

**The point of *Pinnock*: Article 8 continues**  
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**Doughty Street Chambers, February 8, 2011**

1. Housing lawyers have been pressing for the courts to consider proportionality in housing possession cases for a decade. Finally the Supreme Court has decided that Article 8 defences can be run in possession cases.

***Manchester CC v Pinnock* [2010] UKSC 45, [2010] 3 WLR 1441**

2. This is a very important decision of the SC. It is a nine judge court and one judgment of the court. It puts to rest a lot of issues but does leave some issues to be decided. Lord Neuberger gave the sole judgment.

A reminder of the facts:

3. Mr P had been the tenant since 1978 of premises with his partner and 5 children. In March 2005 MCC applied for possession or a demoted order due to actions of his children. On 8.6.07 a demoted order was made. On 6.6.08 MCC served notice under s143E Housing Act 1985 stating that it would seek possession. The notice alleged further anti social behaviour in the area by two of the children. A review was sought. The Panel upheld the decision to seek possession. MCC issued the possession claim. Mr P defended challenging some of the factual basis on which the council had decided to seek possession and contending that seeking the order would violate his A8 rights.
4. In the county court, the judge held that he could not resolve factual disputes and that his remit was limited to conducting a “conventional judicial review” as per *Kay v Lambeth and Doherty v Birmingham*. He concluded that the council’s decision to seek a review was rational and therefore ordered possession.
5. Mr P appealed. The Court of Appeal took the view that an even more restricted approach applied where the tenancy was a demoted tenancy. The court was only able to consider whether the procedures laid down in s143E and 143F had been followed. If the procedure had been followed the court must make an order and the county court cannot review the substance or rationality of the decision.

The SC analysed the appeal as giving rise to 4 issues:

**Issue 1: Strasbourg jurisprudence**

6. In deciding these issues the SC set out very succinctly the arguments for Mr P [23]. The court then considered the three main HL cases of *Qazi, Kay and Doherty*. [27]-[29].
7. The SC then turned to the Strasbourg jurisprudence. It is not intended to review the same save to say that the court ran through the cases from *Connors v UK* to *Kay v UK*. *Kay v UK* (App no

37341/06) was the most recent decision of the EurCtHR. In *Kay*, the court stated that whilst it welcomed the increasing tendency of the domestic courts to develop and expand conventional judicial review grounds in the light of article 8, nevertheless the court considered that at the time the cases were considered in the UK courts, there was an important distinction between the majority and minority approaches in *Kay* itself. The court accepted that McCann was right in adopting the minority approach. Therefore in *Kay*, the court concluded at [74] that

“The decision by the County Court to strike out the applicant’s article 8 defences meant that the procedural safeguards required by article 8 for the assessment of the proportionality of the interference were not observed. As a result, the applicants were dispossessed without any possibility to have the proportionality of the measure determined by an independent tribunal. It follows that there has been a violation of article 8 of the Convention in the instant case,”

8. The SC cited various propositions as arising from Strasbourg jurisprudence:
  - (a) any person at risk of dispossession at the suit of a local 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 under domestic law has come to an end.
  - (b) A judicial procedure which is limited to addressing the proportionality of the measure through the medium of judicial review (*ie* where court is not permitted to assess the facts of the case) is inadequate as it is not appropriate for resolving sensitive factual issues.
  - (c) Where the measure includes proceedings involving more than one stage, it is the proceedings as a whole that must be considered in order to see if article 8 is complied with.
  - (d) If the court concludes it is disproportionate to evict a person from his home notwithstanding that he has no domestic right to remain there, it would be unlawful to evict so long as the conclusion obtains.
9. Further the court commented that there was a view, albeit not a principle, in EurCtHR that it will only be in exceptional cases that article 8 proportionality would even arguably give a right to continued possession where the applicant has no right to remain under domestic law.
10. Whilst the SC recognised that it was not bound to follow every decision of the EurCtHR it also took the view that where, as here, “there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line” [48]. The court took the view that even before *Kay v UK*, the SC’s opinion was that it should accept and apply the minority view in the House of Lords in the cases of *Qazi*, *Kay* and *Doherty*. Therefore it concluded that if UK law is to be compatible with article 8, where a court is asked to make an order for possession of a person’s home at the suit of a local authority, the court must have the power to assess the proportionality of making the order, and, in making that assessment, to resolve any relevant dispute of fact. [49]

11. The SC made clear that their conclusions related to proceedings brought by local authorities although their observations related to other social landlords to the extent that they are public authorities under the Human Rights Act 1998 [3]. The conclusions are not intended to apply to private landowners. Given that the court is a public authority, there is an argument to be raised in this respect. The SC did not say that its conclusions did not apply in the private sector but that it would not express a view until the issue arises and is determined [50] .

### **Exceptionality**

12. The Supreme Court did not consider it was appropriate to say that it will only be in “very highly exceptional cases” that it will be appropriate to consider proportionality. The question is whether the eviction is proportionate to the legitimate aim sought. The court sets out at [52]-[54] factors that may arise.
13. Where a person has no right in domestic law to remain in occupation, the proportionality of making an order for possession at the suit of the local authority will be supported not merely by the fact that it will serve the authority’s ownership rights. Normally it will also be supported by the fact that “it would enable the authority to comply with its duties in relation to the distribution and management of its housing stock, including, for example the fair allocation of its housing, the redevelopment of the site, the refurbishing of substandard accommodation, the need to move people who are in accommodation that now exceeds their needs, and the need to move vulnerable people into sheltered or warden-assisting housing. Furthermore in many cases (such as this appeal) other cogent reasons, such as the need to remove a source of nuisance to neighbours , may support the proportionality of dispossessing the occupiers.”
14. The fact that the authority is entitled to possession and should in the absence of cogent evidence to the contrary, be assumed to be acting in accordance with its duties will be a strong factor in support of the proportionality of making a possession order. But a local authority may have particularly strong reasons for wanting possession and could rely on that factor but would need to plead it and adduce evidence in support.
15. The court made clear that in “virtually every case” where the residential occupier has no statutory or contractual protection and there is an entitlement under domestic law to possession, there will be a very strong case for saying the order for possession would be proportionate but in some cases there may be factors that tell the other way [54]

### **Issue 2: application of the conclusion in general**

16. The SC considered that as in relation to secure tenancies, no order can be made unless it is reasonable to do so, any factors that would require to be considered in relation to proportionality or any dispute of fact that requires to be resolved in order to assess proportionality, would need to be taken into account to resolve reasonableness. The SC concluded that it seems highly unlikely that it could be reasonable for a court to make an order for possession in circumstances in which it would be disproportionate to do so under article 8.

17. The SC acknowledged that its decision placed a new potential obstacle in relation to the making of possession orders where the domestic law imposes no requirement of reasonableness and gives an unqualified right to possession. The SC stated at [57]
- “The wider implications of this obligation will have to be worked out. As in many situations , that is best left to the good sense and experience of judges sitting in the County Court.”
18. Whilst recognising that introductory tenancies and homelessness cases were to be addressed in the forthcoming appeal of *Salford CC v Mullen*, the court set out general points about article 8 in possession claims [60]-[64]:
- (i) Article 8 only comes into play where a person’s “home” is under threat; it is open to argument whether the premises are the person’s home;
  - (ii) As a general rule, article 8 will only be considered by the court if raised by the occupier in the proceedings;
  - (iii) If article 8 is raised, the court should initially consider it summarily; if the court is satisfied that, even if the facts relied on are made out, the point would not succeed, the defence should be dismissed;
  - (iv) If domestic law justifies an outright order for possession , the effect of article 8 may , in exceptional cases, justify granting an extended period for possession, suspending the order or refusing it altogether.
  - (v) The conclusion that the court must have the ability to assess article 8 proportionality of making a possession order may require certain statutory and procedural provisions to be revisited (*eg* s89 HA 1980 ; CPR 55).
  - (vi) Proportionality is likely to be a more relevant issue where the occupants are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty and that issue may also require the local authority to explain why they are not securing alternative accommodation in such cases.

### **Issue 3: application of the conclusion to demoted tenancies**

19. In relation to demoted tenancies, the court considered the wording of S143D(2)
- “The court must make an order for possession unless it thinks that the procedure under sections 143E and 143F has not been followed”
20. The court concluded that, if the procedure has not been complied with because the express requirement of s143E or 143F have not been observed or because the rules of natural justice have been infringed, the tenant should be able raise that as a defence to a possession claim under s143D(2). Lawfulness is an inherent requirement of the procedure. Equally it must be open to the court to consider whether the procedure has been lawfully followed having regard to the defendant’s article 8 Convention rights and section 6 of the HRA. Therefore the court considered that s143D(2) should be read as allowing the court to exercise the powers which are necessary to consider and, where appropriate , to give effect to, any article 8 defence raised in

the possession proceedings [77]-[79]. Article 8 would require the court to consider not only proportionality but, in making that assessment, to resolve any relevant dispute of fact. [83].

21. An alternative basis for their conclusion was that where a tenant contends that the decision of a local authority to issue or continue possession proceedings can in some way be impugned, the tenant should be able to raise that contention in the possession proceedings themselves even if they are in the County Court. This follows on from *Wandsworth v Winder* as approved in *Kay and Doherty*. The court disapproved the reasoning of the Court of Appeal in *Manchester CC v Cochrane* [1999] 1WLR 809 where the CA had concluded that a challenge to possession proceedings brought against an introductory tenant could not be made in the County Court.
22. The court considered s6(2) of the HRA and concluded that section 143D(2) can be read and given effect compatibly with article 8 Convention rights. The decision of a local authority to bring or continue possession proceedings will be compatible with article 8 rights where it brings proceedings that are proportionate because the demoted tenant has, for instance, continued to act in a manner that causes a nuisance to neighbours. Thus s 6(2) would be inapplicable. Similarly where a local authority fails to take into account Convention values when deciding whether or not to bring or continue proceedings it is not acting so as to give effect or enforce statutory provisions which are incompatible with Convention rights.
23. The Court added two further points regarding demoted tenancies:
  - (i) There are no express fetters on the nature of the grounds that a local authority can rely on when invoking possession against a demoted tenant. There is no express provision limiting the local authority to relying on repetitions of similar incidents that gave rise to the demotion order.
  - (ii) It would only be in “highly exceptional” circumstances that article 8 will assist a demoted tenancy as the court will have made a demotion order and considered reasonableness within the previous two years. In addition the tenant will have been given the local authority’s reasons for deciding to seek possession and will have had the opportunity to challenge the same and have them considered by the Panel.

#### **Issue 4: application of conclusions to facts of this case**

24. The court then went on to decide the proportionality issue. In concluding that it was proportionate to evict Mr P, the SC commented :
  - (a) that there was nothing in the statute which limited the grounds that the local authority could rely on when deciding to issue possession proceedings. There was no reason to limit the same save by reference to rationality in domestic law and proportionality in respect of the Convention. The court were reluctant to imply words into the statutory provisions but also the tenant has lost all protection during the period of the demoted tenancy. The local authority is not therefore limited to raising only breaches of the tenancy to justify a decision to issue and continue claim for possession against a demoted tenant.

- (b) The Panel should be able to consider all available information when assessing the justification and proportionality of the local authority seeking possession. Both landlord and tenant must be able to raise matters that have arisen since the notice was served. The Panel and the court hearing the possession claim can take into account grounds not contained in the notice.
- (c) The fact that the Notice has a bad reason does not destroy the right to seek possession unless the bad reason somehow infects the good faith of the landlord.

25. Mr P and his partner Mrs W had lived at the premises for over 30 years. It was argued on Mr P's behalf that that none of the five children lived with them and that there had been no further incidents since February 2008. Further none of the three matters relied on since the demotion order were breaches of the tenancy agreement. Ms W had committed no acts of nuisance since 2003 and there was no suggestion Mr P was likely to. The children did not live with them and they could be excluded from the area using s153C of the 1996 Act.

26. The incidents relied on related to one matter in 9.07 when Clive Pinnock resisted arrest at the premises and ran off. He was later convicted of resisting a constable in execution of his duty. There was no evidence of any nuisance or annoyance to neighbours. Another son pleaded guilty to causing death by dangerous driving on 18.1.08. He killed and seriously injured two others in an incident about 1.5 miles from the premises. Ms W blamed the police for this latter incident and did not accept her son was responsible. Finally in 2.08 there was a burglary committed by another son a few minutes from the premises. This offence also involved an assault on a woman.

27. The court concluded that the history of the crime nuisance and harassment leading up to the demotion order in 6.07 was "extraordinary in its extent and persistence". The demotion order was a last chance for Mr P. Despite this there were three serious incidents in a year; one in the premises and the other two in its immediate vicinity. All three being the responsibility of Mr P's children. Further Ms W appeared to have learnt nothing. The argument that the children did not live at the premises was of scant assistance as they visited and when they did, they committed crimes and made a nuisance of themselves in the vicinity. The fact that some of the incidents did not involve a breach of the tenancy agreement was not a problem as there was no requirement that they should. Mr P may not have been responsible for the incidents but this was not very significant. The order was not made to punish him. The fact that there were other remedies to punish the children was of little force. Rather than seeking ASBOs or ASBIs to keep them out of the vicinity, it is scarcely irrational or disproportionate to decide to remove the parents whom the children visit. In the light of the history, the demotion order, the interest of the neighbours and the Council's right to manage and allocate its housing stock, the decision could not be characterised as unreasonable or disproportionate. Thus the appeal was dismissed and the order for possession upheld.

## **Commentary**

What does it all mean?

28. It is a fundamental change in focus. Tenants/occupiers of local authorities and social landlords who are public authorities under HRA may now run a proportionality defence. Such an argument will add little to those claims where reasonableness is already in play.
29. Practically A8 may add a defence in some areas: possible areas where such a defence may arise:
- (i) mandatory grounds for possession
  - (ii) Non statutory succession: has there been a succession, does local policy allow for the same; has the policy been applied
  - (iii) Termination of joint tenancy by notice to quit; what are the circumstances that have led to the same; has the occupying tenant had the opportunity to explain ie domestic violence allegations
  - (iv) Failure to follow anti social behaviour policies; rent arrears policies etc
  - (v) Personal promises that arise to something akin to a legitimate expectation that occupier can remain or have security of tenure
  - (vi) Vulnerable tenants/occupiers especially those with mental health problems
30. The above are not intended to be exclusive but to suggest some areas where a defence may need to be considered. Advisers need to revisit current cases to check whether such arguments arise and to amend if need be. However be cautious this is not a green light. The cases where such defences succeed will be unusual.
31. In considering proportionality, it is highly important to bear in mind a) that the assessment of the proportionality may also require the court to decide factual issues and b) the comments made at [64] that this issue is more likely to be relevant where the occupier is vulnerable due to mental or physical illness. In such cases the issues may also require the landlord to explain why they are not securing alternative accommodation. This is a very important factor in this context.
32. Gateways (a) and (b) are of limited relevance or dead depending on your approach. Gateway (a) is the traditional argument that the statutory regime is incompatible with Convention rights.
33. Gateway (b) could be said to have some limited application to those cases where the argument rests on procedural unfairness (see *McGlynn v Welwyn Hatfield DC* [2009] EWCA Civ 285 and *Barber v Croydon LBC* [2010] EWCA Civ) rather than a challenge based on the rationality of the decision where the issues relate to the personal circumstances of the occupier. However one can alternatively merely see these cases as A8 defences where procedural fairness is raised in support of the proportionality assessment.
34. Whilst the decision is highly important and changes the landscape, note that
- The court suggested that the concept of an applicant's "home" could be questioned.

- Further the court accepted that the local authority did not have to plead and prove a legitimate aim to the claim for possession, the onus was on the tenant to raise the proportionality defence. This may lead to issues for the unrepresented defendant.
- It remains the case that the court will consider the A8 defence summarily and it therefore needs to be clearly and carefully pleaded.
- Whilst there is no “highly exceptional” threshold, it is clear that such defences will only succeed in very strong and clear cases. It is not a routine defence.
- Local authorities in demoted tenancy cases can raise matters that were not in the Notice and can raise matters that are not breaches of the tenancy.

35. The defence may act not to prevent eviction long term but to postpone it for a period say to allow a young person to complete their final year of schooling and examinations before eviction or for treatment at a local hospital. This may in fact be one of the most important tools namely using A8 defences to delay eviction for a period of time whilst a particular set of facts exist.

36. To what extent are PRPs public authorities for A8 purposes? What is the horizontal effect *ie* how will it impact on private landlords? The latter is a very interesting question. It was left open by the court in *Pinnock*. The court must interpret legislation in a manner that is compatible with the convention (s3 HRA) and it is a public authority (s6 HRA) and it is unlawful for it to act in a manner that is not compatible with Convention Rights. Arguably the court must therefore refuse to grant possession where it considers that the eviction would not be proportionate notwithstanding the landlord’s right to possession. Circumstances where this issue will arise may not be obvious but there may be instances where the eviction appears disproportionate and notwithstanding the fact that the parties are both private bodies, there is the possibility of arguing A8 matters. In *Patel v Pirabakaran* [2006] 1WLR 3112 the Court of Appeal in considering whether legislation complied with Convention rights considered that the matter could be considered notwithstanding that the claim related to two private parties. Similarly in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 the House of Lords read Schedule 1 of para 2 of Rent Act 1977 so as to enable a long term partner to succeed to a tenancy. In both these instances the court was considering the effect of statute. In relation to the common law, the courts do appear to have accepted that there is some horizontal effect when considering an existing relevant cause of action (see *Campbell v MGN* [2004] 2 AC 457, *Douglas v Hello!* [2006] QB 125 and *HRH Prince of Wales v Associated Newspapers* [2008] Ch 57) and have given effect to convention rights when developing common law causes of action. Whilst these cases related to actions for breach of confidence, the same principles would apply in relation to actions for trespass. Thus the courts in considering trespass claims should ensure that the common law develops with A8 in mind. In most instances the fact that the law entitles the private landlord to possession will be determinative and it will only be in very unusual cases that convention rights will alter the outcome.

## **Proportionality**

### ***Introduction***

1. The Supreme Court in *Pinnock* accepted that the “clear and constant” line of authorities in the ECtHR requires that “*where a court is asked to make an order for possession of a person's home at the suit of a local authority, the court must have the power to assess the proportionality of making the order; and, in making that assessment, to resolve any relevant dispute of fact*” ([48]).
2. This begs the immediate question: what is proportionality? The Supreme Court itself acknowledged that this presented a “*new obstacle to the making of a possession order*”, but was not of great assistance in defining the scope and limitations of this shift in approach to public law defences, preferring to conclude that “*The wide implications of this obligation will have to be worked out. As in many situations, that is best left to the good sense and experience of judges sitting in the county court*” ([57]).
3. Those with closer and more frequent contact with county court possession lists may not share the optimism of the Supreme Court that “good sense” will prevail or that there will be any consistency in approach. It is useful, therefore, to attempt to identify what the term “proportionality” connotes and what factors it introduces to the existing complexity of housing law.

### ***The origins of proportionality***

4. Proportionality is widely accepted as a German concept which became a substantive part of the jurisprudence of the European Court of Justice. Reference to proportionality as a tool for calling to account administrative decision-making, is not a new concept: as early as the *GCHQ* case<sup>1</sup>, it was suggested that proportionality may become an independent head of judicial review.<sup>2</sup>
5. It is perhaps easiest to understand proportionality by contrasting it with a concept that is more readily known and understood. *Wednesbury* unreasonableness provides that a decision can be challenged only if it is so unreasonable that no reasonable public body could have made it. That is a notoriously high test. In *Wednesbury* itself, Lord Diplock suggested that it would only apply to a decision “*which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it*”, the example given was a teacher who was dismissed because he had red hair. The rationale for such

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<sup>1</sup> *R v Minister for the Civil Service, ex p Council of Civil Service Unions* [1985] AC 374

<sup>2</sup> For the progress of proportionality in judicial review in general, see *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, *R (Alconbury) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 A.C. 295, *R (Association of British Civilian Internees (Far East Region)) v Secretary of State for Defence* [2003] EWCA Civ 473, [2003] Q.B. 1397.

a high threshold was based in the separation of powers and the constitutional position of the courts: they could not interfere in an area which Parliament had conferred on a public body just because the court believed that a different way of exercising discretionary power would be more reasonable than that chosen by the public body; to do so would substitute a judicial view for that of the public body entrusted with the decision-making function. Thus, the courts could exercise a supervisory jurisdiction without becoming involved in the merits of a particular case or undertaking a balancing exercise between competing principles.

6. Of course, this is a fiction. If the courts strictly followed Lord Diplock's definition of reasonableness and limited irrationality review to manifest absurdity, there would be almost no successful challenges of this kind. Administrative action is often struck down on the *Wednesbury* grounds, even though the action itself could not be said to have been in defiance of logic or accepted moral standards.<sup>3</sup>
7. It follows that the courts have always been willing to use *Wednesbury* unreasonableness as a flexible tool, when applying which they have to make explicit or implicit value judgments regarding the acceptability of the administrative action that is in issue.
8. Against that background, proportionality becomes simpler to understand. It is a flexible principle which is used in different contexts to protect different interests and entails varying degrees of judicial scrutiny; it is dictated by the subject matter. Just as *Wednesbury* at its "weakest" involves value judgments, proportionality requires the court to scrutinise the facts and determine whether the ends sought to be achieved justify the means to achieve them.

### ***What is proportionality?***

9. Proportionality is often said to consist of three principles:
  - (i) suitability - is the power being exercised in a way which is suitable to achieve the purpose intended and for which the public body holds that power;
  - (ii) necessity - is the exercise of the power necessary in order to achieve the relevant purpose;
  - (iii) proportionality in the narrower sense - does the exercise of the power impose burdens or cause harm to other legitimate interests which are disproportionate to the importance of the object to be achieved.
10. What this means in practice is that the means employed to achieve a given aim both correspond to the importance of that aim and are necessary for its achievement.<sup>4</sup> In *Fedesa*,<sup>5</sup> proportionality was defined as requiring that measures:

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<sup>3</sup> cf. *R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd* [1998] 1 All ER 129, where Lord Cooke suggested that the *Wednesbury* test was too extreme and that a better formulation was whether the decision was one which a reasonable authority could reach.

<sup>4</sup> *Kokkinakis v. Greece* (1993) 17 E.H.R.R. 397; *Fromançais S.A. v. F.O.R.M.A.* [1983] E.C.R. 395, ECJ.

<sup>5</sup> Case C331/88, *R. v. Ministry of Agriculture, Fisheries and Food Ex p. Federation Europeene de la Sante Animale (FEDESA)* [1990] E.C.R. I-4023.

*“... are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.”*

11. Proportionality may require the court to look at the interference complained of and determine whether the reasons adduced as justification for that interference were relevant and sufficient and whether the means employed were proportionate to the legitimate aim pursued. Thus, it may be said that one aspect of proportionality is that it demands a more reasoned justification from the decision-maker: in *First City Trading*, Laws J. said *“It is not enough merely to set out the problem and assert that within his discretion the [decision-maker] chose those or that solution constrained only by the requirement that his decision must have been a reasonable one which a reasonable [decision-maker] might make. Rather the court will test the solution arrived at, and pass it only if substantial factual considerations are put forward in its justification: considerations which are relevant, reasonable, and proportionate to the aim in view.”*
  
12. The requirement for reasons to be relevant and sufficient would appear to suggest that, if no reasons are advanced for the interference, the requirements of proportionality will not be fulfilled and the action will be unlawful.<sup>6</sup>
  
13. Proportionality may also require that the action taken is the least restrictive means available such that where alternative, less restrictive action would achieve the same object, the authority should use it, for example, in *Campbell v UK* (1993) 15 E.H.R.R. 137 where the ECHR considered that the policy of opening all prisoners’ mail to check for prohibited material was disproportionate in circumstances where the prison could have adopted the less restrictive measure of only opening the letters of those suspected of receiving restricted material. In *Clays Lane*,<sup>7</sup> it was held that, where the decision to be made was between two proffered alternatives:  

*“...[T]he appropriate test of proportionality requires a balancing exercise and a decision which is justified on the basis of a compelling case in the public interest and as being reasonably necessary but not obligatorily the least intrusive of Convention rights.”*<sup>8</sup>
  
14. In *Samaroo*,<sup>9</sup> Dyson LJ said that proportionality required consideration of two questions: first, “can the objective of the measure be achieved by means which are less interfering of an

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<sup>6</sup> See *Autronic AH v Switzerland* (1990) 12 E.H.R.R. 485.

<sup>7</sup> *R (Clays Lane Housing Co-Operative) v Housing Corporation* [2004] EWCA Civ 1658, [2005] H.L.R. 15.

<sup>8</sup> *Clays Lane Housing*, at [25]. Emphasis in original.

<sup>9</sup> *Samaroo v Secretary of State for the Home Department* [2001] EWCA Civ 1139, [2001] U.K.H.R.R. 1150.

individual's rights"; second, does the measure have an excessive or disproportionate effect on the interests of affected persons.<sup>10</sup>

15. The question of proportionality extends not only to the outcome, but also to the procedure to achieve that outcome: in *Buckley v UK*,<sup>11</sup> the ECHR said, in relation to procedure:

*“Whenever discretion capable of interfering with the enjoyment of a Convention right such as [Art.8] is conferred on national authorities, the procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. Indeed it is settled case law that, whilst article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded to the individual by article 8.”*

### ***Proportionality in Pinnock***

16. Caselaw prior to *Pinnock* suggests that “*there is nothing in Article 8, or in the associated jurisprudence of the European Court of Human Rights, which should carry county courts to materially different outcomes from those that they have been arriving at for many years when deciding whether it is reasonable to make an outright or a suspended or no possession order*” (*Lambeth LBC v Howard* [2001] 33 HLR 58). To a considerable extent, *Pinnock* reinforces this: “*It therefore seems highly unlikely, as a practical matter, that it could be reasonable for a court to make an order for possession in circumstances in which it would be disproportionate to do so under article 8.*” ([56]).

17. Proportionality becomes relevant where there is no statutory or contractual security of tenure (e.g. demoted tenants, introductory tenants, non-secure tenants, a person in respect of whom a notice to quit has been served, trespassers). In such cases, proportionality will have a role to play. Even here, the Supreme Court went to great lengths to emphasise the unusual circumstances that would be necessary before a proportionality would be successful: “*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.*” ([54]).

18. The Supreme Court left the detail of proportionality to be decided at a different hearing. The *Birmingham CC v Frisby* appeals afforded “*a more appropriate vehicle for the giving of general guidance*” than *Pinnock*. That said, they provided some guidance as to the application of the proportionality principle -

- (i) proportionality is only relevant where the proceedings threaten the defendant's “home”, *i.e.* not very short-term accommodation but rather somewhere with which the

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<sup>10</sup> At [19]-[20]. See also *R v Shayler* [2002] UKHL 11, [2003] 1 A.C. 247, *per* Lord Hope.

<sup>11</sup> (1997) 23 E.H.R.R. 101.

applicant has “sufficient and continuous links” (*Gillow v UK* (1986) 11 EHRR 335), an example would be the recreation ground which the defendant occupied for two days prior to receiving notice to quit in *Leeds CC v Price*, which was joined with *Lambeth LBC v Kay* in the House of Lords: [2006] UKHL 10, [2006] 2 AC 465.

- (ii) proportionality (and Art.8 itself) need only be considered by the court if it is raised in the proceedings by or on behalf of the residential occupier - presumably this will be regardless as to whether the defendant had representation;
- (iii) if an article 8 point is raised, the court should initially consider it summarily; only if the court is satisfied that it could affect the order that the court might make should the point be further entertained; where the court is satisfied that, even if the facts relied on are made out, the point would not succeed, it should be dismissed (this is consistent with the approach of Lord Bingham in *Kay*, who suggested that deciding whether there was a seriously arguable human rights defence to proceedings “*should be decided summarily, on the basis of an affidavit or of the defendant's defence, suitably particularised, or in whatever other summary way the court considers appropriate. 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.*”)
- (iv) The issue of proportionality does not bite purely on the question as to whether an order for possession should be made; it may additionally justify granting an “extended period for possession” or suspending the order for possession (the Supreme Court acknowledged that this may necessitate revisiting statutory procedural provisions such as the “long stop” on postponement of possession of 42 days, contained in s.89, Housing Act 1980, or the provisions of CPR 55 authorising summary possession proceedings).
- (v) proportionality is more likely to be a relevant issue in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty, and that the issue may also require the local authority to explain why they are not securing alternative accommodation in such cases.

19. If those factors count in favour of the tenant, the Supreme Court was clear to emphasise that the proportionality of eviction would be supported by:

- (i) the fact that it would serve to vindicate the authority's ownership rights;
- (ii) the fact that it would enable the authority to comply with its duties in relation to the distribution and management of its housing stock, including the fair allocation of its housing,
- (iii) the authority's need to redevelop a site, refurbish sub-standard accommodation, move people who are in accommodation that exceeds their needs or move vulnerable people into sheltered or warden-assisted housing;
- (iv) a need to remove a source of nuisance to neighbours.

### ***Points to raise in any defence***

20. Although expressed in terms of “exceptionality”, it remains open to raise questions of proportionality in any proceedings not attended by security of tenure. Those matters which would normally be raised by way of defence (on the grounds of reasonableness) or to support an argument that any order should not be outright, will be relevant here (given the court’s juxtapositioning of reasonableness and proportionality, it is arguable that the existing case law on reasonableness applies equally in relation to proportionality arguments).
21. It is to be hoped that the *Birmingham CC v Frisby* cases will provide greater clarity as to what factors influence proportionality - as the conjoined appeals will address non-secure tenancies as well as introductorys, the scope for guidance is considerably wider. Until such guidance is provided, the following provides a guideline:
- (i) how the occupier entered into occupation and whether he enjoyed any security of tenure;
  - (ii) how the occupier came to face eviction - was security of tenure lost for no reason of his own (*e.g.* by operation of the rule in *Hammersmith & Fulham LBC v Monk* [1992] 1 AC 478, HL);
  - (iii) why is possession being sought, is the landlord seeking to recover possession in order, for example, to develop the property;
  - (iv) what steps has the landlord taken prior to commencing proceedings;
  - (v) what reasons has the landlord given for seeking possession, can the objective behind those reasons be satisfied by any means other than possession;
  - (vi) does the occupier over or under occupy the premises;
  - (vii) what are the personal circumstances of the occupier - does he occupy the property with his family or with his children, does he suffer from any form of illness or disability;
  - (viii) are the occupier’s circumstances such that the authority should be rehousing him - this may raise interesting questions where the occupier can be said to be owed a *prima facie* duty under Pt 7, Housing Act 1996, (*Bristol CC v Mousah* (1998) 30 HLR 32 seemed to suggest that the outcome of any Pt 7 application was irrelevant to the question of reasonableness);
  - (ix) do any of the landlord’s policies - rehousing, allocation, domestic violence, anti-social behaviour, homelessness prevention - impact on the decision to seek possession and have they been taken into account when reaching the decision to evict;
  - (x) would eviction cause the occupier hardship over and above that which any evicted tenant would suffer;
  - (xi) has the occupier been the subject of any complaints regarding his behaviour or any warnings from the landlord during his occupation of the property (*e.g.* concerning payments of rent or mesne profits) or any allegation of, *e.g.* domestic violence.

### **Status of successful occupiers**

22. *Pinnock* clearly confers on the courts a far wider discretion than they had previously had to manage. So much is evident in the suggestion that legislation may require amendment to permit

postponement of possession beyond 42 days. It follows that occupiers - whether introductory tenants, tenants of non-secure tenancies or mere licencees - may be permitted to remain in occupation. What then is their status?

23. For example, to return to the facts of *Qazi v Harrow LBC* where one joint tenant leaves the property and serves the authority with notice to quit thereby terminating the joint tenancy (*cf.* the rule in *Monk*, which has been said to be compliant with Art.8 in *Wilson v Harrow LBC* [2010] EWHC 1574 (QB)). The authority then serves notice to quit and seeks possession against the remaining occupier who no longer enjoys any security of tenure. In possession proceedings, the court accepts that it would not be proportionate to order eviction (or grants possession but suspends execution). What is the status of the occupier - the notice to quit lawfully determined the tenancy but the occupier remains in occupation.
24. This question is not touched on in *Pinnock* nor did it entertain the courts in *Kay* or *Doherty*. There are a number of possibilities:
- (i) continued occupation creates a new tenancy, which is likely to be a secure tenancy with all that that entails (although it could be argued that the tenancy should be introductory);
  - (ii) is the concept of “tolerated trespasser” revived and, if so, do the historical problems associated with that status likewise recur;
  - (iii) does the pre-existing right to occupy survive - *e.g.* a non-secure tenant remains such under the same terms as he was prior to the service of notice, a demoted tenant remains a perpetual demoted tenant;
  - (iv) is some new form of tenancy created whereby the occupier is permitted to remain, subject to a condition subsequent (such as the death of an ill relative who justified the exercise of the discretion or children - whose presence made it disproportionate to order immediate possession - reaching the age of majority).
25. Where the occupancy was pursuant to a non-secure tenancy, one method for avoiding these problems is for the court to find that the service of the notice to quit was disproportionate, thereby in essence continuing the non-secure tenancy. Where, however, that approach is not adopted and the court merely refuses to grant possession or suspends the execution of an order, the tenancy has come to an end on the expiry of the notice to quit.
26. Again, it is to be hoped that these issues can be resolved (or at least addressed) by the Supreme Court in the *Frisby* cases.