

A dish to savour?

Article

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A DISH TO SAVOUR?

IN BRIEF:

- A case which brought the Swedish Government before the European Court of Human Rights has been reported as giving tenants a ‘human right to erect a satellite TV dish’
- How may landlords may wish to respond to this?
- Is the case as wide-ranging as has been reported?
- Has an important point of English law been overlooked?

A 2008 ruling of the European Court of Human Rights (ECtHR) finding Sweden in breach of the European Convention on Human Rights (the Convention) has come to prominence as a result of recent coverage in the *Mail on Sunday* and *Sunday Times*.

In the Swedish case the tenants of a flat had erected a satellite dish in breach of their tenancy agreement. The landlord took enforcement action, which the Swedish courts upheld. The ECtHR held that Sweden was in breach of its obligations under the Convention under Art 10, dealing with the right to freedom of expression: this includes the right to receive and impart information and ideas. The newspapers may have come across the case because the Equality and Human Rights Commission has included a similar (though rather more compelling) scenario in its leaflet: *Human Rights at Home: Guidance for Social Housing Providers*:

“Example: A social housing provider’s standard terms of tenancy prevent the erection of any satellite dish or aerial on the exterior of the home. A disabled tenant is only able to engage in her particular religious community if she is able to receive transmissions of specific religious services held overseas which are exclusively available by satellite. The term of the tenancy agreement, and most particularly its enforcement, may amount to an unlawful breach of her human right to freedom of religion under Article 9.”

Khursid Mustafa

The Swedish case, *Khursid Mustafa & Tarzibachi v Sweden* (App no 23883/06) involved tenants, a married couple renting from a commercial landlord, who erected a satellite dish on the outside of their flat in breach of their tenancy agreement. Several other tenants had also done so. After a

few years a new landlord tried to evict the tenants because of their breach. The local rent tribunal upheld the landlord, as did the appeal court. The ECtHR held that the Swedish Government was in breach of its obligations under Art 10 of the Convention on the basis that the tenants were of Iraqi origin, and they and their children could maintain contact with their own language and culture only by means of satellite TV broadcasts, which were not available through the landlord's communal aerial. The landlord in the Swedish courts (and the Government of Sweden before the ECtHR) had wanted the tenancy agreement upheld on the basis of safety arguments, and aesthetic considerations, coupled with the general principle that, as the landlord had a coherent set of tenancy rules, it undermined them generally if they were not enforced.

The ECtHR rejected the argument based on the safety of the tenant and the other residents, on the basis that there was no evidence that the particular installation was a safety hazard, and the landlord was bound to consider the safety of each installation on its merits. It could not impose a blanket ban.

That left aesthetic considerations as the only basis for refusal. The block was a tenement block of no particular architectural merit, and such aesthetic considerations as there were had to be balanced against the tenants' Art 10 rights. The tenants' rights had to prevail in this balancing exercise.

The tenants moved out to a town near Stockholm rather than staying on condition that they removed their dish. They were granted financial compensation of €11,500, plus costs and interest.

Applicability in the UK

Decisions before the ECtHR are not, of course, binding precedents for UK courts. The Human Rights Act 1998 merely says that the UK courts 'must take [them] into account'. Normally a UK court will follow a decision of the ECtHR, but there is some scope for not doing so: the 'margin of appreciation'. Essentially this means that, whilst courts must follow the main thrust of the Convention and the decisions of the ECtHR, they are allowed some room for manoeuvre in how the Convention is interpreted in points of detail: there is a limited area within which national traditions can be allowed for, and a different balance may be struck between competing principles. The Convention does not therefore have to be interpreted in exactly the same way in

each and every country. The UK Supreme Court has also made clear that it would not feel constrained to follow a ruling from the ECtHR if it considered that its reasoning appeared ‘to overlook or misunderstand some argument or point of principle’ (*Manchester CC v Pinnock*, [2010] UKSC 45, [2011] 1 All ER 285).

How the decision might be applied

The report in the *Mail on Sunday* (8 August 2011) suggested that not allowing people to watch sport on satellite TV was a breach of their human rights, and that this might undermine a ban on satellite dishes on listed buildings.

This seems far-fetched. The ECtHR specifically found that the building was of no particular architectural merit. In the case of listed buildings and conservation areas, the national Government has already determined that the buildings or their settings are of merit. It would be surprising if the ruling of the ECtHR were treated as overriding conservation area and/or listed building status in the UK: strict requirements as to siting of dishes could be upheld.

It is more likely is that the ruling could be used to challenge a provision in a tenancy agreement or a long lease which banned satellite dishes entirely. *Khursid Mustafa* involved a commercially rented property.

Stockholm

How would a case involving a long-leaseholder compare with this? On the one hand, there was evidence that there was a shortage of rented accommodation in Stockholm, and one could argue that there is plenty of long leasehold property on the market, and the “they knew what they were signing” argument applies to leasehold owners (either when they take a new lease or buy an existing leasehold property). On the other hand, long-leasehold ownership is generally seen as tantamount to buying a flat, and the ECtHR may think it less appropriate for a landlord to interfere with what can be done by a long-leaseholder, as opposed to a ‘renting tenant’.

It should be noted that the basis of *Khursid Mustafa* was that the tenants wanted to maintain links with their Iraqi culture: they did not just want a wider choice of TV channels. So the tenant or leaseholder who just wants to view a particular sports channel might therefore not succeed in

challenging a ban on satellite dishes. However, if a ground landlord has had to concede the point on a dispute involving the speaker of a foreign language, or (in the case of the example given by the Equality and Human Rights Commission, the disabled adherent of a minority religion), it is difficult to see how in practice the ban could be enforced against those with a less pressing claim to erect a dish.

The only way in which a landlord could be reasonably sure that it could maintain an outright ban on satellite dishes would be if it offers a sufficiently wide range of satellite services which include the coverage of minority languages and religions that tenants may require. If this is done, then there is no argument under Arts 9 or 10 to balance against the aesthetic and safety considerations that a blanket ban seeks to uphold, and the basis for a claim under the Convention simply evaporates. *Khursid Mustafa* would suggest that it would even be possible to require a tenant or leaseholder to remove a satellite dish, on alternative provision being made for the block.

Unsafe Installation

Safety considerations can still be taken into account, but it is clear from *Khursid Mustafa* that a landlord would have to show that the particular installation was unsafe, not merely that it might be unsafe, and so it was more convenient to impose a blanket ban. Assessing the safety of each dish after it has been installed is likely to cause difficulties in practice. It might be more a more practicable solution – and in practice a more enforceable deterrent to the installation of a satellite dish - if a lease or tenancy agreement, rather than imposing a blanket ban, specifically stated that they were allowed only with the written consent of the landlord, such consent not to be unreasonably withheld, and the lease required the leaseholder or to make an application with a plan and specification, and to pay the costs incurred by the landlord’s surveyors and solicitors in considering the application, in formally granting consent, and in inspecting the installation when completed. It would be difficult to argue that such conditions were unreasonable, as they would be justifiable on safety grounds.

An alternative approach?

Another argument that seems to have been largely overlooked in *Khursid Mustafa* could be employed in any case arising in England and Wales. The report refers to “the landlord's right to property and its interest in maintaining order and good conditions on the property” [para 27] but

the *landlord's* property rights seem hardly to have been discussed. They barely, in fact, arose in *Khursid Mustafa* because, by the time the dispute reached the Swedish courts, the satellite dish was attached to a metal arm which extended through a small open window when the dish was in use. The evidence suggested that the arm was so extended most of the time, so the principal objection was the purely aesthetic one. But in the vast majority of English and Welsh tenancy agreements and leases – usually quite explicitly in long leases - the area actually demised to the tenant ends at the inner surface of the external walls and so he would be seeking to attach a satellite dish to an external wall which simply did not belong to him. Although the jurisprudence of the ECtHR is quite clear that it does not necessarily have to follow the characterisation of legal interests adopted by domestic legal systems, erecting a satellite dish on an external wall (as opposed to the manner of installation in *Khursid Mustafa*) will amount to a trespass to the landlord's land: indeed, even such an installation could well be a trespass to the landlord's airspace. Any argument under Arts 9 or 10 would therefore have to justify an interference with the landlord's property rights under Art 1 of the First Protocol.

One could argue that the property rights of an 'outside' commercial landlord should be subordinated to tenants' rights under Arts 9 or 10. The landlord's position where the main structure is vested in a Residents' Management Company may be stronger, as it clearly would have an interest in the appearance of the block. But if a tenant is allowed to commit trespass against his landlord, what is to stop any owner from insisting on installing a dish on a neighbour's property?