Hilary Term
[2010] UKSC 8
On appeal from: [2008] EWCA Civ 1228

JUDGMENT

Tomlinson and others (FC) (Appellants) *v* Birmingham City Council (Respondents)

before

Lord Hope, Deputy President
Lady Hale
Lord Brown
Lord Collins
Lord Kerr

JUDGMENT GIVEN ON

17 February 2010

Heard on 23 and 24 November 2009

Appellant
James Goudie QC
Zia Nabi
(Instructed by Community Law Partnership)

Respondent
Andrew Arden QC
Christopher Baker
(Instructed by Birmingham City Council)

Intervener (Secretary of State for Communities and Local Government)
Natalie Lieven QC

(Instructed by Treasury Solicitor)

LORD HOPE, with whom Lady Hale and Lord Brown agree

1. The respondents, Birmingham City Council, are a local housing authority within the meaning of Part VII of the Housing Act 1996. This is the Part of the Act which sets out the duties that local housing authorities owe to a person who is homeless or threatened with homelessness. Among its provisions is section 193, which identifies the duty that the authority owes where it is satisfied that an applicant is homeless, eligible for assistance and has a priority need and is not satisfied that he became homeless intentionally. In that situation the duty that the authority owes is to secure that accommodation is available for the applicant: section 193(2). The section also defines circumstances in which the authority will cease to be subject to that duty. Various circumstances will bring this about. The one that is relevant to these appeals is where the applicant, having been informed of the possible consequences of refusal, refuses an offer of accommodation which the authority are satisfied is suitable for him and the authority notify him that they regard themselves as having discharged their duty under the section: section 193(5).

2. The applicant has the right to request a review of any decision of a local housing authority as to what duty, if any, is owed to him under section 193: section 202(1)(b). The procedure for review requires that the reviewing officer must be someone who was not involved in the decision and who is senior to the officer who made it. If the applicant is dissatisfied with the decision on the review he may appeal to the county court. But he may only do so on a point of law arising from the decision: section 204(1). The jurisdiction which the county court exercises under that provision is one of judicial review. There is no general right of appeal against the decision of the reviewing officer. The county court judge may not make fresh findings of fact. He must accept the conclusions on credibility that have been reached by the reviewing officer.

3. The question which these appeals raise is whether a decision that the local housing authority take under section 193(5) of the 1996 Act that they have discharged their duty to the applicant is a determination of his "civil rights" within the meaning of article 6(1) of the European Convention on Human Rights and, if so, whether the quality of review that the statute provides for is sufficient to meet the requirements of that article.

4. Underlying these questions, however, there is a wider and more fundamental issue which has prompted the Secretary of State for Communities and Local Government to intervene. His interest arises because he has policy

responsibility for the 1996 Act. But he is concerned at the effect, if these appeals are successful, that this result will have on the conduct of local government homelessness decision-making across England and Wales and upon the way proceedings have to be conducted in the county court if these decisions are taken to appeal. He suggests that the outcome could affect indirectly the way decisions are made in other areas of local and central government activity such as community care and education.

5. Lord Hoffmann drew attention to this problem in *Runa Begum v Tower Hamlets London Borough Council* [2003] UKHL 5, [2003] 2 AC 430, paras 42-44. As he pointed out, it is one thing for the rule of law to require that certain decisions, such as findings of breaches of the criminal law or adjudications of private rights, be entrusted to the judicial branch of government. But there are other areas where utilitarian considerations have their place. It is not in the public interest that an excessive proportion of the funds available for schemes for the regulation of social welfare should be consumed in administration and legal disputes. He referred to a passage in the joint dissenting opinion in *Feldbrugge v The Netherlands* (1986) 8 EHRR 425, 443, para 15 which, as he said, seems highly material in this context. It contains the following sentence:

> "The judicialisation of dispute procedures, as guaranteed by article 6(1), is eminently appropriate in the realm of relations between individuals but not necessarily so in the administrative sphere, where organisational, social and economic considerations may legitimately warrant dispute procedures of a less judicial and formal kind."

I would venture to suggest that those words are as true today as when they were written over twenty years ago.

6. In that case the minority were unable to persuade the majority to restrict the application of article 6, in the civil sphere, to rights and obligations in private law. It has now been extended to public law rights, such as social security or other cash under publicly funded schemes. No clearly defined stopping point to this process of expansion has yet been identified by the Strasbourg court. But concerns about over-judicialisation of dispute procedures in the administration of social and welfare benefits have not gone away. I believe that this case provides us with an opportunity to introduce a greater degree of certainty into this area of public law.

The facts

7. The Court of Appeal heard argument in two cases, those of Ms Fazia Ali and Ms Khadra Ibrahim. There was a third case, that of Ms Emma Tomlinson. The respondents refused her application that she was homeless on the basis that she was intentionally homeless. This was because she had been evicted from her home on account of rent arrears. Their decision was confirmed by the reviewing officer, who held that she had not acted in good faith in relation to her finances and the way she had given up her tenancy. Her appeal to the county court was dismissed on the grounds that an appeal lay on a point of law only and that the finding of the reviewing officer was not irrational or perverse. But her case had become academic by the time it reached the Court of Appeal as the respondents, having accepted that the homelessness duty was owed to her, had provided her with accommodation. So the Court of Appeal declined to hear her appeal: [2008] EWCA Civ 1228, para 17. It did however hear the appeals in the cases of Ms Ali and Ms Ibrahim.

8. The way the Court of Appeal dealt with their appeals was strongly influenced by the approach which the House of Lords took to issues arising under Part VII of the 1996 Act in *Runa Begum v Tower Hamlets London Borough Council* [2003] 2 AC 430. In that case the question decided by the reviewing officer, and on appeal to the county court on conventional judicial review grounds, was whether the accommodation offered to Runa Begum, which she had refused, was suitable. The House heard argument as to whether the decision of the reviewing officer under section 202 was a determination of Runa Begum's "civil rights" within the meaning of article 6(1) of the Convention. But it declined to express a concluded view one way or the other on this issue. As Lord Bingham of Cornhill explained in para 6, it preferred to assume, without deciding, that her domestic law right was also a "civil right" and to consider, on that assumption, whether the statutory provision of an appeal to the county court on a point of law satisfied the requirements of that article. Having done so, it concluded that the context did not require a full fact-finding jurisdiction and that the county court's appellate jurisdiction was sufficient to satisfy its requirements.

9. The Court of Appeal too proceeded on the assumption that article 6(1) was engaged in these cases: para 21. The issue that they raised was not, as in *Runa Begum*, whether the accommodation was suitable. For reasons that I shall explain, they raised simple questions of primary fact which were decided against the appellants by the reviewing officer. It was submitted that, as these questions did not depend on specialist knowledge or expertise, the appellants' cases were not within the scope of the decision in *Runa Begum*. The Court of Appeal rejected this argument. Thomas LJ said that no proper distinction could be drawn between these appeals and the appeal in that case. The appellants seek to persuade this court that,

where simple questions of fact are in issue, the court must exercise a full fact-finding jurisdiction if the requirements of article 6(1) are to be satisfied. They submit that the decisions of the review officers should be remitted to the county court for consideration on their merits or that it be declared that section 204(1) of the 1996 Act is incompatible with the appellants' rights under that article.

10. The question that arose in the cases of Ms Ali and Ms Ibrahim was indeed, a very simple one, and it was a question of fact. It was whether they received a letter from the respondents of the kind that section 193(5) requires, informing them of the possible consequences if they were to refuse their offer of accommodation under that section. The respondents' case is that the letters were sent as required by the statute. The appellants maintain that they never received them. The circumstances in which this issue arose in each case are as follows.

(a) Ms Ali

11. Ms Ali is single and has two children. She applied for assistance under Part VII of the 1996 Act in October 2006. By letter dated 7 November 2006 the respondents notified her that they were satisfied that she was eligible for assistance and that they would be securing accommodation for her occupation. They also told her that their housing policy was that homeless applicants received only one offer of suitable accommodation. On 8 November 2006 she received an offer of accommodation which she refused because she was unhappy with the location. The respondents told her that in their opinion the accommodation was suitable but, following a review of their decision which was determined in Ms Ali's favour, they agreed to make her another offer. On 14 March 2007 a housing officer informed her by telephone that a further offer was being made, that a viewing had been arranged and that a letter would follow. She was not, during this conversation, given the full address of the property.

12. The respondents' case is that on 14 March 2007 they sent a letter to Ms Ali headed "Final offer of accommodation" offering her accommodation at 16 Bromford Lane, Erdington, Birmingham which, as discussed, was to be available for viewing by her on 16 March. The letter satisfied the requirements of the statute, as it contained a statement that if she refused the offer without good cause the respondents would consider that they had discharged their duty to her under Part VII. In the county court it was agreed that the letter had been sent and that the offer which it contained had been communicated orally beforehand. But Ms Ali denied receiving it. She said that she had to telephone the housing office to obtain the address and that the viewing appointment was re-arranged. Having viewed the property on 19 March 2007 she refused the offer as she was not happy with the condition of the communal area. By letter dated 21 March 2007 the respondents notified her that they were satisfied that the accommodation at 16 Bromford Lane

was suitable for her needs and that of her family. They told her that they considered that their duty to her under Part VII had been discharged by her refusal.

13. By letter dated 29 March 2007 Ms Ali's solicitors requested a review under section 202. In another letter of the same date they said that she had never received an offer of accommodation at 16 Bromford Lane in writing. On 3 April 2007, while her case was still pending before the review panel, the respondents made another offer of accommodation to Ms Ali. This offer, which was made under Part VI of the 1996 Act, was of accommodation in a flat at Teviot Tower, Mosborough Crescent, Birmingham. Although it was stated in this letter that Ms Ali had provisionally accepted the property she did not in the event accept this offer. About a month later on 1 May 2007 Arlene Daniel, a homelessness review officer employed by the respondents, conducted a telephone interview with Ms Ali in order to establish her reasons for refusing the offer of accommodation at 16 Bromford Lane. By letter dated 2 May 2007 she informed Ms Ali that she had decided to uphold the respondents' decision that they had discharged their duty to her under section 193.

14. Arlene Daniel's reasons for this decision were set out in her letter of 2 May 2007. She said that she was aware that the offer of accommodation letter was sent and that she had no reason to believe that Ms Ali did not receive it, as it was sent to her current address to which a number of other letters had been sent and received by her. There then followed this passage:

> "In the light of the above I contacted you on the 1 May 2007 to establish the reasons why you had decided not to accept this offer of accommodation as it was apparent from the reasons given in the letter from your representatives, dated 29 March 2007, that you (sic) alleging that you had not received the offer letter was not the reason you had refused the offer of accommodation.
>
> I put this to you and you advised that you had in fact received the offer letter and refused the offer of accommodation for a number of reasons, firstly that there was no lift. Also the entrance was dirty and smelly. Your son was born premature and suffers with lots of infections. Therefore, had you accepted this offer your sons (sic) health would have been at risk."

Ms Ali does not deny saying that she had received the offer. Her explanation is that she initially thought that she was being asked about the offer of a flat at Teviot Tower. She then realised that she was being asked about the offer of accommodation at 16 Bromford Lane. She gave her reasons for refusing that offer, but failed to mention her earlier confusion as to which offer was being referred to.

15. Ms Ali then appealed to Birmingham County Court, but on 29 August 2007 HHJ MacDuff dismissed her appeal. He held that the decision as to whether the letter had been received was properly and fairly to be made by the reviewing officer, and he declined to hear evidence on the point. He added that he understood Ms Ali's counsel to concede that if he were to hold, as he did, that it was a decision for the reviewing officer rather than for the court hearing live evidence, it could not be regarded as perverse or otherwise capable of being set aside.

(b) Ms Ibrahim

16. Ms Ibrahim's household consists of herself and six children. She applied to the respondents for assistance under Part VII of the 1996 Act in May 2005. By letter dated 29 May 2005 the respondents notified her that they were satisfied that she was eligible for assistance and that they would be securing accommodation for her occupation under Part VII of the 1996 Act. They also told her that their housing policy was that all homelessness applicants accepted under that Part received one offer of suitable accommodation. On 16 August 2005 they made an offer of accommodation which she refused. She sought a review of this decision which was determined in her favour. On 12 October 2005 they agreed to make her a further offer. On 26 October 2005 they offered her accommodation at 11 Dawberry Road, Birmingham which she also refused. The dispute between the parties relates to the way in which this further offer was made.

17. The respondents say that their housing officer, Lisa Hopkins, sent two letters both dated 26 October 2005 and both offering accommodation at 11 Dawberry Road to Ms Ibrahim in a single envelope. As HHJ McKenna was later to observe when the case came before him in Birmingham County Court on 4 October 2006, somewhat unusually and confusingly these letters were in different terms. One was a Part VI offer letter. It was the type of letter which is sent to people awaiting accommodation who are on the respondents' housing register. It made no reference to the respondents' homelessness duty under Part VII of the 1996 Act. The other was a Part VII letter. It referred to the respondents' duty under that Part of the Act to secure accommodation for her, stating that to discharge their duty the respondents only had to provide one suitable offer of accommodation. It also warned her that if she decided to refuse the offer without good reason to do so the respondents would consider that they had discharged their duty under Part VII and that no further offers of accommodation would be made.

Ms Ibrahim's case is that she received the first letter but not the second. She refused the offer of accommodation at 11 Dawberry Road without viewing it because she did not want accommodation in that area and because it was too small for her family.

18. By letter dated 3 November 2005 the respondents notified Ms Ibrahim that they considered that they had discharged their duty to secure accommodation for her and her family under Part VII and that no further offers of accommodation would be made. By letter dated 14 November 2005 Ms Ibrahim's representative requested a review of that decision. By letter dated 7 December 2005 the respondents' reviewing officer, David Colston, informed Ms Ibrahim that he had decided to uphold the decision of discharge of duty. He was persuaded by Ms Ibrahim's representative to take a second look at the case, but by letter dated 16 December 2005 he informed her that he had decided not to change his mind. Ms Ibrahim then appealed to Birmingham County Court, where her appeal was disposed of by means of a consent order to the effect that the decision of 7 December 2005 be quashed and the case referred back to the review panel for a further decision to be made. A further review was then carried out by Martin Dewell, another of the respondents' review officers. By letter dated 19 May 2006 he notified Ms Ibrahim that he was minded to uphold the respondents' decision letter of 3 November 2005.

19. Martin Dewell's reasons for this decision were set out in his letter of 19 May 2006. He said that among the matters that he had been asked to consider were various respects in which it was submitted that the accommodation was unsuitable. There was also a point that had not been raised before, that the offer letter did not comply with section 193(5) of the 1996 Act. After dealing with the question whether the accommodation was suitable, the letter went on to say this:

> "I consider that we have adequately dealt with the point you raise about the validity of the offer letter. In her statement dated 21 February 2006 the housing officer Lisa Hopkins clearly states that the two offer letters were sent to you in the same envelope. One was originally addressed to you at your previous temporary address of 110 Fernley Road, Sparkhill, Birmingham. This letter was sent to this address by mistake as it was the last address showing on the computer system following your move to 61 Adria Road, Sparkhill, Birmingham. This mistake was realised and both copies of the offer letter were then sent to you in the same envelope. Your argument that the offer letter does not comply with section 193(5) is therefore not substantiated. The information contained in the offer letter sent to 110 Fernley Road and then sent to 61 Adria Road is fully compliant with section 193(5).

> It is therefore entirely reasonable to conclude that you were fully acquainted with your options following either acceptance or refusal of the offer."

20. Ms Ibrahim then appealed again to Birmingham County Court under section 204 of the 1996 Act. She raised, as a factual issue, her contention that she did not receive the Part VII offer letter. But by the time her case came before HHJ McKenna it had been conceded that this was a matter for the reviewing officer to decide. No point was taken that to approach that issue in this way was incompatible with article 6(1) of the Convention. The judge said that the issue for his determination was whether or not it was reasonable for Ms Ibrahim to have accepted the offered accommodation, and that in his judgment it was reasonable for her to have accepted it. He rejected arguments about the content of the offer letter, holding that it was made crystal clear to her that she had the one offer only and what the consequences of refusal would be.

The issues

21. The issues that arise in this case can be summarised in this way. First, does on appeal under section 204 of the 1996 Act involve the determination of a "civil right" for the purposes of article 6(1) either generally or in cases such as the present ones where the issue is simply one of fact? Second, if so, does article 6(1) require that the court hearing such an appeal must have a full fact-finding jurisdiction so that it can determine for itself a dispute of fact either generally or in a case such as these? Third, if so, can section 204 of the 1996 Act be read compatibly with article 6(1) so as to entitle the county court to exercise that jurisdiction? If not, it is agreed that a declaration of incompatibility will have to be made.

22. In order to set the scene for an examination of these issues I must say a bit more about the statutory background. This is important, as the questions that arose for decision in this case must be seen in that context. They were, as I have said, pure questions of fact. But they were, in each case, only one of a number of questions that had to be addressed in order to decide whether the respondents' duty under section 193 had come to an end. Their resolution was a stepping stone to a consideration of the much broader question as to whether the accommodation that had been declined was suitable. This called for the exercise of expertise and judgment on a variety of factual issues. The scheme of the statute is that a decision on all these questions is entrusted, in the event of a review, to the reviewing officer and is subject to appeal on a point of law only.

The statutory provisions

23. Section 193 of the 1996, as amended by the Homelessness Act 2002 and so far as relevant, provides as follows:

> "(1) This section applies where the local housing authority are satisfied that an applicant is homeless, eligible for assistance and has a priority need, and are not satisfied that he became homeless intentionally.
>
> ...
>
> (2) Unless the authority refer the application to another local housing authority (see section 198), they shall secure that accommodation is available for occupation by the applicant.
>
> (3) The authority are subject to the duty under this section until it ceases by virtue of any of the following provisions of this section.
>
> …
>
> (5) The local housing authority shall cease to be subject to the duty under this section if the applicant, having been informed by the authority of the possible consequence of refusal and of his right to request a review of the suitability of the accommodation, refuses an offer of accommodation which the authority are satisfied is suitable for him and the authority notify him that they regard themselves as having discharged their duty under this section.
>
> (6) The local housing authority shall cease to be subject to the duty under this section if the applicant –
>
> (a) ceases to be eligible for assistance,
>
> (b) becomes homeless intentionally from the accommodation made available for his occupation,

(c) accepts an offer of accommodation under Part V1 (allocation of housing), or

(cc) accepts an offer of an assured tenancy (other than an assured shorthold tenancy) from a private landlord,

(d) otherwise voluntarily ceases to occupy as his only or principal home the accommodation made available for his occupation.

…"

24. Section 202(1) as amended by the 2002 Act and the Housing and Regeneration Act 2008 deals with the right to request a review of a decision of the local housing authority. It provides a useful guide to the nature and range of decisions that a local housing authority may have to take in the performance of their duties under Part VII of the Act. It provides:

"An applicant has the right to request a review of –

(a) any decision of local housing authority as to his eligibility for assistance,
(b) any decision of a local housing authority as to what duty (if any) is owed to him under sections 190 to 193 and 195 and 196 (duties to person found to be homeless or threatened with homelessness),
(c) any decision of a local housing authority to notify another authority under section 198(1) (referral of cases),
(d) any decision under section 198(5) whether the conditions are met for the referral of his case,
(e) any decision under section 200(3) or (4) (decision as to duty owed to applicant whose case is considered for referral or referred),
(f) any decision of a local housing authority as to the suitability of accommodation offered to him in discharge of their duty under any of the provisions mentioned in paragraph (b) or (e) or as to the suitability of accommodation offered to him as mentioned in section 193(7), or
(g) any decision of a local housing authority as to the suitability of accommodation offered to him by way of a private accommodation offer (within the meaning of section 193)."

25. Section 203(1) provides that the Secretary of State may make provision by regulations as to the procedure to be followed in connection with a review under section 202. Section 203(2)(a) provides that provision may be made by regulations requiring the decision on review to be made by a person of appropriate seniority who was not involved in the original decision. The Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 (SI 1999/71) provide that the officer shall be someone who was not involved in the original decision and who is senior to the officer who made the original decision. The reviewer is required to consider any representations that may be made to him. If he considers that there is a deficiency or irregularity in the original decision, or in the manner in which it was made, but is minded nevertheless to make a decision which is against the interests of the applicant on one or more issue, he must notify the applicant that he is so minded and the reasons why he is of that view so that the applicant or someone on his behalf may make representations about them.

26. Section 204(1) provides that, if an applicant is dissatisfied with the decision on review, he may appeal to the county court on any point of law arising from the decision or, as the case may be, the original decision. No provision is made for an appeal against the facts found by the reviewing officer.

27. The scheme which Part VII lays down can be seen, therefore, to have these characteristics. It provides a right to assistance if the relevant conditions are satisfied. But this is not a pecuniary right, nor is the benefit that is to be provided defined by the application of specific rules laid down by the statute. Even where the full homelessness duty arises under section 193, the content of the statutory duty lacks precise definition. There is no private law analogy. The duty is expressed in broad terms – to secure that "accommodation is available" – which leave much to the discretionary administrative judgment of the authority. As Professor Ian Loveland, *Does Homelessness Decision-making Engage Article 6(1) of the European Convention on Human Rights?* [2003] EHRLR 176, 184 observes, no tightly defined rules are laid down. The legislative requirement is couched only in terms of broad principle.

Is this a civil right?

28. The appellants submit that the right to accommodation under section 193 of the 1996 Act is a civil right within the meaning of article 6(1) of the Convention. Mr Goudie QC summarised his argument in this way. The effect of the statutory scheme was to confer on the appellants an entitlement to accommodation. This was a right, the correlative of which was a duty on the local housing authority which subsisted until it ceased to be subject to the duty in one or other of the ways

provided for by the statute. The right to accommodation was an individual economic right which flowed from specific rules laid down in a statute, according to the Strasbourg court's reasoning in *Salesi v Italy* (1993) 26 EHRR 187 and *Mennitto v Italy* (2000) 34 EHRR 1122. From this it followed that the reviewing officer's decision, which brought that right to an end, was a determination of the appellants' civil rights within the meaning of the article.

29. Mr Goudie acknowledged that a right to accommodation was a right to a benefit in kind rather than a right to a financial payment or a subsidy. But he said this did not in itself disqualify it from being a civil right. A series of Russian cases beginning with *Teteriny v Russia*, application no 11931/03, 1 July 2005, and ending with *Nagovitsyn v Russia*, application no 6859/02, 24 January 2008, indicated the contrary. It was held in those cases, which arose out of failures to comply with judgments by which the applicants were to be provided with accommodation of a certain size in a specified location, that there had been a violation of article 6(1). It was also held that the effect of the judgments, under which the applicants were entitled to a social tenancy agreement, was that their claim was sufficiently established to constitute a possession falling within the ambit of article 1 of Protocol No 1: see, eg, *Teteriny*, paras 48-50. In *Stec v United Kingdom* (2005) 41 EHRR SE 295, para 48 the Grand Chamber said that it was in the interests of the coherence of the Convention as a whole that the autonomous concept of "possessions" in article 1 of Protocol No 1 should be interpreted in a way which is consistent with the concept of pecuniary rights under article 6(1) and that it was important to adopt an interpretation which avoids inequalities of treatment based on distinctions which, at the present day, appear illogical or unsustainable.

30. Mr Arden QC for the respondents was content to follow the approach of the House of Lords in *Runa Begum v Tower Hamlets London Borough Council* [2003] 2 AC 430 and to assume that the appellants' entitlement to accommodation under section 193 was a civil right within the meaning of article 6(1). As he put it, the respondents approached this issue with equanimity. Their concern was to deal fairly with the cases that were before them. But he said that, if this was a civil right, it was very much at the edge of cases that were engaged by that concept. Miss Lieven QC for the Secretary of State, on the other hand, addressed this point head on. She submitted that the proper conclusion in this case was that there was no civil right within the meaning of that article. Strasbourg case law had limited civil rights to those which were related to individual economic rights which were enforceable through the courts. Any right under section 193 was subject to a large number of decisions that were left to the judgment of the local housing authority. There was also a judgmental decision as to how any such right was to be delivered, as the duty under section 193 was merely to secure that accommodation was available. The inclusion of benefits in kind such as these in the determination of

rights protected by article 6(1) was a step further than the Strasbourg court had gone, and this Court should decline to take it.

31. As already noted, the House preferred not to decide this question in *Runa Begum*. It chose instead to concentrate on the question whether the statutory provision of an appeal to the county court on a point of law only satisfied the requirements of article 6(1). No doubt it was content to do this because it was satisfied that the absence of a full fact-finding jurisdiction in the county court did not mean that, in the context of the statutory scheme that Part VII lays down, it did not have the jurisdiction that it needed to satisfy the requirements of that article. But the reason that Lord Hoffmann gave for preferring not to decide whether rights under section 193 should be classified as civil rights is instructive. In para 70 he said that this was for one reason only. This, as he explained in the previous paragraph, was his concern should it be decided in Strasbourg that the administration of social welfare benefits falling within the *Salesi* principle required a more intrusive form of judicial review, that no obstacle should be placed in the way of the UK Government arguing that, in a case such as that, the principle did not apply at all.

32. Almost seven years have now passed since the judgment in *Runa Begum* was delivered. The contingency which Lord Hoffmann had in mind has not yet arisen. The jurisprudence of the Strasbourg court has not developed in the way he thought it perhaps might. The balance of advantage now points in a different direction. The time has come for the Court to address this question and take a decision upon it. The present state of uncertainty as to whether the administration of social welfare benefits, such as those which are available to those who are homeless or threatened with homelessness, is unhealthy. It encourages litigation on issues that would not require to be addressed at all if their right to accommodation under section 193 did not give rise to a civil right within the meaning of article 6. The delay and expense that uncertainty on this issue gives rise to involves a waste of resources which would be much better deployed elsewhere in the public interest.

33. It may be helpful, as Miss Lieven suggested, to approach the question in stages: to look at the position in Strasbourg before *Runa Begum*; to look at *Runa Begum* itself; and then to look at how the law has developed since the decision in that case.

(*a) before Runa Begum*

34. As Lord Walker of Gestingthorpe said in *Runa Begum*, para 112, the cases on this topic start with *Feldbrugge v The Netherlands* (1986) 8 EHRR 425 and lead on to *Salesi v Italy* (1993) 26 EHRR 187 and *Mennitto v Italy* (2000) 34 EHRR 1122. In these cases the Strasbourg court extended the concept of civil rights to social security benefits for employees and their dependants that were analogous to benefits under insurance schemes in private law, and then to entitlements to welfare payments which lacked the analogy to private insurance as they were non-contributory and not related to employment.

35. In *Feldbrugge* the issue was whether the applicant's entitlement to a statutory sickness allowance, which was a contributory scheme but for which she had not registered due to illness, was a civil right within the meaning of article 6: see also *Deumeland v Germany* (1986) 8 EHRR 448, a case about a widow's supplementary pension arising from her husband's death in an industrial accident in which judgment was delivered on the same day. In para 37 of *Feldbrugge* the court said that the applicant was claiming a right "flowing from specific rules laid down by the legislation in force" and that the right in question was "a personal, economic and individual right", a factor which brought it close to the civil sphere. Taking account of the affinity of the statutory scheme with insurance under the ordinary law, it held that the features of private law predominated and that they conferred on her entitlement the character of a civil right within the meaning of the article: para 40. This was a significant development because, as a powerful dissenting opinion in that case pointed out, the phrase "civil rights and obligations" was originally intended to mean those rights and obligations that were adjudicated upon by the civil courts: see also *Runa Begum*, paras 28 and 64, per Lord Hoffmann.

36. The scope of article 6 was then extended to statutory schemes financed entirely out of public funds. In *Salesi v Italy* (1993) 26 EHRR 187 the principle was applied to welfare payments which, as they were not contributory, could not be said to be analogous to a scheme of insurance. In para 19 the court said that the development in the law that was initiated by the judgments in *Feldbrugge* and *Deumeland* and the principle of equality of treatment warranted taking the view that the general rule now was that article 6(1) applied in the field of "social insurance". The considerations that pointed in favour of the applicability of the article were said in that paragraph to be that:

> "Mrs Salesi was not affected in her relations with the administrative authorities as such, acting in the exercise of discretionary powers; she suffered an interference with her means of subsistence and was claiming an individual,

> economic right flowing from specific rules laid down in a statute giving effect to the Constitution."

That decision was followed in *Mennitto v Italy* (2000) 34 EHRR 1122. But there was an important qualification. In para 23 of its decision in that case the court said that the outcome of the proceedings must be directly decisive for the right in question. As in *Salesi*, the entitlement was to an amount of benefit that was not in the discretion of the public authority. I do not find support in these cases for Mr Goudie's submission that the right to accommodation under Part VII of the 1996 Act is a civil right because, as he put it, it is an individual economic right which flows from specific rules laid down in a statute. The entitlement in section 193(2) is simply to "accommodation". There is a considerable area of administrative discretion as to how that accommodation is to be provided by the authority in any given case.

(b) Runa Begum

37. Although the House preferred not to take a decision on this issue in *Runa Begum*, there are some pointers to the decision that it would have taken had it felt obliged to do so.

38. In para 6 Lord Bingham said that to hold that the right enjoyed by Runa Begum was a civil right for the purposes of article 6 would be to go further than the Strasbourg court had yet gone. I respectfully agree with this assessment. It would seem to follow, applying the principle which he was later to enunciate in *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, para 20 that, as the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time, Runa Begum's right to accommodation under Part VII was not a civil right within the autonomous meaning of that expression. To reach that conclusion would not have been to dilute or weaken the effect of existing Strasbourg case law. It would, on the contrary, be to transgress Lord Bingham's warning that it was not for the national courts to interpret the Convention in a way that provides for rights more generous than those that have hitherto been found by Strasbourg.

39. In para 67 Lord Hoffmann said that the whole scheme of Part VII was shot through with discretions in which either the council's duty was dependent upon it being satisfied of some state of affairs or could be discharged in various ways of its own choosing. He contrasted that situation with *Mennitto* where, once the applicant had satisfied the conditions for entitlement to the allowance, all that remained was an arithmetical calculation of its amount. In para 69 he too said that

to apply the *Salesi* doctrine to the provision of benefits in kind, involving the amount of discretion that is inevitably needed in such cases, would be to go further than the Strasbourg court has so far gone. In para 91 Lord Millett listed among features which took the case beyond the existing case law the authority's discretion as to how it will discharge its duties and the fact that ultimately this called for an exercise of judgment. Runa Begum could not be said to be claiming an individual, economic right flowing from specific rules laid down in a statute: para 92. This is directly contrary to the view Mr Goudie invited the Court to take of the appellants' position in this case.

40. Miss Lieven said that these observations were a powerful steer towards the conclusion that to extend the concept of a civil right to a claim under Part VII of the 1996 Act would be to go beyond the tests that had been so far laid down by the Strasbourg court. I agree, but this leaves open the question whether anything that has come from Strasbourg since the date of that decision points to the contrary conclusion.

(c) since Runa Begum

41. One of the issues raised in *R (A) v Croydon London Borough Council* [2009] UKSC 8: [2009] 1 WLR 2557 was whether a decision that a local authority makes as to whether or not to provide accommodation for a child in need under section 20(1) of the Children Act 1989 was a determination of a civil right within the meaning of article 6(1). The question was fully and carefully argued, and with that advantage I ventured to suggest that it could be asserted with reasonable confidence that the local authority's duty, which is to provide accommodation for any child in need within their area who appears to them to require accommodation as a result of the factors mentioned in that subsection, did not give rise to a civil right: para 65. I reached that conclusion after an examination of various decisions by the Strasbourg court since *Runa Begum* and Lady Hale said in para 44 that she would be most reluctant to accept that article 6 requires the judicialisation of such claims. We have now been shown a decision which did not appear on the list that was provided to the court in *Croydon*: the court's admissibility decision in *Associazione Nazionale Reduci dalla Prigionia dall'Internamento e dalla Guerra di Liberazione v Germany* (2007) 46 EHRR SE143.

42. The first case that needs to be mentioned is *Tsfayo v United Kingdom* (2006) 48 EHRR 457. The applicant had failed to renew her application for housing and council tax benefit. After taking advice she submitted a prospective claim and a backdated claim for both types of benefit. The council accepted the prospective claim but rejected the backdated one on the ground that the applicant had failed to show good cause why she had not claimed this benefit earlier. The

council's housing benefit and council tax benefit review board rejected her appeal against this decision. Her complaint was that the board was not an independent and impartial tribunal, contrary to article 6(1). The court held that disputes about entitlement to social security and welfare benefits generally fell within the scope of article 6(1) and that the article applied to the applicant's claim for housing benefit: para 40. The question whether the claim concerned the determination of the applicant's civil rights was not disputed. This was not surprising, as the case fell within the mainstream of cases such as *Salesi v Italy* (1993) 26 EHRR 187 and *Mennitto v Italy* (2000) 34 EHRR 1122 where the issue was one as to the entitlement to an amount of benefit that was not in the discretion of the public authority. The case offers important guidance as to what is needed to satisfy the requirements of article 6(1). But it takes us no further on the question whether a statutory duty to provide benefits in kind as part of a scheme of social welfare falls within the scope of that article.

43. There are however, as I said in the *Croydon* case, para 62, a number of straws in the wind since *Runa Begum* that suggest that a distinction can indeed be made between the class of social security and welfare benefits that are of the kind exemplified by *Salesi v Italy* whose substance the domestic law defines precisely and those benefits which are, in their essence, dependent upon the exercise of judgment by the relevant authority. The phrase "civil rights" is, of course, an autonomous concept: eg *Woonbron Volkshuisvestingsgroep v The Netherlands* (2002) 35 EHRR CD161. In that case it was held that decisions about state subsidies to housing associations do not raise issues about civil rights. But the phrase does convey the idea of what, in *Stec v United Kingdom* (2005) 41 EHRR SE295, para 50, the Grand Chamber referred to as "an assertable right". The court's references in *Loiseau v France* application no 46809/99, 18 November 2003 (unreported), para 7, to "a 'private right' which can be said, at least on arguable grounds, to be recognised under domestic law" and to "an individual right of which the applicant may consider himself the holder" are consistent with this approach. So too are the references in *Mennitto v Italy* (2000) 34 EHRR 1122, para 23, to "a 'right' which can be said, at least on arguable grounds, to be recognised under domestic law", where the court added:

> "The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. The outcome of the proceedings must be directly decisive for the right in question."

44. In para 64 in the *Croydon* case I said that the series of cases about the enforceability of judgments made by the courts about social housing in Russia to which Mr Goudie referred in this case, of which the latest is *Nagovitsyn v Russia* application no 6859/02, 24 January 2008 (not reported), offer no assistance as the

question whether a duty to provide social housing gives rise to a civil right before it results in a court order was not argued. I remain of that opinion. No consideration was given in any of these cases to that question, as the only point in issue was whether a final, binding judicial decision for the provision of accommodation of a specified kind should be allowed to remain inoperative: *Teteriny v Russia*, application no 11931/03, 1 July 2005, para 40. As Lady Hale said in *Croydon*, para 40, it is easy to slip into the assumption that once a right has been crystallised in a court judgment against a public authority it must amount to a civil right. References to the line of authority exemplified by cases such as *Salesi v Italy* (1993) 26 EHRR 187 and *Mennitto v Italy* (2000) 34 EHRR 1122 are conspicuous by their absence.

45. The case of *Associazione Nazionale Reduci dalla Prigionia dall'Internamento e dalla Guerra di Liberazione v Germany* (2007) 46 EHRR SE143 is of interest because it appears to be the only decision after *Stec v United Kingdom* (2005) 41 EHRR SE 295 in which the court has considered the application of article 1 of Protocol No 1. The applicants' complaint was that they had claims for compensation for forced labour under German civil law prior to the coming into force in August 2000 of a law, referred to as the Foundation Law, which excluded claims going beyond the benefits provided by the Foundation Law, as a result of which their claims were lost. The question was whether the facts of the case attracted the protection of article 14 in conjunction with article 1 of Protocol No 1. The court found that the applicants could not claim to have a legitimate expectation of compensation for their detention and forced labour and that the facts at issue did not fall within the ambit of Protocol No 1: para 75.

46. The court went on to say that this finding was not contradicted by its judgment in *Stec*, in which it was held that non-contributory social benefits funded by general taxation fell within the scope of article 1 of Protocol No 1 and that, although that provision does not grant the right to receive a social security payment of any kind, if a state does decide to establish a benefits scheme, it must do so in a manner compatible with article 14. This was because the payments of compensation were made outside the framework of social security legislation and could not be likened to the payments in *Stec*: para 77. It also held that the case was distinguishable from *Woś v Poland* (2006) 45 EHRR 667 where the applicant was held to enjoy, at least on arguable grounds, a right to compensation which fell within the ambit of article 6. But I do not detect in the court's reasoning any indication that it would hold that the right to accommodation that is in issue in this case was a civil right for the purposes of article 6(1). If anything, the comment that article 1 of Protocol No 1 does not grant the right to receive a social security payment of any kind is an indication to the contrary.

47. In *Crompton v United Kingdom*, application no 42509/05, 27 October 2009, the applicant who had joined the Territorial Army as a pay and accounts clerk was

made redundant. He claimed redress in respect of his redundancy from his Commanding Officer. There then followed a prolonged series of proceedings which took eleven years to reach their conclusion before he achieved a settlement of his claim. He contended that this was a breach of his right to a hearing within a reasonable time under article 6(1). The Government accepted that his civil rights were determined in the civil proceedings and that article 6 was applicable: para 53. Like *Tsfayo v United Kingdom* (2006) 48 EHRR 457, the case is of interest as to what is needed to satisfy the requirements of article 6(1). But it takes us no further on the question whether a statutory duty to provide benefits in kind as part of a scheme of social welfare falls within the scope of that article.

48. The other members of the court in the *Croydon* case preferred to leave open the question whether a local authority's duty under section 20(1) of the Children Act 1989 gave rise to a civil right for the purposes of article 6(1). In para 45 Lady Hale said that, if it was a civil right at all, she would be inclined to hold that it rested at the periphery of such rights. The issue having been left open in that case, the way is clear for us, if we wish, to reach a concluded view on the matter.

49. That being the present state of the authorities, I would be prepared now to hold that cases where the award of services or benefits in kind is not an individual right of which the applicant can consider himself the holder, but is dependent upon a series of evaluative judgments by the provider as to whether the statutory criteria are satisfied and how the need for it ought to be met, do not engage article 6(1). In my opinion they do not give rise to "civil rights" within the autonomous meaning that is given to that expression for the purposes of that article. The appellants' right to accommodation under section 193 of the 1996 Act falls into that category. I would hold that article 6 was not engaged by the decisions that were taken in the appellants' cases by the reviewing officer.

The article 6 review

50. The question whether the scheme of decision making that is set out in Part VII is compliant with article 6(1) was fully argued and, although I would hold that this is not necessary for the disposal of the appeals, I would like to make some brief observations about it.

51. Mr Goudie invited the court to hold that the decisions that were made in these cases were directly analogous to those that were considered in *Tsfayo v United Kingdom* (2006) 48 EHRR 457. In that case the Housing Benefit Review Board was deciding a simple question of fact, namely whether there was a good cause for the applicant's delay in making a claim for housing and council tax benefit. He said that this was a gateway question of fact, a positive answer to

which would determine her entitlement to the benefit. So too in this case, he said, there were two gateway questions of fact: was the applicant informed of the consequences of a refusal, and did she refuse the accommodation. Only when those questions were answered against her would the question arise as to the accommodation's suitability. As the court said in *Tsfayo*, para 46, the issues in cases such as *Runa Begum* required a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims. That was not so here, as no specialist knowledge was required to determine the issue whether or not the letters were received by the appellants.

52. He sought to draw support for these submissions from *Crompton v United Kingdom*, application no 42509/05, 27 October 2009, para 71 where the court said:

> "The Court has previously held that in order to determine whether the article 6-compliant second-tier tribunal had 'full jurisdiction', or provided 'sufficiency of review' to remedy a lack of independence at first instance, it was necessary to have regard to such factors as the subject-matter of the decision appealed against, the manner in which that decision was arrived at and the content of the dispute, including the desired and actual grounds of appeal."

Reference was made to *Bryan v United Kingdom* (1995) 21 EHRR 342, paras 44-47 and *Tsfayo v United Kingdom*, para 43 in which those factors were said to be among those to which it was necessary to have regard: see also the concurring opinion of Mr Bratza as he then was, in *Bryan* at p 354 where he set out a similar list of considerations. Commenting on *Tsfayo* in para 73, the court said that the determination of the issue in that case did not require any specialist expertise. Nor could the factual findings there be said to be merely incidental to the reaching of broader judgments of policy or expediency which it was for the democratically accountable authority to take. That, said Mr Goudie, was the situation in the case of these appeals. The questions that they raised were not incidental to a judgment as to whether or not accommodation was suitable, such as whether there was a lift. The subject matter of the decision was simply whether or not the letters had been received.

53. I agree that the questions that had to be decided in these cases can be distinguished from the question that had to be decided in *Runa Begum.* As the Strasbourg court acknowledged in *Crompton*, the question in that case could not be said to be purely and simply one of fact as the question whether the accommodation was suitable was one for the expert assessment of the housing officer. But the subject matter of the decision appealed against here is exactly the

same. The question whether or not the letters were received was just one among a number of questions that had to be addressed to determine whether the respondents' duty under section 193 had been discharged. They are dealt with together in section 193(5) in a way that shows that they are all interlinked. The scheme of the Act is that they are to be dealt with together both at the initial stage and, in the event of a review, by the reviewing officer. To separate out questions as to whether the formalities laid down by the subsection were complied with from those as to whether the accommodation was suitable would complicate a scheme which, in the interests of speed and economy, was designed to be simple to administer. Several of the further cases referred to in section 193(6) in which the authority ceases to be subject to the duty also raise issues that require the exercise of judgment. That is inherent in the entire structure of Part VII of the 1996 Act.

54. The way the reviewing officers approached their task in these cases shows very clearly how the scheme works in practice. For ease of administration the review is entrusted to a single officer who is equipped to deal with issues as to the suitability of the accommodation that has been declined. An answer to the question whether or not the letters were received was incidental to a more searching and judgmental inquiry into the accommodation's suitability. It was, as Lord Bingham put it in *Runa Begum*, para 9(2), a staging post on the way to the much broader judgment that had to be made. These cases are quite different from *Tsfayo*, where no broad questions requiring professional knowledge or experience had to be addressed once the question whether there was good cause had been answered. In these circumstances I would hold that the ratio of the decision in *Runa Begum* should be applied and that the absence of a full fact-finding jurisdiction in the court to which an appeal lies under section 204 does not deprive it of what it needs to satisfy the requirements of article 6(1).

55. I am fortified in this view by the absence of any indication by the Strasbourg court that it disagrees with the decision in *Runa Begum*. On the contrary, I interpret its reference to this decision in *Tsfayo*, paras 45-46 as endorsing its approach. An important factor is the way in which the House addressed the relationship between the article 6(1) concept of civil rights on the one hand and the article 6(1) requirement of an independent and impartial tribunal on the others. As Lord Bingham put it in para 5, the narrower the interpretation given to "civil rights", the greater the need to insist on a review by a tribunal exercising full powers. Conversely, the more elastic the interpretation given to that concept, the more elastic must be the approach to the independent and impartial review if the emasculation by over-judicialisation of administrative welfare schemes is to be avoided. Mr Bratza's concurring opinion in *Bryan v United Kingdom* (1995) 21 EHRR 342, 354, where he said that the requirement that a court or tribunal should have "full jurisdiction" cannot be applied mechanically, provides valuable support for this approach. Support for it is to be found also in

Crompton, paras 71-72 and in the concept of "sufficiency of review" which is now well established in the jurisprudence of the Strasbourg court.

56. A consequence of this approach has been to drive the courts to applying a test which is imprecise and uncertain. Is the case near or close to the borderline? Is it at the periphery, as Lady Hale said in *Croydon*, para 45? In *Runa Begum*, para 59, Lord Hoffmann expressed his agreement with Laws LJ's observation in *R (Beeson's Personal Representatives) v Dorset County Council* [2002] EWCA Civ 1812 that there is some danger of undermining legal certainty by excessive debates over how many angels can stand on the head of the article 6 pin. That is why I prefer to dispose of these appeals by holding that the appellants' cases are outside the scope of article 6 altogether.

57. The third issue, whether section 204 of the 1996 Act can be read compatibly with article 6(1) so as to entitle the county court to exercise a full fact-finding jurisdiction, is superseded. I would dismiss these appeals.

LORD COLLINS

58. I agree with Lord Hope that the appeals should be dismissed on the basis that a decision of the local housing authority under section 193(5) of the 1996 Act that it has discharged its duty to the applicant is not a determination of the applicant's civil rights for the purposes of Article 6(1) of the Convention. Although I agree with much of Lord Hope's reasoning, I would place less emphasis on the evaluative nature of the exercise under section 193, and greater emphasis on the nature of the applicant's rights under Part VII of the 1996 Act, and in particular on the absence of what the Strasbourg Court has characterised as an important, and perhaps necessary, feature, namely an individual economic right in the applicant.

59. The crucial developments in Strasbourg relevant to the present case are the decisions in *Ringeisen v Austria (No 1)* (1971) 1 EHRR 455; *König v Federal Republic of Germany* (1978) 2 EHRR 170; *Feldbrugge v Netherlands* (1986) 8 EHRR 425; *Deumeland v Germany* (1986) 8 EHRR 448; and *Salesi v Italy* (1993) 26 EHRR 187. It is not necessary to elaborate on them here, because they have been the subject of characteristically helpful discussion by Lord Hoffmann in *R (Alconbury Developments Ltd) v Secretary of State for the Environment* [2001] UKHL 23, [2003] 2 AC 295, at [78]-[84] and in *Runa Begum v Tower Hamlets London Borough Council* [2003] UKHL 5, [2003] 2 AC 430, at [28]-[33]; and see also Lord Millett in the latter decision at [82]-[90]. For present purposes it is only necessary to say that in *Ringeisen* and *König* the Court applied Article 6(1) to

disputes with public authorities concerning licences to, respectively, sell land and to practise as a doctor. Article 6(1) was extended to social insurance claims against the State in *Feldbrugge* and *Deumeland*, and then to welfare assistance in *Salesi.*

60. The Strasbourg Court has said that it is not necessary to give what it has called an "abstract definition" of the concept of civil rights and obligations: *Benthem v Netherlands* (1985) 8 EHRR 1 at [35]; *Feldbrugge v Netherlands* (1986) 8 EHRR 425 at [27]; and *Deumeland v Germany* (1986) 8 EHRR 448 at [61]. It is understandable that the Court has been reluctant to provide abstract definitions. What is not so comprehensible is its apparent reluctance to enunciate principles which will enable a line to be drawn between those rights in public law which are to be regarded as "civil rights" and those which are not to be so regarded.

61. The mere fact that evaluative judgments are required will not take the case out of Article 6(1). For example, in *Schuler-Zgraggen v Switzerland* (1993) 16 EHRR 405 the applicant's invalidity pension depended on a finding that she was at least 66.66% incapacitated. It was held that, despite the public law features of the case, the applicant suffered an interference with her means of subsistence, and that she was claiming an individual, economic right flowing from specific rules in legislation: at [46].

62. The reference in that decision to "an individual, economic right flowing from specific rules" in legislation reflects a thread running through the case-law in this area. It is plain from the jurisprudence of the Court that an important factor in the application of Article 6(1) in disputes with public authorities in areas which in national law would normally be regarded as public law is the assertion by the applicant of what has been variously described as "an economic right" or an "individual, economic right" or a "purely economic right."

63. The citation of passages from three decisions, among many others, will illustrate the point. In *Feldbrugge v Netherlands* (1986) 8 EHRR 425 the Court said (at [37])

> "37. To begin with, Mrs. Feldbrugge was not affected in her relations with the public authorities as such, acting in the exercise of discretionary powers, but in her personal capacity as a private individual. She suffered an interference with her means of subsistence and was claiming a right flowing from specific rules laid down by the legislation in force.

> For the individual asserting it, such a right is often of crucial importance; this is especially so in the case of health insurance benefits when the employee who is unable to work by reason of illness enjoys no other source of income. In short, the right in question was a personal, economic and individual right, a factor that brought it close to the civil sphere."

64. So also in *Deumeland v Germany* (1986) 8 EHRR 448 the Court said (at [71])

> "… [T]he widow of Mr. Deumeland Senior was not affected in her relations with the public authorities as such, acting in the exercise of discretionary powers, but in her personal capacity as a private individual. She was claiming a right flowing from specific rules laid down by the legislation in force. The right in question was a personal, economic and individual right, a factor that brought it close to the civil sphere."

65. In *Schuler-Zgraggen v Switzerland* (1993) 16 EHRR 405, referred to above, and which involved a contributory invalidity scheme, the Court said (at [46])

> "… today the general rule is that Article 6(1) does apply in the field of social insurance, including even welfare assistance …. State intervention is not sufficient to establish that Article 6(1) is inapplicable; other considerations argue in favour of the applicability of Article 6(1) in the instant case. The most important of these lies in the fact that despite the public-law features pointed out by the Government, the applicant was not only affected in her relations with the administrative authorities as such but also suffered an interference with her means of subsistence; she was claiming an individual, economic right flowing from specific rules laid down in a federal statute …"

66. In a long series of cases the Court has held that Article 6(1) applied to claims by civil servants against the State which were pecuniary and which asserted a purely or essentially economic right: e.g. *Abenavoli v Italy* Application No

25587/94 (unreported) 2 September 1997; *Couez v France* Application No 24271/94 (unreported) 24 August 1998; *Kirsten v Germany* Application No 19124/02 (unreported) 15 February 2007. So also in *Mennitto v Italy* (2000) 34 EHRR 1122 the Court emphasised that the applicant's right to an allowance as the father of a disabled child was an economic right. In *Woś v Poland* (2006) 45 EHRR 667 the Court held, applying *Salesi v Italy* and *Mennitto v Italy*, that Article 6(1) applied to claims by Polish victims of Nazi persecution against a fund set up by a Polish-German agreement. The applicant had suffered an interference with his means of subsistence and was claiming an individual, economic right flowing from specific rules laid down in the Foundation's Statute and its by-laws: at [76].

67. There is an emphasis in many of the Strasbourg cases on the pecuniary nature of the applicant's rights. But there is no reason to suppose that that is anything more than a factor in the evaluation. Consequently there is nothing in principle to prevent rights in relation to housing, whether pecuniary or not, from being civil rights for the purposes of Article 6(1).

68. Thus in *Tsfayo v United Kingdom* (2006) 48 EHRR 457 it was conceded (see at [36]) that Article 6(1) applied to a dispute concerning entitlement to housing benefit, a means-tested benefit payable towards housing costs in rented accommodation. The cases relied on by the appellants for the proposition that benefits in kind, as opposed to pecuniary benefits, are protected as civil rights under Article 6, are both cases not only where the applicants were entitled to the housing, but where the entitlement had been reflected in a court judgment. In *Teteriny v Russia* Application No 11931/03 (unreported) 30 June 2005 the applicants (husband and wife) were retired judges. Under Russian law judges were entitled to priority treatment in the allocation of flats. A court ordered the town council to provide the husband with a flat, but the order was not complied with. The complaint was that the failure to comply with the judgment violated the applicants' rights under Article 6(1), and also their right under Article 1 of the First Protocol not to be deprived of their possessions. The Russian Government made no submissions on the merits of the claim, and the Court found, without any discussion of whether the application concerned civil rights, that there had been a violation of Article 6(1) on the ground that it applied to the enforcement of judicial decisions. Although Article 1 of the First Protocol did not apply to a right to live in a property not owned by the applicant because it was not a "possession", the claim to a flat was sufficiently established by the Russian court's judgment to constitute a possession. *Sypchenko v Russia* Application No 38368/04 (unreported) 1 March 2007 and *Nagovitsyn v Russia* Application No 6859/02 (unreported) 24 January 2008 are similar cases involving, respectively, judgments awarding housing to a person suffering from infectious tuberculosis, and to a person exposed to radiation as a result of the Chernobyl explosion. None of these cases decides whether a civil right is engaged *before* a duty to provide housing provision crystallises in a court order.

69. But it does not follow from that the fact that Article 6(1) may apply in some circumstances to disputes relating to housing benefits that it applies to all such disputes. The following aspects of the homelessness legislation in Part VII of the 1996 Act (on which see the valuable article by Loveland, *Does Homelessness Decision Making Engage Article 6(1) of the European Convention on Human Rights?* [2003] EHRLR 176) are important. The duties of the local authority arise only if a person is homeless. A person is homeless if he has no accommodation available for his occupation. He may be in accommodation but nevertheless homeless if the accommodation is not such that it would be reasonable for the person to occupy (section 175(1), (3)). Accommodation is regarded as available for a person's occupation only if it is available for occupation by them together with (a) any other person who normally resides with him as a member of his family; or (b) any other person who might reasonably be expected to reside with him: section 176, as amended. It is not reasonable for a person to continue to occupy accommodation if it is probable that this will lead to domestic violence, or other violence, against him: section 177.

70. Certain homeless persons are treated as having a priority need for accommodation, including, persons who are vulnerable as a result (inter alia) of old age or mental illness: section 189(1)(c). Certain homeless persons are treated as becoming homeless intentionally, where they deliberately do or fail to do anything in consequence of which they cease to occupy accommodation which is available for their occupation and which it would have been reasonable for them to continue to occupy: section 191(1). Where a person is intentionally homeless but has a priority need, the local authority has a duty to secure that accommodation is available for his occupation for such period as they consider will give him a reasonable opportunity of securing accommodation for his occupation, and provide him with advice and assistance in securing accommodation: section 190(2). But if he is not in priority need, the duty is limited to advice and assistance: section 190(3).

71. Where a person is homeless, but not in priority need and not intentionally homeless, the local authority is under a duty to provide advice and assistance (section 192(1)) and "may secure that accommodation is available for occupation by the applicant" (section 192 (3)).

72. Section 193 sets out the duties to persons in priority need, in particular the duty to "secure that accommodation is available for occupation by the applicant" (section 193(2)). The consequence is that the local authority has to investigate whether applicants are homeless, whether they are in priority need, and whether they are intentionally homeless. It is only in relation to applicants with priority need that the local authority comes under the full duty to secure accommodation. By section 193(5) the local authority ceases to be subject to the duty if the

applicant refuses an offer of accommodation which the authority is satisfied is suitable.

73. As Lord Hope points out (at [27]) the content of the statutory duty lacks precision. There is no right to any particular accommodation. The duty is to secure that accommodation is available. In my judgment, these factors together with the essentially public nature of the duty mean that the duty does not give rise to an individual economic right, and a dispute concerning the question whether the applicant has been properly notified of the consequences of refusal of accommodation is not within Article 6(1).

LORD KERR

74. I agree with Lord Hope and Lord Collins that this appeal should be dismissed. One can recognise, however, the initial attraction of the argument that the right involved here was a civil right within the autonomous meaning of article 6. To be provided with accommodation in the circumstances in which the appellants find themselves may be argued to constitute a statutory entitlement; the right to accommodation is conferred by section 193 (2) of the 1996 Act and therefore has a statutory base; it endures until determined by the occurrence of one of the events provided for in the succeeding provisions of section 193; and it can be argued to fulfil what have been recognised as the necessary criteria for an article 6 right. In particular, the right can be said to be an economic right; it is individual or personal to the applicant; it is the product of or flows from the application of rules; those rules are specific and they are laid down in statute. But I have been persuaded by the respondent's argument that the case-law points unmistakably in the opposite direction and I think that now is the time to recognise its effect.

75. I have not found it easy to reach a principled basis for the distinction between social security payments and social welfare provision for both require the expenditure of public resources; both provide a valuable resource to the recipient; and both are activated by a need on the part of the beneficiary. But, the lack of similarity to (or, rather, the distinction that can be made with) a private insurance scheme; and the dependence on discretionary judgments not only to establish entitlement but also to discharge the state's obligation and the way in which the obligation can be met all combine to make this a different type of case from the *Salesi* (*Salesi v Italy* (1993) 26 EHRR 187) or *Mennitto* (*Mennitto v Italy* (2000) 34 EHRR 1122) models. This is not an assertable right as that term was used in *Stec v UK* (2005) 41 EHRR SE 295.

76. On the question of whether judicial review provides a sufficient review by an independent and impartial tribunal, I confess to some feelings of unease about the way in which this issue has been tackled in the past. At a fundamental level, the purpose of the article 6 review might be said to be to nullify or offset the effect of the established lack of the appearance of partiality. In *Crompton v UK* 27 October 2009, application 42509/05, at para 71, the purpose was described in this way:

> "The Court has previously held that in order to determine whether the Article 6-compliant second-tier tribunal had 'full jurisdiction', or provided 'sufficiency of review' *to remedy a lack of independence at first instance*, it was necessary to have regard to such factors as the subject-matter of the decision appealed against, the manner in which that decision was arrived at and the content of the dispute, including the desired and actual grounds of appeal (see [*Bryan v the United Kingdom* (1995) 21 EHRR 342, paras 44 to 47 and *Tsfayo v Untied Kingdom* (2006) 48 EHRR 457, para 43]" [My emphasis.]

77. The underlying purpose is identified in this passage as to "remedy a lack of independence at first instance". In *Tsfayo v United Kingdom* (2006) 48 EHRR 457 this was also given as the purpose of the article 6 review – see para 43, "sufficiency of review to remedy a lack of independence at first instance". The means by which the examination takes place *i.e.* having regard to such factors as the subject-matter of the decision appealed against; the manner in which that decision was arrived at; and the content of the dispute must be distinguished from the *purpose* of the exercise.

78. Where the decision involves an evaluative judgment one can quite see that a judicial review challenge would be appropriate but where a conclusion on a simple factual issue is at stake, judicial review does not commend itself as an obviously suitable means by which to rid the original decision of its appearance of bias. In particular, judicial review might be said to be a singularly inapt means of examining issues of credibility which lie at the heart of the present appeals. Judicial review *is* suitable to deal with issues such as the rationality of the judgment reached; whether relevant factors have been taken into account; whether sufficient opportunity has been given to the affected party to make representations etc. All of these take place on – if not an agreed factual matrix – at least one in which the areas of factual controversy are confined. It is quite different when one comes to decide a sharply conflicting factual issue.

79. *But*, the decision in *Runa Begum v Tower Hamlets LBC* [2003] 2 AC 430 continues to occupy this particular field. The observations of Lord Bingham (in paragraph 10) and of Lord Hoffmann in paragraphs 59 *et seq* effectively conclude the arguments on the second issue arising on the appeal. There is also much force in Ms Lieven QC's argument that Part VII decisions invariably partake of factual inquiry and discretionary judgment. The nature of the scheme as a whole, therefore, dictates the answer.

80. I agree with Lord Collins that the Russian cases do not assist in reaching a conclusion on the second issue. There is much to be said for Lord Brown's suggestion (made during argument) that even where one litigates a claim that does not itself involve an article 6 civil right, one may nevertheless assert that such a right arises where the judgment obtained on the claim which does not fall within article 6 remains unsatisfied. But, it is quite clear that the European Court of Human Rights did not in the Russian cases address the question whether cases such as *Salesi* and *Mennitto* should be extended. It is impossible to conclude that the Strasbourg court intended to radically expand the category of article 6 rights by these judgments.