

From decades of certainty to a causational minefield, a note on intentional homelessness following the ruling in *Haile v London Borough of Waltham Forest* [2015]

A homeless person may be owed a duty to be re-housed by a local housing authority if they can meet the requirements set out in the Housing Act 1996. The authority does not owe the full duty, however, in circumstances where the homeless person has made themselves 'intentionally homeless' - where they have carried out a deliberate act or omission which has led to their loss of accommodation. The House of Lords ruling in *Din v Wandsworth London Borough Council* [1983]¹ had created a consistent and certain approach to findings of intentionality. The Supreme Court in *Haile*² claims not to have departed from the reasoning in *Din*. Still, it will be shown that the express findings in *Haile* have completely changed the approach to intentionality. Despite the Supreme Court's protestations to the contrary, a certain deliberate act by a homeless person can now be ignored if, hypothetically, the homeless person would have become homeless anyway – creating a causational nightmare for authority decision makers.

Keywords: Housing Act 1996; Intentional homelessness; *Din*; *Haile*.

1. Background Law

The Housing Act 1996, Part VII, governs the duties owed by a housing authority to the homeless. S.193 contains the 'full housing duty', requiring that the housing authority shall 'secure that accommodation is available for occupation by the applicant', in circumstances where:

(1) 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.

Intentionality is defined at s.191:

(1) A person becomes homeless intentionally if he deliberately does or fails to do anything in consequence of which he ceases to occupy accommodation which is available for his occupation and which it would have been reasonable for him to continue to occupy.

Much of the relevant case law was decided before the Housing Act 1996 came into force. Its predecessor, however, the Housing (Homeless Persons) Act 1977, contained an almost identical provision at section 17.

¹ *Din v Wandsworth London Borough Council* [1983] 1 AC 657

² *Haile v London Borough of Waltham Forest* [2015] UKSC 34, [2015] AC 1471

2. Factual Background to *Haile*

The appellant was the tenant of a bed-sitting room in a hostel in Leyton, London. On 25th October 2011, she surrendered the bed-sitting room of her own accord, because she was unhappy about smells in the hostel.

She moved into temporary accommodation in Kings Cross until November 2011, when she had to leave due to over-crowding. On 24th November 2011, she applied as homeless to London Borough of Waltham Forest ('the Authority'). The Authority provided her with temporary accommodation, where she remained until the date of the Supreme Court decision.

On 15th February 2012, she gave birth to her daughter. It was accepted that the terms of the appellant's original tenancy in Leyton were such that she would have had to leave the accommodation once her child was born. On 1st August 2012, the Authority decided that although homeless, eligible and in priority need, she was also intentionally homeless. Applying s.191 of the Housing Act 1996, she had given up accommodation in Leyton in October 2011 that was (at the time she left) available for her and reasonable for her continued occupation. The fact that she had given birth was deemed irrelevant, as it was not 'in consequence' of her daughter's birth that she had lost the Leyton accommodation.

The Authority upheld its decision on review in January 2013. This review decision fell to be considered on appeal by the Supreme Court.

3. The Decision in *Haile*

The issue for the Supreme Court was whether the birth of the baby broke the chain of causation for intentionality, as the applicant would have been homeless anyway by the time the application was considered. The Supreme Court held that it did, ruled that the Authority's decision was erroneous and overturned the finding of intentionality.

Lord Reed, giving the lead judgment, stated that the review officer's decision was deficient because 'no consideration was given to the question whether the cause of her current state of homelessness was her surrender of the tenancy of the room in the hostel'³. If that question had been asked, then the only reasonable conclusion would be, 'no it had not'.

Much of Lord Reed's judgment relied on the earlier case of *Dyson*⁴. He uses this as authority for the proposal that a two-stage process is required when deciding a question of intentionality. First, applying s.191⁵, a housing authority must decide if the person had ceased to occupy accommodation due to a deliberate act or omission. Second, s.193⁶ required an authority to consider if the current homelessness was the result of that deliberate act, or a different event⁷.

³ *ibid* [66].

⁴ *Dyson v Kerrier District Council* [1980] 1 WLR 1205 CA

⁵ Housing Act 1996

⁶ Housing Act 1996

⁷ *Haile* (n 1) [26] – [27]

Lord Reed describes this as a ‘but for’ test of causation⁸ and concludes that, due to the birth of the baby, it could not be said that ‘if she had not done that deliberate act she would not have become homeless’⁹. Therefore, she would still have been homeless at the time of her homeless application, even if she had remained in her Leyton accommodation. In explaining his reasoning Lord Reed gives the example of an elderly man becoming homeless when his care home closes and then being found intentionally homeless due to his being evicted from ‘student digs’ as a young man because of rowdy parties. He finds this absurd as there is no causal connection between the current homelessness and the historic eviction¹⁰.

Lord Reed also focuses on public policy. He decides, without full explanation, that ‘the policy underlying the provisions as to intentional homelessness’ is ‘to prevent queue-jumping’¹¹. This finding leads him to conclude that the applicant was not queue-jumping and so his decision must therefore be consistent with the public policy of the legislation.

Most interestingly, the Supreme Court goes to great lengths to find that the decision being made is consistent with the existing authority on intentionality. Prior to *Haile*, the key authority for intentional homelessness was *Din*¹² - which had been relied on by practitioners and housing authorities for over 30 years. Lord Reed in his judgment states of *Din* that the decision ‘appears to me to have been correct and to remain good law’¹³.

Lord Neuberger, in *Haile*, stresses that the Supreme Court should be ‘very slow before departing from an earlier decision of this court or the House of Lords’¹⁴. He cites *Fitzleet*¹⁵ as authority that precedent should not be departed from even perhaps if an earlier decision is wrong, as it provides certainty and an orderly development of the rules. He also cites, with approval, a recent judgment of Lord Hodge who stated:

Where Parliament re-enacts a statutory provision, which has been the subject of authoritative judicial interpretation, the court will readily infer that Parliament intended the re-enacted provision to bear the meaning that case law had already established¹⁶

The relevant provisions in the Housing Act 1996, as we have seen, were a direct re-enactment of the Housing (Homeless Persons) Act 1977. Lord Neuberger accepted therefore that ‘if this appeal could not be allowed without departing from *Din*, it should be dismissed’¹⁷. He was convinced, with some ‘hesitation’ however, that Lord Reed’s argument did not ‘involve departing from the reasoning

⁸ *Haile* (n 1) [30].

⁹ *Haile* (n 1) [67]

¹⁰ *Haile* (n 1) [28] – [29]

¹¹ *Haile* (n 1) [67]

¹² *Din v Wandsworth London Borough Council* [1983] 1 AC 657 (HL)

¹³ *Haile* (n 1) [9]

¹⁴ *Haile* (n 1) [73]

¹⁵ *Fitzleet Estates Ltd v Cherry (Inspector of Taxes)* [1977] 1 WLR 1345 (HL)

¹⁶ *R (on the applications of ZH and CN) v London Borough of Newham and London Borough of Lewisham* [2014] UKSC 62, [2014] 3 WLR 1548 53

¹⁷ *Haile* (n 1) [72]

of the majority in *Din*¹⁸. It is therefore worthwhile setting out briefly the facts of *Din* to examine this claim.

4. Factual Background to *Din*

The applicants in *Din* rented a flat in Wandsworth and had fallen into considerable rent arrears due to the failure of their business. There was no suggestion that they had any fault in the build-up of arrears, but in their reduced financial circumstances they simply could not afford to pay the rent. The family approached the local housing authority and were advised to remain in the flat until evicted.

The applicant was served with a distress warrant in August 1979 and he and his family abandoned the Wandsworth flat and move into unsuitable temporary accommodation until December 1979. At this point they were required to leave the temporary accommodation and applied to the relevant authority as homeless. It was accepted by all parties that by December 1979 the family would have been evicted from the Wandsworth flat and become homeless anyway.

5. The decision in *Din*

The applicant in *Din* was found to be intentionally homeless. He had carried out a deliberate act in leaving accommodation available for him (the Wandsworth flat). This was the operative cause of his homelessness, it did not matter that he would have lost the accommodation by the time of his homeless application¹⁹.

6. Does the judgment in *Haile* involve departing with the reasoning in *Din*?

The key departure in *Haile* from the findings in *Din* revolves around whether or not a hypothetical rather than an actual cause of homelessness can be used to absolve an applicant of the stigma of intentionality.

It is noteworthy that counsel for the unsuccessful appellant in *Din* raised almost identical arguments to those espoused by Lord Reed in *Haile*. Counsel contended that there 'must be an unbroken chain of causation but the chain was broken by the fact that...the tenancy would in any event have been terminated by December', and that 'it is always the homelessness of the applicant at the time of the application that is being enquired into'²⁰.

This argument was given short shrift by the majority in *Din*. Lord Wilberforce, handing down the lead judgment, confirmed that although it was argued that the applicant would have been homeless anyway, that the original cause of homelessness had ceased to operate and that there must be a

¹⁸ *Haile* (n 1) [79]

¹⁹ *Din* (n 11)

²⁰ *Din* (n 11) 658

causal nexus between the original act and the homelessness subsisting at the time of the decision, he was 'unable to accept this argument'. Such an argument 'cannot be reconciled with the wording of the Act' which 'is completely and repeatedly clear in concentrating attention on when the appellants became homeless, and requiring the question of intention to be ascertained as at that time'²¹. An authority could not be required to look into hypotheses, what might have happened had the appellants not moved, and such a finding would add 'greatly to the difficulties of the local authority's task in administering this Act'²².

In *Din*, Lord Fraser agreed that hypothetical reasons for homelessness could not be relied on 'if he actually became homeless deliberately, the fact that he might, or would, have been homeless for other reasons at the date of the inquiry is irrelevant'²³.

Lord Carnwath dissented in *Haile*, as he felt that Lord Reed's reasoning was not consistent with that in *Din*; which he cited with approval²⁴. He considered that the law had been consistent for over 20 years, and that the wording of the relevant provisions had not changed with the introduction of the Housing Act 1996. Lord Reed had undertaken 'his own re-analysis of *Din* in a way not suggested by the parties before us, nor (to my knowledge) by anyone else in the three decades since it was decided'²⁵. This re-analysis was not desirable or necessary. The review officer's decision was 'a perfectly orthodox reflection of the majority approach in *Din*'²⁶. The appeal should fail quite simply because 'the birth of her child might have been, but was not, the actual cause of her loss of either the original or the temporary accommodation'²⁷.

Lord Reed, in *Haile*, appears to justify his re-interpretation in part, by explaining that the law has changed in two ways since *Din*. He refers to Lord Lowry's judgment in *Din* as making reference to the causal link being described 'in terms of continuing homelessness' and that this condition continued until the appellant obtained 'non-temporary or "settled" accommodation'²⁸. He claimed that this concept had been overturned by the case of *Awua*²⁹ where events other than the obtaining of settled accommodation were held to break the chain of causation and 'confirmed that the necessary connection between the deliberate conduct required by the definition of "becoming homeless intentionally" and the applicant's homelessness at the time of the enquiry was causal'.³⁰

The concept of 'settled' accommodation described in *Din* was, however, expressly approved in *Awua* but further defined. Lord Hoffman held that the occupation of settled accommodation (something more than temporary accommodation) as an act that might break the chain of causation for intentionality was 'well established...and nothing I have said is intended to cast any doubt upon

²¹ *Din* (n 11) 667

²² *Din* (n 11) 667

²³ *Din* (n 11) 672

²⁴ *Haile* (n 1) [89]

²⁵ *Haile* (n 1) [89]

²⁶ *Haile* (n 1) [89]

²⁷ *Haile* (n 1) [93]

²⁸ *Haile* (n 1) [11]

²⁹ *R v Brent London Borough Council, Ex p Awua* [1996] AC 55

³⁰ *Haile* (n 1) [11]

it³¹. Nevertheless, Lord Hoffman continued to state that this was only one of the potential acts that might break the chain, although he in fact reserved judgment on whether it was the 'sole and exclusive method' for doing so, as this point had been conceded by the housing authority in that case³².

In *Din*, only Lord Lowry had made reference to a need for homelessness to be continuous and Lord Hoffman answered this point, confirming that 'what persists until the causal link is broken is the intentionality, not the homelessness'³³.

These points help little in re-aligning *Haile* and *Din*. Lord Hoffman, in *Awua*, maintained that hypothetical causes could not be relied on to break the chain of causation. He cited Lord Fraser in *Din* with approval and maintained that an 'argument, based on what would have hypothetically happened had she have done something different, is precluded by the decision of this House in *Din*'³⁴.

Since *Awua*, a variety of cases have relied on events other than the obtaining of settled accommodation to break the chain of causation. In *Fahia*³⁵, the loss of temporary accommodation due to a significant reduction in Housing Benefit, that made the accommodation unaffordable, broke the chain of causation. In *Bassett*³⁶, the House of Lords found that an applicant leaving settled accommodation to move to Canada with her husband was not intentionally homeless. On the couple's return to England they lived with the husband's sister, however, the couple split and the applicant was required to leave her sister in law's home. It was the breakdown of her marriage that led to the loss of her accommodation and broke the chain of causation, not the move to Canada.

Similarly, the Court of Appeal in *Aranda*³⁷ considered the applicant was not intentionally homeless when she left settled accommodation in England to move to Colombia with little capital and no job. The chain of causation was broken by the breakdown of her relationship, which led to the loss of her Colombian accommodation, Henry L.J. finding that 'the husband's abandonment of his family broke the chain of causation between her decision to surrender the Camden tenancy.....and her eventual homelessness, thereby making it impossible to find intentional homelessness as a result of that choice'.³⁸

Every relevant case before *Haile* required an event to have actually occurred that intervened to prevent the intentionality from being operative. Lord Carnwath, in his dissenting speech in *Haile* summarised the position perfectly, all these cases show is that to break the chain of causation, the:

intervening accommodation comes to an end due to a change of circumstances for reasons not directly linked to its temporary nature....the key to these cases is that the new event is the direct

³¹ *Awua* (n 28) 69

³² *Awua* (n 28) 69

³³ *Awua* (n 28) 69

³⁴ *Awua* (n 28) 73

³⁵ *R v Harrow London Council, Ex p Fahia* [1996] 29 HLR 94 (HL)

³⁶ *R v Basingstoke and Deane Borough Council, Ex p Bassett* [1983] 10 HLR 125

³⁷ *R v Camden London Borough Council, Ex p Aranda* [1998] 30 H.L.R. 76

³⁸ *Ibid* 88

cause of the eventual homelessness, and is treated as its operative cause, thus breaking the chain of causation from the (intentional) loss of the previous settled accommodation³⁹

The lack of consistency in the Supreme Court's approach in *Haile* can be demonstrated by returning to Lord Reed's simplistic example of the elderly man being evicted from a closing care home. Following the principles in *Din*, an authority should look for an actual event taking place that caused his homelessness. In this case, the closure of the care home would seem to be the operative cause of his (clearly unintentional) homelessness.

Imagine the same elderly man however reading for his degree as a mature student. He is a violent man and is evicted from his student digs for severe nuisance and for assaulting a fellow student in the May of his final year of study. He sleeps rough until the end of his undergraduate studies in June (when he would have had to leave his digs anyway) and presents as homeless in July to the relevant authority.

Following *Din*, the deliberate act causing his homelessness (the violence and nuisance) means that he is intentionally homeless. Following Lord Reed's analysis in *Haile*, however he is not intentionally homeless: the assault causing his eviction is ignored and an event that did not cause his homelessness (the end of the University year) is the operative event, a complete departure from the earlier case law.

What of the public policy issue raised by Lord Reed in *Haile*? This is also expressly dismissed as a key factor in *Din*. Lord Lowry found that the applicants in *Din* were equally free of blame - stating that 'there is, to my mind, no question here of queue-jumping or other unmeritorious conduct'⁴⁰. Despite this, the public policy consideration could not overcome his 'applying the law...to the facts' and therefore holding that 'the appellants lost their priority by becoming homeless in a relevant way'⁴¹.

7. The impact of Haile

The Supreme Court, in *Haile*, felt compassion for the applicant, yet could not easily distinguish *Din* and *Awua*. Attempting to do so, Lord Reed pointed to an actual event in *Haile* (the birth of the daughter), that would have led to the appellant becoming homeless anyway by the time of the homeless application, whereas in *Din* there was merely a possibility that they might have been evicted. Even Lord Neuberger in his consenting speech accepted that this 'is a rather narrow ground for distinguishing the earlier decision in *Din*'⁴².

After an examination of the previous authority, especially the cases of *Din* and *Awua*, it can be seen that the reasoning of the majority in both cases has not been followed. Events that might have hypothetically led to a loss of accommodation are being used to justify a break in the chain of causation rather than the actual reason for the loss (something that the earlier cases were keen to

³⁹ *Haile* (n 1) [92]

⁴⁰ *Din* (n 11) 681

⁴¹ *Din* (n 11) 681

⁴² *Haile* (n 1) (80)

avoid). Had the Supreme Court in *Haile* accepted that it was departing from the reasoning of the majority in *Din* and set out new causational guidelines for local housing authority decision makers, then this would have at least allowed some certainty. Instead, it has left a review officer to second-guess when a court might decide that an event had broken the chain of causation.

The potential effect of the judgment in *Haile* is far reaching. Authorities can no longer look to the actual cause of the applicant's homelessness but need to consider also any number of hypothetical eventualities that might have had the same effect. Even more unsatisfactory is that over twenty years of certainty has been disturbed by the Supreme Court, leaving two seemingly contradictory decisions both of which are still maintained to be 'good' law.