

# PROPORTIONALITY TEST – EQUALITY ACT AND ARTICLE 8: AKERMAN-LIVINGSTONE V ASTER COMMUNITIES LIMITED - MARCH 2015

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The Supreme Court in *Akerman-Livingstone v Aster Communities Limited* [2015] UKSC 15 gave some clarity on the approach to be used when determining proportionality under the Equality Act 2010, compared with the approach to take when considering proportionality under Article 8 of the European Convention on Human Rights. Despite being unable to rescue the appellant on this occasion, the court's distinction may be of encouragement to litigants seeking to rely on the Equality Act in the future.

## Background

The case involved the respondent, a housing association, seeking to enforce a possession order against the appellant, an occupier of temporary social housing.

The appellant's case was that he had not been able to accept any of the multiple offers of alternative properties because of his mental disability, and that he was therefore unlawfully discriminated against in that he suffered unfavourable treatment (eviction) arising in consequence of his disability (s 15 Equality Act). He argued that if discrimination was proved the respondent's steps to evict the appellant would be unlawful under s 35(1)(b) Equality Act. The respondent's case was that there was no unlawful discrimination because the eviction was a proportionate means of achieving a legitimate aim.

The first instance judge, in dismissing the appellant's argument, commented that the test of proportionality under s 15(1)(b) was the same as when considering defences under Article 8 as that laid down in *Manchester City Council v Pinnock* [2011] 2 AC 104 and *Hounslow London Borough Council v Powell* [2011] 2 AC 186.

The Supreme Court disagreed. In her judgment, Lady Hale made it clear that there was a necessary distinction between Equality Rights and Convention rights when considering what was proportionate or not. Although agreeing that there would be instances where a 'discrimination defence' under the Equality Act could be summarily dealt with (see Lord Neuberger at para 59), it was nevertheless correct that the 4-stage test must be worked through when considering the question of proportionality (Lady Hale at para 28) in relation to the objective justification defence.

This approach sits in direct contrast to the approach of the court in *Pinnock* and *Powell* where the 'structured approach' was rejected as the means of determining proportionality in Article 8 cases.

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