



Recent developments in Housing Law: public law

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- Developments in public law: article 8 redux
- Homelessness
- Tolerated trespassers

The story of McCann



- *Birmingham City Council v Gerrard McCann*
- 5 April 2001: Wendy McCann obtains a non-molestation order from Birmingham County Court before leaving the property. She is re-housed as homeless by Birmingham City Council
- November 2001: bail conditions on McCann are lifted. He breaks into the property and resumes occupation

Birmingham finds out



- 4th January 2002: Birmingham City Council interview McCann, and obtain a Notice to Quit from Mrs McCann
- 8th February 2002: Birmingham City Council inform McCann they will not grant him the tenancy
- 2002: possession proceedings are begun

Meanwhile...



- *Qazi* in the Court of Appeal: *Qazi v London Borough of Harrow* [2001] EWCA Civ 1834
- *Sheffield City Council v Smart* [2002] EWCA Civ 04
- *Greenwich LBC v Eze* (Legal Action July 2002)
- *Kensington & Chelsea v O'Sullivan* [2003] EWCA Civ 371

HHJ Durman



- McCann (represented by Stephen Cottle) argued that there were exceptional circumstances in his case because a valid request for an exchange had been blocked by a manoeuvre
- 15th April 2003: Judge held that he would not order possession but would not rule out Birmingham City Council making a fresh claim
- “I am not persuaded that the Local Authority has acted as a public authority should under article 8(2) and I do not make any findings with regard to that; it is for them to satisfy me that the grounds exist for the interference with the right to possession of his home that this would involve”
- Birmingham City Council appealed to the Court of Appeal

Qazi to the rescue



- *Qazi v LB Harrow* [2003] UKHL 43
- whether a property is a person's home is a question of fact in each case
- An eviction is not automatically an interference with the tenant's article 8 rights and may not even engage Article 8
- where the landlord is entitled as a matter of domestic law to obtain possession, seeking, obtaining and executing a possession order does not amount to an interference with the right to respect of the home. No balancing exercise under Article 8.2 arises
- if there is a public law complaint about the manner in which a public authority is exercising its private law rights to seek possession, that must be the subject of a judicial review application, and is not justiciable as a defence to the county court proceedings
- Qazi's application to the ECtHR was declared inadmissible

The Court of Appeal



- 9th December 2003
- Joined with *Bradney v Birmingham City Council*
- Linked with *Newham KBC v Kibata*
- article 8 is not available as a defence to the possession proceedings, even though the premises in question was the “home” of the occupant for the purposes of the article.
- The Council acted lawfully and within its powers in obtaining the notice to quit, which had the effect of terminating the secure tenancy.
- This is not a “wholly exceptional” case where, for example, something has happened since the service of the notice to quit, which has fundamentally altered the rights and wrongs of the proposed eviction and the Council might be required to justify its claim to override the article 8 right

Minor skirmishes



- Birmingham City Council sought to enforce the order for possession granted by the COA
- 4th June 2004: McCann sought an injunction from the County Court restraining enforcement.
- This was refused.
- McCann petitioned the House of Lords but was refused

Judicial review



- McCann commenced judicial review proceedings, initially directed at the decision to enforce the order from the COA then against the whole history
- Leveson J 8th and 9th September 2004: Claim dismissed, as COA had already held that Birmingham City Council had acted lawfully; the judicial review proceedings were an attempt to relitigate the same issues
- McCann appealed and permission was refused on 16th December 2004 (Sedley LJ)
- He then applied to the European Court of Human Rights but left the property



So all is well....

But then...

Connors v UK



- ECtHR
- 6th May 2004
- Concerned gypsies – particularly vulnerable
- “the eviction of the applicant and his family from the local authority site was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with his rights and consequently cannot be regarded as justified by a ‘pressing social need’ or proportionate to the legitimate aim being pursued. There has, accordingly, been a violation of Art. 8 of the Convention.”

So...



- There was a conflict between *Qazi* and *Connors*.
- Which should Courts follow?

Price v Leeds CC



- 16th March 2005: Court of Appeal
- They would follow the House of Lords but give permission to appeal
- Price was then joined by *Kay v Lambeth LBC* (judgment of the COA 20th July 2004)

Kay/Price in the Lords



- Hearing December 2005, judgment 8th March 2006
- Paragraph 110
- a defence which does not challenge the law under which the possession order is sought as being incompatible with the article 8 but is based only on the occupier's personal circumstances should be struck out.
- If the requirements of the law have been established and the right to recover possession is unqualified, the only situations in which it would be open to the court to refrain from proceeding to summary judgment and making the possession order are these:
 - (a) if a seriously arguable point is raised that the law which enables the court to make the possession order is incompatible with article 8, the county court in the exercise of its jurisdiction under the Human Rights Act 1998 should deal with the argument in one or other of two ways: (i) by giving effect to the law, so far as it is possible for it do so under section 3, in a way that is compatible with article 8, or (ii) by adjourning the proceedings to enable the compatibility issue to be dealt with in the High Court;
 - (b) if the defendant wishes to challenge the decision of a public authority to recover possession as an improper exercise of its powers at common law on the ground that it was a decision that no reasonable person would consider justifiable, he should be permitted to do this provided again that the point is seriously arguable



So all is well again....

But then...

Doherty v Birmingham City Council



- Gypsy site occupied on a permanent basis by travellers. Birmingham City Council wish to improve the site and need vacant possession to do so
- 4th March 2004: Notice to Quit, 27th May 2004 possession proceedings commenced
- 20th December 2004: HHJ McKenna orders possession and gives permission for appeal direct to the Lords but on 20th June 2005 the House of Lords refused permission as the Court could await the decisions in *Price and Kay...*

Doherty in the Court of Appeal



- There are only two possible “gateways” (our term) for a successful defence to summary judgment in such cases:
- (a) a seriously arguable challenge under Article 8 to *the law under which the possession order is made, but only where it is possible* (with the interpretative aids of the Human Rights Act) to adapt the domestic law to make it more compliant;
- (b) a seriously arguable challenge on conventional judicial review grounds (rather than under the Human Rights Act) to *the authority’s decision to recover possession*

Doherty in the Court of Appeal



- *Wandsworth v Winder*
- The right of defendants in the county court to use any available legal weapons, public or private
- The House of Lords in *Price* had accepted it as settled that “conventional” judicial review grounds could be raised as a defence to possession proceedings in the County Court
- A defendant has the right to contend that the decision to seek possession was one which no reasonable person would consider justifiable

Doherty in the House of Lords



- Hearing 12-13 March 2008
- 13 May 2008: judgment of the ECtHR in *McCann v UK*
- 2 June 2008: further submissions on the effect of *McCann*
- 30 July 2008: judgment

McCann in Europe



- Background: *Blečić v. Croatia* 8 March 2006, *Stankova v Slovakia* 9 October 2007
- No oral argument
- Paragraph 50: The loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end.
- Support for the minority in *Kay/Price*

What?



- How does paragraph 50 sit with the previous caselaw, including *Connors*?
- All possession proceedings are statutory – paragraph 25, 48, 51
- That some tenants have less protection than others is part of that statutory scheme and within the national margin of appreciation: paragraph 48, *Connors*
- If paragraph 50 is right, where is the margin of appreciation?
- The only basis upon which the ECtHR could have found for McCann was that a more article 8-friendly procedure was available and had been circumvented

What did the Lords make of *McCann*?



- Lord Hope, Walker : domestic law is consistent with *McCann* and even if not, the effect is too wide-reaching [19-20]
- Lord Scott: *McCann* is wrong [82] and McCann was no poster boy for human rights
- Lord Walker: the decision-making process leading up to the commencement of proceedings ought to be Convention-compliant

What next for *McCann*?



- Dead letter following the House of Lords?
- Still being referred to eg in tolerated trespassers cases
- Will inevitably have some lingering aftereffects

What else did Doherty decide?



- *Kay/Price* were correctly decided
- Gateway (a) is unlikely ever to arise in practice. Everything is statutory and anything statutory is article 8 compliant
- Gateway (b): it is possible to seek judicial review of the decision to seek possession as a defence to possession proceedings in the County Court.
- [per Lord Mance] the usual judicial review time limits do not apply (why ever not?!)
- Such judicial review is on conventional grounds.
- When deciding how to seek possession, the local authority should bear in mind the human rights of the tenant.

“conventional judicial review?”

- This means:
 - Irrationality [Hope]
 - The decision was arbitrary, unreasonable or disproportionate [Hope again]
 - An examination of the *reasons* for seeking possession and whether that was a decision no reasonable local authority could reach in the circumstances of the case [Hope]
 - Personal circumstances [Scott]
 - Conventional judicial review with an article 8 tinge [Walker and Mance]
 - An examination of whether the decision making process leading up to the taking of possession proceedings was article 8 compliant [Walker]
 - *Winder* – is the decision to seek possession so irrational that it is unlawful? [Mance]

Judicial review defences in possession claims are here to stay



- HL/COA emphasise that it should only be in exceptional cases
- Which brings us to *R (Weaver) v London & Quadrant HT* – what is a public body?
- Richards LJ and Swift J in the Admin Court
- Follows *YL v Birmingham City Council* in the Lords
- Attack on the use of Ground 8 by a housing association on the basis of legitimate expectation

HAs are public bodies



- Hybrid of core public body
- non-profit-making charity acting for the benefit of the community
- Sector subject to detailed regulation, permeated by state control and influence with a view to meeting the Government's aims
- RSLs work side by side with, and can in a very real sense be said to take the place of, local authorities

...but there was no legitimate expectation



- Because the HA was a public authority for the purposes of the HRA it was amenable to conventional judicial review
- There was no clear and unequivocal representation and no breach of it
- Permission to appeal granted but ? Appeal abandoned

Three cases on *Tsfayo*



- *Tsfayo v UK* 14 November 2006
- Housing Benefit determinations were not article 6 compliant as decisions were not being taken by an independent authority

R (Gilboy) v Liverpool CC



- Demoted tenancies
- COA 2 July 2008
- Reasoning in *R (McLellan) v Bracknell Forest BC* applied
- *Price/Kay* applied
- *Tsfayo* distinguished: the tenant had already had a fully article 6-compliant hearing to determine whether she should be a demoted tenant
- *McCann* made no difference (pre-*Doherty*)

R (M and A) v Lambeth/Croydon



- Hearing in COA 15-16 September 2008
- Asylum seekers who claim to be under 18
- Article 6: What is a civil right?
- Judicial review: issues of precedent fact

Tomlinson/Ali/Ibrahim v Birmingham City Council



- Article 6 in homelessness cases
- *Runa Begum v Tower Hamlets* revisited
- Heard 26 June 2008
- Judgment awaited

Homelessness



- Medical evidence
- Appeal out of time
- Minded-to letters
- The nature of accommodation
- costs

Medical evidence



- *Shala v Birmingham City Council*
- Use of Dr Keen
- “Like-for-like” evidence
- Use of witness statements
- *LB of Wandsworth v Allison*
- Dr Keen can advise and explain but where he has not seen the applicant and does not have the same level of expertise, care is required

Appeal out of time



- *Barrett v Southwark LBC*
- “good reason”: Some fact which, having regard to all the circumstances (including the Appellant’s state of health and the information he had received and that which he might have obtained) would probably have caused a reasonable person of his age and experience to act (or fail to act) as the Appellant did.

Minded-to letters

- *Lambeth LBC v Johnston*
- Has not changed existing law
- Rather emphasises the advantages of minded-to letters
- Cannot argue that minded-to letter would not have made any difference so there is no prejudice

Accommodation



- *Manchester CC v Moran, Richards v Ipswich BC*
- *R (Aweys) v Birmingham City Council*
- *Harouki v Kensington & Chelsea RBC*

Hostels



- Battered women's refuges can be accommodation
- It could be reasonable to continue to occupy the accommodation
- When considering whether it is reasonable take into account general factors:
 - (a) the size, type and quality of the accommodation made available to the woman, including the extent of her need to share its facilities;
 - (b) the terms of the agreement by which it is made available to her;
 - (c) her ability to afford it;
 - (d) the appropriateness of its location for her and her child (if any);
 - (e) the extent of its facilities for her child;
 - (f) its appropriateness for her and her child in the light of any particular characteristics (including as to health) which each may have;
 - (g) the length of time for which they have already occupied it;
 - (h) the state of their physical and emotional health while in occupation of it; and
 - (i) the length of time for which, unless accepted as homeless, they might expect to continue to occupy it.

Particular factors relating to hostels



- (a) the nature of the refuge;
- (b) the scale of support which the refuge aspires to provide to the woman;
- (c) in particular, whether reflected in the terms of the licence agreement, in its published material or otherwise, the length of the period for which the refuge expects her to remain in occupation of it;
- (d) the length of the period for which women generally occupy it;
- (e) the extent to which, during her occupation, the refuge has been full;
- (f) any evidence that her occupation may have prevented, and in particular the extent of the risk that any continued occupation on her part may in the future prevent, the refuge from offering accommodation to another victim of domestic violence in an emergency;
- (g) the extent to which any conditions of the licence agreement, by way, for example, of the prohibition of visitors or of dissemination of the address of the refuge, make it reasonable or otherwise for her, in the light of the length of her occupation to date, to continue to occupy it; and
- (h) the extent of her need, and of her ability to accept, such physical and emotional support as the refuge may to her.

Homeless at home



- Unlawful to leave applicants in the accommodation from which they are homeless pending sourcing suitable permanent accommodation
- If accommodation was unsuitable it was unsuitable even for one more night
- Appeal to the House of Lords pending on the basis that “suitability” has a temporal aspect

Overcrowding



- Overcrowding does not of itself make it unreasonable to continue to occupy accommodation
- It is lawful to refuse to accept an applicant as homeless if they are overcrowded

Costs



- *Waltham Forest LBC v Maloba*
- The practice of adjourning the question of costs where an appeal has been successful to the extent of quashing the first decision to await the second decision was neither approved nor disapproved

Tolerated trespassers



- House of Lords 8th October 2008
- Knowsley HT v White: can assured tenants be tolerated trespassers
- L&QHT v Ansell: the “Swindon v Aston trap”
- Shepherds Bush v Porter: was Ansell right?
- Islington LBC v Honeygan-Green: exercise of RTB in the “limbo period”

Housing and Regeneration Act 2008 schedule 11



- Amnesty for existing tolerated trespassers
- Prevention of new tolerated trespassers
- Amendments to sections 82 and 85
- Lots of interpretation to be done... Watch this space!