Housing Team Legal Bulletin

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GARDEN COURT NORTH CHAMBERS of IAN MACDONALD QC

Pinnock, Proportionality and Practice

Hounslow LBC v Powell; Leeds CC v Hall; Birmingham CC v Frisby [2011] UKSC 8 judgment

The Supreme Court has today delivered judgment in three appeals relating to the practical application of the principles established in *Manchester CC v Pinnock* [2010] UKSC 45 more. Ms Powell was a non-secure tenant placed in accommodation pursuant to Hounslow's duties under Part VII Housing Act 1996; Mr Hall and Mr Frisby were introductory tenants.

The basic principle accepted by the Court in *Pinnock* remains good. Article 8 requires that whenever a court ' considers a claim for possession brought by a public authority landlord it is entitled to consider whether the order sought would be necessary and proportionate. This principle applies as much to non-secure or introductory tenants as it does to a demoted tenant like Mr Pinnock.

Lords Hope and Phillips (with whom the other 5 justices agreed) considered the practical issues which were likely to require resolution in such cases. It was held that:

(1) In introductory tenancy cases there is no need to give detailed reasons as to the basis on which possession is being sought by including such reasons in the Particulars of Claim, given that there is already a statutory duty to give reasons at the stage of the serving of the s128 notice.

(2) In the case of non-secure tenancies however, there is an obligation on authorities to notify a tenant of the basis on which she is to be evicted, although that detail need not be pleaded or supplied prior to the service of the notice to quit as long as it is provided at a stage which gives the tenant the chance of being able to raise a proportionality defence. The opportunity to give a more detailed practice direction was declined and considered something possibly better left to a formal Practice Direction attached to the CPR.

(3) The county court judge only needs to consider proportionality if it is raised by the occupier. Such a defence must be 'seriously arguable'. The Court appeared at pains to point out that this would be a high threshold and that it would only be in the rare case that that test would be satisfied. Great weight would be attached to the fact that local authorities hold housing stock for the benefit of the community and the court is not best equipped to make decisions about housing management.

(4) The question for the court would then be whether eviction would be a proportionate means of achieving a legitimate aim.

(5) As to legitimate aims, the fact that the authority was seeking to vindicate property rights, and that it was seeking to comply with its public law duties to manage housing stock were, when taken together, likely to constitute 'legitimate aims' in virtually every case.

(6) The Court was then concerned with the occupier's personal circumstances, and any relevant factual objections she may raise – and in the light of the view it took thereof, whether eviction was lawful and proportionate.

(7) As to factual disputes between the parties, and in cases of alleged anti social behaviour, the authority is *not* required to be able to prove that such incidents occurred; rather (applying *R(McLellan) v Bracknell Forest DC* [2002] QB 1129) the question is whether it is in all the circumstances reasonable for the local authority to proceed to terminate the tenancy.

(8) The approach to proportionality set out in *Huang v SSHD* [2007] UKHL 11 ought not be applied directly in possession claims where Article 8 is raised, so that there would *not* be a need for the court ought to

balance the needs of an individual tenant against those of the local authority, and to consider for example whether the local authority's reason for seeking possession was relevant in the particular factual context. The two legitimate aims described above at (5) should be taken for granted and it is against them that the question of proportionality must be measured.

(9) In introductory tenancy cases, section 127(2) Housing Act 1996 (which appears to require the court to make an order if the procedural requirements set out in s128 are met) can be read in such a way as to permit the court to decline to make a possession order if the provisions of Article 8 are not satisfied. The principle set out in *Pinnock* relating to demoted tenancies applies equally here.

(10) Section 89 Housing Act 1980 (which places a restriction on the maximum period (42 days) for which a possession order may be suspended or stayed in cases where the occupier lacks security of tenure) cannot sensibly be read in a way such as to allow the court to grant a longer period of time to an occupier. A declaration of incompatibility is however not required as there was no evidence that 42 days is less than is required in cases where a possession order is to be made. This restricts the court's powers so that 'suspended' orders may not be imposed on the parties so as to achieve compliance with Art 8. The court can properly adjourn proceedings to enable proper case management, which may in practice afford further time to an occupier. And the court can of course decide that the claim for possession ought to be dismissed in order to avoid contravening Article 8.

In *Powell* the authority had offered alternative accommodation and although the Court might have remitted the case to the county court if it had not been there was no need so to do; the appeal was nonetheless allowed. In *Hall* the council had by then accepted that any anti social behaviour had ceased and offered him a secure tenancy. In those circumstances the court was prepared to allow the appeal and set aside the possession order. In *Frisby* although Mr Frisby had not been given the right to raise any proportionality defence in the county court, on the facts none would have been likely to succeed; his appeal was dismissed.

Comment

There is certainly much more specificity here than was the case in Pinnock, and it was to be expected that given the seismic nature of that decision, such guidance was to be sought and given at some stage. It is possible to detect a degree of modification (or rowing back?) by the Court from the broad statements of principle in *Pinnock*. So although in *Pinnock* the Court was at pains to confirm that there was no overriding test of 'exceptionality' that an occupier had to overcome to be able to raise an Art 8 defence, here we see the Court making it very clear that it does not consider that the existence of a right to bring such a defence will be one that ought to be commonly entertained. A 'high threshold' of 'serious arguability' is likely to be seen by the average county court judge as requiring a pretty exceptional case to be made out at that first hearing. Practitioners should attend court prepared to explain why this is the case.

For all the detailed comments around the issue of 'legitimate aims' there is a lack of detailed consideration of when – and when not – eviction might be 'necessary and proportionate'. No analysis is provided as to how a judge might decide whether on given facts that test is made out or not. The Supreme Court appears to have left that to county courts to work out in practice. *Huang v SSHD* set out the structured way in which the court would consider whether the provisions of Article 8 were met in the context of an immigration decision. Here the position is different, said the SC, because eviction by a public authority landlord is being sought in the context of a specific statutory scheme which provides for the reduction in an occupier's rights (or their practical non existence). It would be unduly burdensome to require the authority to justify every decision by reference to the particular statutory purpose of the particular scheme under which the occupier was housed. But that cannot mean that the question of whether eviction is necessary and proportionate is just a broad question to be considered at large. The kind of 'structured' approach used in immigration and prison law cases (for example) is arguably just as applicable here, despite what was

said by Lord Hope at [41]; so in trying to work out whether the test was met the court should consider:

- Is the objective sufficiently important to justify limiting a fundamental right?
- Are the measures designed to meet the objective rationally connected to it?
- Are the means used no mean than is necessary to achieve the objective?

Although it is clear the Court thought that the first of these requirements would always be met, the second and third might well not be.

The conclusions of Lord Phillips as to the means by which factual disputes might have to be resolved (see [93]) seem to represent a regressive step – and perhaps a further example of rowing back from the high water mark of *Pinnock*. In the case of a tenant accused of anti social behaviour his view was that the authority would not need to be able to prove these allegations but merely would have to show that the decision to evict was reasonable. This cannot be right. A tenant who is facing eviction on the basis that she has caused nuisance, but who can show that the allegations made against her are in fact false, must surely be able to aver that in support of an argument that eviction would be contrary to Article 8 (see *Pinnock* at [74]), even if she was unable to persuade the court that the council's decision to proceed was other than 'reasonable' on the facts known to it. This issue may end up facing further consideration in the appellate courts.

The Court was clear as to whether there was any ability to suspend an order in an appropriate case, or to postpone the date for giving up of possession for longer than 42 days: there is no such power. That removes the possibility, floated in *Pinnock*, that orders of this kind might be made as a happy medium between eviction and dismissal of proceedings. No such medium can however exist; by the time the court is considering the matter at trial at least, either possession is ordered (with a maximum of 42 days grace being allowed) or it is refused.

As in *Pinnock* the Court here referred only the principles in question applying only in cases involving a 'local authority'; there is however surely no reason why Article 8 ought not apply to *all* those landlords who are 'public authorities' and thus amenable to the provisions of the HRA 1998. *Weaver v London and Quadrant Housing* [2009] CA makes it reasonably clear that most housing associations (or rather Private Registered Providers of Social Housing) will be so amenable, and so until the point in Weaver is reconsidered by the Supreme Court (the invitation given by the SC after Weaver for a suitable case on the point to be 'leapfrogged' still appears to be an open one) the growing numbers of occupiers in accommodation owned by PRPSHs are as entitled to argue cases based on Article 8 as those in local authority accommodation.

Whatever the restrictions that this judgement places on the practical availability of an Article 8 defence, experience suggests that there will still be many situations where unprotected tenants such as those in these appeals are able to establish a viable defence to a claim for possession. It of course is still relatively common for 'private' law defences to succeed; the NTQ or s128 notice is invalid or not properly served; proceedings were not issued within the trial period of an introductory tenancy etc. It is likewise common (and more common than appreciated by the Supreme Court) that a public law defence of the type previously categorised as falling within 'gateway (b)' might also succeed and the availability of such defences is expressly stated at [42]. Such challenges might now be framed as demonstrating that the decision to evict was contrary to Article 8 on the basis that it was not 'in accordance with the law'. But examples of authorities acting in a way which breaches basic public law obligations are not that hard to find; failing to apply specific and relevant policies to the facts of a particular case being one of the more common failings. Practitioners advising occupiers of public authority owned housing should remain alert to these kinds of challenges as much as to those based on the brave new world of Article 8.

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