Public law and human rights defences
Where are we now?

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What can I expect?

• Overview of principles underlying public law defences

• Overview of principles underlying human rights defences

• Study of case law including *Winder, Qazi, Kay, Doherty, Pinnock, Mullen* etc

• Focus on *Pinnock* and its consequences
Public law defences

• Supervisory jurisdiction of courts

• Exercised over public bodies

• Public bodies?


Public law defences

• Grounds of review commonly classified under three heads:
  – Illegality
  – Procedural impropriety
  – Irrationality

• Proportionality?

• Traditionally the preserve of the High Court in judicial review proceedings
Public law defences

• But:

  – *Wandsworth LBC v Winder (No1)* [1985] AC 461
  
  – *Kay v Lambeth LBC* [2006] UKHL 10 [2006] 2 AC 465
  

  “All seem to have accepted it as settled law … that ‘conventional’ judicial review grounds can be raised by way of defence to possession proceedings in the county court” [36]
Public law defences

• Little impact where the court has a discretion to consider the reasonableness of a possession order

• Usually deployed where tenant lacks security of tenure

• Recent examples:
  

  – *Eastland Homes Partnership Ltd v Whyte* [2010] EWHC 695 (QB) – assured shorthold tenancy
Public law defences

• Lessons to be learned:
  – Adherence to policy and procedure
  – Principled decision making
  – Good record keeping
  – Regular reviews
Human rights defences

• Human Rights Act 1998 incorporated many of ECHR’s rights and fundamental freedoms: see section 1 and Schedule 1

• Article 8 most commonly encountered:

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.
Human rights defences

• Section 6: unlawful for public authority to act incompatibly with Convention right

• Public authority?


Human rights defences

• Section 2:
  – domestic courts must take account of relevant ECtHR decisions

• Section 3:
  – domestic courts must, if possible, interpret legislation compatibly with convention rights

• Section 4:
  – domestic courts cannot strike down incompatible legislation, only declare it to be incompatible
Human rights defences

• 2 possible human rights defences in possession claims:

  – law on which landlord relies for possession is incompatible with Convention rights

  – eviction would breach occupier’s Convention rights, e.g. Article 8 ECHR
Human rights defences

No defence arguing incompatibility of the law has yet been successful in possession proceedings, e.g.:


Human rights defences

• Usual defence: possession order and/or eviction would infringe Article 8 ECHR

• Little impact where the court has a discretion to consider the reasonableness of a possession order.

• Reasonableness includes consideration of proportionality:
  
  
  
  – *Kay v Lambeth LBC; Leeds CC v Price* [2006] UKHL 10 [2006] 2 AC 465
Human rights defences

• What of cases where court has no discretion?

• Article 8 has enjoyed a chequered history in domestic jurisprudence

• *Harrow LBC v Qazi* [2003] UKHL 43 [2004] 1 AC 983
  
  – Landlord’s contractual and proprietary right to possession could not be defeated by Article 8 defence

• *Kay v Lambeth LBC; Leeds CC v Price* [2006] UKHL 10 [2006] 2 AC 465
  
  – “…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…” per Lord Hope at 110
Human rights defences

• *McCann v United Kingdom* (2008) EHRR 40 [2008] HLR 40 ECtHR

  - ECtHR approved minority view in *Kay*.

  - Loss of a person’s home is an extreme form of interference with the right to respect for the home. Any person at risk of an interference of such magnitude should be able to have its proportionality determined by an independent tribunal in the light of Article 8, notwithstanding that, under domestic law, his right of occupation has come to an end.
Human rights defences

• *Doherty v Birmingham CC* [2008] UKHL 57 [2009] 1 AC 367

– “I think that … it would be unduly formalistic to confine the review strictly to traditional Wednesbury grounds. The considerations that can be brought into account are wider. An examination of the question whether the [authority’s] decision was reasonable, having regard to the aim which it was pursuing and to the length of time that the [defendant] and his family have resided on the site, would be appropriate. But that 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 [110] of Kay, whether the decision to recover possession was one which no reasonable person would consider justifiable.” Per Lord Hope at [55]
Human rights defences

• **Kay v United Kingdom** [2011] HLR 2 ECtHR

  – Any person at risk of losing his home should be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under article 8, notwithstanding that under domestic law his right to occupation has come to an end. [67]–[68]

  – ECtHR welcomed the “increasing tendency of domestic courts to develop and expand conventional judicial review grounds in the light of Article 8.”

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

• Facts: see newsletter

• Summary of decision:-

  – A court invited by a public authority to make an order for possession of a person’s home must be able to assess the proportionality of an eviction and, in doing so, to resolve any relevant factual disputes between the parties.

  – Traditional review powers should be expanded to permit the court to carry out that exercise
Pinnock

• Summary of decision

  – Exceptionality is not the test when applying Article 8: save in demoted tenancy cases, the issue is always whether eviction is a proportionate means of achieving a legitimate aim

  – Section 143D(2) of the Housing Act 1996 could be read compatibly with art.8.

  – On the facts, Mr Pinnock’s Article 8 defence could not succeed.
Pinnock

Further:-

- Court will not be required to consider the proportionality of a possession order unless the issue is raised by the occupier.

- Court will be expected, initially, to consider the issue summarily.

- Unencumbered property rights will carry ‘real weight’ on the scales of proportionality, providing a ‘very strong case’ for saying that an eviction is proportionate.

- Only ‘in exceptional cases’ will Article 8 justify, in ascending order of effect, postponing the date of possession, suspending enforcement of an order or refusing an order altogether.
Further:

- Such cases are more likely to involve ‘occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty’.

- In these cases, a public authority might need to explain why it is not securing alternative accommodation for the occupier.

- Certain statutory and procedural provisions – notably section 89 of the Housing Act 1980 and parts of CPR 55 – would have to be revisited.
Upshot of *Pinnock*

- Landmark decision?
- Practical consequences?
  - Will unmeritorious Article 8 defences be disposed of summarily?
  - How will courts deal with factual disputes?
  - How will landlords manage and plead their cases?
- Exit tolerated trespasser, enter ‘un-tolerated’ trespasser?
- Consequences of, e.g. unlawful decision to serve a notice to quit?
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