The Queen on the application of JL v The Secretary of State for Defence

Case No: C1/2012/2165

C12009/1250(A)

Court of Appeal (Civil Division)

30 April 2013

[2013] EWCA Civ 449

2013 WL 1795826

Before: Lady Justice Arden, DBE Lord Justice Sullivan and Lord Justice Briggs

Date: 30/04/2013

On Appeal from Queens Bench Division, Administrative Court

Ingrid Simler QC

[2012]EWHC 2216 (Admin)

Hearing dates: 11 April 2013

Representation

Mr J Stark (instructed by Lomax Solicitors) for the Appellant.

Mr B Hooper (instructed by The Treasury Solicitor) for the Respondent.

Judgment

Lord Justice Briggs:

1 This is an appeal from the dismissal by Ingrid Simler QC sitting as a Deputy Judge of the Queen's Bench Division of a claim for judicial review of a decision made on 8 February 2011 to enforce an order for possession of residential premises occupied by the claimant and her family as their home. The judge made an anonymity order to protect the claimant and her family. This court extended it on 11 April until the handing down of judgment. I am satisfied that it should be further extended so that the names of the claimant and her family should be anonymised in these judgments, and in any order arising therefrom.

2 Although the matter had been pleaded more broadly, the two grounds for judicial review actively pursued before the Judge were:

(1) That the decision was unlawful because of a failure to have regard to considerations of mandatory relevance.

(2) That the decision to enforce the possession order was a disproportionate interference with the claimant's Article 8 rights.

3 The case is said by counsel for both parties to break new ground because it is the first (at least in this court) in which those grounds have been advanced in relation to a decision to enforce rather than to obtain a possession order. Both before the judge and by a respondent's notice in this appeal the Secretary of State contended that, although available by way of a defence to a claim for a possession order, Article 8 rights cannot in any circumstances be deployed in opposition to the enforcement of a possession order once obtained. In the present case, the claimant's unsuccessful attempt to deploy her Article 8 rights by way of opposition to the enforcement of the possession order obtained by the Secretary of State arose in the wholly exceptional (and probably never to be repeated) circumstance that the possession order was obtained at a time when, on binding House of Lords authority, Article 8 rights were not available at that stage by way of defence, whereas it became settled law that such rights could be so deployed, before the Secretary of State sought to enforce the possession order.

The Facts

4 The Secretary of State has for very many years maintained and managed a stock of residential properties for the accommodation of members of the armed forces and their families. Until the end of the 1980s that function extended to the appellant Mrs L and her twin daughters R and S, because the appellant was married to an officer in the Army.

5 The appellant's husband resigned from the Army in July 1989 following a court martial. As a result, the Secretary of State ceased to be under any continuing duty to provide residential accommodation for the appellant or her family. None the less the respondent continued to do so, and from September 1989 she and her daughters were provided with a four bedroom house in Leeds (“the premises”), on compassionate grounds, but on what was described as a temporary basis until she could obtain housing from Leeds City Council (“the Council”).

6 In 1996 all the respondent's residential properties, including the premises, were made the subject of a sale and lease back transaction with Annington Homes Limited. In 1998 the appellant's family was augmented by the birth of S's son J. Since then the appellant, her daughters and grandson have continued to reside in the premises as their family home.

7 From as early as 1993 the respondent made attempts to recover possession of the premises from the appellant. Nothing came of them until, in June 2007 the respondent commenced possession proceedings in the Leeds County Court. The appellant resisted that claim upon the basis that her eviction from the premises would be an unjustified interference with her Article 8 rights. Those proceedings were transferred to the Administrative Court and heard over one and a half days by Collins J.

8 The factual basis of the appellant's Article 8 defence arose from her serious and by then long-standing physical difficulties, and from the long-standing mental health difficulties of her daughter R. The appellant is confined to a wheelchair due to Failed Back syndrome, a permanent condition arising from difficulties she encountered in labour. She also suffers from high blood pressure, and uses inhalers and nebulisers for breathing difficulties. She also suffers from trigeminal neuralgia. Her daughter R suffers from long-standing permanent mental health difficulties thought to be attributable at least in part to her having been the victim of sexual abuse by her father. She has in the past being diagnosed as suffering from bi-polar disorder and schizophrenia and has, on more than one occasion, attempted suicide. The appellant's grandson J suffers from Crohns disease. In addition to caring for him, his mother S cares both for her twin sister and for the appellant.

9 This battalion of troubles affecting the appellant and her family's daily lives was fully deployed at the hearing before Collins J. None the less he found himself bound to conclude, as the law then stood, that a residential occupier's Article 8 rights could not be prayed in aid by way of defence to the unqualified right of a property owner to possession, even where the owner was a public authority: see *Kay v Lambeth London Borough Council [2006] UKHL 10* and *Doherty v Birmingham City Council [2008] UKHL 57* . Accordingly, on 5 May 2009, he made an order for possession of the premises, stayed for six weeks (being the maximum period permitted by Section 89(1) of the Housing Act 1980). Recognising that the possession order would impose a duty on the Council to provide accommodation for the appellant and her family due to homelessness, he expressed the hope in his judgment that the special circumstances of the family might lead to the respondent permitting the premises to be used as if they were temporary

accommodation provided by the Council while carrying out its duty to find permanent accommodation for the family.

10 The appellant sought permission to appeal the possession order and was refused both in writing, and at an oral hearing in May 2010. She has since filed an application with the European Court at Strasbourg alleging a breach of Articles 8 and 14 of the Convention, but those proceedings stand adjourned pending the outcome of these proceedings. The result is that, subject only to the application to the ECHR , the respondent has vindicated its unqualified right to possession of the premises by a court order for possession which is now beyond challenge.

11 The appellant lost no time in making a homelessness application to the Council. Her solicitors did so by letter dated 20 May 2009, in which they set out in detail her views as to the requirements of permanent accommodation, in terms of accessibility by a person in a wheelchair, and as to availability on the ground floor of sleeping, bathing, toilet and cooking facilities suitable for someone with her restricted mobility. In June 2009 the Council sought and obtained from the respondent confirmation that, as suggested by Collins J, the premises could continue to be treated as provided by the Council as temporary accommodation for the appellant until suitable permanent accommodation could be found.

12 The search for suitable accommodation was addressed at a meeting on 19 March 2010 attended by representatives of the respondent, the Council and the family. The Council confirmed that the family had been accepted as homeless and awarded the highest level of priority on the Leeds Homes Register. Concern was expressed on behalf of the respondent as to the time which had elapsed since the making of the possession order without permanent accommodation having been found. It was stated that the respondent would be prepared to allow a further six months, but no longer, for the premises to be used as temporary accommodation, with a possible further 28 weeks after the finding of new accommodation so as to assist in a smooth transfer of care provision for the family during the move, having regard in particular to R's psychiatric difficulties.

13 The six month period of grace to which the respondent had committed at the March meeting expired without suitable permanent accommodation satisfactory to the family being found. In October the appellant's solicitors reported of their client's unsuccessful search to the respondent, seeking confirmation that the possession order would not at that stage be enforced. On 8 November, the respondent's solicitors replied that: “MOD reserves its rights to exercise the possession order”. This elicited no further response from the appellant.

14 On 8 February 2011 a written Ministerial Submission was made by David Olney, Deputy Chief Executive of Defence Estates, recommending the enforcement of the possession order by the eviction of the family. It will be necessary to refer in due course in some detail to parts of the Submission, since its alleged deficiencies constitute the basis of the appellant's case that the decision which followed was unlawful. In summary, the Submission contained an outline of the history of the matter, reference to the possession order, to the family's physical and mental health difficulties, to their special need for an adapted property, and to their lack of success thus far in finding satisfactory alternative accommodation. It noted the assumption by the Council of responsibility to house the family, including the provision of temporary accommodation if necessary, and the department's intention to liaise closely with the Council's Social Services to manage the consequences of an eviction sensitively. It identified the available options as (a) do nothing (b) evict and (c) sell the premises to the appellant. It suggested that eviction would allow MOD to recover the property, deal with the Health and Safety issues and limit the financial losses.

15 The Health and Safety issue was described as relating mainly to electricity and gas, together with the inability to maintain the property due to denial of access by the appellant. The financial issues were identified as arising from the non-collection of rent by MOD, and its obligation to pay £3,900 per annum to Annington Homes Limited for the premises.

16 The Minister decided there should be an eviction on the same day. On 9 March the respondent obtained a writ of possession, having notified the appellant's solicitors of its intention to do so by letter on the previous day, which pointed out that a further six months had been allowed by the respondent for the appellant to find alternative accommodation beyond the six month commitment made at the March 2010 meeting. These proceedings then ensued.

Article 8 – change in the law

17 In *November 2010, the Supreme Court gave judgment in Manchester City Council v Pinnock [2011] 2 AC 104* . Departing from the majority decisions in the Kay and Doherty cases, the nine justice court held that in order for domestic law to be compatible with Article 8 , a court which was asked to make an order for possession of a person's home at the suit of a local authority had to have the power to assess the proportionality of making the order and therefore to consider a defence based on an alleged breach of the occupant's Article 8 rights. Lord Neuberger of Abbotsbury MR summarised the principles to be derived from the jurisprudence of the European Court as follows, at paragraph 45:

> "(a) Any person at risk of being dispossessed of his home at the suit of a local authority should in principle have the right to raise the question of the proportionality of the measure, and to have it determined by an independent tribunal in the light of article 8, even if his right of occupation under domestic law has come to an end: McCann v United Kingdom 47 EHRR 913 , para 50; #osi# v Croatia 52 EHRR 1098 , para 22; Zehentner v Austria 52 EHRR 739 , para 59; Pauli# v Croatia given 22 October 2009 , para 43; and *Kay v United Kingdom [2011] HLR 13* , paras 73-74. (b) A judicial procedure which is limited to addressing the proportionality of the measure through the medium of traditional judicial review (ie, one which does not permit the court to make its own assessment of the facts in an appropriate case) is inadequate as it is not appropriate for resolving sensitive factual issues: Connors v United Kingdom 40 EHRR 189 , para 92; McCann v United Kingdom 47 EHRR 913 , para 53; *Kay v United Kingdom [2011] HLR 13* , paras 72-73. (c) Where the measure includes proceedings involving more than one stage, it is the proceedings as a whole which must be considered in order to see if article 8 has been complied with: Zehentner v Austria 52 EHRR 739 , para 54. (d) If the court concludes that it would be disproportionate to evict a person from his home notwithstanding the fact that he has no domestic right to remain there, it would be unlawful to evict him so long as the conclusion obtains — for example, for a specified period, or until a specified event occurs, or a particular condition is satisfied. Although it cannot be described as a point of principle, it seems that the European court has also franked the view that it will only be in exceptional cases that article 8 proportionality would even arguably give a right to continued possession where the applicant has no right under domestic law to remain: McCann v United Kingdom 47 EHRR 913 , para 54; Kay v United Kingdom, para 73. "

18 At paragraph 53, relying upon dicta in Lord Bingham's dissenting judgment in the Kay case, at paragraph 29, he said that it would in the overwhelming majority of cases be burdensome and futile to require the local authority routinely to plead and prove that the possession order sought was justified under Article 8 . If the authority was entitled to possession, and there was no cogent evidence to suggest that it was not acting in accordance with its duties in seeking possession, that would be a strong factor in support of the proportionality of making an order for possession.

19 At paragraph 54 he concluded:

> "Unencumbered property rights, even where they are enjoyed by a public body such as a local authority, are of real weight when it comes to proportionality. So, too is the right – indeed the obligation – of a local authority to decide who should occupy its residential property. As Lord Bingham said in *Harrow London Borough Council v Qazi [2004] 1 AC 983* , 997, para 25:
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> > "The administration of public housing under various statutory schemes is entrusted to local housing authorities. It is not for the court to second guess allocation decisions. The Strasbourg authorities have adopted a very pragmatic and realistic approach to the issue of justification."
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> Therefore, in virtually every case where a residential occupier has no contractual or statutory protection, and the local authority is entitled to possession as a matter of domestic law, there will be a very strong case for saying that making an order for

possession would be proportionate. However, in some cases there may be factors which would tell the other way."

Analysis

20 Both before the judge and on this appeal, (although by different counsel) the appellant has challenged the eviction on two distinct grounds. The first is a traditional domestic public law challenge to the lawfulness of the decision, based mainly upon an alleged failure to place before the Minister (in the Submission) matters which he was required to take into account in deciding whether or not to enforce the possession order by eviction.

21 On this appeal Mr James Stark for the appellant helpfully encapsulated this part of the detail of his case in six bullet points in his skeleton argument, to which I will shortly refer. None the less, the general thrust of his submission was that the Minister (who had nothing other than the Submission with which to inform himself) was not provided with a sufficiently full or accurate presentation of the material facts with which to be able to make a properly informed judgment.

22 I consider (as did the judge) that this submission needs to be addressed by close reference to the context in which the decision fell to be made. The respondent had no duty to house the appellant or her family as manager of housing stock designed for members of the armed services and their families, the MOD's responsibilities towards this family had ceased more than 20 years previously. By contrast the Council both had and have expressly acknowledged a duty to house the appellant and her family from the time of the making of the possession order in May 2009. That duty extended to the provision of suitable temporary accommodation for as long as it took to find suitable permanent accommodation, and the respondent had since May 2009 done no more than lend its voluntary assistance to the Council in the performance of that duty, on an expressly time-limited basis, which had by February 2011 long since expired.

23 Perhaps more importantly, the rights and wrongs of the respondent's wish to obtain possession of the premises from the appellant and her family had, from the perspective of domestic law, been fully ventilated before a judge of the administrative court, and the respondent's entitlement to possession vindicated by a possession order which had been rendered final and conclusive (subject only to the pursuit of an Article 8 case in the European Court) by the refusal of permission to appeal. The vindication of the respondent's right to obtain possession of the premises, for the better performance of the scheme for providing accommodation to members of the armed services and their families had been vindicated at substantial expense, after the passage of a considerable period of time during which the matter was litigated.

24 Finally, it had not been suggested by or on behalf of the appellant during the substantial period which had passed since the making of the possession order that the personal circumstances of herself or her family had materially changed. All that had happened in the intervening period was that her search for suitable permanent accommodation had thus far proved unsuccessful, as the Minister was indeed told in the Submission. There is in fact nothing in the evidence to suggest that the personal circumstances of the appellant and her family had indeed changed at all. Her own disability, the psychiatric condition of her daughter R and the ailment of her grandson were all continuing conditions of long-standing.

25 In that context it seems to me that a decision in substance not voluntarily to prolong the MOD's assistance to the Council in discharging its duty to provide temporary, and in due course permanent accommodation for the appellant and her family beyond a period which was already almost double that to which the respondent had been committed, called for no further or detailed review of the personal circumstances of the appellant, or of her family. A decision to enforce a legal right to possession already established in legal proceedings ought not, as the judge put it, be subject to further searching or intensive judicial review in the absence of any relevant change of circumstances. It would have been extraordinary if such a review were permitted or encouraged in relation to a decision made within the six week period contemplated by Parliament under Section 89 of the Housing Act 1980 as the maximum permissible period for a discretionary stay by the Court. The mere passage of a substantial further period while the public authority voluntarily refrains from enforcement, but without more in the form of a relevant change of circumstances, justifies no further or more detailed review.

26 Turning to the specific matters of complaint about the Submission pursued by Mr Stark the first was that the Submission failed to inform the Minister of the nature and severity of R's mental health problems. These included suicidal tendencies, and a perception that stress arising from a forced eviction, or from a double move first to temporary then to permanent accommodation might exacerbate her condition. In my judgment these were no doubt matters to be taken into account by the Council in discharging its social housing responsibilities in relation to the family, and it is clear (albeit from material arising after the decision was made) that the Council has those well in mind. For example it has made it clear that temporary accommodation will take the form of a self-contained house rather than a hostel, and that the family will be accommodated together, rather than separately, so as to enable them to continue to provide mutual care and support to each other as they are doing at present.

27 Secondly, Mr Stark submitted that the Minister ought to have been informed of the circumstances in which, on compassionate grounds, the premises had originally been provided for the family, in 1989. These included the sexual abuse of R by her father, and his subjection of the appellant to domestic violence. In my judgment these were, by 2011, matters of distant history, and their relevance to the obtaining of possession to the premises had been overtaken by the making of the possession order.

28 Thirdly, Mr Stark maintained that the Submission suggested that the appellant had somehow been to blame for the failure to find suitable permanent accommodation by placing inappropriate restrictions on the location and type of property which she was prepared to consider. Paragraph 6 of the Submission does state that she had placed restrictions on the location and type of property, and that it had severely restricted the number of properties available for consideration. But I do not regard the Submission as suggesting that she was to blame for doing so, still less that the decision to evict was in any way justified as some form of penalty for that aspect of her conduct. On the contrary, paragraph 6 of the Submission acknowledged that for health and physical reasons the family probably needed a property which had been specially adapted for their use.

29 Next, the Submission was criticised for failing to point out that the loss of some £15,000 incurred by the MOD by reason of its decision not to collect rent, on legal advice, had been criticised by Collins J in the possession proceedings as erroneous. In fact, no “rent” or other compensation for the appellant's use and occupation of the premises had been paid since the making of the possession order. The evidence suggests that the respondent's solicitors had invited the appellant to do so and that, quite independently, the appellant had offered to do so, but that neither the invitation nor the offer had been taken up. The appellant's evidence was that the respondent's letter requesting payment had not been received. The appellant could produce no copy of any letter from her offering payment, and the respondent's evidence was that no such letter had been received in any event.

30 In my judgment this criticism goes nowhere, on the rather inconclusive evidence. The Submission does not blame the appellant in any way for the loss of £15,000, nor does it suggest that financial considerations were a primary reason for re-gaining possession.

31 Next, and this is perhaps the appellant's best point in this part of the case, it is said that the Submission provided the Minister with a partial and inaccurate account of the health and safety issues. The relevant part of the Submission (paragraph 9) reads as follows:

> “Mrs L has, in recent years, denied access so that D E (*“Defence Estates”*) has been unable to maintain the property which is now believed to be in a very poor state of repair. There are very serious concerns over Health and Safety issues; particularly in regard to electricity and gas. Although Mrs L's solicitor has, in the past, organised the issue of annual test certificates for the gas and electricity meters, MOD representatives have not been allowed access to check them. The latest certificates are outstanding, and there is a risk that MOD could be held legally responsible for H & S shortcomings.”

32 The evidence before the Judge suggested first that there had indeed been issues about access, which had been ventilated in the possession proceeding but not resolved. Secondly, there had been no request for access to be given to MOD representatives since, at least, the making of the possession order. Thirdly, the position as to gas and electrical test certificates

continued to be unsatisfactory, in the sense that, although the appellant's evidence was that certificates had been obtained, neither she nor her solicitors could locate them for the purpose either of satisfying the court, or the respondent. Finally, the respondent admitted in evidence that this part of the Submission could have been better phrased, in that the Minister could have been informed that, on some occasions, access to the premises had been granted.

33 The judge's view was that the health and safety issue was no more than part of the background to the decision, since it was no part of the reasoning of the advice to evict that the appellant should in any way be punished for failing to provide proper access. In my judgment health and safety considerations were, albeit not in any penal sense, a significant aspect of the advice to the Minister, and paragraph 9 of the Submission did tend to exaggerate them, and was in certain respects ambiguous. In particular it is not clear whether the allegation that MOD representatives had “not been allowed access to check them” was a reference to the electricity and gas certificates or to the installations for the provision of those services in the premises.

34 Nonetheless I consider that exaggeration and ambiguity about the precise nature of the health and safety concerns does not go to the heart of the matter, which was that the Minister was being asked to decide in substance whether to authorise the recovery of the premises for the MOD's proper use or disposal, pursuant to a court order already obtained, at considerable time and expense for that purpose. This criticism comes nowhere near rendering an affirmative decision unlawful.

35 Mr Stark's final criticism was that the Submission provided no briefing to the Minister about the detailed consequences of eviction for the appellant and her family, the precise nature of the alternative accommodation required, or the particular risks occasioned by the probable need for a double move into temporary and then permanent accommodation. Again, I consider that these matters, although of primary relevance to the discharge by the Council of its housing duties, were by no means matters which the Minister was required to consider being under no statutory duty in those respects and, by comparison with the Council ill-equipped to address them in detail.

36 The result is that, whether taken separately or in the aggregate, the criticisms of the lawfulness of the decision making process which led to the obtaining by the respondent of a warrant for the possession of the premises are, for reasons which do not differ substantially from those given by the judge, ill-founded. The decision to enforce the possession order was in my judgment lawful in accordance with all relevant principles of domestic law, so that this first ground of appeal fails.

Article 8

37 The first issue under this heading is whether the occupant of a house can ever rely upon Article 8 by way of opposition to the enforcement of a possession order already obtained by the owner. Both here and in the court below Mr Ben Hooper for the respondent submitted that Article 8 entitled the occupant to a single proportionality review of the eviction process, and that the Supreme Court in the Pinnock case had determined that this review was to be conducted (if requested by the occupant) only at the hearing of the claim for a possession order. He said that the Supreme Court had only been persuaded with the greatest of reluctance to permit an Article 8 defence to be introduced at all into the enforcement of rights of possession which were otherwise unqualified in domestic law, and that to admit even the possibility of a further Article 8 challenge after a possession order had been obtained would risk grave adverse consequences in terms of delay, expense and uncertainty in the obtaining of possession of premises by public authorities. Further, he submitted that a perception by public authorities of the risk of a re-introduction on an Article 8 challenge after the obtaining of a possession order would lead to an unwelcome tendency to enforce them quickly and rigidly, rather than with the good sense and humanity currently displayed.

38 Those are powerful submissions, but the judge was not persuaded by them, and nor am I. The starting point is that Article 8 confers a right that respect be had for a person's home, such that an interference with it by a public authority must be both lawful, and a proportionate means of achieving a legitimate end. The court's task is to subject the process of dispossession by the public authority to a proportionality review. That is a process which may typically involve a number of stages, beginning in the present case with a notice to quit, followed by the issue of possession proceedings, the obtaining of judgment after a hearing, and the enforcement of an

order for possession by the obtaining and execution of a writ of possession.

39 In the overwhelming majority of cases the occupant's Article 8 rights will be appropriately and sufficiently respected by the provision at the occupant's request of a proportionality review during the possession proceedings themselves, and usually at the hearing of them. That is because, under English procedure, it is those proceedings, and in particular the hearing of them, which are designed finally to determine (subject only to any appeal) the lawfulness or otherwise of the owner's claim for possession.

40 The court hearing the possession proceedings is not obliged to conduct a proportionality review of its own motion. It must do so if, but only if, that review is requested by the occupant, by the raising of an Article 8 defence: see the Pinnock case, at paragraph 61. Thus, in the absence of special circumstances the owner will only be in a position to seek a writ of possession after the occupant's Article 8 rights have been exhausted, either because they have not been prayed in aid during the possession proceedings, or because they have been raised as a defence, but rejected. Generally, an attempt to re-litigate the Article 8 issue at the enforcement stage, or to litigate it for the first time when it could and should have been raised as a defence in the possession proceedings, would have been an abuse of process by the occupant.

41 But there will be exceptional cases, and the present is a very unusual but powerful example, where the raising of Article 8 rights at the enforcement stage will not be an abuse. The obvious example is where there is a fundamental change in the occupant's personal circumstances after the making of the possession order but before its enforcement. The example canvassed during the hearing of this appeal was that of the diagnosis of an incurable illness for the first time after the making of the possession order, making it disproportionate for the public authority to evict the occupant before he or she could be allowed to die peacefully at home.

42 The present case is a (probably unique) example where it would not be an abuse of process to pray in aid Article 8 rights at the enforcement stage. The appellant vigorously pursued her Article 8 rights during the possession proceedings but, as the law then stood, and Collins J was bound to conclude, they afforded her no defence. Yet it is now recognised, before the end of the process designed to lead to her eviction, that the appellant has a right to a proportionality review of the enforced loss of her home on the application of the respondent public authority. There is, quite simply, no occasion other than the present proceedings, in which that review can be conducted in that case.

43 I am not deterred from that analysis by Mr Hooper's submissions about the risks of cost, delay, uncertainty and a resort by public authorities to swift and rigid enforcement of possession orders. The courts are familiar with last minute attempts of occupants of residential properties to stay the enforcement of possession orders. County court judges will be well able to discern, on a summary basis, whether some substantial change of circumstances gives rise for the first time to an Article 8 issue which neither was, nor could have been pursued prior to the making of the possession order. Abusive attempts to re-litigate, or litigate Article 8 issues which could and should have been raised during the possession proceedings can be met with the usual sanctions imposed for abuse of process including, where necessary, the making of Civil Restraint Orders.

44 Nor am I persuaded that there is anything in the Pinnock case, or any other case, which decides this question by way of binding or even persuasive authority. The question has simply never arisen before in this jurisdiction. A related question did arise in Bjedov v Croatia [2012] ECHR 42150/09 , in which the European Court decided that Croatian enforcement proceedings were inadequate procedurally for an Article 8 proportionality review, by comparison with possession proceedings. But that turned on the civil procedure of Croatia, and did not in any event deal with the question which arises in the present case, where for unusual reasons the possession proceedings were not available to be used for that purpose.

45 It follows that the judge was correct in the wholly exceptional circumstances of the present case, to accede to the appellant's request to conduct a proportionality review of the requested eviction, even though it will be a very rare case where it is appropriate to do so at the enforcement stage.

46 The final question is whether the judge was correct at the end of her review, to conclude that the eviction of the appellant and her family was a proportionate, and therefore justified, interference with her Article 8 rights.

47 The judge carried out a careful and sympathetic analysis of the consequences for the appellant and her family of the threatened eviction, based in particular upon the medical evidence of R's general practitioner and a report from a forensic psychiatrist, Dr Green, and a letter from the Council dated 2 July 2012 describing the family's prospects of obtaining both temporary and permanent accommodation. In summary, the evidence showed that R's long-standing mental health difficulties were being treated with prescribed anti-depressant medication but that she had not seen clinical specialists during the period following the making of the possession order. The medical evidence disclosed a risk that any forced move (and in particular a forcible eviction by bailiffs) might aggravate R's condition and lead to a return of her earlier suicidal tendencies and that a double move (to temporary followed by permanent accommodation) would be riskier than a single move. The medical experts expressed particular concern about the risks which will arise if the family were accommodated in a hostel, or separated from each other while in temporary accommodation.

48 The letter from the Council demonstrated a lively appreciation of the detail of the family's accommodation requirements, both temporary and permanent. It confirmed that, on homelessness and medical grounds, the family had the highest possible priority for housing, and contained an assurance that, even while temporarily accommodated, the family would not be split up nor required to live in a hostel. It confirmed that temporary housing would be accessible by the appellant despite her reduced mobility, but the Council was unable to guarantee that temporary accommodation would in every respect, provide all the facilities at ground floor level which the appellant said that she needed, and which I have already described. All in all, the Council's letter confirmed that suitable temporary accommodation would be made available if the possession order was enforced, although it might not provide all the facilities which the appellant was specifying, as requisite in permanent accommodation, in an ideal world.

49 Against that, the judge referred to the twin aims of the respondent to vindicate his right under domestic law to regain possession and to perform his public law duty efficiently to manage Service properties and the Ministry of Defence's resources more generally. In particular, the judge noted that the premises were not surplus to the MOD's service accommodation requirements in the Leeds area and that, unless they could not be repaired to a sufficient standard at economical cost, they would be used to accommodate a service family. If beyond economical repair, they would be returned to Annington Homes Limited.

50 The judge noted the high threshold identified in the Pinnock case as facing any occupant relying upon Article 8 as a defence to the pursuit of an unqualified right to possession and added that this high threshold “must apply with even more force to an Article 8 challenge at the later stage of a decision to enforce a possession order that the court had already granted” (paragraph 76). She noted the concession by the appellant (in her evidence) that she could not expect to remain in the premises indefinitely, and that it could not be said with certainty that the requirement for a double move could be avoided by the identification of suitable permanent accommodation within any particular time frame, whether three, six or even twelve months thence. She noted that the respondent had no public function of providing social housing and that, in relation to the appellant and her family, the Council had accepted its statutory duty to provide accommodation for them. In the result, she decided that the enforcement of the respondent's possession order was not a disproportionate interference with the appellant's Article 8 rights.

51 Mr Stark challenged that analysis on three main grounds. First he said that the judge had failed to consider the strength of what he accepted were the respondent's legitimate aims. Secondly, he submitted that the judge had failed to examine in sufficient depth the extent to which the Council's proposals as to temporary accommodation fell short of the appellant's real needs. Thirdly he submitted that the judge had wrongly elevated the height of the threshold facing the appellant because her challenge was raised at the enforcement stage rather than during possession proceedings. The general thrust of his submissions was that the eviction of the appellant and her family would be disproportionate unless and until suitable permanent accommodation, meeting all the detailed requirements arising from her impaired mobility, was located.

52 I have not been persuaded by any of those submissions. As to the first, the strength of the respondent's legitimate aims lay primarily in the fact that, as the judge recognised, it was the Council rather than the respondent which had the statutory function of dealing with the housing needs of the appellant arising from her homelessness and her own and her family's medical

difficulties, and that there was nothing in the evidence to show that the Council would fall short of a full discharge of that responsibility. Where Parliament allocates the responsibility for addressing the Article 8 rights of persons upon a particular public authority (here the Council), the taking of steps by another public authority with no such responsibility which would have the effect of placing upon the responsible authority the burden of addressing those rights seems to me to be a very powerful form of legitimate aim.

53 As to the second submission, I do not consider that the judge's summary of the particular difficulties arising for the family from the prospect of a double move, and from having to take up temporary accommodation which might well fall short of meeting all their requirements, can be criticised. It is evident from a reading of her judgment as a whole that she had well in mind the documentary evidence in which those aspects of the matter were set out. It was not incumbent upon her to spell out in her judgment every detail of them providing, as she clearly did, that she took them sufficiently into account. They are circumstances which attract the sympathy of any court, but which have to be balanced against the rights and legitimate aims of the respondent.

54 As to the third submission, I do not read paragraph 76 of her judgment as containing the implication which Mr Stark suggests. She was referring to a high threshold identified in the Pinnock case as applicable to an Article 8 defence in possession proceedings and stating no more than the obvious, namely that the same high threshold was applicable, *a fortiori* , at the enforcement stage.

55 Mr Stark sought permission to withdraw the concession made by the appellant in her evidence that she could not expect to remain in the premises indefinitely. The logic of the judge's conclusion that a refusal to permit enforcement of the respondent's possession order would have that result makes it understandable that counsel should seek to do so. Quite apart from the difficulties of withdrawing a concession made in evidence rather than in submission, I consider that it was rightly made. As the judge said, by the time of the hearing before her, the appellant had been using the premises as temporary accommodation for over three years from the making of the possession order, and permanent accommodation was no nearer being found in 2012 than it had been in 2009. The respondent had, initially on compassionate grounds, been accommodating the appellant and her family without any duty or function to do so for over 20 years.

56 The result is that, again substantially for the reasons given by the judge, the Article 8 challenge to the enforcement of the possession order fails, so that, in my judgment, this appeal should be dismissed. I agree with the additional point made by Arden LJ in her judgment.

Lord Justice Sullivan:

57 I agree with both judgments.

Lady Justice Arden:

58 I also agree. With the benefit of discussion with my colleagues, there is a further point I would add.

59 In paragraph 45 of her judgment, the judge held that the challenge to the decision of the respondent on public law grounds had been “overtaken by Pinnock , at least in cases where the proportionality principle is to be applied to the making of the possession order.”

60 The judge, therefore, proceeded on the basis that a conventional judicial review challenge on domestic law grounds was automatically displaced because there was an issue as to proportionality.

61 In my judgment, this approach was not correct in law. A conventional judicial review challenge is not *necessarily* displaced by a defence based on proportionality.

62 It *may* be subsumed within that defence where it raises in substance a point already encompassed by the proportionality defence, for example, where the tenant's case is that the decision to evict him or her was perverse because it failed to take account of factors which also support the proportionality defence. In that case, the judicial review challenge adds nothing in practice.

63 However, the conventional judicial review challenge may be also directed to a different

question, for example, whether the decision was taken for an improper purpose. Such a challenge may raise issues not within the proportionality defence. In such a case, the conventional judicial review challenge may lie quite independently of whether or not there is a defence based on proportionality and the court must then address both matters.

64 In this case, the conventional judicial review challenge to the respondent's decision was not based on perversity, but shortcomings in the Submission, which, it is said, included irrelevant or inaccurate material and failed to include other relevant material. It, therefore, had to be separately addressed. However, as Briggs LJ has explained, it fails in any event.

65 Finally, I would repeat the point made by Briggs LJ that it is only in an exceptional case that circumstances will justify the refusal by a court to make a possession order on the grounds of an Article 8 defence: see paragraphs 45 and 54 of the speech of Lord Neuberger in Pinnock set out at paragraphs 17 and 19 above.