Hilary Term
[2011] UKSC 8
On appeal from: [2010] EWCA Civ 336

JUDGMENT

Mayor and Burgesses of the London Borough of Hounslow (Respondents) *v* Powell (Appellant)

Leeds City Council (Respondent) *v* Hall (Appellant)

Birmingham City Council (Respondent) *v* Frisby (Appellant)

before

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

JUDGMENT GIVEN ON

23 February 2011

Heard on 23 and 24 November 2010

Appellant (Powell)
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Kevin Gannon
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Respondent
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Kelvin Rutledge
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Daniel Stilitz QC
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LORD HOPE

1. These are three of five conjoined appeals which were heard by the Court of Appeal in *Salford City Council v Mullen* [2010] EWCA Civ 336, [2010] LGR 559. They are concerned with possession proceedings brought by a local authority in circumstances where the occupier is not a secure tenant under Part IV of the Housing Act 1985. Two of them, *Leeds City Council v Hall* ("*Hall*") and *Birmingham City Council v Frisby* ("*Frisby*"), are cases where the claims for possession were made against tenants occupying under introductory tenancies entered into under Chapter 1 of Part V of the Housing Act 1996. In the third, *London Borough of Hounslow v Powell* ("*Powell*"), the claim for possession was made against a person who was granted a licence of property under the homelessness regime in Part VII of the 1996 Act. Permission to appeal was given in a fourth case, *Salford City Council v Mullen*. But the proceedings in that case were stayed to await the outcome of these appeals.

2. Common to all three cases is the claim by each of the appellants that the property which is the subject of the proceedings for possession against them is their "home" for the purposes of article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides:

> "Everyone has the right to respect for his private and family life, his home and his correspondence."

Their case is that, to avoid a breach of article 8, the interference must be justified under article 8(2) as being "necessary in a democratic society" and that this means that it must be in accordance with the law, it must be for a legitimate aim and it must be proportionate to the aim that the local housing authority is seeking to achieve. They maintain that, as the court did not assess the proportionality of making the orders against them, there was a breach of their article 8 rights.

3. The Court had the opportunity in *Manchester City Council v Pinnock* [2010] UKSC 45, [2010] 3 WLR 1441 ("*Pinnock*") of considering the application of article 8 to a claim for possession brought against a demoted tenant under Chapter 1A of Part V of the 1996 Act (as inserted by paragraph 1 of Schedule 1 to the Anti-social Behaviour Act 2003). It held that article 8 requires a court which is being asked to make an order for possession under section 143D(2) of the Housing Act 1996 against a person occupying premises under a demoted tenancy as his "home" to have the power to consider whether the order would be necessary in a

democratic society: para 2. Although Mr Arden QC submitted forcefully that it should not apply to introductory tenancies in view of their probationary nature, I would hold that this proposition applies to all cases where a local authority seeks possession in respect of a property that constitutes a person's home for the purposes of article 8. There is a difference of view between the parties, however, as to its consequences, and in particular as to how cases of this kind should be dealt with in practice by the courts and local authorities.

4. The Court recognised that cases of the type that was examined in *Pinnock* arise relatively rarely and that cases of the kind represented by these appeals, which involve possession orders in different and more common circumstances, were likely to provide a more appropriate vehicle for the giving of general guidance: paras 58-59. It was expected that the lawyers preparing for these appeals would have the opportunity of giving particular attention to the guidance that might usefully be given where possession is sought against introductory tenants and against applicants under the homelessness regime where there is no provision for the kind of procedure envisaged in Chapters 1 and 1A of Part V of the 1996 Act for introductory and demoted tenancies. I wish to pay tribute to counsel on all sides for the way in which they have taken full and careful advantage of that opportunity.

The issues

5. The Court of Appeal delivered its judgment in *Salford City Council v Mullen* [2010] EWCA Civ 336 on 30 March 2010. As Waller LJ explained in para 4, the court held that it was bound by what was said in *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465, para 110, as to the circumstances in which a county court might decline to make a possession order. They were limited to two situations: first, if it was seriously arguable that the law which enables the county court to make the possession order is itself incompatible with article 8 (which the Court of Appeal in *Doherty v Birmingham City Council* [2006] EWCA Civ 1739, [2007] LGR 165, para 28 called "gateway (a)"); and second, if it was seriously arguable that the decision of the public authority was (regardless of the tenant's Convention rights) an improper exercise of its powers because it was a decision that no reasonable person would consider justifiable (which the Court of Appeal in *Doherty* called "gateway (b)"). So, where the local authority had fulfilled the requirements for the recovery of possession contained in the ordinary domestic law, a defence which did not challenge the law under which the order was sought as being incompatible with article 8 but was based on the proposition that the interference with the person's home was disproportionate should be struck out.

6. Writing extrajudicially, Lord Bingham of Cornhill said of the Strasbourg jurisprudence that its strength lies in its recognition of the paramount importance to some people, however few, in some circumstances, however rare, of their home, even if their right to live in it has under domestic law come to an end: *Widening Horizons*, The Hamlyn Lectures (2009), p 80. There has never been any dispute about gateway (a). It can be traced back to *Kay v Lambeth London Borough Council* [2006] 2 AC 465, para 39 where, in head (3)(a) of his summary of the practical position, Lord Bingham described the first of the two grounds on which the court might consider not making a possession order as being that the law which required the court to make the order despite the occupier's personal circumstances was Convention-incompatible. But gateway (b), albeit widened to some degree by what was said in *Doherty v Birmingham City Council* [2008] UKHL 57, [2009] AC 367, para 55, has always been controversial. The central issue which divided the parties in *Pinnock* was whether the proposition which was encapsulated in it should still be applied in the light of subsequent decisions of the European Court of Human Rights in *McCann v United Kingdom* (2008) 47 EHRR 913, *Ćosić v Croatia* (Application No 28261/06) (unreported) given 15 January 2009, *Zehentner v Austria* (Application No 20082/02) (unreported) given 16 July 2009 and *Paulić v Croatia* (Application No 3572/06) (unreported) given 22 October 2009.

7. This Court held that those cases, together with *Kay v United Kingdom* (Application No 37341/06) given 21 September 2010, The Times 18 October 2010, provided a clear and constant line of jurisprudence to the effect that any person at risk of being dispossessed of his home at the suit of a local authority should in principle have the right to question the proportionality of the measure and to have it determined by an independent tribunal in the light of article 8: para 45. The decision in *Doherty v Birmingham City Council* had shown that our domestic law was already moving in that direction, and the time had come to accept and apply the jurisprudence of the European court. So, where a court is asked to make an order for possession of someone's home by 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: para 49.

8. It is against the background of that decision that the issues that arise in the present appeals must be considered. They can be summarised briefly at this stage as follows. (1) What is the form and content of the proportionality review that article 8 requires? (2) What procedural protections are implicit in article 8 in homelessness cases before service of a notice to quit and after service but before possession proceedings are commenced? (3) Can the court defer the delivery of possession for a period in excess of the maximum permitted by section 89 of the Housing Act 1980 if it considers that it would be the proportionate course to do so and, if not, should there be a declaration of incompatibility? (4) Can section 127(2) of the 1996 Act be read compatibly with the introductory tenant's article 8

Convention right so as to allow him to defend a claim for possession on the grounds recognised in *Pinnock*, or must there be a declaration that section 127(2) is incompatible with the Convention right? These issues are dealt with in paras 33-64. The correct disposal of each appeal will also have to be considered, having regard to the facts of each case. This is dealt with in paras 65-70.

The statutory background

9. As was explained in paras 5-7 of *Pinnock*, most residential occupiers of houses and flats owned by local authorities are "secure tenants" under Part IV of the Housing Act 1985. In those cases the tenant must be given a notice setting out the reasons why possession is sought, the tenant cannot be evicted unless the landlord establishes that one of the grounds for possession listed in Schedule 2 to the 1985 Act applies and, except in some specified categories of case where suitable alternative accommodation is available, the court is satisfied that it is reasonable to make the order. But certain types of tenancy are excluded from this regime. They are listed in Schedule 1 to the 1985 Act. They include two types of tenancy that were included in that Schedule by amendment: introductory tenancies referred to in paragraph 1A, added by paragraph 5 of Schedule 14 to the 1996 Act; and demoted tenancies referred to in paragraph 1B, added by paragraph 2(4) of Schedule 1 to the Anti-social Behaviour Act 2003. In addition, paragraph 4 of Schedule 1 to the 1985 Act (as substituted by paragraph 3 of Schedule 17 to the 1996 Act) provides that a tenancy granted in pursuance of any function under Part VII of the 1996 Act, which deals with homelessness, is not a secure tenancy unless the local housing authority concerned has notified the tenant that the tenancy is to be regarded as a secure tenancy.

10. The legislature has excluded these types of tenancy from the statutory scheme which applies to secure tenancies for very good reasons, which are firmly rooted in social policy. In seeking democratic solutions to the problems inherent in the allocation of social housing, Parliament has sought to strike a balance between the rights of the occupier and the property rights and public responsibilities of the public authority. The regimes that apply to introductory tenancies and demoted tenancies have been designed to address the problem of irresponsible or disruptive tenants whose presence in social housing schemes can render life for their neighbours in their own homes intolerable. The homelessness regime provides the local housing authority with the flexibility in the management of its housing stock that it needs if it is to respond quickly and responsibly to the demands that this pressing social problem gives rise to. Measures which would have the effect of widening the protections given to the occupiers by the statutes must be carefully tested against Parliament's choice as to who should, and should not, have security of tenure and when it should be given to them, if at all. Social housing law draws a clear distinction between cases where security of tenure has been given, and those where it has not. There are clear policy reasons why Parliament has denied

security to certain classes of occupier. It is with this in mind that the homelessness and introductory tenancy regimes must now be described in more detail.

(a) homelessness

11. The duties of local authorities in relation to homeless persons are set out in Part VII of the 1996 Act. Ms Powell was provided with accommodation under section 193(2). That section applies where the local housing authority is satisfied that an applicant is homeless, eligible for assistance and has a priority need, and is not satisfied that he became homeless intentionally. In these circumstances section 193(2) imposes a duty on the local housing authority to secure that accommodation is available for occupation by the applicant. The duty ceases in various circumstances, such as if the applicant became homeless intentionally from the accommodation that was made available for his occupation or otherwise voluntarily ceases to occupy that accommodation as his only or principal home.

12. Where the local housing authority decides that its duty under section 193(2) has ceased, the applicant has the right to request that it reviews its decision: section 202(1)(b). If the applicant is dissatisfied with the decision on review he may appeal to the county court on any point of law arising from the decision on review or, as the case may be, the original decision: section 204(1). Where an applicant has been found to be homeless and eligible for assistance but the local housing authority is also satisfied that he became homeless intentionally and has a priority need, it is under a duty to secure that accommodation is available for his occupation for such period as it considers will give him a reasonable opportunity of securing accommodation for his occupation: section 190(2).

13. As already noted, tenancies granted under Part VII of the 1996 Act are not secure tenancies unless the local housing authority has notified the tenant that the tenancy is to be regarded as a secure tenancy. So the local authority is not required under domestic law to establish any particular ground for the termination of the tenancy when seeking possession from a tenant on whom it has served a notice to quit who has not been so notified. The only procedural protections are to be found in the requirement under sections 3 and 5 of the Protection from Eviction Act 1977 that an order of the court must be obtained in order to recover possession and the requirement to give notice to quit in the form stipulated by that Act.

14. Section 89 of the Housing Act 1980 provides that, when the court makes an order for the possession of any land (except in the circumstances set out in section 89(2)), the giving up of possession may not be postponed for more than 14 days or, in cases of exceptional hardship, to a date no later than six weeks after the making of the order.

(b) introductory tenancies

15. Mr Hall and Mr Frisby were tenants under introductory tenancies when the possession orders were sought against them. The regime under which they were granted these tenancies is set out in Chapter 1 of Part V of the 1996 Act. It was created in response to concerns among social landlords about anti-social behaviour among their tenants. In April 1995 a consultation paper was issued in which views were sought on what were then described as probationary tenancies. The idea was that, as a probationary tenancy would be converted automatically into a secure tenancy only if it was completed satisfactorily, a clear signal would be given to new tenants that anti-social behaviour was unacceptable and would result in the loss of their home: para 3.2. The White Paper *Our Future Homes: Opportunity, Choice, Responsibility* (Cm 2901, June 1995) identified the government's aims as being to encourage responsible social tenants and to protect the quality of life for the majority by supporting effective action against the minority of anti-social tenants. Social landlords were to be given the means to act rapidly to remove tenants in the worst cases, as a measure of last resort.

16. Section 124 of the 1996 Act provides that a local housing authority or a housing action trust may elect to operate an introductory tenancy regime. Section 124(2), prior to its amendment by the Housing and Regeneration Act 2008 (Consequential Provisions) Order 2010 (SI 2010/866), provided :

> "(2) When such an election is in force, every periodic tenancy of a dwelling-house entered into or adopted by the authority or trust shall, if it would otherwise be a secure tenancy, be an introductory tenancy, unless immediately before the tenancy was entered into or adopted the tenant or, in the case of joint tenants, one or more of them was –
>
> (a) a secure tenant of the same or another dwelling-house, or
>
> (b) an assured tenant of a registered social landlord (otherwise than under an assured shorthold tenancy) in respect of the same or another dwelling-house."

The duration of an introductory tenancy is defined by section 125. The tenancy remains as an introductory tenancy until the end of the trial period which, unless shortened because the tenant was formerly a tenant under another introductory tenancy, lasts for the period of one year: section 125(2). It does not become a secure tenancy until the end of the trial period: Housing Act 1985, Schedule 1,

paragraph 1A. The conversion then takes place automatically unless the introductory tenancy has been terminated.

17. Section 127 deals with proceedings for possession of a property which is subject to an introductory tenancy. It provided (prior to its amendment by the Housing and Regeneration Act 2008):

> "(1) The landlord may only bring an introductory tenancy to an end by obtaining an order of the court for the possession of the dwelling-house.
>
> (2) The court shall make such an order unless the provisions of section 128 apply.
>
> (3) Where the court makes such an order, the tenancy comes to an end on the date on which the tenant is to give up possession in pursuance of the order."

18. Section 128(1) provides that the court shall not entertain proceedings for the possession of a dwelling-house let under an introductory tenancy unless the landlord has served on the tenant a notice of proceedings complying with that section. The notice must state that the court will be asked to make an order for possession, set out the reasons for the landlord's decision to apply for such an order, specify a date after which proceedings may be begun, inform the tenant of his right to request a review of the landlord's decision to seek a possession order and inform him that he can receive help or advice about the notice from a Citizens' Advice Bureau, a housing aid centre or a solicitor: subsections (2)-(7). Section 129 provides that a request for a review of the landlord's decision to seek an order for possession of the dwelling-house must be made within no more than 14 days of service of the notice of proceedings under section 128.

19. The procedures of the demoted tenancy regime, which is the regime with which the Court was concerned in *Pinnock*, are closely based on the regime for introductory tenancies. The procedure governing the landlord's right to recover possession during the probationary period is set out in sections 143D, 143E and 143F which, as was noted in *Pinnock*, para 13, are virtually identical to sections 127, 128 and 129 of the 1996 Act. But there is one important difference. A tenant under a demoted tenancy was previously a tenant under a secure tenancy, that tenancy having been brought to an end by a demotion order under section 82A of the Housing Act 1985 (as inserted by section 14 of the Anti-social Behaviour Act 2003). The social purpose of the introductory tenancy regime is to allow local authorities to grant tenancies to new tenants without conferring security of tenure

upon them until they have demonstrated that they are responsible tenants during the introductory period. This is a factor which will always be highly relevant in any assessment of the proportionality of the landlord's claim for possession, as the effect of denying the claim will be that an introductory tenant who may not deserve a secure tenancy will automatically obtain one.

The facts

(a) Ms Powell

20. As already noted, the local housing authority was satisfied that Ms Powell was homeless, eligible for assistance and had a priority need, and was not satisfied that she had become homeless intentionally. She was given a licence by the London Borough of Hounslow ("Hounslow") to occupy a two bedroom ground floor flat at 15 Pine Trees Close, Cranford from 2 April 2007. She and her two sons Zaid, born on 3 April 2005, and Nour, born on 14 April 2006, were noted on the agreement as the occupiers. A claim for housing benefit was received by Hounslow on 4 April 2007 in which Ms Powell indicated that she had a partner named Mr Ahmad Sami who normally resided with her. By letter dated 11 May 2007 Hounslow wrote to Ms Powell stating that there were arrears of rent and warning her that this could lead to termination of her licence to occupy the property. But on 14 May a credit of housing benefit was received which reduced the arrears to zero. There was a further period when the payments fell into arrears, but they were fully cleared by a payment of housing benefit on 3 December 2007.

21. On 5 February 2008 Hounslow's housing benefit section wrote to Ms Powell asking her to provide it with information in connection with her claim. On 7 March 2008 it wrote to her stating that the information which it had asked for had not been provided. As a result the housing benefit claim was terminated from 23 December 2007. On 10 March 2008 Hounslow's income recovery officer wrote to Ms Powell informing her that there were arrears of licence payments and asking her to attend for an interview on 17 March 2008. Ms Powell did not attend as she had an interview at about the same time and on the same day with the Department of Work and Pensions. On 17 March 2008 Hounslow sent a letter to Ms Powell with a notice to quit. On 20 March 2008 she attended its offices and discussed the arrears with one of its officers. On the same day a letter was sent to her setting out the possible effect on Hounslow's homelessness duty towards her were she to be evicted due to rent arrears.

22. On 28 April 2008 Hounslow's housing benefit section sent Ms Powell a housing benefit form. It was received on 12 May 2008 and payment of housing benefit was resumed on 26 May 2008. But there were substantial arrears of rent,

represented by some 11 weeks' rent, which were not covered by the initial credit of housing benefit and which remained unpaid. On or about 19 September 2008 Hounslow issued a claim for possession of the premises, relying on the notice to quit dated 17 March 2008. It was explained that there were arrears as at 30 June 2008 of £3,536.39. The matter came before Deputy District Judge Shelton on 14 May 2009, who heard evidence from witnesses, including Ms Powell. He found that the measures that had been taken by Hounslow were reasonable and proportionate (in the *Doherty* sense), and granted possession of the premises to Hounslow. Having heard submissions as to her personal circumstances, he required Ms Powell to give possession of the property on or before a date 14 days after the date when the order was made.

23. Ms Powell was granted permission to appeal against the judge's order by Mummery LJ on 2 July 2009, with a stay of execution on condition that Ms Powell paid off the arrears at £5 per week. Her appeal was heard as one of five appeals by the Court of Appeal in March 2010. It held that the decision in Ms Powell's case was lawful, as the circumstances were not highly exceptional in the context of the homelessness legislation: [2010] EWCA Civ 336, para 76. Her appeal was dismissed and the judge's order was stayed pending the filing of a notice of appeal to this Court.

24. Ms Powell's current position is that she is 23 years old and that her household consists of herself, her partner Mr Ahmad Sami and their four children, Zaid who is now 5, Nour who is now 4, Taysier who was born on 13 July 2007 and is now 3, and Laila who was born in July 2009 and is now 1. The family is in receipt of various benefits including housing benefit which covers all of the rental liability. In December 2009 the family was moved from 15 Pine Tree Close so that disrepair within the premises could be dealt with. Work was completed in April 2010, and the family returned to the premises and has remained in occupation ever since.

(b) Hall

25. Mr Hall became an introductory tenant of property at 147 Leeds and Bradford Road, Bramley, Leeds of which he was granted a sole tenancy by Leeds City Council ("Leeds") on 21 April 2008 and where he lives alone. Allegations were made of noise nuisance and anti-social behaviour by Mr Hall and by visitors to the property. The behaviour which was complained of was mainly of noise nuisance from loud music and television and the banging and slamming of doors. Mention was also made of shouting, screaming and arguing, banging on the communal door and ringing a neighbour's doorbell at night and in the early hours of the morning. It was also said that Mr Hall had engaged in threatening and intimidating behaviour and had been verbally abusive towards his neighbours. On

1 July 2008 a noise abatement notice was served on him. He did not appeal against this notice, and he appears to have disregarded it as complaints continued to be received.

26. On 28 November 2008 Leeds served a notice of proceedings for possession on him under section 128 of the 1996 Act. A review was sought, and the notice was withdrawn following the review. Leeds continued nevertheless to receive allegations of noise nuisance and anti-social behaviour, so on 6 March 2009 it served a further notice of proceedings for possession on Mr Hall. He again requested a review, but this time the review hearing upheld the service of the notice.

27. When the claim for possession came before His Honour Judge Spencer QC in the county court on 6 August 2009 the appropriateness of the notice was not challenged, nor was its validity. Mr Hall accepted in a statement that was produced for the trial that there may have been occasions when he had played loud music and that, when his now ex-girlfriend visited him and they drank alcohol together, they would sometimes argue. He claimed that he had been drinking excessively because he had been suffering from depression and said that he had been receiving support from an organisation which supports vulnerable people who were having difficulty in maintaining their tenancies. He asked the court to consider whether matters occurring after the review could provide a basis for challenging Leeds' decision to seek possession.

28. The judge held that he could not consider anything occurring after the date of the review because section 127(2) of the 1996 Act provides that when, as happened in this case, the tenant has been served with a notice of proceedings that complies with section 128, "the court shall make" the order. He made an order for possession, the effect of which was that Mr Hall was required to give possession of the property on or before a date 28 days after the date when the order was made. He gave Mr Hall permission to appeal, and stayed execution of the order for possession pending the appeal.

29. On 21 September 2009 Mr Hall lodged a notice of appeal and his appeal was heard together with that of Ms Powell and Mr Frisby as one of five appeals by the Court of Appeal (Waller, Arden and Patten LJJ) in March 2010. The court said that the judge ought to have considered whether the facts that had become known after the review made it arguable that the decision to pursue the proceedings was unlawful and in fact held that this was unarguable. This was because tenants are on probation under the introductory tenancy scheme, because the review was not challenged and because there was no basis for arguing that it was unlawful for a local authority to refuse to change its mind by reference to facts which simply sought to demonstrate that the occupier's behaviour had improved: [2010] EWCA

Civ 336, para 79. The appeal was dismissed and the judge's order was stayed for pending the filing of a notice of appeal to this Court. Mr Hall remains in occupation of the property.

(c) Mr Frisby

30. Mr Frisby became an introductory tenant of property at 9 Hebden Grove, Hall Green, Birmingham under a tenancy agreement with Birmingham City Council ("Birmingham") dated 23 April 2007. Birmingham received complaints of excessive noise, including singing, music and banging emanating from the property. It served a noise abatement notice on Mr Frisby on 19 November 2007 which permitted proceedings to be brought for a warrant to confiscate sound producing equipment. On 4 February 2008 it served a notice under section 125A of the 1996 Act which had the effect of extending the trial period of the tenancy by six months to 22 October 2008. Mr Frisby was advised of his right to seek a review of the decision to extend his introductory tenancy but he did not do so. Having received further complaints of noise, Birmingham executed a warrant under the Environmental Protection Act 1990 and seized and removed sound producing equipment from the property.

31. On 2 May 2008 Birmingham served a notice of proceedings for possession on Mr Frisby under section 128 of the 1996 Act. He requested a review of the decision to seek the order. When the review panel convened he raised a number of issues and the panel decided to adjourn the hearing as they needed further information. He did not attend the resumed hearing which proceeded in his absence, and the decision to commence proceedings was upheld. On 17 September 2008 Birmingham commenced proceedings for possession in Birmingham County Court. Mr Frisby filed a defence in which it was averred that Birmingham was amenable to judicial review and that the decision to seek possession was an improper exercise of its common law powers and an interference with his rights under article 8. The possession claim was heard by District Judge Gailey on 3 July 2009. He held in favour of Birmingham and struck out Mr Frisby's defence. But he acceded to an application that he should not make a possession order there and then but should first hear argument as to whether or not he should adjourn the proceedings to enable an application for a judicial review to be brought in the administrative court.

32. On 27 October 2009 Mr Frisby was given permission to appeal against the judge's decision, and the matter was referred to the Court of Appeal under CPR 52.14. As in the cases of Ms Powell and Mr Hall, his appeal was heard as one of five appeals by the Court of Appeal in March 2010. Having allowed certain additional expert evidence to be admitted, it dismissed the appeal: [2010] EWCA

Civ 336, para 80. The judge's order was stayed pending the filing of a notice of appeal to this Court. Mr Frisby remains in occupation of the property.

The form and content of the proportionality review

33. The basic rules are not now in doubt. The court will only have to consider whether the making of a possession order is proportionate if the issue has been raised by the occupier and it has crossed the high threshold of being seriously arguable. The question will then be whether making an order for the occupier's eviction is a proportionate means of achieving a legitimate aim. But it will, of course, be necessary in each case for the court first to consider whether the property in question constitutes the defendant's "home" for the purposes of article 8. This is because it is only where a person's "home" is under threat that article 8 comes into play: *Pinnock*, para 61. It is well established in the jurisprudence of the Strasbourg court that an individual has to show sufficient and continuing links with a place to show that it is his home for the purposes of article 8: *Gillow v United Kingdom* (1986) 11 EHRR 335, para 46; *Buckley v United Kingdom* (1996) 23 EHRR 101, 115, para 54; see also *Harrow London Borough Council v Qazi* [2003] UKHL 43, [2004] 1 AC 983, paras 9, 61-68. In *Paulić v Croatia*, para 33 the court said:

> "'Home' is an autonomous concept which does not depend on classification under domestic law. Whether or not a particular premises constitutes a 'home' which attracts the protection of article 8(1) will depend on the factual circumstances, namely, the existence of sufficient and continuous links with a specific place."

This issue is likely to be of concern only in cases where an order for possession is sought against a defendant who has only recently moved into accommodation on a temporary or precarious basis. The Leeds appeal in *Kay v Lambeth London Borough Council* [2006] 2 AC 465, where the defendants had been on the recreation ground in their caravan for only two days without any authority to be there, provides another example of a situation where it was not seriously arguable that article 8 was engaged: see para 48. In most cases it can be taken for granted that a claim by a person who is in lawful occupation to remain in possession will attract the protection of article 8.

(a) homelessness

34. The first question is whether in a case where domestic law imposes no requirement of reasonableness and gives an unqualified right to an order for possession, there is a requirement for an independent determination by a court of

the issue of proportionality. In *Pinnock* it was held 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: para 63. This is so even if the defendant's right of occupation has come to an end: *Pinnock*, para 45, applying *McCann v United Kingdom*, para 50; *Ćosić v Croatia*, para 22; *Zehentner v Austria*, para 59; *Paulić v Croatia*, para 43; and *Kay v United Kingdom*, para 68. But it was also held that, as a general rule, article 8 need only be considered if it is raised by or on behalf of the residential occupier, and that if an article 8 point is raised the court should initially consider it summarily and if it is satisfied that, even if the facts relied on are made out, the point would not succeed it should be dismissed. Only if it is satisfied that it is seriously arguable that it could affect the order that the court might make should the point be further entertained: para 61. I would hold that these propositions apply as much in principle to homelessness cases as they do to demoted tenancies. It follows that in the great majority of cases the local authority need not plead the precise reasons why it seeks possession in the particular case. But if an article 8 defence is raised it may wish to plead a more precise case in reply.

35. Mr Luba QC accepted that the threshold for raising an arguable case on proportionality was a high one which would succeed in only a small proportion of cases. I think that he was right to do so: see also *Pinnock*, para 54. Practical considerations indicate that it would be demanding far too much of the judge in the county court, faced with a heavy list of individual cases, to require him to weigh up the personal circumstances of each individual occupier against the landlord's public responsibilities. Local authorities hold their housing stock, as do other social landlords, for the benefit of the whole community. It is in the interests of the community as a whole that decisions are taken as to how it should best be administered. The court is not equipped to make those decisions, which are concerned essentially with housing management. This is a factor to which great weight must always be given, and in the great majority of cases the court can and should proceed on the basis that the landlord has sound management reasons for seeking a possession order.

36. If the threshold is crossed, the next question is what legitimate aims within the scope of article 8(2) may the claimant authority rely on for the purposes of the determination of proportionality and what types of factual issues will be relevant to its determination. The aims were identified in *Pinnock*, para 52. The proportionality of making the order for possession at the suit of the local authority will be supported by the fact that making the order would (a) serve to vindicate the authority's ownership rights; and (b) enable the authority to comply with its public duties in relation to the allocation and management of its housing stock. Various examples were given of the scope of the duties that the second legitimate aim encompasses – 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. In *Kryvitska and Kryvitskyy v Ukraine* (Application No 30856/03) (unreported) given 2 December 2010, para 46 the Strasbourg court indicated that the first aim on its own will not suffice where the owner is the State itself. But, taken together, the twin aims will satisfy the legitimate aim requirement.

37. So, as was made clear in *Pinnock*, para 53, there will be no need, in the overwhelming majority of cases, for the local authority to explain and justify its reasons for seeking a possession order. It will be enough that the authority is entitled to possession because the statutory pre-requisites have been satisfied and that it is to be assumed to be acting in accordance with its duties in the distribution and management of its housing stock. The court need be concerned only with the occupier's personal circumstances and any factual objections she may raise and, in the light only of what view it takes of them, with the question whether making the order for possession would be lawful and proportionate. If it decides to entertain the point because it is seriously arguable, it must give a reasoned decision as to whether or not a fair balance would be struck by making the order that is being sought by the local authority: *Kryvitska and Kryvitskyy v Ukraine,* para 44.

38. Mr Underwood QC drew attention to the fact that there was no express provision in Part VII of the 1996 Act which empowers a court to refuse to grant a possession order to the local authority where the occupier is accommodated following an exercise of the authority's functions under that Part of the Act. He said that this was because Parliament had taken a positive decision not to provide secure tenancies to persons who were accommodated under the homelessness provisions unless the local authority chooses otherwise. Part VII was intended to be a life-line for those who had nowhere to live; it uses accommodation which may be needed quickly for other cases; an occupier who is evicted through no fault of her own will be accommodated elsewhere; and if there is an issue about fault there is a right of review and of appeal. The thrust of this part of his argument was that it was not possible under the scheme of Part VII to meet the article 8 procedural requirement in a way that was called for by the decision in *Pinnock.*

39. The answer to this argument is to be found in the fact that there is nothing in Part VII of the 1996 Act which either expressly or by necessary implication *prevents* the court from refusing to make an order for possession if it considers it would not be proportionate to do so. In contrast to *Pinnock*, where the court was faced with a direction by the statute that, if the procedural requirements were satisfied, it must grant the order for possession, no equivalent provision is set out anywhere in Part VII. There is, of course, an important difference between Part VII and the regimes that apply to introductory and demoted tenancies, in that it is likely in homelessness cases that the occupier will be the subject of a continuing duty if she is still homeless, eligible for assistance and has a priority need and will be entitled to contest a finding that she became homeless intentionally. But the

legitimate aims that justify seeking a possession order are just as relevant in homelessness cases. The question for the court will always be whether the making of an order for possession would be lawful and proportionate.

40. Mr Luba then said that each of the exceptions to the security of tenure regime was there for a particular social housing reason. It was material to a consideration of the issue of proportionality, therefore, for the court to know whether the local authority's reason for seeking a possession order was relevant in that context. In the case of an occupier who had been provided with accommodation under Part VII, seeking a possession order to enable the local authority to perform its homelessness functions, such as moving a family whose numbers had reduced to smaller accommodation, the case for granting the order would in the overwhelming number of cases be proportionate. But if the local authority's decision was based on other factors such as rent arrears which were not related to the performance of its homelessness functions, it was not enough to tell the court that it was the local housing authority and to rely on the two legitimate aims. He said that a structured approach was required to the issue of proportionality so that the interests of the local authority could be balanced against that of the occupier: *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167, paras 19-20. Support for this was to be found in *Zehentner v Austria*, para 56 where the court said that, while it was 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 its review for conformity with the requirements of the Convention.

41. A structured approach of the kind that Mr Luba was suggesting may be appropriate, and indeed desirable, in some contexts such as that of immigration control which was the issue under discussion in *Huang v Secretary of State for the Home Department.* But in the context of a statutory regime that has been deliberately designed by Parliament, for sound reasons of social policy, so as not to provide the occupier with a secure tenancy it would be wholly inappropriate. I agree with Mr Stilitz QC for the Secretary of State that to require the local authority to plead its case in this way would largely collapse the distinction between secured and non-secure tenancies. It would give rise to the risk of prolonged and expensive litigation, which would divert funds from the uses to which they should be put to promote social housing in the area. In the ordinary case the relevant facts will be encapsulated entirely in the two legitimate aims that were identified in *Pinnock*, para 52. It is against those aims, which should always be taken for granted, that the court must weigh up any factual objections that may be raised by the defendant and what she has to say about her personal circumstances. It is only if a defence has been put forward that is seriously arguable that it will be necessary for the judge to adjourn the case for further consideration of the issues of lawfulness or proportionality. If this test is not met,

the order for possession should be granted. This is all that is needed to satisfy the procedural imperative that has been laid down by the Strasbourg court.

42. The decision of the local authority to seek possession in a homelessness case will, of course, have been taken against the background of all the advice and assistance that the provisions of Part VII of the 1996 Act require to be given to the applicant. It is unlikely, as the course of events in Ms Powell's case demonstrates, that the reason why it has decided to take proceedings for eviction will not be known to the tenant. The right to request a review of the decisions listed in section 202 and the right of appeal under section 204 are further factors to be taken into account. They provide the tenant with an opportunity to address any errors or misunderstandings that may have arisen and to have them corrected. She will have a further opportunity to raise such issues as a judicial review challenge by way of a defence in the county court. But that is a matter for the tenant, not for the local authority. There is no need for the court to be troubled with these issues unless and until, at the request of the tenant, it has to consider whether it should conduct a proportionality exercise.

43. There may, as was pointed out in *Pinnock*, para 53, be cases where the local authority has a particularly strong or unusual reason for wanting to obtain possession of the property. It may think it desirable to inform the court of this fact so that it can take account of it in addition to the two given legitimate aims when it is determining the issue of proportionality. There is no reason why it should not ask for this to be done. But, if it wishes to do so, it must plead the reason that it proposes to found upon and it must adduce evidence to support what it is saying. The particular grounds on which it relies can then be taken into account in the assessment. No point can be taken against the local authority, however, if it chooses not to take this course and to leave it to the tenant to raise such points as she wishes by way of a defence.

(b) introductory tenancies

44. The above analysis applies equally to introductory tenancies. It cannot be said in their case that there is nothing in the statutory scheme which prevents the court from refusing to make an order for possession if it considers it would not be proportionate to do so. Section 127(2) is a direction to the contrary. But, for the reasons set out in paras 50-56 below, that subsection can be read and given effect so as to enable the county court judge to deal with a defence that relies on an alleged breach of the defendant's rights under article 8. As to what this entails, the twin legitimate aims that were held in *Pinnock* to justify seeking a possession order in the case of demoted tenancies are just as relevant in the case of introductory tenancies. The question for the court will always be whether the

making of an order for possession in their case too would be lawful and proportionate.

45. The question as to what the procedural requirements are in the case of introductory tenancies must be judged against the fact that the tenant has a statutory right to request a review of the local authority's decision to seek possession under section 129 of the 1996 Act. This strengthens the grounds for rejecting the structured approach to the issue of proportionality contended for by Mr Luba. As has already been stressed, the regime that applies to introductory tenancies has been deliberately designed by Parliament so as to withhold enjoyment of the right to a secure tenancy until the end of the trial period. In the ordinary case, as in cases of homelessness, the relevant facts will be encapsulated entirely in the two legitimate aims that were identified in *Pinnock*, para 52. It is against those aims that the court must weigh up any factual objections that may be raised by the defendant and what she has to say about her personal circumstances, and it is only if a defence has been put forward that is seriously arguable that it will be necessary for the judge to adjourn the case for further consideration. If this test is not met, the order for possession should be granted.

Procedural protections

46. The Court was invited to answer a series of practical questions which were designed to obtain advice as to the course that should be followed in homelessness cases to enable the occupier to make representations before or after service of a notice to quit and to enable the tenant to know the reasons why possession was being sought. Drawing upon the practice of pre-action protocols, Mr Luba said that the procedural dimensions of article 8 could best be satisfied by requiring that, before possession proceedings are begun, the non-secure occupier knows why the proceedings are being initiated and has an opportunity to make representations to the official charged with making the decision whether to bring proceedings. The Court was also invited to answer a series of questions directed to the way claims for possession in the case of introductory tenancies should be dealt with procedurally in the county court.

47. Detailed questions as to the way claims should be dealt with procedurally are best addressed in the light of facts and circumstances arising from the way proceedings are actually being handled in practice. Otherwise there is a risk that such guidance as this Court can give will create more problems than it will solve. The statutory regimes that are in place must also be taken into account. These are not cases where the defendants were granted secure tenancies. There is no statutory obligation to give reasons with the notice to quit in homelessness cases, and the local authority does not have to justify its motives for seeking a possession

order. It is not obvious that pre-action protocols have a place in proceedings of this kind.

48. Furthermore, on the facts of the present cases there is no real issue that needs to be addressed. Ms Powell was given warnings about her rent arrears and an opportunity to attend for interview and she discussed the problem of arrears with one of Hounslow's officers. The notice to quit was accompanied by a letter giving reasons, and the claim for possession explained that there were arrears. The common law requirement of fair notice was, very properly, observed in her case by Hounslow and none of the steps that they took have been criticised as inadequate. As for the cases of Mr Hall and Mr Frisby, the local authorities told them that they had received complaints of excessive noise, noise abatement notices were served on them against which they did not appeal and in Mr Frisby's case offending equipment was removed from the property. The reasons for the decision to apply for a possession order were set out in the notice of proceedings as required by section 128(3) and the tenants were informed of their right to request a review, all as required by section 128(6).

49. In *R (McLellan) v Bracknell Forest Borough Council* [2001] EWCA Civ 1510, [2002] QB 1129, para 103 Waller LJ said that where a review has taken place it should be the norm for the local authority to spell out in affidavits before the county court how the procedure was operated, how the hearing was conducted and the reason for taking the decision to continue with the proceedings. As Mr Luba pointed out, that suggestion was directed at the task of enabling the judge to decide whether to adjourn the claim so that a judicial review of the decision might be sought in the High Court. He invited the Court to set out a revised list of requirements that had to be satisfied in the context of a case which might raise issues of proportionality. I would, with respect, decline that invitation. Matters of that kind are more appropriate for a practice direction. In any event it is not for this court to give directions on matters of practice where the points at issue in the case do not require this to be done.

Section 127(2) of the 1996 Act

50. As already noted (see para 17, above), section 127(1) of the 1996 Act provides that the landlord may only bring an introductory tenancy to an end by obtaining an order of the court for possession of the dwelling-house. Section 127(2) provides that the court "shall" make such an order unless the provisions of section 128 apply. That section directs the court not to entertain proceedings for possession unless the landlord has served on the tenant a notice complying with its requirements. One of the things that the notice must do is inform the tenant of his right to request a review of the landlord's decision to seek a possession order: section 128(6). Section 129 provides that, so long as the request for a review is

made no later than 14 days after the service of the possession order, the landlord must review its decision and that the review shall be carried out and the tenant notified before the date specified in the notice as the date after which proceedings for the possession of the dwelling-house may be begun.

51. On the face of it, the court has no discretion under section 127(2) as to whether or not it should make the order for possession. Its ordinary meaning is not in doubt. If the requirements of section 128 and by implication section 129 (see para 56, below) are met, the court must make the order whether or not it considers it proportionate to do so. The question that this issue raises is whether section 127(2) can nevertheless be read and given effect under section 3 of the Human Rights Act 1998 so as to permit the tenant to raise his article 8 Convention right by way of a defence to the proceedings in the county court and enable the judge to address the issue of proportionality.

52. In *Pinnock*, paras 68-79, the Court addressed the proper interpretation of section 143D(2) of the 1996 Act, as amended, which together with sections 143E and 143F are so similar to those of sections 127 to 129 as to indicate that they were modelled on what those sections provide. Like section 127(2) in the case of a dwelling-house let under an introductory tenancy, section 143D(2) provides when the court is asked to make an order for the possession of a dwelling-house let under a demoted tenancy that the court "must" make the order (the word "shall" is not used, but the sense is the same) if the notice and review requirements have been complied with. As the Court noted in para 68, if section 143D was construed in accordance with the traditional approach to interpretation, it was 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. The same problem arises with regard to section 127(2). Unless a solution can be found under section 3 of the 1998 Act, the language of that section appears to deprive the court of almost any ability to stand in the way of a landlord who had decided to seek possession against an introductory tenant: see *Pinnock*, para 69.

53. In *Pinnock* it was held that it is open to a tenant under a demoted tenancy to challenge the landlord's decision to bring possession proceedings on the ground that it would be disproportionate and therefore contrary to his article 8 Convention rights: para 73. This finding applies just as much in the case of introductory tenancies, so it must be concluded that, wherever possible, the traditional review powers of the court should be expanded to permit it to carry out that exercise in their case too. The court's powers of review can, in an appropriate case, extend to reconsidering for itself the facts found by a local authority, or indeed to considering the facts which have arisen since the issue of proceedings, by hearing evidence and forming its own view: *Pinnock*, para 74.

54. As was observed in that case, however, much the more difficult question is whether it is possible to read and give effect to section 127(2) in a way that would permit the county court judge to do this. It is difficult because the wording of the subsection indicates that its purpose is to ensure that the court does nothing more than check whether the procedure has been followed. An introductory tenancy, after all, has been deliberately deprived of the protections that apply to a secure tenancy. It could be argued, as it was in *Pinnock*, that for the court to assess the proportionality of the decision to bring and continue the possession proceedings would go against the whole import of the section. It would amount to amending it rather than interpreting it: para 75.

55. The Court decided in *Pinnock* to reject that argument for the reasons set out in paras 77-81. The question in this case is whether there is any good reason for not applying that decision to the regime that the 1996 Act has laid down for introductory tenancies. There are some differences between the two regimes. There is no demotion stage, as a tenancy becomes an introductory tenancy upon its commencement and it remains an introductory tenancy until the end of the trial period. And, while the language of sections 127-129 is for the most part reproduced, mutatis mutandis, in sections 147D-147F, there is one difference between them. Section 127(2) does not refer to section 129, unlike section 143D(2), which states:

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

Furthermore, as Mr Underwood pointed out, Parliament had made a clear choice that introductory tenants were not to have the protection from eviction that secure tenants have. He said that there were many ways in which section 127(2) could be made compatible with article 8, and that it should be left to Parliament to choose between them.

56. The fact that there is no mention in section 127(2) of the review procedure under section 129 can be seen to be of no consequence, in view of the direction in section 128(6) that the tenant must be informed of his right to request a review. The fact that there is no demotion stage in the case of an introductory tenancy does not affect the reasoning on which the decision in *Pinnock* was based. It was that, as lawfulness must be an inherent requirement of the procedure for seeking a possession order, it must equally be open to the court to consider whether that procedure has been lawfully followed having regard to the defendant's article 8 Convention rights: para 77. It was by this route, and by the application of sections 3(1) and 7(1)(b) of the 1998 Act, that the Court held that section 143D(2) could be read and given effect to enable the county court judge to deal with a defence that relies on an alleged breach of the defendant's rights under article 8. There is a

sufficient similarity between section 127(2) and section 143D(2) to apply the reasoning in *Pinnock* to introductory tenancies also. Although the word "procedure" is not used in section 127(2), it does refer to the procedural requirements in section 128. So it should be read and given effect in the same way, and it is not necessary to resort to the making of a declaration of incompatibility.

Section 89 of the 1980 Act

57. The question raised by this issue is whether, if the argument is made out that the proportionate course would be to defer the delivery of possession for a period such as three months or to make a suspended order for possession, this can be done in the face of the provisions of section 89(1) of the Housing Act 1980. That section provides:

> "(1) Where a court makes an order for the possession of any land in a case not falling within the exceptions mentioned in subsection (2) below, the giving up of possession shall not be postponed (whether by the order or any variation, suspension or stay of execution) to a date later than fourteen days after the making of the order, unless it appears to the court that exceptional hardship would be caused by requiring possession to be given up by that date; and shall not in any event be postponed to a date later than six weeks after the making of the order.
>
> (2) The restrictions in subsection (1) above do not apply if –
>
> (a) the order is made in an action by a mortgagee for possession; or
>
> (b) the order is made in an action for forfeiture of a lease; or
>
> (c) the court had power to make the order only if it considered it reasonable to make it; or
>
> (d) the order relates to a dwelling-house which is the subject of a restricted contract (within the meaning of section 19 of the [Rent Act 1977]); or
>
> (e) the order is made in proceedings brought as mentioned in section 88(1) above [proceedings for possession of a dwelling-house let under a rental purchase agreement]."

58. None of the exceptions listed in section 89(2) apply to tenancies which are not secure tenancies. The effect of subsection (1) of that section is to remove from the court the discretion which it had at common law to select whatever length of postponement it thought fit: see *McPhail v Persons Unknown* [1973] Ch 447. In his commentary on this section in *Current Law Statutes* Mr Andrew Arden (as he then was) suggested that the section did not prevent a greater period being allowed

by consent. But it is difficult to see how the consent of the parties could confer a discretionary power on the court which has been removed from it by the statute.

59. The question whether the section permits the court to allow a longer period on grounds of article 8 proportionality was left open in *Pinnock*, para 63. It did not need to be addressed on the facts of that case. It does not arise in any of the cases that are before this Court either, as it has not been suggested in any of them that an order postponing possession for a period in excess of six weeks is necessary to meet the requirements of article 8. In Ms Powell's case the giving up of possession was postponed by 14 days. In Mr Hall's case the period allowed was 28 days. In Mr Frisby's case the judge decided not make a possession order, so that an application could be made to the administrative court. But as the point was fully argued, and as it is a matter of some importance to know what scope there is for departing from the strict timetable on grounds of proportionality in cases of exceptional hardship, it is appropriate that the Court should deal with it.

60. Two possible ways of enabling the court to depart from the strict timetable were suggested in argument. One was to read down the section under the power that the court is given by section 3(1) of the Human Rights Act 1998. The other was to exercise powers of case management by adjourning the proceedings if the six week period was likely to be insufficient to enable the tenant to remove from the property without incurring exceptional hardship, for such length of time as might be necessary to avoid it.

61. The timetable is very precise as to the limit to the power to postpone. The words "shall not in any event" could hardly be more explicit. Its language is in sharp contrast to that of section 87 of the 1980 Act (now contained in section 85 of the Housing Act 1985, as amended), the first two subsections of which provided:

> "(1) Where proceedings are brought for possession of a dwelling-house let under a secure tenancy on any of grounds 1 to 6 or 10 to 13 in Part I of Schedule 4 to this Act, the court may adjourn the proceedings for such period or periods as it thinks fit.
>
> (2) On the making of an order for possession of such a dwelling-house on any of those grounds, or at any time before the execution of the order, the court may –
>
> (a) stay or suspend execution of the order, or
>
> (b) postpone the date of possession,
>
> for such period or periods as the court may think fit."

The scheme of the 1980 Act, as the contrast between sections 87 and 89 illustrates, was to confer protection on secure tenants but to restrict it in relation to non-secure tenants. Its long title states that among the Act's purposes was "to restrict the discretion of the court in making orders for possession." Section 89 contains an express prohibition against exercising the extended powers given by section 85 in the case of secure tenancies.

62. In the face of such strong statutory language, any reading down of the section to enable the court to postpone the execution of an order for possession of a dwelling-house which was not let on a secure tenancy for a longer period than the statutory maximum would go well beyond what section 3(1) of the 1998 Act permits. As Lord Nicholls of Birkenhead said in *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557, para 33, for the courts to adopt a meaning inconsistent with a fundamental feature of legislation would be to cross the constitutional boundary that section 3 of the 1998 Act seeks to demarcate and preserve.

63. Section 89 of the 1980 Act does not, of course, take away from the court its ordinary powers of case management. It would be perfectly proper for it, for example, to defer making the order for possession pending an appeal or to enable proceedings to be brought in the administrative court which might result in a finding that it was not lawful for a possession order to be made, as was contemplated by the judge in the case of Mr Frisby but is now no longer necessary. An adjournment would also be a permissible exercise of the court's discretion if more information was needed to enable it to decide what order it should make. But what the court cannot do, if it decides to proceed to make the order, is play for more time by suspending or staying its effect so as to extend the time limit beyond the statutory maximum.

64. The question then is whether the Court should make a declaration of incompatibility under section 4 of the 1998 Act. This would be appropriate if there was good reason to believe that the time limit that the section sets is likely in practice to be incompatible with the article 8 Convention right of the person against whom the order for possession is made. Mr Arden's comment in *Current Law Statutes* indicates that at the time when section 89 of the 1980 Act was enacted postponements of orders for possession for periods of four to six weeks was normal. No evidence has been put before the Court to show that in practice the maximum period of six weeks is insufficient to meet the needs of cases of exceptional hardship. Furthermore, this is an area of law where the judgment of Parliament as to what was necessary to achieve its policy of restricting the discretion of the court in the case of non-secure tenancies should be respected, unless it was manifestly without reasonable foundation: *Blečić v Croatia* (2004) 41 EHRR 13, para 65. In these circumstances, as no obvious need for the section to be

revisited has been demonstrated, I would decline to make a declaration of incompatibility.

The disposal of these appeals

(a) Ms Powell

65. Mr Underwood informed the Court that Hounslow had decided, in the light of the decision in *Pinnock*, to offer Ms Powell suitable alternative accommodation. As before, this accommodation was to be provided on a non-secure basis. Her rent arrears would be carried forward to the new tenancy on the basis that she continued to pay off the arrears at £5 per week, subject to any changes in her circumstances which would enable her to pay more. Mr Luba said that he was grateful for this offer, and he submitted that in any event the order that had been made against his client should not stand. Evidence had been heard by the district judge in her case. But this was not a full proportionality hearing of the kind contemplated by *Pinnock*, and her personal circumstances had not been examined. He invited the court to allow Ms Powell's appeal. In view of the offer that had been made, Mr Underwood did not oppose this invitation in his oral argument. But in his written case, in which he invited the court to dismiss the appeal, he pointed out that the judge observed that the action taken by Hounslow was proportionate.

66. Had it not been for the offer of suitable alternative accommodation, there might have been grounds for remitting Ms Powell's case to the county court for consideration of article 8 proportionality. Giving effect to the order for possession would have the inevitable consequence of making Ms Powell homeless again so that the local authority's duties to her will continue, unless she were to be found to be intentionally homeless or not to have a priority need. Had there been a live issue to be examined, it would have been preferable for her to be given an opportunity for the proportionality of the order to be considered in the light of her personal circumstances. As it is, it is not necessary to reach a view on this point. An offer of suitable alternative accommodation having been made, no good purpose would be served by maintaining the order for possession or the notice to quit which preceded it. I would allow this appeal for this reason and set the order and the notice to quit aside.

(b) Mr Hall

67. Mr Underwood informed the Court that Leeds had decided, in the light of the decision in *Pinnock* and as there had been no recent reports of his having caused a nuisance, to offer Mr Hall a secure tenancy of his current

accommodation. Mr Luba said that he was grateful for this offer, but he submitted that the order that had been made against his client should not stand in any event as the judge had been wrong to refuse to consider anything occurring after the date of the review. He invited the court to dispose of the matter by allowing Mr Hall's appeal. Mr Underwood acknowledged that Mr Hall did not have a proportionality hearing. But he submitted that under the introductory tenancy scheme it had no power to give him one, so the appeal should be dismissed.

68. Mr Underwood's submission that the county court had no power to consider whether it was proportionate to make the order must be rejected. For the reasons set out in paras 50-56 above, it has that power. So, if there were grounds for thinking that it was seriously arguable that the making of the order was disproportionate, I would have remitted his case to the county court to enable him to present that argument. But the reasons given by the Court of Appeal for holding that it was unarguable that the decision was unlawful apply with equal force to the question whether, on the facts presented by Mr Hall, the decision was disproportionate. No grounds have been put before this Court for thinking that he could present a case which was seriously arguable. Had it not been for the offer of a secure tenancy, I would have dismissed his appeal. As it is, no good purpose would be served by maintaining the order for possession. I would, for this reason only, allow this appeal.

(c) Mr Frisby

69. Birmingham has not made any offer of settlement in Mr Frisby's case and Mr Arden indicated that it was not minded to do so. Mr Luba submitted that, as the district judge had considered only the question of venue and had adjourned the proceedings so that an application could be made for judicial review, the proper course was for this Court to allow the appeal so that proceedings could be resumed in the county court. Mr Arden, on the other hand, invited the Court to dismiss the appeal as Mr Frisby did not take advantage of the adjournment to take proceedings for judicial review and had given no indication of what the issues were that he wanted to raise. He said that he had had his chance, and that he should not be given a further opportunity. He pointed out that Mr Frisby did not appeal against the noise abatement notice, and it appeared that he was not in position to say that the notice of proceedings had not been properly served on him.

70. In view of the way the case was dealt with in the county court, Mr Frisby did not have an opportunity to present his arguments on proportionality in that court. But I do not think that there is any reason for thinking that it is seriously arguable that the making of an order for possession in his case was disproportionate. As already noted (see para 30 and 31, above), when Mr Frisby was advised of his right to seek a review of the decision to extend his introductory

tenancy he did not do so and, having requested a review of the decision to seek an order for possession, he did not attend the resumed hearing. The facts on which that decision was based are compelling, and no notice has been given of any grounds on which it might be suggested that the making of the order was disproportionate. I would dismiss this appeal.

LORD PHILLIPS

Introduction

71. I am grateful to Lord Hope for setting out the facts and issues raised by these appeals with such clarity. I agree with his conclusions, but in relation to some of these I wish to add some comments of my own. I propose to do this, after an introductory overview, by addressing, in some cases very shortly, the issues set out in the Statements of Facts and Issues agreed by the parties.

72. Article 8(1) of the Convention confers on everyone a right to respect for his home. It does not impose on a state, or a public authority within a state, a duty to provide a home or to sort out a person's housing problems – see the comment of Lord Bingham in *Kay v Lambeth London Borough Council* [2006] 2 AC 465, at para 28 and the Strasbourg authorities cited by him. English law, and public authorities acting pursuant to that law, have gone further than the Convention requires. The law lays down a complex framework dealing with rights and obligations in relation to housing. Under this public authorities are under an obligation to provide accommodation for the homeless in the circumstances described by Lord Hope at para 11. The law also regulates the manner in which public authorities provide housing for those requiring this.

73. Article 8, together with section 6 of the Human Rights Act 1998 ("HRA"), imposes on a public authority which has provided a person with a home a duty to have respect for that home. This imposes a fetter on the right of the authority to dispossess the occupier of his home. As a matter of substance, article 8(2) requires that dispossession should be pursuant to one or more of the specified legitimate aims and that it should be a proportionate means of achieving that aim. As a matter of procedure, the occupier is entitled to have any issue as to whether article 8(2) is satisfied determined by an independent tribunal.

74. Parliament has gone a long way towards satisfying these requirements by express statutory provisions. It has created a class of "secure tenants" who cannot be dispossessed unless a court is satisfied, inter alia, that it is reasonable that they should be. Parliament has also, however, deliberately created classes of tenants

who do not have security of tenure ("non-secure tenants"). Parliament has conferred on some of these a degree of substantive and procedural protection, but has sought to place the decision on whether or not they should be dispossessed fairly and squarely on the local authorities themselves. It has sought to avoid, in so far as possible, questions of proportionality being pursued before the courts. The policy behind this approach is not in doubt. It is to prevent the delay and expense that may occur if those who are not entitled to security of tenure are permitted to resist the grant of possession orders by the courts by attacking the reasons that have led the local authorities to claim possession.

75. The Strasbourg Court has made it plain that ousting the powers of the court to consider the proportionality of dispossessing a non-secure tenant is not compatible with the procedural requirements of article 8. In *Manchester City Council v Pinnock* [2010] 3 WLR 1441 this Court held that it was possible to read section 143D(2) of the Housing Act 1996 as permitting a demoted tenant to raise the issue of proportionality by way of defence to an application for a possession order. These appeals require the Court to decide whether the reasoning in *Pinnock* applies where a local authority seeks, pursuant to section 127 of that Act, to recover possession of a property occupied by an introductory tenant or where possession is sought of property occupied pursuant to Part VII of the Act after the tenancy, or licence, has been terminated by a notice to quit. More generally, these appeals raise a number of questions which are not clearly answered by the decision in *Pinnock*. Foremost among these is the question of the matters to which the court must pay regard when an issue of proportionality is raised.

INTRODUCTORY TENANCIES

76. I shall start by considering the issues agreed in the appeals of Mr Hall and Mr Frisby, which arise in relation to introductory tenancies.

Issue 1: Does article 8 apply at all to a claim for possession of premises held on an introductory tenancy?

77. All parties were agreed that, in normal circumstances, the premises occupied by an introductory tenant constitute his home for the purposes of article 8. I endorse that agreement. When a tenant enters into occupation under an introductory tenancy the common intention is that, provided that the probationary period passes without incident, the tenancy will become secure. The tenant enters into the premises with the intention of making them his home and, for the purposes of article 8, they normally become his home.

Issue 2: Must repossession of property that is occupied under an introductory tenancy be subject to an independent determination of proportionality under article 8(2)?

78. It might have been thought that an affirmative answer to the first issue would necessarily require a similar answer to this issue. Counsel for the appellants, for Leeds City Council, and for the Secretary of State were agreed that this was so. Mr Andrew Arden QC, for Birmingham City Council, submitted to the contrary. He accepted that the premises occupied by an introductory tenant were his home for the purposes of article 8. He submitted, however, that the Strasbourg Court had never laid down an absolute requirement for an independent determination of proportionality. The grant of a non-secure tenancy for a probationary period was properly to be considered as part of the process of allocating accommodation, or of the selection of tenants. This was a matter for the local authority, not for the courts. The existence of this probationary scheme was plainly in the interest of other tenants. In these circumstances, and having regard to the requirement that local authorities should be able to act swiftly, economically and decisively in allocating accommodation, there was, exceptionally, no requirement for an independent determination of proportionality. The exigencies of the introductory tenancy scheme outweighed the need for the tenant to be able to challenge proportionality before an independent tribunal. *Pinnock* could be distinguished because it dealt with demoted tenancies, which were not an integral part of the scheme of allocation.

79. While I was initially attracted by this argument, I have not been persuaded by it. The provisions of Part V of the 1996 Act that relate to demoted tenancies closely mirror the provisions that relate to introductory tenancies. Each set of provisions has the effect of placing the tenant on probation, with good behaviour likely to earn the reward of a secure tenancy. I can see no principled basis for distinguishing between the two so far as concerns the manner of application of article 8. I would give an affirmative answer to the second issue.

Issue 3: What legitimate aims may the local authority invoke when seeking to justify under article 8(2) the dispossession of an introductory tenant?

80. This issue, and issue 4 which follows, arise on the premise that an affirmative answer is given to issue 5, a premise which, as I shall explain, I consider to be valid. I agree with Lord Hope (para 36) that the answer to this issue is provided by para 52 of the judgment of this Court in *Pinnock.* The legitimate aims itemised in article 8(2) include "the protection of the rights and freedoms of others". This phrase is wide enough to embrace (i) the vindication of the authority's ownership rights in the property and (ii) the compliance by the authority with its duties in relation to the distribution and management of the

housing stock for the benefit of other tenants. A public authority can properly seek to justify its actions in dispossessing an introductory tenant by asserting that this was reasonably necessary to achieve these legitimate ends. I do not understand any of the parties to dissent from this conclusion which reflects the views expressed by the Strasbourg Court in *McCann v United Kingdom* (2008) 47 EHRR 913, at para 48.

Issue 4: In the light of the legitimate aims, what types of factual issue will be relevant to any proportionality determination?

81. This substantive question is distinct from the procedural question of how the relevant factual issues are to be brought before the court.

The contentions of the parties.

82. On this issue there was a wide variety of submissions. At one extreme was the case advanced by Mr Stilitz QC on behalf of the Secretary of State. He submitted that each of the two legitimate aims was individually so cogent that the particular reasons that motivated the local authority to seek to recover possession were an irrelevance. A local authority's right to recover its own property from a recipient who had no legal right to remain in possession did not require to be supported by reference to the reasons which motivated the authority in seeking to exercise this right. This is how this proposition was expressed in para 50.1 of the Secretary of State's written case in relation to homelessness cases:

> "When assessing proportionality by reference to this legitimate aim, it is not necessary or appropriate for the court to investigate the factual merits of the local authority's reasons for serving the notice to quit, as the merits of the local authority's reasons are irrelevant to the assessment of proportionality against this particular legitimate aim."

83. So far as the second legitimate aim was concerned, the Secretary of State submitted that it should be assumed that possession proceedings were brought in the proper, and (in terms of domestic public law) lawful discharge of the local authority's housing duties.

84. Similar submissions were advanced at para 64 of the Secretary of State's case in relation to introductory tenancies:

> "Unless the local authority specifically seeks to invoke the particular reasons for seeking possession given to the occupier under the statutory scheme, the factual inquiry on an article 8 challenge in the county court will be confined to the determination of the occupier's personal circumstances."

85. At the other extreme, Mr Luba QC for Mr Frisby submitted that there was no restriction or inhibition on the factual matters that either party might deploy in relation to an issue of proportionality raised in possession proceedings. In relation to an introductory tenancy he submitted that the local authority could properly rely on anti-social behaviour or rent arrears, indeed on any breach of the terms of the tenancy other than those which had no adverse impact on third parties, such as "a modest failure to maintain the garden" or the keeping of an innocuous pet. The tenant could raise any matters that he wished in support of his contention that dispossession was disproportionate.

86. Mr Arden did not adopt the extreme case of the Secretary of State. He contended that it was open to the local authority to rely on a presumption that it was acting in proper pursuance of its duties in relation to the management and distribution of housing. It could, however, if it chose, rely upon specific reasons for seeking to recover possession. He accepted that it was open to a tenant to raise at the hearing of the possession application any of the matters previously raised in opposition to the dispossession on the statutory review under section 129 of the 1996 Act.

Lord Hope's analysis

87. Lord Hope deals with issues 3 and 4 together. He does so first in relation to homelessness cases, but goes on to apply the same reasoning to introductory tenancies. So far as issue 3 is concerned, I have agreed with Lord Hope's identification of the legitimate aims. He deals very shortly with the factual issues that may be relevant to the issue of proportionality. He states at para 37 that in the overwhelming majority of cases no issue will arise as to whether the authority is pursuing legitimate aims, for this will be presumed. The only factual issue that may arise will be whether, in the light of the occupier's personal circumstances, the order is lawful and proportionate. At para 41, dealing with homelessness, and again at para 45, when dealing with introductory tenancies, he states that in the ordinary case the relevant facts will be encapsulated in the two legitimate aims that were identified in *Pinnock* and that it is against those aims, which should always be taken for granted, that the court must weigh up any factual objections that may be raised by the defendant and what he has to say about his personal circumstances.

Discussion

88. I agree with Lord Hope's analysis. In seeking an order for possession, the local authority is not required to advance a positive case that this will accord with the requirements of article 8(2). This will be presumed by reason of the authority's ownership of the property and duties in relation to the management of the housing stock. Ownership alone is not enough to satisfy article 8(2), where the owner is a social landlord, as Lord Hope observes at para 36, citing *Kryvitska and Kryvitsky v Ukraine* (Application No 30856/03) given 2 December 2010. Article 8(2) requires that the authority should be seeking possession in order to further the performance of its housing duties but, unless the tenant raises a challenge, this will be presumed. The question raised by issue 4 is, however, the nature of the challenge that it is open to the tenant to make. This is an important question.

89. If article 8(2) requires that repossession of accommodation let on an introductory tenancy should be in furtherance of the authority's housing duties, the same is true of the independent requirements of English public law. If the latter are satisfied, then, so it seems to me, it will almost inevitably follow that the requirements of article 8(2) are also satisfied. The policy behind the introductory tenancy scheme is not in doubt. It was well summarised in three short quotations at para 28 of Mr Arden's printed case, one from a consultation paper on "Probationary Tenancies" and two from parliamentary debates on the Housing Bill 1996. Introductory tenancies place the tenant on probation. They require the tenant to demonstrate that he is a good tenant, both as regards his behaviour towards his neighbours and as regards his contractual obligations to his landlord, before he is granted a tenancy that is secure for life.

90. When deciding whether to dispossess a tenant who has been granted an introductory tenancy, a local authority must have regard to this policy. The authority cannot simply rely upon the fact that it owns the property and that the tenant has no security of tenure. The decision to dispossess the tenant must be a reasoned decision. Section 128(3) of the 1996 Act requires the tenant to be given notice of the reasons for the landlord's decision to seek a possession order and section 129 entitles the tenant to a review of the decision and to the reasons for its confirmation if, indeed, it is confirmed. Under the Introductory Tenants (Review) Regulations 1997 (SI 1997/72) made pursuant to section 129(3) of the 1996 the tenant is entitled to an oral hearing of the review, carried out by a person who was not involved in the original decision and (where the decision makers are officers) senior to that person. He is entitled to be represented at that hearing.

91. It is implicit in this scheme that the reasons for terminating the introductory tenancy before it becomes secure will be that, in one way or another, the tenant has proved unsatisfactory. That has certainly been the position in the cases of Mr Hall

and of Mr Frisby. It is possible to envisage a proportionality challenge before the judge being based on exceptional personal circumstances which have nothing to do with the reasons for seeking the possession order. Normally, however, any attack on the proportionality of dispossession is likely to amount to an attack on the reasons given to the tenant for seeking the possession order. Either the tenant will argue that the facts relied upon by the authority to justify seeking the order do not do so, or he will contend that those facts were not accurate.

92. In paras 51 to 53 this Court in *Pinnock* commented on 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. I believe that this proposition is an accurate statement of fact in relation to introductory tenancies. This is because the judge should summarily dismiss any attempt to raise a proportionality argument unless the defendant can show that he has substantial grounds for advancing this. Two factors make it extremely unlikely that the defendant will be in a position to do this. The first is the relatively low threshold that the authority has to cross to justify terminating the introductory tenancy. The second is the significant procedural safeguards provided to the tenant that I have described in para 90 above.

93. As to the threshold, the arguments advanced by Mr Arden that I have considered at para 78 above are of some relevance. The introductory scheme is designed to enable a local authority to select as long term secure tenants those who demonstrate that they are unlikely to pose problems for the authority or for their neighbours. The authority can properly require a high standard of behaviour by the tenant during the probationary period. Thus I do not accept Mr Luba's suggestion that the authority could not properly rely upon a breach of the tenancy condition if it had no adverse impact on any third party. Furthermore, if a tenancy has given rise to complaints by neighbours of anti-social behaviour the authority does not have to be in a position to prove that these are well founded in order to justify terminating the tenancy. As Waller LJ remarked in *R(McLellan) v Bracknell Forest Borough Council* [2002] QB 1129, at para 97:

> "Under the introductory tenancy scheme it is not a requirement that the council should be satisfied that breaches of the tenancy agreement have in fact taken place. The right question under the scheme will be whether in the context of allegation and counter-allegation it was reasonable for the council to take a decision to proceed with termination of the introductory tenancy."

94. As to the procedural safeguards, they may not be enough in themselves to satisfy article 8(2) in that the decision makers are representatives of the authority and thus not independent. None the less, they have no axe to grind when deciding

whether or not an introductory tenant has shown himself to be a suitable candidate for a secure tenancy. It is likely to be a rare case, particularly as the defendant has a right to a review, where the defendant will be in a position to demonstrate that there are substantial grounds for attacking the authority's findings of fact, or the decision based on them. I note that in *McCann* at para 54 the Strasbourg Court accepted that it would only be in very exceptional cases that an applicant would succeed in raising an arguable case which would require the court to examine the issue and that in the great majority of cases it would be possible for possession orders to continue to be made in summary proceedings.

Issue 5: Can section 127(2)of the 1996 Act be read compatibly with the occupier's article 8 rights so as to allow him to defend a claim for possession of premises held on an introductory tenancy in the county court?

95. Mr Luba and Mr Stilitz submitted that this question should be answered in the affirmative on the ground that the reasoning of this Court in *Pinnock* in relation to section 143D(2) of the 1996 Act applied equally to section 127(2). Mr Arden and Mr Underwood submitted to the contrary.

96. Mr Arden advanced two reasons for distinguishing the reasoning in *Pinnock*. The first was that demoted tenancies are relatively rare whereas introductory tenancies are the norm for all new lettings nationally and amount to tens of thousands a year. The second was that, syntactically it was not possible, as it had been in *Pinnock,* to imply the word "lawfully" into the statutory conditions precedent to making the possession order.

97. Mr Underwood QC advanced a further argument against applying the reasoning in *Pinnock* to section 127(2). Section 143D(2) was inserted into the 1996 Act by amendment after the HRA came into force. Accordingly the construction of the subsection was subject to section 3 of the latter Act. The same was not true of section 127(2), which predated the HRA. Consequently the latter subsection had to be given its natural meaning.

98. I have not found any of these arguments persuasive. Mr Arden himself accepted that, in principle, the volume of cases affected had no obvious impact on construction. As to the syntactical argument, the precise formulation of the proviso required by article 8 is of no significance. Compatibility can be achieved in the case of either subsection by implying the phrase "provided that article 8 is not infringed". As to Mr Underwood's argument, section 3 of the HRA applies to all legislation, whether enacted before or after the HRA came into force. Insofar as this alters the construction given to legislation before the HRA came into force, the

HRA has the effect of amending legislation: see *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

99. For the reasons given by Lord Hope in paras 50 to 56 I would give an affirmative answer to Issue 5.

Issues 6 and 8: Procedural questions

100. The parties agreed a considerable list of procedural questions which would arise if an affirmative answer were given to Issue 5. There is no doubt that the affirmative answer that I would give to that issue creates a requirement for some procedural rules in order to provide an orderly process by which (i) an introductory tenant can raise a proportionality issue by way of defence to a claim for a possession order in respect of his home and (ii) the authority seeking possession can respond to such a defence.

101. I agree with Lord Hope that it is not appropriate for this Court to attempt to give directions or guidance in relation to the appropriate procedures. These are much better formulated in the form of rules of court, practice directions or protocols by those who are normally responsible for producing these. There is, however, one important matter of principle upon which I wish to comment. This is whether the local authority should be required to give notice of the reasons that have led it to seek possession of the defendant's home. In the case of introductory tenancies this question is academic, for sections 128 and 129 of the 1996 Act expressly require reasons to be given. Accordingly I propose to deal with this question in the context of homelessness cases.

Section 89 of the Housing Act 1980

102. Section 89 of the 1980 Act is of general application, so that it applies in relation to both introductory tenancies and homelessness cases. In *Pinnock,* at para 63, this Court raised, but did not answer, the question of whether article 8 of the Convention impacts on, or is incompatible with, the true construction of section 89. Lord Hope has dealt with this question at paras 57 to 64 of his judgment. I agree with his conclusions, but wish to add a word on the question of incompatibility, which he has considered at para 64.

103. In any situation where the judge dealing with an application for a possession order has power to refuse to make the order on the ground that it would infringe article 8, no question of incompatibility can arise in relation to section 89. That section merely increases the options open to the judge. He can (i) make an

immediate order for possession; (ii) make an order the operation of which is postponed up to the limit permitted by section 89; (iii) refuse to make the order on the ground that it would infringe article 8. The clear limit on the judge's discretion to postpone the operation of the order may thus, in rare cases, have the consequence that the order is refused, whereas it would otherwise have been granted, subject to postponement of its operation for a greater period than section 89 permits. This is not a consequence that Parliament can have envisaged.

Issue 7

104. This does not arise

Issue 9: Disposal.

105. For the reasons that he gives I would make the orders proposed by Lord Hope in respect of the appeals in the cases of both Mr Hall and Mr Frisby.

HOMELESSNESS CASES

106. I now turn to consider the position of those who, like Rebecca Powell, are provided with accommodation by a local authority pursuant to its duties under Part VII of the 1996 Act, which deals with homelessness. Lord Hope has summarised the essential features of this scheme at paras 11 to 13 of his judgment.

107. The first two issues that I have considered in relation to introductory tenancies have not been raised in relation to tenancies under Part VII, for all parties have accepted, correctly in my view, that accommodation provided to the homeless will normally become their homes for the purposes of article 8 and that a judge, usually a district judge, who is considering an application for a possession order under Part VII, is entitled to entertain by way of defence to the application a submission that to make the order will infringe article 8.

Issue 1: What special features, if any, apply to the determination of an article 8 defence in the context of accommodation provided under Part VII?

108. Mr Luba has helpfully set out in his printed case six reasons why a person may be accommodated by a local authority under Part VII:

(1) the authority has not yet reached a decision on the homelessness application but the applicant is being accommodated in the interim because he *may* be eligible, homeless and have a priority need: Housing Act 1996, section 188;

(2) the authority is in the process of referring the application to a different local housing authority but accommodating the applicant until that process is resolved: Housing Act 1996, section 200;

(3) the authority has determined the application but the applicant has invoked a statutory review or statutory appeal and the authority is accommodating until the review/appeal is determined: Housing Act 1996, sections 188 and 204(4);

(4) the authority has decided to exercise its power to accommodate an applicant who is eligible, homeless, not intentionally homeless but not in priority need: Housing Act 1996, section 192(3);

(5) the authority has decided that because the applicant is eligible, homeless, and in priority need but has become homeless intentionally it is under a duty to accommodate for such time as gives the applicant a reasonable opportunity of securing his own accommodation: Housing Act 1996, section 190(2)(b); or

(6) the authority has decided that the applicant is eligible, homeless, in priority need and did not become homeless intentionally (the "main housing duty"): Housing Act 1996, section 193.

109. It is apparent from this list why it is that a local authority will not normally be prepared to grant security of tenure where accommodation is provided under Part VII. The scheme is concerned with the provision of temporary accommodation while a person's claim under Part VII is addressed. The housing stock from which the authority provides this temporary accommodation may well not all be owned by the authority. Often it will have been obtained from a housing association or a private landlord. It is important that the authority should have the maximum flexibility to move, where necessary, a tenant from one unit of accommodation to another. Nevertheless, a tenant may be permitted to remain in accommodation provided under Part VII for a considerable period and the local authority may wish to remove the tenant from that accommodation not simply in

the interests of the more efficient management of the housing stock, but because of shortcomings in the tenant's behaviour, such as anti-social activity or a failure to pay rent.

Issue 2: What legitimate aims may the local authority invoke when seeking to justify under article 8 (2) the dispossession of a tenant who is in occupation of premises pursuant to Part VII?

110. This issue is the same as Issue 3 in relation to introductory tenancies and the answer is the same (see para 80 above). The difference in practice is that the local authority's decision under Part VII is more likely to be dictated by the practical requirements of making the best allocation of a limited and fluctuating housing stock.

Issue 3: In the light of the legitimate aims what type of factual issues will be relevant to any such proportionality determination?

111. Just as in the case of introductory tenancies, the factual issues that will be relevant if a defendant makes a proportionality challenge to the making of a possession order are likely to depend upon the reasons that have led the local authority to seek the order. As Mr Luba accepted, where the local authority simply wishes to relocate the defendant in alternative accommodation in the interests of the more efficient allocation of limited and fluctuating housing stock, it is not easy to envisage any issue of fact that the defendant could raise that would constitute a substantial ground for making a proportionality challenge. In this context it is relevant that section 202 of the 1996 Act gives a statutory right to a review of the suitability of accommodation offered to a person pursuant to a local authority's duties under Part VII.

112. Where the reason for seeking possession is alleged shortcomings on the part of the tenant, such as failure to pay rent, it will be open to the tenant to seek to challenge the facts upon which the decision is based. The position will be similar to that considered in relation to introductory tenancies. The defendant will have to show that he has substantial grounds for the challenge if he is to avoid the summary imposition of the possession order. As Mr Luba pointed out, where the reason is non-payment of rent there is not likely to be much scope for bona fide issues of fact.

113. For these reasons the statement that it will only be in rare cases that a valid proportionality challenge can be raised by way of defence to a possession order applies equally to repossession of accommodation provided under Part VII.

Issue 4: Does article 8 require the local authority to give notice of its reasons for seeking possession?

114. Mr Luba submitted that the procedural protections implicit in article 8 required that the tenant should be informed of the authority's intention to seek possession and the reasons for it before service of the notice to quit, or at least before the commencement of the possession proceedings, in order to permit the tenant the opportunity to challenge those reasons and the authority's decision. This raises an important question of principle. Sometimes a local authority will wish to recover possession of premises in the interests of a more effective allocation of the housing stock. Sometimes the authority will be reacting to the behaviour, or perceived behaviour of the tenant. In the latter event the authority may be proceeding on the basis of a factual assumption that is unsound. If the only reason that the authority is seeking possession is that the tenant has been guilty of bad behaviour, obtaining possession will not further the legitimate aims of the authority if that factual premise is unsound. If the defendant is not informed of the reason why the authority is seeking possession he will be denied the opportunity of displacing the presumption that the authority's action will serve a legitimate aim.

115. I do not believe that the Strasbourg Court would tolerate a regime under which a person can be deprived of his home by a public authority without being told the reason for this. Nor would I, for it is fundamentally unfair. In *Connors v United Kingdom* (2004) 40 EHRR 189, at para 94 the Strasbourg Court said:

> "The power to evict without the burden of giving reasons liable to be examined as to their merits by an independent tribunal has not been convincingly shown to respond to any specific goal …. The references to 'flexibility' or 'administrative burden' have not been supported by any concrete indications of the difficulties that the regime is thereby intended to avoid."

The Court was there dealing with gipsies but those words are equally applicable in the present context.

116. I do not suggest that there is any burden on a local authority, in the first instance, to justify to the court its application for a possession order or to plead the reason for seeking this. What I do suggest is that the tenant must be informed of the reason for the authority's action so that he can, if so minded, attempt to raise a proportionality challenge. I do not believe that recognition of this obligation will have any significant practical consequences for I find it inconceivable that local authorities are, in practice, seeking possession orders against tenants accommodated pursuant to Part VII without telling them why they are doing so.

Mr Luba told the Court that tenants under Part VII who are relocated by the local authority usually agree to this course. I would expect the local authority to inform the tenant of the reason for the proposed relocation, in order to procure this consent. Where it is the conduct of the tenant that has led to the authority's action, I would equally expect the authority to make this plain. Certainly Hounslow did so in the case of Rebecca Powell.

117. Mr Luba urges that notice of the authority's reasons should be given before service of a notice to quit. I suspect that this is precisely what does happen in practice, but I would not, without further consideration, rule that article 8 requires this. It is possible that article 8 will be satisfied provided that the occupier is given the information he needs in time to decide whether or not to raise a challenge in the possession proceedings.

Issue 5: When and how should notice of the authority's reasons be given?

118. These are matters of procedure on which I do not propose to comment. Mr Luba has referred the Court to a paper prepared by HH Judge Madge on "Article 8 – la lutta continua?" (2009), JHL 2009, 12(3), 43-47, which has been approved by the Housing and Land Committee of the Civil Justice Council. I consider that Judge Madge and that Committee are better placed to decide upon the appropriate procedural changes required by *Pinnock* and by the decision on these appeals than am I.

Issue 6

119. This raises the point on section 89 that I have already considered in the context of introductory tenancies.

Issue 7: Should the judge hearing the application for possession also rule on the validity of the notice to quit?

120. Mr Luba draws attention to the fact that if the judge refuses to make a possession order on article 8 grounds, but does not also rule that the notice to quit was unlawful, the defendant will remain in possession as a "tolerated trespasser" rather than as a non-secure tenant. He urges that this court should endorse the view expressed by Lord Scott in *Doherty v Birmingham City Council* [2008] UKHL 57; [2009] AC 367, at para 84 that the judge hearing a challenge to the claim for a possession order should also be prepared to entertain an article 8 challenge to the validity of the notice to quit. This issue interrelates with the point that I have considered under Issue 4. I can, in principle, see no reason why, if the validity of

the notice to quit is challenged by way of defence to the claim for possession, the judge should not be entitled to deal with that challenge.

Issue 8: Disposal

121. I agree, for the reasons that he gives, that Rebecca Powell's appeal should result in the order proposed by Lord Hope.

LORD RODGER, LORD WALKER, LADY HALE, LORD BROWN AND LORD COLLINS

122. For the reasons given by Lord Hope and Lord Phillips, with which we entirely agree, we too would make the orders proposed by Lord Hope.