

The Human Rights Act: 10 Years On

Daniel Stilitz QC

1. The Human Rights Act 1998 (“**the HRA**”) will have been in force for 10 years on 2nd October 2010. With the stated objective of “bringing rights home”, it incorporated for the first time the European Convention on Human Rights (“**the ECHR**”) into domestic law, and set up a machinery for the direct enforcement of Convention rights against public authorities. Its impact on local government law has been significant, although not perhaps as great as was predicted in some quarters at the inception of the HRA. In this paper, I examine some of the most significant ways in which the HRA has affected the law relating to local authorities over the last 10 years, focussing in particular on the more recent cases.
2. In particular, I will focus on the following themes:
 - 2.1. The extent to which local authority functions are susceptible to the HRA;
 - 2.2. The approach to local authority reasoning required by the HRA;
 - 2.3. The impact of Article 6 on local authority decision-making;
 - 2.4. The impact of Article 8 on local authority housing law; and
 - 2.5. The courts’ approach to Article 14.

THE EXTENT TO WHICH LOCAL AUTHORITY FUNCTIONS ARE SUSCEPTIBLE TO THE HRA

3. The House of Lords considered in *YL v Birmingham City Council* [2007] UKHL 27 the extent to which the HRA may apply directly to private bodies with which local authorities may contract for the purposes of carrying out their functions. The appellant was an 84 year-old woman who suffered from Alzheimer’s disease. The local authority arranged for her to be placed in a private care home, pursuant to its duty under section 21 of the National Assistance Act 1948, where her care was largely funded by the authority. The care home gave notice terminating the arrangement, and the appellant alleged that her Convention rights were thereby infringed. A preliminary issue was considered as to whether the care home fell within the definition of “public

authority” for the purposes of section 6 of the HRA, so as to be under an obligation not to infringe the appellant’s rights. This in turn depended on whether the care home fell within the definition of a “*person certain of whose functions are functions of a public nature*” within the meaning of section 6(3)(b).

4. The majority of the House of Lords (Lord Scott, Lord Mance and Lord Neuberger) held that a care home providing care and accommodation for a publicly-funded resident was not exercising functions of a public nature within the meaning of section 6(3)(b) of the HRA. Lord Mance was particularly influenced by the fact that, in providing care and accommodation, the care home was acting as a private, profit-earning company (see [116]): “*The private and commercial motivation behind Southern Cross’s operations does ... point against treating Southern Cross as a person with a function of a public nature*”. Lord Neuberger considered it particularly important that the proprietor of a care home is not given significant coercive or other statutory powers over its residents, whether they are in the care home pursuant to an arrangement with a local authority or otherwise.
5. However, Lord Bingham and Baroness Hale dissented strongly. Having analysed the various factors in play, Baroness Hale concluded (at [73]):

“Taken together, these factors lead inexorably to the conclusion that the company, in providing accommodation, health and social care for the appellant, was performing a function of a public nature. This was a function performed for the appellant pursuant to statutory arrangements, at public expense and in the public interest. I have no doubt that Parliament intended that it be covered by section 6(3)(b).”

6. As is apparent from the split decision, the issue in ***YL v Birmingham City Council*** was a difficult one. The majority view does have some surprising consequences. In particular, it entails that the practical reach of the HRA will be directly impacted by the extent to which local authorities chose to discharge their duties through private contractors.
7. A more expansive approach to the scope of the HRA was taken by the Court of Appeal in ***R (Weaver) v London & Quadrant Housing Trust*** [2009] EWCA Civ 587 [2009] LGR 962, in which a question arose as to whether a registered social landlord was subject to the HRA in terminating a tenancy. The defendant was a housing association which was also a registered social landlord under the Housing Act 1996. The claimant was an assured tenant of the defendant, and the defendant sought an order for possession against her. The claimant applied for judicial review, alleging breach of a legitimate expectation amounting to a breach of her rights under the Convention.
8. It was conceded that the defendant was a “hybrid” authority for the purposes of section 6(3)(b), by virtue of at least some of functions being of a public nature. The majority of the Court of Appeal

(Elias LJ and Lord Collins) held that the provision of social housing by the defendant was a public function, thus bringing the defendant within the scope of section 6 of the Human Rights Act 1998. Elias LJ identified the essential question as being whether the act of terminating the tenancy is a private act. It was significant, in his view, that there was a significant element of public funding involved. Secondly, the association acted in very close harmony with the local authority, assisting it to achieve its statutory duties and objectives. Thirdly, the provision of subsidised housing may be seen as a governmental function. Moreover, the association acted in the public interest and had charitable objectives, placing it outside the realm of ordinary commercial activity. Further, it was subject to regulation designed, at least in part, to ensure that the objectives of government policy with respect to vulnerable members of society are achieved. Elias LJ concluded that the act of termination of a tenancy is so bound up with the provision of social housing that, once such provision is seen as the exercise of a public function, then acts which are necessarily involved in the regulation of the function must also be public acts. Lord Collins reached the same conclusion.

9. Rix LJ, in a powerful dissenting judgment, set out the relevant Strasbourg and domestic jurisprudence at length, before concluding on the basis of a “multifactorial” approach that the termination of a tenancy did not involve the exercise of a public function. In his view, the case was concerned merely with the termination of a contract, an act essentially of a private nature, and neither the social housing context nor the particular role of a registered social landlord made any difference to this.
10. The decision of the Court of Appeal in **Weaver** sits uneasily with that of the House of Lords in **YL**. That makes it all the more surprising that the Supreme Court refused permission to appeal in **Weaver**, thus leaving the law in an unnecessary state of uncertainty. Tantalisingly, in refusing permission the Supreme Court accepted that the point was one which merited their consideration, but considered that it was not a suitable case on its facts for determining the issue.
11. Not least in view of the diffidence with which the Supreme Court refused permission, it is likely that we have not heard the last on this issue.

THE APPROACH TO LOCAL AUTHORITY REASONING

12. An important point of practical significance for local authorities was determined by the House of Lords in the cases of **R (Begum) v Head Teacher and Governors of Denbigh High School [2006] UKHL [2007] 1 AC 100** and **Miss Behavin’ v Belfast Council [2007] UKHL 19 [2008] LGR 127**.

13. In the ***Denbigh High School*** case, Lord Bingham rejected the Court of Appeal's finding that the decision of a school not to allow a pupil to wear a particular religious form of dress was unlawful because the school had not sufficiently shown consciousness of the pupil's rights under Article 9 of the Convention in reaching its decision¹. He stated at [29]:

"[T]he focus at Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision-making process, but on whether, in the case under consideration, the applicant's Convention rights have been violated ... The unlawfulness proscribed by section 6(1) is acting in a way which is incompatible with a Convention right, not relying on a defective process of reasoning, and action may be brought under section 7(1) only by a person who is a victim of an unlawful act."

14. In the ***Miss Behavin'*** case, the defendant council had refused the claimant a licence to open a sex shop in Belfast. The claimant alleged that the decision had infringed its right to freedom of expression under Article 10 of the Convention and the right to enjoyment of property under Article 1 of the First Protocol. Lord Hoffmann rejected in characteristically pithy terms the suggestion that the decision was unlawful merely because the council had not demonstrated that it had consciously considered the Convention rights of the claimant. He stated at [13]:

"A construction of the 1998 Act which requires ordinary citizens in local government to produce ... formulaic incantations would make it ridiculous. Either the refusal infringed the respondent's Convention rights or it did not. If it did, no display of human rights learning by the Belfast City Council would have made the decision lawful. If it did not, it would not matter if the councillors had never heard of Article 10 or the First Protocol."

15. Thus, whilst some Convention rights do have a procedural element, in particular Article 6 and Article 8, a mere defect in a local authority's reasoning process will not give rise to a breach of a Convention right if there has been no violation of the right as a matter of substance. Having said that, it will always be good practice to consider the human rights implications of every action taken by a local authority. As Lord Bingham noted in ***Denbigh High School*** at [31]: "*If ... it appears that ... a body has conscientiously paid attention to all human rights considerations, no doubt a challenger's task will be the harder.*"

¹ The High Court rejected similar challenges to restrictions on attire in schools as amounting to alleged breaches of Article 9 of the Convention in ***R (X) v Head Teacher of Y School*** [2007] EWHC 298 (Admin) [2007] LGR 698 (refusal to allow a Muslim girl to wear the niqab) and ***R (Playfoot) v Governing Body of Millais School*** [2007] EWHC 1698 (Admin) [2007] LGR 851 (refusal to allow a Christian girl to wear a "purity" ring by virtue of prohibition on wearing jewellery)

THE IMPACT OF ARTICLE 6 ON LOCAL AUTHORITY DECISION MAKING

16. Article 6(1) of the Convention provides, in so far as is relevant:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ... “

17. The right to a fair hearing embodied in Article 6 of the ECHR has been invoked to challenge the fairness of a wide range of internal local authority decision-making processes on grounds that the local authority itself cannot be seen as an independent decision-maker. The domestic approach to Article 6 of the ECHR had seemed to have been resolved, up to a point, by the House of Lords' decision in ***Runa Begum v Tower Hamlets London Borough Council* [2003] 2 AC 430 [2003] UKHL 5**, which itself tidied up various loose ends left by the House of Lords' previous decision in ***R (Alconbury Developments Ltd) v Secretary of State for the Environment* [2003] 2 AC 295 [2001] UKHL 23**. The appellant in ***Runa Begum*** claimed that her Article 6 rights had been breached because the review she had requested of a homelessness decision under Part VII of the Housing Act 1996 had been carried out internally by the local authority. Applying the so-called “composite approach” developed in Strasbourg, the House of Lords concluded that many decisions of an administrative nature affecting individual rights could be taken internally without any breach of Article 6, in the light of the availability of judicial review to challenge such a decision.
18. Lord Bingham focussed on three particular factors in concluding that Article 6 was satisfied by the availability of an internal review which could be subject to an application for judicial review (at [9]): (1) the homelessness legislation is part of a far-reaching statutory scheme in an important field of social regulation, the administration of which has been largely entrusted to local authorities; (2) although a local authority may have to resolve factual issues in determining a review, its factual findings “*will only be staging posts on the way to much broader judgments which the authority has as make*”; (3) although the decision-maker was not independent, there are a number of procedural safeguards under the relevant subordinate legislation which “*preclude unreasoned decision-making by an unknown and unaccountable bureaucrat whom the applicant never has a chance to seek to influence*”.
19. Lord Hoffmann, giving the other leading judgment, rejected the notion that the degree of factual enquiry involved would be determinative of whether Article 6 would be satisfied by the availability of an internal hearing followed by judicial review, noting at [58] that “*the relative degree of factual and discretionary content is too uncertain*”. He identified the relevant question (at [59]) as being “*whether, consistently with the rule of law and constitutional propriety, the relevant decision-making powers may be entrusted to administrators*”. The House of Lords thus accepted that, in the context of administrative decisions by local authorities, there was no general need for the merits to be determined independently, even if the decision affected the rights of individuals.

20. The subsequent decision of the European Court of Human Rights in ***Tsfayo v United Kingdom (Appl No 60860/00) [2007] LGR 1*** was seen in some quarters as reopening the question of the scope and application of Article 6 in the context of local authority decision-making. In ***Tsfayo***, the Strasbourg court had held that decisions of the Housing Benefit Review Board infringed Article 6, principally because the nature of the decision in question was a narrow question of fact, requiring no professional judgment or expertise, and the Board was composed of up to five elected members of the authority which would stand to lose out financially if the appeal was allowed. Since that decision, a number of attempts have been made to develop the law on Article 6 beyond the formulation in ***Runa Begum***.

21. The recent cases fall broadly into under two headings:

21.1. Cases concerned with the applicability of Article 6 in social welfare and housing contexts.

21.2. Cases concerned with the application of Article 6 in disciplinary contexts.

(1) Social welfare and housing

R (A) v Croydon London Borough Council

22. The decision of the Supreme Court in ***R (A) v Croydon London Borough Council [2009] UKSC 8 [2010] LGR 183*** concerned the proper approach to determining the age of unaccompanied asylum seekers for the purposes of receiving local authority assistance by way of accommodation under the Children Act 1989. “Child” is defined in the 1989 Act as a person under the age of 18, but it was unclear under the statutory scheme whether the determination of the question of whether an unaccompanied asylum seeker was a child was a matter for the local authority to determine through its social workers, or whether it was a question of precedent fact to be ruled upon by the courts. If it was a matter for the local authority, a further question arose as to whether the right to be considered for accommodation was a “civil right” for the purposes of Article 6(1), and, if so, whether Article 6(1) was satisfied by the availability of a judicial review challenge to the local authority’s decision.

23. In the event, the Supreme Court determined that the question of whether an individual was a child was a question of precedent fact for the court, so the Article 6 issues did not need to be determined. Nonetheless, both Lady Hale and Lord Hope considered the Article 6 questions in some detail. They followed and endorsed the general approach to Article 6 articulated by the House of Lords in ***Runa Begum***, rejecting any suggestion that it fell to be revisited in the light of ***Tsfayo***.

24. Lady Hale, in common with the House of Lords in ***Runa Begum***, declined to express a view on whether a “civil” right was engaged in this context. However, she concluded at [44]-[45]:

“Every decision about the provision of welfare services has resource implications for the public authority providing the service. Public authorities exist to serve the public. They do so by raising and spending public money. If the officers making the decisions cannot be regarded as impartial, and the problem cannot be cured by the ordinary processes of judicial review based upon the usual criteria of legality, fairness and reasonableness or rationality, then tribunals will have to be set up to determine the merits of claims to children’s services, adult social services, education services and many more. Resources which might be spent on the services themselves will be diverted to the decision-making process. Such a conclusion would be difficult, if not impossible, to reconcile with the decision of this House in ***Runa Begum***. The degree of judicialisation required of an administrative decision, in the view of Lord Hoffmann in ***Alconbury***, depends upon the ‘nature of the decision’ ...”

If this is a civil right at all, therefore, I would be inclined to hold that it rests at the periphery of such rights and that the present decision-making processes, coupled with judicial review on conventional grounds, are adequate to result in a fair determination within the meaning of Article 6.”

25. Lord Scott, Lord Walker and Lord Neuberger all agreed with Lady Hale.
26. Lord Hope adopted an even more robust approach to the Article 6 issues. He specifically adopted the approach of the House of Lords in ***Runa Begum***, following (at [55]) Lord Bingham’s analysis that “*The narrower the interpretation given to ‘civil rights’, the greater the need to insist on review by a judicial tribunal exercising full powers. Conversely, the more elastic the interpretation that is given to the expression, the more flexible must be the approach to the requirement if over-judicialisation of welfare schemes is to be avoided.*” He went on to interpret the European Court of Human Rights’ decision in ***Tsfayo*** as, in effect, endorsing the approach of Lord Bingham in ***Runa Begum*** (see Lord Hope at [61]).
27. More boldly, having reviewed the Strasbourg authorities on the scope if a “civil right” for the purposes of Article 6(1), Lord Hope concluded that, in order to fall within its scope, a public law decision must determine a “private right”. He commented at [63] that “*cases where the award of benefit is dependent upon a series of evaluative judgments as to whether the statutory criteria are satisfied and, if so, how the need for it as assessed ought to be met do not answer to that description*”. In accordance with that analysis, he concluded at [65]:

“ ... I think that it can now be asserted with reasonable confidence that the duty of the local authority under section 20(1) of the 1989 Act to provide accommodation for any child in need within their area who appears to them to require accommodation as a result of the factors mentioned in that subsection does not rise to a ‘civil right’ within the meaning of Article 6(1) of the Convention.”

28. None of the other Justices of the Supreme Court allied themselves to Lord Hope’s reasoning, and Lord Walker expressly stated that he preferred to leave the matter open, given the developing nature of the Strasbourg jurisprudence. Nonetheless, the Supreme Court’s decision in ***R (A) v***

Croydon London Borough Council may be seen, at a minimum, as firmly endorsing the House of Lords' approach in **Runa Begum**, and perhaps as indicating an increasing willingness to limit the boundaries of Article 6 altogether.

R (Ali) v Birmingham BC [2010] UKSC 8 [2010] LGR 401

29. The Supreme Court developed their reasoning in **R (A) v Croydon London Borough Council** in their subsequent decision in **Ali & others v Birmingham City Council [2010] UKSC 8 [2010] LGR 401**. These conjoined appeals concerned the same statutory scheme for assistance to the homeless as was considered by the House of Lords in **Runa Begum**.
30. In each case, the local housing authority had decided under section 193(5) of the 1996 Act that it had discharged its homelessness duty to the appellant, on the basis that the appellant had refused an offer of suitable accommodation, having been informed of the possible consequences of refusal. This turned on a simple factual question, namely whether the appellant had received a letter from the authority informing them of such possible consequences. Once a reviewing officer of the local authority had determined this question, the appellant's only recourse was by way of an appeal to the county court under section 204 of the 1996 Act, such appeal being on point of law only, and thus analogous to the Administrative Court's judicial review jurisdiction.
31. In **Runa Begum**, the House of Lords had been content to assume, without deciding, that Article 6 was engaged by the decision of a local authority under Part VII of the 1996 Act. In **Ali**, Lord Hope, this time giving the majority judgment with Lady Hale and Lord Brown, firmly grasped the nettle. Following a careful review of the Strasbourg jurisprudence on the scope of Article 6, he noted that, whilst the determination of entitlement to welfare payments had been held to engage Article 6 in cases such as **Salesi v Italy (1993) 26 EHRR 187** and **Mennitto v Italy (2000) 34 EHRR 1122**, in each of those cases the entitlement was to a non-discretionary benefit, as to which the proceedings were directly decisive for the right in question. In the instant case, by contrast, Article 6 was not engaged.
32. In particular, Lord Hope said at [49]:

“ ... I would be prepared now to hold that cases where the award of services or benefits in kind is not an individual right of which the applicant can consider himself the holder, but is dependent upon a series of evaluative judgments by the provider as to whether the statutory criteria are satisfied and how the need for it ought to be met, do not engage article 6(1). In my opinion they do not give rise to 'civil rights' within the autonomous meaning that is given to the expression for the purposes of that article. The appellants' right to accommodation under section 193 of the 1996 Act falls into that category. I would hold that article 6 was not engaged by the decisions that were taken in the appellants' cases by the reviewing office.”
33. Although it was not strictly necessary to do so, Lord Hope went on to consider whether the homelessness review procedure, combined with the availability of a statutory appeal to the county court, was sufficient to ensure compliance with Article 6 in any event. The instant appeals could

not be distinguished from **Runa Begum**, even though they turned on a narrow question of fact, namely whether the appellant had received the requisite notification from the local housing authority. As Lord Hope stated at [53]:

“ ... the subject matter of the decision appealed against here is exactly the same. The question whether or not the letters were received was just one among a number of questions that had to be addressed to determine whether the respondents’ duty under section 193 had been discharged. They are dealt with together in section 193(5) in a way that shows that they are all interlinked. The scheme of the Act is that they are to be dealt with together both at the initial stage and, in the event of a review, by the reviewing officer. To separate out questions as to whether the formalities laid down by the subsection were complied with from those as to whether the accommodation was suitable would complicate a scheme which, in the interests of speed and economy, was designed to be simple to administer.”

34. He continued at [54]:

“An answer to the question whether or not the letters were received was incidental to a more searching and judgmental inquiry into the accommodation’s suitability. It was, as Lord Bingham put it in *Runa Begum*, para 9(2), a staging post on the way to the much broader judgment that had to be made. These cases are quite different from *Tsfayo*, where no broad questions requiring professional knowledge or experience had to be addressed once the question whether there was good cause had been answered.”

35. Lord Hope took support in this analysis from the fact that the Strasbourg court had not given any indication that it disagreed with **Runa Begum**. On the contrary, it had, at least implicitly, endorsed the approach taken in that case in **Tsfayo** at [45]-[46]: see Lord Hope at [55].

36. Lord Collins agreed with Lord Hope that the relevant decision of the local housing authority did not constitute the determination of civil rights for the purposes of Article 6. He reached this conclusion essentially on the basis of “*the absence of ... an individual economic right in the applicant*” (at [58]). He stated at [62]:

“The reference ... to ‘an individual economic right flowing from specific rules’ in legislation reflects a thread running through the case-law in this area. It is plain from the jurisprudence of the Court that an important factor in the application of Article 6(1) in disputes with public authorities in areas which in national law would normally be regarded as public law is the assertion by the application of what has been variously described as ‘an economic right’ or an ‘individual, economic right’ or a ‘purely economic right.’”

37. Lord Collins noted that, whilst there is an emphasis in the Strasbourg cases on the pecuniary nature of the applicant’s rights, there is nothing in principle to prevent rights in relation to housing, whether pecuniary or not, from being civil rights for the purposes of Article 6(1) (at [67]).

38. Against this background, Lord Collins agreed that the right to homelessness assistance falls out scope of Article 6(1). He concluded at [73]:

“ ... the content of the statutory duty lacks precision. There is no right to any particular accommodation. The duty is to secure that accommodation is available. In my judgment, these factors together with the essentially public nature of the duty mean that the duty does not give rise to an individual economic right, and a dispute concerning the question whether the application has been properly notified of the consequences of refusal of accommodation is not within Article 6(1).”

39. Lord Kerr, concurring, adopted a similarly multi-factorial approach (at [75]):

“ ... the lack of similarity to (or, rather, the distinction that can be made with) a private insurance scheme; and the dependence on discretionary judgments not only to establish entitlement but also to discharge the state’s obligation and the way in which the obligation can be met all combine to make this a different type of case from the *Salesi* and *Mennitto* models.”

40. The decision in *Ali v Birmingham* is thus an important one, in that it represents the first attempt by the Supreme Court to lay down a marker as to where the scope of “civil rights” for the purposes of Article 6(1) must end. It also represents a firm endorsement of the approach in *Runa Begum* to the question of when the availability of judicial review will provide a sufficient safeguard to ensure compliance with Article 6(1) in circumstances where an initial decision is taken by a non-independent, administrative decision-maker. It follows that the Article 6 onslaught on local authority decision-making has, for now at least, been effectively fought off by the House of Lords.

De-Winter Heald v Brent London Borough Council [2009] EWCA Civ 930 [2009] LGR 937

41. The decision *De-Winter Heald v London Borough of Brent [2009] EWCA 930 [2009] LGR 937* was yet another claim concerned with the homelessness review procedures undertaken by local authorities. The Court of Appeal upheld the arrangements made by the local authority to contract out homelessness reviews to a private company, Housing Reviews Ltd. The claimant had been refused accommodation by the council on the basis that she did not have priority need. She sought to review that decision pursuant to section 202 of the Housing Act 1996. The private reviewer rejected the application, and the claimant challenged the decision on the basis that the council had not carried out a lawful review of her claim, as it had delegated it to someone outside the council.

42. The Court of Appeal held that delegation of the performance of reviews was permitted by the legislative scheme, relying in particular on section 70 of the Deregulation and Contracting Out Act 1994. The Secretary of State had issued an order under the 1994 Act in the housing and homelessness context. The Court also held that the legislation permitted the contracting out of the review function to an outsider. Reviews could be lawfully contracted out so long as the contractor had the necessary independence and impartiality to satisfy Article 6.

43. On the issue of Article 6 compatibility, Stanley Burnton LJ took as his starting point (at [51]) the decision in *Runa Begum*, which establishes that a review by an employee of a local authority does not infringe Article 6, even though the employee is not independent. It is then necessary to compare the independence and impartiality of a person to whom the review function is contracted out with those of an employee. He noted that it is possible to build a high degree of independence into the relevant contractual arrangements, for example by prescribing a long contractual term that is terminable only for serious breach. Although the contractor is not himself democratically accountable, the local authority remains accountable for the efficiency and fairness

of its review procedures. Moreover, Stanley Burnton LJ suggested (at [53]) that, on one view, the contractor's lack of democratic accountability might make him more rather than less independent.

44. On the question of the applicability of Article 6, this decision has in any event now been superseded by ***Ali v Birmingham City Council***.

(2) Disciplinary proceedings

45. Article 6 has featured increasingly in disciplinary cases involving public bodies, in particular in regard to the question of whether the employee is entitled to be represented by a lawyer in such proceedings.

***Kulkarni v Milton Keynes Hospital NHS Trust* [2009] IRLR 829 [2009] EWCA Civ 789**

46. The Court of Appeal in ***Kulkarni v Milton Keynes Hospital NHS Trust* [2009] IRLR 829 [2009] EWCA Civ 789** considered whether Article 6(1) required that the appellant, a doctor, should be entitled to have legal representation in internal disciplinary proceedings brought by his employer, an NHS hospital trust. The doctor was accused of inappropriate sexual behaviour. Although the case was determined on the primary ground that the appellant had a contractual right to be legally represented, Smith LJ, giving the only reasoned judgment, went on to consider the Article 6 issues arising.
47. She concluded at [65] that in ordinary disciplinary proceedings, where all that could be at stake was the loss of a specific job, Article 6 would not be engaged. However, where the effect of the proceedings could be far more serious, and in particular could deprive the employee of the right to practice his or her profession, Article 6 was engaged. Given the gravity of the charges against the appellant, in the event that they were found proven he would be effectively barred from employment in the NHS.
48. Moreover, in this context Article 6 implied a right to legal representation: see [68]. Although the proceedings are disciplinary in nature, the allegations were tantamount to a criminal charge. Smith LJ rejected the argument that Article 6 would be satisfied because, if the case went against the appellant, he would have a further opportunity to put forward his case either before the GMC or the Employment Tribunal. Each of those fora would be considering different questions from the employer. Smith LJ acknowledged that this approach did create practical difficulties for an employer:

“The employer faced with [a request for legal representation] is in some difficulty in that the line between cases in which Article 6 is and is not engaged (because of the potentially grave effect of an adverse finding on the doctor's ability to practise his profession) may be a difficult line to draw.”

49. It is difficult to predict with certainty in what future cases the seriousness of the consequences will bring Article 6 into play in disciplinary proceedings (but see *R (G) v Governors of X School* below). The gravity of the charge, and the consequences of an adverse finding for future employment, are likely to be the critical factors. However, as things stand, Article 6 does not require that legal representation should be permitted in the general run of local authority disciplinary cases.

R (LG (mother and litigation friend of V)) v IAP for Tom Hood School [2009] LGR 691 [2009] EWHC 369

50. The central question at issue in *R (LG (mother and litigation friend of V)) v IAP for Tom Hood School [2009] LGR 691 [2009] EWHC 369* was whether Article 6 was engaged in an appeal against a school's exclusion decision. Silber J held that it was not, as no "civil right" was in play. The claimant sought to rely on an alleged "*right to continue the studies he had begun at the school*", as well as his right to education under Article 2 of the First Protocol to the Convention and his Article 8 rights. However, Silber J found that none of these gave rise to a relevant "civil right". No generalised "*right to continue studies*" was recognised either in domestic law nor in the case law of the European Court of Human Rights. In the light of the decision of the House of Lords in *A v Head Teacher and Governors of Lord Grey School [2006] 2 AC 363*, it was clearly established that the decision to uphold an exclusion did not undermine or significantly effect and rights which the appellant might have under Article 2 of the First Protocol. Equally, Article 8 was not on the facts of the case engaged by the appellant's exclusion. It followed that the civil limb of Article 6 was not in play.

51. Nor was the appeal panel concerned with the determination of any criminal charge against the appellant. Even if they had been, it would not have necessarily followed that the charges against the appellant would have needed to be determined beyond reasonable doubt. At common law, the relevant standard of proof would have been the balance of probabilities.

R (Wright) v Secretary of State for Health [2009] 1 AC 739 [2009] UKHL 3

52. The claimants in *R (Wright) v Secretary of State for Health [2009] 2 WLR 267 [2009] UKHL 3* were care workers who were referred to the Secretary of State for Health under section 82(1) of the Care Standards Act 2000, which made provision for keeping a list of people considered unsuitable to work with vulnerable adults. Pending the determination of each reference, the Secretary of State put each of the claimants on the list on a temporary basis, as well as on a list of persons unsuitable to work with children maintained under section 1 of the Protection of Children Act 1999.

53. The House of Lords upheld the claimants' appeal. They had little difficulty in finding that Article 6 was engaged. As Lady Hale, noted at [19], "*The right to remain in the employment one currently holds must be a civil right, as too must the right to engage in a wide variety of jobs in the care sector even if one does not currently have one.*" The more controversial question was whether provisional listing amounted to the determination of a civil right for the purposes of Article 6(1). In general, the full rigours of Article 6(1) do not apply to interim measures. The House of Lords nonetheless held that the scheme for provisional listing did not comply with Article 6(1). The care worker has no opportunity to answer the allegations made against her before a decision is taken which may cause irreparable damage to her employment or prospects of employment: see Lady Hale at [28]. It followed that section 82(4)(b) of the Care Standards Act 2000 is incompatible with the Convention: see Lady Hale at [38]. This was perhaps an unsurprising outcome in circumstances where the statutory scheme would in practice be likely to cause the care worker to lose their job before they had had any opportunity to meet the charges against them.

R (G) v Governors of X School [2010] EWCA Civ 1 [2010] LGR 207

54. A further indication of the way in which this area of law is developing in the context of disciplinary proceedings is provided by the decision of the Court of Appeal in ***R (G) v Governors of X School [2010] EWCA Civ 1 [2010] LGR 207***. The claimant was employed as a teaching assistant at a primary school. Allegations were made against him that he had kissed and had sexual contact with a 15 year old boy undertaking work experience at the school. The allegations also constituted potential criminal offences under the Sexual Offences Act 2003, although the CPS had declined to bring proceedings. The school suspended G and commenced disciplinary proceedings. In addition, the school's governors were obliged, under the Education (Prohibition from Teaching or Working with Children) Regulations 2003, to make a reference to the Secretary of State for him to consider making a direction under section 142 of the Education Act 2002 preventing G, indefinitely, from working with children. This section was repealed, with the relevant power being transferred from the Secretary of State to the Independent Safeguarding Authority. Before the ISA, G would have the right to legal representation. G requested that he be permitted legal representation for the purposes of his disciplinary proceedings, but this was refused by the governing body.

55. The Court of Appeal held that G was entitled to be permitted legal representation in the disciplinary proceedings. Having reviewed the case law, Laws LJ, giving the lead judgment, concluded at [37]:

"... where an individual is subject to two or more sets of proceedings (or two or more phases of a single proceeding), and a 'civil right or obligation' enjoyed or owed by him will be determined in one of them, he may (not necessarily will) by force of Article 6 enjoy appropriate procedural rights in relation to any of the others if the outcome of that other will have a substantial influence or effect on the determination of the civil right or obligation."

56. Laws LJ rejected the argument that Article 6 was not engaged if a fully-Article 6 compliant court or tribunal would ultimately give consideration to the case. Such an approach was appropriate only in the context of administrative decision-making, such as arose in **Alconbury** and **Runa Begum**. Article 6 was applicable, because, as Laws LJ noted at [47]:

“ ... there is every likelihood that the outcome of the disciplinary process in a case like this, where there has been a finding of abuse of trust by virtue of sexual misconduct, will have a profound influence on the decision-making procedures relating to the barred list.”

G’s right to practice his profession could therefore be irretrievably prejudiced by the disciplinary proceedings.

57. As to whether Article 6 required that G be permitted to have legal representation for the disciplinary proceedings, Laws LJ noted that the civil limb of Article 6 does not necessarily confer such a right, but may do so. Given the effect an advocate might have in the disciplinary proceedings, and in the light of the authorities (including **Kulkarni**), Laws LJ concluded that Article 6 required that G should be permitted to arrange for legal representation in those proceedings.

58. Like the decision in **Kulkarni**, therefore, the Court of Appeal’s decision in **R (G) v Governors of X School** provides no definitive guidance on when disciplinary proceedings brought by a public body against one of its employees will engage Article 6 in such a way as to require the body to permit legal representation.

R (Kirk) v Middlesborough Borough Council [2010] EWHC 1035 (Admin) [2010] IRLR 699

59. The limits of the applicability of Article 6 in disciplinary proceedings are illustrated by the decision of HHJ Grenfell in **R (Kirk) v Middlesborough Borough Council [2010] EWHC 1035 (Admin) [2010] IRLR 699**. The claimant was a social worker employed by Action for Children, a child protection charity, on an agency basis to work for a local authority. Another local authority received a child protection complaint against her, as a result of which it passed on information to Action for Children and the authority at which she was working, leading to the termination of her agency placement and disciplinary proceedings being brought against her. Action for Children was particularly concerned that the claimant had not informed it that she was under investigation.

60. Judge Grenfell held that the claimant’s Article 6 rights were not engaged. The issue was essentially a private law employment dispute, and was not a preliminary step in the claimant being placed on any barring list (in contrast to the the position in **R (Wright) v Secretary of State for Health** and **R (G) v X School**).

Article 6: The future

61. In *Pinnock v Manchester City Council* (heard in July 2010), the Supreme Court was called upon to consider, among other things, whether the statutory scheme for demoted tenancies is compatible with Article 6 of the Convention. Judgment is currently awaited. The Court of Appeal previously held in *R (Gilboy) v Liverpool City Council* [2008] EWCA Civ 751 [2009] 3 WLR 300 that such procedures were compatible with Article 6, applying *Runa Begum*. In view of the decision in *Ali v Birmingham City Council*, it is unlikely that the Supreme Court will wish to adopt a radically different approach to that of the Court of Appeal in *Gilboy*. However, there is a material difference between the two cases, in that *Pinnock* is concerned with the termination of a pre-existing tenancy, rather than the refusal of alternative accommodation.

ARTICLE 8 AND HOUSING LAW

62. Article 8 of the Convention provides:

“(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

63. There has been an abundance of litigation over the last few years both in Strasbourg and domestically concerning Article 8 of the European Convention and its impact on local authority possession proceedings. Three features of this litigation are of particular note:

63.1. The occupiers of publicly-owned domestic premises have repeatedly sought to use Article 8 to achieve *de facto* security of tenure in circumstances where no such security is provided by statute.

63.2. There has been something of a stand-off between Strasbourg and the House of Lords² as to whether an occupant should always have the opportunity to raise a challenge to possession proceedings founded on Article 8 available to them.

² It remains to be seen whether the Supreme Court will continue this trend: judgment is currently awaited in *Pinnock v Manchester City Council*

63.3. As a result, the law in this area has become convoluted and unclear, and is likely to be subject to further developments.

64. The key decisions in this area are summarised below.

Harrow LBC v Qazi [2003] UKHL 43 [2004] 1 AC 983

65. In ***Harrow LBC v Qazi* [2003] UKHL 43 [2004] 1 AC 983**, the defendant had been a joint tenant of the premises with his wife of a house owned by the local authority. She left him and gave the housing authority notice to quit in accordance with the tenancy agreement. That had the effect of terminating the joint tenancy, and the defendant no longer had the legal right to occupy the house. He resisted the possession proceedings brought by the local authority on the grounds that they were failing to give effect to his right to respect for the home under Article 8.

66. Importantly, ***Qazi*** establishes that Article 8 may provide protection to the occupant of premises whether or not they are in lawful occupation. Whether a particular habitation constitutes a person's "home" is a question of fact, dependent on whether he has sufficient and continuous links with it, and not on whether his occupation is lawful.

67. However, the Law Lords were split over whether Article 8 could be relied upon in defence of possession proceedings in this context. The majority (Lord Hope, Lord Millett and Lord Scott) concluded that Article 8 could not be relied on to defeat proprietary rights to possession. Since the domestic law gave the housing authority an unqualified right to immediate possession once the joint tenancy had been determined, there could be no infringement of the defendant's Article 8(1) rights and no question arose for determination under Article 8(2) as to whether such infringement was proportionate.

68. The minority (Lord Bingham and Lord Steyn) considered that the question of justification raised under Article 8(2) of the Convention should be remitted to the county court, since this ensured a more rigorous examination of whether the occupier's rights had been infringed. Presciently, Lord Steyn expressed concern at the majority's approach, stating at [27], "*It would be surprising if the views of the majority on the interpretation and application of Article 8 of the European Convention ..., as incorporated into our legal system by the Human Rights Act 1998, withstood European scrutiny*". Despite that warning, Mr Qazi's application to the European Court of Human Rights was rejected *in limine*.

Connors v United Kingdom (2005) 40 EHRR 9

69. European scrutiny nonetheless came along swiftly in the form of the decision in **Connors v United Kingdom**. This was one of a number of Article 8 challenges which have been brought by Gypsies living on local authority caravan sites. By virtue of the provisions of the Caravan Site Act 1968 (“**the 1968 Act**”) and the Mobile Homes Act 1983 (“**the 1983 Act**”) in force at the time, such Gypsies enjoyed no security of tenure (save for a requirement under the 1968 Act that they should receive 4 weeks’ notice of termination). The applicant had lived on the caravan site in question for many years, but was given notice to quit following allegations of anti-social behaviour. When he contested these allegations, the local authority changed tack and simply sought to rely on their unqualified right to terminate the licence on 4 weeks’ notice. In those circumstances, the county court had no power to entertain any argument that granting possession would infringe the applicant’s Article 8 rights. The court accordingly granted possession, and the applicant and his family were forcibly evicted.

70. The European Court of Human Rights held that there had been a breach of Article 8 of the Convention. In doing so, it focussed on the procedural aspects of Article 8, noting (at [83]) that “*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*”. Also of significance was the vulnerable position of Gypsies as a minority group. The Court rejected the Government’s argument that the availability of judicial review provided sufficient protection of the applicant’s Article 8 rights, noting at [92]:

“ ... a factual dispute clearly existed between the parties. Nonetheless, the local authority was not required to establish any substantive justification for evicting him and on this point judicial review could not provide any opportunity for an examination of the facts in dispute between the parties.”

71. The Court concluded, therefore, at [95] that the eviction of the application and his family was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the interference with his rights, and accordingly was not justified or proportionate.

72. Although a decision in a different context, on its face this approach seemed incompatible with that of the majority of the House of Lords in **Qazi**, namely that Article 8 could never provide an answer to possession proceedings in circumstances where the local authority landlord had an unqualified proprietary or contractual right to possession.

Kay v Lambeth LBC; Price v Leeds CC [2006] UKHL 10 [2006] 2 AC 465

73. In the light of **Connors** it appeared that the House of Lords’ approach in **Qazi** needed to be reconsidered. The issue therefore came back to the House of Lords in the conjoined appeals in

Kay v Lambeth LBC and **Price v Leeds CC** [2006] UKHL 10 [2006] 2 AC 465. Since the House of Lords was being asked to overrule its own recent decision in **Qazi**, it sat, unusually, as a panel of seven. Unfortunately, the facts of neither case were ideal for considering the point.

74. The appellants in **Kay** occupied “short life” properties, which had been informally licensed by the local authority to a housing trust. The local authority granted leases to the trust, terminable on 6 months’ notice. The appellants were offered shorthold tenancies, but declined and so remained in occupation as licensees. The local authority subsequently terminated the headleases with the trust and sought possession of the properties. The appellants’ contention that they were secure tenants of the local authority was rejected, as was their defence based on Article 8.
75. **Price v Leeds CC** concerned a family of Gypsies who had unlawfully occupied land used by a local authority as a recreation ground for a matter of days before being evicted.
76. The majority of the House of Lords (Lord Hope, Lord Scott, Baroness Hale and Lord Brown) accepted that **Qazi** needed to be modified in the light of the decision in **Connors**. However, the modification adopted fell some way short of permitting an occupant to argue that it would be a disproportionate interference with their rights under Article 8(1) for the court to grant possession. The majority sought to minimise the impact of **Connors** by focussing on the particular legal regime which applied to Gypsies on local authority caravan sites (i.e. the absence of any procedural safeguards in respect of such sites under the 1968 Act and the 1983 Act) as being the fundamental reason for the Strasbourg court’s decision to uphold the application in **Connors**.
77. The leading majority speech was given by Lord Hope who summarised the relevant modification of **Qazi** at [110] in the following terms:

“Subject to what I say below, I would hold that a defence which does not challenge the law under which the possession order is sought as being incompatible with article 8 but is based only on the occupier’s personal circumstances should be struck out ... Where domestic law provides for personal circumstances to be taken into account, as in a case where the statutory test is whether it would be reasonable to make a possession order, then a fair opportunity must be given for the arguments in favour of the occupier to be presented. But 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 to 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: **Wandsworth London Borough Council v Winder** [1985] AC 461. The common law as explained in that case is, of course, compatible with Article 8. It provides an additional safeguard.”

78. Thus so-called “gateway (a)” and “gateway (b)” were born. This analysis has provided the template for the subsequent decisions of the English courts on Article 8 and possession proceedings.
79. In summary, where a landlord has an unqualified right to possession, an occupier may do one of two things. He may argue that the law is incompatible with Article 8 and seek a declaration of incompatibility (although that will not prevent a possession order being granted) (gateway (a)). Or he may raise a public law defence in the county court by arguing that the public authority landlord’s decision to see possession is so unreasonable that no reasonable person would consider it justifiable, and that possession should accordingly be refused on that ground (gateway (b)).
80. The minority (Lord Bingham, Lord Nicholls and Lord Walker) took a similar line to that of the minority in *Qazi*. In particular, Lord Bingham, giving the leading minority judgment, adopted the following formulation as to how the courts should approach Article 8 defences to possession proceedings at [39]:

“(1) It is not necessary for a local authority to plead or prove in every case that domestic law complies with article 8. Courts should proceed on the assumption that domestic law strikes a fair balance and is compatible with article 8. (2) If the court, following its usual procedures, is satisfied that the domestic law requirements for making a possession order have been met the court should make a possession order unless the occupier shows that, highly exceptionally, he has a serious arguable case on one of two grounds. (3) The two grounds are: (a) that the law which requires the court to make a possession order despite the occupier’s personal circumstances is Convention-incompatible; and (b) that, having regard to the occupier’s personal circumstances, the local authority’s exercise of its power to seek a possession order is an unlawful act within the meaning of section 6. (4) Deciding whether the defendant has a seriously arguable case on one or both of these grounds will not call for a full-blown trial. The question should be decided summarily, on the basis of an affidavit or 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 the question. (5) If the court considers the defence sought to be raised on one or both of these grounds is not seriously arguable the court should proceed to make a possession order. (6) Where a seriously arguable issue on one of these grounds is raised, the court should itself decide this issue ...”

81. Thus, whilst the minority considered that there would be a heavy presumption that Article 8 would not provide a defence to possession proceedings where the law gave the landlord an unqualified right to possession, it accepted that an argument could in principle be raised that, in the light of the occupier’s personal circumstances, it was a breach of the local authority’s duty under section 6(1) of the Human Rights Act 1998 to seek a possession order.

Smith v Buckland (on behalf of the Gypsy Council) [2007] EWCA Civ 1318 [2008] 1 WLR 661

82. Following the decision in **Connors**, the Government amended the 1968 Act (but not, at that stage, the 1983 Act) so as to permit the county court to suspend an order for possession in respect of a local authority Gypsy caravan site for up to 12 months at a time under section 4 of the 1968 Act (see section 211 of the Housing Act 2004). That amendment came into effect on 18th January 2005.
83. The question which arose for consideration in **Smith v Buckland [2007] EWCA Civ 1318 [2008] 1 WLR 661** was whether the amendment of the 1968 Act had rectified the incompatibility with Article 8 which had been identified by the European Court of Human Rights in **Connors**. The Court of Appeal held that it had. In particular, it accepted an argument that the interference with Article 8 took place at the point of eviction, not when a possession order was made. Moreover, given that the county court could take all relevant factual circumstances into account in deciding whether to suspend the order for possession, full compatibility with Article 8 could be achieved. It followed that, in the Court of Appeal's view, the modest amendment to the 1968 Act was sufficient to cure the incompatibility which had been identified in **Connors**.

McCann v United Kingdom (Appl No 19009/04) [2008] LGR 474

84. The applicant in **McCann v United Kingdom (Appl No 19009/04) [2008] LGR 474** and his wife were joint tenants of a family house owned by a local authority. Following the breakdown of the marriage, Mrs McCann moved out of the house, returned the keys to the Council, and indicated that she was giving up the tenancy. It would appear that the applicant also moved out for a time, but subsequently returned and did work to renovate the house. He applied to the local authority for an exchange of the property.
85. Following the authority's receipt of the applicant's application for an exchange, a local housing officer visited Mrs McCann and asked her to terminate the tenancy by signing a notice to quit, which she did. The housing officer's request was in accordance with the local authority's written policy on how to deal with tenants relinquishing properties. Mrs McCann was not advised that this would have the effect of extinguishing the applicant's right to live in the house or exchange it for another local authority property. Mrs McCann subsequently sought to withdraw the notice to quit, but it remained effective in law to terminate the joint tenancy. Under the common law, the applicant accordingly had no defence to the authority's claim for possession (nor did he have any statutory protection). In broad terms, **McCann** was thus very similar on its facts to **Qazi**.
86. The local authority brought possession proceedings against the applicant in the county court, which he sought to defend on Article 8 grounds. The county court refused possession on the

grounds that the local authority had not acted in accordance with Article 8(2) of the Convention (see [14]). The local authority's appeal to the Court of Appeal was adjourned pending the House of Lords' decision **Qazi**. Following that decision, the Court of Appeal allowed the local authority's appeal. The applicant applied for judicial review of the local authority's decision to procure a notice to quit from his wife and of its decision to issue possession proceedings. That application was unsuccessful. The applicant was accordingly evicted from the house.

87. The Strasbourg Court considered at length the decisions in **Qazi** and **Kay v Lambeth LBC** and concluded its analysis of the domestic authorities by quoting the following passage from Lord Bingham's speech in **Kay v Lambeth LBC**:

"I do not accept, as the appellants argued, that the public authority must from the outset plead and prove that the possession order is justified. That would, in the overwhelming majority of cases, be burdensome and futile. It is enough for the public authority to assert its claim in accordance with domestic property law. If the occupier wishes to raise an Article 8 defence to prevent or defer the making of a possession order it is for him to do so and the public authority must rebut the claim if, and to the extent that, it is called upon to do so. In the overwhelming majority of cases this will be in no way burdensome. In rare and exceptional cases it will not be futile." (Lord Bingham at [29])

88. In making its assessment, the Strasbourg Court identified the central question in the case as being whether the interference was proportionate to the aim pursued and thus "necessary in a democratic society". Having noted that Article 8 has a procedural as well as a substantive aspect, and quoted extensively from **Connors**, the Court concluded at [50]:

"The Court is unable to accept the Government's argument that the reasoning in **Connors** was to be confined only to cases involving the eviction of gypsies or cases where the applicant sought to challenge the law itself rather than its application in his particular case. The loss of one's home is the 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."

89. At [52], the Court noted that it was not open to the county court to consider the proportionality of the possession order under the applicable summary procedure. Further, at [53] the Court rejected the submission that the availability of judicial review provided sufficient procedural safeguards to ensure compliance with Article 8, stating:

"In the present case, the judicial review proceedings, like the possession proceedings, did not provide any opportunity for an independent tribunal to examine whether the applicant's loss of his home was proportionate under Article 8(2) to the legitimate aim pursued."

90. Finally, the Strasbourg Court rejected the suggestion that its approach would have detrimental consequences for functioning of domestic property law, stating at [54]:

“The court does not accept that the grant of the right to the occupier to raise an issue under Article 8 would have serious consequences for the functioning of the system or for the domestic law of landlord and tenant. As the minority of the House of Lords in **Kay** observed ... it would be only in very exceptional cases that an applicant would succeed in raising an arguable case which would require a court to examine the issue; in the great majority of cases, an order for possession could continue to be made in summary proceedings.”

91. The Court accordingly found that, because of the lack of adequate procedural safeguards, there had been a violation of Article 8 of the Convention.

Doherty v Birmingham City Council [2008] UKHL 57 [2008] 3 WLR 636

92. The next case in which Article 8 and possession proceedings came to be considered by the higher domestic courts was **Doherty v Birmingham City Council [2008] UKHL 57 [2008] 3 WLR 636**. On its facts, the case was very close to **Connors**. It involved the eviction of the appellants from a local authority caravan site, against a background of allegations of anti-social behaviour. The relevant proceedings were commenced before the amendments to the 1968 Act which came into force on 18th January 2005, and so the wider power to suspend possession was not available to the county court.

93. The European Court of Human Rights’ decision in **McCann v United Kingdom** was delivered after oral argument in the House of Lords but before judgment. The parties made additional written submissions in the light of **McCann**. The Government took the line that, in the light of **McCann**, the House of Lords would need to reverse **Kay v Lambeth** and, in effect, follow the minority approach.

94. The House of Lords, however, did not accede to this argument, again by a bare majority. Lord Hope, Lord Rodger and Lord Walker formed the majority, and essentially reaffirmed the approach in **Kay v Lambeth**, with relatively minor modifications. Their Lordships would appear to have held that the scope for a gateway (b) challenge is somewhat wider than a traditional collateral public law challenge in possession proceedings, such as was raised in **Wandsworth LBC v Winder [1985] AC 461**. Lord Hope, again, gave the leading majority speech. He concluded at [55]:

“I think that in this situation it would be unduly formalistic to confine the review strictly to traditional Wednesbury grounds. The considerations that can be brought into account in this case are wider. An examination of the question whether the respondent’s decision was reasonable, having regard to the aim it was pursuing and to the length of time that the appellant and his family have resided on the site, would be appropriate. But the requisite scrutiny would not involve the judge substituting his own judgment for that of the local authority. In my opinion the test of reasonableness should be, as I said in para 110 of **Kay**, whether the decision to recover possession was one which no reasonable person would consider justifiable.”

95. Lord Walker, also in the majority, suggested at [109] that human rights must be woven into the fabric of public law. At [123], he agreed with Lord Hope's approach and concluded that "*If the defence is focused ... on the housing authority's decision-making process the judge will in effect be hearing an application for judicial review on traditional review grounds.*"
96. In addition, Lord Hope took the view (at [37]-[40]) that the local authority's decision was taken within the context of a scheme which primary legislation has laid down that gives general powers of management to a public authority. It followed that the council was acting so as to give effect to the provisions of a statute within the meaning of section 6(2)(b) of the Human Rights Act 1998. It followed that the exercise of that right could not be held to be incompatible with Convention rights pursuant to section 6(1) of the 1998 Act. Lord Walker reached the same conclusion, albeit rather reluctantly, at [113].
97. Lord Rodger agreed with Lord Hope and Lord Walker.
98. The majority speeches in **Doherty** in some ways raise more questions than they answer. Whilst they indicate some broadening or modification of the grounds for judicial review which might be available in challenges to possession proceedings, they given no indication of precisely how the available grounds for judicial review have been augmented. Further, both Lord Hope and Lord Walker appear to contemplate that oral evidence may be required in order to determine whether a "gateway (b)" defence should succeed. But that is contrary to the established approach to judicial review, when oral evidence is very rarely heard.
99. Lord Scott and Lord Mance, in the minority, would have favoured a wider approach which permitted the proportionality of the local authority's decision to seek possession (within the meaning of Article 8(2)) to be determined under gateway (b): see Lord Scott at [84]-[85] and Lord Mance at [161]. However, Lord Mance recognised that this was not the view of the majority. He stated at [162]:
- " ... I for my part regret that it has not been possible on this appeal to agree to modify gateway (b) in paragraph 110 more generally, so as to allow express regard to be had to Human Right Convention principles in relation to any defence raised against a public authority under the rule in **Wandsworth LBC v Winder** ..."
100. Yet again, the House of Lords' held the line in favour of property rights trumping the right to respect for the home, despite the clear indication from Strasbourg in **McCann** that such an approach is regarded as inadequate.

Cosic v Croatia (App No 28261/06)

101. A further indication of Strasbourg's wider view of the scope of Article 8 came in the case of ***Cosic v Croatia (App No 28261/06)***. The applicant was a tenant in publicly-owned accommodation, but she had ceased to have any lawful right to reside there under the domestic law. The national courts had therefore confined themselves to finding that the applicant had no legal basis for continuing in occupation, but had not considered the proportionality of granting possession. At [22] the Court reiterated the analysis which it had adopted in ***McCann v United Kingdom***, but made clear once again its view that an evaluation of proportionality should be available in every case where an individual stands to lose their home:

“ ... the Court reiterates that 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 and reasonableness 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 or her right of occupation has come to an end ...”

102. Further, in contrast to the approach of the Court of Appeal in ***Smith v Evans***, the European Court specifically held that the applicant's Article 8 rights had been interfered with, even though her eviction had not yet been executed. The approach in ***McCann*** and ***Cosic*** was followed again by the ECtHR in ***Paulic v Croatia (Appl No 3572/06)***.

Doran v Birmingham City Council [2009] EWCA Civ 146 [2009] LGR 395

103. The Court of Appeal considered the meaning and effect of the decision in ***Doherty v Birmingham CC*** in ***Doran v Birmingham City Council [2009] EWCA Civ 146***. Toulson LJ, with whom the other members of the Court agreed, summarised the position post-***Doherty*** as follows at [48]-[50]:

“As I see it, the effect of ***Doherty*** is two fold.

First, there is no formulaic or formalistic restriction of the factors which may be relied upon by the licensee in support of an argument that the council's decision to serve a notice to quit, and seek a possession order, was one which no reasonable council would have taken. Such factors are not automatically irrelevant simply because they may include the licensee's personal circumstances, such as length of time of occupation. In ***Doherty***, where the family had been in occupation for a substantial time without causing any trouble, but the council wanted to use the site in a different way, it might also be thought relevant whether the council had taken any steps to offer the family, or help them to acquire, alternative accommodation.

Secondly, the question whether the council's decision was one which no reasonable person would have made is to be decided by applying public law principles as they have been developed at common law, and not through the lens of the Convention.”

104. Toulson LJ also confirmed at [60] that any public law (or gateway (b)) challenge would be based on the facts as they reasonably appeared, or ought to have appeared, to the landlord at the time of the decision to seek possession:

“The purpose of the remission in *Doherty* was so that the court could probe the facts on the basis of which the council had made its decision, relating to the council’s plans for the future use of the site. Lord Hope stated at para [55] that the requisite scrutiny would not involve the judge substituting his own judgment for that of the local authority. It cannot therefore have been envisaged that the court would make a judgment of the reasonableness of the council’s decision otherwise than on the facts as they reasonably appeared, or should have appeared, to the council at the time of making its decision.”

105. Toulson LJ’s judgment brings some much needed clarity to the law in this area. He appears to confine the “gateway (b)” challenge to a domestic judicial review-type challenge, to be based on the facts known to the local authority when deciding to seek possession.

Other recent cases on Article 8

106. However, it would be a mistake to think that the law in this area is now settled. Far from it. For example, in *Defence Estates v JL* [2009] EWHC 1049 (Admin) (a case concerning possession proceedings against the occupier of property owned by the Ministry of Defence, in respect of which no security of tenure is available), Collins J suggested that it might be right for the county court judge to make additional findings of primary fact when determining possession proceedings, since such findings might be relevant to any subsequent judicial review challenge to the local authority’s subsequent application to execute the possession order. On one view, his suggestion (albeit *obiter*) opens the back door to bringing an Article 8 challenge at the eviction stage.

107. In *Central Bedfordshire Council v Taylor* [2009] EWCA Civ 613 [2009] LGR 773, a case which was analogous on its facts to *Kay v Lambeth LBC*, in that the defendants had become trespassers as a result of the claimant local authority’s termination of their lessor’s lease, the Court of Appeal revisited the effect of *Kay* and *Doherty*. Unusually, the claimant local authority was not a local housing authority and so did not hold the properties for the purposes of discharging housing duties. Waller LJ (at [44]) accepted that the question of whether a local authority’s decision to seek possession was “reasonable” (post *Doherty*) went beyond the question of whether it was rational. Further, in reaching any such decision, the local authority should take into account any personal circumstances of the occupier known to it. However, it did not follow that there would ever be circumstances in which it would be unreasonable to seek possession against trespassers in situations similar to those in *Kay*.

108. In ***Manchester City Council v Pinnock* [2009] EWCA Civ 852 [2009] LGR 869** (which has since been heard by the Supreme Court, with judgment awaited) the appellant challenged the termination of his demoted tenancy under Article 8. Stanley Burnton LJ summarised the applicable principles as follows at [46]-[47] following a long review of the authorities:

“In my judgment, two simple propositions follow from these authorities. First, a landlord deciding to seek possession in a statutory context such as the present, and a court making an order for possession, is acting so as to give effect to or enforce statutory provisions, and if those provisions are incompatible with Convention rights, the landlord’s decision and the order of the county court is nonetheless lawful by virtue of section 6(2)(b) of the Human Rights Act 1998.

Secondly, on a judicial review of the landlord’s decision, the applicable grounds are those applicable on a non-Convention domestic review, subject to the rationality test extended as stated by Lord Hope in ***Doherty*** and commented upon in ***Doran*** and ***Taylor***.”

109. Further, the Court of Appeal held that, in the demoted tenancy context, the County Court had no jurisdiction to consider whether the local authority’s decision was lawful in a public law sense, since its role was strictly circumscribed in the context of demoted tenancies by sections 143D and 143F of the Housing Act 1996 (per Stanley Burnton LJ at [50]-[55]). It followed that any public law challenge to a local authority’s decision to terminate a demoted tenancy had to be raised by way of an application for judicial review in the Administrative Court (in contrast to the position identified in ***Kay*** and ***Doherty***). As noted, the Supreme Court judgment on the further appeal in ***Pinnock v Manchester City Council*** is awaited.

110. In ***R (Coombes) v Secretary of State for Communities and Local Government* [2010] EWHC 666 (Admin)** Cranston J rejected an argument that section 3 of the Protection from Eviction Act 1977 was incompatible with Article 8 of the Convention. Section 3 provides that, where premises have been let under a tenancy which is neither a statutorily protected tenancy nor an excluded tenancy, it is unlawful for the owner to enforce possession against the occupier other than by way of court proceedings for possession. As Cranston J noted at [54], section 3 merely prohibits a property owner from re-possession property without first obtaining an order from the court. That restriction on the owner’s rights could not possibly be incompatible with the Convention. A majority of the Court of Appeal had previously held in ***Desnousse v Newham London Borough Council* [2006] EWCA Civ 547 [2007] LGR 368** that the exemption from the protection of section 3 of the Protection from Eviction Act 1977 of licenses granted by local authorities temporarily pursuant to homelessness provisions contained in section VII of the Housing Act 1996 did not amount to an infringement of Article 8.

111. Finally, the Court of Appeal’s decision in ***Salford City Council v Mullen* [2010] EWCA Civ 336 [2010] LGR 559** addressed the requirements of Article 8 in the context of introductory tenancies and short-term tenancies granted under the homelessness provisions contained in Part VII of the Housing Act 1996.

112. The Court of Appeal recognised that it was bound by the House of Lords' decisions in **Kay v Lambeth LBC** and **Birmingham City Council v Doherty**. Given that the Court of Appeal was also bound by previous decisions to find the relevant statutory schemes compatible with the Convention, the argument focussed on the scope of the public law challenge under gateway (b). Waller LJ, giving the judgment of the court, held that the gateway (b) did not permit a full Article 8(2) proportionality review and would, in view of the assumption that Parliament had passed Convention-compliant legislation, be available only in "highly exceptional" circumstances. As to forum, the Court of Appeal held that public law challenges to possession proceedings under the homelessness legislation could be raised in the county court, but that this was precluded by the introductory tenancy regime. Where an introductory tenant sought to challenge possession proceedings, therefore, he should apply to the county court for an adjournment pending an application to the Administrative Court for judicial review.
113. Permission to appeal to the Supreme Court has been given in **Salford City Council v Mullen**, with the hearing currently due to take place in November 2010. However, the timing and scope of this hearing may depend on whether judgment is delivered in **Pinnock v Manchester City Council** in the meantime.

Article 8: The future

114. The application to Strasbourg in **Kay v United Kingdom** is now under consideration. If, as is quite possible, the Strasbourg court holds that the applicant's Article 8 rights were violated in that case by virtue of the absence of adequate procedural protections and, in particular, any examination of the proportionality of the decision to seek possession within the terms of Article 8(2) (in contrast to the view taken by the House of Lords), the position of the domestic and Strasbourg courts will have been brought into direct conflict, and the fault-line in the jurisprudence exposed.
115. However, judgment is also awaited from the Supreme Court in **Manchester City Council v Pinnock**. Given that the Court was being asked to overrule **Kay** (in which the Law Lords had sat as a panel of seven) and **Doherty**, the appeal was heard in July 2010 by nine Justices. It may be that a fundamentally new approach arises from the judgment in that case. However, there is as yet no indication as to when judgment will be given. As noted above, the appeal in **Salford City Council v Mullen** is also due to be heard by the Supreme Court this autumn.

ARTICLE 14

116. Article 14 of the Convention provides:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

117. Article 14 thus prohibits unjustified discrimination in the enjoyment of Convention rights, not only on the specified grounds, but by reference to any “*other status*”. The domestic approach to Article 14 was summarised by Lord Nicholls in ***R (Carson & Reynolds) v Secretary of State for Work & Pensions*** [2005] UKHL 37 [2006] 1 AC 173 at [3] in the following terms:

“Article 14 does not apply unless the alleged discrimination is in connection with a Convention right and on a ground stated in Article 14. If this prerequisite is satisfied, the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court’s scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact.”

118. In ***Carson & Reynolds***, the House of Lords distinguished between discrimination on “*particularly sensitive grounds*”, such as race, sex or sexual orientation, and discrimination on other grounds. The former will require more weighty reasons by way of justification: see Lord Hoffmann at [15]-[17] and Lord Walker at [57]-[60].

119. In ***R (Wilson) v Wychavon District Council*** [2006] EWCA Civ 547 [2007] LGR 540 the claimant was a Romany Gypsy who had been served with enforcement and stop notices to prevent her from using a site for the stationing of caravans. Section 183 of the Town and Country Planning Act 1990 provides that a stop notice “*shall not prohibit the use of any building as a dwellinghouse*”, but this exemption did not apply to the use of a caravan as a dwelling. The claimant argued that this amounted to discrimination contrary to Article 14 of the Convention. It was common ground that Article 8 was engaged and that the impact of the provision was indirectly discriminatory against Gypsies, and so the question was whether it was justified.

120. Richards LJ, giving the lead judgment, found that protection of the environment was plainly a legitimate objective for the interference with the claimant’s Article 8 rights. In considering proportionality, he accepted that the discrimination in question was on a “*particularly sensitive ground*”, given that it impacted particularly on Gypsies, and it thus called for severe scrutiny (at [46]-[51]). However, given that the discrimination was indirect, it did not call for the very strict

approach applicable in cases of direct discrimination (see [55]). On the facts of the case, Richards LJ found (at [87]) that the differential treatment was justified, as there were cogent reasons for the exemption in respect of dwelling houses not applying to residential caravans, and the provision was accordingly not disproportionate.

121. In *DH v Czech Republic* (2008) 47 EHRR 3 the Grand Chamber of the European Court of Human Rights analysed the approach to be taken to cases of indirect discrimination brought under Article 14, the key question being whether a general measure has a disproportionately prejudicial effect. In *R (Ghai) v Newcastle City Council* [2009] EWHC 978 (Admin) the claimant alleged, among other things, that the legislation restricting outdoor cremations discriminated against him indirectly as a Hindu (and an Indian) in the exercise of his right of freedom of religion under Article 9 of the Convention, contrary to Article 14. Cranston J doubted whether there was any prejudicial effect, but in any event found the legislation to be plainly justifiable. This issue did not arise before the Court of Appeal.

Conclusion

122. For all the furore in the press over the supposedly extravagant consequences of the enactment of the HRA, it is clear that the domestic courts have in general interpreted the Act in a limited and sensible way. Whilst considerations of human rights now inform the functions of local authorities in a manner very different to the position prior to the coming into force of the HRA, the HRA has not led to the dismantling of existing local government legislation, administration or decision-making.
123. Whether any such revolution occurs in future may depend on whether the Coalition Government acts upon the intermittent commitments of the Conservative Party (prior to the election) to repealing the HRA and replacing it with a British Bill of Rights. However, such a potentially radical constitutional step currently seems to be relatively low on the Government's priorities.

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