Michaelmas Term
[2010] UKSC 45
On appeal from: [2009] EWCA Civ 852

JUDGMENT

Manchester City Council (Respondent) *v* Pinnock (Appellant)

before

Lord Phillips, President
Lord Hope, Deputy President
Lord Rodger
Lord Walker
Lady Hale
Lord Brown
Lord Mance
Lord Neuberger
Lord Collins

JUDGMENT GIVEN ON

3 November 2010

Heard on 5, 6, 7 and 8 July 2010

Appellant
Richard Drabble QC
James Stark
(Instructed by Platt Halpern)

Respondent
Andrew Arden QC
Jonathan Manning
(Instructed by Manchester City Council)

Intervener (*Secretary of State for Communities and Local Government)*
Daniel Stilitz QC
Ben Hooper
(Instructed by Treasury Solicitor)

Intervener (Equality and Human Rights Commission)
Jan Luba QC

(Instructed by Equality and Human Rights Commission)

LORD NEUBERGER

1. This is the judgment of the Court, to which all members have contributed.

2. The principal questions in this appeal are (a) whether article 8 of the European Convention on Human Rights ("the Convention") requires a court, which is being asked to make an order for possession under section 143D(2) of the Housing Act 1996 ("the 1996 Act") against a person occupying premises under a demoted tenancy, to have the power to consider whether the order would be "necessary in a democratic society" and (b) if so, whether section 143D(2) is compatible with article 8 of the Convention ("article 8"). In the result, the Court answers both questions in the affirmative, the first at paras 22-54, the second at paras 65-107 below.

3. The appeal concerns a tenancy granted by a local authority, but observations relating to local authority landlords in this judgment apply equally to other social landlords to the extent that they are public authorities under the Human Rights Act 1998 ("HRA").

4. On the other hand, we should emphasise at the outset that nothing in this judgment is intended to bear on cases where the person seeking the order for possession is a private landowner. We briefly explain why at para 50 below.

The background to the appeal: secure and demoted tenancies

5. Most residential occupiers of houses and flats owned by local authorities are "secure tenants" under Part IV of the Housing Act 1985 ("the 1985 Act"). By virtue of section 84 of the 1985 Act, a secure tenant cannot be evicted unless the landlord establishes to the satisfaction of the court (a) that one of the grounds specified in schedule 2 to the 1985 Act (e g, non-payment of rent or nuisance to neighbours) exists, and (b), except in some specified categories of case where suitable alternative accommodation is available, that it is reasonable to make an order for possession against the tenant.

6. Even where the landlord establishes that these two requirements are satisfied, the court has a wide discretion under section 85 of the 1985 Act as to what order to make. It may refuse to make any order, it may adjourn the proceedings, it may make an outright possession order which takes effect on a specific day, or it may make a suspended possession order which will not take effect so long as, for instance, the tenant pays the rent or creates no nuisance.

7. The secure tenancy regime was originally introduced by the Housing Act 1980 ("the 1980 Act"), but its provisions were consolidated in by Part IV of the 1985 Act. Certain types of tenancy are excluded from this regime, and they are set out in schedule 1 to the 1985 Act. Subsequently, amendments were made to the regime, most relevantly for present purposes by the 1996 Act and the Anti-social Behaviour Act 2003 ("the 2003 Act").

8. The 2003 Act inserted a new section 82A into the 1985 Act ("section 82A"). This section gives the court the power to make a "demotion order" in respect of a secure tenancy. A demotion order results in a tenancy ceasing to be a secure tenancy and becoming, instead, a "demoted tenancy". Section 82A(4) states that such an order may only be made if (a) the tenant (or someone living with him) has engaged, or has threatened to engage, in (i) "housing-related anti-social conduct" (as defined in section 153A of the 1996 Act) or (ii) conduct which consists of or involves using the "premises for unlawful purposes" (as explained in section 153B of the 1996 Act), and (b) "it is reasonable to make the order". Section 82A makes it clear that the demoted tenancy is a new tenancy. The terms of the previous tenancy as to rent are carried across into the new tenancy, but the demotion results in much reduced rights of security of tenure for the tenant.

9. Somewhat confusingly, the provisions dealing with the operation of the demoted tenancy regime were inserted as Chapter 1A of Part V of the 1996 Act. Subsection (1) of section 143B of that Act ("section 143B") explains that, if a tenancy is demoted, the demotion will last for a year, unless the landlord brings possession proceedings within that year. If such proceedings are brought within the year and are not determined before the year's end, the demoted tenancy continues until the proceedings are determined. If such proceedings are brought within the year and an order for possession is made, the tenancy ends. If no such proceedings are brought, or they are brought and they fail, then, at the end of the year, the demoted tenancy will become a secure tenancy.

10. Subsection (1) of section 143D of the 1996 Act ("section 143D") states that a landlord can only bring a demoted tenancy to an end by obtaining an order for possession from the court. Since it is central to the present appeal, section 143D(2) must be quoted in full:

> "The court must make an order for possession unless it thinks that the procedure under sections 143E and 143F has not been followed."

11. The effect of section 143E of the 1996 Act ("section 143E") is that, before issuing possession proceedings against a demoted tenant, a local authority landlord must serve a notice (a "Notice") informing him of (a) the fact that it has decided to seek possession, (b) the reasons why, (c) the date after which the proceedings will be issued, (d) the tenant's right to request a review of the landlord's decision (a "Review"), and (e) where to get legal advice. Section 143F of the 1996 Act ("section 143F") entitles the tenant, within fourteen days of the Notice, to request a Review, in

which case the local authority landlord is obliged to carry out a Review which complies with regulations made by the Secretary of State under section 143F(3) and (4), and then to inform the tenant of the outcome. Such regulations have been made in the Demoted Tenancies (Review of Decisions) (England) Regulations 2004 (SI 2004/1679).

12. Section 143N of the 1996 Act states that the County Court has jurisdiction "to determine questions arising", and "to entertain proceedings brought", under, inter alia, sections 143B-143F, even if the only relief sought is a declaration.

13. The procedures of the demoted tenancy regime are closely based on those of a regime first introduced by Chapter 1 of Part V of the 1996 Act. It enabled a local authority to grant a tenancy under which a new tenant had a one-year probationary period before becoming a secure tenant. During that first year the tenancy is an "introductory tenancy". The procedure governing the landlord's right to claim possession during that probationary period is contained in sections 127, 128, and 129 of the 1996 Act, whose provisions are, mutatis mutandis, virtually identical to sections 143D, 143E, and 143F respectively.

The procedural background to the appeal

14. In November 1978 Manchester City Council ("the Council") granted Cleveland Pinnock a tenancy of a house at 65 Meldon Road, Longsight ("the property"), where he has lived ever since with his partner, Christine Walker, and, from time to time, with all or some of their five children. In March 2005 the Council applied to the Manchester County Court for an order for possession of the property, or in the alternative a demotion order in respect of Mr Pinnock's secure tenancy. Each of these claims was based on the contention that all of Mr Pinnock's children and Ms Walker (but not Mr Pinnock) had been guilty of serious anti-social behaviour, in breach of the covenants in Mr Pinnock's tenancy. The proceedings came before Recorder Scott Donovan, who heard considerable evidence and argument over a total of six days. In part, the length of the proceedings was due to the Council amending its case in relation to the relief it was seeking.

15. The Recorder gave a full judgment on 8 June 2007. He concluded that a large number of serious allegations against Ms Walker and Mr Pinnock's children were well founded. He nevertheless decided that it would be "truly draconian" to make an order for possession, "bearing in mind the length of the tenancy and Mr Pinnock's blameless life looked at from his own lack of direct involvement in criminal activity". However, he went on to say that "[a]pplying the criteria of 'reasonableness', I am satisfied that a demotion of tenancy order is the most appropriate order and that compliance with the order is entirely within Mr Pinnock's and Christine Walker's own hands."

16. The demotion order therefore took effect from 8 June 2007. On 6 June 2008, the day before the order would effectively have lapsed, the Council served a Notice

under section 143E, which indicated that possession would be sought. The Notice had the effect – pursuant to section 143B – of prolonging the demoted tenancy, and of initiating the procedure envisaged in sections 143D, 143E and 143F. The Notice sought to justify the projected possession proceedings on the ground of further alleged incidents of anti-social behaviour in the vicinity of the property involving two of Mr Pinnock's sons. Mr Pinnock exercised his right to seek a Review, which duly took place before a panel appointed by the Council ("the Panel"). In its decision of 3 July 2008, the Panel effectively upheld the Notice.

17. The Council then issued a claim for possession which came before His Honour Judge Holman in the Manchester County Court. After a two-day hearing, the Judge gave a full judgment on 22 December 2008. The upshot of his decision was that he made an outright order for possession of the property. Mr Pinnock appealed to the Court of Appeal, who dismissed his appeal: [2009] EWCA Civ 852. Mr Pinnock now appeals to this Court.

The issues which arise on this appeal

18. That simple description of the present proceedings rather masks the important and difficult issues to which they give rise. Those issues are apparent from the clear and careful judgments of Judge Holman, in the County Court, and of Stanley Burnton LJ (with whom Mummery and Lloyd LJJ agreed) in the Court of Appeal. Mr Pinnock wished to challenge the factual basis on which the Council had decided to seek possession and the Panel had decided to uphold the decision. He also contended that the making of an order for possession would violate his article 8 Convention rights.

19. Judge Holman concluded that his role in this case was, as he put it, at para 60, "limited to conducting a conventional judicial review" of the Council's decision to bring the possession proceedings, and that his remit did not extend to "resolv[ing] factual disputes". In particular, he could not entertain any argument based on article 8. Having accepted that he could review the Council's decision to bring and maintain the possession claim on normal judicial review principles, the Judge concluded that the Council's decision to prosecute the claim was rational. He accordingly made an outright order for possession.

20. Stanley Burnton LJ agreed in the result, but, while largely agreeing with Judge Holman's analysis, he thought that the County Court's role was even more limited. He said this, [2009] EWCA Civ 852, at para 50:

> "Section 143D of the 1996 Act restricts the county court to considering whether the procedure under sections 143E and 143F has been followed. If the court concludes the procedure has not been followed, it will not make an order for possession. If it has been followed, it must make the order. I emphasise the word procedure. The court's review is limited to matters of procedure, and the county court cannot review the substance

> or rationality of the landlord's decision, or whether or not it is consistent with the tenant's or other occupiers' Convention rights."

Stanley Burnton LJ nonetheless went on, helpfully, to consider whether he would have agreed with the Judge's conclusion that the Council's decision to maintain a claim for possession was rational. He concluded that it was; indeed he thought that the Judge had taken rather a restrictive view of the relevant evidence which the Council could have taken into account.

21. This appeal gives rise to four main issues, of increasing specificity. The first is whether the jurisprudence of the European Court of Human Rights ("EurCtHR") requires that, before making an order for possession of property which consists of a person's home pursuant to a claim made by a local authority (or other public authority), a domestic court should be able to consider the proportionality of evicting that person from his home under article 8, and, in the process of doing so, to resolve any relevant factual disputes between the parties. We deal with that question in paras 22-54 below and answer it in the affirmative. The second issue (paras 55-64 below) is what this conclusion means in practice in relation to claims for possession, and related claims, in relation to residential property. The third issue (paras 65-107 below) is whether the demoted tenancy regime in the 1985, 1996 and 2003 Acts can properly be interpreted so as to comply with the requirements of article 8, or whether at least some aspects of that regime are incompatible with the occupiers' article 8 Convention rights. The fourth issue (paras 108-132 below), which requires a fuller consideration of the facts of this case, is how the appeal should be disposed of in the light of the answers on the first three issues.

First issue: what does the Convention require of the courts?

The nature of the issue

22. So far as relevant, article 8 of the Convention provides:

> "1. Everyone has the right to respect for … his home… .
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of … the economic well-being of the country, for the prevention of disorder or crime, …or for the protection of the rights … of others."

It is also appropriate to refer to article 6, which, so far as relevant, provides:

> "In the determination of his civil rights and obligations … everyone is entitled to a fair … hearing … by an independent and impartial tribunal established by law."

23. The argument on behalf of Mr Pinnock is as follows.

> (a) At any rate where the person seeking possession is a "public authority", a court invited to make an order for possession of a person's home must be satisfied that article 8 is complied with.
> (b) Accordingly, in the present proceedings, Judge Holman had to satisfy himself that the order for possession which he was being invited to make complied with article 8.
> (c) Article 8, when read together with article 6, required the Judge, as the relevant independent tribunal, to be satisfied that the order for possession (i) would be "in accordance with the law", and (ii) would be "necessary in a democratic society" – i e, that it would be proportionate.
> (d) The order for possession was "in accordance with the law" since it was made pursuant to the provisions relating to demoted tenancies in the 1985 and 1996 Acts, which are in principle unobjectionable under article 8.
> (e) However, Mr Pinnock was not given the opportunity to raise with the court the question whether the order for possession was, in all the circumstances of this case, proportionate. Therefore article 8 was violated.
> (f) Further, in order to determine proportionality, the court should have had power to resolve for itself any issues of fact between the Council and Mr Pinnock, and to form its own view of proportionality, rather than adopting the traditional judicial review approach taken by the Judge.
> (g) Either the legislation should be interpreted to have the effect contended for in points (e) and (f), or this court should make a declaration of incompatibility.

24. The issues identified in the argument for Mr Pinnock are by no means novel. It is therefore necessary for the Court to look briefly at the decisions of the House of Lords which deal with them and then, in a little more detail, at the relevant decisions of the EurCtHR.

The House of Lords Cases

25. In three relatively recent cases the House of Lords held that it was not open to a residential occupier, against whom possession was being sought by a local authority, to raise a proportionality argument under article 8. In other words, the House rejected points (e) and (f) in the outline of the argument for Mr Pinnock in para 23 above. Point (g) therefore did not arise. For this reason, the Court of Appeal and Judge Holman were bound to come to the conclusions which we have summarised in paras 19 and 20 above.

26. The three decisions of the House of Lords are *Harrow London Borough Council v Qazi* [2003] UKHL 43; [2004] 1 AC 983*, Kay v Lambeth London Borough Council* [2006] UKHL 10; [2006] 2 AC 465, and *Doherty v Birmingham City Council* [2008] UKHL 57; [2009] 1 AC 367. In each of them the defendants were residential occupiers of properties owned by a local authority, but, for one reason or another, they were not secure tenants, and, having had any right to continue to occupy the respective properties brought to an end in accordance with domestic law, they were trespassers. So, in accordance with domestic law, the defendants could raise no defence to the local authority's claim for possession. In each case, however, the defendants contended that they should be able to rely on the argument that, even though they were trespassers with no defence to a claim for possession under domestic law, they had the right to have the proportionality of the loss of their home taken into account by virtue of their article 8 Convention rights. No disrespect is intended to the impressive and careful reasoning in those three decisions when we say that, for present purposes, it is unnecessary to consider them in any detail.

27. In *Harrow v Qazi* [2004] 1 AC 983 and in *Kay v Lambeth* [2006] 2 AC 465, albeit in each case by a bare majority, the House decided that, "a defence which does not challenge the law under which the possession order is sought as being incompatible with article 8 but is based only on the occupier's personal circumstances should be struck out": *Kay v Lambeth* [2006] 2 AC 465, 516-517, para 110, per Lord Hope of Craighead, with whom Lord Scott of Foscote, Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood agreed. This observation applied to claims against trespassers, just as much as to claims against current or former tenants or licensees. At the end of the same paragraph Lord Hope explained that, following *Wandsworth London Borough Council v Winder* [1985] AC 461, in principle, it would be open to a defendant "to challenge the decision of a local authority to recover possession as an improper exercise of its powers at common law" on the traditional judicial review ground "that it was a decision that no reasonable person would consider justifiable".

28. In *Doherty v Birmingham* [2009] 1 AC 367 the law as stated in para 110 of *Kay* was substantially reaffirmed. On the article 8 point Lord Mance, however, dissented, at para 132, and Lord Walker of Gestingthorpe displayed less than whole-hearted enthusiasm, at paras 107-108. The law on the judicial review point was affirmed by Lord Hope, Lord Walker, and Lord Mance, at paras 56, 123 and 157 respectively. Nevertheless, in the light of the developments in the Strasbourg jurisprudence which we describe below, the House developed the law by acknowledging that the traditional approach to judicial review would have to be expanded, particularly to permit the court to make its own assessment of the relevant facts: [2009] 1 AC 367, especially at p 416, para 68, per Lord Scott, and at p 443, para 138, per Lord Mance.

29. In both *Harrow v Qazi* [2004] 1 AC 983 and *Kay v Lambeth* [2006] 2 AC 465, Lord Bingham of Cornhill (dissenting along with Lord Steyn in the former case, and with Lord Nicholls of Birkenhead and Lord Walker in the latter) accepted that it should be open, as a matter of principle, to a residential occupier, against whom a local authority is seeking possession, to raise an article 8 proportionality argument

based on the facts of the particular case. However, in *Qazi*, [2004] 1 AC 983, at para 25, Lord Bingham said that, if this was right, "the occasions on which a court would be justified in declining to make a possession order would be very highly exceptional". He effectively repeated this view in *Kay v Lambeth* [2006] 2 AC 465, 491-492, para 29, where he suggested that only in "rare and exceptional cases" would an article 8 proportionality challenge "not be futile".

The Strasbourg Jurisprudence

30. Mr Pinnock contends that, exceptionally, it is appropriate for this nine-judge court to depart from the majority view in these cases because there is now a consistent series of decisions of the EurCtHR which unambiguously supports the minority view in the earlier House of Lords decisions, and there is no good reason not to follow that series of decisions. We must therefore examine them.

31. In *Connors v United Kingdom* (App no 66746/01), 27 May 2004 (2004) 40 EHRR 189, gypsies had initially been permitted to locate their caravan on a piece of land owned by a local authority, but their right of occupation was brought to an end because the local authority considered that they were committing a nuisance. The local authority then successfully brought summary proceedings for possession, on the ground that they were trespassers and had no right to remain in occupation of the land. Before the First Section of the EurCtHR the gypsies successfully contended that the proceedings violated their rights under article 8.

32. Although the local authority's decision to evict the gypsies was susceptible to judicial review, the EurCtHR considered, 40 EHRR 189, para 92, that this procedure was insufficient to satisfy the requirements of article 8 because "the local authority was not required to establish any substantive justification for evicting [the gypsies], and on this point judicial review could not provide any opportunity for an examination of the facts in dispute between the parties."

33. In a passage, 40 EHRR 189, paras 81-83, which has often been quoted verbatim in subsequent decisions, the EurCtHR said:

> "81. An interference will be considered 'necessary in a democratic society' for a legitimate aim if it answers a 'pressing social need' and, in particular, if it is proportionate to the legitimate aim pursued. While it is for the national authorities to make the initial assessment of necessity, the final evaluation as to whether the reasons cited for the interference are relevant and sufficient remains subject to review by the Court for conformity with the requirements of the Convention.
>
> 82. In this regard, a margin of appreciation must, inevitably, be left to the national authorities …. This margin will vary according to the nature

> of the Convention right in issue, its importance for the individual and the nature of the activities restricted, as well as the nature of the aim pursued by the restrictions .... Where general social and economic policy considerations have arisen in the context of article 8 itself, the scope of the margin of appreciation depends on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant.
>
> 83. The procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, the Court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by article 8."

34. In *Blečić v Croatia* (App no 59532/00), 29 July 2004 (2004) 41 EHRR 185, the First Section of the EurCtHR held that there had been no violation of the applicant's article 8 rights in circumstances where her protected tenancy of her home had been terminated by the Croatian court on the ground that she had ceased to occupy it for 10 months during 1991-1992. Her case was that it had been her home since 1953, and that her absence had been attributable to armed conflict in Dalmatia, but it was held that it had been her "personal decision … to leave". The EurCtHR said, at 41 EHRR 185, para 65:

> "State intervention in socio-economic matters such as housing is often necessary in securing social justice and public benefit. In this area, the margin of appreciation available to the State in implementing social and economic policies is necessarily a wide one. The domestic authorities' judgment as to what is necessary to achieve the objectives of those policies should be respected unless that judgment is manifestly without reasonable foundation. Although this principle was originally set forth in the context of complaints under article 1 of Protocol No 1 … the State enjoys an equally wide margin of appreciation as regards respect for the home in circumstances such as those prevailing in the present case, in the context of article 8. Thus, the Court will accept the judgment of the domestic authorities as to what is necessary in a democratic society unless that judgment is manifestly without reasonable foundation, that is, unless the measure employed is manifestly disproportionate to the legitimate aim pursued."

The case then went to the Grand Chamber, which held that, ratione temporis, the court had had no jurisdiction to hear it. The Grand Chamber said nothing, however, to cast doubt on what the First Section had said in the passage which we have quoted: [2006] ECHR 207.

35. In *McCann v United Kingdom* (App no 19009/04), 13 May 2008 (2008) 47 EHRR 913 the County Court made an order for possession against a man who occupied his home as a joint tenant with his estranged wife, on the ground that the tenancy had been determined by a notice to quit which she had served at the request of the local authority landlord and without reference to her husband. The EurCtHR (Fourth Section) rejected the contention that the reasoning in *Connors v UK* 40 EHRR 189, paras 81-83, was "confined only to cases involving the eviction of gypsies or cases where the applicant sought to challenge the law itself rather than its application in his particular case": 47 EHRR 913, para 50. The court continued:

> "The loss of one's home is the most extreme form of interference with the right for respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under [article 8], notwithstanding that, under domestic law, his right of occupation has come to an end."

36. At para 54, the EurCtHR considered and rejected the contention that "the grant of the right to the occupier to raise an issue under article 8 would have serious consequences for the functioning of the system or for the domestic law of landlord and tenant", citing and confirming the view of Lord Bingham in *Kay v Lambeth* [2006] 2 AC 465, 491-492, para 29, to the effect that "only in very exceptional cases" could "an applicant … succeed in raising an arguable case which would require a court to examine the issue". The court also said that "in the great majority of cases, an order for possession could continue to be made in summary proceedings."

37. In *Ćosić v Croatia* (App no 28261/06), 15 January 2009 the Croatian state had obtained an order evicting the applicant from her home, which she had ceased to have any right to occupy as a matter of domestic law. After quoting and considering *Connors v UK* 40 EHRR 189, paras 81-83, the EurCtHR (First Section) pointed out, at para 21, that the national courts had based their decision "exclusively on the [domestic] applicable laws" and had "thus confined themselves to finding that occupation by the appellant was without legal basis [and] made no further analysis as to the proportionality of the measure to be applied against the applicant". The court immediately went on to say that the Convention required that the eviction order was "proportionate … to the legitimate aim pursued", and that "no legal provision of domestic law should be interpreted and applied in a manner incompatible with Croatia's obligations under the Convention".

38. In paras 22 and 23, the EurCtHR concluded that article 8 had been violated since "the applicant [had not been] afforded [the] possibility" of having "the proportionality and reasonableness of the measure [viz, an order of court evicting her from her home] determined by an independent tribunal in the light of the relevant principles under article 8 …".

39. In *Zehentner v Austria* (App no 20082/02), 16 July 2009 the EurCtHR (First Section) had to consider the effect of article 8 in the context of an order evicting the applicant from her home following a "judicial sale", after the making of the Austrian equivalent of a charging order. The procedural circumstances were rather unusual, but the court held, at para 54, that "the judicial sale and the applicant's eviction are to be seen as a whole." Importantly, for present purposes, at paras 52-59, the court reaffirmed the approach in *Connors v UK* 40 EHRR 189 and *McCann v UK* 47 EHRR 913. In particular, the court also stated, at para 59, that a person at risk of eviction from their home should "be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under article 8."

40. In *Paulić v Croatia* (App no 3572/06), 22 October 2009 the EurCtHR (First Section) cited *McCann v UK* 47 EHRR 913 and reiterated, at para 43, "that any person at risk of an interference with his right to home should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal … notwithstanding that, under domestic law, he or she has no right to occupy a flat." The court went on to explain that this right "does not arise automatically", but only if the issue is raised with the court by the person concerned.

41. Finally, there is *Kay v United Kingdom* (App no 37341/06), 21 September 2010 in which the EurCtHR (Fourth Section) gave its judgment after the conclusion of the oral argument in this case. We then received written submissions on the decision from the parties. In that case the application was made to the Strasbourg court by the unsuccessful appellants in *Kay v Lambeth* [2006] 2 AC 465. They had no security of tenure in their homes and their defences to claims for possession brought by the local authority – based on the contention that it was disproportionate to deprive them of their homes in the light of article 8 – had been struck out. After carefully considering the various views expressed in the House of Lords in *Kay v Lambeth* [2006] 2 AC 465 and *Doherty v Birmingham* [2009] 1 AC 367, and the relevant decisions of the Court of Appeal, the EurCtHR stated, at paras 65-68, that the principles laid down in *Connors v UK* 40 EHRR 189 and *McCann v UK* 47 EHRR 913 applied.

42. The EurCtHR then stated, at para 73:

> "The Court welcomes the increasing tendency of the domestic courts to develop and expand conventional judicial review grounds in the light of article 8. A number of their Lordships in *Doherty* alluded to the possibility for challenges on conventional judicial review grounds in cases such as the applicants' to encompass more than just traditional *Wednesbury* grounds (see Lord Hope at para 55; Lord Scott at paras 70 and 84 to 85; and Lord Mance at paras 133 to 135 of the House of Lords judgment). However, notwithstanding these developments, the Court considers that at the time that the applicants' cases were considered by the domestic courts, there was an important distinction between the majority and minority approaches in the House of Lords, as

demonstrated by the opinions in *Kay* itself. In *McCann*, the Court agreed with the minority approach [in *Kay v Lambeth* [2006] 2 AC 465] although it noted that, in the great majority of cases, an order for possession could continue to be made in summary proceedings and that it would be only in very exceptional cases that an applicant would succeed in raising an arguable case which would require a court to examine the issue."

43. Accordingly, in the next paragraph of its judgment, the EurCtHR concluded:

"In conclusion, the *Kay* applicants' challenge to the decision to strike out their article 8 defences failed because it was not possible at that time to challenge the decision of a local authority to seek a possession order on the basis of the alleged disproportionality of that decision in light of personal circumstances. Accordingly, for the reasons given in *McCann*, the Court concludes that the decision by the County Court to strike out the applicant's article 8 defences meant that the procedural safeguards required by article 8 for the assessment of the proportionality of the interference were not observed. As a result, the applicants were dispossessed of their homes without any possibility to have the proportionality of the measure determined by an independent tribunal. It follows that there has been a violation of article 8 of the Convention in the instant case."

44. The EurCtHR was therefore saying that, in so far as the law had subsequently been developed in *Doherty v Birmingham* [2009] 1 AC 367, this development could not be relied on by the United Kingdom in *Kay v UK* (App no 37341/06).

Conclusion on the first issue

45. From these cases, it is clear that the following propositions are now well established in the jurisprudence of the EurCtHR:

(a) Any person at risk of being dispossessed of his home at the suit of a local authority should in principle have the right to raise the question of the proportionality of the measure, and to have it determined by an independent tribunal in the light of article 8, even if his right of occupation under domestic law has come to an end: *McCann v UK* 47 EHRR 913, para 50; *Ćosić v Croatia* (App no 28261/06), para 22; *Zehentner v Austria* (App no 20082/02), para 59; *Paulić v Croatia* (App no 3572/06), para 43, and *Kay v UK* (App no 37341/06), paras 73-4.

(b) A judicial procedure which is limited to addressing the proportionality of the measure through the medium of traditional judicial review (i e, one which does not permit the court to make its own assessment of the facts in an

appropriate case) is inadequate as it is not appropriate for resolving sensitive factual issues: *Connors v UK* 40 EHRR 189, para 92; *McCann v UK* 47 EHRR 913, para 53; *Kay v UK* (App no 37341/06), paras 72-73.

(c) Where the measure includes proceedings involving more than one stage, it is the proceedings as a whole which must be considered in order to see if article 8 has been complied with: *Zehentner v Austria* (App no 20082/02), para 54.

(d) If the court concludes that it would be disproportionate to evict a person from his home notwithstanding the fact that he has no domestic right to remain there, it would be unlawful to evict him so long as the conclusion obtains – for example, for a specified period, or until a specified event occurs, or a particular condition is satisfied.

Although it cannot be described as a point of principle, it seems that the EurCtHR has also franked the view that it will only be in exceptional cases that article 8 proportionality would even arguably give a right to continued possession where the applicant has no right under domestic law to remain: *McCann v UK* 47 EHRR 913, para 54; *Kay v UK* (App no 37341/06), para 73.

46. We have referred in a little detail to the EurCtHR jurisprudence. This is because it is important for the Court to emphasise what is now the unambiguous and consistent approach of the EurCtHR, when we have to consider whether it is appropriate for this Court to depart from the three decisions of the House of Lords.

47. As we have already explained, the House of Lords decisions have to be seen against the backdrop of the evolving Strasbourg jurisprudence. So, for instance, the first of the House of Lords decisions, *Harrow v Qazi* [2004] 1 AC 983, came before any of the EurCtHR judgments. *Kay v Lambeth* [2006] 2 AC 465 was decided after *Connors v UK* 40 EHRR 189. But, viewed without the benefit of subsequent EurCtHR jurisprudence, the reasoning in *Connors* could have been interpreted as applying only to gypsies. Indeed one point made on the applicant's behalf was that gypsies occupying sites owned by local authorities were not given any rights of security of tenure, unlike occupiers of flats or houses owned by local authorities, who were secure tenants. Although *McCann v UK* 47 EHRR 913 had been decided by the time of *Doherty v Birmingham* [2009] 1 AC 367, it would have been inappropriate for a five-judge court, at least in the particular circumstances, to depart substantially from the decision of the seven-judge court in *Kay*. Importantly, the judgments in *Ćosić v Croatia* (App no 28261/06), *Zehentner v Austria* (App no 20082/02), *Paulić v Croatia* (App no 3572/06) and *Kay v UK* (App no 37341/06) were all given after the last of the three House of Lords decisions.

48. This Court is not bound to follow every decision of the EurCtHR. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the Court to engage in the constructive dialogue with the EurCtHR which is of value to the development of Convention law (see e g *R v*

Horncastle [2009] UKSC 14; [2010] 2 WLR 47). Of course, we should usually follow a clear and constant line of decisions by the EurCtHR: *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323. But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber. As Lord Mance pointed out in *Doherty v Birmingham* [2009] 1 AC 367, para 126, section 2 of the HRA requires our courts to "take into account" EurCtHR decisions, not necessarily to follow them. Where, however, 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.

49. In the present case there is no question of the jurisprudence of the EurCtHR failing to take into account some principle or cutting across our domestic substantive or procedural law in some fundamental way. That is clear from the minority opinions in *Harrow v Qazi* [2004] 1 AC 983 and *Kay v Lambeth* [2006] 2 AC 465, and also from the fact that our domestic law was already moving in the direction of the European jurisprudence in *Doherty v Birmingham* [2009] 1 AC 367. Even before the decision in *Kay v UK* (App no 37341/06), 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. Therefore, if our law is to be compatible with article 8, where a court is asked to make an order for possession of a person's home at the suit of a local authority, 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.

50. We emphasise that this conclusion relates to possession proceedings brought by local authorities. As we pointed out at para 4 above, nothing which we say is intended to bear on cases where the person seeking the order for possession is a private landowner. Conflicting views have been expressed both domestically and in Strasbourg on that situation. In *Harrow v Qazi* [2004] 1 AC 983 the views of Lord Bingham and Lord Steyn, at paras 23 and 26, can be contrasted with the view of Lord Hope, at para 52. In *Belchikova v Russia* (App no 2408/06, 25 March 2010), the application was held to be inadmissible, but the EurCtHR (First Section) seems to have considered that article 8 was relevant, even when the person seeking possession was a private sector landowner. Presumably, this was on the basis that the court making the order was itself a public authority. But it is not clear whether the point was in contention. In the rather older admissibility decision of *Di Palma v United Kingdom* (App no 11949/86) (1986) 10 EHRR 149, 155-156, the Commission seems to have taken a different view, but the point was only very briefly discussed. No doubt, in such cases article 1 of the First Protocol to the Convention will have a part to play, but it is preferable for this Court to express no view on the issue until it arises and has to be determined.

Exceptionality

51. It is necessary to address the proposition that it will only be in "very highly exceptional cases" that it will be appropriate for the court to consider a proportionality argument. Such a proposition undoubtedly derives support from the views expressed by Lord Bingham, and has been referred to with apparent approval by the EurCtHR in more than one case. Nevertheless, it seems to us to be both unsafe and unhelpful to invoke exceptionality as a guide. It is unhelpful because, as Lady Hale pointed out in argument, exceptionality is an outcome and not a guide. It is unsafe because, as Lord Walker observed in *Doherty v Birmingham* [2009] 1 AC 367, para 122, there may be more cases than the EurCtHR or Lord Bingham supposed where article 8 could reasonably be invoked by a residential tenant.

52. We would prefer to express the position slightly differently. The question is always whether the eviction is a proportionate means of achieving a legitimate aim. Where a person has no right in domestic law to remain in occupation of his home, the proportionality of making an order for possession at the suit of the local authority will be supported not merely by the fact that it would serve to vindicate the authority's ownership rights. It will also, at least normally, be supported by the fact that it would enable the authority to comply with its duties in relation to the distribution and management of its housing stock, including, for example, the fair allocation of its housing, the redevelopment of the site, the refurbishing of sub-standard accommodation, the need to move people who are in accommodation that now exceeds their needs, and the need to move vulnerable people into sheltered or warden-assisted housing. Furthermore, in many cases (such as this appeal) other cogent reasons, such as the need to remove a source of nuisance to neighbours, may support the proportionality of dispossessing the occupiers.

53. In this connection, it is right to refer to a point raised by the Secretary of State. He submitted that a local authority's aim in wanting possession should be a "given", which does not have to be explained or justified in court, so that the court will only be concerned with the occupiers' personal circumstances. In our view, there is indeed force in the point, which finds support in Lord Bingham's comment in *Kay v Lambeth* [2006] 2 AC 465, 491, para 29, that to require the local authority routinely, from the outset, to plead and prove that the possession order sought is justified would, in the overwhelming majority of cases, be burdensome and futile. In other words, 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. But, in a particular case, the authority may have what it believes to be particularly strong or unusual reasons for wanting possession – for example, that the property is the only occupied part of a site intended for immediate development for community housing. The authority could rely on that factor, but would have to plead it and adduce evidence to support it.

54. Unencumbered property rights, even where they are enjoyed by a public body such as a local authority, are of real weight when it comes to proportionality. So, too, is the right – indeed the obligation – of a local authority to decide who should occupy its residential property. As Lord Bingham said in *Harrow v Qazi* [2004] 1 AC 983, 997, para 25:

> "[T]he administration of public housing under various statutory schemes is entrusted to local housing authorities. It is not for the court to second-guess allocation decisions. The Strasbourg authorities have adopted a very pragmatic and realistic approach to the issue of justification."

Therefore, 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.

Second issue: the application of this conclusion in general

55. The conclusion that, before making an order for possession, the court must be able to decide not only that the order would be justified under domestic law, but also that it would be proportionate under article 8(2) to make the order, presents no difficulties of principle or practice in relation to secure tenancies. As explained above, no order for possession can be made against a secure tenant unless, inter alia, it is reasonable to make the order. Any factor which has to be taken into account, or any dispute of fact which has to be resolved, 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 under section 84 of the 1985 Act. Reasonableness under that section, like proportionality under article 8(2), requires the court to consider whether to order possession at all, and, if so, whether to make an outright order rather than a suspended order, and, if so, whether to direct that the outright order should not take effect for a significant time.

56. Moreover, reasonableness involves the trial judge "tak[ing] into account all the relevant circumstances … in … a broad common-sense way": *Cumming v Danson* [1942] 2 All ER 653, 655, per Lord Greene MR. It therefore seems highly unlikely, as a practical matter, that it could be reasonable for a court to make an order for possession in circumstances in which it would be disproportionate to do so under article 8.

57. The implications of article 8 being potentially in play are much more significant where a local authority is seeking possession of a person's home in circumstances in which domestic law imposes no requirement of reasonableness and gives an unqualified right to an order for possession. In such a case the court's obligation under article 8(2), to consider the proportionality of making the order

sought, does represent a potential new obstacle to the making of an order for possession. The wide implications of this obligation will have to be worked out. As in many situations, that is best left to the good sense and experience of judges sitting in the County Court.

58. The present appeal involves a type of case which arises relatively rarely, namely a claim for possession against a demoted tenant, and we heard relatively little in the submissions about other types of case. When it comes to possession proceedings, a demoted tenant is unusual in two respects: (a) he has already been the subject of proceedings which have resulted in the loss of statutory protection, and (b) he will have been given notice of the grounds on which possession is being sought, and an opportunity to challenge those grounds.

59. The conjoined appeals in *Salford City Council v Mullen* [2010] EWCA Civ 336, which are due to be heard by this Court later this month, involve possession orders made in different and more common circumstances, namely the introductory tenancy regime (under Chapter 1 of Part V of the 1996 Act) and the homelessness regime (under Part VII of the 1996 Act). Those appeals may therefore provide a more appropriate vehicle for the giving of general guidance. Moreover, in relation to the homelessness regime, this Court will be able to consider whether any guidance can usefully be given to local authorities as to what course to take before seeking possession in cases where there is no provision for the kind of procedure envisaged in sections 143E and 143F of the 1996 Act. In the light of our decision in the present appeal the lawyers preparing for those appeals will have the opportunity to give particular attention to these aspects of the matter.

60. Nevertheless, certain general points can be made, even at this stage.

61. First, it is only where a person's "home" is under threat that article 8 comes into play, and there may be cases where it is open to argument whether the premises involved are the defendant's home (e g where very short-term accommodation has been provided). Secondly, as a general rule, article 8 need only be considered by the court if it is raised in the proceedings by or on behalf of the residential occupier. Thirdly, 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.

62. Fourthly, 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.

63. Fifthly, 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. For example, section 89 of the 1980 Act limits the period for which a possession order can be postponed to 14 days, or, in cases of "exceptional hardship", 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. Again, we say no more on the point, since these aspects were not canvassed on the present appeal to any significant extent, save in relation to the legislation on demoted tenancies which we are about to discuss under the third issue.

64. Sixthly, the suggestions put forward on behalf of the Equality and Human Rights Commission, 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" seem to us well made.

Third issue: the application of this conclusion to demoted tenancies

Introductory

65. As explained above, where an order for possession is made against a demoted tenant, such as Mr Pinnock, the court is involved at two different stages. The first stage, which arises if the landlord decides to apply for a demotion order, requires the court to decide whether to make such an order. The second stage, which arises if the landlord decides to make an application for an order for possession while the demotion order applies, requires the court to decide whether to make an order for possession. Each stage involves a significant and direct assault on the tenant's right to occupy his home, and therefore engages article 8.

66. So far as the first stage is concerned, before making a demotion order, the court must consider for itself the factual basis for making such an order. Moreover, the court can only make such an order once it is satisfied (a) that the facts which it investigates and determines justify the order under section 82A(4)(a), and (b) that it is reasonable to make the order under section 82A(4)(b). I therefore find it impossible to conceive of circumstances where the requirements of article 8 would not be satisfied by the plain words of the relevant statutory provisions.

67. Greater problems arise, however, when one turns to the second stage where, as in this case, the court is asked to make an order for possession against a demoted tenant.

The proper interpretation of section 143D(2) of the 1996 Act

68. The first argument raised against the conclusion that the County Court judge who is asked to make an order for possession under section 143D(2) can carry out his own article 8 assessment of the proportionality of making such an order arises from the wording of the sub-section. We have quoted it at para 10 above. The provision requires the court to make an order for possession, "unless it thinks that the procedure under sections 143E and 143F has not been followed." If one construes that section in accordance with the traditional approach to interpretation, it is hard to see how the court could have the power either to investigate for itself the facts relied on to justify the decision to seek possession, or to refuse to make an order for possession if it considered that it would be disproportionate to do so.

69. Therefore there is obvious force in the point that, in the absence of any article 8 Convention right, section 143D(2) would limit the court to satisfying itself that the procedural requirements of sections 143E and 143F had been complied with. Stanley Burnton LJ took that view in the Court of Appeal. At any rate, absent the HRA, the purpose of section 143D appears to be to deprive the courts of almost any ability to stand in the way of a landlord who had decided to seek possession against a demoted tenant.

70. However, as the Convention requires the court to have the power to consider the proportionality under article 8 of making a possession order at the instance of a local authority in respect of a person's home, the effect of section 3(1) of the HRA is that section 143D(2) should be read as not excluding that power, if at all possible. Accordingly, it is necessary to examine the issue rather more critically.

71. Clearly, the local authority, when deciding to bring possession proceedings against a demoted tenant under section 143E, and any Panel reviewing that decision under section 143F have a duty in domestic law to act rationally and to investigate the relevant facts fairly, as well as a duty under article 8 to consider proportionality, which includes investigating the relevant facts.

72. Rightly, in our view, it is common ground that a court has jurisdiction, under normal judicial review principles, to satisfy itself that the local authority and Panel have indeed acted reasonably and have investigated the relevant facts fairly, when deciding to bring possession proceedings. From this it must follow that any decision by the local authority to continue possession proceedings is similarly susceptible to judicial review. At the same time, it is right to emphasise that it would almost always require a marked change of circumstances following a Panel's decision to approve the proceedings, before an attempt could properly be made to judicially review the continuance of proceedings which were initially justified.

73. In our judgment, 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. Further, as we saw at paras 31 to 43 above, the 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. We have already pointed out, at para 28 above, that Lord Scott and Lord Mance, in particular, reached this conclusion in *Doherty v Birmingham* [2009] 1 AC 367, paras, 68 and 138. The EurCtHR acknowledged this development in *Kay v UK* (App no 37341/06), para 73. In these circumstances we are satisfied that, wherever possible, the traditional review powers of the court should be expanded so as to permit it to carry out that exercise.

74. In summary. 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.

75. Much the more difficult question, however, is whether it is possible to read and give effect to section 143D(2) in a way that would permit the County Court judge to carry out this exercise. As we have pointed out at para 69 above, the purpose of the subsection appears to be to ensure that the court makes an order for possession in all cases except where it thinks that the procedure under sections 143E and 143F has not been followed. In other words, the purpose is to ensure that the court does nothing more than check whether the procedure has been followed. It could therefore be argued that holding that the court could assess the proportionality of the local authority's decision to bring and to continue the possession proceedings would go against the whole import of the section and would amount to amending rather than interpreting it.

76. We have come to the conclusion that we should reject that argument.

77. In our view, 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). After all, the tenant's argument in such circumstances would be within the scope of the ambit of section 143D(2), namely that "the procedure under sections 143E and 143F has not been [lawfully] followed", since lawfulness must be an inherent requirement of the procedure. It must equally be open to the court to consider whether the procedure has been lawfully followed, having regard to the defendant's article 8 Convention rights and section 6 of the HRA.

78. This approach is borne out by section 7(1) of the HRA which, so far as relevant, provides:

> "A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—
>
> …
>
> (b) rely on the Convention right or rights concerned in any legal proceedings…."

By virtue of this provision, 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. This approach fits with the observation of the EurCtHR in *Paulić v Croatia* (App no 3572/06), para 43, that the court need consider proportionality only if it is raised by the person whose article 8 rights are said to be infringed.

79. We therefore consider that 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.

80. This approach to the interpretation of section 143D(2) also goes a long way towards disposing of Mr Arden's argument that, even if article 8 required this kind of review, the County Court does not have jurisdiction to carry it out. So, he suggested, the issue would have to be referred to the High Court, where it would presumably be assigned to the Administrative Court. In effect, section 7(1)(b) confers the necessary jurisdiction on County Court judges when it is necessary for them to deal with a defence which relies on an alleged breach of the defendant's article 8 Convention rights.

81. The same conclusion can be justified on the rather wider basis that, where a tenant contends that the decision of a local authority landlord to issue, or indeed to continue, possession proceedings can in some way be impugned, the tenant should be entitled to raise that contention in the possession proceedings themselves, even if they are in the County Court. This seems to us to follow from the decision of the House of Lords in *Wandsworth v Winder* [1985] AC 461, as cited and approved in the present context in *Kay v Lambeth* [2006] 2 AC 465, para 110, and again in *Doherty v Birmingham* [2009] 1 AC 367, paras 56, 123 and 157 (see para 28 above). This approach also derives strong support from the observations of Lord Bingham in *Kay v Lambeth* [2006] 2 AC 465, para 30.

82. This second reason involves disapproving part of the reasoning of the Court of Appeal in *Manchester City Council v Cochrane* [1999] 1 WLR 809, by which, understandably, the Court of Appeal in this case appears to have regarded itself as

bound. In *Manchester City* the Court of Appeal held that an introductory tenant could not raise a defence to a claim for possession when that defence was based on the contentions that (a) there had been no breaches of the tenancy agreement (the substantive ground relied on by the Council for bringing the instant proceedings), (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.

83. As a result of our conclusion on the first issue on this appeal, article 8 would require the court to be able to consider the facts, as well as proportionality, for itself. However, even in the absence of article 8, a court would have had power to consider whether a reasonable local authority and panel could have reached the conclusion that such breaches existed. Similarly, a court would have had power to consider whether the relevant Regulations had been followed, and whether the rules of natural justice had been followed. The question is whether that court could be the court hearing the possession claim, given that it is (virtually always) the County Court.

84. In *Manchester City* [1999] 1 WLR 809, three reasons were given for concluding that the defences sought to be raised could not be pursued in the County Court. The first was that section 127(2) of the 1996 Act, which is in similar terms to section 143D(2), required the court to make an order for possession: [1999] 1 WLR 809, 818G-820B. That is, in substance, the view which we have rejected in paras 76-79 above.

85. The second reason for the Court of Appeal's conclusion in *Manchester City* was based on the contrast between section 127(2) and section 204 of the 1996 Act, in Part VII of the 1996 Act which is concerned with homelessness: [1999] 1 WLR 809, 820B-C, 821H-822A.

86. However, like Lord Fraser of Tullybelton in *Wandsworth v Winder* [1985] AC 461, 510A-B, we would adopt the principle stated by Viscount Simonds in *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260, 286, that a citizen's "recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words."

87. The third reason for the Court of Appeal's decision in *Manchester City* is discussed at [1999] 1 WLR 809, 820C-821E, and relies on the presumption that possession claims against demoted tenants could be procedurally derailed if tenants could raise public law points in the course of the possession proceedings. We do not consider that this presumption is correct. Indeed, the ability of a tenant to delay possession proceedings by raising a public law point would be greater if such points had to be taken in separate proceedings in the High Court.

88. For these reasons we are satisfied that we should apply the approach of the House of Lords in *Wandsworth v Winder* [1985] AC 461. This permits us to confirm our earlier conclusion that section 143D(2) should be read as allowing the County

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 possession proceedings brought in that court.

Section 17(1)(a) of the Crime and Disorder Act 1998

89. A further difficulty which is said to stand in the way of the conclusion that the County Court judge can carry out a proportionality exercise is based on section 17(1)(a) of the Crime and Disorder Act 1998 ("section 17"), which provides

> "Without prejudice to any other obligation imposed on it, it shall be the duty of each authority to which this section applies to exercise its various functions with due regard to the likely effect of the exercise of those functions on, and the need to do all that it reasonably can to prevent (a) crime and disorder in its area…"

90. This section, Mr Arden rightly submitted on behalf of the Council, applied when, inter alia, a local authority was exercising its function as the landlord of its housing stock. He then went on to submit that the Council's duty under section 17 could conflict with its duty, by virtue of the occupier's article 8 Convention rights, to consider whether it would be proportionate to bring or continue possession proceedings against him. For instance, bringing such proceedings might be a reasonable way of preventing crime and disorder in the authority's area, even though bringing those proceedings would be disproportionate when viewed in the particular context of the individual concerned.

91. In our view, this argument is devoid of substance. In the first place, section 17 begins with the qualifying words "Without prejudice to any other obligation imposed on it…". Therefore, if the effect of the HRA is to impose an obligation on a local authority landlord to consider proportionality under article 8 before embarking on possession proceedings against a demoted tenant, section 17 is not inconsistent with, and does not undermine, that obligation. As far as the County Court is concerned, insofar as it is to be treated as reviewing the local authority's decision to bring proceedings, the same point applies, and, insofar as it is to be treated as carrying out its own assessment, nothing in section 17 impinges on it.

92. Secondly, section 17 requires a local authority to exercise its functions, paying "due regard" to the need to prevent crime and disorder. The section imposes no absolute obligation on an authority to do everything to reduce crime and disorder, irrespective of other persons' rights or of its own other duties – and it would be very surprising if it did. Accordingly, the furthest this point goes is to suggest that a local authority, when deciding to bring possession proceedings against a demoted tenant, should take into account its duty under section 17, as well as the article 8 Convention rights of the tenant and any other Convention rights that may be in play. That would also be a factor to be taken into account by the Panel when reviewing the local

authority's decision. Similarly, it would be a factor for the County Court judge to take into account when considering whether the local authority had acted proportionately.

Section 6(2) of the Human Rights Act

93. We have concluded that section 143D(2) of the 1996 Act can be read and given effect compatibly with the article 8 Convention rights of any occupiers of local authority housing. So no question of the application of section 6(2) of the HRA arises in that respect.

94. Nor, indeed, did Mr Arden argue that section 6(2) would make it lawful for the local authority to disregard the occupier's article 8 Convention rights when deciding whether to bring possession proceedings against him. On the contrary, it was, rightly, common ground that a local authority must take into account a demoted tenant's article 8 rights when taking possession proceedings under the 1996 Act. The same applied to a Panel reviewing that decision.

95. But, as is plain from the speeches of Lord Walker and Lord Mance in *Doherty v Birmingham City Council* [2009] 1 AC 367, at paras 110-113 and 141-153, respectively, two passages at paras 86 and 114 in the speech of Lord Hope in *Kay v Lambeth* [2006] 2 AC 465, could be interpreted as indicating that section 6(2) did apply to the local authority's decision as to whether to bring possession proceedings in the circumstances of those cases so as to make it lawful for the authority to disregard the occupiers' article 8 Convention rights.

96. The absence of any real debate on the point makes the present case an unsuitable vehicle for any wide-ranging discussion of section 6(2). Nevertheless, we think it right to confirm that, in our view, the subsection has no application to the decision of a local authority as to whether to bring or continue possession proceedings against demoted tenants.

97. Section 6 of the HRA provides:

> "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2) Subsection (1) does not apply to an act if—
>
> > (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions."

98. Plainly, subsection (2)(a) applies only where legislation imposes a duty to act. That provision is not relevant for present purposes since the local authority is under no statutory duty which would compel it to take possession proceedings against a demoted tenant.

99. The statutory provision which relates to the bringing of possession proceedings against demoted tenants is section 143D(1) of the 1996 Act. It provides:

> "(1) The landlord may only bring a demoted tenancy to an end by obtaining—
>
> (a) an order of the court for the possession of the dwelling-house, and
>
> (b) the execution of the order."

In addition, as already explained, section 143E provides for the local authority to give notice of its decision to apply for an order for possession of the tenant's house. Section 143F provides for the Panel to review that decision at the request of the tenant.

100. It does not particularly matter on which of these provisions we choose to concentrate. But it can be assumed, for the purposes of the argument, that, when a local authority landlord decides to bring possession proceedings against a demoted tenant, the authority is "acting so as to give effect to" section 143D(1) within the meaning of section 6(2) of the HRA.

101. Then the only question is whether section 143D(1) can be given effect in a way that is compatible with the demoted tenant's article 8 Convention rights. If so, section 6(2) does not apply. For the reasons which we have already set out in detail, the answer is that section 143D(1) can unquestionably be given effect in a way that is compatible with the demoted tenant's article 8 Convention rights. Most obviously, the local authority will give effect to section 143D(1) in a way that is compatible with those rights when it brings proceedings that are proportionate because the demoted tenant has, for instance, continued to act in a manner that causes a nuisance to his neighbours. That being so, section 6(2) of the HRA has no application to the decision of a local authority to bring or continue possession proceedings against a demoted tenant.

102. In these circumstances, mutatis mutandis, the conclusion of Lord Mance in *Doherty v Birmingham City Council* [2009] 1 AC 367, 447, para 153, applies in the present situation:

> "Accordingly, a local authority which fails to take into account Convention values when deciding whether or not to give any and if so what length of notice to quit cannot, in my opinion, be said to be 'acting so as to give effect to or enforce' statutory provisions which are incompatible with the Convention rights."

103. As the Council accept, the result therefore is that section 6(2) does not make it lawful for a local authority to fail to consider whether it would be proportionate to bring or continue such proceedings. The same must apply to a local authority's decision to take possession proceedings against other occupiers who are not secure tenants.

Conclusion on the third issue

104. We are, accordingly, of the view that 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. It follows that the demoted tenancy regime in the 1996 Act is compatible with article 8.

105. Having said that, there are two further points we should make.

106. First, as already observed, there appears to be no express fetter on the nature of the grounds which a local authority can invoke for seeking possession against a demoted tenant. It would seem that, as in this case, local authorities seeking possession against demoted tenants in practice normally rely on repetitions of the type of incidents which gave rise to the demotion order. It may well be that the nature of the grounds upon which possession can be sought against demoted tenants is limited in that way, as a matter of law. However, that would involve implying some sort of limitation into the statute, as there is no express provision which would prevent a local authority relying on, say, the fact that it has a more deserving potential occupier of the premises in question. We say no more on the matter since the point does not arise in this appeal, and it was not the subject of any argument.

107. Secondly, we have expressed reservations about the view that, in relation to possession claims generally, article 8 will assist an occupier only in "highly exceptional" circumstances. However, there are two features of possession claims under section 143D which enable us to express such a view in relation to these claims. First, the court will already have decided that it was reasonable (and therefore proportionate under article 8) to have made the demotion order, largely removing the

tenant's security of tenure. The court will have done this less than two years (and, no doubt, in some cases less than one year) before it is being asked to make an order for possession. The two sets of proceedings must be viewed as a whole for the purposes of article 8: *Zehentner v Austria* (App no 20082/02), para 54 (quoted at para 39 above). This highlights the fact that, while article 8 is still engaged at the second, possession order, stage, it would be difficult for the tenant successfully to invoke it, given that its requirements had been satisfied at the first, demotion order, stage. Secondly, as with introductory tenancies, the tenant will have been given the local authority's reasons for deciding to seek possession. So he will have had the opportunity to challenge the decision and to have that challenge considered by the Panel.

Fourth issue: application of these conclusions to the facts of this case

108. For the reasons already explained, neither Judge Holman nor the Court of Appeal thought that they had jurisdiction either to consider whether the making of an order for possession in this case was "necessary in a democratic society" under article 8 (i e, whether it was proportionate to evict Mr Pinnock and Ms Walker from the property), or to resolve any disputes of fact between the parties in relation to that issue. As we have concluded that the Judge had jurisdiction to deal with both matters, there are two alternative courses that we could now take: we could address the proportionality issue ourselves, or we could remit the issue to the Manchester County Court.

109. If we can take the former course, we should do so: it is more than three years since the demotion order was made in respect of Mr Pinnock's tenancy, and more than two years since these possession proceedings were started against him. Before they reached this court, they had already taken up three days of court time (plus the six hearing days before the Recorder who made the demotion order). However, we can only determine the issue of article 8 proportionality if we can do so without needing to hear further evidence.

110. In order to consider which course to take, we must set out the relevant circumstances in a little more detail.

111. After stating that, as the tenant, he was "responsible for the behaviour of every person (including children) living in or visiting [his] home", Mr Pinnock's tenancy agreement contained covenants to the effect that neither he nor anyone residing with him would "cause a nuisance, annoyance or disturbance to any other person" or would "harass any other person". Examples were given in the agreement of possible breaches of these covenants. They included "offensive drunkenness" and "doing anything that interferes with the peace, comfort or convenience of others."

112. The events which led the Recorder to conclude that a demotion order was justified were many and serious. In very summary terms, Anti-Social Behaviour

Injunctions (under section 152 of the 1996 Act) had been granted against Ms Walker and one of Mr Pinnock's sons, Clive, in 2003. Ms Walker had gone on to breach the injunction. Anti-Social Behaviour Orders had been granted against another son, Devon, in 2002, and against his twin sons, Orreon and Orraine, in 2004. Each of them had been breached. Further, each of the five children had appeared before the criminal courts where they had been convicted of a variety of offences, including a racial Public Order Act offence, driving while disqualified and blackmail. The last of these involved the obtaining of some £1,000 by repeated, almost daily, threats of violence against a 16-year-old youth. In a schedule to his judgment, the Recorder listed no fewer than 32 crimes or serious nuisances which were committed by Ms Walker and Mr Pinnock's five children between 1992 and 2006.

113. There are some differences among the allegations relied on by the Council in its Notice served on 6 June 2008 under section 143E, the allegations relied on by the Panel which carried out the review pursuant to section 143F, the allegations relied on by Judge Holman, and the allegations relied on by the Court of Appeal. In our view, however, the Court of Appeal's analysis of the relevant allegations was clearly correct.

114. We would make three comments in relation to that analysis.

115. First, there is nothing in the statutory provisions relating to the demoted tenancy regime which limits the particular grounds on which a local authority can rely when deciding to issue possession proceedings against a demoted tenant. Subject to the possible type of limitation discussed in para 106 above, we see no reason to restrict those grounds in a particular case, save by reference to rationality in domestic law and proportionality in the light of the Convention. This view is not based only on a reluctance to imply words or conditions into statutory provisions. It is also based on the point that, by demoting a tenancy, a court has decided that the tenant has forfeited any statutory protection for at least a year, and it seems wrong to imply a degree of protection back into the statute, unless it is necessary to do so – e g, because the Convention requires it. We are therefore satisfied that a local authority is not limited to relying on matters which amount to breaches of the tenancy in question in order to justify a decision to issue and continue a claim for possession against a demoted tenant.

116. Secondly, the Panel should be able to take into account all the available information when it assesses the justification for, and proportionality of, the local authority issuing a claim for possession against a demoted tenant. It seems obvious that before the Panel the tenant could raise events that happened after the Notice, and it is hard to see why the same should not apply to the landlord. In any event, if the tenant raises his article 8 Convention rights as a defence to possession proceedings, the court must consider all relevant issues. These must include a matter that arose after the date of the Notice. We are therefore satisfied that it is open to the Panel and to the court hearing the possession claim to take into account grounds which are not contained in the Notice.

117. Thirdly, we can see no reason why the fact that a Notice contains a bad reason should destroy the landlord's right to seek possession, unless, for instance, the bad reason somehow infects the good faith of the landlord.

118. On that basis, the following matters are relied on as supporting the Council's decision to bring and maintain the possession proceedings against Mr Pinnock.

119. First, on 22 September 2007, Clive Pinnock resisted arrest at the property and ran off. In due course he was convicted of resisting or obstructing a constable in the execution of his duty. Although this conduct was obviously an annoyance for the police officers involved, there was no evidence that it caused nuisance or annoyance to neighbours. Therefore it may not have constituted a breach of the tenancy agreement. Nevertheless, it was plainly relevant to the housing management functions of the Council. Further, as Stanley Burnton LJ pointed out, this behaviour was *capable* of causing nuisance or annoyance to any person.

120. Secondly, Devon Pinnock pleaded guilty to causing death by dangerous driving, and driving a vehicle while disqualified and uninsured on 18 January 2008. A young woman died and two others were seriously injured in the incident which occurred 1.55 miles from the property.

121. It is relevant to mention that Ms Walker blamed the police for the incident and did not accept that Devon was in any way responsible. As Stanley Burnton LJ said, this "bore on whether she and Mr Pinnock were able and willing to exercise parental control over their children who lived at, or visited, the property so as to bring their anti-social behaviour to an end".

122. Thirdly, in February 2008, Orreon Pinnock committed a burglary of premises a few minutes' walk from the property – an offence which also involved an assault on a woman. He was convicted of this offence after the service of the Notice, but the Judge and the Court of Appeal rightly held that this was a relevant factor when deciding whether to issue and prosecute possession proceedings against Mr Pinnock.

123. Judge Holman thought that the second incident (but only in so far as it involved Ms Walker blaming the police and excusing Devon) and the third incident could be relied on by the Council as a ground for justifying its claim for possession against Mr Pinnock. He therefore concluded, at para 70, that "there was material before the review panel ... entitling it to uphold the decision to terminate". To much the same effect, Stanley Burnton LJ said he could "not see any basis for a finding that the review panel's decision was one that no reasonable person could consider appropriate, and if the judge had had jurisdiction to review that decision I would have upheld his decision to uphold it": [2009] EWCA Civ 852, para 67.

124. Mr Pinnock's case is that it would be disproportionate to evict him (now a pensioner) and Ms Walker (still in employment) from their home of over 30 years, given that none of their five children lives with them, and that there have been no further incidents since February 2008. In this connection Mr Drabble QC made a number of points which he said that the Panel, Judge Holman and the Court of Appeal had failed to take into account. None of the matters relied on, he said, constituted a breach of the tenancy agreement. Ms Walker had committed no nuisance, offence or harassment since 2003, and there was no suggestion that she or Mr Pinnock is likely to commit any nuisance or crime in the future. As for the children save for Orreon, they did not reside in the property at the date of the offences relied on. Further, any crime or nuisance which they might commit in the area in the future could not be attributable to the tenancy continuing, as they do not live in the property. For the same reason, Mr Pinnock could not be treated as responsible for their behaviour. Moreover, there was no evidence that the children were, or would be, particularly drawn to the area by their parents' living at the property. In any event, other remedies such as Anti-Social Behaviour Orders and Injunctions, and orders excluding the children from the area under section 153C of the 1996 Act, would be more effective deterrents.

125. We see the force of these points. But, unless there is some dispute of fact which needs to be resolved, we are not persuaded that this is a case where the occupiers of the property have any real prospect of successfully relying on article 8 proportionality, or indeed on the contention that the decision of the Council to issue and maintain possession proceedings against them was unreasonable.

126. 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 made in June 2007 was extraordinary in its extent and persistence. Were it not for Mr Pinnock being innocent of any such conduct on his own account, we doubt whether the Recorder would have thought it right to refuse the Council's original claim for possession. As it was, he made it clear that the demotion order represented what was very much a last chance for Mr Pinnock (and for Ms Walker).

127. Despite this being their last chance, as we have explained, there were incidents at or near the property. Clive resisted arrest at the property and ran away from the police (of which he was convicted). Devon caused death by dangerous driving in the vicinity of the property and then ran away (of which he was convicted). Ms Walker refused to accept that Devon was in any way responsible for this and, instead, blamed the police. Orreon committed a burglary near the property (and was later imprisoned). In short, there were three serious incidents in a year, one in the property, two in its immediate vicinity. Mr Pinnock's children were responsible for all of them. Moreover, there is every sign that Ms Walker, at least, has learnt nothing. All this happened under the shadow of a demotion order.

128. The argument that none of the children lives in the property any longer is of scant assistance to Mr Pinnock since his case is that none of them has lived there since the demotion order was made. Even if that is true, it is clear that the children visit the

property, and, unfortunately, when they do, they appear to commit crimes and make a nuisance of themselves in the vicinity. Furthermore, there is no guarantee that at least some of the children will not stay at the property on a temporary, intermittent or permanent basis. For the Council to evict Mr Pinnock on such grounds may well seem to him harsh. However, in the light of the history, the demotion order, the interests of their neighbours, and the Council's right and duty to manage and allocate its housing stock, the decision cannot be characterised as unreasonable or disproportionate.

129. If some of the children did in fact live in the property, then Mr Pinnock has been dishonest, and the Council's case is even stronger. In this connection it should be said that there is good reason to think that Devon did live in the property. Mr Pinnock's evidence to the Panel was that Devon had moved out about five years earlier, but that evidence had been given to, and rejected by, the Recorder – not least because Devon had given the property as his address to the criminal courts in July 2005, June 2006, and March 2007. When he appeared in court on the charge of causing death by dangerous driving in January 2008, he again gave his address as the property. The only new evidence before the Panel disputing his residence at the property was a statement by the mother of his girlfriend. But she, too, said that he had ceased to live at the property four or five years previously. It is thus hard to see how any tribunal could conclude that he did not reside there, but, as the Judge said, the Panel ducked the issue of residence in their written decision.

130. The fact that some (or even all) of the grounds justifying the rationality and proportionality of the Council's decision to seek possession may not have involved any breach of the tenancy agreement does not give rise to a problem. There is no requirement in the 1996 Act that they should, and, as already mentioned, there is no warrant for implying any such requirement into the statute. The fact that Mr Pinnock may not be responsible for the incidents is not of great significance: the order for possession was not sought or made to punish him. The fact that there may be other remedies to deal with the children is also of little force: rather than seeking ASBOs or ASBIs to keep them out of the vicinity, it is scarcely irrational or disproportionate to decide to remove their parents, whom they undoubtedly visit, even if (which is an unresolved issue) they do not live with them.

Conclusion

131. In these circumstances, it is unnecessary to remit this case for the question of proportionality to be determined. The only issues of fact which are in dispute are whether Devon lived at the property at the time he caused death by dangerous driving and whether Clive's resisting his arrest actually caused any nuisance locally. For the reasons just given in para 128 above, it is unnecessary to decide whether Devon was living at the property at the relevant time. Equally, it is unnecessary to establish whether Clive's action actually resulted in a nuisance: as Stanley Burnton LJ said, it is sufficient that he resisted arrest and that this could have caused a nuisance.

132. We shall accordingly dismiss the appeal and uphold the order for possession made against Mr Pinnock, – albeit for reasons that are rather different from those of Judge Holman and the Court of Appeal. Mr Pinnock is, and was, entitled to an opportunity of having the proportionality of the measure determined by a court, and, if necessary for that purpose, of having any relevant issue of fact resolved. That right was not acknowledged by the courts below (for wholly understandable reasons). We have, however, afforded him the opportunity to have the proportionality of the possession order considered. Having considered the issue, we are satisfied that it was proportionate to make the order, irrespective of the truth relating to the two possible issues of fact between Mr Pinnock and the Council.

Hilary Term
[2011] UKSC 6
On appeal from: [2009] EWCA Civ 852

JUDGMENT

Manchester City Council (Respondent) *v* Pinnock (Appellant) (No. 2)

before

Lord Phillips, President
Lord Hope, Deputy President
Lord Rodger
Lord Walker
Lady Hale
Lord Brown
Lord Mance
Lord Neuberger
Lord Collins

JUDGMENT GIVEN ON

9 February 2011

Heard on 5, 6, 7 and 8 July 2010

Appellant
Richard Drabble QC
James Stark
(Instructed by Platt Halpern)

Respondent
Andrew Arden QC
Jonathan Manning
(Instructed by Manchester City Council)

Intervener (*Secretary of State for Communities and Local Government)*
Daniel Stilitz QC
Ben Hooper
(Instructed by Treasury Solicitor)

Intervener (Equality and Human Rights Commission)
Jan Luba QC

(Instructed by Equality and Human Rights Commission)

LORD NEUBERGER

1. Following the handing down of our judgment on 3 November 2010, the parties have made written submissions on two issues, namely the terms of the consequential order which the court should make, and the allocation of costs. The issue relating to the terms of the order gives rise to a point of a little difficulty and potentially more general application. It therefore seems right to set out our conclusions and reasons on the two issues in this short further judgment.

Introductory

2. In summary terms, the facts giving rise to the appeal were as follows. Mr Pinnock was a demoted tenant of residential premises (and therefore had limited statutory protection), and his landlord, Manchester City Council, applied to the Manchester County Court for an order for possession against him. In a judgment given on 22 December 2008, His Honour Judge Holman rejected Mr Pinnock's contention that the court had to be satisfied that article 8 of the Convention was satisfied before making an order for possession, and therefore he did not consider whether it was proportionate to make an order for possession against Mr Pinnock. The Judge accordingly made an order requiring Mr Pinnock to deliver up possession of the premises on 12 January 2009. He also gave Mr Pinnock permission to appeal, and stayed enforcement of the possession order provided that the notice of appeal was served by 26 January 2009.

3. Mr Pinnock served a notice of appeal by that date, arguing that the Judge should have taken into account article 8, and therefore should have considered whether it was proportionate to order Mr Pinnock to deliver up possession of the premises. The Court of Appeal rejected his appeal, [2009] EWCA Civ 852; [2010] 1 WLR 713, and Mr Pinnock appealed to the Supreme Court. The Court of Appeal did not continue the stay imposed by the Judge, but the parties agreed that the possession order would not be enforced pending the outcome of the appeal to this court.

4. In our decision, [2010] UKSC 45; [2010] 3 WLR 1441, we held that the Judge and the Court of Appeal were wrong in taking the view that article 8 could not be raised by Mr Pinnock, and that, in those circumstances, there were "two alternative courses that we could … take: we could address the proportionality issue ourselves, or we could remit the issue to the Manchester County Court" – [2010] 3 WLR 1441, para 108. We then went on to decide that we would take the former course, because, for the reasons set out at [2010] 3 WLR 1441, paras 119-

124 and 127-130, we were "not persuaded that this is a case where the occupiers of the property have any real prospect of successfully relying on article 8 proportionality, or indeed on the contention that the decision of the Council to issue and maintain possession proceedings against them was unreasonable" – [2010] 3 WLR 1441, para 125.

The form of order

5. At any rate at first sight, the terms of the order we should make seem to present no problem: the Judge made an order for possession, which the Court of Appeal upheld, which it can be said we have upheld, albeit for different reasons, and accordingly we should simply dismiss the appeal. However, the Council argues that this apparently simple course would produce an unjust result, which arises form the transitional provisions of the Housing and Regeneration Act 2008.

6. In this case, the order for possession made by Judge Holman took effect on 12 January 2009; under section 143D(3) of the Housing Act 1996 this meant that Mr Pinnock's demoted tenancy came to an end on that date. His status thereafter was that of a tolerated trespasser, as discussed in *Austin v Southwark London Borough Council* [2010] UKSC 28, [2010] 3 WLR 144.

7. Section 299 of, and schedule 11 to, the 2008 Act abolished the concept of tolerated trespass in relation to various types of tenancy, including demoted tenancies, by providing that, where an order for possession is made, the tenancy comes to an end on the date that the order is executed rather than (as was previously the position) the date on which the tenant is to give up possession pursuant to the order. In the case of demoted tenancies this was achieved by the insertion of a new subsection (1A) into section 143D of the 1996 Act– see para 13 of schedule 11 to the 2008 Act.

8. These provisions of the 2008 Act, which were prospective in their effect, came into force on 20 May 2009 (pursuant to article 2 of the Housing and Regeneration Act 2008 (Commencement No.5) Order 2009 SI 2009/1261), some eighteen weeks after Judge Holman's order for possession took effect. If that order is confirmed, the effect will be, by virtue of paras 16, 19 and 26 of Schedule 11 to the 2008 Act, that on 20 May 2009, a new demoted tenancy will have been created in favour of the former tenant and tolerated trespasser. On the basis that that might indeed prove to be the position, the Council served a notice of proceedings under section 143E of the 1996 Act, in respect of which Mr Pinnock requested a review under section 143F (as explained at [2010] 3 WLR 1441, para 11). Further proceedings on that notice have been adjourned.

9. The Council contends that, although it has protected its position if we simply dismiss Mr Pinnock's appeal and effectively affirm the orders of the Judge and the Court of Appeal, it would be "contrary to any rational legal principle" to require the Council to incur the expense, effort and delay, as well as any possible uncertainty of outcome, of further possession proceedings against Mr Pinnock based on his new demoted tenancy, given the procedure that has already been undertaken, as described in [2010] 3 WLR 1441, paras 14-17.

10. Accordingly, the Council argues that we should vary Judge Holman's order to adjust the date on which he is to deliver up possession from 12 January 2009 to 21 May 2009.

11. Mr Pinnock does not challenge this proposal on its merits, but contends that, for two reasons, we have no jurisdiction to make the variation sought by the Council. The first reason is said to be that we cannot in 2011 retrospectively amend Judge Holman's order, made in December 2008, in order to deprive Mr Pinnock of a tenancy which statute gave to him on 20 May 2009; the second reason is that, by virtue of section 89(1) of the Housing Act 1980, Judge Holman was precluded from making an order for possession which took effect more than six weeks after 22 December 2008, when he made the order for possession, and we cannot amend Judge Holman's order in a way which would mean that, albeit retrospectively, it would conflict with that provision.

12. Mr Pinnock is right not to challenge the good sense of the Council's argument. There may be force in the two technical points that he takes, particularly the second, but there is no need for us to consider these. The wide terms of Rule 29(1) of the Supreme Court Rules 2009 permit us to adopt an alternative way of giving effect to the Council's justified concerns which is not open to such objections.

13. We propose to set aside the order for possession made by Judge Holman, and substitute a fresh order for possession to take effect on 10 March 2011. The effect of this will be to preserve Mr Pinnock's original demoted tenancy, which started on 8 June 2007 (as explained at [2010] 3 WLR 1441, para 16) and which has continued pending the resolution of these proceedings. It will come to an end when possession is obtained against him pursuant to our order for possession.

14. This course is consistent with the reasoning in our judgment. We decided that the Judge and the Court of Appeal had reached their conclusions on an erroneous basis, and accordingly we had to make our own assessment as to whether an order for possession should be made. Thus, we were effectively overruling the order for possession made and affirmed below, and were concluding

that we should make our own order for possession. That is well demonstrated by the passage quoted from [2010] 3 WLR 1441, paras 108 and 125 quoted in para 4 above. If we had taken the course of remitting the case to the County Court, we would have set aside the original order for possession, and the County Court would in due course have made a fresh order for possession (for the reasons we gave at [2010] 3 WLR 1441, paras 119-130): it would be anomalous if a different result obtained because we decided that we could make the order for possession ourselves without remitting it.

15. In those circumstances, to set aside the orders below and make our own order for possession more accurately reflects our reasoning than simply dismissing Mr Pinnock's appeal.

16. Quite apart from this, it would seem rather curious if we could not make an order which achieves the outcome for which the Council contends. If the Judge had dismissed the claim for possession, and had been upheld in the Court of Appeal, our decision that an order for possession should be made would have led to no difficulties for the Council. It would seem a bit odd if the position of the Council were to be prejudiced by the fact that it in fact succeeded in both of the courts below.

The costs

17. As to the issue of costs, the dispute, in summary terms, is as follows. The Council seeks an order for costs against Mr Pinnock, on the ground that, as between the parties, the ultimate issue was whether the Council was entitled to claim possession of the premises, and its claim succeeded at every stage, most importantly in this court. On the other hand, Mr Pinnock argues for an issue-based approach, contending that the real issue between the parties, which resulted in most of the costs and justified the case coming to the Supreme Court, was whether he could rely on article 8, and, as he won on that point, the correct order is that the Council pays 50% of his costs, at least in the Supreme Court.

18. In our view, there should be no order for costs in the Supreme Court or in the Court of Appeal, and the order for costs made in favour of the Council in the County Court should stand. As to the order in the County Court, the Council claimed possession while Mr Pinnock resisted the claim, and the effect of our decision is that the claim succeeds, so an order for costs in favour of the Council should follow, absent a good reason to the contrary, and no such reason appears to exist. The decision to make no order for costs in the Court of Appeal and in this court is arrived at on a somewhat rough and ready basis, but it appears to us to reflect the relative degree of success enjoyed by each party on appeal, and

therefore the overall justice of the position. The effect of the appeal process is that the Council has succeeded against Mr Pinnock on the ultimate issue between the parties, namely whether it is entitled to maintain its right to possession, whereas Mr Pinnock has succeeded against the Council in establishing a fundamental general principle, namely that article 8 can be relied on by someone whose home is the subject of a possession claim.

Conclusion

19. In these circumstances, we set aside the order for possession made by Judge Holman, we make an order for possession to take effect on 10 March 2011, we make no order for costs in this court or the Court of Appeal, and the order for costs made by Judge Holman stands. No doubt the parties can agree any other terms of the order which are outstanding.