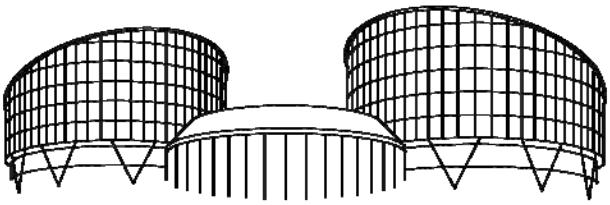

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF BAH v. THE UNITED KINGDOM

(Application no. 56328/07)

JUDGMENT

STRASBOURG

27 September 2011

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Bah v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Lech Garlicki, *President,*
Nicolas Bratza,
Ljiljana Mijović,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Vincent A. De Gaetano, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 6 September 2011,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 56328/07) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Sierra Leonean national, Ms Husenatu Bah ("the applicant"), on 23 November 2007.

2. The applicant was represented by Pierce Glynn Solicitors, a firm of lawyers practising in London. The United Kingdom Government ("the Government") were represented by their Agent, Mr D. Walton, of the Foreign and Commonwealth Office.

3. The applicant alleged that she had been a victim of a violation of Article 14 of the Convention, taken in conjunction with Article 8. On 1 December 2009, the Acting President of the Chamber decided to give notice of the application to the Government.

4. The Chamber having decided, after consulting the parties, that no hearing on the merits was required (Rule 59 § 3 *in fine*), the parties replied in writing to each other's observations. In addition, third-party comments were received from the Equality and Human Rights Commission, which had been given leave by the Acting President of the Chamber to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3). The respondent Government replied to those comments (Rule 44 § 6).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The facts of the case, as submitted by the applicant, may be summarised as follows.

6. The applicant arrived in the United Kingdom in 2000 as an asylum seeker from Sierra Leone. Although her asylum claim was refused, she was granted exceptional leave to remain and then, in 2005, indefinite leave to remain. After she obtained indefinite leave to remain, she applied to have her son Mohamed Saliou Jalloh, a Sierra Leonean national born in 1994, join her in the United Kingdom. Her son arrived in January 2007, with conditional leave to remain in the United Kingdom, the condition being that he must not have recourse to public funds. He is considered as being "subject to immigration control" within the meaning of the Asylum and Immigration Act 1996, as is the applicant (see paragraph 12 below).

7. At the time of her son's arrival in the United Kingdom, the applicant was renting a room in a private home. However, her landlord was unwilling to accommodate her son as well, and informed the applicant shortly after her son's arrival that they would have to move out by 31 March 2007. The applicant applied to the London Borough of Southwark Council for assistance on 9 February 2007, on the basis that she had become unintentionally homeless. An unintentionally homeless person with a minor child would ordinarily qualify as being in priority need pursuant to section 189 of the Housing Act 1996 (see paragraph 13 below), and would thus be provided with suitable housing, usually within the locality. Those in priority need are considered to be a class of persons to whom reasonable preference must be given in the allocation of social housing. As there is a significant shortage of social housing in London, those in priority need would generally be placed in temporary accommodation until appropriate social housing became available. In the case of the applicant, however, as her son was subject to immigration control, he was disregarded by the Council in the determination of whether the applicant was in priority need, in accordance with section 185(4) of the Housing Act 1996. On 14 March 2007 the Council decided that the applicant was not therefore in priority need and not entitled to housing.

8. The applicant requested a review of this decision, which was carried out by a senior officer, who reiterated that persons subject to immigration control are not eligible for housing assistance and that persons who are not eligible for housing assistance shall be disregarded when determining whether another person has a priority need for accommodation. As the applicant's son was not eligible, the applicant did not have a priority need. Consideration was also given to the question of whether the applicant was

vulnerable for any other reason; however, it was found that the applicant was not hindered in the performance of everyday tasks by any medical problems and that she was no less able to fend for herself than the average person. There was therefore no special reason to find that she was entitled to homelessness assistance due to vulnerability. On 24 May 2007 the original decision was upheld.

9. The Council assisted the applicant to find a private sector tenancy in September 2007, which she accepted. The applicant and her son were not therefore at any point actually homeless. However, the private tenancy was more expensive than a social tenancy would have been, and was outside the Borough of Southwark and therefore far from the applicant's previous employment and her son's school. The applicant claimed that she had to give up her job after three months of commuting as she was unable to cope with the travel required, and that her son spent four hours per day travelling to and from school.

10. The applicant, who had remained on the waiting list for social housing in the Borough of Southwark, obtained an offer of a social tenancy of a one-bedroom flat in March 2009. She and her son therefore moved back to Southwark.

II. RELEVANT DOMESTIC LAW

1. Asylum and Immigration Act 1996

11. Section 9 sub-sections 1 and 2 of the Asylum and Immigration Act 1996 provide:

> "9. Entitlement to housing accommodation and assistance
>
> (1) Each housing authority shall secure that, so far as practicable, no tenancy of, or licence to occupy, housing accommodation provided under the accommodation Part is granted to a person subject to immigration control unless he is of a class specified in an order made by the Secretary of State.
>
> (2) A person subject to immigration control—
>
> (a) shall not be eligible for accommodation or assistance under the homelessness Part; and
>
> (b) shall be disregarded in determining, for the purposes of that Part, whether another person—
>
> (i) is homeless or is threatened with homelessness; or
>
> (ii) has a priority need for accommodation,
>
> unless he is of a class specified in an order made by the Secretary of State..."

12. Section 13(2) of the same act defines "a person subject to immigration control" as being a person who under the Immigration Act 1971 requires leave to enter or remain in the United Kingdom (whether or not such permission has been given).

2. Housing Act 1996

13. The Housing Act 1996, as amended by Schedule 15 of the Housing and Regeneration Act 2008, provides insofar as relevant:

> "184. Inquiry into cases of homelessness or threatened homelessness
>
> (1) If the local housing authority have reason to believe that an applicant may be homeless or threatened with homelessness, they shall make such inquiries as are necessary to satisfy themselves –
>
> (a) whether he is eligible for assistance, and
>
> (b) if so, whether any duty, and if so what duty, is owed to him under the following provisions of this Part.
>
> ...
>
> (3A) If the authority decide that a duty is owed to the applicant under section 193(2) or 195(2) but would not have done so without having had regard to a restricted person, the notice under subsection (3) must also –
>
> (a) inform the applicant that their decision was reached on that basis,
>
> (b) include the name of the restricted person,
>
> (c) explain why the person is a restricted person, and
>
> (d) explain the effect of section 193(7AD) or (as the case may be) section 195(4A)
>
> ...
>
> (7) In this Part "a restricted person" means a person –
>
> (a) who is not eligible for assistance under this Part,
>
> (b) who is subject to immigration control within the meaning of the Asylum and Immigration Act 1996, and
>
> (c) either –
>
> (i) who does not have leave to enter or remain in the United Kingdom, or

(ii) whose leave to enter or remain in the United Kingdom is subject to a condition to maintain and accommodate himself, and any dependents, without recourse to public funds.

185. Persons from abroad not eligible for housing assistance.

(1) A person is not eligible for assistance under this Part if he is a person from abroad who is ineligible for housing assistance.

(2) A person who is subject to immigration control within the meaning of the Asylum and Immigration Act 1996 is not eligible for housing assistance unless he is of a class prescribed by regulations made by the Secretary of State.

...

(4) A person from abroad who is not eligible for housing assistance shall be disregarded in determining for the purposes of this Part whether a person falling within subsection (5) –

(a) is homeless or threatened with homelessness, or

(b) has a priority need for accommodation.

(5) A person falls within this subsection if the person –

(a) falls within a class prescribed by regulations made under subsection (2); but

(b) is not a national of an EEA State or Switzerland.

...

189. Priority need for accommodation.

(1) The following have priority need for accommodation –

(a) a pregnant woman or a person with whom she resides or might reasonably be expected to reside;

(b) a person with whom dependent children reside or might reasonably be expected to reside;

(c) a person who is vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason, or with whom such a person resides or might reasonably be expected to reside;

(d) a person who is homeless or threatened with homelessness as a result of an emergency such as flood, fire or other disaster.

...

193. Duty to persons with priority need who are not homeless intentionally.

(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.

...

(3B) In this case "a restricted case" means a case where the local housing authority would not be satisfied as mentioned in subsection (1) without having had regard to a restricted person.

...

(7AA) In a restricted case the authority shall also cease to be subject to the duty under this section if the applicant, having been informed of the matters mentioned in subsection (7AB) –

(a) accepts a private accommodation offer, or

(b) refuses such an offer

(7AB) The matters are –

(a) the possible consequence of refusal of the offer, and

(b) that the applicant has the right to request a review of the suitability of the accommodation."

3. Allocation of Housing and Homelessness (Eligibility) (England) Regulations 2006, SI 2006/1294

14. The Regulations, made by the Secretary of State in the exercise of powers conveyed by certain sections of the Housing Act 1996, referred to above, provide insofar as relevant:

"3. Persons subject to immigration control who are eligible for an allocation of housing accommodation

The following classes of persons subject to immigration control are persons who are eligible for an allocation of housing accommodation under Part 6 of the 1996 Act –

(a) Class A – a person who is recorded by the Secretary of State as a refugee within the definition in Article 1 of the Refugee Convention and who has leave to enter or remain in the United Kingdom;

(b) Class B – a person –

(i) who has exceptional leave to enter or remain in the United Kingdom granted outside the provision of the Immigration Rules; and

(ii) who is not subject to a condition requiring him to maintain and accommodate himself, and any person who is dependent on him, without recourse to public funds;

(c) Class C – a person who is habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland and whose leave to enter or remain in the United Kingdom is not subject to any limitation or condition, other than a person –

(i) who has been given leave to enter or remain in the United Kingdom upon an undertaking given by his sponsor;

(ii) who has been resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland for less than five years beginning on the date of entry or the date on which his sponsor gave the undertaking in respect of him, whichever date is the later; and

(iii) whose sponsor or, where there is more than one sponsor, at least one of whose sponsors, is still alive;

...

5. Persons subject to immigration control who are eligible for housing assistance.

(1) The following classes of persons subject to immigration control are persons who are eligible for housing assistance under Part 7 of the 1996 Act –

(a) Class A – a person who is recorded by the Secretary of State as a refugee within the definition in Article 1 of the Refugee Convention and who has leave to enter or remain in the United Kingdom;

(b) Class B – a person –

(i) who has exceptional leave to enter or remain in the United Kingdom granted outside the provision of the Immigration Rules; and

(ii) who is not subject to a condition requiring him to maintain and accommodate himself, and any person who is dependent on him, without recourse to public funds;

(c) Class C – a person who is habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland and whose leave to enter or remain in the United Kingdom is not subject to any limitation or condition, other than a person –

(i) who has been given leave to enter or remain in the United Kingdom upon an undertaking given by his sponsor;

(ii) who has been resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland for less than five years beginning on the date of entry

or the date on which his sponsor gave the undertaking in respect of him, whichever date is the later; and

(iii) whose sponsor or, where there is more than one sponsor, at least one of whose sponsors, is still alive."

4. Westminster City Council v. Morris *[2005] EWCA Civ 1184*

15. On 14 October 2005, the Court of Appeal handed down its judgment in this case, which involved a woman who was a British citizen and her daughter who was subject to immigration control. The local authority had refused to treat mother and daughter as being in priority need of homelessness assistance when they became unintentionally homeless, due to the daughter's immigration status. The Court of Appeal held that Part VII of the Housing Act 1996 and specifically sections 188, 189 and 193 were designed to protect the family lives of the homeless by ensuring that families who became unintentionally homeless were accommodated together. It therefore fell within the ambit of Article 8 of the Convention. A majority of the Court of Appeal found that the basis of distinction between Mrs Morris, on the one hand, and the parent of a child who was not subject to immigration control, on the other, was either the national origin of the child, or a combination of statuses including nationality, immigration status, settled residence and social welfare. It was not considered necessary to decide finally whether there was one sole factor on which the distinction was based; the important point was that nationality was amongst the factors. As such, very weighty or solid justification was required if the distinction was to be found to be compatible with the Convention. The Court of Appeal found that, regardless of the precise basis of the differential treatment, the justification offered by the Government – the need to preserve immigration control and to prevent "benefits tourism" – was not sufficiently weighty, nor was it a proportionate and reasonable response to the perceived problem. The discouraging of "benefits tourism" or the "over-staying" of dependent relatives was an intelligible policy goal, but was not served by legislative measures which discouraged British citizens or those with a right of abode from coming to or remaining in the United Kingdom, because they could not accommodate their dependent relatives who were also lawfully permitted to be in the United Kingdom. Section 185(4) was found not to be a proportionate or even logical response to the perceived problem. The Court of Appeal observed that it was not apparent that the Government or Parliament had considered the potentially discriminatory impact of the legislation; however, even if such impact had been considered, it could not be considered to fall within even the very wide margin of appreciation that the Government enjoyed with regard to such matters.

16. The Court of Appeal therefore made a declaration of incompatibility in the following terms:

> "That s. 185(4) of the Housing Act 1996 is incompatible with art. 14 of the Convention to the extent that it requires a dependent child of a British citizen, if both are habitually resident in the United Kingdom, to be disregarded when determining when a British citizen has a priority need for accommodation when that child is subject to immigration control."

17. The case of Mrs Morris was considered by the Court of Appeal alongside that of Mr Badu, who had indefinite leave to remain in the United Kingdom but was considered by the court to have "equivalent status" to British citizenship (see paragraph 60 of the judgment). He too was excluded by section 185(4) from establishing a priority need for housing assistance because his child was subject to immigration control. Unlike Mrs Morris, however, at the time of the Court of Appeal's judgment, he had an ongoing need for assistance, being still prospectively homeless. This situation would not be alleviated by the declaration of incompatibility, since the impugned provision would remain in force until changed by Parliament. Mr Badu's case was therefore remitted by the Court of Appeal to the relevant local authority for reconsideration, with specific regard to whether he could be provided with accommodation under powers conferred upon the authority by other legislation.

18. As a result of the declaration of incompatibility in *Westminster v. Morris*, the Government amended the Housing Act 1996 by means of Schedule 15 to the Housing and Regeneration Act 2008, as noted above. The changes addressed the incompatibility insofar as British citizens are concerned but meant that a person such as Mr Badu or indeed the applicant in this case, with indefinite leave to remain, would still not be considered to be in priority need of housing assistance if his or her eligibility was dependent on another person who was from abroad and subject to immigration control, such as the applicant's son. Moreover, in the case of a British citizen like Mrs Morris or an European Economic Area (EEA) or Swiss national, where the priority need resulted from a dependent child who was subject to immigration control, the local authority's duty to provide accommodation would be satisfied by the local authority procuring an offer of a tenancy from a private landlord, whether or not the applicant chose to accept such an offer. In cases where there was a dependent child who was not subject to immigration control, by contrast, the local authority's duty would not be discharged by procuring such an offer if the applicant chose not to accept it.

THE LAW

1. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

19. The applicant complained of a violation of Article 14 of the Convention read together with Article 8.

Article 8 of the Convention provides that:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as 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 and morals, or for the protection of the rights and freedoms of others."

20. Article 14 provides that:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. Admissibility

21. The Government submitted that the complaint was manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and therefore inadmissible. The Court, however, finds that the application is not manifestly ill-founded, nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

a) The Government's submissions

22. The Government submitted that, following the declaration of incompatibility made by the Court of Appeal in *Westminster v. Morris* (see paragraphs 15-18 above), the relevant provisions of the Housing Act 1996 had been amended by Schedule 15 of the Housing and Regeneration Act 2008 (see paragraph 13 above).

23. However, the declaration of incompatibility made in *Westminster v. Morris*, and the legislative changes enacted as a result of that declaration, did not apply to the applicant who was not a British citizen, but only had indefinite leave to remain in the United Kingdom and was subject to immigration control. Although the applicant was eligible for housing assistance pursuant to Regulation 5(1)(c) of the Regulations cited at paragraph 14 above, she had been and still was unable, both prior to and after the legislative amendments, to rely on her son who was also subject to immigration control to convey priority need for accommodation.

24. On the facts of the applicant's case, the Government observed that she would not have been automatically entitled to social housing even had she been accepted as having a priority need. No individual had an entitlement to social housing under the Housing Act 1996. The applicant, if considered to be in priority need, would have fallen into a class of persons entitled to be given reasonable preference for an allocation of social housing. However, given the scarcity of such housing in London, she would most likely have been granted temporary accommodation until an offer of social housing could be made. The Government further observed that at the time the applicant sought assistance, those identified as homeless spent on average 21 months in temporary accommodation, which was frequently property leased by the local authority from private landlords and then sub-let to tenants and could therefore be more expensive to tenants than even the private sector tenancy obtained by the applicant, given the costs of leasing the property. Given that the applicant obtained an offer of social housing in March 2009, the Government submitted that she spent a similar amount of time in privately leased accommodation as she would have done had she been granted temporary accommodation and that it is possible that she would have paid a higher rent in such temporary accommodation than she had had to pay in the private accommodation she found with the assistance of her local authority. The Government emphasised the fact that the applicant and her son were never actually homeless and that there was other legislation which required local authorities to provide accommodation or other assistance to children who were in need. In the event of the applicant's son actually becoming homeless, then, the Government argued that there were means other than section 193 of the Housing Act 1996 by which he could have been provided with housing.

25. As regards the applicant's complaint, the Government accepted that its subject matter fell within the ambit of Article 8. However, the Government contended that the differential treatment accorded to the applicant as a result of her son's immigration status did not fall under Article 14, because the ground for differentiating was not his nationality or national origin but his immigration status, which was not an "other status" within the terms of Article 14. Immigration status being an entirely legal

status and not a "personal characteristic", the Government maintained that there was no discrimination falling foul of Article 14.

26. In the alternative, and if the different treatment was found to be discrimination within the meaning of Article 14, the Government submitted that since the ground of discrimination was immigration status rather than nationality, significantly less justification was required. This was because discrimination based exclusively on nationality was plainly suspect and required close scrutiny, whereas discrimination based on immigration status flowed from the State's need to control and monitor immigration. Given that the case concerned the allocation of scarce resources, namely social housing, the Government contended that they enjoyed a wide margin of appreciation and that Parliament was best placed to reach policy decisions dealing with the allocation.

27. The justification offered by the Government for the differential treatment imposed by the legislation was the need to allocate scarce resources and the preference in so allocating for those with the greatest level of connection to the United Kingdom, which the Government submitted was possessed by British and EEA citizens rather than those with indefinite leave to remain in the United Kingdom. The Government took the view that it was wholly reasonable and proportionate for the State to limit the provision of a scarce and expensive resource such as housing to those whose priority need flowed from their and their dependants' fixed and permanent rights to be present in the United Kingdom. It would have been unacceptable, according to the Government, if the applicant had gained priority status by reason of her son, whose permission to be in the United Kingdom was expressly conditional upon his having no recourse to public funds. The Government contended that their policy of differential treatment in the allocation of housing, dependent upon a person's immigration status, was plainly proportionate.

28. The Government observed that the applicant's comparison between EEA nationals and those with indefinite leave to remain was irrelevant, since it was justifiable to treat EEA nationals more favourably than others due to the nature of the "special legal order" formed by the European Union and the special status thereby conferred upon its nationals. As to British citizens, it was fair to assume that, as a general rule, they had a greater connection to the United Kingdom than those with indefinite leave to remain.

b) The applicant's submissions

29. The applicant maintained that, contrary to the Government's submission, the underlying ground of discrimination was nationality even if the official ground was immigration status, and pointed out, with reference to the Court's judgment in *Gaygusuz v. Austria*, 16 September 1996, § 42, *Reports of Judgments and Decisions* 1996-IV, that very weighty reasons

were required to justify such discrimination. In support of the contention that the ground of discrimination was nationality, the applicant cited the case of *Westminster v. Morris* (see paragraphs 15-18 above), in which the majority of the Court of Appeal had found, at paragraphs 52 and 82 of the judgment, that nationality was the underlying ground on which the distinction was drawn. The applicant submitted that the Court should accept the reasoning of the Court of Appeal as determinative.

30. The applicant criticised the justification offered by the Government for the differential treatment of those with a dependent child subject to immigration control and those with a dependent child not subject to such control, or, since the legislative amendments following *Westminster v. Morris*¸ British, EEA or Swiss nationals with a dependent child subject to immigration control and those who were themselves subject to immigration control and whose dependent child was too. Specifically, the applicant pointed out that it was illogical to make a distinction based on purportedly different levels of connection to the United Kingdom in respect of priority need for accommodation in times of homelessness, when no such distinction was drawn for the purposes of allocation of housing. The applicant, with indefinite leave to remain and irrespective of her child's conditional immigration status, was eligible for social housing. The applicant contended therefore that if she had a sufficient level of connection to the United Kingdom to be eligible for housing, she should also have a sufficient level of connection to be considered in priority need of assistance. If the distinction made by the legislation on priority need were genuinely justified by the scarcity of social housing, as the Government claimed, then the distinction would be extended to the allocation of long-term social housing and those in the applicant's position, who could not be considered to be in priority need of assistance because of their child's immigration status, would not be eligible for long-term housing either.

31. The applicant further submitted that the Government's position did not make sense since it could not be argued that EEA nationals, as a class of persons, had a greater degree of connection to the United Kingdom than those with indefinite leave to remain. Persons with indefinite leave to remain were treated for all practical purposes, including the allocation of social benefits, in the same manner as British citizens; whereas EEA nationals' right to be in the United Kingdom and their entitlement to social benefits were dependent on their being and remaining "qualified persons," such as workers. The applicant therefore contended that those with indefinite leave to remain had a greater level of connection to the United Kingdom than EEA nationals and that the Government's justification for treating the two classes of person differently was invalid.

32. Finally, the applicant pointed to the Court of Appeal's consideration of Mr Badu's appeal in *Westminster v. Morris*. Like the applicant, he was not a British citizen but had indefinite leave to remain in the United

Kingdom. The Court of Appeal noted at paragraph 62 of the judgment that Mr Badu had "equivalent status" to citizenship. The applicant endorsed this characterisation of indefinite leave to remain. She contended that *Westminster v. Morris* had been correctly decided by the Court of Appeal and that the reasoning employed in that case applied with equal force both to British citizens and to those with indefinite leave to remain. In the view of the applicant, by amending the legislation so that it only improved the position for those with citizenship (or nationals of other EEA states and Switzerland), the Government had failed to give full force to the declaration of incompatibility made by the Court of Appeal.

c) The third party intervention

33. The Equality and Human Rights Commission (EHRC) characterised this case as involving ongoing structural discrimination in the domestic housing legislation. At the time the application was lodged, no legislative changes had been made in response to the decision of the Court of Appeal in *Westminster v. Morris*. Changes were enacted in 2008. However, the EHRC criticised the Government's "inadequate and grudging approach to seeking to correct the breach of Article 14" identified by the Court of Appeal in *Westminster v. Morris*, noting in particular the length of the period during which no steps had been taken to amend the impugned legislation; the failure to conduct any monitoring of the impact of the legislative provisions; and the eventual changes to the legislation which, in the view of the EHRC, replaced the old form of discrimination with a new form. Specifically, the legislation continued to differentiate between households including a child who was subject to immigration control – now termed a "restricted person" by section 184(7) of the Housing Act 1996 – and households which did not include a "restricted person."

34. The EHRC argued that the justification offered by the Government for the new provisions was no different from or any more coherent than that in respect of the previous provisions. The nationality of the dependent child who triggered a priority need for assistance on the part of its parent was simply not relevant, in the view of the EHRC, to the underlying policy objective behind Part 7 of the Housing Act 1996, which was keeping families in need together. Even if there were a logical link between discriminating against those whose dependent child was subject to immigration control and protecting the limited stock of social housing, it would not amount to the weighty justification necessary to render the discrimination acceptable.

2. The Court's assessment

a) General principles

35. The Court recalls that Article 14 complements the other substantive provisions of the Convention and the Protocols, but has no independent existence since it applies solely in relation to the "enjoyment of the rights and freedoms" safeguarded by those provisions. The application of Article 14 does not necessarily presuppose the violation of one of the substantive Convention rights. It is sufficient – and also necessary – for the facts of the case to fall "within the ambit" of one or more of the Convention Articles (see *Burden v. the United Kingdom* [GC], no. 13378/05, § 58, ECHR 2008-). The prohibition of discrimination in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and Protocols require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention article, for which the Contracting State has voluntarily decided to provide. This principle is well entrenched in the Court's case-law. It was expressed for the first time in the *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium (Merits)* (judgment of 23 July 1968, Series A no. 6, § 9).

36. The Court has also established in its case-law that only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of Article 14 (*Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976, § 56, Series A no. 23). Moreover, in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (*D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007; *Burden v. the United Kingdom* [GC], cited above, § 60). Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (*Burden v. the United Kingdom* [GC], cited above, § 60).

37. The scope of this margin will vary according to the circumstances, the subject matter and the background (see *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 61, 16 March 2010). As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of nationality or sex as compatible with the Convention (see respectively *Gaygusuz,* cited above, § 42; and *Van Raalte v. the Netherlands*, 21 February 1997, § 39,

Reports of Judgments and Decisions 1997-I). On the other hand, a wide margin is usually allowed to the Contracting State under the Convention when it comes to general measures of economic or social strategy (see, for example, *James and Others v. the United Kingdom*, 21 February 1986, § 46, Series A no. 98, and *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, 23 October 1997, § 80, *Reports* 1997-VII). Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation" (*Stec and Others v. the United Kingdom,* [GC], nos. 65731/01 and 65900/01, § 52, ECHR 2006).

b) Application to the facts of the case

38. The Court recalls that the applicant claims that she was impermissibly discriminated against because, as she was not classed as being in priority need of accommodation when threatened with homelessness, she was not granted reasonable preference for social housing and provided with temporary accommodation until such social housing became available. Instead, she was assisted to find a private sector tenancy outside the Borough of Southwark by her local authority and subsequently obtained a social tenancy back in the Borough of Southwark seventeen months later when one became available.

39. As a preliminary note, the Court cannot make a finding as to the conformity with the Convention of the new legislative scheme put in place by the amendments made subsequent to *Westminster v. Morris*, since it was the old scheme that applied to the applicant and gave rise to the facts of this case. The Court observes that, regardless of the amendments, the applicant's case would not have been handled any differently under the new legislation, since as she is not a British citizen or an EEA or Swiss national, the new limited duty brought in by section 193(7AA) of the Housing Act 1996 would not have applied to her. She would still not have been eligible for homelessness assistance under the amended legislation. However, the Court must confine itself to an examination of the compliance or otherwise with the Convention of the legislation as it applied in the applicant's case.

40. Having thus defined the scope of its examination, the Court begins by observing that there is no right under Article 8 of the Convention to be provided with housing (see *Chapman v. the United Kingdom* [GC], no. 27238/95, § 99, ECHR 2001-I). However, as the Court has previously held with regard to other social benefits (see, for example, *Stec and Others v. the United Kingdom* (dec.) [GC], cited above, § 55), where a Contracting State decides to provide such benefits, it must do so in a way that is compliant with Article 14. The impugned legislation in this case obviously

affected the home and family life of the applicant and her son, as it impacted upon their eligibility for assistance in finding accommodation when they were threatened with homelessness. The Court therefore finds that the facts of this case fall within the ambit of Article 8. In so finding, the Court notes the conclusion of the Court of Appeal at paragraph 25 of *Westminster v. Morris* (see paragraphs 15-18 above) and further notes the fact that the Government agree that Article 8 applies to the instant case. The Court must therefore go on to consider whether the applicant was impermissibly discriminated against within the meaning of Article 14.

41. As observed at paragraph 36 above, only where there is differential treatment, based on an identifiable characteristic or "status", of persons in analogous or relevantly similar positions, can there be discrimination. Dealing first with the question of who is the appropriate comparator to this applicant, or the person to whom she was in an analogous situation, the Court notes that the applicant does not make an express submission in this regard. However, given her reliance on the case of *Westminster v. Morris*, cited above, and contention that persons with indefinite leave to remain in the United Kingdom have an equivalent status to those with British citizenship, the Court assumes that she may well consider herself to have been in a relevantly similar position to a person, such as Mrs Morris, who was a British citizen with a child who was subject to immigration control. The Court recalls, however, its finding at paragraph 39 above that it is only the position under the Housing Act 1996 prior to its amendment that is relevant to the consideration of the applicant's case. The Court further notes that a person such as Mrs Morris would have been treated in exactly the same way as the applicant under the relevant provisions, in that they would not have been considered to be in priority need because their dependent child, being subject to immigration control, would have been disregarded under section 185(4) of the Housing Act 1996. There is therefore no differential treatment for the purposes of Article 14 if a British citizen with a child subject to immigration control is the appropriate comparator.

42. The Court notes, however, that there is another potential comparator, namely a person who has indefinite leave to remain in the United Kingdom like the applicant, but whose child is either not subject to immigration control or has an unconditional form of leave, such as indefinite leave to remain, which would mean that they could convey priority need status on their parent or carer. Again, the Court observes that the applicant does not specifically state that she considers herself to be in an analogous position to such a person. However, the Court considers that such a person is a more relevant comparator than a British citizen, given that the submissions of both the Government and the applicant as regards the ground of distinction, considered below, focus on the applicant's son's status rather than that of the applicant, and also given that, but for the applicant's son's status, the applicant would have been considered to be in priority need of housing

assistance. In any event, the Court does not consider it necessary to determine conclusively whether the applicant and her son were in an analogous situation to either of the comparators suggested above, for reasons which are expanded upon at paragraphs 48-51 below.

43. The Court now turns to the issue of the ground of distinction, or the basis for the differential treatment. In this case, the applicant contends that she was treated differently based on the nationality of her son, which equates to "national origin" for the purposes of Article 14. The Government, on the other hand, contend that the basis for the differential treatment of the applicant was her son's immigration status which, being a purely legal rather than a personal status, did not amount to an "other status" in terms of Article 14.

44. The Court must therefore decide whether the ground of distinction was indeed the applicant's son's immigration status, or rather his nationality, as the applicant claims. The Court has had regard to the conclusions of the Court of Appeal in *Westminster v. Morris* (see paragraphs 15-18 above) in relation to the ground of distinction, but notes that, firstly, neither of the judges who formed the majority of the Court of Appeal in that case reached an express conclusion as to whether nationality formed the sole ground for the distinction; and secondly, that that case involved a British citizen rather than a person, such as the applicant, with indefinite leave to remain in the United Kingdom. The Court finds that, on the facts of this applicant's case, the basis upon which she was treated differently to another in a relevantly similar position, who for the reasons given at paragraph 42 above is considered to be the unintentionally homeless parent of a child not subject to immigration control, was her son's immigration status. The Court specifically notes in this regard that the applicant's son was granted entry to the United Kingdom on the express condition that he would not have recourse to public funds. The Court finds that it was this conditional legal status, and not the fact that he was of Sierra Leonean national origin, which resulted in his mother's differential treatment under the housing legislation.

45. The Court does not agree with the Government that immigration status cannot amount to a ground of distinction for the purposes of Article 14, since it is a legal rather than a personal status. The Court has previously found that a person's place of residence constitutes an aspect of personal status within the scope of Article 14 (see *Carson and Others*, cited above, § 70-71), in spite of the fact that a person can choose their place of residence, meaning that it is not an immutable personal characteristic. Similarly, immigration status where it does not entail, for example, refugee status, involves an element of choice, in that it frequently applies to a person who has chosen to reside in a country of which they are not a national. The Court further notes the Grand Chamber's judgment in *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 182-190, ECHR 2009-... in

which, although it was not found necessary to consider the complaints under Article 14, the Grand Chamber nonetheless upheld the findings of the House of Lords that there had been impermissible discrimination on the grounds of nationality or immigration status. In so doing, the Court tacitly accepted immigration status as a possible ground of distinction within the scope of Article 14. Finally, the Court recalls that it has in its previous case law found that a large variety of different statuses, which could not be considered to be "personal" in the sense of being immutable or innate to the person, amounted to "other status" for the purposes of Article 14 (see *Clift v. the United Kingdom*, no. 7205/07, § 58, 13 July 2010, for a review of the Court's case-law on this question).

46. The Court finds therefore, in line with its previous conclusions, that the fact that immigration status is a status conferred by law, rather than one which is inherent to the individual, does not preclude it from amounting to an "other status" for the purposes of Article 14. In the present case, and in many other possible factual scenarios, a wide range of legal and other effects flow from a person's immigration status.

47. The Court recalls that the nature of the status upon which differential treatment is based weighs heavily in determining the scope of the margin of appreciation to be accorded to Contracting States. As observed above at paragraph 45, immigration status is not an inherent or immutable personal characteristic such as sex or race, but is subject to an element of choice. In the applicant's case, while she entered the United Kingdom as an asylum seeker, she was not granted refugee status. She cannot therefore be described as a person who was present in a Contracting State because, as a refugee, she could not return to her country of origin. Furthermore, she subsequently chose to have her son join her in the United Kingdom. Given the element of choice involved in immigration status, therefore, while differential treatment based on this ground must still be objectively and reasonably justifiable, the justification required will not be as weighty as in the case of a distinction based, for example, on nationality. Furthermore, given that the subject matter of this case – the provision of housing to those in need – is predominantly socio-economic in nature, the margin of appreciation accorded to the Government will be relatively wide (see *Stec and Others*, cited above, § 52).

48. The Court notes that while the Government argued before the Court of Appeal in the *Westminster v. Morris* case that the differential treatment under the Housing Act 1996, as it was prior to amendment, was justified by the need to maintain immigration control and to prevent "benefits tourism", the justification as presented to this Court was framed in terms of the need for the fair allocation of a scarce resource. The Government maintained that it was reasonable, in the allocation of social housing, to prioritise those who had a fixed and permanent right to be in the United Kingdom, or who had a priority need for housing due to dependants who had such a right.

49. The Court finds that it is legitimate to put in place criteria according to which a benefit such as social housing can be allocated, when there is insufficient supply available to satisfy demand, so long as such criteria are not arbitrary or discriminatory. As the Court has previously held, any welfare system, to be workable, may have to use broad categorisations to distinguish between different groups in need (see *Runkee and White v. the United Kingdom,* nos. 42949/98 and 53134/99, § 39, 10 May 2007). The Court also recalls its finding in the case of *Anatoliy Ponomaryov and Vitaliy Ponomaryov v. Bulgaria*, no. 5335/05, § 54, 21 June 2011 (not yet final), that States may be justified in distinguishing between different categories of aliens resident on its territory and in limiting the access of certain categories of aliens to "resource-hungry public services". The Court takes the view that social housing is such a public service.

50. The Court notes that section 185 of the Housing Act 1996 and the Regulations referred to at paragraph 14 above, when read together, set out clearly which classes of persons are eligible for social housing; which classes are eligible for housing assistance if threatened with homelessness; and which classes cannot be considered when determining whether another person has a priority need for housing assistance. The Court further notes that these classes cannot be considered as arbitrary or discriminatory. Those who have a fixed right to be in the United Kingdom, such as refugees or those with permanent, unconditional leave to remain, are entitled both to housing and to housing assistance. Those whose leave to remain in the United Kingdom is conditional on their ability to support themselves without recourse to public funds are not. The Court notes in this regard the applicant's argument that it is inconsistent that she should be eligible for social housing but not considered to be in priority need should she and her son become homeless. However, there is nothing arbitrary in the denial of priority need to the applicant when it would be based solely on the presence in her household of her son, a person whose leave to enter the United Kingdom, granted only a few months before the applicant's request for housing assistance, was expressly conditional upon his having no recourse to public funds. By bringing her son into the United Kingdom in full awareness of the condition attached to his leave to enter, the applicant accepted this condition and effectively agreed not to have recourse to public funds in order to support her son. The Court upholds the Government's argument that it is justifiable to differentiate between those who rely for priority need status on a person who is in the United Kingdom unlawfully or on the condition that they have no recourse to public funds, and those who do not, and finds that the legislation in issue in this case pursued a legitimate aim, namely allocating a scarce resource fairly between different categories of claimants.

51. As regards the proportionality of the means employed to realise this legitimate aim, the Court has had regard to the specific circumstances of the

applicant's case. Without underestimating the anxiety which the applicant must have suffered as a result of being threatened with homelessness, the Court observes that she was never actually homeless and that, as pointed out by the Government (see paragraph 24 above), there were duties imposed by legislation other than section 193 of the Housing Act 1996 which would have required the local authority to assist her and her son had the threat of homelessness actually manifested itself. In the event, the applicant, who had previously lived in private accommodation, moved with her son into other private sector housing, the tenancy of which was secured with the assistance of the local authority. The Court notes that, had the applicant been eligible and considered to be in priority need, she would most likely have been housed in temporary accommodation, quite possibly also within the private sector, until a social tenancy became available. The private sector tenancy obtained by the applicant was outside the Borough of Southwark due to the shortage of suitable private sector housing within the Borough. However, this may also have been the case had the applicant been deemed to be in priority need, and had there been no suitable accommodation available within the Borough of Southwark at the given time. In the applicant's case, she moved back to Southwark when she was offered a social housing tenancy seventeen months later, which was within a similar timescale as that in the case of a person accorded priority need.

52. In these circumstances, the Court finds that the differential treatment to which the applicant was subjected was reasonably and objectively justified by the need to allocate, as fairly as possible, the scarce stock of social housing available in the United Kingdom and the legitimacy, in so allocating, of having regard to the immigration status of those who are in need of housing. On the facts of the applicant's case, the effect of the differential treatment was not disproportionate to the legitimate aim pursued. Accordingly, there has been no violation of Article 14, taken in conjunction with Article 8.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 14 of the Convention taken in conjunction with Article 8.

Done in English, and notified in writing on 27 September 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Lech Garlicki
Deputy Registrar	President