

Housing Team Legal Bulletin

Issue 25. November 2010



MANCHESTER CITY COUNCIL-v-PINNOCK
[2010] UKSC 45, 3rd November 2010

INTRODUCTION

In a landmark decision this morning the Supreme Court has swept away the prohibition on raising defences on the grounds of Article 8 ECHR imposed in Harrow LBC-v-Qazi by the House of Lords and upheld by that court twice since .

The court has not only accepted that Art 8 (and in particular the proportionality of an eviction by a public authority) may be raised as a defence, but that if there are facts in dispute - e.g. as to whether a tenant did engage in nuisance – then not only in cases where there is statutory security of tenure, the court itself must hear and resolve those issues of disputed facts, and decide proportionality for itself on the basis of the facts that it has found. This is a seismic change, in particular for introductory and demoted tenancies.

It also found that the appropriate forum for raising such a defence, as well as a traditional public law defence was the County Court or wherever the possession proceedings were brought and in doing so overruled Manchester City Council –v- Cochrane on the grounds that properly interpreted neither Section 127(2) or Section 143D (2) Housing Act 1996 prohibited defences based on the lawfulness of an eviction – and if an eviction was disproportionate it was unlawful.

Unfortunately, for Mr Pinnock this did not assist him as the court found that applying a proportionality test that it was proportionate for him to be evicted and dismissed his appeal. We are of the view, however, that the Supreme Court has misapplied the test and in doing so has violated Mr Pinnock’s Article 8 rights and it is proposed to take his case to the European Court of Human Rights in Strasbourg.

SUMMARY

Garden Court North proposes to run a course before Christmas for housing lawyers and advisers, which will explain the decision and potentially the later cases of Leeds City Council –v-Hall, Frisby-v-Birmingham City Council and Hounslow LBC-v-Powell – due to be heard late in November by the Supreme Court, which will involve the application of the principles set out in Pinnock, to the introductory and non-secure Part VII homelessness tenancy regimes. It is intended that this course which will be entitled ***“Proportionality in Practice – how to apply Article 8 to possession proceedings”*** will consider how to run these defences tactically and the sort of evidence you will require.

In summary the Supreme Court has held:

- 1 That the case law of the ECtHR must be followed and that the application of Article 8 to possession proceedings requires that any person at risk of losing his home at the suit of a public authority should in principle have the right to raise the question of the proportionality of the measure and to have it determined by an independent tribunal in the light of Article 8 even if his right of occupation in domestic law has come to an end.
- 2 That judicial review of the proportionality of the eviction whether in the Administrative Court or raised by way of a defence in the County Court must be expanded to allow the court to make its own assessment of the facts of the case if they are in dispute even in introductory and demoted tenancy cases. As the restrictions in those cases on the court’s powers did not prevent proportionality defence being raised, as disproportionate eviction was unlawful – and to ask that legal question required the court to find the facts for itself.

- 3 That the proceedings as a whole – if there is a two stage process must be compliant with Article 8 and Art 8 falls to be considered at both stages . The effect of this we suggest is to overrule the Court of Appeal decision in **St-Brice –v-Southwark LBC** that Article 8 did not arise at the warrant stage. It remains open therefore to reconsideration whether a suspended possession order, without any judicial input at that stage, is compliant with Article 8.
- 4 That proportionality is not an all or nothing defence – a court might be able to find that it was unlawful to evict him so long as the conclusion that it is disproportionate remains – for example until a specified period elapses, a specified event occurs, or a particular condition is satisfied. An example might be in an appropriate case until alternative accommodation is offered.
- 5 That nothing in the judgment applies to private landlords. The Supreme Court noted that in a ECtHR admissibility decision **Belchikova-v-Russia** that there did appear to be an argument that these principles did apply to private landlords but preferred not to say any more about it.
- 6 That there was no requirement in most cases where a defence of proportionality was raised by a person without statutory security for it to be “highly exceptional “for such a defence to succeed (but it would be the case that it would be exceptional for a demoted tenant as they had already had an Article 8 compliant hearing to put them at risk of eviction). This is important, it sweeps away the qualification placed on public law defences by the Court of Appeal in **Salford City Council –v-Mullen** and means there is no additional threshold to pass.
- 7 That the landlord did not have to plead that his possession case has a legitimate aim, in all but cases where an unusual aim was being relied on. It is for the tenant to raise Article 8. We suggest that it is important however that district judges apply this flexibly especially in unrepresented cases. If personal circumstances are raised that is an Article 8 defence no matter what label is given to it.
- 8 The court should consider an Article 8 defence summarily at first and only if the court is satisfied that it could affect the order should the point be further entertained.
- 9 The wide implications of this judgment will have to be worked out, but rather than drawing examples the court has set out general principles of what may be weighed in the balance on each side and left this question to the good sense and experience of County Court judges.
- 10 That proportionality may require the interpretation of Section 89 Housing Act 1980 and accelerated possession proceedings to be adapted.
- 11 That proportionality is most likely to arise in cases where occupiers are vulnerable and why suitable alternative accommodation is not being secured is likely to be relevant. Hence, proportionality may require reconsideration of **Darlington BC-v Sterling (1997)** in appropriate cases – under the Housing Acts – where it was held that the availability of suitable alternative accommodation was irrelevant to reasonableness in respect of discretionary grounds that only required the court to show a possession order was reasonable.
- 12 That proportionality and public law defences may be raised in the court hearing the possession proceedings and that there is no need to therefore start separate JR proceedings.
- 13 The local authority review panels must investigate the relevant facts fairly and act rationally and proportionately. In essence, the old canard that a review panel does not find facts but considers whether eviction is reasonable in a climate of allegation and counter allegation is swept away.

- 14 That a "public law" defence can be run and maintained as well as a "proportionality" defence.
- 15 That Section 6(2) Human Rights Act 1998 which had been seen as a bar in the earlier cases to allowing proportionality to be raised in domestic law – was not applicable as the demoted tenancy regime required local authorities only to evict demoted tenants if it was proportionate to do so. Therefore no question arose that they were giving effect to the statute if they acted disproportionately.
- 16 That there is no express fetter on the grounds on which a demoted tenant may be evicted; however the Supreme Court did not consider this point in further detail. It is plain, however, that the question is whether the eviction is proportionate not whether the tenant is in breach of his tenancy conditions.
- 17 That a court may take into account all relevant information when considering whether to evict a demoted tenant, not only grounds raised in the notice to terminate. The fact that the notice contains a bad reason should not destroy the right to possession unless for instance the bad reason somehow affects the bad faith of the landlord. The court does not deal with the case where all the reasons in the notice are shown to be bad. It does not explain what that bad faith is – but we suggest that relying on reasons it knows to be ill-founded simply to extend the demoted tenancy whilst it carries out further investigations to try and find something of substance would be covered.

CONCLUSION

The full impact of this decision may well take some time to sink in. It will effect major change on how possession proceedings are to be approached in respect of all occupiers but in particular those without security or no property right to remain. What is plain is that human rights are now central to possession proceedings.

JAMES STARK
3 November 2010

HOUSING LAW SEMINAR

Proportionality in Practice – how to apply Article 8 to possession proceedings

Date tbc
Manchester

Garden Court North Chambers will present a seminar which will explain the **Pinnock** decision and potentially the later cases of **Leeds City Council –v-Hall, Frisby-v-Birmingham City Council** and **Hounslow LBC-v-Powell** – due to be heard late in November by the Supreme Court, which will involve the application of the principles set out in **Pinnock**, to the introductory and non-secure Part VII homelessness tenancy regimes.

It is intended that this seminar will consider how to run these defences tactically and the sort of evidence you will require.

We hope to announce the date of this seminar in the next few days. In the meantime, please contact hray@gcnchambers.co.uk for more details.