

## COMPARING APPLES AND ORANGES

### How to get an Article 8 case past the first hearing

In **Manchester City Council v Pinnock** [2010] UKSC 45 [judgment](#) at [para 61] Lord Neuberger suggested that where an Article 8 point is raised, the court should consider it summarily. If, -

*the court is satisfied that, even if the facts relied on are made out, the point would not succeed, it should be dismissed.*

This short bulletin aims to suggest a few tips and resources to ensure that, when your case comes to be summarily considered it is not dismissed. Generally, it assumes that your client has a local authority or other social landlord. Where private landlords are involved, the scope for invoking Article 8 is likely to be much more constrained except where proceedings are being brought in bad faith (e.g. a retaliatory eviction following a disrepair claim), or where the client is exceptionally vulnerable and/or the landlord is behaving callously.

#### WHO NEEDS ARTICLE 8?

If your client has security of tenure they will generally be able to question the reasonableness of the decision to evict. Article 8 comes into play where your client lacks that security of tenure or is facing mandatory grounds for possession. He or she may be a trespasser, licensee or holder of an AST; facing mandatory grounds for possession; be on a starter or an introductory tenancy; in interim homelessness accommodation; in sheltered accommodation; may have lost security when a joint tenant served an NTQ or when they sub-let; or may have succeeded to the property outside statutory rules after the original tenant died or left.

#### ARTICLE 8 IN BRIEF...

8 (1) A right to respect for one's home...

8(2) No interference with this right...except such as is in accordance with the law and is necessary in a democratic society.

An eviction of someone from their home will always be an interference with their rights under 8(1). The question is whether this interference can be justified, and specifically whether it is:

- (a) in accordance with the law (broadly – have the correct procedures been followed – this is quite a low threshold); and
- (b) 'necessary in a democratic society' – i.e. **proportionate**. This latter test is the key one.

#### SOME PRACTICALITIES

On the duty scheme it may be that there simply is not time to argue at that stage whether an Article 8 proportionality defence is seriously arguable- or you may well think there is something in it but it requires further investigation before you can formulate your defence. In which case always have with you a case that you might have thought was only of historical interest namely **Kay v Lambeth LBC[2006] 2 AC 465** and in particular the guidance given by Lord Bingham at [Para 39 as to dealing with this first stage which remains good law especially. \*\*The procedural aim of the court must be to decide this question as expeditiously as is consistent with the defendant having a fair opportunity to present his case on this question.\*\*](#)

Hence, if you need more time ask for the case to be adjourned drawing the district judge's attention to that guidance for say 14 days to lodge your defence.

If you can get a draft defence in before the first hearing this is obviously likely to be of great assistance, but whether in a written defence or in oral submissions on the day, your main goal must be to communicate that the matter is such that, either legally or factually, that it cannot safely or justly be dealt with on the spot. Take copies of **Pinnock** and **Hounslow LBC v Powell; Leeds CC v Hall; Birmingham CC v Frisby** [2011] UKSC 8 [judgment](#), and know how to navigate around them. All the references below are to paragraphs in these judgments.

#### CHECK PRELIMINARIES

- Make sure you can sensibly suggest that the client's HOME is at stake. This is a low threshold but if they have not been at that address for long consider their links to the local area, whether they have anywhere else to reside, and ways in which

they may be considered to have 'sufficient and continuous links' to a place [*Powell* para 33].

- Inspect the Notice to Quit. This is obviously important in any case but particularly if your client is in local authority temporary accommodation provided under pt VII HA 1996. Check whether the notice supplies the information prescribed by s.5 of the Protection from Eviction Act 1977 (broadly - that eviction can only occur by court order, that legal advice can be sought and that public funding is available). One arguable effect of *Pinnock* has been to retrospectively vindicate the minority judgment of Lloyd LJ in *Desnousse v London Borough of Newham* [2006] EWCA Civ 547. The majority decision in that case followed *Mohammed v Manek and Kensington and Chelsea RLBC* (1995) 27 HLR 439 in holding that accommodation provided under part VII Housing Act 1996 was not to be considered, "accommodation let or occupied as a dwelling" and hence was excluded from s3 and 5 of the Protection from Eviction Act 1977. Lloyd LJ at para 143 held that the effect of incorporating the ECHR meant that such accommodation should be regarded as a home, and should be subject to the PEA 1977. *Pinnock* has arguably validated his dissent, so that any notice served on such an occupier should now comply with the requirements of s5 of that Act, and should be followed by a claim for possession.
- Think about the remedy you are inviting the court to consider – an Article 8 defence could be advanced purely to buy time (eviction would not be proportionate now), or you might be seeking to defeat the claim in its entirety (eviction would not be proportionate at any time or say without alternative accommodation being provided) [*Pinnock* para 62&64 ]. If the former, are there any circumstances imminently about to change that would justify an extension of time?

### IT'S ALL ABOUT THE FACTS –AND IT'S YOUR VERSION OF THE FACTS THAT COUNTS

For the sake of the summary hearing the Court must assume – unless it can be demonstrated at that hearing to be false - that your client's version of the facts is correct. This flows from para 61 of *Pinnock*, referred to above: the court should be assuming that, '*the facts relied upon are made out*' (in your favour).

Of course, at this early stage - pre-disclosure - you may not know what the facts are. Effectively the challenge is to identify the strongest possible facts which might exist which could make a difference. The more you can

suggest that there appear to be important factual issues at stake which might make or break the case, the stronger will be the justification for listing the case. If further enquiry, or expert report, or disclosure is needed because there are good grounds for suspecting that critical facts may come to light, then stress that justice requires that decisions be taken on the basis of accurate facts. Refer to Lord Phillips at *Powell* [para114]:

"obtaining possession will not further the legitimate aims of the authority if [that] factual premise is unsound"

One of the key themes to which Strasbourg has continually returned has been the need for an independent tribunal to be able to make its own assessment of the facts in an appropriate case [*Pinnock* para 45]. If the facts are in dispute and if found as you allege them to be it is seriously arguable that eviction is disproportionate then the defence must be allowed to proceed. It is clear that this requirement is not adequately met by prior internal reviews or investigations that have made findings of fact, if the only subsequent mechanisms of challenge (like JR) involve points of law, where it is not possible to reopen the facts of the case before the court. [*Pinnock* para 45].

### HOW TO COMPARE APPLES AND ORANGES

How to weigh against each other two things as incomparable as your client's need for a home, and the imperatives of a social landlord when trying to evict her? The structured framework for assessing proportionality in the context of Article 8 was set out in a three part test in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, and repeated in a range of contexts and cases since then:

whether:

- (i) the legislative objective is sufficiently important to justify limiting a fundamental right;
- (ii) the measures designed to meet the legislative objective are rationally connected to it; and
- (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

More recently in *Huang v Secretary of State for the Home Department* [2007] UKHL 11 a fourth step was added to the analysis – namely:

- (iv) "the need to balance the interests of society with those of individuals and groups."

In *Powell*, Lord Hope expressed some scepticism about applying this test in the context of housing but his comments should be treated as referring only to the first of these criteria, i.e. weighing up the legislative object otherwise proportionality would be deprived of all meaning (see below), but for the moment it is the only tool we have for weighing such different priorities against each other.

Applied in our context, the steps are as follows:

**1. Is the landlord following a legitimate aim?**

For social landlords this will generally be assumed (though see the next section). *Pinnock* at [para 52] suggests they can be divided into two broad categories – one of these is simply an amalgam of all the functions social landlords perform, and the other is ‘vindicated property rights.’ Note that the latter will, on its own **not** amount to a legitimate aim. [*Powell* para 36, citing *Kryvitska v Ukraine*].

**2. Is there a logical connection between this aim and seeking possession of your client's home?** e.g.

- Seeking possession because of the previous behaviour of a son who has now left and will not return will not defeat ASB;
- Bringing proceedings on mandatory grounds for rent arrears where they are caused by HB delay and will be paid in due course will not safeguard scarce financial resources of the Landlord;
- A local authority seeking to evict a family from s 190 HA 1996 accommodation when it has accepted a fresh homelessness application and will then immediately owe them a part VII duty is not doing anything logical.

**3. Is the interference with your client's right to a home no more intrusive than necessary?**

- Was the client informed of the situation and properly warned before proceedings commenced?
- Were appropriate support packages offered?
- Were less drastic measures considered or attempted (deducting arrears from benefits, injunctions against the perpetrators)?
- Were relevant policies (rent arrears protocol, ASB policies) followed?
- If the local authority's redevelopment plans for a building / car park are on hold, is it really necessary to evict squatters / travellers in the interim, if evidence suggests they are looking after the building / the area?

**4. Has the balance between the rights of the individual or group and the rights of society been properly struck?**

- Where someone has lived in a property for 40 years is it proportionate to evict them because the landlord's policy is to refuse all requests for non-statutory succession?
- Where a client is, “vulnerable as a result of mental illness, physical or learning disability, poor health or frailty,” [see *Pinnock* para 64] (or is a carer for such a person, or has young children, or has other vulnerabilities) the justification for interfering with their Article 8 rights is likely to need to be much stronger, possibly because the impact of eviction may be harsher, alternatively, such a client may need additional support to maintain a tenancy. Alternative accommodation arrangements may well need to be in place before possession is an appropriate step. Check carefully whether such a person can be brought within the scope of the Equality Act on grounds of disability, and if not (or also) consider whether you can argue that given their vulnerable status derived from belonging to a particular group (specify this), the action for possession amounts to discrimination within the ambit of a convention right (Article 8) and is therefore also contrary to Article 14 ECHR.

**PROPORTIONALITY IS NOT (ONLY) ABOUT THE TENANT'S CIRCUMSTANCES**

In *Powell* the Local Authorities wanted proportionality to be purely about the *tenant's* personal circumstances, relying on the general assumption that social landlords work for the greater good. This would effectively limit the court's power to scrutinize the actions of landlords in steps 1-3 above, and collapse the entire test into step 4 – in essence – “*is this a deserving hard luck case?*”

To a limited extent this argument was accepted by Lord Hope, who at 37 suggests that, “the [local] authority is to be assumed to be acting in accordance with its duties in the distribution and management of housing stock” [cf. *Pinnock*, para 53].

But while the courts may well *start* from this assumption as a practical procedural shortcut (so that e.g. social landlords will not need to explicitly plead their ‘legitimate aim’ in their Particulars of Claim), it is obviously an assumption capable of being cast in doubt or rebutted, and where the local authority has **not** ‘been acting in accordance with its duties’ this **is** likely to be

highly relevant to the proportionality of its actions (as well as to their validity in public law).

At its heart, proportionality is about the *relationship* between a decision and its consequences, and so logically the relationship must be capable of being analysed from both sides, even if, as a matter of practice, it will not always be necessary to dig over the obvious. Ultimately though, if confronted with a DJ wary of 'newfangled thinking' and skeptical of your presentation of criticisms of the landlord's actions under steps 1-3 above, argue in the alternative: simultaneously articulate the substance of these criticisms using more traditional public law concepts.

### **DON'T FORGET WIDER PUBLIC LAW CONSIDERATIONS**

While in theory the focus in proportionality is more on the *outcome* of the decision rather than (as with a public law challenge) the *processes* which led up to it, wherever possible it is definitely worth challenging on both fronts, particularly in view of Lord Hope's reservations [*Powell* para 41]. In practice a decision which can be attacked on public law grounds may well not be proportionate for the same reason – e.g. a landlord fettering its discretion with a blanket policy which permits no exceptions; or where the authority has had no proper regard to its own policies, or where the Defendant has not been properly listened to or informed of allegations before steps to evict were taken.

As well as overlapping with proportionality, in extreme situations actions capable of being considered unlawful in public law terms might also be capable of being described as not 'in accordance with the law' - the other limb in Article 8(2).

### **YOUR CASE DOES NOT NEED TO BE EXCEPTIONAL**

The Supreme Court expressly considered and rejected Lord Bingham's suggestion that a case would need to be exceptional for an Article 8 defence to succeed. Requiring a case to be exceptional is unhelpful, 'because exceptionality is an outcome and not a guide'. It is also unsafe because, 'there may be more cases than the ECtHR or Lord Bingham supposed where article 8 could reasonably be invoked.'*Pinnock* para 51].

You are likely to have to work much harder however in situations where procedural safeguards exist, for instance in cases of introductory tenancies, and pay attention to Lord Phillips' remarks in *Powell* at [para 90-

94]; (though insofar as there is an ongoing dispute of fact, you may be able to argue around this).

What then, can be made of Lord Neuberger's remark in *Pinnock* at [para 54]?

"in virtually every case where a residential occupier has no contractual or statutory protection, and the local authority is entitled to possession as a matter of domestic law, there will be a very strong case for saying that making an order for possession would be proportionate. However in some cases there may be factors which tell the other way".

'Virtually every case' is NOT a legal test. It is a prediction about outcomes, a statement of Lord Neuberger's expectations. Whether his predictions turn out to be any more reliable than Lord Bingham's or the ECtHR's is not important. The issue is not whether a given possession case is exceptional or not, but whether a particular case for possession is proportionate or not. The Supreme Court have preferred not to specify in detail what this means but have left it instead to the 'good sense and experience of judges sitting in the County Court' [*Pinnock* para 57].

*"In other words Sir..." (you will solemnly say, as you entrust to Mr Withering your client's fate) "...to the good sense of people such as yourself."*

## Informal Advice

Please bear in mind that barristers at GCN are always available to give informal advice on any housing matters. In the first instance please contact the clerks (Sarah Wright, Annmarie Nightingale or Nicola Carroll) on 0161 236 1840.

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