Michaelmas Term
[2014] UKSC 62
On appeal from: [2013] EWCA Civ 804 and 805

JUDGMENT

R (on the applications of ZH and CN) (Appellants)

v

London Borough of Newham and London Borough of Lewisham (Respondents)

and

Secretary of State for Communities and Local Government (Interested Party)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Clarke
Lord Wilson
Lord Carnwath
Lord Toulson
Lord Hodge

JUDGMENT GIVEN ON

12 November 2014

Heard on 23, 24 and 26 June 2014

Appellants
Andrew Arden QC
Toby Vanhegan
Justin Bates
Senay Nihat
(Instructed by TV Edwards LLP)

Respondents
Matt Hutchings
Jennifer Oscroft

(Instructed by Head of Legal Services LB of Newham and LB of Lewisham)

Intervener
Martin Chamberlain QC
Oliver Jones
(Instructed by Treasury Solicitors)

LORD HODGE (with whom Lord Wilson, Lord Clarke and Lord Toulson agree)

1. The issues in this appeal are (i) whether the Protection from Eviction Act 1977 ("PEA 1977") requires a local housing authority to obtain a court order before taking possession of interim accommodation it provided to an apparently homeless person while it investigated whether it owed him or her a duty under Part VII of the Housing Act 1996 ("the 1996 Act"), and (ii) whether a public authority, which evicts such a person when its statutory duty to provide such interim accommodation ceases without first obtaining a court order for possession, violates that person's rights under article 8 of the European Convention on Human Rights ("ECHR").

Factual background

CN

2. CN was born on 3 August 1994. His mother ("JN") applied to the London Borough of Lewisham ("Lewisham") for assistance under Part VII of the 1996 Act in August 2009 and Lewisham arranged for a housing association to grant her an assured shorthold tenancy which commenced in May 2010. JN and her family became homeless in November 2011 after the housing association obtained an order for possession because of arrears of rent. JN again applied to Lewisham for homelessness assistance. On 15 November 2011 Lewisham, fulfilling its duty under section 188 of the 1996 Act, granted JN a licence of a five-bedroom house with communal kitchen and bathroom pending its inquiries under section 184 of that Act as to whether she was eligible for assistance and, if so, what duty, if any, was owed to her. The property was privately owned. Its owner licensed it to Lewisham for use as temporary accommodation for homeless persons.

3. On 15 December 2011 Lewisham wrote to JN to intimate its decision under section 184 of the 1996 Act ("the section 184 decision"). It stated that its duty to house her had come to an end because she had become homeless intentionally from the housing association property. Lewisham informed her that it would terminate the temporary accommodation within 28 days and that she would be served with a notice to vacate shortly. It stated that it was under a duty to provide her with advice and assistance in her efforts to secure accommodation and invited her to contact its housing options centre for that

purpose. The letter also informed her of her right to request a review under section 202 of the 1996 Act and enclosed a leaflet explaining the review process. Lewisham's Homeless Families Floating Support Service carried out a needs assessment on 12 January 2012 and concluded that the family did not need the support which that service provided.

4. On 5 March 2012 JN requested a review of the section 184 decision and instructed solicitors to represent her. Lewisham extended her interim accommodation pending the outcome of the review. On 27 March 2012 Lewisham wrote to inform her that the review officer had upheld the section 184 decision and had found that she had become homeless intentionally. It intimated that its duty to secure accommodation for her had come to an end and gave her 28 days to leave the property. Lewisham informed her that she was entitled to advice and assistance from its housing options centre and that she could appeal to the county court on a point of law against the outcome of the section 202 review. JN chose not to do so.

5. Thereafter JN's solicitors requested an assessment under the Children Act 1989. On 29 April 2012 the solicitors wrote to challenge Lewisham's decision to evict her without a court order and before completing an assessment under the Children Act 1989. Lewisham extended the provision of temporary accommodation until the outcome of that assessment. Lewisham wrote on 30 April 2012 with a copy of the assessment and intimated that the accommodation would cease on 1 May 2012. In response, CN issued the judicial review claim which has given rise to the appeal to this court.

ZH

6. ZH was born on 23 March 2012. His mother ("FI") was born in 1991 and has a younger sister ("MI") who was born in 1994. FI had an assured tenancy of a house in Liverpool. She left Liverpool in October 2011 to live with her aunt in London. In August 2012 her aunt asked FI to leave and on 7 September 2012 FI applied to the London Borough of Newham ("Newham") for assistance under Part VII of the 1996 Act. In a letter dated 26 November 2012 Newham, acting under section 188 of the 1996 Act, granted FI a licence to occupy a two-bedroom self-contained flat on a day-to-day basis. Newham had licensed the property from a private sector company ("RC") which provided spot-booked bed and breakfast and nightly-let accommodation for homeless and other persons.

7. In a letter dated 19 February 2013 Newham advised FI that it had decided that she was homeless and in priority need but that she had become homeless intentionally by giving up her assured tenancy in Liverpool. Newham stated that it would help her search for alternative accommodation and allow her to stay in her current accommodation until 18 March 2013. Newham also provided her with written advice and informed her of her right to review the decision. On the same day solicitors acting for ZH asked Newham to review the decision and for accommodation pending the review. The solicitors also informed RC of their view that RC could not evict without first obtaining a court order. In a letter dated 14 March 2013 Newham refused to provide accommodation pending a review and told FI that she must leave the property by 21 March 2013.

8. ZH commenced judicial review proceedings on 18 March 2013 in which he challenged the decision to evict without first obtaining a court order. After an assessment under the Children Act 1989 Newham undertook to provide interim accommodation and financial support to assist FI in securing private rented accommodation. Newham also carried out a section 202 review which FI appealed to the county court. That appeal settled after Newham, in September 2013, accepted that it owed FI a "full housing duty" under section 193(2) of the 1996 Act, namely to secure that accommodation was available for her to occupy ("the full housing duty"). By that stage ZH's case had been linked to CN's case in the Court of Appeal.

The legal proceedings

9. CN was initially refused permission to proceed with the judicial review claim. That decision was appealed and on 23 November 2012 Davis LJ granted permission for the judicial review and ordered the claim to be retained in the Court of Appeal for a hearing. On 9 May 2013 Sales J gave ZH permission for his judicial review and transferred it to the Court of Appeal. The two judicial review claims were heard in June 2013; and on 11 July 2013 the Court of Appeal handed down judgment dismissing the claims.

10. Interim injunctions have protected CN's occupation of accommodation and on 23 November 2012 Davis LJ continued the injunction pending final disposal of the appeal. Although Newham has provided ZH with accommodation in accordance with its full housing duty, the parties agreed that it was appropriate that his case should be considered with that of CN in this appeal.

The homelessness legislation

11. For many years Governments in the United Kingdom have sought to alleviate the suffering caused by homelessness. In Part III of the National Assistance Act 1948 local authorities were placed under a duty to provide temporary accommodation to persons who were in urgent need of it. The accommodation was to be provided in premises which the relevant local authority or another local authority managed or in the premises of a voluntary organisation to which the local authority made appropriate payments (sections 21 and 26). The local authority was empowered to make rules for the management of the premises which entitled it to require a person to leave the premises if he was no longer entitled to receive accommodation under that Part of the Act (section 23).

12. The Housing (Homeless Persons) Act 1977 replaced the provisions of the 1948 Act, by which only temporary accommodation was provided, with a statutory regime which also provided longer term accommodation for the homeless. That regime in its essentials survives in the 1996 Act. In particular, the 1977 Act introduced:

    i) the concept of priority need (section 2),

    ii) the obligation on the local housing authority to provide temporary accommodation while it investigates whether the applicant is homeless and in priority need and whether he or she is homeless intentionally (section 3), and

    iii) the duties, arising from the results of that investigation, (a) to provide advice and appropriate assistance, (b) to provide temporary accommodation for a period to give a reasonable opportunity to secure other accommodation, or (c) to secure that accommodation becomes available for occupation (section 4).

13. The 1977 Act was consolidated into wider housing legislation in Part III of the Housing Act 1985. That in turn was repealed by the 1996 Act, which in Part VII provides the current statutory regime for tackling homelessness.

14. I need only summarise the relevant provisions of the 1996 Act. When an applicant applies for accommodation or assistance in obtaining accommodation (section 183), the local housing authority carries out

inquiries to satisfy itself whether he or she is eligible for assistance and, if so, what if any duty is owed (section 184). Of central importance in this appeal is the interim duty to accommodate under section 188. Section 188(1) provides:

> "If the local housing authority have reason to believe that an applicant may be homeless, eligible for assistance and have a priority need, they shall secure that accommodation is available for his occupation pending a decision as to the duty (if any) owed to him under the following provisions of this Part."

Section 188(3) provides:

> "The duty ceases when the authority's decision is notified to the applicant, even if the applicant requests a review of the decision (see section 202).
>
> The authority may secure that accommodation is available for the applicant's occupation pending a decision on a review."

15. The possible results of section 184 investigation, so far as relevant, are as follows. If the local housing authority is satisfied that the applicant is homeless, eligible for assistance but homeless intentionally, its duty, if he or she has a priority need, is (a) to secure that accommodation is available for a period to give a reasonable opportunity of securing accommodation for occupation and (b) to provide advice and assistance in attempts to secure accommodation (section 190(2)). If not satisfied that the applicant has a priority need, the authority's duty is confined to (b) above (section 190(3)). If the authority is satisfied that the applicant is homeless and eligible for assistance, not satisfied that he or she is intentionally homeless, but also not satisfied that he or she has a priority need, the duty is to provide advice and assistance as in (b) above (section 192). If the authority is satisfied that the applicant is homeless, eligible for assistance and has a priority need and is not satisfied that he or she became homeless intentionally, it is under a duty to secure that accommodation is available for occupation by the applicant (section 193(2)).

16. In this appeal we are concerned only with whether an applicant is entitled to both a set period of notice and a court order before eviction if, on completing the section 188 investigation, a local authority finds him or her to be homeless intentionally or otherwise not entitled to the full housing duty under section 193

of the 1996 Act. The logic of the answer to that question will apply also to other temporary accommodation provided under Part VII of the 1996 Act, namely sections 188(3) (above), 190(2) (above), 200(1) (accommodation pending a possible referral to another authority), and 204(4) (accommodation pending the determination of an appeal).

Protection from eviction legislation

17. Abuses by private sector landlords in the 1950s and 1960s led to measures to regulate the eviction of tenants in section 16 of the Rent Act 1957 and Part III of the Rent Act 1965. PEA 1977 consolidated those provisions and related enactments. Section 1 makes the unlawful eviction or harassment of a residential occupier a criminal offence. Section 3 prohibits eviction without due process of law. Of particular relevance are section 3(1) and (2B). Section 3(1), which, subject to an immaterial amendment, is in the same terms as originally enacted, provides:

> "Where any premises have been let as a dwelling under a tenancy which is neither a statutorily protected tenancy nor an excluded tenancy and
>
> (a) the tenancy (in this section referred to as the former tenancy) has come to an end, but
>
> (b) the occupier continues to reside in the premises or part of them,
>
> it shall not be lawful for the owner to enforce against the occupier, otherwise than by proceedings in the court, his right to recover possession of the premises."

18. Section 3(2B), which was inserted by the Housing Act 1988, provides:

> "Subsections (1) and (2) above apply in relation to any premises occupied as a dwelling under a licence, other than an excluded licence, as they apply in relation to premises let as a dwelling under a tenancy, and in those subsections the expressions "let" and "tenancy" shall be construed accordingly."

Section 3A, which the 1988 Act also introduced, listed excluded tenancies and licences. The listed exclusions now include among others a tenancy or licence granted as a temporary expedient to a trespasser (section 3A(6)), a tenancy or licence to occupy premises for a holiday (i.e. a holiday let) or if granted otherwise than for money or money's worth (i.e. a bare licence) (section 3A(7)), a tenancy or licence granted to provide accommodation under Part VI of the Immigration and Asylum Act 1999 (i.e. accommodation provided to asylum seekers and their dependants) (section 3A(7A)) or temporary accommodation to displaced persons (section 3A(7C)), and a licence which confers rights of occupation in a hostel provided by specified bodies (section 3A(8)). There is no general exclusion in section 3A of accommodation provided under Part VII of the 1996 Act or in particular under section 188 of that Act.

19. Section 5(1A) of PEA 1977 provides that a notice to determine a periodic licence to occupy premises as a dwelling (other than an excluded licence) is valid only if it is in writing and contains prescribed information and is given not less than 4 weeks before the date on which it is to take effect.

20. Accordingly, where a person grants a licence to which PEA 1977 applies, he must give notice of at least 28 days and also obtain a court order to regain possession of the premises. While counsel could not agree on the likely timescale of average court proceedings, it is likely that, in uncontested proceedings, a local authority might often have to wait several months to recover possession of a property provided as interim accommodation if such accommodation is subject to PEA 1977. In contested proceedings the wait would probably be longer. Lewisham's experience is that it can take between 3 and 6 months to recover possession in undefended proceedings in the county court. Newham's experience is that such undefended proceedings take between 3 and 4 months.

The first issue: the appellants' challenge

21. On the first issue the appellants' case was straightforward. Mr Arden submitted (i) that PEA 1977 requires a court order to recover possession of "premises occupied as a dwelling under a licence" (section 3(2B)) and (ii) that Parliament had set out comprehensively in section 3A of PEA 1977 the tenancies and licences which were to be excluded from the scope of section 3 of that Act. As a result, an owner can take possession of the accommodation provided by a local housing authority under section 188 of the 1996 Act only after he has obtained a court order. The court must give effect to the clear words of Parliament.

22. In support of his submission he also referred, by way of contrast, to other legislation which contained express exclusions and, he submitted, supported the view that Parliament viewed temporary accommodation provided to the homeless as being "let as a separate dwelling", a phrase which has long been the key definition of property which was subject to statutory rent restrictions and security of tenure. He submitted that, if premises were let as a separate dwelling, they were necessarily "let as a dwelling" in section 3 of PEA 1977. He referred to the Housing Act 1985, which in Schedule 1 paragraph 4 expressly excluded all tenancies granted under Part VII of the 1996 Act from the security of tenure which the Housing Act 1980 had introduced for public sector tenants. Similarly, section 209 of the 1996 Act (adapting earlier provision in section 1(6) of the Housing Act 1988) provides that a tenancy granted by a private landlord under arrangements which a local housing authority makes in pursuance of its interim duties under sections 188, 190, 200 or 204(4) cannot be an assured tenancy before the end of 12 months after the date on which the applicant is notified of the relevant decision or outcome of the appeal unless the landlord has given notice to the contrary. In short, he submitted that Parliament had exempted the temporary provision of accommodation to homeless persons from security of tenure but not from PEA 1977. If that was correct, the extension of PEA 1977 to cover licences in 1988 meant that temporary accommodation provided to a homeless person under a licence also fell within the scope of that Act.

23. He also drew attention to section 130 of the Social Security Contributions and Benefits Act 1992, which gives an entitlement to housing benefit when a person is liable to make payments in respect of a dwelling which he occupies as his home. Housing benefit is often paid to people who occupy temporary accommodation under Part VII of the 1996 Act. This supported the view that such accommodation should be treated as a "dwelling" under PEA 1977.

Discussion of the first issue

(i) "licence to occupy premises as a dwelling"

24. The first issue is whether the premises, which the authorities provided to CN and ZH as temporary occupation under section 188 of the 1996 Act, were licensed for occupation as a dwelling. Counsel agreed that the phrases "let as a dwelling under a tenancy" in section 3(1) and "premises occupied as a dwelling under a licence" in section 3(2B) of PEA 1977 both addressed the purpose of the tenancy or licence rather than the use of the premises by the occupier. I also agree: section 3(2B) (para 18 above) applies section 3(1) to licensed premises; as section 3(1) looks to the purpose of the lease, so also must section 3(2B) look to the purpose of the licence. Unless that licence is

superseded by a later contract, either express or inferred from the parties' actions, which provides for a different user, the court looks to the purpose of the original licence. See the judgments of the Court of Appeal on analogous provisions in the Rent Acts in *Wolfe v Hogan* [1949] 2 KB 194 and *Russell v Booker* (1982) 5 HLR 10. See also, in the context of accommodation initially provided under section 188 of the 1996 Act, the judgment of Elias J in *Rogerson v Wigan Metropolitan Borough Council* [2005] HLR 129, at paras 33 and 34.

25. Accordingly, as there is no suggestion that the legal basis of the occupation by CN and ZH changed since the licences were granted, PEA 1977 instructs us in each case to look to the purpose of the licence to see if it is for occupation "as a dwelling".

26. The word "dwelling" is not a technical word with a precise scientific meaning. Nor does it have a fixed meaning. Words such as "live at", "reside" and "dwell" are ordinary words of the English language, as is "home". It is clear, as the respondent local authorities submitted, that the word "dwelling" in the phrase, "let as a dwelling" has been used in PEA 1977 in the same sense as that word was used in the phrase "let as a separate dwelling" in the Rent Acts. Section 3 of PEA 1977 had its origin in section 32 of the Rent Act 1965 and section 5 in section 16 of the Rent Act 1957. There is no reason to think that Parliament intended the word "dwelling" to have a different meaning in sections on protection from eviction from its meaning in provisions relating to rent restriction and security of tenure. In *Skinner v Geary* [1931] 2 KB 546, Scrutton LJ (at 564) said that the Rent Acts did not protect a tenant who was not in occupation of a house in the sense that the house was his home. More recently, in *Uratemp Ventures Ltd v Collins* [2002] 1 AC 301 the speeches in the House of Lords showed that the word "dwelling" had different shades of meaning. Lord Bingham of Cornhill (at para 10) said that a "dwelling-house" was "the place where someone dwells, lives or resides". Lord Steyn (at para 15) suggested that the court should not put restrictive glosses on the word which conveyed the idea of a place where someone lived. Lord Millett said (at para 30):

> "The words 'dwell' and 'dwelling' are not terms of art with a specialised legal meaning. They are ordinary English words, even if they are perhaps no longer in common use. They mean the same as 'inhabit' and 'habitation' or more precisely 'abide' and 'abode', and refer to the place where one lives and makes one's home. They suggest a greater degree of settled occupation than 'reside' and 'residence', connoting the place where the occupier habitually sleeps and usually eats, …"

In my view there is no strict hierarchy in terms of settled occupation between the words "live at", "reside" and "dwell" and much may depend on the context in which the words are used. But there are nuances and as a general rule I agree with Lord Millett that "dwelling" suggests a greater degree of settled occupation than "residence".

27. Mr Arden did not argue that a "dwelling" encompassed any residential accommodation provided for occupation, regardless how short was the intended period of occupation. He accepted that an overnight stay in a hotel or hostel would not amount to dwelling in that accommodation. Beyond that he submitted that it was a question of fact in each case. The respondent local authorities submitted, by reference to cases that I consider in paras 37-44 below, that premises must be occupied as a settled home and that lettings for a limited and temporary purpose involving transient occupation did not enjoy the protection of the Rent Acts in the past or of PEA 1977. They also pointed out that breach of section 3(1) of PEA was a criminal offence and submitted that there was a need for certainty as to its scope.

28. I do not find either view wholly persuasive. The former makes insufficient allowance for a degree of settled occupation, the establishment of a home, as a component of "dwelling". It also fails to recognise the extent to which the courts in several of the cases which I consider below have included as a component of their interpretation of the word "dwelling" their understanding of the relevant statutory policy; see in particular the cases in para 37 below. The latter view draws on case law which points to a statutory intention in the Rent Acts, and by extension in PEA 1977, to protect a person's home but not accommodation provided or occupied as a temporary expedient. There is force in the respondents' interpretation (see para 45 below) but it risks setting up a generalised proposition that goes beyond that which the case law supports. In my view, in construing words that may have refined distinctions of meaning it is important to have regard to the statutory policy of PEA 1977. In applying the statutory words to a specific contract, the legal and factual context of the contract is particularly important.

29. Under the Rent Acts when the court considers whether a property is let as a separate dwelling it looks to the purpose of the tenancy. That involves a consideration of both the terms of the contract and the factual matrix of the letting. Thus a tenancy at will is the letting of a "dwelling", notwithstanding the precariousness of the contractual right to occupy, where it is clear that the indeterminate period of authorised occupation is consistent with an intention that the tenant establishes a home in the property. In ascertaining the nature of the tenancy the court looks at the lease, which is "a practical document dealing with a practical situation" (Danckwerts J in *Levermore v Jobey* [1956] 1 WLR 697 CA, 708), and also the surrounding circumstances. It

considers the parties' contract, the nature of the premises and also the statutory intention. Thus, for example, in *Martin Estates Ltd v Watt and Hunter* [1925] NI 79 (CA), in which police officers occupying police barracks sought to resist the recovery of possession on the basis that the property was let as a dwelling-house, the Northern Irish Court of Appeal rejected the defence. Moore LJ (86-87) held that housing let for the public service and occupied by public servants was not a dwelling for the purposes of the Rent Acts and that policemen in police barracks, patients in hospital and inmates in a gaol could not claim security of tenure.

30. A similar approach is appropriate here. The court, in deciding whether the accommodation involved in these appeals falls within the meaning of "dwelling" in section 3(1) of PEA 1977, must construe the terms of the relevant licences in the context of the applicable provisions of the 1996 Act. Section 188(1) imposes on the local housing authority a duty with a low threshold. It arises if the authority has reason to believe that the applicant may be homeless, eligible for assistance and have a priority need. The duty is to secure that accommodation is available for his or her occupation pending the authority's section 184 decision. The authority is not under a duty to provide a particular form of accommodation or to provide the same accommodation for the applicant throughout the period pending its decision. It can require the applicant to transfer from one address to another more than once during that period. The duty to secure short-term accommodation under section 190(2), in order to give someone who is found to be homeless intentionally a reasonable opportunity to secure alternative accommodation for occupation, is similarly limited. So too are the powers under sections 188(3) and 204(4) to provide accommodation pending a decision on a review or pending an appeal.

31. In some cases the authority can reach a section 184 decision very quickly. Other cases require more complex inquiries. The Homelessness Code of Guidance for Local Authorities (2006), which the Government issued under section 182 of the 1996 Act, suggested (at para 6.16) that inquiries should whenever possible be concluded within 33 working days. In CN's case Lewisham notified JN of its section 184 decision within one month after it provided the interim accommodation. Newham's inquiries took almost 3 months after it granted FI the licence of the temporary accommodation.

32. The licences granted to the applicants in these cases are consistent with the limited and short-term nature of the authority's duty. Lewisham's licence to JN was an offer of "interim nightly paid accommodation" for about two weeks. It stated:

> "As this is nightly paid temporary accommodation it is likely that you will be moved with short notice. When this occurs you will be expected to move on either the same day or the next working day. Also, if you plan to not stay at your accommodation for more than 1 night you must inform the council."

JN also undertook in the licence that only the persons named in her application for assistance would occupy the accommodation. Newham's licence to FI was for interim accommodation on a day-to-day basis while it decided whether it had a duty to provide her with re-housing. Newham explained that it had entered into arrangements with accommodation providers to provide self-contained accommodation and hotel accommodation which it let on a day-to-day basis. It stated:

> "You occupy interim accommodation on a day to day basis. You do not therefore have the rights of security of a tenant. In the event that the proprietor does not want to continue to allow the council to use the property, we shall have to withdraw our permission for you to live there and ask you to move to other accommodation which we shall provide. If there is a need to move you we shall endeavour to tell you that as soon as we can. As you do not enjoy the rights of a tenant, if you are required to leave the interim accommodation and refuse there is no obligation on the proprietor of the premises or the council to obtain a Court Order requiring you to leave the premises."

Newham also required FI to sign a daily register and restricted those allowed to reside in the accommodation to three named individuals, namely FI, ZH and MI.

33. In my view there are a number of features that militate against such licences being licences to occupy premises as a dwelling. First, there is the statutory context of the licence in the 1996 Act, namely the provision by the local housing authority to a homeless person of short-term accommodation at one or more locations and in one or more forms of accommodation pending the section 184 decision, the outcome of a review or appeal, or the expiry of the reasonable period under section 190(2). The statutory duty in section 188 of the 1996 Act is to secure accommodation for the applicant, not necessarily at one location, for a short and determinate period. Most significantly, a person who is given temporary accommodation under Part VII of the 1996 Act does not cease to be homeless. To hold otherwise would defeat the scheme of the 1996 Act. In *Moran v Manchester City Council* [2009] 1 WLR 1506, this was

a matter of concession (paras 54 and 55) and Lady Hale (at para 65) stated an analogous principle that "in most cases a woman who has left her home because of domestic (or other) violence within it remains homeless even if she has found a temporary haven in a women's refuge". Such temporary accommodation is not intended to provide a home. Another way of looking at the matter is that having a roof over your head in such short-term accommodation does not give you a fixed abode.

34. Secondly, consistently with that statutory regime, each licence is a day-to-day or nightly licence which recognises that the authority may require the applicant to transfer to alternative accommodation at short notice. The licence in each case confers private law rights in relation to the property to which it relates, but the licence must be construed and the nature of those rights must be assessed in the context of the authority's duties under the 1996 Act.

35. Thirdly, the imposition of the requirements of PEA 1977 would significantly hamper the operation by the authorities of the statutory scheme under the 1996 Act and its predecessor Acts. An authority would not be able to transfer an applicant from one location to another without either his or her consent or, alternatively, the obtaining of a court order. The authority, while awaiting the court order for possession, would have to provide accommodation to someone about whom it had made an adverse section 184 decision and to whom it had already given a reasonable opportunity to obtain alternative accommodation, thereby tying up scarce housing resources. In a time of strained public finances this may deprive other applicants who may have priority need of suitable accommodation and also restrict the authority's ability to provide accommodation where it has a discretion to do so, as under sections 188(3) and 204(4) of the 1996 Act. Further, there seems little purpose in requiring court proceedings to recover possession as it is difficult to see what a homeless person could advance as a defence to the application, particularly as the 1996 Act contains its own provisions for challenging adverse decisions of the local authority by way of review and appeal to the court (para 69 below).

36. In my view the policy considerations of the third point would not by themselves be determinative, but the features in combination, the legislative and factual context of licences, point to the conclusion that the temporary accommodation, which the authority provides in performance of its duties under section 188 of the 1996 Act, is not provided "as a dwelling" for the purpose of PEA 1977.

37. I turn to the case law on which the respondent authorities relied for the more general proposition that a temporary residence cannot be a dwelling. There

are dicta in those cases which support the proposition; but they also must be seen in context. Many of the judicial statements were made in cases in which a person alleged that he or she had two homes and the court had to decide if a second home fell within the scope of the Rent Acts. *Walker v Ogilvy* (1974) 29 P & CR 288 concerned a tenant of a flat which he used principally at weekends and for short holidays. The tenant had another permanent residence. Ormrod LJ (at p 293) stated that Parliament in passing the Rent Act 1968 never intended to protect people in occupation of what were in effect holiday houses. *Regalian Securities Ltd v Scheuer* (1982) 5 HLR 48 concerned the right of a protected tenant to become a statutory tenant on the termination of the protected tenancy under section 2(1)(a) of the Rent Act 1977, which required him to occupy the dwelling house "as his residence". In that case the tenant occupied the flat as a temporary expedient for part of the time when the house, which his wife had purchased and in which they and their children lived, was let to others during the winter. The Court of Appeal held that his residence in the flat did not have the quality needed to attract the protections of the Rent Acts. Cumming-Bruce LJ (at p 56) asked whether the second residence was used as a home rather than a place of convenient resort. Eveleigh LJ (at p 59) and May LJ (at p 62) took a similar approach, the latter asking whether there was occupation as a home. Cumming-Bruce LJ (at p 58) stated two principles that were relevant in that context:

> "First, the court enquires what is the extent and what are the characteristics of the user of the residence? When that is ascertained the court also enquires: Is the nature of the residence during the period that it persisted the kind of residence that is within the contemplation of the Rent Act? Is this the kind of residence that Parliament intended should clothe the tenant with the right to claim statutory protection?"

38. In *Swanbrae Ltd v Elliott* (1986) 19 HLR 86 the Court of Appeal considered the quality of residence required where a person claimed to be a statutory tenant in succession to her mother, who had been a protected tenant, because she had resided in the premises with her before she died. The appellant had visited frequently and then had moved in on a part-time basis to nurse her sick mother while retaining a home elsewhere. The Court held that "residing with" meant more than "living at"; a person claiming a statutory tenancy had to show that she had made her home in the premises. Swinton Thomas J (at p 90) distinguished the earlier case of *Collier v Stoneman* [1957] 1 WLR 1108 on its facts because Mrs Elliott had a tenancy of her own while in that case the claimant did not. He concluded (at p 95) that Mrs Elliott had not shown that she had made her home at the premises and become part of the

household. Kerr LJ (at p 96) agreed and made the same distinction from other cases because Mrs Elliott had a permanent home of her own.

39. Similarly, in *Freeman v Islington London Borough Council* [2010] HLR 6, another succession to tenancy case in which the focus was on the statutory words "resided with", the Court of Appeal adopted a similar approach, looking at the claimant's actions and ascertaining whether they exhibited a "home-making intention" rather than merely staying with the tenant for a limited time and a limited purpose: Jacob LJ at paras 28 and 33.

40. In my view the statutory successor cases are of only limited assistance. Because of the different statutory provisions the court in each case looked objectively at the quality of the claimant's residence and at her intention when living with the protected tenant. They establish that occupation which has the quality of home-building is needed to obtain protection as a successor of a protected tenant. They did not entail an assessment of the purpose of a letting or licence, which the current case involves.

41. *MacMillan & Co Ltd v Rees* [1946] 1 All ER 675 was not a case which involved an allegation that someone had two homes. It concerned the lease of premises as an office in which the tenant or her business partner were authorised to sleep when required. The Court of Appeal drew a distinction between an authorised user of merely sleeping or eating on premises and use as a dwelling house. Authorised acts, which were residential in character, did not make the business premises a dwelling house: Evershed J, delivering the judgment of the court at pp 677-678.

42. The respondent authorities and the Secretary of State also relied on the two Court of Appeal cases which have directly addressed the question whether PEA 1977 applies to temporary accommodation provided under section 188 of the 1996 Act or its predecessor Act. In *Mohamed v Manek and Kensington and Chelsea LBC* (1995) 27 HLR 439, the Court of Appeal was concerned with the predecessor provisions in section 63 of the Housing Act 1985 under which the local authority arranged for the provision to the claimant of interim bed and breakfast accommodation in a private hotel. Auld LJ (at p 450) held as a matter of construction that "occupied as a dwelling under a licence" in section 3(2B) of PEA 1977 did not apply to bed and breakfast accommodation provided as a temporary arrangement pending what is now a section 184 decision. He also stated that it did not accord with the ordinary use of language to describe temporary accommodation in a hotel or hostel for this purpose as premises "occupied as a dwelling under a licence". Nourse LJ agreed and stated (at p 451)

> "I rest my decision primarily on the simple proposition, derived from a purposive construction of both statutes, that accommodation made available for an applicant pursuant to section 63(1) of the Housing Act 1985 pending a decision as a result of the local housing authority's inquiries under section 62 cannot, as a general rule, be premises let as a dwelling under a tenancy of premises occupied as a dwelling under a licence within section 3(1) and (2B) respectively of the Protection from Eviction Act 1977. … [I]t cannot be a purpose of the 1977 Act to give protection to persons whose entirely transient needs bring them within section 63(1)."

Henry LJ agreed with both judgments.

43. In *Desnousse v Newham London Borough Council* [2006] QB 831, which also concerned the application of PEA 1977 to arrangements entered into under section 188 of the 1996 Act (in that case a self-contained flat), the Court of Appeal applied *Mohamed v Manek* in the face of a sustained challenge by Mr Arden which Lloyd LJ analysed in detail. The court held that the ratio of *Mohamed v Manek* was not confined to accommodation of the nature of a hotel or hostel but was a general proposition. The court was divided on whether the reading of section 3(2B) of PEA 1977 in *Mohamed v Manek* was compatible with article 8 of ECHR. Lloyd LJ (at para 143) held that it was not and that section 3 of the Human Rights Act 1998 required the court to apply section 3 of PEA 1977 to the occupation of self-contained residential accommodation provided in pursuance of the local authority's duties under section 188(1) or 190(2)(a) of the 1996 Act. Tuckey LJ and Pill LJ disagreed. I discuss article 8 of ECHR in paras 57-73 below.

44. In *Mohamed v Hammersmith and Fulham London Borough Council* [2002] 1 AC 547 the House of Lords held that the occupation by a homeless person of interim accommodation provided under section 188 of the 1996 Act could be "normal residence" for the purpose of establishing a local connection under section 199(1)(a) of that Act. Lord Slynn of Hadley, with whom the other Law Lords agreed, stated (at para 18) that words like "ordinary residence" and "normal residence" take their precise meaning from the context of the legislation in which they appear. He suggested that the place that a person voluntarily accepts and in which he eats and sleeps is for the relevant time where he normally resides. The fact that the local authority had given him interim accommodation in performance of its statutory duty under section 188 of the 1996 Act did not prevent that accommodation from being the place where he was for the time normally resident. This is consistent with the view that Lord Millett expressed in *Uratemp* (para 26 above) that

"dwelling" generally connotes a greater degree of settled occupation than "residence".

45. Pulling together the threads of the case law, in my view the following can be stated: (i) the words "live at", "reside" and "dwell" are ordinary words of the English language and do not have technical meanings, (ii) those words must be interpreted in the statutes in which they appear having regard to the purpose of those enactments, (iii) as a matter of nuance, "dwelling" as a general rule suggests a more settled occupation than "residence" and can be equated with one's home, although "residence" itself can in certain contexts (such as the two-home cases) require such an equation, and (iv) under the 1996 Act a person remains homeless while he or she occupies temporary accommodation provided under sections 188(3), 190(2), 200(1) or 204(4) of the 1996 Act so long as the occupation is properly referable to the authority's performance or exercise of those statutory duties or powers. In my view it is consistent with this approach to conclude in the context of PEA 1977 that an overnight or day-to-day licence of accommodation pending the making of a decision under section 184 or on review or appeal does not show any intention to allow the homeless applicant to make his or her home in that accommodation.

(ii) The exclusions in section 3A of PEA 1977

46. Mr Arden also contended that section 3(1) and (2B) of PEA 1977 covered all residential tenancies or licences unless they were expressly excluded by section 3A of that Act. The exclusions in section 3A included several arrangements which were likely to be temporary in nature. He submitted that by defining the excluded tenancies and licences, Parliament had expressed an intention that all other residential tenancies and licences were subject to the protections in sections 3 and 5 of PEA 1977.

47. I am not persuaded that that submission is correct. If, by providing the exclusions, Parliament meant that otherwise the excluded tenancies or excluded licences would have been within the concepts of "let as a dwelling" or "occupied as a dwelling under a licence" (section 3(1) and (2B)), that would have had the effect of altering the meaning of "dwelling" from that of the Rent Acts, in which the protection against eviction originated. As mentioned above, it is clear from prior case law (*Walker v Ogilvy*) that holiday lets did not fall within the expression "let as a separate dwelling". But such lets are expressly excluded in section 3A(7)(a). Similarly, the Rent Acts treated a tenancy under which the occupier shared accommodation with the landlord and other persons as a restricted contract rather than a protected tenancy: Rent Act 1977 section 21. Yet such was expressly excluded in

section 3A(2). In my view Parliament, by providing those exclusions, sought to confirm the scope of the statutory protection which the provisions of the Rent Acts or case law established rather than alter the concept of "dwelling". While it is correct that, as Mr Arden submitted, the Housing (Homeless Persons) Act 1977, which was enacted at the same time as PEA 1977, could have excluded its provision of temporary accommodation from the scope of the latter Act, it was not necessary to do so.

48. It may be correct, as both Mr Hutchings for the respondent local authorities and Mr Chamberlain for the Secretary of State contended, that several of the express exclusions of temporary accommodation involve circumstances in which the occupation may continue for significant periods of time. The exclusion in section 3A(6) of a tenancy or licence granted as a temporary expedient to a trespasser is an example of an exclusion of a letting which was intended to be temporary. But such lettings are on occasion intended to last for several years. See, for example, *Smart v Lambeth London Borough Council* [2014] HLR 7, in which a local authority granted a licence to a housing association which in turn allowed a housing cooperative to provide accommodation to former squatters on a licence which was initially for 5 years but was extended. But for the exclusion, such accommodation by providing settled occupation could readily fall within the scope of section 3 of PEA 1977. Similarly, the tenancy or licence granted to provide accommodation under Part VI of the Immigration and Asylum Act 1999 (section 3A(7A)) or under the Displaced Persons (Temporary Protection) Regulations 2005 (SI 2005 No 1379) (section 3A(7C)) can in some cases involve the provision of accommodation for prolonged periods which might *prima facie* bring it within section 3 of PEA 1977. The exclusions remove accommodation so provided from the scope of PEA 1977. But I do not rely on distinctions between certain types of temporary accommodation and another type. Rather I base my view on the meaning of "dwelling" in section 3 and the absence of any evidence of an intention on the part of Parliament to extend that meaning to cover accommodation which would not have been treated as a "dwelling" under the Rent Acts.

49. Absent an intention to re-define the meaning of "dwelling", it appears to me that Parliament in enacting and amending section 3A created several of the exclusions for the avoidance of doubt. One must address the prior question as to what is a "dwelling". The absence of an exclusion for accommodation provided under section 188 of the 1996 Act does not mean that such accommodation falls within section 3 of PEA.

(iii) Inferences from other statutes

50. As set out in para 22 above, Mr Arden also invited the court to draw an inference of parliamentary intention in PEA 1977 from provisions in other statutes. I am not persuaded that such inferences should be drawn. Section 209 of the 1996 Act, adapting the earlier provisions in the Housing Act 1985 (section 79(2) and Schedule 1 paragraph 4), and section 1(6) and (7) of the Housing Act 1988, prevents a tenancy from being an assured tenancy before the end of 12 months after the relevant decision by the local authority. But a tenancy which continued for such a period after a decision under section 184 or on review or appeal would in most cases have ceased to be properly referable to the provision of interim accommodation pending the decision (see para 24 above).

51. Housing benefit under section 130 of the Social Security Contributions and Benefits Act 1992 ("the 1992 Act") has been given to people provided with temporary accommodation under the 1996 Act. That section provides:

> "A person is entitled to housing benefit if-
>
> he is liable to make payments in respect of a dwelling in Great Britain which he occupies as his home; …"

It is argued that, if an applicant in temporary accommodation is entitled to housing benefit because she is occupying a dwelling as her home, she is also occupying a dwelling under a licence for the purposes of section 3(2B) of PEA 1977. But there are two answers which to my mind contradict this view. First, the social security legislation is in a different field of human activity from PEA 1977 and looks to the fact of occupation rather than the purpose of the letting. I see no reason why in the context of the 1992 Act temporary occupation of premises should not be treated as occupation as a home while in other legislation, which has different policy objectives, a different conclusion is reached. Secondly, the 1992 Act defines "dwelling" by reference to the type of building rather than its intended use. The definition of "dwelling" in section 137 is in these terms:

> "any residential accommodation, whether or not consisting of the whole or part of a building and whether or not comprising separate and self-contained premises".

(iv) Settled practice and policy considerations

52. Mr Hutchings submitted that it had for years been a widespread practice of local housing authorities in London to arrange for the re-possession of temporary accommodation provided under section 188 of the 1996 Act without first obtaining a court order. They had adopted and followed that practice in good faith and might face criminal sanctions if this court were to change the law. Their practice was consistent with the Secretary of State's guidance in the Homelessness Code of Guidance for Local Authorities (2006) which (at para 7.11) refers to the general rule that accommodation provided under section 188(1) does not create a tenancy or licence under PEA 1977 but notes that the general rule may be displaced by an agreement between the authority and the applicant or if the accommodation is allowed to continue on more than a transient basis.

53. Mr Chamberlain further argued that Parliament had endorsed the Secretary of State's construction of PEA 1977. Parliament, he submitted, should be taken to have been aware of the Court of Appeal's judgments in *Mohamed v Manek* and *Desnousse* (the former having been decided in 1995 and the latter in 2006) and had not reversed those decisions although there had been opportunities to do so in legislation which amended either PEA 1977 or the 1996 Act. Lord Carnwath has set out this argument in more detail in his concurring judgment. It suffices for me to say that where Parliament re-enacts a statutory provision which has been the subject of authoritative judicial interpretation, the court will readily infer that Parliament intended the re-enacted provision to bear the meaning that case law had already established: *Barras v Aberdeen Sea Trawling and Fishing Co Ltd* [1933] AC 402, Viscount Buckmaster at pp 411-412. Applying that in the present case, one can readily conclude, as I have, that the word "dwelling" in the phrase "let as a dwelling" in PEA 1977 must bear the same meaning as it had in section 31 of the Rent Act 1965 and in the phrase "let as a separate dwelling' in the Rent Acts. Inferences from parliamentary inaction are more difficult. In my view, the settled practice principle, of which Lord Carnwath writes, is available where there is ambiguity in a statutory provision. But for the reasons set out above, I detect no ambiguity in section 3 of PEA 1977 in its application to a licence to a person who is and remains homeless throughout the period of interim accommodation: it does not apply.

54. Counsel also referred to considerations of policy. I accept, as Mr Arden submitted, that families with young children and other vulnerable people often invoke the homeless persons provisions of the 1996 Act. They are clearly worthy of protection. But that does not mean that a court order for eviction must be obtained when the authority has reached an adverse section 184 decision and terminates its licence of temporary occupation. As the

respondent local authorities argued, private sector providers of accommodation for homeless persons depend on the local authorities for their business, which they would lose if they behaved irresponsibly in re-possessing their properties. They are also subject to the Protection from Harassment Act 1997 and section 6 of the Criminal Law Act 1977 which prohibits the use or threats of violence to secure entry to premises. Further, as Mr Chamberlain submitted, good administration requires local housing authorities to use scarce public resources effectively in providing support for homeless persons. He referred to Auld LJ in *Mohamed v Manek* who stated (at pp 449-450):

> "A council's ability efficiently to perform their public duty as a local housing authority could be seriously affected if the protection of the 1977 Act were automatically to attach to every temporarily housed unsuccessful applicant for housing just because he had been able to satisfy the low threshold under [section 184] for investigation of his application."

In my view policy considerations do not point in one direction as a homeless person might prefer a court officer to control his or her eviction, and, in any event, as I have said (para 35 above) the inconvenience to local authorities is not sufficient by itself to determine the outcome this appeal.

55. For reasons which I discuss below, I do not consider that article 8 of ECHR requires a different, broader interpretation of the scope of section 3(1) and (2B) of PEA 1977.

(v) Further clarification

56. I recognise that the conclusion which I have reached on this first issue has not found favour with Lord Neuberger or Lady Hale. It may be helpful if I comment briefly on some areas of disagreement. First, the provisions of PEA 1977 in issue in this appeal, which extended section 3 to licences and introduced the exclusions, were enacted in 1988, over a decade after the Housing (Homeless Persons) Act 1977, which created the new homelessness regime, came into operation. Thus while the concept of "let as a dwelling" predated the new homelessness legislation, its extension to licences and the enactment of the exclusions did not. Secondly, my emphasis on the terms of the licences which should be construed against the background of the interim duties of the 1996 Act (paras 33 and 34 above) entails a recognition that mere precariousness of occupation, as in a tenancy at will, would not exclude the statutory protection of PEA 1977 if one could infer that the property was let

as a home; see para 29 above. It is not the mere precariousness of the occupation but the wider statutory context in which the licences were granted that reveals the true nature of the arrangement and supports the exclusion of section 3 of PEA 1977. Accordingly my interpretation does not provide a green light to unscrupulous landlords in other contexts.

57. Thirdly, I accept that, if other things were equal, the fact that a person is "homeless" for the purposes of the 1996 Act would not mean that as a matter of statutory interpretation he or she did not "dwell" in the provided accommodation for the purpose of another statute. I adopt a similar approach in my discussion of the 1992 Act in para 51 above. But if, as is my view, the Rent Acts and by extension PEA 1977 require a contract that is intended to give the occupant a degree of settled occupation, in other words a home, the context of the 1996 Act in which the licences were granted points clearly against their being licences of a "dwelling" for the purpose of PEA 1977.

The second issue: Article 8 of ECHR

58. The appellants' submission in short was that it is inherent in article 8 of ECHR that a public authority must always use court proceedings before it evicts someone from his or her home. Mr Arden submitted that it did not matter that the owner of the property in each case was a private sector landlord as the authority controlled the whole process. The authority decided whom it placed in accommodation and when the licence ended in each case.

59. Article 8 of ECHR, which section 1 of the Human Rights Act 1998 created as a Convention right in our domestic law, provides:

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

60. The respondent local authorities and the Secretary of State all conceded that article 8.1 was engaged in these appeals. But they did not accept that article

8 was engaged in all cases of temporary accommodation provided under Part VII of the 1996 Act and questioned whether a public authority was responsible for interference with an article 8 right when it was the private sector landlord who was evicting the homeless persons. I do not think that it is necessary to reach a concluded view on those matters or on the question of horizontal effect in this case. It is better to leave such issues to a case in which they have to be determined. Because of the view that I have reached on the position if article 8.2 were engaged, I am content to proceed on the basis that both article 8.1 and 8.2 are engaged.

Discussion of the second issue

61. Article 8 of the ECHR so far as relevant is concerned with a person's right to respect for his or her home and regulates interference by public bodies with that right. In article 8 the concept of "home" is autonomous and does not depend on classification under domestic law. It is concerned with occupation in fact, and it is not limited to premises which are lawfully occupied or have been lawfully established. It is concerned with "the existence of sufficient and continued links with a specific place". See among others *Hounslow London Borough Council v Powell* [2011] 2 AC 186, Lord Hope para 33; *Prokopovich v Russia* (2006) 43 EHRR 10, para 36; *Kryvitska and Kryvitskyy v Ukraine* App No 30856/03, para 40. Thus premises may not be "let as a dwelling" under PEA 1977 and yet be a home for the purposes of article 8 of the ECHR.

62. As is well known, an interference with an article 8 right must be in accordance with the law, in pursuit of a legitimate aim, and necessary in a democratic society for that aim. The latter notion implies a pressing social need and requires that measure to be proportionate to the legitimate aim pursued: *Blečić v Croatia* (2005) 41 EHRR 13, at paras 55-59. Proportionality involves striking a fair balance between the interests of the individual and those of the community as a whole. The ECHR guarantees rights that are practical and effective. A public authority that interferes with a person's right to respect for his or her home, especially when it intervenes in the most extreme way by removing him or her from that home, must have in place a fair procedure in order to show that respect. This requires the occupier to be involved in the decision-making process in order to protect his or her rights. In assessing the effectiveness of the procedure to achieve respect for the safeguarded rights the court looks to the whole proceedings involving the interference with the home. See *Tysiąc v Poland* (2007) 45 EHRR 42 paras 113 and 115; *Blečić v Croatia* para 68; *Zehentner v Austria* (2011) 52 EHRR 22 para 54.

63. A fair procedure requires the occupant to have a right to raise the issue of the proportionality of the interference and to have that issue determined by an independent tribunal: *Manchester City Council v Pinnock* [2011] 2 AC 104, Lord Neuberger MR para 45; *McCann v United Kingdom* (2008) 47 EHRR 40, para 50; *Kay v United Kingdom* (2012) 54 EHRR 30, para 68; *Paulić v Croatia* [2009] ECHR 1614, para 43; *Buckland v United Kingdom* (2013) 56 EHRR 16, para 65. The appellants submit that that procedural protection requires the owner to obtain a court order before evicting the occupant, thus enabling the latter to raise the issue of proportionality as a defence. The respondent local authorities and the Secretary of State disagree and submit that it suffices if there are procedures by which the occupant can raise the issue before an independent tribunal.

64. The authority's assessment of an applicant's circumstances as a result of its inquiries under section 184 of the 1996 Act is intimately linked to the decision to end the provision of temporary accommodation. The authority provides the accommodation while undertaking the inquiries and its decision as to its housing duties brings to an end its obligation to provide the interim accommodation. In my view, when one looks at the procedures as a whole, the procedural safeguards contained in the 1996 Act, the procedures available under the Children Act 1989 and the possibility of judicial review of the authority's section 202 decision by a court with enhanced powers are sufficient to comply with article 8 of ECHR in this context. See paras 70 and 71 below. Article 8's procedural guarantee does not require further involvement of the court in granting an order for possession. The interim accommodation which an authority provides under section 188 of the 1996 Act is but transient accommodation, a stop gap pending the completion of inquiries and a decision on the scope of the authority's duties towards a homeless person. As I have set out above, domestic law requires less formal procedures at the final stage of the recovery of possession in such circumstances than when the occupier has a more substantial and long-term connection with the accommodation.

65. It is only in very exceptional cases that the applicant will succeed in raising an arguable case of a lack of proportionality where an applicant has no right under domestic law to remain in possession of a property: *Kay v Lambeth London Borough Council* [2006] 2 AC 465, Lord Bingham para 29, Lord Nicholls paras 53-54; *McCann v United Kingdom* para 54; *Kay v United Kingdom*, para 73; *Manchester City Council v Pinnock*, Lord Neuberger MR para 54. In my view this is so particularly where an authority seeks to recover possession of interim accommodation provided under section 188 of the 1996 Act: if court proceedings are necessary, and the day of the court hearing arrives, what would be the homeless person's defence?

66. It is for the occupier to raise the question of proportionality: *Paulić v Croatia* [2009] ECHR 1614, para 43; *Orlić v Croatia* [2011] ECHR 974, para 66. The court may deal with such an argument summarily unless it is seriously arguable: *Manchester City Council v Pinnock*, Lord Neuberger MR para 61; *Hounslow London Borough Council v Powell* [2011] 2 AC 186, Lord Hope paras 35-37, Lord Phillips para 92. In an appropriate case the court, if satisfied that eviction was disproportionate, could prohibit the eviction for as long as that was the case, for example if the local authority did not provide alternative accommodation: *Manchester City Council v Pinnock*, Lord Neuberger MR paras 45 and 64.; *Hounslow London Borough Council v Powell*, Lord Hope paras 62 and 63.

67. I turn to the application of an article 8 analysis to the facts of these cases. First, in each case the termination by the authority of the occupier's licence and the private owner's actions to recover possession of the property are both in accordance with the law – see the discussion of the first issue above - and in pursuit of a legitimate aim. The local authority, faced with the pressing social problem of homelessness and charged with duties to provide accommodation for the homeless with priority need, will wish to make the accommodation available to other applicants who are entitled to benefit from the provision of interim accommodation under the 1996 Act. The private owner of the property seeks to recover possession of it in accordance with his or its right of ownership and to put the property to economic use by obtaining income from the local authority for its occupation. These are legitimate aims which fall within "the protection of the rights and freedoms of others": *Hounslow London Borough Council v Powell*, Lord Phillips para 80.

68. Secondly, in my view recovery of possession is proportionate to the aim which is being pursued and is therefore "necessary in a democratic society" under article 8. It is well known that authorities have limited resources to provide accommodation to individuals who claim to be homeless and in priority need. As a general rule there can be no justification for preferring those whose claims have been investigated and rejected over those whose claims are still the subject of inquiry under section 184 of the 1996 Act and who may be found to be homeless, to have priority need, and to be the objects of the authority's full housing duty. There are also safeguards in the decision-making process that allow the occupant to be involved in the process and, through an appeal to the county court or by judicial review in the Administrative Court, give an opportunity for him or her to raise the question of proportionality before an independent tribunal. There is no need for an additional procedural hurdle which would impose costs on an authority without any significant benefit to the applicant.

69. Those safeguards include the following. First, the authority must give the applicant written notice of the reasons for an adverse section 184 decision, thus enabling the applicant to understand the basis of the decision: section 184(3) and (6). In so doing the authority must inform the applicant of his or her right to request a review of the decision under section 202: section 184(5). Secondly, the Government's Homelessness Code (2006) (at para 7.1.10) requires the authority to give the applicant/occupier a reasonable period of notice to vacate the accommodation. The general practice of authorities is to give 28 days' notice. Thirdly, where the individual has become homeless intentionally, the authority is under a duty to give the applicant advice and assistance in his or her attempts to obtain alternative accommodation: section 190(2) and (3). If the applicant, who has become homeless intentionally, has a priority need the authority is under a duty to secure that accommodation is available to give him a reasonable opportunity of securing alternative accommodation.

70. Fourthly, the applicant is entitled to have the adverse decision reviewed: sections 202 and 203. The purpose of the review is, as Lord Hope stated in *Hounslow London Borough Council v Powell* (at para 42) to correct errors and misunderstandings. The authority is under a duty to inform the applicant of the reasons for the decision on review and inform him of his right to appeal: section 203(4) and (5). Fifthly, that right is a right to appeal the decision on review to the county court on a point of law: section 204.

71. Sixthly, the decisions of this court in 2011, in *Manchester City Council v Pinnock* and *Hounslow London Borough Council v Powell*, extended the powers of the county court when hearing applications by a local authority to recover possession of a property in order to comply with article 8 of ECHR. It appears to me that it is necessary for the same reason to interpret section 204 of the 1996 Act as empowering that court to assess the issue of proportionality of a proposed eviction following an adverse section 184 or 202 decision (if the issue is raised) and resolve any relevant dispute of fact in a section 204 appeal. As there is no other domestic provision involving the court in the repossession of the accommodation after an adverse decision, the section 204 appeal, which reviews the authority's decision on eligibility for assistance, is the obvious place for the occupier of the temporary accommodation to raise the issue of the proportionality of the withdrawal of the accommodation. Alternatively, as Moses LJ stated in this case ([2013] EWCA Civ 804) at para 89, the occupier of the temporary accommodation may raise the issue of proportionality of such an eviction by way of judicial review in the Administrative Court, which similarly could resolve relevant factual disputes. An occupier might have to resort to judicial review if an authority were not willing to continue the provision of interim accommodation pending a review.

72. Finally, where a child forms part of the homeless family, the authority is under a duty in section 213A of the 1996 Act to seek the consent of the applicant to refer the facts of the case to the social services authority or department. That authority or department will carry out an assessment of the children's needs as part of its general duty under section 17 of the Children Act 1989 to promote the welfare of children in need. Lewisham made such an assessment of CN, which it completed on 27 April 2012. The assessment concluded that if his family did not find private accommodation, the authority would seek to provide him with accommodation as a child in need. Newham completed an assessment of ZH under the Children Act 1989 on 1 May 2013. As a result the authority gave appropriate interim accommodation and financial support to assist FI in securing private rented accommodation, until, in the course of an appeal to the county court against its section 202 decision, Newham accepted that it owed FI a full housing duty.

73. It is correct that the current arrangements involve eviction at the hands of the landlord or his agent, if the occupant does not vacate voluntarily in response to notice, while an enforcement officer would, if necessary, carry out an eviction after a court made an order for possession. But that does not in my opinion alter the balance between the interests of the individual and those of the community so as to render the eviction disproportionate.

74. Having regard to the proceedings as a whole, there are several opportunities for the applicant to involve himself or herself in the decision-making process and also procedures by which an independent tribunal can assess the proportionality of the decision to re-possess the accommodation and determine relevant factual disputes. In my view there are sufficient procedural safeguards to satisfy the applicant's article 8 rights. The article 8 challenge therefore fails.

Conclusion

75. I would dismiss both appeals.

LORD CARNWATH

76. I agree that the appeals should be dismissed for the reasons given by Lord Hodge. I add some comments on an argument which has been advanced in various forms on behalf of both the local authorities and the Secretary of State: that particular weight should be given to the Court of Appeal's

interpretation of the relevant statutory words, in effect because it has stood the test of time.

77. This, it is said, is reflected in the facts that the reasoning in *Mohammed v Manek* has stood without challenge for 20 years and was confirmed by the same court eight years ago in *Desnousse v Newham LBC*; that since at least 2006 it has been adopted without criticism or comment in the Department's statutory code of guidance; that it has been applied on numerous occasions by local authorities and the lower courts without apparent problems or injustice; and that Parliament has not legislated to reverse its effect despite many opportunities to do so. As Kitchin LJ observed in the Court of Appeal, when refusing permission to appeal in this case:

> "Those opportunities include the Homelessness Act 2002, the Housing and Regeneration Act 2008 and the Localism Act 2011, each of which amended Part VII of the 1996 Act; and the Immigration and Asylum Act 1999, the Nationality, Immigration and Asylum Acts of 2002 and the Immigration, Nationality and Asylum Act 2006, each of which amended the 1977 Act." (para 83)

78. Mr Chamberlain for the Secretary of State goes further, drawing to our attention the committee debates on what became the Housing and Regeneration Act 2008 (HC Deb (2007-08), 24 January 2008 (afternoon), cc 512-516), in which the responsible minister apparently relied on the reasoning of the Court of Appeal in those cases when resisting a proposed amendment to extend the protection available to those in temporary accommodation under this legislation.

79. Appealing as such arguments may be as a matter of common sense, they need to be based on sound legal principle, if they are to be accepted as a ground of decision on an issue of statutory interpretation. Subject to narrowly defined exceptions (such as under *Pepper v Hart* [1993] AC 593), "it is a cardinal constitutional principle that the will of Parliament is expressed in the language used by it in its enactments" (*Wilson v First County Trust Ltd (No 2)* [2003] UKHL40; [2004] 1 AC 816 at [67] per Lord Nicholls). The courts' primary task therefore is to ascertain the intention of Parliament from the language it has used. If that does not conform to the way it has been applied in practice, the conventional remedy, pending legislative amendment, is to correct the practice, not rewrite the law.

80. Notwithstanding that general principle, support for the use of subsequent practice as an aid to interpretation may be found in the textbooks and the authorities there cited. Mr Chamberlain groups them under two headings: "tacit legislation" and "customary meaning".

Tacit legislation

81. Under this heading, Mr Chamberlain relies on a passage in *Bennion on Statutory Interpretation* (6th ed.), p.661:

> "Parliament is normally presumed to legislate in the knowledge of, and having regard to, relevant judicial decisions. If therefore Parliament has a subsequent opportunity to alter the effect of a decision on the legal meaning of an enactment, but refrains from doing so, the implication may be that Parliament approves of that decision and adopts it. This is an aspect of what may be called tacit legislation."

82. With respect to that distinguished author, I have difficulty with the phrase "tacit legislation", if it is intended to connote some form of silent endorsement by Parliament implied from its failure to act. As Lord Nicholls made clear, Parliament legislates by what it says, or what is said under its authority, not by what it does not say. Anything else can only be justified, if at all, as "judge-made law", and the criticisms implicit in that expression must be faced.

83. It is true that this passage in Bennion was cited with approval by the Divisional Court in *R (Woolas) v The Parliamentary Election Court* [2010] EWHC 3169 (Admin), para 86, per Thomas LJ. But the context was quite different from the present. Following judicial interpretation of a particular statutory provision, which Parliament had re-enacted in substantially the same form, the court held that the previous interpretation continued to apply. The principal authority relied on, *Barras v Aberdeen Sea Trawling Co Ltd* [1933] AC 402, was to similar effect. The House of Lords held that the word "wreck or loss of a ship" as interpreted by the Court of Appeal under the Merchant Shipping Act 1894 must be treated as having the same sense when re-enacted in a 1925 statute. The House approved (at p 412 per Viscount Buckmaster) the statement of the rule by James L.J. in *Ex parte Campbell*: L. R. 5 Ch. 703, 706:

> "Where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the Legislature has repeated them without alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them."

84. The principle has been often applied (a very recent illustration of the principle and its limits can be found in *Manchester Ship Canal Co Ltd v United Utilities Water plc* [2014] UKSC 40). However, account also needs to be taken of the comments of members of the House of Lords in the cases referred to by Lord Neuberger. Whatever the true scope of the principle, I do not find the expression "tacit" legislation a very apt description. In such cases Parliament has not remained silent. Rather, the previous court decision (even at a level below the highest court) is relevant, because it is part of the background against which Parliament has spoken, and by reference to which accordingly its intention can properly be ascertained.

85. In any event, we were referred to no authority which has applied that principle to a case where, as here, the most that can be said is that Parliament has failed to take what might have seemed an obvious opportunity to legislate. Absence of legislation may be governed by many factors which have nothing to do with the perceived merits of a possible change, not least Parliamentary time and other government priorities.

86. Nor, with respect to Mr Chamberlain's initial submissions (in fairness, not strongly pressed on this point), can the argument be bolstered by reference to Ministerial statements to Parliament in response to possible amendments which were not in the event carried. The special exception allowed by *Pepper v Hart* is directed at Ministerial statements in support of legislation, and even then the circumstances in which reference is permissible are closely defined. It provides no support for reference to such a statement in relation to proposed legislation which was not in the event adopted.

87. In the same context Mr Hutchings (for the two local authorities) sought support in words of Lord Neuberger in *Williams v Central Bank of Nigeria* [2014] 2 WLR 355, concerning the meaning of the word "trustee" in the Limitation Act 1980. That I read as no more than an application of another familiar principle, that Parliament is taken to use legal words in their ordinary legal sense. As Lord Neuberger said, it would have been surprising "if a statute concerned with consolidating the law governing the powers and duties of trustees did not adopt an orthodox definition of 'trust' and 'trustee'" (para 69). It provides no assistance in the present case.

88. Other common law countries have also attempted to grapple with this issue but there does not appear to be a settled or uniform approach. The presumption applied in *Barras v Aberdeen Steam Trawling* has been restated in Australian and Canadian case law on numerous occasions: see e.g. the unanimous High Court bench of seven justices in *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96; 123 ALR 193 and the Supreme Court of Canada in *Studer v Cowper* [1951] SCR 450. However, the common law position has been modified by statute in both countries: see e.g. section 18 of the Acts Interpretation Act 1915 (South Australia) and section 45(4) of the Interpretation Act (RSC 1985). These provisions expressly remove the presumption that Parliament is taken to have approved or adopted any judicial construction of an enactment when it is re-enacted. However, courts may still draw appropriate inferences from the legislative history of a statutory provision even in the absence of any common law presumption. The US Supreme Court has sometimes inferred that inaction on the part of Congress can be taken as approving or acquiescing in a judicial construction of a provision, especially where the construction has been brought to the attention of the public and Congress: see e.g. *United States v Rutherford* 442 US 544 (1979) and *Bob Jones Univ v United States* 461 US 574 (1983).

Customary meaning

89. In the alternative Mr Chamberlain relies on what he calls the "customary meaning" of the words of the statute. He refers to the judgment of Lord Phillips in this court, in *Bloomsbury International Ltd v Department for Environment, Food and Rural Affairs* [2011] 1 WLR 1546, para 57-60. The appeal concerned the meaning of the phrase "landed in the United Kingdom" in the context of a levy imposed on those engaged in the sea fish industry. Lord Phillips gave a judgment agreeing with the majority but he was on his own on this issue. He drew attention to the "the unusual feature" that for nearly thirty years everyone concerned had proceeded on the basis of a broad interpretation of the phrase, that the levy had been collected on that basis, and the funds so raised disbursed in payment for schemes intended to benefit the sea fish industry - activities which if the decision of the Court of Appeal were correct, must be drastically curtailed. He thought that in such circumstances "there must be, at the very least, a powerful presumption that the meaning that has customarily been given to the phrase in issue is the correct one".

90. He quoted from a judgment of my own (*Isle of Anglesey County Council v Welsh Ministers* [2009] EWCA Civ 94, [2010] QB 163 para 43):

> "Where an Act has been interpreted in a particular way without dissent over a long period, those interested should be able to continue to order their affairs on that basis without the risk of being upset by a novel approach."

He commented that this had "the air of pragmatism rather than principle", but agreed that courts are "understandably reluctant to disturb a settled construction and the practice that has been based on that construction" (referring to *Bennion on Statutory Interpretation*, 5th ed (2008), section 288 at p 913 and the authorities there cited).

91. He thought that a more principled justification for the principle would be that of "contemporaneous exposition", citing *Clyde Navigation (Trustees of) v Laird & Sons* (1883) 8 App Cas 658, where Lord Blackburn had regarded the levying and payment of statutory dues on a particular basis without protest for twenty-five years as a strong indication that there must exist "some legal ground for exacting the dues". He noted, however, that Lord Watson had not agreed with this approach (except possibly in relation to very old statutes). Lord Phillips commented:

> "An important element in the construction of a provision in a statute is the context in which that provision was enacted. It is plain that those affected by the statute when it comes into force are better placed to appreciate that context than those subject to it thirty years later…." (para 61)

92. I doubt if "contemporary exposition", in the sense described by Lord Phillips, would have provided a satisfactory answer in the *Anglesey* case. The issue was not one of linguistic usage, but of application in practice - whether fishery rights granted by an 1868 Act should be treated as purely personal, rather than capable of assignment as had been the general understanding (and the basis on which subordinate legislation had been drafted) over the intervening century and a half.

93. The sentence quoted by Lord Phillips from my judgment was part of a longer section (paras 39-44) discussing the question left unresolved by Lord Blackburn and Lord Watson, that is the relevance of subsequent history as an aid to statutory interpretation. I referred to authorities cited in that connection in Halsbury's Laws Vol 44(1) Statutes, paras 1427-1430, which disclosed "no consistent or settled view". They ranged from the contrasting views expressed in 1883 in the *Clyde Navigation* case, to much more recent observations in *R (Jackson) v Attorney-General* [2006] 1 AC 262, by Lord

Nicholls (paras 68-9) and by Lord Carswell (para 171), which tended to support Lord Blackburn's approach. I concluded:

> "My own respectful view is that Lord Blackburn's more liberal view is supported by considerations of common sense and the principle of legal certainty. Where an Act has been interpreted in a particular way without dissent over a long period, those interested should be able to continue to order their affairs on that basis without risk of it being upset by a novel approach. That applies particularly in a relatively esoteric area of the law such as the present, in relation to which cases may rarely come before the courts, and the established practice is the only guide for operators and their advisers."(para 43)

Legal certainty and settled practice

94. Review of these authorities shows how varied are the contexts in which a settled understanding or practice may become relevant to issues of statutory interpretation. Concepts such as "tacit legislation" or "customary meaning" provide no more than limited assistance. The settled understanding may emerge from a variety of sources, not necessarily dependent on action or inaction by Parliament, or particular linguistic usage. Nor can the debate, exemplified by the difference 130 years ago between Lord Watson and Lord Blackburn, be reduced to one between principle and pragmatism, as Lord Phillips suggested. Rather it is about two important but sometimes conflicting principles - legal correctness and legal certainty. In drawing the balance between them, as in most areas of the law, pragmatism and indeed common sense have a legitimate part to play.

95. In my view this case provides an opportunity for this court to confirm that settled practice may, in appropriate circumstances, be a legitimate aid to statutory interpretation. Where the statute is ambiguous, but it has been the subject of authoritative interpretation in the lower courts, and where businesses or activities, public or private, have reasonably been ordered on that basis for a significant period without serious problems or injustice, there should be a strong presumption against overturning that settled practice in the higher courts. This should not necessarily depend on the degree or frequency of Parliamentary interventions in the field. As in the *Anglesey* case, the infrequency of Parliamentary intervention in an esoteric area of the law may itself be an added reason for respecting the settled practice. On the other hand it may be relevant to consider whether the accepted interpretation is consistent with the grain of the legislation as it has evolved, and subsequent legislative action or inaction may be relevant to that assessment.

96. This would not be new law, even at this level. The approach receives strong endorsement, in a context close to the present, from the House of Lords decision in *Otter v Norman* [1989] AC 129. In interpreting the phrase "payments in respect of board" in the Rent Acts, the House of Lords placed weight on the obiter observations of the Court of Appeal in a case decided more than 60 years before, in the absence of legislative intervention in the ensuing period on this particular point (in spite of the enactment of more precise statutory definitions on related aspects). Lord Bridge (giving the only substantive speech) said:

> "There has been no reported English decision bearing upon the point after *Wilkes v. Goodwin* [1923] 2 KB 86. But Parliament chose not to interfere in relation to 'board', and it seems to have been assumed ever since that the majority view in *Wilkes v. Goodwin*, albeit expressed obiter, correctly stated the law, in the words of Bankes LJ, at p 93, that 'any amount of board' which is more than de minimis will suffice to exclude a tenancy from statutory protection. Thus successive editions of Sir Robert Megarry's standard text book on the Rent Acts (*Megarry, The Rent Acts*) have stated that: 'In practice, the dividing line appears to fall between the early morning cup of tea on the one hand and 'bed and breakfast' on the other:" see 10th ed (1967), p 141. The same view has been adopted in Scotland: see *Holiday Flat Co. v. Kuczera*, 1978 SLT (Sh.Ct.) 47. My Lords, I think we must assume that for many years many landlords and tenants have regulated their relationships on this basis, and even if I thought that a different construction could reasonably be placed on section 7(1) of the Act of 1977 I would not think it right to adopt it now and to upset existing arrangements made on the basis of an understanding of the law which has prevailed for so long." (p 145-6)

97. This provides direct authority for the application of the settled practice principle in a situation closely analogous to the present. That case was concerned with the basis on which private landlords and tenants had regulated their relationships. I see no reason why the same principle should be less relevant to relations between housing authorities and those for whom they are responsible under the homeless persons legislation. Indeed, given the pressures facing authorities in this area, and the financial constraints under which they are acting, it is particularly important that the legal and policy context in which they act should be clear and settled. One of the purposes of the departmental code is to provide such guidance. Although the guidance may not compete in terms of legal scholarship with Sir Robert Megarry's great work on the Rent Acts, it has the underpinning of statute, and the

authorities were bound to have regard to it. If that practice is now overturned, they have been responsible, albeit acting in good faith, for many unlawful evictions. It may be that this result would have to be accepted, if the statute properly construed permitted no other reasonable interpretation. But this is not such a case. With respect to Lord Neuberger I do not consider that the authority of Lord Bridge's words is undermined by the absence of any reference to *Barras* or *Farrell*. As I have explained they were dealing with a different issue, which had nothing directly to do with the issue of settled practice as an aid to interpretation.

98. For these reasons, even if the issues were more finely balanced than indicated by Lord Hodge's judgment, the settled practice principle would in my view be an additional reason for dismissing the appeal.

LORD NEUBERGER:

Introductory

99. The two issues raised by these appeals are identified by Lord Hodge in para 1 of his judgment, and I gratefully adopt his explanation of the factual and legal background as see out in paras 2-19 and 58-60 of his judgment.

100. While I agree with Lord Hodge on the second issue, the first issue gives rise to a difficult point, on which I have reached a different conclusion.

101. The first issue, in a nutshell, is whether accommodation occupied pursuant to a temporary licence granted to a homeless person by a local housing authority under section 188 of Part 7 of the Housing Act 1996 ("the 1996 Act"), while the authority investigates whether she is eligible for assistance and if so what if any duty is owed to her under Part 7, is "occupied" by that person "as a dwelling under a licence" within the meaning of section 3(2B) of the Protection from Eviction Act 1977 ("PEA 1977"), as amended by the Housing Act 1988.

102. I agree with what Lord Hodge says at para 23, namely that the effect of section 3(2B), when read together with section 3(1) of PEA 1977 and cases such as *Wolfe v Hogan* [1949] 2 KB 194, is that the issue can, at least normally, be reformulated as being whether, in the light of the terms of the licence and the circumstances in which it was granted, the purpose of the licence, objectively assessed, was to enable the licensee to occupy the accommodation in question

as a dwelling - ie "was the accommodation licensed for occupation as a dwelling"?

103. I include the qualification "at least normally", because it is possible that, after the grant of the licence, something may have been said or done which justifies the conclusion that the parties agreed or must have intended a change in the purpose of the licence. However, the mere fact that the occupation continues longer than expected, for instance while the investigation or appeal process continues under Part 7 of the 1996 Act, would, on its own, be insufficient to change the objectively assessed intention of the parties.

The relevance of court decisions in relation to the Rent Acts

104. The words "occupied as a dwelling under a licence" have to be interpreted in their context, as is illustrated by the point made in para 102 above. The statutory history may be a legitimate factor to take into account as part of the context, given that PEA 1977 consolidated section 16 of the Rent Act 1957 and Part III of the Rent Act 1965, at the same time as Parliament was consolidating the rest of the Rent Act legislation (with certain amendments) in the Rent Act 1977. Prior to that, almost all of the Rent Act legislation had previously been in the Rent Act 1968, which itself consolidated all the previous Rent Act legislation (with the exception of those provisions which were consolidated in PEA 1977).

105. However, there are many judicial warnings against the use of previous statutory provisions when interpreting the words in a consolidating statute. The law on the topic was authoritatively discussed in *R v Environment Secretary Ex p Spath Holme Ltd* [2000] UKHL 61, [2001] 2 AC 349. Lord Bingham said at p 388 that "it is plain that courts should not routinely investigate the statutory predecessors of provisions in a consolidation statute, particularly where … the issue concerns the construction of a single word or expression", although he added that "it seems to me legitimate for the court – even … incumbent on it - to consider the earlier, consolidated, provision in its social and factual context for such help as it may give, the assumption, of course, being (in the absence of amendment) that no change in the law was intended". Lord Nicholls, having referred to the legislative history as a potential "external aid" on the previous page, said at p 398 that "the constitutional implications point to a need for courts to be slow to permit external aids to displace meanings which are otherwise clear and unambiguous and not productive of absurdity", Lord Hope said at pp 405-406 that "there is no doubt that, as general rule, it is not permissible to construe a consolidating enactment by reference to the repealed statutes which that enactment has consolidated", but added that "an exception may

be made where words used in the consolidation Act are ambiguous" or "where the purpose of a statutory word or phrase can only be grasped by an examination of the social context in which it was first used". To the same effect at p 409, Lord Hutton said that "the underlying principle which emerges from the cases is that in construing a consolidation Act a court should not have regard to earlier enactments unless the language of the Act is unclear or ambiguous or there is something in the context of the Act or the relevant section which causes the court to consider that it should look for guidance to an earlier enactment or enactments".

106. Accordingly, any reliance in the present appeals on decisions as to the meaning of words such as "dwelling" and "residence" in the Rent Act legislation, which stretches back to 1915, may be hard to justify. Nonetheless, the statutory history is at least be worth examining because of the division of opinion in this court as to the meaning of the words, the fact that "dwelling" and even "residence" are words not greatly in current use, and also because so much judge-made law has been added to, even incorporated in the Rent Act legislation. Quite apart from this, we were referred to many cases concerned with the meaning of "dwelling" and "residing" in the Rent Act context, and so it may be helpful to start by considering those cases and the statutory history of PEA 1977.

The Rent Act context

107. Since 1968 (reflecting a combination of previous statutory and judge-made law), the Rent Acts have provided that (i) a tenancy was protected provided that, inter alia, it was a tenancy of "a dwelling-house", which could be "a house or part of a house", which was "let" to the tenant "as a separate dwelling" (section 1 of the Rent Act 1968, now section 1 of the Rent Act 1977), (ii) after such a tenancy expired, the tenant had a statutory tenancy, ie a right to retain possession, so long as he "occupie[d] the dwelling-house as his residence" (section 3(1)(a) of the Rent Act 1968, now section 2(1)(a) of the Rent Act 1977), and (iii) oversimplifying things a little, after a statutory tenant died, a relation who had been "residing with" him could succeed to the tenancy (Schedule 1 to the 1968 Act, now Schedule 1 to the Rent Act 1977).

108. The expressions "dwelling-house" and "let as a separate dwelling" were included in the Rent Act legislation from the start, namely in section 2(2)(a) of the Increase of Rent and Mortgage Interest (War Restrictions) Act 1915. However, the requirement that a tenant must occupy the dwelling-house as a residence if he was to enjoy a statutory tenancy was developed by the courts, perhaps most significantly in *Haskins v Lewis* [1931] 2 KB 1 and *Skinner v Geary* [1931] 2 KB 546. The courts developed the rule that a tenant who was

absent from the dwelling-house had to establish animus revertendi and corpus possessionis, inward and outward manifestations of residential occupation, before he could be held to be "occup[ying] the dwelling-house as his residence" - see eg *Brown v Brash* [1948] 2 KB 247. Similarly, it was decided that a tenant who had another principal home could occupy a dwelling-house as a residence, provided it was a genuine home, and not merely a resort of convenience – see *Beck v Scholz* [1953] 1 QB 570.

109. Residence only became a statutory requirement of a statutory tenancy in section 3 of the Rent Act 1968, subsection (2) of which, somewhat unusually, provided that the expression "occupies … as his residence" was to be construed as it had been by the courts since 1920 (now re-enacted in section 2(3) of the Rent Act 1977). The distinction between "a dwelling-house let as a dwelling" and "occupie[d] as a residence" was thus that a tenancy of a dwelling-house let as a separate dwelling remained protected by the Rent Acts until it determined, whereas the question of the tenant's "residence" only arose after the contractual tenancy came to an end. As for the "residing with" requirement for succession to a statutory tenancy, it was introduced early on - see section 12(1)(g) of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920.

110. Turning to the cases on the Rent Acts to which we were referred, I do not consider that cases on the "residence" requirement for statutory tenants, such as *Skinner*, *Walker v Ogilvy* (1974) 29 P&CR 288 and *Regalian Securities v Scheuer* (1982) 5 HLR 48, are helpful in the present context. The primary issue on these appeals is whether premises are "let as a dwelling" (or licensed for occupation as a dwelling) in circumstances where the occupier has no other home. Those cases were concerned with a different issue, namely whether the tenant was occupying the relevant premises as a residence, which is a different expression, with a different statutory history and a different statutory purpose. But at least as importantly, in each of those cases the tenant had another residence, which was his principal home.

111. The words "dwelling" and "dwelling-house" in the Rent Acts are used in a phrase dealing with the objective purpose of the letting of the premises in question, whereas the word "residence" considered in those cases was used in a phrase dealing with the subsequent use of, and attitude of the occupier to, those premises. Further, in all the cases mentioned in para 110, the tenant had another home, and the court was considering whether the tenant's intermittent use of, or long absence from, the premises concerned, defeated his contention that he "occupie[d] the dwelling-house as his residence", given that he undoubtedly had another home, which even on his case was his principal home. These appeals are concerned with individuals for whom the premises in question would be their only home as they would otherwise be

homeless, and therefore the quality or intensity of their use of the premises is not in issue. What is in issue on these appeals is the effect of the precarious, provisional, and short term nature of their occupation of what is their only accommodation, which was not a feature of the "two-homes" cases on "residence".

112. Even more unhelpful in my view are cases such as *Collier v Stoneman* [1957] 1 WLR 1108, *Swanbrae v Elliott* (1986) 19 HLR 86 and *Freeman v Islington LBC* [2010] HLR 6, which were concerned with the question whether a person was "residing with" a statutory or assured tenant who has died, and therefore had a right to succeed to a statutorily protected tenancy. Not only do many of the problems described in the immediately preceding two paragraphs apply, but, additionally, there are the consequences of the important word "with" which has to be taken into account, and which of course plays no part in the instant case.

113. Previous decisions concerned with the question whether premises were a "dwelling-house" which was "let as a dwelling" under the Rent Acts are potentially more in point. The history of the courts' approach to the expressions was discussed illuminatingly by Wilson LJ in *Pirabakaran v Patel* [2006] EWCA Civ 685, [2006] 1 WLR 3112. As he explained in para 22, "dwelling-house" has been given a broad meaning ever since *Epsom Grandstand Association Ltd v Clarke* [1919] WN 171. However, as in Wilson LJ's discussion in *Pirabakaran* at paras 24-29, almost all of the cases to which we were referred which addressed the question of whether premises were "let as a [separate] dwelling" were concerned with premises let for commercial purposes, but with some residential use. In my view, those cases are of no real assistance in the present case as the issue was very different. Although each case involved someone (normally the tenant) sleeping in the premises concerned, the landlord's argument in almost all the cases was that the premises had been let for a very different purpose.

114. Thus, cases such as *Wolfe* or *MacMillan & Co Ltd v Rees* [1946] 1 All ER 675 involved premises which had been let primarily for commercial use, and the issue was whether the indulgence of the landlord permitting the tenant to sleep on the premises brought the letting within the Rent Acts. The facts did not require the court to consider the quality of the contemplated habitation (to use a neutral word) required for the premises to be "let as a dwelling". Having said that, it is perhaps worth noting that Evershed J made the point in *MacMillan* at 677H that "to sleep on particular premises at night, or to have one's meals upon them by day, or both, ought not ipso facto to have the effect in law of making those premises a dwelling-house … ". In *Martin Estates Co Ltd v Watt* [1925] NI 79, officers who slept in police barracks were held not to be protected by the Rent Acts. However, that was because the barracks had

been let "for the public service", and the court held that the surrounding circumstances and nature of the demised premises made it clear that the purpose of the letting was not as a dwelling. As was explained in the judgment, premises let for use as a prison, or as a hospital, would not be held to be "let as a dwelling" simply because prison officers, or doctors and nurses, slept and ate on the premises, even if that was contemplated at the time of the letting. Again, that is very different issue from that raised in these appeals, because it is ultimately concerned with living accommodation, which was very much ancillary to the purpose of the letting.

115. The issue in such cases was explained by Romer LJ in *Whiteley v Wilson* [1953] 1 QB 77, 85, in these terms:

> "[T]he question in such cases, where the subject-matter of the tenancy is one building used partly as a dwelling-house and partly as a shop, and no purpose is specified in the tenancy agreement, is whether the building should in a broad sense be regarded as a dwelling-house which is partly, or even substantially used for a shop, or on the other hand as a shop which is used in part for residential purposes".

It is not without significance that Romer LJ seems to have regarded "residential purposes" as being effectively synonymous with "dwelling-house let as a dwelling". In the same case, Sir Raymond Evershed MR similarly treated the letting of a dwelling-house as a dwelling as equivalent to "the premises" concerned being "used for residential purposes" at p 83.

Uratemp Ventures v Collins [2001] UKHL 43, [2002] 1 AC 301

116. Although the issue in the House of Lords case of *Uratemp Ventures v Collins* [2001] UKHL 43, [2002] 1 AC 301 concerned the question whether certain premises were a dwelling-house let as a dwelling, the issue was, again, very different from that in these appeals. It was whether a room was precluded from being within the Housing Act 1988 (section 1(1) of which uses the expression "dwelling-house … let as a separate dwelling", obviously taken from the Rent Acts), because the tenant was forbidden to cook in it. The decision of the House of Lords removed some long-standing and artificial distinctions which many people assumed had been built up by the courts over the years (in particular, the quaint notion that a tenancy of a room without washing facilities could be a letting of the room "as a separate dwelling", whereas a tenancy of a room without cooking facilities could not).

117. Further, I must confess to a little confusion as to the precise nature of the ratio of the case - other than the simple point that the prohibition on cooking did not prevent such a room being "a dwelling-house … let as a separate dwelling". Thus, Lord Irvine LC seems to have addressed the question by reference to the composite expression – see para 2. However, Lord Bingham, with whom Lord Irvine and Lord Steyn agreed, approached the issue on the basis that it was whether the room was a "dwelling-house" – see paras 9, 10 and 13. So did Lord Steyn (with whom Lord Irvine and Lord Bingham agreed), who apparently thought it plain that the room had been let as a separate dwelling – see paras 13-15, especially the third sentence of para 13. Lord Millett, with whom Lord Irvine, Lord Steyn and Lord Hobhouse agreed, considered the issue by reference to the expression "let as a separate dwelling" – see paras 30 and 40ff. Although this can be said to represent a divergence of approach, it is fair to say that all their Lordships were concerned with the meaning of "dwelling", whether as part of the composite noun "dwelling-house", or in the expression "let as a separate dwelling" - or both.

118. However, some general guidance was given in *Uratemp*. Lord Steyn said at para 15 that "'dwelling-house' is … a word of wide import … used interchangeably with lodging", and "conveys the idea of a place where somebody lives". He continued:

> "The setting in which the word appears in the statute is important. It is used in legislation which is intended to afford a measure of protection to tenants under assured tenancies. This context makes it inappropriate for the court to place restrictive glosses on the word 'dwelling'. On the contrary, … the courts ought to interpret and apply the word 'dwelling-house' in [the Housing Act 1988] in a reasonably generous fashion."

This observation is supported by Lord Irvine's deprecation in para 2 of "a restrictive interpretation" given that the statutory purpose was "to give some protection to tenants in modest rented accommodation". It is also supported by Lord Bingham in para 10, where he said that a "dwelling-house" "describes a place where someone dwells, lives or resides", and stated that the legislation should be interpreted bearing in mind that it was "directed … to giving a measure of security to those who make their homes in rented accommodation at the lower end of the housing market".

119. Lord Millett took a slightly different approach, saying at para 30 that:

> "The words 'dwell' and 'dwelling' … are ordinary English words, even if they are perhaps no longer in common use. They mean the same as 'inhabit' and 'habitation' or more precisely 'abide' and 'abode', and refer to the place where one lives and makes one's home. They suggest a greater degree of settled occupation than 'reside' and 'residence', connoting the place where the occupier habitually sleeps and usually eats, but the idea that he must also cook his meals there is found only in the law reports."

And in the following paragraph he added this:

> "In both ordinary and literary usage, residential accommodation is 'a dwelling' if it is the occupier's home (or one of his homes). It is the place where he lives and to which he returns and which forms the centre of his existence. Just what use he makes of it when living there, however, depends on his mode of life."

120. Unsurprisingly, on these appeals the respondent Housing Authorities and the Secretary of State relied on Lord Millett's suggestion that "'dwell' and 'dwelling'" … involve a greater degree of settled occupation than 'reside' and 'residence'". However, at least to me, the two types of word do not have this rather subtle distinction: a temporary dwelling is as natural a concept as a temporary residence, and carries the same meaning. Further, I would have thought that, particularly in the context of the Rent Acts and associated legislation, such a subtle distinction between two words which are effectively synonyms is of questionable value in that it is likely to lead to over-subtle distinctions. Indeed, as already mentioned in para 115 above, Evershed MR and Romer LJ seem to have thought that premises were a "dwelling-house let as a separate dwelling" if the principal use was intended to be "residential", using the latter word in its normal way. And in *Beck* at pp 575-576, Evershed MR plainly treated "home", a rather more frequently used word, as a synonym for "residence". And I note that what many people think of as the bible on the topic, *Megarry on The Rent Acts*, treats "residence" as synonymous with "dwelling" when discussing the meaning of "dwelling" in the phrase "let as a separate dwelling" – see 11th edition (1988) pp 109-117.

121. In any event, as a matter of statutory interpretation, in the context of the Rent Acts it seems pretty plain to me that Lord Millett's suggested distinction is demonstrably wrong. As explained briefly in paras 107-111 above, the law relating to "residence" had been conceived and developed up by the courts between 1920 and 1968, so that, as a matter of policy, a degree of intensity

of occupation of the premises (in the case of intermittent use), or physical and mental commitment to the premises (in the case of absence), was required on the part of the tenant before the court was prepared to hold a tenant "resident" in a dwelling-house, and the law as thus developed was incorporated into the statutory scheme in 1968. No such requirements as to the quality of the tenant's use of the dwelling-house were developed in relation to the issue of whether premises were "let as a dwelling"; on that aspect, issues arose either because of the mixture of residential and commercial uses, or because the demised premises lacked an allegedly essential functionality.

122. Furthermore, given the structure of the opening few sections of the Rent Act 1968 (and the Rent Act 1977), as summarised in para 107 above, the draftsman must, in my view, have assumed that a tenant of a tenancy of "a dwelling-house let as a separate dwelling" could lawfully "occup[y] the dwelling-house as his residence". That is because it seems unlikely that he would have envisaged that it would be impermissible for a tenant to "occup[y] a dwelling-house as his residence" if it was a "dwelling-house … let as a separate dwelling". This must logically mean that the draftsman considered that "dwelling" was at least as wide as "residence".

123. That point is reinforced when one considers the two-homes cases such as those referred to in paras 109-110 above, and more fully discussed by Lord Hodge in paras 36-38 of his judgment. In those cases, the occupier was held to have no statutory tenancy, because his use of the premises concerned was insufficient to enable him to establish that he "occupie[d] the dwelling-house as his residence". Yet there was no suggestion in any of those cases that the premises were not a "dwelling-house" or had not been "let as a separate dwelling". Indeed, in *Walker* at p 290, Orr LJ specifically referred to the premises in that case as "the dwelling-house – that is the flat".

Conclusion on the Rent Act cases

124. In my view, therefore, even in the absence of the concerns expressed in *Spath Holme* as to the appropriateness of relying on the meaning of words or expressions in predecessor legislation, only limited assistance can be safely gathered from the history of the Rent Act legislation or the decided cases on the meaning of those statutes, as to the meaning in 3 of PEA 1977 of the expression "let as a dwelling" or licensed for occupation as a dwelling.

125. However, para 15 of Lord Steyn's opinion in *Uratemp* is valuable to the extent that it emphasises that (i) "dwelling" is an ordinary English word, (ii) it is of "wide import", and (iii) in the Rent Act type of context, it is to be

interpreted generously. Lord Millett's suggestion in the same case that "dwelling" implies a more permanent meaning than "residence" may be said to be inconsistent with the latter two observations, but, for the reasons I have given, it seems to me to be wrong as a matter of ordinary language as well as in the context of the Rent Acts.

The Protection from Eviction Act 1977

126. The effect of section 3(1), (2A) and (2B) of PEA 1977 is to render it an offence for the owner of premises, which are "let as a dwelling", or "occupied as a dwelling under a licence", albeit subject to exclusions identified in section 3A, to take possession of the premises "otherwise than by proceedings in court", where the occupier "continues to reside in the premises", provided, according to subsection (2), that that occupation is lawful.

127. As mentioned in para 120 above in relation to the wording of the Rent Acts, the wording of section 3(1) of PEA 1977 indicates that the concept of "dwelling" is at least as wide as "residing", as the draftsman appears to have proceeded on the basis that it would be lawful to reside in any premises let as a dwelling. Indeed, I consider that the structure of section 3(1) of PEA 1977 makes the point even more clearly than sections 1 and 3 of the Rent Act 1968 (or sections 1 and 2 of the Rent Act 1977). The words "continues to reside" in section 1(1)(a) of PEA 1977 seem to me plainly to assume that the "premises let as a dwelling-house" will have been resided in at the inception of the tenancy, and therefore *ex hypothesis*, that they can lawfully be resided in. Furthermore, PEA 1977 has no equivalent to section 3(2) of the Rent Act 1968 (see para [11] above), so "reside" must be assumed to have its ordinary meaning, and is not encrusted with the case-law to which section 3(2) of the 1968 Act makes reference. Thus, any premises let as a dwelling for the purpose of section 1(1) can be resided in for the purpose of section 1(1), *ergo* a "dwelling" has at least as wide a meaning as "residence". This is not called into question by section 3(2) of PEA 1977, which appears to me to be included simply to exclude unlawful occupiers from the protection of PEA 1977.

128. This conclusion is also supported by section 5 of PEA 1977, which requires a notice to quit premises let as a dwelling (or a notice to determine a licence to occupy premises as a dwelling) to give at least four weeks notice, but which makes no reference as to how the premises are occupied - whether as a residence or otherwise. It would be curious if any premises, other than those subject to an excluded tenancy or excluded licence, which were lawfully

occupied as a residence, were not subject to that provision, which again suggests that the meaning of "dwelling" is at least as broad as "residence".

Other cases on statutory provisions referring to "residence" and "dwelling"

129. As Lord Hodge rightly implies in para 51 in relation to the appellants' argument based on the inclusion of the word "dwelling" in section 130 of the Social Security Contributions and Benefits Act 1992, one has to be careful before taking into account statutes in different fields even where they use the same words. However, although they are of limited value, I consider that observations made in two House of Lords cases, *Railway Assessment Authority v Great Western Railway Co* [1948] AC 234 and *Mohamed v Hammersmith and Fulham LBC* [2001] UKHL 57, [2002] AC 547, about the normal meaning of the words "residing" and "dwelling" are of some relevance to the present case. As to *Railway Assessment*, the fact that "dwelling" and "dwelling-house" are somewhat archaic expressions suggests that real help may be obtained from a highly authoritative source considering their meaning at a time when they were in more current usage. And the fact that *Mohamed v Hammersmith* is a House of Lords case concerned with accommodation provided under section 188 of the 1996 Act means that it is at least worth considering in another case involving the same provision.

130. *Railway Assessment* concerned the expression "occupied as a dwelling-house" in the context of a rating statute. The property in question was a hostel in Didcot, which had a canteen and many furnished cubicles, in which railway company employees were permitted to live there while they were temporarily working away from "their home stations" - see at pp 236-237. Although it is a rather different context from the present, Lord Thankerton (who gave the only reasoned opinion) made it clear at p 238, that he thought that the words "occupied as a dwelling-house" must be given "their ordinary meaning". He went on to explain that the accommodation in that case had been provided for staff while they were working far from home, because there was insufficient "lodging-house accommodation at Didcot". He then said that "[w]hile they are at their work, these members of the staff may properly be said to dwell or reside in the hostel, or to inhabit the hostel". On three subsequent occasions at pp 238-239, he again used the expression "dwell or reside" or "residence or dwelling", treating the concepts of residing and dwelling as meaning much the same thing. At p 240, Lord Thankerton rejected the view that the occupation by the employees was not as a dwelling because it was too transient and their families lived elsewhere, saying that "the fact that the occupants of the cubicles do reside in the hostel through all the periods of their duty, and do not leave the hostel until their employment at Didcot terminates, provides a sufficient element of permanence". He added

that he could not "think that the presence of families and household goods is an essential element".

131. It appears to me that this decision provides a measure of support for a number of propositions. First, and perhaps least relevantly for present purposes, it shows the width of the term "dwelling-house", as used in normal parlance. Secondly, it confirms the notion that the normal concept of "dwelling" includes a relatively temporary residence - even where the premises concerned consist of a room in an employees' hostel and the occupier has a permanent home where his family remains. Thirdly, the reference to "lodging-house accommodation" strikes the same note as Lord Steyn's observation in *Uratemp* (see para 118 above). Fourthly, the discussion supports the notion that, as a matter of ordinary language, the concepts of dwelling and residing are very similar, and can often be used interchangeably (consistently with the way in which Evershed MR and Romer LJ expressed themselves in *Whiteley*).

132. In relation to the ordinary meaning of the word "residence", I consider that the decision of the House of Lords in *Mohamed v Hammersmith* is of assistance. That case is also rather more in point on the facts than any of the other cases so far discussed, as the issue was whether a person was "normally resident" (for the purposes of section 199 of the 1996 Act) in accommodation provided under section 188 of the 1996 Act, the very section under which accommodation was provided to the appellants in the instant appeals.

133. Having said that "words like … 'normal residence' may take their precise meanings from [their] context", Lord Slynn (who gave the only reasoned judgment) said this in para 18:

> "[T]he prima facie meaning of normal residence is the place where at the relevant time the person in fact resides. … So long as that place where he eats and sleeps is voluntarily accepted by him, the reason why he is there rather than somewhere else does not prevent that place from being his normal residence. He may not like it, he may prefer some other place, but that place is for the relevant time the place where he normally resides. If a person, having no other accommodation, takes his few belongings and moves into a barn for a period to work on a farm that is where during that period he is normally resident, however much he might prefer some more permanent or better accommodation. In a sense it is 'shelter' but it is also where he resides. Where he is given interim accommodation by a local housing authority even more clearly is that the place where for

> the time being he is normally resident. The fact that it is provided subject to statutory duty does not, contrary to the appellant authority's argument, prevent it from being such."

134. As I read those observations, Lord Slynn was saying that a person provided with temporary accommodation under section 188 of the 1996 Act, as a matter of ordinary language "normally resides" in that accommodation, even though it is provided to her on a temporary basis by a housing authority, because she lives there and because she has no other home. To my mind, it follows that for the same sort of reasons, the person may, as a matter of normal language be said to be dwelling in such accommodation, which would naturally be described as a dwelling-house.

Conclusions on the first issue

135. The purpose of section 3 of PEA 1977 is to prevent a person who has been lawfully living in premises, which have been let as a dwelling or licensed to be occupied as a dwelling, being evicted without a court order, and the purpose of section 5 is to ensure that, where premises have been let as a dwelling, or licensed to be occupied as a dwelling, on terms which require notice to vacate, the occupier must be given at least 28 days' notice. Plainly, it seems to me, these sections should not be accorded an unnaturally narrow effect; indeed, I think one should lean in favour of a wide, rather than a narrow, meaning when it comes to deciding the ambit of these sections. They do not represent a substantial incursion into the property rights of the owners of premises, and they reflect a policy that people who have been lawfully living in premises should not be summarily evicted or locked out. Because of the nature of the rights accorded by these provisions and their aim of protecting people against the inconvenience and humiliation of being deprived of their homes summarily, one would expect the two sections to have a wide, rather than a narrow, meaning, a conclusion supported by the passages which I have referred to in the opinions in *Uratemp* in para 118 above.

136. I do not consider that it would be appropriate to exclude from the ambit of those sections accommodation, whether a house or flat or room, which has been lawfully occupied by a person (or families) as her (or their) only home, simply because her (or their) occupation is short term, provisional or precarious. It is a perfectly natural use of the word to describe a person as "dwelling", or indeed "residing", in accommodation provided by a housing authority under section 188 of the 1996 Act, or occupying those premises as a dwelling-house, even though she may be there for a short term on a precarious basis. Of course, it would be wrong to say that, simply because

she has no other dwelling, the accommodation must be that person's dwelling: a person does not need to have a dwelling. But, equally, as a matter of language, the fact that the person would be otherwise homeless makes it all the more difficult to contend that it is an inappropriate use of language to describe the accommodation provided to her under section 188 as a dwelling, even if it was on a temporary basis, pursuant to a statutory duty. To describe a house flat or room as the occupier's temporary or short term dwelling is a perfectly natural use of language.

137. Accordingly, the fact that the arrangement under which a person is permitted to occupy premises as her only habitation is short term and precarious does not seem to me to prevent them being let "as a dwelling-house" or occupied "as a dwelling", as a matter of ordinary language. So long as the arrangement persists, the premises are that person's "lodging" and the "place where [she] lives", to quote Lord Steyn, or "the place where [she] lives and to which [she] returns and which forms the centre of [her] existence" to quote Lord Millett, in *Uratemp*. The mere fact that the landlord or licensor has the right to substitute other premises on short notice does not seem to me to alter that conclusion: unless and until that right is exercised, the premises are the occupier's lodging, where she lives and to which she returns. If that were not so, it would have provided a very simple method for private sector landlords to avoid the incidence of the Rent Acts. I draw some support for this conclusion from the observations of Lord Thankerton in *Railway Assessment* and of Lord Slynn in *Mohamed v Hammersmith*, in addition to the observations in *Uratemp.*

138. Of course, the nature of the premises subject to the letting may be such that it might not be natural to refer to them as a dwelling or dwelling-house (as illustrated by the cases considered in paras 113-115 above). However, apart from such cases where the nature of the premises precludes them being described as being let or occupied as a dwelling, I find it hard to see why the relatively temporary nature of the occupation, or the fact that the occupier can be required to shift to other premises on a day's notice, prevents premises being let or licensed "as a dwelling" or "occupied as a dwelling", or indeed "occupied as a residence", particularly where the tenant or licensee has no other home. Indeed, many might think that those who are housed under section 188 of the 1996 Act are the sort of people who particularly need the protection of PEA 1977, given that, whatever the merits of their claims under Part 7 of the 1996 Act, they are likely to come from the more vulnerable sectors of society.

139. In my opinion, the view that people housed under section 188 of the 1996 Act are entitled to the benefit of sections 3 and 5 of PEA 1977 receives considerable support from section 3A of PEA 1977, which identifies the

arrangements which are excluded from the ambit of section 3. The exclusions in subsections (6)–(8) appear to me to be particularly significant for present purposes. They include a tenancy or licence (i) "if it was granted as a temporary expedient to a person who entered the premises … as a trespasser", (ii) if it is for a holiday only, (iii) if it is gratuitous (iv) "if it is granted in order to provide accommodation" for asylum seekers and their families "under Part VI of the Immigration and Asylum Act 1999", or (v) "if it confers rights of occupation in a hostel, within the meaning of the Housing Act 1985, which is provided by [certain defined authorities]". These are all types of licences which need not have been excluded from the ambit of PEA 1977 if it did not apply to short term, precarious and/or charitable arrangements, and so they strongly support my conclusion. I am unimpressed by the point that some of these licences or tenancies could last a long period. First, that point does not apply to categories (i) and (ii). Secondly, the fact that the arrangement in categories (iv) and (v), or indeed category (iii), may continue for some time in a few cases is not really the point, as one is normally concerned with the purpose of the arrangement in question when it started, and almost all such arrangements would be expected to be short term. Indeed, it may well be that interim accommodation provided under Part 7 of the 1996 Act will occasionally be occupied for a long time – eg because the appeal process is protracted.

140. I was initially attracted by the argument developed in para 33 of Lord Hodge's judgment, that, because a person who is temporarily housed by a housing authority under Part 7 of the 1996 Act, while inquiries are pending, should be treated as "homeless" for the purpose of that Act, he can and should be treated as not being provided with a "dwelling", or indeed a "residence" under PEA 1977. However, on reflection, it appears to me that this does not involve a proper approach to statutory interpretation. As already mentioned, the fact that "dwelling' is given a certain meaning in the 1996 Act (whether in the statute or by the court) does not entitle that meaning to be simply applied to another Act, namely PEA 1977, and it appears to me to be a fortiori that the fact that someone is "homeless" for the purposes of one Act does not mean that she cannot have a "dwelling" or indeed a "residence" for the purpose of PEA 1977.

141. Further, as already mentioned, the House of Lords in *Mohamed v Hammersmith* accepted that, as a matter of ordinary language, the occupier of accommodation provided under section 188 of the 1996 Act would be "normally resident" in that accommodation, and therefore was "normally resident" for the purposes of section 199 of the 1996 Act. It seems to me that, if a person occupying accommodation provided under section 188 of the 1996 Act is "normally resident" in that accommodation for the purposes of another provision in the same Act, then, to put it at its lowest, it can scarcely be

inconsistent with section 188 to say that she "continues to reside in" the accommodation for the purposes of another Act. And, if she resides for the purposes of section 3 of PEA 1977, as was envisaged when her tenancy or licence was granted, then, for the reasons already given, it would seem to follow that the premises must have been let as a dwelling or licensed for occupation as a dwelling.

The effect of previous Court of Appeal decisions on the issue

142. The Court of Appeal in previous decisions on the interrelationship of Part 7 of the 1996 Act and PEA 1977 had come to a different conclusion - see *Mohammed v Manek and Kensington and Chelsea LBC* (1995) 27 HLR 439 and *Desnousse v Newham LBC* [2006] QB 831. It is argued by the respondent Housing Authorities and the Secretary of State that we should not disturb the effect of those decisions, and therefore dismiss these appeals, even if we would not otherwise have done so, on the ground that Parliament has amended PEA 1977 and re-enacted the earlier homelessness legislation in the 1996 Act, on terms which were consistent with those decisions. However, it is accepted that there is no specific statutory provision which demonstrates Parliamentary confirmation or assumption that those decisions were correct.

143. In my view, where, as here, Parliament has not specifically enacted any legislation which shows that it must have assumed or accepted that the law as stated by the Court of Appeal is correct, it is not safe in practice or appropriate in principle to draw the conclusion that the present legislation bindingly assumes sub silentio that the law is as the Court of Appeal had decided. Parliament must be taken to know not only that the Court of Appeal has decided as it has, but also that the House of Lords, or now the Supreme Court, could overrule the Court of Appeal. It would, in my view, be dangerous both in practice and principle, for the courts to start "second-guessing" the legislature. Of course, where it is clear that, in subsequent legislation, Parliament has expressly, or even impliedly, accepted clearly the correctness of the Court of Appeal decision, or adopted the decision, different considerations are very likely to apply.

144. I note what Lord Carnwath says about the principle in *Barras v Aberdeen Sea Trawling and Fishing Co Ltd* [1933] AC 402 in paras 79-87. If Parliament has re-enacted a statutory provision in identical words, after it has been interpreted as having a certain meaning by the courts of record, then there is, I accept, some attraction in the notion that the Parliamentary intention was that the provision should have that meaning - particularly if (as here) the interpretation has been confirmed by the Court of Appeal more than once. The issue is similar to that discussed in paras 104-106 above, and I am far

from convinced that the principle can be regarded as correct, at least in the absence of some additional factor in favour of maintaining the interpretation previously adopted, in light of observations in *Farrell v Alexander* [1977] AC 59. In that case, the unsuccessful respondent argued that a particular statutory provision (prohibiting the charging of premiums for the assignment of Rent Act tenancies) had been interpreted by the Court of Appeal in *Remmington v Larkin* [1921] 3 KB 404, and that, in the light of the *Barras* doctrine, the fact that the provision had been subsequently re-enacted in much the same way more than once, the interpretation in *Remmington* had been effectively adopted by Parliament.

145. Lord Wilberforce thought that *Remmington* could be distinguished, but, after referring to *Barras*, he said at p 74, that he had "never been attracted by the doctrine of Parliamentary endorsement of decided cases", which he described as "based upon a theory of legislative formation which is possibly fictional". He added that "if there are any cases in which this doctrine may be applied …any case must be a clear one". Lord Dilhorne (who thought that *Remmington* could not be distinguished and should be overruled), while not referring expressly to *Barras* doctrine, said at p 81, that while "it may be that … the decision in *Remington* escaped the notice of the draftsman, … our task is to give effect to the intention of Parliament" which involved considering "the words used by Parliament". Lord Simon of Glaisdale also thought that *Remmington* could not be distinguished and should be overruled, and at pp 90-91 he was critical of the *Barras* doctrine, saying at p 91:

> "To pre-empt a court of construction from performing independently its own constitutional duty of examining the validity of a previous interpretation, the intention of parliament to endorse the previous judicial decision would have to be expressed or clearly implied. Mere repetition of language which has been the subject of previous judicial interpretation is entirely neutral in this respect—or at most implies merely the truism that the language has been the subject of judicial interpretation for whatever (and it may be much or little) that is worth."

Lord Edmund-Davies thought that *Remington* had been rightly decided, but that the statutory language had since significantly altered, and he was accordingly concerned with a different doctrine, namely the assumption that in enacting consolidating legislation Parliament did not intend to change the law – see at 94. Only Lord Russell (who dissented) appears at pp 101-103 to have assumed that the *Barras* doctrine was correct.

146. Since then, in *A v Hoare* [2008] UKHL 6, [2008] 1 AC 844, para 15, Lord Hoffmann followed an earlier decision of the House of Lords, *Lowsley v Forbes* [1999] 1 AC 329, which he explained in these terms:

> "In that case, the Court of Appeal in 1948 (*W T Lamb and Sons v Rider* [1948] 2 KB 331) had given a provision of the Limitation Act 1939 an interpretation which the House thought was probably wrong. But Parliament had then enacted the Limitation Amendment Act 1980 in terms which made sense only on the basis that it was accepting the construction which had been given to the Act by the Court of Appeal."

Lord Hoffmann also said that "[t]he value of such previous interpretations as a guide to construction will vary with the circumstances."

147. In my opinion, in the light of the views expressed in *Farrell* and in *A v Hoare*, before this Court could invoke the *Barras* principle, it would almost always require something more than the mere re-enactment of a previous statutory provision which has been interpreted by the Court of Appeal. Like Lord Simon, I am concerned about the constitutional propriety of this Court simply invoking what it regards as a judicial misreading of an earlier statute to justify a decision that a current statute means something other than this Court thinks it means. However, as it is not necessary to decide the point on these appeals, I would not wish to be taken to be saying that it could never be done.

148. I have even greater reservations about the so-called "customary meaning" rule. As just mentioned, a court should not lightly decide that a statute has a meaning which is different from that which the court believes that it has. Indeed, so to decide could be said to be a breach of the fundamental duty of the court to give effect to the will of parliament as expressed in the statute. Legal certainty and settled practice, referred to by Lord Carnwath in paras 94-97 are, as I see it, an aspect of customary meaning. Although Lord Bridge expressed himself as he did in *Otter v Norman* [1989] AC 129, 145-6 (as quoted by Lord Carnwath in para 96), neither *Barras* nor *Farrell* was cited to him, and he relied on the fact that "for many years, many landlords and tenants have regulated their relationships on [the] basis that" observations in an earlier decision of the Court of Appeal were right. Even on that basis, I would wish to reserve my position as to the correctness of Lord Bridge's *obiter* observations.

149. Turning to these appeals, there is no question of PEA 1977 having been re-enacted since the decisions in *Mohammed v Manek* or *Desnousse*, and

therefore the *Barras* principle cannot apply. Even if there is a customary meaning rule and twenty years is a long enough period to justify invoking it, I do not consider that it should apply here. One can see the force of the customary meaning rule where private individuals and companies have made dispositions or entered into agreements in the reasonable belief that the law was as laid down by the Court of Appeal – as Lord Bridge said in *Otter*. However, it is much harder to justify invoking the rule in circumstances where a housing authority may have assumed that the law is as laid down by the Court of Appeal in connection with an arrangement which the authority was in any event required to enter into by statute. A housing authority can hardly claim to have complied with its duty to provide temporary accommodation under section 188 of the 1996 Act, only because it believed that the occupier of the accommodation could not invoke sections 3 or 5 of PEA 1977. I do not suggest that no housing authority could identify any action that it had (or had not) taken in the belief that PEA 1977 did not apply to licences such as those granted to the appellants in these cases, but I do not believe that any such action (or inaction) would be such as to justify invoking the customary meaning rule.

Conclusion

150. For these reasons, despite the clear and impressive reasoning in his judgment, I have reached a different conclusion from Lord Hodge.

151. To many people this may appear an unattractive result, as it does not seem obviously sensible for homeless individuals, who are temporarily housed on an interim basis, while the housing authority makes enquiries as to what rights if any they may have, to be afforded protection under PEA 1977. Such a conclusion would inevitably increase the pressure on already hard-pressed housing authorities, many of whom are faced with a demand for residential accommodation which substantially exceeds the supply, which places a great administrative burden on them. However, the consequences of my view as to the effect of PEA 1977 would, I suspect, be more of an exacerbating nuisance rather than a far-reaching disaster. And, while I see the good sense of PEA 1977 not applying to licensees such as the appellants in these appeals, it does not seem to me obvious that they should not be able to benefit from PEA 1977.

152. Even if that is wrong, having interpreted PEA 1977, and noted Parliament's exercise of its power to identify which short-term, precarious and charitable rights of occupation should be excluded from protection, I consider that the correct, if to some people a rather unpalatable, conclusion is that individuals

such as the appellants in these appeals are entitled to the benefit of sections 3 and 5 of the Protection from Eviction Act 1977.

153. The contrary view is to some extent based upon policy considerations. I accept that, when considering the proper interpretation of a statute, a court can, and where appropriate should, take into account policy considerations, and I sympathise with the view that policy considerations favour dismissing these appeals, as I have indicated in para 151 above. However, judges have to be very careful before adopting an interpretation of a statute based on policy considerations, and should only to do so where those considerations point clearly in one direction. In this case, it seems to me to be particularly difficult to justify dismissing the appeal on policy grounds, given that (i) it involves departing from the natural meaning of the relevant statutory words, (ii) the policy argument is not overwhelming, (iii) there are policy considerations pointing the other way, and (iv) Parliament has apparently considered the policy - in section 3A.

154. Furthermore, when it comes to relying on policy in a case of statutory interpretation, I would respectfully refer to the observations of Lord Simon and Lord Diplock in *Maunsell v Olins* [1975] AC 373, 393 which, although in a dissenting judgment (as might be appreciated from the way in which they are expressed), were cited with apparent approval (see at p 388) by Lord Bingham in *Spath Holme* at p 385:

> "For a court of construction to constrain statutory language which has a primary natural meaning appropriate to its context so as to give it an artificial meaning which is appropriate only to remedy the mischief which is conceived to have occasioned the statutory provision is to proceed unsupported by principle, inconsonant with authority and oblivious of the actual practice of parliamentary draftsmen."

155. As to the second issue discussed by Lord Hodge in paras 61-71 of his judgment, it would not, on my view on the first issue, arise. However, on the basis of the view reached by the majority of the Court on the first issue, the second issue does arise. On that basis, I agree with Lord Hodge's reasoning and conclusion on the second issue.

156. For my part, therefore, for the above reasons and for those much more economically expressed by Lady Hale, I would have allowed these appeals on the first issue, the appellants' reliance on the Protection from Eviction Act

1977, but I would dismiss these appeals on the second issue, namely their reliance on article 8 of the European Convention on Human Rights.

LADY HALE

157. The issue in this case is the meaning of the words "licensed as a dwelling house" in section 3(1) of the Protection from Eviction Act 1977, when read with section 3(2B) of that Act, which provided for the inclusion of licences in the protection given by that section (the relevant provisions are helpfully set out in the judgment of Lord Hodge at para 17). It is agreed that those words refer to the purpose for which the premises in question were licensed to the licensee and not to the purpose for which she actually occupied them (see the judgment of Lord Hodge at para 23). In these cases, however, it is difficult to see a distinction between the two: JN and FI and their children used these premises for the purpose for which they were licensed to occupy them. The question is what that purpose was.

158. There can be little doubt that the premises in each case constituted a "dwelling house". As it happens, both were self-contained premises, not shared with others when they were licensed. The courts have always taken a broad view of what constitutes a "dwelling house". It has long been held that a room without bathroom facilities may be a "dwelling house … let as a separate dwelling" for the purpose of section 1 of the Housing Act 1988 and its predecessors. In *Uratemp Ventures v Collins* [2001] UKHL 43, [2002] 1 AC 301, the House of Lords held that a room in an hotel where cooking was forbidden nevertheless constituted a "dwelling house … let as a separate dwelling" for the same purpose. There is no requirement in section 3 of the 1977 Act that the premises be let or licensed as a "separate" dwelling.

159. When a dwelling house is let or licensed to an individual to occupy, albeit for what may turn out to be for a very short time, considerable work has to be done in order to conclude that the purpose of the letting or licence is not to use the premises as a dwelling. Counsel for the local authorities in question, and for the Secretary of State, have put in considerable work in order to persuade us that the words must be read in the light of the construction given to similar (but not identical) wording in other provisions in the Rent Acts. For the reasons given by Lord Neuberger, which I need not repeat, I do not find any of that work persuasive, let alone convincing. I share his view that "dwelling" is at least as wide as "residing" and thus must respectfully disagree with the view expressed by Lord Millett (but not by the other members of the appellate committee) in *Uratemp* that "The words 'dwell' and 'dwelling' … suggest a greater degree of settled occupation than 'reside'

and 'residing'". That is, at it seems to me, to confuse two rather different meanings of the verb "to dwell". I "dwell *on*" a subject when I fix my attention, write or speak on it length (as we sometimes have to do in our judgments). I "dwell *in*" a place when I live there. In my view, "residing" and "dwelling" and "living" somewhere generally mean the same thing, although all may be distinguished from "staying".

160. Unlike holiday-makers, it is hard to describe these families as simply "staying" in their accommodation. If, as the House of Lords held in *Mohamed v Hammersmith and Fulham LBC* [2001] UKHL 57, [2002] AC 547, a person can be "normally resident" in accommodation provided under section 188 of the 1996 Act, because he lives there for the time being and has nowhere else to go, I find it hard to see how he is not also provided with that accommodation as a "dwelling". As Lord Neuberger demonstrates, a person can dwell, reside or live in premises where his occupation is not only temporary but precarious in the extreme. The purpose of the 1977 Act was not to provide security of tenure: that was done in other ways. The purpose was to prevent landlords resorting to such self-help as is lawful to rid themselves of tenants (and now licensees) who would not leave voluntarily.

161. Nor, with respect, do I find persuasive any of the three matters relied upon by Lord Hodge in reaching a contrary conclusion. He points, first, to the statutory context of the licence, as a purely temporary measure while the local authority pursue their statutory inquiries. We are, of course, construing section 3 of the 1977 Act and not Part 7 of the 1996 Act. That statutory context cannot, of course, have been in the contemplation of the legislature when the provisions with which we are concerned were first enacted. The Protection from Eviction Act 1977 and the Housing (Homeless Persons) Act 1977 received the Royal Assent on the same day. But the Protection from Eviction Act was a pure consolidation Act, bringing together provisions which had first been enacted, in the case of the requirement of four weeks' notice to quit in section 5 of the 1977 Act, in section 16 of the Rent Act 1957, and in the case of section 3 of the 1977 Act with which we are principally concerned, in Part III of the Rent Act 1965. At that time, such duty as there was to provide temporary accommodation for people in urgent need of it was contained in section 21(1)(b) of the National Assistance Act 1948. There was nothing to prevent a local authority separating homeless families by receiving the children into care and leaving the adults to fend for themselves. The Housing (Homeless Persons) Act 1977 was intended to bring in a new regime in which specific and carefully modulated duties were owed to particular classes of homeless persons.

162. People in temporary accommodation are still treated as "homeless" for the purpose of what is now Part 7 of the 1996 Act while the local authorities'

enquiries are persisting. (This is despite the fact that they have an express licence to occupy the accommodation with which they are provided, and so would fall outside the definition of "homeless" in section 175 of the Act - unless that definition is directed to the time when they present themselves to the local authority.) That does not mean that they do not live in the accommodation provided for the time being or that they are not provided with that accommodation for that purpose.

163. Many (indeed one suspects the great majority) of those provided with temporary accommodation under Part 7 of the 1996 Act are in receipt of housing benefit. The whole system of funding local authorities' duties under the 1996 Act would fall apart if housing benefit were not available to those who cannot afford to pay for the (often expensive) temporary accommodation arranged for them. Section 130 of the Social Security Contributions and Benefits Act 1992 provides that a person is entitled to housing benefit if he is "liable to make payments in respect of a dwelling … which he occupies as his home". If the temporary and transient nature of his occupation is not sufficient to prevent the dwelling being his home for this purpose, I find it very difficult indeed to see how that same temporary and transient nature is sufficient to prevent the licence under which he is permitted to occupy the dwelling also being for the purpose of his occupying it as his home, that is, dwelling or residing or living rather than merely staying there.

164. Secondly, Lord Hodge relies upon the terms of the licences in question. But these cannot take something which would otherwise fall within the statutory protection outside it. Calling a tenancy a licence does not make it a licence if in fact it is a tenancy: *Street v Mountford* [1985] AC 809. Reserving the right to change the accommodation provided at little or no notice does not prevent the accommodation being provided as a home if that is what it is. Otherwise, as Lord Neuberger points out, it would have been extremely easy for unscrupulous landlords to avoid the effect of the 1977 Act and its predecessor.

165. In this context, I am puzzled by what appears to be the generally accepted view that the protection of section 3 of the 1977 Act *will* apply once the local authority have accepted that they owe the family the "full housing duty" in section 193(2) of the 1996 Act. But the existence of that "full housing duty" is a quite separate matter from the terms on which the family occupy their accommodation. They may well remain in exactly the same accommodation on exactly the same contractual terms thereafter. There may well be no new letting or no new licensing for some time. Their occupation of those particular premises is just as precarious as before. The full housing duty will come to an end if they refuse an offer of suitable accommodation elsewhere. So can it be said that the purpose for which the premises were let or licensed has

changed just because the nature of the local authority's duty has changed? Even if that could be said, the contractual terms of the tenancy or licence cannot be determinative of its purpose.

166. Thirdly, Lord Hodge relies upon the unfortunate practical consequences if section 3 is held to apply to temporary accommodation provided under Part 7 of the 1996 Act. Counsel before us disagreed about how real the problems would in fact be; but we can, I think, take it for granted that it would indeed make life more difficult for hard-pressed housing authorities who are having to cope with increasing numbers of homeless persons and diminishing resources with which to do so. However, as Lord Hodge himself acknowledges, this would not by itself be determinative. The answer to the practical problems is a properly tailored legislative exception, as has already been provided for some other situations in section 3A of the 1977 Act.

167. I fear that I am also unimpressed by the argument that we should not disturb what has been understood to be the law since the decision of the Court of Appeal in *Mohammed v Manek and Kensington and Chelsea LBC* (1995) 27 HLR 439, followed in *Desnousse v Newham LBC* [2006] QB 831. There is no question of Parliament having passed legislation on the basis that the law as stated by the Court of Appeal is correct. The 1977 Act has not been repealed and re-enacted so as to invoke the principle in *Barras v Aberdeen Sea Trawling Co Ltd* [1933] AC 402. The most that can be said is that Parliament might have amended the 1977 Act so as to reverse or modify the Court of Appeal's decision, if it did not like it, but has not done so. That comes nowhere near an expression of Parliamentary approval of it. Parliament can always legislate to change a decision of the higher courts should it wish to do so, but no conclusions can be drawn from the fact that it has not. There must be many, many decisions which the Parliament of the day finds surprising, inconvenient or downright wrong, but has done nothing to correct. The reasons for inaction may range from ignorance, indifference, lack of Parliamentary time or Whitehall resources, to actual approval. Moreover, Parliament's failure to act tells us nothing about what Parliament intended when the legislation was passed, which is what this court must decide. Parliament must, like everyone else, be taken to understand that a Court of Appeal decision may always be overturned on appeal to this court. (Of course, there are occasions when Parliament has specifically legislated on the basis that a Court of Appeal decision is correct, but the higher court has still been prepared to hold that it was incorrect: see *Bakewell Management Ltd v Brandwood* [2004] UKHL 14, [2004] 2 AC 519.)

168. I also share Lord Neuberger's reservations about the "so-called customary meaning rule". In *In re Spectrum Plus* [2005] UKHL 41, [2005] 2 AC 680, the House of Lords was not deterred from over-ruling a decision of a highly

respected High Court judge as to the effect of the wording of a particular debenture in common use, despite the fact that his decision had stood and been relied upon by the banks for many years. The banks, like anyone else, must be taken to know that the decisions of the lower courts are liable to be over-turned on appeal, even years after the event, if they are wrong. They cannot be regarded as definitely settling the law or have, as Lord Nicholls put it, lulled the banks into a false sense of security (para 43). In this case, there can be no question of the local authorities' relying upon the Court of Appeal's decisions. Their duties towards the homeless remain the same, whether or not the 1977 Act applies to the accommodation arrangements they make. They still have to go on fulfilling those duties. Unlike the banks in *In re Spectrum Plus*, there is nothing they can do about it, and they have not been lulled into a false sense of security.

169. In agreement with Lord Neuberger therefore, to whose judgment this is merely a footnote, I would therefore allow these appeals on the first issue. That being the case the second issue does not, in my view, arise.