

Public / Human rights

A new gateway?

Jamie Burton & **Alex Gask** consider how the gateway defence could make life easier for non-secure tenants

IN BRIEF

- Aggrieved non-secure tenants are gaining the right to raise their defence in the county court, and on grounds which are wider than the traditional *Wednesbury* criteria.
- The creation and interpretation of the gateway a & b defences.

The ultimate impact of the Human Rights Act 1998 (and in particular Art 8 of the European Convention on Human Rights) on the rights of tenants who have limited security of tenure may not be known until nine Supreme Court judges hear the appeal in *Pinnock v Manchester CC* [2009] EWCA 852, [2009] All ER (D) 10 (Aug) later this month. However, in the five conjoined appeals in *Salford City Council v Mullen* [2010] EWCA Civ 336, [2010] All ER (D) 289 (Mar) the Court

their resources as efficiently as possible, Parliament has ensured that homeless applicants in temporary accommodation are given extremely limited security of tenure. These “non-secure tenancies” can be determined by the mere service of a valid notice to quit: the authority does not need to establish grounds for the eviction or persuade a county court judge that it is reasonable to order possession.

It is also increasingly the case that local housing authorities are adopting “Introductory Tenancy Regimes” pursuant

Homeless applicants in temporary accommodation are given extremely limited security of tenure

of Appeal has in the meantime tried to “provide some guidance as quickly as possible to the courts dealing with these cases”. In particular the court addressed two issues: what is the appropriate venue for hearing a defence based on Art 8; and what standard of review must the court apply when determining it? It also granted permission to appeal to the Supreme Court.

Background

While they wait for a more permanent home from their local housing authority, homeless persons must be provided with temporary accommodation. In order to ensure that those authorities can use

to Pt V of the Housing Act 1996. This means that even when the homeless applicant is offered a permanent home, she is initially subjected to a probationary period, normally of a year, during which the local housing authority can again determine the tenancy without having to persuade a court to do so.

The introductory tenancy differs from the non-secure tenancy only in that the landlord must give the tenant notice of its decision to seek possession, the reasons for its decision, and, if requested, review its decision having heard representations from the tenant.

Challenging eviction

Until relatively recently the only way in which an aggrieved non-secure or

introductory tenant could challenge their eviction was by seeking to impugn the landlord’s decision to evict them by way of an application for judicial review in the administrative court. However, prompted by the Human Rights Act 1998 and certain decisions from Strasbourg, the jurisprudence of the courts would appear to be moving inexorably in the direction of allowing such tenants the right to raise their defence in the county court, and on grounds which are wider than the traditional *Wednesbury* criteria.

Article 8 affords everyone the right to respect for their home. Any interference with this right, including an eviction, must be a proportionate response to a legitimate aim. It has long been accepted that a place may be someone’s home even if they don’t have any private law rights in respect of it. So what does Art 8 mean for a tenant who enjoys only the most basic security of tenure and who cannot rely on a judge to conduct the careful balancing exercise that Art 8 requires?

Kay v Lambeth

In *Kay v Lambeth LBC* [2006] UKHL 10, [2006] All ER (D) 120 (Mar) the House of Lords considered this question. The result was the creation of the “gateway a & b” defences, derived from para [110] of Lord Hope’s speech: “If the requirements of the law have been established and the right to 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 Art 8....(b) if the defendant wishes to challenge the decision of a public authority to recover possession as an improper exercise of their powers at common law on the ground that it was a decision which no reasonable person would consider justifiable, he should be permitted to do this provided again that the point is seriously arguable.”

Appropriate venue

In *Doherty v Birmingham City Council* [2008] UKHL 57, [2009] 1 All ER 653 the claimant authority sought possession against a family of gypsies

after their licence to occupy a pitch on the authority's site had been determined. The House of Lords held that the defendant was entitled to raise their public law "gateway b" defence that the decision to evict him was an improper exercise of the authority's power to seek possession at common law in the county court.

However, the decision in *Doherty* did not mean that every occupier who does not have a private law right to remain may try and resist their eviction in the county court. By parity of reasoning with the decision in *Pinnock* (which concerns the demoted tenancy regime which shares many similarities with the introductory tenancy regime), the Court of Appeal confirmed in *Mullen* that introductory tenants must continue to argue their case in the administrative court. However those in homelessness accommodation must do so in the county court. This difference is not based on some issue of principle, but on statutory construction: the relevant provisions in both the demoted and introductory tenancy regimes state that the county court "shall" grant possession where the procedural requirements have been met, leaving no scope for a public law defence.

The differences between the county court and the administrative court are obvious. In terms of practice and procedure the former has the necessary experience of dealing with landlord and tenant issues, whereas the latter has the public law expertise. While it is debatable which is best for determining the gateway defences, uniformity of approach is surely desirable. Parliament can be expected to intervene at some point in the future in order to achieve this.

Standard of review

Another point which arose from the *Doherty* decision and which the court had to deal with in *Mullen* concerned the standard of review which is applicable to a "gateway b" defence. Lord Hope himself had this to say in *Doherty* [55]: "I think that...it would be unduly formalistic to confine the review strictly to traditional *Wednesbury* grounds. The considerations that can be brought into account are wider. An examination of the question whether the [authority's] decision was reasonable, having regard to the aim which it was pursuing and to the length of time that the [defendant] and his family have resided on the site,



would be appropriate...In my opinion the test of reasonableness should be, as I said in [110] of *Kay*, whether the decision to recover possession was one which no reasonable person would consider justifiable."

The court in *Mullen* was bound therefore to hold that the gateway b defence does not permit of a full proportionality review: the trial judge, whether in the Administrative or the county court, is not entitled to substitute his own judgement for that of the landlord. Yet it went further, stating that in "the introductory tenancy scheme

In *Mullen* the court dealt with another ambiguity in the law. It is now clear that a gateway b defence does not fall to be determined solely by reference to the facts known to the landlord at the time it served the requisite notice or indeed at the time proceedings were issued. A tenant may rely on facts which have only come to the attention of the landlord at a later stage, including, presumably, during the trial of the defence. Therefore landlords are effectively under a duty to continuously review their decision, having regard to any matters which have arisen since it was made, even, it would seem,

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the question will be whether there is some highly exceptional circumstance which should lead to the county court adjourning the matter so that Judicial Review can be applied for in the administrative court. Circumstances, personal or otherwise, which Parliament must have contemplated would be likely to be present in the context of such a scheme could not be considered as "exceptional" never mind "highly exceptional".

This restrictive approach may not survive the appeal to the Supreme Court. Councils who wish to evict introductory tenants must establish grounds and give reasons for their decision: this led the Court of Appeal in *R (McLellan) v Bracknell Forest BC* [2002] QB 1129 to say that when terminating an introductory tenancy the "circumstances of the particular tenant" were "brought directly into focus". Therefore any challenge to that termination will inevitably be based on those circumstances.

the mere passage of time (which may of course have allowed the tenant to reduce his arrears or stop committing anti-social behaviour).

The decision in *Mullen* has clarified a number of issues while raising a similar number of questions. The Court of Appeal granted permission to appeal to the Supreme Court. It may be that the Supreme Court's decisions in *Pinnock* and now *Mullen* resolve all of these difficult issues once and for all, but in light of the fact that the European Court of Human Rights is due to give its judgment in *Kay v UK* later in the year those decisions may prove to be only the end of the beginning rather than the beginning of the end in this important area of law.

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