Housing & the Human Rights Act 1998

Issues other than possession proceedings

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The Books

Baker, Carter & Hunter *Housing & Human Rights Law*, Legal Action Group 2001

Luba, *Housing & the Human Rights Act 1998 Special Bulletin*, Jordan Publishing, 2000

The sections of the 1998 Act and Housing Issues

HRA 1998 section 3 (interpretation of legislation)

Ghaidan v Godin-Mendoza
[2004] UKHL 30 [2004] 2 AC 557, [2004] 3 WLR 113, [2004] 2 P & CR DG17, [2004] 2 FLR 600, [2004] Fam Law 641, [2004] 3 All ER 411, [2004] UKHL 30, 16 BHRC 671, [2004] 2 FCR 481, [2004] UKHRR 827, [2004] NPC 100, [2004] 27 EGCS 128
Should living together "as husband and wife" include a same sex couple?

Patel v Pirabakaran
[2006] EWCA Civ 685, [2006] 1 WLR 3112
Should Protection from Eviction Act 1977 apply to a combined business and residential letting?

Desnousse v Newham LBC
[2006] EWCA Civ 547, [2007] 2 All ER 218, [2006] 3 WLR 349
Should Protection from Eviction Act 1977 apply to temporary accommodation made available to the homeless?

Manchester City Council v Pinnock
[2010] UKSC 45, [2010] 3 WLR 1441
Do the words "shall make a possession order" prevent a court from considering whether it is proportionate to do so?

Hounslow LBC v Powell
[2011] UKSC 8, [2011] 2 WLR 287
Do the statutory words "shall" or "must" force the judge to make a possession order?
Compatibility can be achieved in the case of either subsection by implying the phrase "provided that article 8 is not infringed" per Lord Phillips at [98]

HRA 1998 section 4 (declaring legislation incompatible)

Westminster City Council v Morris
[2005] EWCA Civ 1184, [2006] 1 WLR 505
Not counting a child as part of a homeless person's household if they were of the 'wrong' nationality declared incompatible.
Remedied in part by Housing & Regeneration Act 2008 s314. Or was it?

Husenatu BAH v United Kingdom
[2006] ECHR 2060 (1 December 2009)
Follow-up to the *Morris* problem
"Has the applicant been discriminated against in violation of Article 14, read in conjunction with Article 8 of the Convention? Specifically, the Government are asked to comment on what steps have been taken or are envisaged to address the declaration of incompatibility made by the Court of Appeal in *Westminster v Morris [2005] EWCA 1184*."

Connors v United Kingdom
[2004] ECHR, [2004] 40 EHRR 9, [2004] 4 PLR 16, (2005) 40 EHRR 9, 16 BHRC 639, [2004] HLR 52
Strong hint that UK legislation excluding gypsies on council run travellers sites from security of tenure was incompatible.

Doherty v Birmingham CC
[2008] UKHRR 1022, [2008] 3 WLR 636, [2008] UKHL 57, [2008] HRLR 47, [2009] 1 P & CR 11, [2008] 31 EG 89, [2008] HLR 45, [2008] NPC 91, [2008] BLGR 695, [2009] 1 All ER 653
Following up *Connors,* House of Lords would have declared those provisions incompatible but the Housing & Regeneration Act 2008 had already been passed and contained remedial provisions (not yet in force)

HRA 1998 section 6 (breach of convention rights by a public authority is unlawful)

"Public Authority"

YL v. Birmingham City Council & Ors
[2007] UKHL 27, [2007] 3 WLR 112, [2007] 3 All ER 95 7
Phrase does not cover a private care home provider

London & Quadrant Housing Trust v Weaver
[2009] L & TR 26, [2009] 25 EG 137, [2009] 4 All ER 865, [2009] HLR 40, [2009] HRLR 29, [2009] NPC 81, [2009] EWCA Civ 587
Does cover a social landlord such as a housing association engaging in the public function of letting and managing social housing tenancies

R(McIntyre) v Gentoo Group
[2010] EWHC 5 (Admin)
Function of "managing" includes housing association dealing with mutual exchanges and transfers.

"Section 6(2)"

Manchester City Council v Pinnock
[2010] UKSC 45 at [102] – [103]

HRA 1998 section 7 (ability to remedy breach of convention rights)

Manchester City Council v Pinnock
[2010] UKSC 45
Tenant entitled to take Convention point as a 'defence' to a claim for possession and to do so in the court where possession is sought.

HRA 1998 section 8 (available remedies)

Two "housing" cases on damages for breach of Convention Rights

R(Bernard) v Enfield LBC
[2003] BLGR 423, [2003] UKHRR 148, [2003] HLR 27, [2003] HRLR 4, [2002] EWHC 2282 (Admin)

Anufrijeva v Southwark LBC
[2004] QB 1124, [2003] 3 FCR 673, [2004] 2 WLR 603, [2004] HLR 22, [2004] HRLR 1, 15 BHRC 526, [2004] 1 FLR 8, (2003) 6 CCL Rep 415, [2003] EWCA Civ 1406, [2004] Fam Law 12, [2004] UKHRR 1, [2004] BLGR 184

HRA 1998 Schedule 1 (the Convention Rights)

ARTICLE 3

Secretary of State for the Home Department v Limbuela & Ors
[2005] UKHL 66
"Late-claiming" asylum seekers deprived of accommodation, state support and the ability to work.

ARTICLE 6

Lots of problems arise in the housing field where the "dispute resolution" mechanism tends to be decision – internal review – judicial review

Tomlinson & Ors v Birmingham City Council
[2010] 2 WLR 471, [2010] UKSC 8, [2010] HRLR 18, [2010] 2 All ER 175, [2010] PTSR 524, [2010] UKHRR 417
Homelessness cases

R(Brown) v South Oxfordshire DC
[2008] EWHC 3378 Admin, [2009] Legal Action March p23
Discretionary housing payment – appeal to councillors of same authority.

London Borough of Wandsworth v Dixon
[2009] EWHC 27 (Admin), [2009] L & TR 28, [2009] NPC 21
And see [2009] EWCA Civ 821
Housing allocation decisions

ARTICLE 8

"…respect for his home…"
in the sense of

(1) not allowing it to fall into serious disrepair

Lee v Leeds CC
[2002] EWCA Civ 6, [2002] 1 WLR 1488

Erskine, R (on the application of) v Lambeth LBC
[2003] EWHC 2479 (Admin)

(2) not allowing intrusive traffic noise

Andrews v Reading BC
[2004] EWHC 970 (QB)

(3) not allowing intrusive aircraft noise

Dennis & Anor v Ministry of Defence
[2003] EWHC 793 (QB)

(4) not allowing flood-water/sewage incursion

Marcic v Thames Water Utilities Ltd
[2004] 2 AC 42, [2003] NPC 150, 91 Con LR 1, [2004] UKHRR 253, [2003] 50 EGCS 95, [2003] UKHL 66, [2003] 3 WLR 1603, [2004] 1 All ER 135, [2004] BLR 1, [2004] Env LR 25, [2004] HRLR 10

(5) not allowing sewage smell and mosquito intrusion

Dobson & Ors v Thames Water Utilities Ltd
[2009] EWCA Civ 28, [2009] BLR 287

(6) not allowing intruders to force their way in

X & Y v Hounslow LBC
[2009] EWCA Civ 286, [2009] NPC 63, [2009] 2 FLR 262, (2009) 12 CCL Rep 254, [2009] Fam Law 487

(7) not allowing orders under TOLATA 1996 (e.g. for sale/charging orders) to be made unless proportionate

National Westminster Bank v Rushmer
[2010] EWHC 554 (Ch), [2010] Fam Law 590, [2010] 2 FLR 362

(8) not evicting unless proportionate to do so

[see Nic's notes]

ARTICLE 10

Khurshid Mustafa and Tarzibachi v Sweden
23883/06 [2008] ECHR 1710
Tenancy agreement said: "The tenant undertakes not to set up, without specific permission, placards, signs, sunblinds, outdoor antennae and the like on the house."
Held: breach of Article 10 – ability to receive information from broadcasts by satellite transmission interfered with.

ARTICLE 14

RJM, R (On the application of) v Secretary of State For Work and Pensions
[2008] UKHL 63 [2009] 2 All ER 556, [2009] HRLR 5, [2008] 3 WLR 1023, [2009] PTSR 336, [2009] UKHRR 117, [2009] 1 AC 311
Justified discrimination in not extending particular disability benefit to the homeless.

See too the 'gypsy' cases above.

ARTICLE 1 PROTOCOL 1

Stretch v UK
[2003] ECHR 320, [2004] 03 EG 100, [2004] 1 EGLR 11, (2004) 38 EHRR 12, [2003] 29 EG 118, [2003] NPC 125
Leases and 'options to renew' within scope of personal possessions

***Kay v Lambeth LBC* (in Court of Appeal)**
[2004] 3 WLR 1396, [2004] EWCA Civ 926, [2004] HLR 56, [2005] QB 352
at para [108]

> “Lambeth accepts that Mr Kay's tenancy was a "possession" for the purposes of Article 1. But that Article is concerned to protect a citizen's possessions from arbitrary interference or deprivation by public authorities. As Lord Hope said in *Wilson –v- First County Trust Ltd* (No 2) [2003] 3 WLR 568 at paragraph 106, the Article "does not confer a right of property as such nor does it guarantee the content of any rights in property." The nature of Mr Kay's "possession" is therefore defined by domestic law. His tenancy was at all times vulnerable to the rule of domestic law that it would terminate on the lawful determination of LQHT's lease. The fact that the lease was terminated by notice given by Lambeth does not in any way change the nature of Mr Kay's "possession". Once LQHT's lease had been terminated, Mr Kay had no more right to be in the premises than Mr Qazi after his right to remain in occupation had been determined by the service by his wife of a notice to quit as joint tenant. The termination of Mr Kay's tenancy was the result of the exercise by Lambeth of its proprietary rights under domestic law. To accede to Mr Luba's submission would, accordingly, be to give Mr Kay, in effect, additional substantive rights, which was not the purpose, and can never be the effect, of Article 1.”

Delaney v Belfast Improved Housing Association
[2007] NIQB 55, (2008) Legal Action November p18
‘Right to buy’ not an Article1 possession.

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The game of ping pong is over

In 2009, I wrote an editorial for the Journal of Housing Law entitled *La Lutta Continua?* [2009] JHL 43, http://www.nicmadge.co.uk/Art_8_-_after_Doherty.php) in which I referred to an "unedifying game of ping-pong" between the European Court of Human Rights (ECtHR) and the House of Lords (as it then was) about whether Article 8 could provide a defence to possession claims. In *Kay v UK* Application no. 37341/06, the ECtHR undoubtedly hit the ball back over the net towards the Supreme Court. The ECtHR welcomed the increasing tendency of the domestic courts to develop and expand conventional judicial review grounds in the light of Article 8. It noted that in *Birmingham CC v Doherty* [2008] UKHL 57, [2009] 1 AC 367, the House of Lords referred to the possibility of challenges on conventional judicial review grounds encompassing more than just traditional *Wednesbury* grounds and stated that the gateway (b) test[1] set out by Lord Hope in *Kay* should now be applied in a more flexible manner, allowing for personal circumstances to be relevant to the county court's assessment of the reasonableness of a decision to seek a possession order. The ECtHR noted that the widening of gateway (b) occurred after the end of the *Kay* case. It found a breach of Article 8 in its procedural aspect because the decision by the county court to strike out the occupants' Article 8 defences meant that the procedural safeguards required by Article 8 for the assessment of the proportionality of the interference were not observed. The occupants were dispossessed of their homes without any possibility of having the proportionality of the measure determined by an independent tribunal. The court implied that if the occupants' case had been heard in the domestic courts after *Doherty*, there would have been no procedural breach.

[1] "… if the requirements of the law have been established and the right to recover possession is unqualified, the only situations in which it would be open to the court to refrain from proceeding to summary judgment and making the possession order are these: (a) if a seriously arguable point is raised that the law which enables the court to make the possession order is incompatible with article 8 ["gateway (a)"], … (b) if the defendant wishes to challenge the decision of a public authority to recover possession as an improper exercise of its powers at common law on the ground that it was a decision that no reasonable person would consider justifiable ["gateway (b)"] …" (*Kay v Lambeth Borough Council; Price v Leeds County Council* [2006] UKHL 10, per Lord Hope, para 110)

In other words, the substantive law, allowing a land owner to obtain a possession order against occupants who had become trespassers did not breach Article 8. The problem, at the time of *Kay* in the English courts, was procedural. The courts were not able to consider the proportionality of the decision to bring the possession claim.

In *Manchester CC v Pinnock* [2010] UKSC 45; [2010] 3 WLR 1441, 3 November 2010, the Supreme Court effectively conceded that it had lost the game of ping pong. In a single judgment, delivered by Lord Neuberger MR, the court held that (i) Article 8 requires courts asked to make possession orders against demoted tenants under Housing Act s143D(2) to have the power to consider whether the order would be "necessary in a democratic society"; and (ii) that s143D(2) is compatible with Article 8. After considering the ECtHR jurisprudence on Article 8 and possession clams in general, he said that if UK "law is to be compatible with article 8 ... the court must have the power to assess the proportionality of making the order, and, in making that assessment, to resolve any relevant dispute of fact." [para 49]

After referring to the decisions of the House of Lords in *Harrow LBC v Qazi* [2003] UKHL 43; [2004] 1 AC 983*, Kay v Lambeth LBC* [2006] UKHL 10; [2006] 2 AC 465, and *Doherty v Birmingham CC* [2008] UKHL 57; [2009] 1 AC 367, he stated that it was" unnecessary to consider them in any detail". As there was "now [an] unambiguous and consistent approach of the EurCtHR", the Supreme Court had to consider whether it was appropriate to depart from those decisions. Although the Supreme Court was not bound to follow Strasbourg decisions, "Where ... there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line. [48] Even before the decision in *Kay*, "we would, in any event, have been of the opinion that this Court should now accept and apply the minority view of the House of Lords in those cases. In the light of *Kay*, that is clearly the right conclusion." [49]

However, the Supreme Court dismissed Mr Pinnock's appeal. It noted that "the history of crime, nuisance and harassment on the part of those living at the property in the period leading up to the demotion order was extraordinary in its extent and persistence." [para 126] In the light of events since then, many of which were not disputed, it was proportionate to make a possession order.

In *Hounslow LBC v Powell; Leeds CC v Hall; Birmingham CC v Frisby* [2011] UKSC 8; 23 February 2011; [2011] 2 WLR 287, (2011) Times March 1, the Supreme Court considered whether and to what extent introductory tenants and licensees occupying premises provided under the homelessness regime in Housing Act 1996 Part 7 can rely on ECHR Article 8 as a defence to a possession claim. Mr Frisby and Mr Hall were introductory tenants. Ms Powell had a non secure tenancy granted by a local authority performing its

homelessness functions under Housing Act 1996 Part 7. Lord Hope and Lord Phillips delivered concurring speeches, with which the other five Supreme Court justices agreed.

When does Article 8 come into play?

In *Powell*, *Hall* and *Frisby*, Lord Hope said that the obligation to consider proportionality only arises if the property constitutes the occupant's home – the individual has to show sufficient and continuing links with a place to show that it is his or her home for the purposes of Article 8, but "in most cases it can be taken for granted that a claim by a person who is in lawful occupation to remain in possession will attract the protection of Article 8." [Lord Hope, 33] However, "[the] court will only have to consider whether the making of a possession order is proportionate if the issue has been raised by the occupier and it has crossed the high threshold of being seriously arguable. The question will then be whether making an order for the occupier's eviction is a proportionate means of achieving a legitimate aim."

Does *Pinnock* apply to other kinds of occupancy lacking security of tenure?

On the face of it, the decision in *Pinnock* appeared to apply to all kinds of occupancy lacking security of tenure, not just demoted tenancies. The importance of the decision in relation to occupants other than demoted tenants appears to be demonstrated by the following passages;

- "if domestic law justifies an outright order for possession, the effect of article 8 may, albeit in exceptional cases, justify (in ascending order of effect) granting an extended period for possession, suspending the order for possession on the happening of an event, or even refusing an order altogether. [para 62]

- "the conclusion that the court must have the ability to assess the article 8 proportionality of making a possession order in respect of a person's home may require certain statutory and procedural provisions to be revisited", e.g. Housing Act 1980 s89 and some of the provisions of CPR 55, "which appear to mandate a summary procedure in some types of possession claim". [para 63]

However, this is an issue which was argued before the Supreme Court in *Powell, Hall* and *Frisby*. Mr Frisby and Mr Hall argued that Human Rights Act 1998 s3 enabled the court to hold that Housing Act 1996 s127(2) should be read as "The court shall make an order [for possession] *where otherwise lawful to do so*…unless the provisions of section 128 apply." The Secretary of State accepted that the word "lawfully" should be read into s128(1) and (5).

In *Frisby*, notwithstanding *Pinnock,* counsel for Birmingham argued that even though the premises were Mr Frisby's home, there was no requirement for an independent determination of proportionality under Article 8 during the trial period of occupation and that the decision in *Manchester CC v Cochrane* [1999] 1 WLR 809, CA, remained good law. Their submission was that the county court was correct to refuse to entertain a defence based on domestic

public law grounds. In *Powell*, counsel for Hounslow argued that courts were not entitled to consider the lawfulness of notices to quit, under Article 8, as nothing in that Article permitted or required them to do so. The Secretary of State accepted that county courts hearing possession claims against introductory tenants may consider domestic public law challenges to both decisions to serve notices of proceedings and decisions to begin possession proceedings, and may, as necessary, consider any Article 8 defence that is raised by the occupier. He also accepted that where a tenancy has been granted under Housing Act 1996 Part 7, the occupier will in principle be able to raise an Article 8 defence and argue that the grant of such an order would be disproportionate.

In *Powell*, *Hall* and *Frisby*, Lord Hope noted that in *Pinnock* the Supreme Court held that Article 8 requires courts asked to make possession orders under Housing Act 1996 s143D(2) against demoted tenants to have the power to consider whether the order would be necessary in a democratic society. He held that "this proposition applies to all cases where a local authority seeks possession in respect of a property that constitutes a person's home for the purposes of article 8". [3] "There is a sufficient similarity between section 127(2) and section 143D(2) to apply the reasoning in *Pinnock* to introductory tenancies also." [56] Lord Phillips could "see no principled reason for distinguishing between the two".

Although there is no express provision in Part 7 which empowers a court to refuse to grant a possession order, "there is nothing in Part VII … which either expressly or by necessary implication prevents the court from refusing to make an order for possession if it considers it would not be proportionate to do so." [*Powell*, *Hall* and *Frisby*, para 39] Lord Phillips stated that "compatibility [with Article 8] can be achieved in the case of [both s127(2) and s143D(2)] by implying the phrase 'provided that article 8 is not infringed" [98].

So the answer is "yes", what was said in *Pinnock* applies to other kinds of occupancy lacking security of tenure.

What is the extent of proportionality?

In *Pinnock,* in relation to demoted tenants, Lord Neuberger stated "if the procedure laid down in section 143E or 143F has not been lawfully complied with, either because the express requirements of that section have not been observed or because the rules of natural justice have been infringed, the tenant should be able to raise that as a defence to a possession claim under section 143D(2)." [para 77] "An occupier who is the defendant in possession proceedings in the County Court and who claims that it would be incompatible with his article 8 Convention rights for him to be put out of his home must be able to rely on those rights in defending those proceedings." [para 78] Accordingly "section 143D(2) should be read as allowing the court to exercise the powers which are necessary to consider and, where appropriate, to give effect to, any article 8 defence which the defendant raises in the possession proceedings." [para 79]

The Supreme Court disapproved part of the reasoning of the Court of Appeal in *Manchester CC v Cochrane* [1999] 1 WLR 809, that an introductory tenant could not raise a defence based on the contentions that; (a) there had been no breaches of the tenancy agreement; (b) the relevant Regulations had not been complied with; and (c) there had been a failure to comply with the rules of natural justice in the conduct of the review by the Panel. [para 82] In such circumstances "article 8 would require the court to be able to consider the facts, as well as proportionality, for itself". [83]

In *Pinnock*, Lord Neuberger referred to the view that it would only be in exceptional cases that article 8 proportionality would even arguably give a right for an occupant to remain in possession where there was no such right under domestic law (see eg *McCann v UK* 47 EHRR913, para 54; *Kay v UK* (App no 37341/06), para 73). However, he stated that consideration of proportionality arguments should not be limited to "very highly exceptional cases". It would be "both unsafe and unhelpful to invoke exceptionality as a guide. ... [E]xceptionality is an outcome and not a guide". [para 51] "The fact that the authority is entitled to possession and should, in the absence of cogent evidence to the contrary, be assumed to be acting in accordance with its duties, will be a strong factor in support of the proportionality of making an order for possession. " [para 53] He continued by stating **"**in virtually every case where a residential occupier has no contractual or statutory protection, and the local authority is entitled to possession as a matter of domestic law, there will be a very strong case for saying that making an order for possession would be proportionate. However, in some cases there may be factors which would tell the other way." [para 54]

In *Powell*, *Hall* and *Frisby*, Lord Hope said "The threshold for raising an arguable case on proportionality [is] a high one which would succeed in only a small proportion of cases. [35. See too para 92] "[There] will be no need, in the overwhelming majority of cases, for the local authority to explain and justify its reasons for seeking a possession order." [37. See too para 88]

In *Pinnock*, The Supreme Court declined to give further guidance, stating "The wide implications of the obligation" to consider the proportionality of making a possession order "are best left to the good sense and experience of judges sitting in the County Court." [57]

In what kind of cases will proportionality defences succeed? How much wider is a proportionality defence than a conventional administrative law defence?

These are the questions left begging by the preceding paragraph and which, hopefully, will be answered by the courts in the coming months and years.

One of the key differences is that conventional judicial review and administrative law defences focus upon the decision making process and the procedure followed. Proportionality challenges focus upon outcomes. As Lord Bingham said in *R (Begum) v Denbigh High School Governors* [2006] UKHL 15, (2007) 1 AC 100 "what matters in any case is the practical outcome, not the quality of the decision making process that led to it. [31]

There is no doubt that the merits of the personal circumstances of the occupants will be important. In *Pinnock*, Lord Neuberger said that the submissions "that proportionality is more likely to be a relevant issue 'in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty', and that 'the issue may also require the local authority to explain why they are not securing alternative accommodation in such cases'" seemed to be "well made". [para 64]

However, occupants defending possession claims may well be able to rely on both a mix of traditional administrative law grounds and proportionality. If that happens, courts will have to consider both the decision making process by the landlord and the occupants' [personal circumstances.

Five possible examples

(a) Joint tenancies terminated by one tenant's notice to quit. Mr and Mrs A are joint tenants. Mrs A is blameless. Mr A leaves the premises and either out of spite or because he does not want to continue to be liable for rent, he serves a notice to quit, terminating the tenancy. Perhaps the local authority encourages him to serve a notice. The local authority landlord then begins a possession claim against Mrs A. (In other words, *Harrow LBC v Qazi* [2003] UKHL 43; [2004] 1 AC 983, *Bradney v Birmingham CC; Birmingham CC v McCann* [2003] EWCA Civ 1783; [2004] HLR 27, but with merits.)

(b) Cases where a non-tenant family member has lived in premises for many years, but security is lost – e.g. (i) "second succession cases", provided that there is no significant under-occupation (cf Housing Act 1985 s87 which only allows one succession). Council grants tenancy to Mr B in 1954. He lives in the flat until he dies in 1999. His wife succeeds to the tenancy under HA 1985 s85, but she too dies in 2005. The council then serves a notice to quit on their son, who has lived in the flat since 1954 when he was six years old. (cf *R (Coombes) v Secretary of State for Communities and Local Government and Waltham Forest LBC* [2010] EWHC 666 (Admin), 8 March 2010, *R (Gangera) v Hounslow LBC* [2003] EWHC 794 Admin; [2003] HLR 68 *Sheffield City Council v Wall (No 2)* [2010] EWCA Civ 922, [2010] HLR 47 and *Stanková v Slovakia* Application no 7205/02; 9 October 2007; or (ii) Ms C is a sole secure tenant, living in premises with her 20 year old son. He has never lived anywhere else. She abandons the tenancy, leaving him in the flat. Local authority serves notice to quit and brings a possession claim.

(c) Ground 8 cases. A housing association which is a core public authority brings a possession claim against Mr D under Ground 8. Mr D defends saying he has a housing benefit claim which through no fault of his own has not yet been determined. If it is granted, the housing benefit will clear the arrears. (cf *North British Housing*

Association Limited v Matthews [2004] EWCA Civ 1736; [2005] 1 WLR 3133) Or a housing association which is a core public authority seeks possession relying upon a Housing Act 1988 s21 notice.

(d) Cases where a local authority brings a possession claim, despite failing to comply with its own statutory obligations – e.g. under Housing Act 1996 Part 7, perhaps with a s202 review outstanding. A proportionality defence may strengthen a traditional administrative law defence.

(e) Pure personal circumstances – e.g. tenant terminally ill, or about to undergo major surgery.

What is the test to be applied when county court judges initially consider whether to dispose of public law defences "summarily"?

Lord Neuberger stated "If an article 8 point is raised, the court should initially consider it summarily, and if, as will no doubt often be the case, the court is satisfied that, even if the facts relied on are made out, the point would not succeed, it should be dismissed. Only if the court is satisfied that it could affect the order that the court might make should the point be further entertained." [para 61]

In *Powell*, *Hall* and *Frisby*, Lord Hope said a "court should initially consider [that question] summarily and if it is satisfied that, even if the facts relied upon are made out, the point would not succeed, it should be dismissed." [34. See too para 92]

What is the test for "summary" disposal? The Supreme Court in *Pinnock* appear to have taken the reference to "summary disposal" from the ECtHR decision in *McCann* where they referred to occupants "raising an arguable case which would require a court to examine the issue; in the great majority of cases, an order for possession could continue to be made in summary proceedings." [para 54] In *Frisby, Hall* and *Powell*, counsel for the Secretary of State argued that regard should be had to CPR 55.8(2) – whether the claim is genuinely disputed on grounds which appear to be substantial. On the other hand, CPR Rule 24.2 (Grounds for summary judgment) provides that "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if- (a) it considers … (ii) that defendant has no real prospect of successfully defending the claim or issue.

It may be that there is little difference between the two tests. With the possible exceptions of *Welwyn Hatfield DC v McGlynn* [2009] EWCA Civ 285, 1 April 2009; [2010] HLR 10, and *Doherty* (in which the remitted hearing is yet to take place), it is likely that the defences in all the recently reported Gateway (b) cases would have been summarily dismissed, applying either test. The merits in many of these cases were truly appalling. (See e.g. *Leeds CC v Price* [2006] UKHL 10, *Kay*, *Central Bedfordshire Council v Taylor* [2009] EWCA Civ 613, [2010] 1 WLR 446, *Brent LBC v Corcoran* [2010] EWCA Civ 774, 8 July 2010, *Liverpool CC v Doran* [2009] EWCA Civ 146; [2009] 1 WLR

2365, *Nettleton Road Housing Co-operative Limited v Joseph* [2010] EWCA Civ 228, [2010] HLR 30, *Brent LBC v Stokes* [2009] EWHC 1426 (QB), 10 July 2009 and *Defence Estates v JL* [2009] EWHC 1049 (Admin), 5 May 2009.)

What facts should county court judges consider?

Until *Pinnock,* few would have argued that county courts considering wider, more flexible administrative law defences would need to determine facts or hear oral evidence. Traditionally, claims for judicial review, and so by analogy administrative law defences, were determined on the documents. Local authorities have primary responsibility for determining facts, not the Administrative Court. Why should the position be any different in the county court? The answer is because the court needs to focus on outcomes (which are likely to involve consideration of personal circumstances) and not just procedure.

In *McCann,* the ECtHR stated that "judicial review procedure is not well-adapted for the resolution of *sensitive* factual questions which are better left to the County Court responsible for ordering possession". In *Doherty*, the House of Lords clearly expected the court to resolve any disputed facts.

In *Pinnock*, Lord Neuberger said

- "... once it is accepted that it is open to a demoted tenant to seek judicial review of a landlord's decision to bring and continue possession proceedings, then it inevitably follows that, as a generality, it is open to a tenant to challenge that decision on the ground that it would be disproportionate and therefore contrary to article 8. ... EurCtHR jurisprudence requires the court considering such a challenge to have the power to make its own assessment of any relevant facts which are in dispute." [para 73]

- Where it is required in order to give effect to an occupier's article 8 Convention rights, the court's powers of review can, in an appropriate case, extend to reconsidering for itself the facts found by a local authority, or indeed to considering facts which have arisen since the issue of proceedings, by hearing evidence and forming its own view. [para 74]

- "a County Court judge who is invited to make an order for possession against a demoted tenant pursuant to section 143D(2) can consider whether it is proportionate to make the order sought, and can investigate and determine any issues of fact relevant for the purpose of that exercise." [para 104]

However, since a local authority's aim in wanting possession should be a "given", which does not have to be explained or justified in court, "[t]he court will only be concerned with the occupiers' personal circumstances." [para 53]

If a defence is raised and is not dismissed summarily, the court must determine any disputed factual issues.

In *Powell*, *Hall* and *Frisby*, in relation to introductory tenancies, Lord Hope stated that the "court's powers of review can, in an appropriate case, extend to reconsidering for itself the facts found by a local authority, or indeed to considering the facts which have arisen since the issue of proceedings, by hearing evidence and forming its own view." [53]

The real difficulty is likely to be a practical one – how, during a time of significant cuts in resources, will courts (and to an extent, landlords) cope with the increasing number of defendants in such cases who are unrepresented as a result of the recent and ongoing changes in public funding?

What, if any, is the effect of Pinnock and *Powell* on possession claims against tenants enjoying security of tenure, facing a discretionary ground for possession?

The answer must be "none". In *Pinnock*, Lord Neuberger said that Article 8(2) "presents no difficulties of principle or practice in relation to secure tenancies" because of the requirement in Housing Act 1985 s84 that no order for possession can be made against a secure tenant unless it is reasonable to make the order. Any factor which has to be taken into account for the purpose of assessing proportionality under Article 8(2), would have to be taken into account or resolved for the purpose of assessing reasonableness. This is entirely consistent with *Castle Vale Housing Action Trust v Gallagher* (2001) 33 HLR 810, CA.

What, if any, is the effect of *Pinnock* and *Powell* on landlords other than local authorities?

In *Pinnock,* Lord Neuberger stated that the court's observations relating to local authority landlords applied equally to other social landlords to the extent that they are public authorities under the Human Rights Act 1998, but nothing in the judgment applied to private landowners. So, in view of *R (Weaver) v London & Quadrant Housing Trust* [2009] EWCA Civ 587, [2010] 1 WLR 363, if a housing association or other PRPSH is a core public authority or a hybrid authority performing a public function, all that is said in *Pinnock, Powell, Hall* and *Frisby* applies equally to it.

The position in relation to private sector landlords is far more doubtful. It has been suggested that the reference in *Pinnock* to *Zehentner v Austria* (App no 20082/02, 16 July 2009), where the ECtHR considered the effect of Article 8 in the context of an order evicting the applicant from her home following a "judicial sale", opens up the possibility of relying on Article 8 as a defence in private sector possession claims – e.g. after service of a Housing Act 1988 s21 notice on an assured shorthold tenant. Although an argument that Human Rights Act 1998 s6(1) would require courts as public authorities to act in a way which is compatible with Convention rights would require them to consider Article 8 in every possession claim has not been closed off, given landlords' rights under Article 1 of the First Protocol, it is unlikely that such an argument would succeed.

To what extent is the current statutory regime compatible with Article 8? What about Housing Act 1980 s89?

The issue of compatibility with Article 8 was argued in *Pinnock*, *Powell*, *Hall* and *Frisby*. In view of the power that the courts now have to consider proportionality in possession claims, there is no issue about the compatibility of the law concerning introductory and demoted tenants etc.

In *Pinnock*, Lord Neuberger said that Housing Act 1980 s89 (period for which a possession order can be postponed limited to 14 days unless exceptional hardship when 42 days) and some of the provisions of CPR 55, which appear to mandate a summary procedure in some types of possession claim, "may present difficulties in relation to cases where article 8 claims are raised."

However, the Supreme Court also considered Housing Act 1980 s89 in *Powell, Hall and Frisby*. Notwithstanding what was said in *Pinnock*, it stated that no evidence had been put before it to show that in practice the maximum period of six weeks was insufficient to meet the needs of cases of exceptional hardship. "[Any] reading down of the section to enable the court to postpone the execution of an order for possession of a dwelling-house which was not let on a secure tenancy for a longer period than the statutory maximum would go well beyond what [Human Rights Act 1998] section 3(1) permits." [62] However, s89 does not "take away from the court its ordinary powers of case management. It would be perfectly proper for it, for example, to defer making the order for possession pending an appeal or to enable proceedings to be brought in the administrative court which might result in a finding that it was not lawful for a possession order to be made." [63]

So, what is the position if a local authority seeks possession against a terminally ill non-secure occupant who is likely to die in six months time? Before finding deciding whether or not the claimant is entitled to a possession order, the court may be able to adjourn. However, if a trial has taken place, it seems that the court has limited options – either finding that it is disproportionate to make a possession order and dismissing the claim or finding that the claimant is entitled to possession and that it is proportionate to make a possession order to take effect in six weeks (assuming exceptional hardship).

How far has the law moved on as a result of *Pinnock*, *Powell*, *Hall* and *Frisby*?

It really depends on what is taken as the starting point. The law has moved a long way from *Qazi* and *Kay*, but not so far from *Wansworth LBC v Winder* [1985] AC 461. On one view, the journey from Wandsworth to Hounslow is short. However, the House of Lords/Supreme Court has taken the scenic route via Leeds, Birmingham and Manchester.

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