "Wednesbury unreasonable" was the Decision nonetheless, in all the circumstances, an unreasonable exercise of the Department's powers?

(4) Did the Decision engage Article 8(1) of the Convention, for being an interference with Mr Forrest and his family's right to respect for (a) their home and/or (b) their private and family life?

(5) If so, and in the context of reviewing the reasonableness of the Decision under (3) above, did the Department satisfy the Jurats that the Decision was a justifiable interference with those rights within the scope of Article 8 (2) of the Convention?

51. The nature of issues in a Housing Law appeal such as this was considered by Beloff JA in *Walters v States Housing Authority* (1997) Civil Appeal No 231, (see also 24 GLJ 32) in particular at pages 45C-46D, including the "five possible views" of the decision being challenged and the procedural consequences in each case (see pp 46F – 46D). Having regard to those principles, the LB directed the Jurats that the issue of the "reasonableness" (or otherwise) of the Decision, under s 56(1) of the 1994 Law was a matter of fact for them, but as the appeal process is not simply a general reconsideration of the merits at large, to find the decision "unreasonable", they would have to disagree with it for some stronger reason than simply that they themselves would have come to a different conclusion if they had been the Department.

52. *Walters (supra)* having been decided before the coming into force of the Human Rights Law, the LB further directed the Jurats that, in accordance with the principles of that Law, what constitutes "unreasonable" under s.56 (1) now requires that this term in the 1994 Law be interpreted compatibly with the tenets of the Convention. Their finding as to unreasonableness (or otherwise) must therefore take account of the principles of Article 8, *if* that were engaged. However, the dispute as to whether or not it was engaged at all was primarily a matter of law. The LB's further directions to the Jurats with regard to the test to be applied if and when they came to consider any justification for the Decision in terms of Article 8 (2) of the Convention are set out later in this judgment.

Preliminary

53. Advocate Lund began by emphasising a general point which she submitted must inform the court's approach to all the issues. This was the "formidable" character of the powers contained in the 1994 Law, conferring, as it does,

> "unusually extensive powers of control over the rights of many ordinary people as to where they may choose to live".

This has long been judicially recognised. She referred to *Ward v Housing Authority* (Guernsey CA 28 November 1989, Le Quesne JA) for the above citation and emphasised the further injunction at [34,] that

> "such drastic power calls for meticulous care in its exercise and scrupulous balancing of the conflicting interests which it affects".

(It is to be noted that this comment very much foreshadows the jurisprudence on "proportionality" in the later human rights cases.) Advocate Lund referred to further similar *dicta* in *Perkins v President of the States Housing Authority* (Guernsey CA, 2nd August 1995, Southwell JA) to the effect that such "draconian" powers must be exercised with "care and sensitivity".

54. Advocate Lund also referred to *Matheson v States Housing Authority* (Guernsey CA 24 July 1998, Beloff JA) for the place of policy considerations in such a decision. This is to the effect that a public authority may seek to implement a policy, provided it is (i) consistent with the law and (ii) the authority is prepared to listen to argument why, in an appropriate case, it should make exceptions to it, and indeed to make appropriate exceptions.

55. All members of the court have been mindful of the above approach, both in examining the Department's process and reasoning in the Decision, and in coming to their own conclusions on the Appeal.

(1) Was the Decision *ultra vires* on the grounds that the Department failed to consider the Application under Section 6(2)(a) of the 1994 Law but only under Section 6(2)(b)?

56. This is principally a matter of law, and this section therefore sets out the LB's reasoning and conclusion except where indicated. Where convenient, s. 6(2)(a) is referred to as "grounds (a)" and s. 6(2)(b) as "grounds (b)".

57. Advocate Lund supported her argument on two bases. The first was that of the alleged true construction of s.6(2). She submitted that the word "firstly" in the first line of s.6(2) required the matters in s. 6(2)(a) - ie "employment related" grounds - to be considered "first", either in any event, or, certainly, before there could be a consideration of the grounds in s. 6(2)(b) - which are perhaps more appropriately labelled "connection" grounds, rather than "compassionate" grounds.

58. In support of this she relied on a dictum of Finch LB in *Bate v Minister of Housing* (Royal Court, 8th February 2008, at [17]) that

> "The use of the word "firstly" does not mean that (to use the word employed by Counsel) (a) "obviates" (b). On a plain reading it simply means that [the Department] must "firstly" consider the employment based licence and "in any other case" the familial or like connections with Guernsey licence. The fact that Housing must consider an employment based licence first does not entail that they cannot consider the other type of licence."

59. This, she submitted, showed that the Department must consider the application under grounds (a), and must do so "first". This the Department had admittedly not done, as they had said in the Decision itself. They had considered the application only under s.6(2)(b).

60. Her second argument was that Mr Forrest's application ought to have been considered under grounds (a) as it ought fairly to have been interpreted as making also such an application. She pointed out that Mr Forrest had specifically mentioned his employment intentions in his application, namely either to obtain employment in a high tech/telecommunications industry or become a self-employed consultant in such industry, and/or to supplement this through paid work in tennis coaching. Applying the care and sensitivity appropriate to dealing with an application from a layman, she submitted that this should have been viewed as making an employment related application under s.6(2)(a), as well as one under s. 6(2)(b), and

considered as such. She relied on *Kinley v Minister of Housing Department* (Royal Court, 28 May 2009, Collas DB) for the proposition that if an application for a housing licence could be read in such a light, then the Department was under a duty to consider it as such. She did not shrink from the fact that this might mean that any application which referred to the applicant's prospective employment position would have to be interpreted as an application made on grounds (a).

61. She submitted that the consequence had been the unfair one that Mr Forrest had been deprived of the opportunity, at which one only had one "bite at the cherry" (see s. 6A), to have his application considered on employment related grounds, such that the Decision was vitiated for being *ultra vires*.

62. The LB rejects both arguments. First, the wording of s.6(2) of the 1994 Law, simply does not, on proper examination, mean what Advocate Lund submits. As Advocate Hill-Tout pointed out, the word "firstly" in the first line of s.6(2) does not relate to sub-paragraph (a) on its own, but relates to the combination of subparagraph (a) *or* subparagraph (b): see the word "or" at the end of subparagraph (a) (iii). In other words, the duty is to consider "firstly", either the grounds in subparagraph (a) where the application is made on employment related grounds, or the grounds in subparagraph (b) where the application is made in any other case. This "first" consideration is drawing a contrast with the matters which might be engaged on a "further" consideration under s.6(4).

63. Section 6(2) does seem to assume applications for housing licences being made on grounds (a) or (b) as alternatives. Whether or not they were exclusive alternatives, or could be cumulative, was the point for decision in *Bate (supra).* Finch LB decided that there was nothing in the section to prevent a person from applying on both grounds, if appropriate. Whilst Advocate Lund relies on the dictum in *Bate* quoted above, that is only supportive on a cursory reading. In fact, when read in context, it does not necessarily mean what Advocate Lund contends, and it is still less clear that Finch LB was purporting to *decide* this. It was not necessary for his actual decision, and the syntactical point mentioned above does not appear to have been drawn to his attention. The syntax does not support Advocate Lund's contention and the dictum of Finch LB does not, in the LB's judgment, do so either.

64. This issue then becomes one of the fair interpretation of the nature of Mr Forrest's application, as received by the Department. As to this there can really be only one answer. Mr Forrest used the printed form which expressly referred to grounds (b), the information contained in his application was all directed at those grounds, and he specifically and intentionally headed his "Supplementary Information" with the words which describe those grounds.

65. As Advocate Hill-Tout pointed out, if the application had been made on grounds (a) the Authority would, and obviously would, have required more and different information about the employment contemplated, and suchlike, in order to make a decision. No such information was provided. She also pointed out that the application in *Kinley* had been made by letter, before the present application forms had been prescribed (probably as a result of that decision) so that the intended basis for Ms Kinley's application, on a fair reading, was open to interpretation. *Kinley* had therefore been a different case and did not support Advocate Lund's contention.

66. The LB therefore prefers Advocate Hill-Tout's submissions. In doing so, she is fortified by the fact that there was really no evidence at all that Mr Forrest himself intended his application to be made on grounds (a) as well as grounds (b). Quite apart from his use of the form and wording applicable to grounds (b), the Department, in its Decision, explained

clearly that they did not understand his application to be being made on grounds (a) and why, and said that they had not considered it on those grounds although it remained open to him or any prospective employer of his to make such an application if appropriate. This statement did not elicit any protest from Mr Forrest at the time, as one would have expected if he had been misunderstood. Neither was any attempt made to submit any application on grounds (a) in response to the apparent invitation.

67. Advocate Lund further submitted that it was unreasonable for the Department not to consider Mr Forrest's application on employment related grounds because they had not told him before sending the Decision letter that that was what they proposed to do. This is an issue of fact, and it was the unanimous view of the Jurats, particularly in the light of the heading, tenor and content of the application, that the Department had not acted unreasonably in this respect, having received the application which it had.

68. For completeness, the LB records that at one point Advocate Lund came close to arguing that the court should infer that Mr Forrest had been advised by the Department, at the meeting of 17th July 2012 and with no legal assistance present, to make an application on grounds (b) rather than upon grounds (a), and that this would vitiate the Decision. The LB ruled, however, that this argument was not open to her. First, in the absence of any evidence being called by Mr Forrest, there was no evidence to support it as fact; it was mere unfounded speculation. Second it was nowhere presaged in the Cause. Third, such a complaint was, in effect, an allegation of breach of some alleged duty owed by the Department to Mr Forrest, and as such was a case of an entirely different nature from, and outside the scope of, the Appeal. This argument was therefore not pursued.

(2) Was the Decision *ultra vires* for being, in all the circumstances, irrational or "Wednesbury unreasonable"?

69. This is a point of law (see *Walters (supra)*), and this section contains the conclusions of the LB.

70. This is a challenge to the Decision only on an extreme basis, namely that the Decision lacks any discernible logical support or is so extreme in its unreasonableness that, manifestly, no reasonable or right-thinking decision-maker could possibly have reached it. The legal principle is that a public authority simply has no power to make an irrational, or impossibly unreasonable, decision.

71. It can be disposed of quite shortly because, in the circumstances of this Appeal, the LB has no hesitation in dismissing it. The Decision itself, summarised above, sets out various points made in Mr Forrest's application and gives the Department's response and its ultimate reasons for refusing his application. The content is not irrational, and in the LB's judgment it cannot be said that the Decision was a conclusion that could not possibly have been reasonably reached.

72. This decision of law does not, of course, preclude the Jurats from coming to a conclusion of fact that the Decision was nonetheless "unreasonable" as envisaged by s. 56(1) of the 1994 Law, interpreted in conformity with the Convention. That is their province as the judges of fact. The LB's decision is no more than the very narrow decision that such a conclusion is not inevitable.

(3) Is Article 8 engaged at all?

73. It is convenient to deal with this point here as it is again largely one of law. Article 8(1) says

> "Everyone has the right to respect for his private and family life, his home and his correspondence."

74. Advocate Lund submitted that the Decision engaged Article 8 in that it constituted an interference with Mr Forrest's and his family's private and family life, and their home. Advocate Hill-Tout argued that neither right was infringed on the facts of this case.

(i) Home

75. As to "home" Advocate Hill-Tout submitted that Mr Forrest's case in this regard failed at the outset, because his Cause pleaded that it was "Guernsey" which was his "home" (see para 4 (vi)) and the concept of "home" had been interpreted judicially as not being capable of being a locality. "Home" meant a building, or at least an identifiable "habitation" in the sense of a place where a person

> "lives and to which he returns and which forms the centre of his existence"

(Lester and Pannick *Human Rights Law and Practice* 4th Edition paragraph 4.8.70). She cited *Moreno Gomez v Spain* : ECt HR Judgment 16th February 2005 at paragraph [53]

> "A home will usually be the place, the physically defined area, where private and family life develops"

and further passages from *Human Rights Practice* by Fottrell & Khan, paragraphs 8.032 -3.

76. The family's home was therefore, she submitted, "The Barnacle", that being the house in which they were living at the time of the Decision letter, but that was not Mr Forrest's pleaded case.

77. However, she had a second objection. This was that the family was about to vacate the Barnacle anyway, quite apart from any action of the Department, because they were under notice to quit by the landlord. The notion of interference with a "home" was focussed on the right to physical, peaceful occupation of the person's dwelling. Here, that was The Barnacle. The Decision was not at all interfering with that for so long as the family would or could enjoy it. For these reasons she submitted that there was no question of Article 8 being engaged with regard to the Forrest family's "home".

78. In answer to questions put by the court, Advocate Hill-Tout submitted that the concept of "home" did not extend to any other building to which the person might be expecting to move, even if the intention to move had been formed and was going to be implemented in the normal course. She argued that, just as the concept of home could not extend to land on which a person might expect to build a house (*Loizidou v Turkey* (1996) 23 EHRR 513 at para [66]), it could not extend to a building to which one might expect to move.

79. Advocate Lund argued the contrary, and submitted that it would be absurd if there were held to be no interference with a person's "home" just because he was just about to exchange one physical dwelling for another, which would be equally interfered with.

80. As to the "locality" point, it appeared to the LB that this could be cured by giving Advocate Lund permission to amend the cause to plead that Mr Forrest's home was The Barnacle, or such other home as he might move into, this being the real issue between the parties. Advocate Hill-Tout did not object to such an amendment, accepting (as the experienced counsel that she is) that she was well able to deal with that point of interpretation in argument, and was not put at any real disadvantage if amendment were permitted. The LB therefore gave Advocate Lund permission to amend the cause appropriately, and by an agreed form of words, it was then pleaded that the Forrest family's "home" was "

> "..... " The Barnacle" or whatever home the Appellant was intending to move into, the Respondent being on notice of his fact before the issuance of the 22 October Letter by virtue of the email from the Appellant to the Respondent dated 18th October 2012".

81. Advocate Hill-Tout's argument therefore now rested on her second point, namely that the relevant "home" for the purposes of Article 8 was The Barnacle, and only The Barnacle.

82. The LB rejects Advocate Hill-Tout's submission that the intended future move from "The Barnacle" to "Honeysuckle Cottage" prevented the Decision from constituting an interference with Mr Forrest's right to respect for his "home" within the meaning of Article 8 (1) in point of law.

83. Such interference as the Decision might cause to the Forrest family's "home" in the shape of The Barnacle would be no different in character in respect of its "home" as Honeysuckle Cottage, or any other replacement dwelling which the Decision would require the Forrest family then to vacate. "Home" has a conceptual as well as a physical element. The LB noted the dictum of Lord Millett in *Harrow London Borough Council v Qazi* [2004 1AC 983 at 1016, cited by Finch LB in *Thomas v Minister of Housing Department* (Royal Court 26 February 2008)

> "A person's home .... is the place where he and his family are entitled to be left in peace free from interference by the State or agents of the State. It is an important aspect of his dignity as a human being and is protected as such and not as an item of property"

Finch LB further noted that consideration of this concept should be "down to earth and pragmatic" (see para [32]). The LB respectfully agrees. In her judgment, Advocate Hill-Tout's argument is technical rather than pragmatic, and leads to an absurd rather than a down-to-earth, result.

84. Having considered the jurisprudence cited by the parties, including, further, Lester & Pannick *Human Rights Law and Practice* 4th Edition Chapter 4, and in particular paragraphs 4.8.66 – 4.8.69, it is the LB's judgment that, whilst the concept of a "home" is directed at a physical place, it is a concept which can and does extend to a person's "home from time to time" where necessary. It is therefore wide enough to cover a right to respect for a "home" to which one is about to move, in the normal course of life.

85. The LB therefore ruled that Article 8 was properly engaged in respect of the Forrests' right to respect for their "home".

(ii) *"Private and family life."*

86. There is a great deal of jurisprudence on the concepts of "private and family life", which, though amalgamated concepts in the text of Article 8 (1) are analysed separately in Lester and Pannick *Human Rights Law & Practice;* see Chapter 4. "Family life" encapsulates, broadly, the right to live freely and without interference *as a family*, namely as a social group recognisable as such, of with the paradigm is parents and children. It is in fact the element of "private life" which is more pertinent in this case, because of the breadth with which that term has been interpreted in the European Court jurisprudence, and which Advocate Lund rightly emphasised.

87. She pointed out that "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 world."
> *Pretty v United Kingdom* (ECt HR) 2002 35 EHRR 1 at para [61].

Whilst Advocate Lund also cited the further passage from *Pretty*:

> "The Court considers the notion of personal autonomy is an important principle underlying the interpretation of its guarantees....."

it must be observed that, in the context of the issues in *Pretty* - challenging criminal prohibition on assisted suicide - this appears to be a reference to an individual's corporeal personal autonomy. The scope of the issues in the present case must not, of course, obscure the fact that "private life" also extends to some very basic and fundamental rights with regard to control of one's own body and mind, and the potential right to live according to one's own lights and wishes even if unconventional or of a minority persuasion, as well as the aspects cited above for being material in this case, such as the formation, maintenance and development of relationships and a "place in a community".

88. Advocate Lund referred further to *Thomas* (supra) where Finch LB said, albeit in the different context of an attempt by the Housing Authority to impose a condition that a housing licence-holder must take in a lodger,

> "it [sc the concept of "private life] can be said to cover all aspects of a person's identity and thus freedom to live as they choose"

89. It was said in *Connors v United Kingdom* (2005 40 EHRR 9 at [82]) that Article 8

> "concerns rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with other and settled and secure place in the community . Where general social and economic policy considerations have arisen in the context of Article 8 itself, the scope of the margin of appreciation depends on the context of the case, with particular significance attending to the extent of the intrusion into the personal sphere of the applicant"

and in *Secretary of State for Work & Pensions v M* [2006] UKHL 1 at [80] Lord Walker, citing this dictum observed that

> "Although the "extent of the intrusion into the personal sphere" is here being treated as relevant to the state's margin of appreciation, the authorities suggest to me that it is also not without relevance to the question of ambit".

90. Advocate Hill-Tout did not dissent from the above citations, but argued that the right to respect for private and family life did not include a right to maintain a certain standard of living, or to preserve savings for the future.

91. Her first argument, however, was that Article 8 was not engaged at all with regard to Mr Forrest and his family's "private and family life". This was based on the proposition that a refusal of a housing licence did not mean that the family would necessarily have to leave Guernsey, because they could remain here by renting accommodation on the open market if they chose. They would therefore be able to "go about their daily lives" and thus maintain their personal relationships and so forth "in the same way as they have done for the last 5 years and maintain the same private and family life". Advocate Hill-Tout submitted that there was thus no interference with the right to respect for private and family life, and Article 8 was accordingly never engaged at all in this regard.

92. It will be immediately apparent that this proposition assumes that the Department's conclusion as to Mr Forrest's options is right. In fact, Mr Forrest's case in this regard, as pressed by Advocate Lund, was not so much to the effect that this conclusion was wrong, but that, knowing Mr Forrest's intentions, it was an interference with Mr Forrest's right to "respect for his private and family life" that the Department should force upon him a choice contrary to those intentions, namely either to leave Guernsey or to spend the savings which he had put aside for other purposes on renting in the open market. This was, as she put it, taking away his right to make his own personal choices, and even this would engage Article 8.

93. In any event, though, the Department's argument also rests implicitly on an assertion that the disruption or disturbance involved simply in having to move from a local market to an open market property would not amount to an interference with the Forrests' private and family life, within the meaning of Article 8. That is a proposition which is not self-evident and which, it seemed to the LB, would require a consideration of more detailed jurisprudence about what amounts to an interference with "private and family life", together with findings of fact and degree, before it could be endorsed.

94. The LB therefore took the view that it would be disproportionate to consider the Department's preliminary legal argument further, because any final determination would still require findings of fact which were matters for the Jurats. It was therefore more convenient for the entire issue to go to the Jurats.

95. The LB therefore directed the Jurats that in all the circumstances they should proceed on the basis that Article 8 was engaged, and that Mr Forrest had discharged the initial burden of demonstrating that the Decision caused at least *some* interference with the family's right to "respect for their private and family life and their home", such that justification for this would become material. The extent of any such interference would be a matter of fact for them to decide within their deliberations generally.

96. It can be recorded here, though, that the Jurats were unanimously of the initial view that the impact of the Decision would cause *some* degree of interference with the Forrests' private and family life, as a matter of common sense impression.

(4) Was the decision reasonable?

(i) Approach

97. The LB suggested to the Jurats that they might think it helpful to consider, first, whether Mr Forrest satisfied them that the Decision had been unreasonable in a general sense under the Housing Law, as a provisional view. If they did so find, they would allow the Appeal. If they did not so find, they would then re-examine and test this conclusion critically with regard to the requirement for reasonableness and justification under the Human Rights Law, and whether the Department had satisfied them that such interference as the Decision may have caused to the Forrest family's rights to "respect for their private and family life and home" was justified in terms of Article 8 (2) (cited below).

98. They might think this approach convenient because (a) it followed the structure of the Decision itself and (b) it would ensure that proper consideration was given to the need to comply with Article 8, bearing in mind the shifting burden of proof. It also followed the approach to reconciling public law and human rights considerations suggested by Hickinbottom J, in the English case of *Stevens v Secretary of State for Communities and Local Government* [2013] EWHC 792 (Admin) at para [87] (in the context of the impact of human rights considerations on judicial review in planning law).

99. The Jurats then considered their findings of fact.

100. The Jurats were unanimously of the view, having taken account of the facts recited above and carefully read all the Application material and the Decision, that the Department had considered the Application with the meticulous care which it was its duty to apply. Any challenge to the reasonableness of the resulting Decision must therefore rest on the contents of the Decision itself.

101. Subject to only one reservation (mentioned below) the Jurats were further unanimously of the view that the Department had given proper and appropriate weight to the considerations which were put forward by Mr Forrest or which it mentioned in the Decision letter, and that these were reasonable and justified its decision in terms of s. 6 of the 1994 Law. Whilst the Jurats themselves might have placed different weight on individual matters relied on by the Department, they would have come to the same ultimate conclusion. Consequently they were not satisfied that the Decision was unreasonable under the Housing Law and were, indeed, of the view that it was reasonable and was right.

Section 6(2) of the 1994 Law

102. The Jurats first considered Advocate Lund's criticisms of the Decision in relation to s.6(2)(b) of the 1994 Law. Advocate Lund submitted that it was unreasonable for the Department to rely on alleged lack of evidence of strength of Mr Forrest's connections with Guernsey because they had not sought to elicit any, and the information on the website to which Mr Forrest had been directed (Page 23A) did not mention this. The Jurats found that the Department had not acted unreasonably; it had made it clear to Mr Forrest that he should submit all information which he might think relevant, and that the suggestions on the website were not exhaustive. It was no part of the Department's function to advise an applicant (in contrast with, at its highest, explaining the options, as they had done). In any event, there was no suggestion of any further evidence which Mr Forrest could have adduced.

103. Advocate Lund submitted that the Department had unreasonably placed insufficient weight on the contents of the letters appended to the Application, as evidence of the strength of Mr Forrest's connections with Guernsey, and in particular had failed to give sufficient weight to Mr Forrest's valuable contribution to tennis in Guernsey (or to Mrs Forrest's naturalisation, or to the children's close involvement in school and community activities). The Jurats unanimously disagreed, finding that the Department had given these features proper and appropriate weight. They were of the view that, whilst the family's involvements in local life and the community were commendable, and Mr Forrest's work in the tennis field was distinctive, these features were not exceptional as features of a family's involvement in its locality, through work, education, social and recreational activities. They were of the same general order as was quite natural and commonplace.

104. Advocate Lund submitted that the Department had placed over mechanistic reliance on the length of the Forrest family's residence in Guernsey at five years, with insufficient regard to the quality of that residence. However, the Jurats noted that length of residence was a specific consideration under s 6(2)(b)(ii) of the 1994 Law, (and was plainly of significance for inviting comparison with the length of residence required to gain qualified resident status), and the only qualification was that this consideration was to be "without prejudice" to consideration of the quality and strength of connection under s. 6(2)(b)(i). Insofar as this made length of residence a subordinate consideration to those matters, the Jurats were satisfied that the Department had observed and applied this.

105. Advocate Lund submitted that the Department had placed too much reliance on the Forrest family's history of residence elsewhere, ignoring the fact that, apart from St. Lucia, Guernsey was the place where they had lived longest. The Jurats, however, regarded the family's residence history as very significant in evaluating Mr Forrest's claim to have a strong connection with Guernsey because he and his family had now "settled" here. The Jurats viewed this assertion with scepticism. They had formed the clear view, from all the evidence of the Forrest family's residence history, the nature of its residence in Guernsey, and the timing of Mr Forrest's consideration of his position, that if Mr Forrest's career had continued as previously, with another employment position being offered to him elsewhere than Guernsey, he and his family would have moved on in the same way as previously, and would not have regarded themselves as "settled" in Guensey.

106. The Jurats rejected the submission that the Department had unreasonably placed too much weight on the absence of any legitimate expectation by Mr Forrest of the renewal of a housing licence on its expiration. On the contrary they considered this to be of major significance, in all the circumstances. Mr Forrest was plainly an educated and intelligent person, who could have been under no illusions as to his position and that his right of access *to the local market* in Guernsey was limited, both in time, and to the continuation of his specific employment, which was a commercial position and not public service, and had been taken up in furtherance of his own career interests. Mr Forrest had been clearly apprised of the time limit on his privileged access to local market housing and had freely accepted this constraint.

107. Advocate Lund submitted that the Department's finding that the Forrest family were "perhaps better able to cope with" the upheaval of relocation than another family was an improper consideration, unsupported by any evidence. The Jurats found this to be an insensitive comment and inappropriately expressed. They considered, however, that it did no more than clumsily state the obvious point that the Forrest family had frequently experienced the upheaval of moving in the past, through Mr Forrest's having chosen to take up an "international" lifestyle for them all. This further point had not been accorded unreasonable, let alone decisive, weight in the Decision in any event.

Other factors: s 6(5)(e)

108. As noted above, s. 6(5)(e) contains a power for the Department, at any stage, to take into account any matters which it deemed necessary or expedient. Advocate Lund criticised the Department's treatment of several such factors. With one reservation, the Jurats found these criticisms to be unfounded.

(i) Redundancy

109. Advocate Lund first submitted that the Department had unreasonably accorded insufficient weight to the fact that Mr Forrest's application had been brought about by redundancy. As to this, whilst sympathising with Mr Forrest's misfortune (as anyone naturally would), the Jurats unanimously agreed with the Department that this was of little weight. It had in no way affected the well-understood time/employment limitation on Mr Forrest's right to live in local market property, and redundancy was, in any event, always a risk, and a foreseeable risk, in any employment-dependent position.

(ii) Mr Forrest's financial options

110. Advocate Lund next submitted that the Department had given insufficient weight to the effect on the family of Mr Forrest's not being granted a housing licence because of his limited resources. As to this, the Jurats noted the financial information given by him as to his previous and comparative estimated prospective earnings and those of his wife, their savings and share ownership, his redundancy payment and his prospective pension entitlement at age 55, as summarised by the Department at p114, (as corrected). The Jurats noted that the Department had accepted this evidence and they did likewise.

111. They therefore examined Mr Forrest's assertion that, in his financial position, whilst he would be able to afford to *buy* a three bedroom local market property (which was now his wish), he could not afford to buy or rent an open market property. They also examined the material upon which this assertion was based, namely: statistical information as to the size and nature of the island's housing stock taken from the 2011 Annual Guernsey Housing Stock Bulletin ("the 2011 Bulletin), figures for the numbers of three bedroom houses advertised for sale or rent, and their prices, gathered by Mr Forrest from local estate agents' websites, Mr Forrests' financial resources and his intentions for these, and suggested mortgage rates and expected purchase "deposit" levels. The Jurats noted the Department's response to this information and figures, and its evidence of asking rents for open market homes, rejecting Mr Forrest's interpretation of his options. Because of the importance of this point the Jurats gave careful and critical appraisal to the material before the Department and before the Court.

112. Advocate Lund objected generally that the Department ought to have, but had not, adduced evidence in support of its reasons for rejecting Mr Forrest's assertions as to the effects of his financial position on his options. The LB rejected this criticism. The Department had adduced evidence (namely the open market rental particulars), but had otherwise elected, as it was entitled to do, to make its case on the basis of argument that the evidence given by Mr Forrest did not support the conclusions which he invited.

113. Having considered all the material and arguments advanced, the Jurats unanimously agreed with the Department's assessment that, in all the circumstances and on the basis of Mr Forrest's own evidence and his own figures, the Forrests could afford to rent an adequate property in the open market for a sufficient period to complete their daughters' school education – the primary stated motive for their impulsion to remain on the island - by prioritising the use of their financial resources, including their savings, to that end.

114. The Jurats are, in fact, fortified in their view by the fact that Advocate Lund did not seriously press otherwise. They noted that neither in the Cause, nor in her Skeleton Argument nor her oral address did Advocate Lund contend that it would be impossible for Mr Forrest to rent in the open market in order to remain in Guernsey, but only that, in order to do so, he and his wife would be unreasonably compelled to liquidate their assets and use their savings.

115. The Jurats unanimously reject that contention. They are satisfied that, with the judicious use of Mr Forrest's savings, assets, and redundancy money, the Forrests could manage their affairs so as to rent in the open market as mentioned, and that the extent to which this would require use of savings, would not be unreasonable in all the circumstances. It is no part of the proper purpose of the grant of a housing licence to enable the applicant to preserve personal savings or achieve other non-essential financial objectives. Furthermore, the Forrests' position in this regard is not exceptional. The Jurats are well aware from their own general experience that others have had to make similar financial choices, and have done so. They can see nothing unreasonable in the Forrests being expected to do likewise in their unexceptional circumstances.

(iii) Impact on children

116. On this basis, the Jurats consider that the foundation for Advocate Lund's next criticism, namely that insufficient weight was accorded to the potential adverse impact on the children of having to move from their education and established social environment, really falls away, as the Forrests would not be forced to leave Guernsey. However, even if it were the case that they were to be compelled to do so, the Jurats would still take the view that the effects of any such upheaval on Natalie and Nicole would not be a sufficiently strong factor to render the Decision unreasonable, in all the circumstances. Disruption and distress caused by moving school, leaving friends and having to make new ones is the commonplace and unavoidable consequence of a family move for any family. Regrettable though this might be, the Jurats saw no evidence that the effects on Natalie and Nicole in this case would in fact be out of the ordinary. The Jurats did not consider that this ordinary kind of consequent upheaval would be a reason of sufficient weight as to make the refusal Decision unreasonable in all the circumstances.

117. Notwithstanding its view that Mr Forrest could, in reality, afford to remain in Guernsey in open market accommodation, the Department had considered the suggested effects on the children, and their education and their social and emotional development, if the family did have to move to the mainland. They had given these appropriate weight. The Jurats did, however, regard the Department's expressed view that any adverse effect on Natalie's education was mitigated by the fact that, being a year ahead of her age group, she would be able to repeat a year, as being, once again, an insensitive and unnecessary comment. However, they were satisfied that this had not been of any material effect on the Decision.

(iv) Health problems

118. The Jurats also formed a similar view with regard to the evidence of the family members' health problems. They were satisfied (and they so find) that these have been caused by the stress of their uncertain position, which is obviously unpalatable, but they are equally satisfied that these effects are, once again, unexceptional, and it was not unreasonable to treat them as such, as the Department had done.

(v) Value to community

119. The Jurats also agreed that the Department had rightly regarded the value of the Forrest family's contributions to the community as being of no greater weight, when considered under s. 6(5)(e), than they had been when considered under s.6(2)(b) as evidence going to strength of connection. That value was acknowledged, but was not really exceptional.

(vi) Housing Needs Survey and housing market evidence

120. Criticism of the Department's reliance on the Housing Needs Survey of 2007 ("The Survey") formed a very major part of Advocate Lund's argument that the Decision had been unreasonable. The Jurats therefore paid particular attention to this point. It was in fact the only matter upon which they had any significant reservation about the content of the Decision.

121. The Survey was a research survey carried out in 2007, based on some 1500 interviews (and therefore considered to be statistically significant) for the purpose of informing States policy decisions with regard to future housing requirements, in particular for the Corporate Housing Programme. The Department relied on certain conclusions from the Survey to support its assertion that there was a need to prioritise the availability of local market accommodation for new households of Qualified Residents or those with housing licences in their own right.

122. Rather remarkably, it did so in almost precisely the same terms as it had used in the case of *Kinley v Minister of Housing Department* (Royal Court, 28th May 2009: see para [47]), despite judicial criticism of the conclusions which it there advanced (see paras [48]-[50] and [69]). Advocate Lund, almost went so far as to submit that, in the light of this criticism, the Survey could not be used in evidence at all. The LB advised the Jurats that this was not correct and the Survey was admissible in evidence, for whatever persuasive effect it might be thought worth - which depended on how it was used and the weight they felt able to attach to its findings The criticism which was upheld in *Kinley* was that the figures used as supposed evidence of a local market housing shortage were simply the predicted net increase in the number of eligible households, and took no account of additional homes being built.

123. It was therefore for the Jurats to decide whether the Department had addressed that criticism. The Department had, additionally, relied on the 2011 Housing Bulletin (also invoked by Mr Forrest) as demonstrating that the annual net increase in available housing stock that year was still less (at 230) than the annual net increase in demand predicted in the Survey (340).

124. The Jurats had major reservations about this use of the statistics, or, indeed, whether any reliable conclusions could legitimately be drawn. The Survey was five years old, and had made predictions. The starting figure used by the Department, of 340 units of new local market housing needed in 2011or 2012, was therefore an annualised average figure, uncritically derived from a prediction which was already five years out of date. The attempt to take account of new build houses by use of the 2011 Housing Bulletin figure, whilst being aimed at the particular criticism in *Kinley*, could not render that starting point any more reliable.

125. Equally, however, the Jurats did not find propositions advanced by Advocate Lund on Mr Forrest's behalf, based on the 2011 Housing Bulletin to be convincing, either. They were deployed to support the contention that there was in fact "no shortage" of three or four bedroom local market houses available, such that granting him a licence to occupy such a dwelling (for 15 years or indefinitely) would not in practice prejudice the prioritisation of local market housing for Qualified Residents and those who fully qualified for housing licences.

126. For example Advocate Lund relied on the fact that there were, apparently, 62 vacant local market properties with 3 bedrooms in November 2011 (see Table 6.1.1 p 238) as showing that "supply exceeded demand". However, properties were classified as 'vacant' on the basis of electricity consumption data, and, in any event, mere vacancy does not equate to availability on the market (ie supply). She argued that the stated increase in the available number of local market units of 230 in the year 2011 could really be regarded as 275, because a net increase of 45 attributed to "administrative amendments" should be taken into account. However, what "administrative amendments" meant was not clear, and Advocate Hill-Tout submitted that these would include, for example, extra units which had been "found" simply because they had not been included in the previous census, which would not indicate an increase in available properties at all. Third, Advocate Lund pointed out that there had been an overall net increase of 41 in the number of 3 bedroom local market units in 2011, and invited comparison with the annualised predicted requirement for 3 bedroom units only contained in the Survey itself, which had been 40. She suggested that this showed that demand had been met. This, however, seemed to the Jurats to be subject to the very same criticisms about reliability as already mentioned above. The Jurats felt that these examples illustrated the dangers of drawing any simplistic conclusions from statistics in these surveys.

127. The other evidence advanced by Mr Forrest was the number of 3 bedroom (or more) local market units which he said were being advertised for sale or rent by estate agents, and their asking rents/prices. This had not been examined or tested as far as could be seen, the Department simply having expressed the opinion that these raw numbers did not mean that it was unnecessary or unreasonable to preserve the availability of such properties for qualified and licensed residents. The Jurats did not find the Department's "chain" argument (ie that whilst properties of the size which Mr Forrest wanted a licence to occupy were not the most in demand, they needed to be kept available to enable upsizing which would "free up" the smaller properties which were more in demand) convincing. However, they did accept that there were further hidden factors, behind simple appearances, which were to be taken into account, and as to which the Department's judgment, derived from experience, should be accorded some weight. These would include, for example, likely calls on local market accommodation from those with expectations of achieving local market qualified status, or the likelihood that those who might be contemplating disposing of a local market property, would be entitled to, and might well themselves require, to take up another. These factors would, as the Department mentioned, suggest that bare "on the market" figures could not simply be taken as evidence of an excess, or sufficiency, of supply as against demand.

128. The Jurats would themselves add the further obvious economic fact that the number of properties "available" at any time might merely indicate that asking prices were too high and should come down, a material possibility given that one purpose of local market control was to keep housing costs within the reasonable means of locally qualified occupiers. They also noted that the Department recognised that market conditions might change abruptly, which, if so, would mean that placing undue weight on any current "snapshot" position would operate arbitrarily and inconsistently in respect of housing licence applications made at different times in otherwise similar circumstances.

129. Whilst the Jurats were of the view that it would have been helpful if the Department had explained the reasons for their opinion in greater detail and with more supporting fact (as indeed Advocate Lund complained), on the evidence available they nonetheless preferred (and accepted) the Department's view over the contentions advanced by Mr Forrest, which they found to be over-simplistic.

130. However, and in any event, the Jurats considered the weight to be attached to any consideration of apparent availability of accommodation of the type which Mr Forrest wished to occupy to be very much reduced, because it is not a primary factor to be taken into account

as justifying the grant of a housing licence (see s.6(2) of the Law) but only falls to be considered "further" in the context of an application which has not been refused for failing to meet either of the requirements of s.6(2). For reasons already given Mr Forrest had never surmounted that hurdle, nor actually come close to doing so. It followed that, even if the Department's assessment of the supply and demand factor had been flawed, that had not played any part in causing the adverse outcome of his application and did not make the Decision unreasonable.

(vii) Precedent

131. Lastly, Advocate Lund criticised the Department's reliance on the allegedly damaging precedent which the grant of a housing licence to Mr Forrest in his situation would set. The Jurats consider this to be a very important aspect of the appeal, which leads on from the last point.

132. Having initially denied that "precedent" was a proper consideration at all in the Cause, Advocate Lund modified her arguments in the light of *Campbell* (above) where Day DB said (at p 19B)

> "The Authority is perfectly entitled if it so wishes, to use a precedent argument. But it must apply the correct precedent".

133. The LB advised the Jurats that in *Campbell* the Authority's mistake had been to view the precedent allegedly being created as operating in too wide a set of circumstances. It failed to appreciate a major and distinctive feature in Mrs Campbell's case, namely that the loss of her open market flat (occupied for nearly 20 years) was being occasioned by her landlord's deregistering it as "open market" in order to gain permission to develop more open market units elsewhere in a prestigious scheme being encouraged by the States. Her loss of accommodation was therefore being caused by a States policy or decision, in a manner which was outside her control, was "very unusual", and could only ever affect a handful of people. The "precedent" which might be set was therefore extremely narrow. The LB advised the Jurats, therefore, that in considering the reasonableness of a "precedent" argument, the key point was whether or not there was a distinguishing feature about the appellant's case of sufficient objective materiality to his claim and sufficient exceptionality from the general case, to enable that factor to be relied upon as a material distinction if others in an apparently similar position sought to complain that they should get similar treatment.

134. In this context, the Jurats noted, and accepted, the numbers of licensed occupiers holding housing licences of up to 5 years' duration (700) and those with licences of between 5 and 15 years, (170) in respect of whom, therefore, a precedent might be argued to be set if their licences ended or their employment terminated. The Jurats considered that these figures were rightly regarded as being very significant and they felt this to be a very important point.

135. Advocate Lund submitted that the Department ought to have recognised Mr Forrest's redundancy as a factor which would distinguish Mr Forrest's case sufficiently from the ordinary case of a mere licence-expired local market occupier, and this was the "correct" precedent. She submitted that this was a feature of sufficient scarcity that no damaging precedent would in fact be set.

136. The Jurats have no hesitation in rejecting this proposition. Mr Forrest's redundancy is not of sufficient (if any) materiality to the basis of his housing licence application, and makes it

no different in character or quality from that of someone whose housing licence had simply expired by efluxion of time.

137. That is enough to deal with this point, but the Jurats also consider that to hold redundancy to be a distinguishing feature militating in favour of the grant of a housing licence under s.6(2)(b) would be entirely inconsistent with the policy of the 1994 Law in granting, primarily, employment related housing licences, in the first place. In addition, it might well encourage or invite collusive "redundancies".

138. The Jurats are perfectly satisfied that the grant of a housing licence to Mr Forrest, to continue to occupy a local market house after a mere five years' residence, in his unexceptional circumstances, would be likely to set a damaging precedent in terms of the Housing Law, and that this was a factor which could be and was appropriately taken into account by the Department.

Summary

139. To sum up, therefore, the Jurats are unanimously of the opinion that the Department's Decision was not unreasonable in terms of the Housing Law, their only reservation being as to the weight attached by the Department to supposed statistical evidence with regard to the question of supply and demand for local market accommodation, in particular of the size desired by Mr Forrest. However, the Jurats agreed that Mr Forrest's application had been rightly held to fail the test at s. 6(2)(b), such that this was of no real relevance. The Jurats were perfectly satisfied that the Decision was reasonable on the other grounds relied on by the Department and the balance they had struck in considering all other factors.

140. In effect Advocate Lund was submitting that the Department had unreasonably failed to exercise its power so as to grant exceptional favoured status, in the general scheme of the Housing Law which affects all islanders, to Mr Forrest. The States had, though, done nothing, directly or indirectly, to create or encourage any legitimate expectation on Mr Forrest's part that such an indulgence would be extended to him. (Indeed, the Jurats asked rhetorically, what more could the Housing Department have done to prevent any such expectation arising?)

141. The Jurats saw the particularly significant factors as being Mr Forrest's knowledge, at all times, of the time limit on his right to reside lawfully in local market accommodation; his freely chosen "international" career and consequent lifestyle, with its peripatetic residence history; his wish to settle having in all likelihood been prompted more by his redundancy than any change of attitude; his short period of residence in Guernsey, of an unexceptional nature; his previous lack of any connection at all with Guernsey; and the fact that the refusal of a housing licence would not prevent him and his family from remaining in Guernsey, but merely require them to deploy their financial resources less advantageously than they would like. These factors outweighed any countervailing considerations, of which the possibility of disadvantage or disruption to the children's education and relationships was the most significant and could in any event be largely avoided if the Forrests chose to arrange their affairs so as to remain in Guernsey in open market accommodation. In that overall context, even the fact that a housing licence possibly "could" be granted without directly causing a shortage for other properly qualified local market residents was of no weight, not least because the "precedent" argument against doing so was substantial.

(5) Is the Decision disproportionate under Article 8 (2) of the Convention?

142. The LB reminded the Jurats that they should review their initial decision critically in the light of the considerations of Article 8 of the Convention. This imported the requirement that, insofar as the Decision brought about any interference with the Forrest family's right to "respect for their family and private life, [and] their home...", it was for the Department to satisfy the Jurats that any such interference was justified in terms of Article 8 (2) of the Convention, which reads:

> "(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"

If the Department failed so to satisfy them of this, the burden to do so being on the Department, then Mr Forrest's appeal must be allowed because the Decision would have been a breach of the human rights of Mr Forrest and/or members of his family.

143. The LB further directed the Jurats, both generally and in answer to questions, as follows:

(i) The Department had identified the relevant "interest" as being "the protection of the rights and freedoms of others", and specifically the rights and freedoms of those with pre-existing rights to reside in controlled accommodation (being qualified residents or those to whom housing licences had been granted). The Jurats would at this stage already have decided that the Decision was "in accordance with the law" apart from the present issue, which was therefore whether the Decision was a measure "necessary in a democratic society" to protect those identified interests.

(ii) "Necessity" had been construed to mean that there should be a "legitimate aim" on the part of the authority, (in the sense of a pressing social need), and that the measure in question should be proportionate to that aim: see *Gillow v UK* (above) at para [55]. The test is, therefore,

> 'whether the interference with the applicants' right .....struck the requisite fair balance between the demands of the general interest of the public and the requirements of the protection of the individual's fundamental rights, or whether it imposed a disproportionate and excessive burden on them.' (*Bugajny v Poland* ECtHR 6 November 2007, para [67]).

In *Cusack v London Borough of Harrow* [2013] UKSC 40 Lord Carnwath commented

> "As that case [sc *Bugajny*] also shows, the issue of proportionality is not hard-edged, but requires a broad judgment as to where the "fair balance" lies.

This test therefore requires an appropriate balance to be drawn, having regard to the importance of the objective of the measure being challenged, and the gravity of the effect of it on the individual concerned.

(iii) The concepts of a "home" and of "private and family life" were as discussed above in paragraphs 75 and 84 (home) and 87-89 (private and family life).

(iv) The right in question is a right to "*respect for*" one's private and family life, home, etc, and not a "*right to*" a private and family life, home etc, as such. This carries the flavour of a negative right, in the sense of a right not to be subject to (unjustified) interference by the state when pursuing those personal rights according to one's own wishes, resources and ability. It does not, for example, create a positive obligation on the state to provide a home or to solve one's housing problems (*Lester & Pannick Human Rights Law and Practice* (above) para 4.8.70**.)**

(v) They could, and must, consider the "home" and "private and family life" of all members of the Forrest family as individuals, although they were entitled to have regard to their interrelationship. In particular, the rights of the children were bound up with the position of their parents. The Jurats would therefore have to consider, if necessary, whether the degree of interference caused to the independent Article 8 rights of the children was such as to render it disproportionate to refuse to grant a housing licence to their father, Mr Forrest.

(vi) The ultimate test was whether, in making its the Decision, the Department had drawn a fair balance between the public interest in the sense of the rights and freedoms of those which the Housing Law 1994 was aimed at protecting, and the relevant rights of the Forrest family insofar as these were being subjected to interference - or whether, on the other hand, the interference being caused to the latter was "disproportionate and excessive" having regard to the former.

144. The Jurats therefore reviewed their initial conclusion having regard to the above principles, and recognising that this review should therefore pay particular attention to the impact of the Decision on the material rights of the Forrests, it being for the Department to persuade them that, in all the circumstances, such impact was not disproportionate to the objectives at which the 1994 Law was aimed.

145. Having found that the Decision does not, in practice, force the Forrests to leave Guernsey, the Jurats find that the relevant interference with the Forrests' right to respect for their "home" at the time is the fact that it requires them to vacate the physical place in which they have set up home, and use their resources and efforts to make a new and different "home", in another building. The Jurats note, however, that the Forrests are not being denied the right to make a "home". They find that the interference which the Forests will suffer in this respect is not interference of a major or exceptional type in the ordinary course of life.

146. With regard to interference with the Forrests' "private and family life" the Jurats observe that the quality of private and family life developed by Mr Forrest and his wife has always been in the context of their chosen "international" lifestyle. As regards "family life" the Jurats in fact see no interference with this as such. On the evidence, they find that the interference caused to their "private life" as that concept has been developed under the Convention will comprise, in each person's case, the degree of interference which the need to move house would cause to that person's unfettered ability to maintain and develop

> ".....relationships with others and a settled and secure place in the community....."

see *Connors v UK (supra),* and additionally, in the case of the children some possible degree of distress which could be said to affect their psychological well-being. The Jurats do not find that such interference extends to such fundamental matters as

> "...identity, self determination, [or] physical and moral integrity"

nor any

"intrusion into the personal sphere".

Insofar as the Forrests are not being obliged to leave Guernsey entirely, the Jurats find that the relevant interference is, in practice, that of inconvenience or inhibition in continuing personal and community relationships as before, but from a different home or base. They consider this to be relatively minor.

147. The Jurats expressly reject Advocate Lund's submission that it is a breach of a right to respect for one's private and family life to be prevented from deploying one's financial resources as one would ideally wish to do - certainly in the circumstances of this case, where it is no more than the commonplace position of having to make less-than-ideal choices because of a mismatch between one's desires and one's resources. Whilst not ruling out the possibility of such interference being excessive and disproportionate in some other extreme case, the Jurats are satisfied that that is not this case.

148. Turning to the "legitimate aim of the 1994 Law, the Jurats find this to be of fundamental importance to social policies in Guernsey with regard to housing and population control. Such control has been seen as necessary in some form or other for over 60 years in order to regulate the population of a densely populated island, and protect the interests of those inhabitants with strong island connections, but possibly limited means, from unreasonable competition for a limited housing stock. Amendment of the principles of this policy may from time to time be appropriate, as circumstances change, but that is a matter for the Guernsey legislature.

149. The Jurats find that the present law is aimed at providing a system of clear and recognisable (if intricate) rules for identifying qualified residents and those meriting licences, and, at the same time, an appropriately flexible system to enable exceptions to be made in truly exceptional and meritorious cases. They are also of the view that it is important that the system operates fairly and sustainably which, in a democratic society, connotes even-handedness between all those in similar situations, and in particular those who adhere to, and respect, the rules of the system. Advantageous exception should be granted only on principled and objectively justifiable grounds, failing which the operation of the system will appear arbitrary and fall into disrepute.

150. Having regard to the above, as well as to all the factors previously considered in more detail and summarised in Paragraphs 139 -141, the Department succeeds in convincing the Jurats that the Decision does not constitute a disproportionate interference with the Article 8 rights of any member of the Forrest family. This includes the two children, to whose position the Jurats gave special and anxious consideration (as they wish it to be known). In the end, however, they come to their unanimous conclusion without any real hesitation

151. They would add that, in view of their finding of fact that the Decision does not require Mr Forrest to leave the island, since he can (if he chooses) take up the option of renting open market property by using his savings, it has been strictly unnecessary to consider the more serious impact on the Forrest family's right to respect for their home and private and family life which would be occasioned by their being obliged to move to the UK or elsewhere. The Jurats find that, in this regard on the evidence, greater interference would be suffered by the children through having to move school and leave friendships and other established relationships within their current way of life. However, whilst recognising this additional burden, the Jurats do not find that it would tip the balance so far as to make the Decision disproportionate, in all the circumstances.

Result

152. For all the above reasons, therefore, this Appeal will be dismissed.

153. The LB will sit alone to hear any questions arising on costs, but she reminds the parties that costs usually follow the event.