



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF KAY AND OTHERS v. THE UNITED KINGDOM

(Application no. 37341/06)

JUDGMENT

STRASBOURG

21 September 2010

FINAL

21/12/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Kay and Others v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Lech Garlicki, *President*,

Nicolas Bratza,

Giovanni Bonello,

Ljiljana Mijović,

Päivi Hirvelä,

Ledi Bianku,

Nebojša Vučinić, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 31 August 2010,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 37341/06) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by eight British nationals, Mr Gavin Kay, Mr Peter Armstrong, Mr Ian Ballantine, Ms Cherry Barnett, Mr Ian Constantine, Mr Christopher Cole, Mr Thomas Greenhalgh and Mr Martin Breschinsky, and an Irish national, Mr William Gorman (“the applicants”), on 7 September 2006.

2. The applicants were represented by Thomas & Co., a firm of solicitors based in London. The United Kingdom Government (“the Government”) were represented by their Agent, Mr J. Grainger, of the Foreign and Commonwealth Office.

3. On 13 October 2008 the President of the Chamber decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 1).

4. The Equality and Human Rights Commission was granted leave to intervene in the proceedings as a third party pursuant to Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants, Mr Gavin Kay, born in 1951, Mr Peter Armstrong, born in 1959, Mr Ian Ballantine, born in 1946, Ms Cherry Barnett, born in 1965, Mr Ian Constantine, born in 1962, Mr Christopher Cole, born in 1951, Mr Thomas Greenhalgh, born in 1956, and Mr Martin Breschinsky, born in 1960, are British nationals who live in London. Mr William Gorman, born in 1951, is an Irish national and also lives in London.

A. The circumstances of the case

1. *Background facts*

6. The London Borough of Lambeth (“Lambeth”) owned a number of properties which were unsuitable for normal housing use. The properties formed part of the “short life” property of Lambeth, meaning that they were scheduled for demolition, redevelopment or works. Following aggressive squatting, which exacerbated the poor condition of the properties, and an increase in responsibilities on local housing authorities to provide shelter for homeless people, Lambeth began to consider a scheme under which housing associations would take over short life property and find and manage tenants until the property was required by Lambeth for demolition or redevelopment. In around 1977, Lambeth began informally licensing short life property to the London and Quadrant Housing Trust (“LQHT”), a charitable housing trust, in order that the latter could provide temporary accommodation for homeless people to whom Lambeth owed a statutory duty to arrange accommodation. However, some of the short life property could not be made suitable for use by homeless families and so, in a separate arrangement in 1979, Lambeth began to pass properties to LQHT and other bodies to use as housing for those to whom no statutory duty was owed and who would not generally be allocated housing by Lambeth. This was called the “singles scheme”. The applicants were all provided with housing under the singles scheme.

7. Until 1986, LQHT had an informal arrangement with Lambeth which covered the properties occupied by the applicants. This arrangement was replaced by a licence in 1986, reflecting the previous arrangement and terminable on three months' notice. In 1995, the licence arrangement was replaced by individual ten-year leases of each property granted to LQHT by Lambeth. The leases were subject to a break clause allowing either party to terminate the leases early on just over six months' notice. One purpose of the grant of the individual head leases was to allow LQHT to replace its

licences to the applicants with assured shorthold tenancies, which would prevent them from acquiring security of tenure under the Housing Act 1985 (“the 1985 Act”). In fact, few of the applicants agreed to enter into assured shorthold tenancies with LQHT.

8. In 1999, Lambeth gave notice to terminate the head leases to LQHT. In November 1999, LQHT advised the applicants that the head leases had been terminated.

2. *Domestic proceedings*

9. In August 2000, Lambeth brought summary possession proceedings against Mr Kay, Ms Barnett, Mr Constantine, Mr Cole and Mr Greenhalgh (“the *Kay* proceedings”). They defended the proceedings on the basis that they were secure tenants of Lambeth. In August 2000, Mr Gorman brought an action against Lambeth for a declaration making the same claim. Lambeth sought an order for possession by way of counterclaim in Mr Gorman's proceedings.

10. The applicants argued that they were tenants of Lambeth and had secure tenancies under Part IV of the 1985 Act. They argued in the alternative that an order for possession against them would breach their right to respect for their homes under Article 8 of the Convention. Lambeth argued that it was not bound by tenancies created by LQHT and applied to strike out the applicants' Article 8 defence on the grounds that it showed no reasonable ground for defending the claim.

11. On 13 December 2002, the judge ruled that the applicants were not tenants of Lambeth and therefore had no security of tenure under Part IV of the Housing Act 1985. On 19 December 2003, following the July 2003 decision of the House of Lords in *London Borough of Harrow v. Qazi* [2003] UKHL 43 and on the basis of the majority view in that judgment, the judge struck out the applicants' alternative defence based on Article 8 without considering whether the specific personal circumstances arising in each of the applicants' cases rendered Lambeth's decision to seek possession disproportionate. The applicants appealed.

12. In the meantime, possession orders were made in respect of Mr Armstrong, Mr Ballantine and Mr Breschinsky on 19 November 2003. The proceedings against them were stayed by agreement pending the outcome of the *Kay* proceedings.

13. The appeal against the two rulings in the *Kay* proceedings was dismissed by the Court of Appeal on 20 July 2004. Auld LJ concluded (at paragraph 100):

“The fact is that Lambeth has an unqualified right to possession. And on the basis of the majority opinions in *Qazi* by which we are bound, that is a sufficient answer to the claim under Article 8.”

14. However, he noted that a defence on public law grounds was possible, indicating (at paragraphs 101 and 103) as follows:

“However ... [t]he decision to bring possession proceedings was an administrative decision to which the ordinary principles of administrative law apply. Accordingly it can be challenged by judicial review and perhaps by way of defence in proceedings such as the present.

...

But that does not mean that, by the backdoor, Article 8 comes back into play as a 'relevant consideration'. Initially, as in all decisions related to housing, the particular needs of a tenant and his family will form a necessary background to the decision a housing authority has to take. And they will therefore form part of the considerations which the housing authority has to evaluate. But those considerations fall to be evaluated on ordinary administrative law principles. In the present case, no material has been put before the court to suggest that the decision was unlawful or unreasonable in the *Wednesbury* sense ...”

15. The House of Lords granted leave to appeal on 22 June 2005. The Government intervened in the case in support of the applicants' Article 8 argument. On 8 March 2006, the House of Lords sitting as a committee of seven judges dismissed the appeal (see further “Relevant domestic law and practice”, below).

16. On 28 April 2006, the county court made possession orders against each of the applicants.

B. Relevant domestic law and practice

1. Housing law and Article 8 defences to possession proceedings

a. Security of tenure

17. By section 82 of the Housing Act 1985, a secure tenant of a local authority or other public authority has security of tenure. Under section 84(1) of the Act, a court shall not make an order for possession of a dwelling house let under a secure tenancy except on one or more of the grounds set out in Schedule 2 to the Act. Section 84(2) provides that:

“The court shall not make an order for possession—

(a) on the grounds set out in Part I of that Schedule (grounds 1 to 8), unless it considers it reasonable to make the order,

(b) on the grounds set out in Part II of that Schedule (grounds 9 to 11), unless it is satisfied that suitable accommodation will be available for the tenant when the order takes effect,

(c) on the grounds set out in Part III of that Schedule (grounds 12 to 16), unless it both considers it reasonable to make the order and is satisfied that suitable accommodation will be available for the tenant when the order takes effect.”

b. The House of Lords judgment in *Qazi*

18. The House of Lords judgment in *Qazi* is described in detail in the Court's judgment in *McCann v. the United Kingdom*, no. 19009/04, § 22-25, 13 May 2008. In that case, the House of Lords found that the property continued to be Mr Qazi's home notwithstanding the fact that the tenancy had come to an end and so Article 8 was engaged. However, the majority (Lords Hope of Craighead, Millett and Scott of Foscote) held that a local authority's proprietary or contractual right to possession could not be defeated by a defence based on Article 8. The dissenting minority (Lords Bingham of Cornhill and Steyn) considered that where there was a proposed interference with a person's right to respect for his home, the question of justification, if raised, did fall to be considered and should, in the instant case, be remitted to the county court.

c. The House of Lords judgment in *Kay*

19. In the applicants' case of *Kay v. Lambeth Borough Council; Price v. Leeds County Council* [2006] UKHL 10, the House of Lords revisited *Qazi* following the Court's judgments in *Connors v. the United Kingdom*, no. 66746/01, 27 May 2004 and *Blečić v. Croatia*, no. 59532/00, 29 July 2004 (the latter judgment was subsequently referred to the Grand Chamber which found, on 8 March 2006, that since the case fell outside the Court's temporal jurisdiction, it was unable to take cognisance of the merits of the case).

20. The majority (Lords Hope, Scott of Foscote and Brown of Eaton-under-Heywood and Baroness Hale) held that the judgment in *Connors* was not incompatible with the view of the majority in *Qazi* and that a defence in possession proceedings which did not challenge the law under which the possession order was sought but was based only on the occupier's personal circumstances should be struck out. At paragraph 110, Lord Hope set out the test to be applied:

“ ... 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 the 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 [“gateway (a)”], 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 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 [“gateway (b)”], he should be permitted to do this provided again that the point is seriously arguable ...”

21. Discussing the implications of the Court's judgment in *Connors* on the decision of the House of Lords in *Qazi*, he later added (at paragraphs 114 and 115):

“There may, however, be cases like *Connors* where the incompatibility with the article 8 Convention right lies in primary legislation which the county court is being asked to apply to the case by the public authority ... In such a case it would be open to the High Court to make a declaration of incompatibility, if it was not possible to read or give effect to the legislation under section 3 of the Human Rights Act 1998 in a way which was compatible with the Convention right. But the legislation would nevertheless still have to be enforced, unless the decision of the public authority to seek to enforce it when faced with that incompatibility could be said, when judicially reviewed, to be arbitrary, unreasonable or disproportionate. The decision could not be held in the county court to be an unlawful act within the meaning of section 6 of the 1998 Act: see section 6(2)(b). The fact that the question of incompatibility that was raised in *Connors* was not capable, under the domestic system, of being dealt with effectively in the county court because of the limits on its jurisdiction reinforces, rather than detracts from, the proposition that a defence which is raised in that court under article 8 should be struck out unless the legislation can be read and given effect in a way that is compatible or it raises an issue as to its incompatibility that ought to be considered in the High Court.

The appellants' right to continue in occupation of premises over which they never had any rights granted to them by the landowner was brought to an end by the operation of law when Lambeth gave notice terminating the leases to LQHT. They have no right to remain there indefinitely, which would be the effect of denying to Lambeth its unqualified right to possession of the premises on the ground that to give effect to this right would be incompatible with article 8. Their interests will be sufficiently protected by the fulfilment of the formal requirements for the eviction, which demand proof by the public authority landowner of its entitlement to obtain an order for possession in the exercise of its property rights. I would dismiss this appeal.”

22. Lord Scott, also for the majority, expressed the following view (at paragraphs 162 and 169 to 172):

“As to 'procedural safeguards', each of the [appellants] filed a pleading setting out the basis on which his article 8 defence, as well as his domestic law defence, was based. The article 8 defences were given due judicial consideration but were struck out as being incapable of constituting a defence to Lambeth's possession claim. Whatever 'procedural safeguards' are requisite, they cannot bar a court from ruling in a particular case that the pleaded facts and matters relied on are not capable of outweighing in the balance the contractual and/or proprietary right to possession of the owner of the property in question. If the home occupier thinks the judge's ruling to

be in error, the ruling can ... be reviewed on appeal, or on an application for permission to appeal.

...

... The possession orders sought by Lambeth engage the article 8 right to respect for the home of the respective occupiers from whom possession was sought. But an order for possession was in accordance with domestic law. As against Lambeth the occupiers had become trespassers with no right to remain in occupation. There was nothing discriminatory or unusual about the statutory and common law framework that produced that result nor about the absence of any statutory protection given to the occupiers by the housing legislation. I respectfully agree with my noble and learned friend Lord Bingham of Cornhill's remarks in para 36 of his opinion that the balance required by article 8(2) to be struck was struck by the general law, that the public authority owner had a right to manage and control its property within the bounds set by statute, that the occupier acquired only a limited right to occupy and that on due determination of that right, a claim by the owner must ordinarily succeed. The appellants ... could not resist Lambeth's possession applications on article 8 grounds unless either they mounted an article 8 attack on the legal framework that entitled Lambeth to possession or they attacked on article 8 grounds Lambeth's decision to seek possession. The first attack was not attempted, and, if it had been, would in my opinion have been bound to fail. There is nothing the matter, from an article 8 standpoint, with a common law rule which gives the owner of property, which is occupied as a home by a person who has no right as against the owner to remain there, the right to recover possession of the property. Parliament's omission to provide any statutory security of tenure for home occupiers in the position in which the [appellants] found themselves is well within the wide margin of appreciation referred to in *Blecic*.

As to the decision of Lambeth to seek possession of the properties occupied by the [appellants], I agree with and adopt the conclusion expressed by Lord Bingham in para 47 of his opinion. No facts have been pleaded or alleged by the appellants which outweigh the right and the duty of Lambeth to manage its housing stock. The wide margin of appreciation referred to in *Blecic* must be accorded to Lambeth.

The article 8 defences were struck out by Judge Roger Cooke. They were in my opinion rightly struck out. If a defendant does not plead or allege sufficient facts which, if made good, could constitute a defence, the defence can be struck out. On the facts pleaded and alleged in the article 8 defences the defences could not have succeeded.

Nor, in my opinion, where a home occupier has no contractual or proprietary right to remain in possession as against the owner of the property, could an article 8 defence based on no more than the personal circumstances of the occupier and his family ever succeed. *Connors* is no authority to the contrary. The successful article 8 defence in *Connors* was founded on a combination of Mr Connors inability to enjoy the security of tenure advantages afforded by statute to occupiers of privately owned caravan sites and on the Strasbourg court's perception (which I think was an unjustified perception) of a lack of sufficient procedural safeguards enabling him to dispute the grounds which had led the council to terminate his site licence."

23. Baroness Hale agreed with the majority, noting (at paragraphs 189 to 190):

“... as I understand it, some of your Lordships would go further and accept that there may be highly exceptional cases in which the occupier could argue that his individual personal circumstances made the application of the general law disproportionate in his case. When, if at all, should the court be able to say that, even though there is no obligation to continue to provide housing in these circumstances, it is not 'necessary in a democratic society' to permit the landowner to assert its property rights?”

My Lords, I myself do not think that the purpose of article 8 was to oblige a social landlord to continue to supply housing to a person who has no right in domestic law to continue to be supplied with that housing, assuming that the general balance struck by domestic law was not amenable to attack and that the authority's decision to invoke that law was not open to judicial review on conventional grounds. It should not be forgotten that in an appropriate case, the range of considerations which any public authority should take into account in deciding whether to invoke its powers can be very wide: see eg *R v Lincolnshire County Council and Wealden District Council, Ex p Atkinson, Wales and Stratford* (1995) 8 Admin LR 529, *R (Casey and others) v Crawley Borough Council* [2006] EWHC 301 (Admin).”

24. She concluded (at paragraph 193):

“Each of the cases before us is a classic example of one in which a defence based upon article 8 would have no real prospect of success ... In the *Lambeth* cases, the occupiers had undoubtedly established homes in the dwellings but they had done so on terms which made them vulnerable, like many sub-tenants, to the superior claims of the landowner. Lambeth's attempts to evict them were in accordance with the law and in pursuit of the legitimate aim of regaining control over this short life housing stock. All the [appellants] were offered alternative accommodation. It would take a very different case from that pleaded to give their claims to remain in the particular dwellings occupied a real prospect of success.”

25. Lord Brown of Eaton-under-Heywood (at paragraph 198) was of the following view:

“For my part I would accept that the recent Strasbourg jurisprudence requires some qualification to be placed on the *Qazi* principle; I cannot, however, agree that it requires, as the minority in *Qazi* suggested, the consideration (even if usually only the most cursory consideration) of an article 8 defence every time it is raised. My opinion is rather, and at this stage I state it very broadly, that although article 8 is clearly engaged in every home repossession case, its requirements are satisfied provided only and always, first, that the substantive domestic law under which the order is sought strikes an acceptable balance between the competing needs and rights at stake and, secondly, that that law is properly applied by the domestic court with the occupier being given a fair opportunity to invoke any defence available to him under it. If either of those two conditions is not satisfied then, I accept, a complaint would properly sound under article 8. But, as I shall seek to show, it by no means follows that article 8 provides the occupier in such cases with a freestanding defence independent of whatever rights he may have under domestic law.”

26. He concluded (at paragraphs 203 to 204 and 207):

“Of course, where the domestic law requires the court to make a judgment (most notably perhaps in those cases ... where repossession can only be ordered if the court considers it reasonable), or to exercise a discretion, the judge will bear in mind that he is performing this task in the context of the defendant's article 8 right to respect for his home. But where under domestic law the owner's right to possession is plainly made

out ..., the judge in my opinion has no option but to assume that our domestic law properly strikes the necessary balances between competing interests (as envisaged in paras 32 and 33 of my noble and learned friend Lord Bingham's judgment) and that in applying it properly he is accordingly discharging his duty under section 6 of the Human Rights Act 1998 ... Where no statutory protection is afforded to occupiers that should be assumed to be Parliament's will: sometimes that will be clearly evident from the terms of the governing legislation ...; even, however, where the owner's rights arise at common law, the absence of statutory protection must surely be, as my noble and learned friend Lord Hope suggests, the result of a deliberate decision by Parliament to leave the owner's right to recover possession in these cases unqualified. As Lord Bingham observes at para 36, it is not unrealistic to regard the general law as striking the required balance.

One of the difficulties I have with the appellants' contended for application of article 8 in these cases is in understanding what sort of 'highly exceptional circumstances' (Lord Bingham's expression at paras 35 and 36) could possibly entitle the county court judge to disregard a clear provision of domestic law so as to deprive the owner ... of his apparently clear entitlement to possession; another is in understanding what are supposed to be the parties' respective rights and interests in the premises once the judge has felt obliged under article 8 to set aside the dictates of domestic law.

...

I too, therefore, would dismiss both these appeals but I would do so for a reason more fundamental than that suggested by certain others of your Lordships. These appellants' defences must fail, not because they disclose no sufficient (highly exceptional) personal merit but because they depend upon establishing a freestanding article 8 right to remain in possession incompatible with the respective claimants' clear entitlement to possession under domestic property law. I would hold that no such freestanding right exists."

27. As to the availability of a defence based on conventional judicial review grounds, Lord Brown added (at paragraphs 208 to 209 and 211):

"There is, however, a quite different basis upon which an occupier could challenge a public authority's claim for possession, namely on the conventional public law ground that the decision to bring the claim was itself so unreasonable as to be unlawful. Such a defence can clearly be advanced in the county court ...

The difficulty with such a defence, however, is that it would be well nigh impossible to make good, the challenge necessarily postulating that under domestic property law the claimant authority was entitled to possession. Accordingly the argument could only be that no reasonable public authority could properly invoke that domestic law right. This would be a more stringent test than would apply were the court, as the appellants assert, under a primary duty to reach its own judgment on the justifiability of making a possession order.

..

It is difficult to suppose, however, that a defence based on a public law challenge of this character to a public authority's decision to pursue its domestic law rights could properly succeed except in such an infinitely rare case as *Connors* itself. Manifestly it

could not have succeeded in either of the present cases which doubtless explains why defences of this particular character were not advanced.”

28. The minority (Lords Bingham of Cornhill, Nicholls of Birkenhead and Walker of Gestingthorpe) considered that occupiers should be able to plead Article 8 as a defence in possession proceedings, although such a defence would only be successful in highly exceptional cases. Lord Bingham (at paragraph 39) described the minority approach as follows:

“The practical position, in future, in possession proceedings can be briefly summarised as follows. (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 seriously 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 fullblown trial. This question should be decided summarily, on the basis of an affidavit or of the defendant's defence, suitably particularised, or in whatever other summary way the court considers appropriate. The procedural aim of the court must be to decide this question as expeditiously as is consistent with the defendant having a fair opportunity to present his case on this question. (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, subject to this: where an issue arises on the application of section 3 [of the Human Rights Act 1998] the judge should consider whether it may be appropriate to refer the proceedings to the High Court”.

29. As for the disposal of the appeal, however, he considered that on the facts of the present case the matter need not be remitted to the county court, concluding (at paragraph 47):

“The question then arises whether these cases should, even after this lapse of time, be remitted to the county court for consideration whether eviction is necessary in a democratic society, as that expression has been defined in the Strasbourg jurisprudence. I would favour that course if there appeared any reasonable prospect of the court deciding that it was not necessary. But it is clear that under domestic property law the appellants have no right to occupy their respective premises, of which the local authority has an unqualified right to possession. The appellants fall outside the categories to which Parliament has extended a measure of protection. The local authority has no duty to accommodate the appellants, but has a power and duty to manage its housing stock. The appellants have not pleaded or alleged facts which give them a special claim to remain. I am satisfied that if these cases were remitted, possession orders would necessarily be made ...”

d. The House of Lords judgment in *Doherty*

30. In 2008, the House of Lords handed down its decision in *Doherty v. Birmingham City Council* [2008] UKHL 57 shortly after the Court's judgment in *McCann v. the United Kingdom*, no. 19009/04, 13 May 2008. The House affirmed *Kay* and sought to clarify the position set out in that judgment, in light of the Court's decision in *McCann*. Lord Hope (at paragraphs 52 to 53 and 55) provided, in particular, the following clarifications of the “gateways” available for defendants to challenge possession orders, as explained in *Kay*:

“As I said earlier, the speeches in *Kay* show that the route indicated by [gateway (b)] is limited to what is conveniently described as conventional judicial review. In para 60, for example, Lord Nicholls indicated that he had in mind a challenge in accordance with *Wandsworth Borough Council v Winder* [1985] AC 461 on grounds which, he said, had nothing to do with the Human Rights Act 1998. In para 208 Lord Brown too acknowledged that this was a quite different basis from that which the Act provides upon which a public authority's claim for possession could be challenged. In para 110 of my own speech I described this as a challenge that would be made at common law, on the ground that the decision was one that no reasonable person would consider justifiable. In para 114 I said that the grounds on which the decision to claim possession could be judicially reviewed were whether it was arbitrary, unreasonable or disproportionate.

Gateway (b) then asserts that in possession cases brought by a public authority a defence which takes the form of a challenge to its decision to seek possession may be available. The court is not bound to make the order if the decision to seek it can be challenged on the ground that it was an improper exercise of the respondent's powers. In this respect the two routes, or 'gateways', may be said to work together to address the incompatibility due to the lack of a procedural safeguard, which is the fundamental point that is at issue in this case. Gateway (a) addresses the question whether the court can read and give effect to the statutes in a way that is compatible with article 8. If it cannot do this, it will be open to the defendant by way of a defence to argue under gateway (b) that the order should not be made unless the court is satisfied, upon reviewing the respondent's decision to seek a possession order on the grounds that it gave and bearing in mind that it was doing what the legislation authorised, that the decision to do this was in the *Wednesbury* sense not unreasonable. This route offers a procedural protection under the common law. If taken, it will enable the grounds on which the respondent based its decision to be scrutinised. It might, on the facts of this case, provide the appellant with an effective defence to the making of the possession order. The fact that it is available as a defence seems to me to strengthen the argument, should it be needed, that it also provides him with the protection which he seeks against an infringement of his Convention right.

...

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 which 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”.

31. Clarifying the difference between the minority and minority approaches in *Kay*, he said (at paragraph 42):

“As I said in para 109 of my opinion in *Kay*, and again at the outset of para 110, a defence to a possession order which does not challenge the law under which it is sought but is based only on the personal circumstances of the occupier should be struck out. The personal interests safeguarded by article 8 must be taken to have been sufficiently safeguarded by the fulfilment of the requirements for the recovery of possession by the landowner laid down by the statute or by the common law. That is the basic law that was established in *Qazi* and it is the point on which the majority in *Kay* differed from the minority: see ground (3)(b) in para 39 of Lord Bingham's opinion.”

32. Lord Scott also considered the minority view in *Kay*, as set out by Lord Bingham, and compared it to Lord Hope's test in *Kay*, concluding (at paragraph 70) that:

“...The only proposition which is in any respect inconsistent with the majority opinions is proposition 3(b) and the inconsistency there is slight though important. Proposition 3(a) covers the same ground as Lord Hope's paragraph 110 gateway (a). But proposition 3(b) attributes to the occupier's personal circumstances a central importance that the majority opinions did not accept. The view of the majority, as expressed by Lord Hope in his gateway (b), was, as I have explained, that a local authority's decision to recover possession would be open to challenge on public law grounds and that the challenge could be raised as a defence in the possession proceedings. The personal circumstances of the defendant might well be a factor to which, along with the other factors relevant to its decision, a responsible and reasonable local authority would need to have regard. The question for the court would be whether the local authority's decision to recover possession of the property in question was so unreasonable and disproportionate as to be unlawful.”

33. He disagreed with a passage in the decision of the Court of Appeal in the case under consideration, noting (at paragraph 76) that:

“...the sentence 'Under gateway (b) the council's action was open to challenge on conventional judicial review grounds, but not on the grounds that it was contrary to Article 8' suggests a disharmony between 'conventional judicial review grounds' on the one hand and Article 8 on the other hand that I do not accept.”

34. In an addendum prepared following the release of the Court's judgment in *McCann*, Lord Scott emphasised (at paragraphs 84 to 85) that:

“... Local authorities, being public authorities, are obliged by section 6(1) of the Human Rights Act 1998 to act in accordance with the Convention rights incorporated by the Act into domestic law. They are obliged when deciding to terminate tenancies and recover possession of residential properties to act consistently with article 8. If a decision, for example to serve a notice to quit, is inconsistent with the article 8 rights of the person on whom it is served the decision would be unlawful and the notice to quit devoid of effect. Lord Hope's paragraph 110 establishes that a point of that sort can be raised as a defence to the possession proceedings. Such a defence would, if raised, be dealt with by a county court judge as part of the possession proceedings ...

... An article 8 defence requires the judge to review the lawfulness of the local authority's decision to recover possession of the property in question and, in doing so, to review the factors that a responsible local authority ought to have taken into account in reaching its decision. The proportionality of the decision in all the circumstances of the case would be central to the review and if the local authority's decision could be shown to be outside the range of reasonable decisions that a responsible local authority could take, having regard both to the circumstances of the defendant as well as to all the other relevant circumstances, the decision would be held to be unlawful as a matter of public law. But in a case in which it is not reasonably arguable on the face of the pleadings, or from the contents of the affidavits that have been filed, that that is so, the judge can be expected to make a summary order for possession. The adjective 'summary' in this context does not mean that the judge would not have considered the proportionality of the requested possession order. It means that the article 8 case put forward by the defendant for a conclusion that a possession order would be disproportionate is not, in the opinion of the judge, capable of being sustained by serious argument. The notion that a defence based on an article 8 right to respect for a home requires the case to proceed to a full trial even though it is apparent that the defence cannot succeed is clearly absurd. An application for a summary judgment does require the defendant's contention that a possession order would be disproportionate to be given proper attention and, if reasonably arguable, to be permitted to proceed to a full trial."

35. Lords Walker and Mance both drew attention to the fact that the majority in *Kay* had drawn an important distinction between human rights and traditional judicial review challenges. Lord Walker noted (at paragraphs 107 to 108) that:

"... As one of the minority in *Kay*, I must accept the decision of the majority, which distinguishes between grounds of judicial review which are based on the HRA [Human Rights Act] and grounds ('common law' or 'conventional' grounds) which are not based on the HRA. The minority accepted the view of Lord Bingham of Cornhill ... that article 8 might, highly exceptionally, provide a tenant or licensee with additional protection. Lord Hope, in the leading speech for the majority, disagreed (para 110). So did Lord Scott (para 172), Baroness Hale (paras 189-190) and (most emphatically) Lord Brown (paras 207-208).

... I think that I may properly express unease and indeed incomprehension at the suggestion, which is at least implicit in this part of the decision, that HRA grounds and traditional judicial review grounds can always be separately identified."

36. Lord Mance observed (at paragraphs 133 to 136) that:

"... Gateway (b), as expressed in paragraph 110 in *Kay* was, as I see it, phrased so as to exclude any direct application of the Convention rights or of the Strasbourg Court's test of proportionality, and to confine attention to common law grounds for judicial review, informed though they may increasingly be by ideas of fundamental rights: see also per Baroness Hale of Richmond at paragraph 190 and Lord Brown of Eaton-under-Heywood at paragraphs 208-211, and contrast the approach of the minority as set out in paragraph 39 of Lord Bingham of Cornhill's speech in *Kay*.

The general distinction which thus emerges is recognised and described in *R (Daly) v. Secretary of State for the Home Department* [2001] UKHL 26 ... per Lord Steyn (para. 27) and Lord Cooke of Thorndon (para. 32, recognising though regretting the distinction) and in *R (ABCIFER) v. Secretary of State for Defence* [2003] EWCA

Civ 473 ... paragraphs 32 to 37, where Dyson LJ, giving the judgment of the Court of Appeal, said that any abandonment of the common law's *Wednesbury* unreasonableness test for a proportionality test was a step which could only be taken by this House. Other potential differences between conventional (or 'domestic') judicial review were discussed in *R (SB) v. Governors of Denbigh High School* [2006] UKHL 15 ... (see in particular per Lord Hoffmann at para. 68) and *Belfast City Council v. Miss Behavin' Ltd.* [2007] UKHL 19 ...

The difference in approach between the grounds of conventional or domestic judicial review and review for compatibility with Human Rights Convention rights should not however be exaggerated and can be seen to have narrowed, with 'the "*Wednesbury*" test ... moving closer to proportionality [so that] in some cases it is not possible to see any daylight between the two tests' (*ABCIFER*, para. 34, citing an extra-judicial lecture by Lord Hoffmann) ... Even so, as the subsequent history of *ex p. Smith* demonstrates, the result may not always achieve the degree of protection for Convention rights which the Strasbourg Court requires: *Smith and Grady v. United Kingdom* (1999) 29 EHRR 493. So there remains room in another case to reconsider how far conventional or domestic judicial review and Convention review can be further assimilated, and in particular whether proportionality has a role in conventional judicial review. This was not, however, argued on the present appeal, and, in common I understand with the majority of your Lordships, I do not consider that it is appropriate to embark on such a review on this appeal.

On this basis, in circumstances such as those in *Kay*, the only question under gateway (b) as expressed in *Kay* is whether the public authority's decision can be challenged on domestic judicial review grounds, in particular as having been based on material misconceptions or improper considerations or as unreasonable, either in the *Wednesbury* sense or in a more relaxed sense which takes full account of the basic interest which any occupant has in his or her home. In other words, in circumstances such as those in *Kay*, a full Convention review is not, at least nominally, possible on the majority view taken in *Kay*."

37. Lord Mance concluded (at paragraphs 162 to 163):

"However, 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 Rights Convention principles in relation to any defence raised against a public authority under the rule in *Wandsworth LBC v. Winder*, whether in circumstances such as those in *Qazi*, *Connors*, *Kay* and *McCann* or in circumstances such as the present. In paragraphs 19, 36 and 55 of his speech my noble and learned friend Lord Hope mentions the need to take account of any judgment of the Strasbourg Court and to give practical recognition to the principles that it lays down, and states that this can be done in the present circumstances by to some extent modifying the reasoning of the majority in *Kay*. At the same time, he rejects the suggestion that the House should depart from the majority view in *Kay* in favour of the minority, believing that this would create very real practical problems: paragraphs 19 to 20.

For my part, I am not persuaded that any significant problems would or need arise, as Convention-compliant statutory schemes are developed and public authorities become accustomed to tailoring their performance of their duties to Convention values. In a large number of cases, County Courts already tackle sensitive issues of reasonableness, as well as issues regarding breach of conditions of occupancy, when deciding whether to make or suspend possession orders; The limited modification that

my noble and learned friend Lord Hope would make to gateway (b) of paragraph 110 (see paragraph 55) would add to such cases a further category in which review on traditional *Wednesbury* grounds was relaxed to become a more straightforward examination of reasonableness. If County Courts can handle such issues in possession claims, there is no reason to doubt their ability to tackle, robustly and with due despatch, the largely parallel issues which would arise from any direct application of the Convention principles in cases of challenges to public authority decisions to seek possession.”

e. The Court of Appeal post-*Doherty*

38. The Court of Appeal has recently considered the application of the gateway (b) defence in three cases: *Doran v Liverpool City Council* [2009] EWCA Civ 146; *McGlynn v. Welwyn Hatfield District Council* [2009] EWCA Civ 285; and *Central Bedfordshire Council v. Taylor and others* [2009] EWCA Civ 613. In *Doran*, considering the effect of the ruling in *Doherty*, Lord Justice Toulson stated (at paragraphs 49 to 52):

“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.

...

Having said that the question whether the council's decision was unreasonable has to be decided by applying public law principles as they have been developed at common law, it is to be remembered that those principles are not frozen. Even before the enactment of the HRA, our public law principles were being influenced by Convention ways of thinking. Since its enactment, the process has gathered momentum. It is now a well recognised fact that the Convention is influencing the shape and development of our domestic public law principles, whether one uses the metaphors of embedding, weaving into the fabric, osmosis or alignment. (See the judgment of Lord Walker in *Doherty* at para 109).”

39. The Court of Appeal in *McGlynn v. Welwyn Hatfield District Council* reiterated Toulson LJ's interpretation of *Doherty*.

40. Subsequently, in *Central Bedfordshire Council v. Taylor*, Lord Justice Waller noted, at paragraphs 11 to 12, as follows:

“But it is important to keep in mind that in *Doran* the court was concerned with a traveller and his eviction from a caravan site; the circumstances were thus similar to those being considered in *Doherty* but are far removed from the circumstances of the

instant cases, which are very close to those which existed in *Kay*. I emphasise that point because although it can be said that *Doran* encourages the view that the personal circumstances of Mr Doran may not be irrelevant in considering a local authority's decision to serve a notice to quit, it will be necessary to go back to *Kay* and consider *Doherty*'s impact on *Kay* where the circumstances are as in *Kay* and as they are in the instant cases. *Doran* would however suggest that in conducting a review of the council's decision *Doherty* has held that something wider than the *Wednesbury* rationality test was appropriate. In *Doran* (it is right to say) despite similarities with the circumstances in *Doherty*, unlike the House of Lords in *Doherty*, the court of appeal found that there was no purpose in remitting the matter because it was not arguable that the council acting reasonably could have come to any different decision.

In *McGlynn* the court was concerned with the termination of a tenancy by a local authority on the grounds of anti-social behaviour. The court held it was 'an unusual case' and that Mr McGlynn had a seriously arguable public law defence based on it being arguable (i) that a reasonable council would after service of the notice to quit have made further investigations as to whether there was further anti-social behaviour and (ii) that there had been a failure by the local authority to make those further investigations. The circumstances of *McGlynn* are far removed from the instant cases."

41. He continued (at paragraph 22):

"Two things are not in dispute which I emphasise at the outset. The decision of a public authority can be made the subject of judicial review and in the context of possession claims in the county court, the correct forum for that review, if an arguable point is raised, is the county court itself. Second even if in *Kay* Lord Hope intended gateway (b) to be confined to what I might term a 'rationality' challenge, in his speech in *Doherty* Lord Hope intended to extend to some extent the scope of judicial review beyond rationality even if not as far as a straightforward challenge by reference to the convention."

42. Waller LJ set out the position as follows (at paragraphs 40 to 41):

"An authority such as the council in the instant appeals may make a decision on the facts as known to it to send a letter seeking possession. *Prima facie* it has no obligation to find out what the true facts are and the burden is going to be on the occupier to demonstrate any grounds relied on as providing an Article 8 defence. If the occupier informs the public authority of relevant circumstances, the public authority will have to take a further decision as to whether to commence proceedings. If no letter is received and the facts are only divulged just prior to the hearing, the public authority in reality has to take a further decision as to whether to proceed. Indeed if the revelation is only during the hearing, the council in deciding to continue to press for an order takes yet a further decision. I do not see why if any one of these decisions could be shown to be 'unreasonable' whatever that means (and I will come back to that), it could not be attacked.

If that is an appropriate analysis, because the county court is seized of the matter, it will be able to see whether there is an arguable case that in deciding even with the revelation of further facts to continue to seek possession is unreasonable. If 'reasonableness' connotes something wider than rationality, that will be very close in reality to the court itself examining a defence based on Article 8."

43. He concluded (at paragraphs 43 to 46):

“The law gives an owner of land the right to obtain possession against a trespasser. But the owner, if the occupier has his home on the land in question, cannot obtain possession other than through proceedings in court. The court has to satisfy itself as to the owner's rights but can in making an order for possession pay regard to the personal circumstances of the occupier. Statute circumscribes the court's powers in certain cases ... and in others does not do so. In cases such as the present and *Kay*, the court simply has a discretion whether to suspend the order for possession for a short period.

It follows that I would accept that the question whether a decision of a public authority is 'reasonable' post-*Doherty* goes beyond the question whether it is rational. I would also accept that a public authority should take account of the personal circumstances of the occupier known to it, but it does not follow from this that there will ever be circumstances in which it will be unreasonable to seek possession against trespassers in situations similar to those in *Kay*. Those situations may make it unreasonable not to allow a period of time to bring the possession order sought into effect but that is something which the court oversees and which the law allows for.

...

Ought we to remit in this case? In my view it would, just as in *Kay*, not be appropriate to do so. To echo the words of Lord Bingham in *Kay*, it is clear that under domestic property law the appellants have no right to occupy their respective premises, of which the council has an unqualified right of possession. The appellants fall outside the categories to which Parliament has provided protection. The council has no duty to accommodate the appellants and has a duty to manage its assets. The appellants have put in a draft pleading before us, but it does not allege any facts which provide some special claim to remain. If the matter were remitted the court would be bound to make an order for possession, although it would be entitled to take account of the personal circumstances in considering the time at which the order would be effective. That latter is something we could do without remission.”

2. *Wednesbury unreasonableness*

44. In *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, Greene MR noted as follows:

“It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.

...

...the task of the court is not to decide what it thinks is reasonable, but to decide whether what is *prima facie* within the power of the local authority is a condition

which no reasonable authority, acting within the four corners of their jurisdiction, could have decided to impose ...

... The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

45. The applicants complained under Article 8 of the Convention that they were prevented from challenging the possession orders on the ground that, having regard to their personal circumstances, the local authority's exercise of its power to seek a possession order was not compatible with their rights under Article 8 of the Convention, which reads as follows:

“1. Everyone has the right to respect for his ... his home ...

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.”

46. The Government contested that argument.

A. Admissibility

47. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

48. The Government did not dispute that the properties in question were the applicants' "homes" for the purposes of Article 8 § 1 of the Convention. Nor did they dispute that Lambeth's decision to seek possession orders and the subsequent granting of the orders constituted an "interference" with the applicants' right to respect for their homes.

49. The parties were also agreed, in the context of Article 8 § 2, that the interference was in accordance with the law and pursued the legitimate aim of protecting the rights and freedoms of others in that it protected the local authority's right to regain possession of the property from an individual who had no contractual or other right to be there and it ensured that the statutory scheme for housing provision was properly applied.

50. Accordingly, the central question which the Court must examine is whether the interference was proportionate to the aim pursued and thus "necessary in a democratic society".

1. *The parties' submissions*

a. **The applicants**

51. The applicants contended that there was no opportunity before the County Court to test the proportionality of the interference with their Article 8 rights because the gateway (b) defence (see paragraph 20 above) was insufficiently broad to permit the issue of proportionality to be considered by the county court and because, in any event, the facts relevant to the issue of proportionality were not determined by the court. The only defences available in a case such as the applicants' were that the relevant law was incompatible with Article 8 of the Convention or that the decision of the public authority to recover possession was one that no reasonable person would consider justifiable, which set a higher threshold than that required under the Article 8 § 2 test of proportionality.

52. The applicants pointed to the fact that the Article 8 issue came before the courts by way of an application that it be struck out of the pleaded defences on the basis that it had no reasonable prospect of success after the decision of the House of Lords in *Qazi*. They argued that such an application would ordinarily be dealt with by consideration of the pleaded material and oral argument. They contended that in their cases, the proportionality issue should have been determined by the court hearing the possession proceedings after it had carried out a fact finding exercise: the authority would advance reasons for seeking possession and the applicants would refer to facts which they alleged rendered the decision to seek possession disproportionate. The factual issues likely to be raised by the applicants included their lengthy occupation of the properties, the improvement works carried out by them, their personal and family

circumstances, the factual correctness (or otherwise) of the authority's reasons for seeking possession and whether there was a need for vacant possession. However, in their cases no oral evidence was given and there was no cross-examination or determination of the facts relevant to the Article 8 issues. The county court had simply to accept the facts as found by the public authority landlord. The applicants argued that the Government's contention that it was sufficient that there existed the possibility for a court to consider whether a local authority had come to a decision which no reasonable authority would consider justifiable did not accord with this Court's decisions in *Connors v. the United Kingdom* and *McCann v. the United Kingdom*, both cited above.

53. The applicants also disputed that they had not sought to rely on their personal circumstances in defending the applications for possession orders, although they accepted that their pleaded defences particularised the alleged Article 8 breach only in general terms. They pointed to their witness statements which they argued set out in sufficient detail why their personal circumstances were such that to make a possession order in their circumstances would be disproportionate. The witness statements were filed in the county court proceedings and were also before the Court of Appeal, although they were not before the House of Lords in light of the nature of those proceedings. The witness statements highlighted in particular that Ms Barnett, Mr Constantine, Mr Gorman and Mr Greenhalgh had received no offer of alternative accommodation, despite having been advised that an offer would be made. In Mr Kay's case, he had not pursued the offer of alternative accommodation because it was clear that such offer would exclude his partner, even though they were living together and she was pregnant with his child. Mr Cole and Mr Breschinsky had refused offers and provided reasons for their refusal which were never addressed, and no further offer was made. Had these matters been considered in evidence, they might have been relevant to the question of the proportionality of the decision to seek possession in their cases. The applicants further argued that it was speculative for the Government to say that no disputed issues of fact arose in the present case, because the facts did not reach the stage of being put in issue. It was therefore impossible to tell whether a dispute existed. In light of Baroness Hale's assertion in the House of Lords that all of the appellants had been offered alternative accommodation (see paragraph 24 above) it would appear that there was a dispute in this respect at least.

54. The applicants further emphasised the ambiguity over the scope of conventional judicial review grounds. Lord Hope in *Kay* (at paragraph 114 of that judgement – see paragraph 21 above) suggested that such grounds extended to consideration of whether the measure was disproportionate but Lords Walker and Mance in *Doherty* clearly saw a distinction between conventional judicial review grounds and human rights grounds as being critical to the difference between the majority and minority approaches in

Kay (at paragraphs 107 and 133 to 136 respectively of the House of Lords judgment— see paragraphs 35 and 36 above). Although the distance between conventional judicial review grounds and Human Rights Act grounds appeared to be narrowing, the extent to which conventional judicial review grounds could be said to encompass proportionality remained unclear. Accordingly, the scope of the defence that the Government allege was open to the applicants remained uncertain even after *Doherty*. In the applicants' view, the decisions of the Court of Appeal in *Doran* and *Taylor* had added to the general confusion at domestic level as to the approach to be taken in possession cases. They pointed to the different approach taken by Waller LJ in *Taylor*, compared to Toulson LJ's approach in *Doran*, as regards the relevance of personal circumstances and the extent to which the public authority was required to inquire before seeking a possession order (see paragraphs 38 to 43 above). They emphasised that the lower courts were required to apply both of these decisions, notwithstanding the divergent approaches. In any event, clarifications in post-*Kay* judgments were of limited assistance and relevance to consideration of the applicants' cases.

b. The Government

55. The Government contended that the interference with the applicants' rights under Article 8 was “necessary in a democratic society”. They submitted that the effect of the decision of the House of Lords in *Kay* was that while an eviction would involve an “interference” for the purposes of Article 8 § 1, such interference would ordinarily be justified under Article 8 § 2 in circumstances where the person was evicted in accordance with the domestic law of property and contract. However, a defence in eviction proceedings could be available where: (1) the occupier challenged the domestic law itself as being incompatible with Article 8; or (2) the occupier challenged the decision of the public authority to seek possession as being unlawful on public law grounds. As to the nature of the public law challenge under (2), the Government referred to Lord Hope's comments in *Kay* (paragraph 114), where he noted:

“But the legislation would nevertheless still have to be enforced, unless the decision of the public authority to seek to enforce it when faced with that incompatibility could be said, when judicially reviewed, to be arbitrary, unreasonable or disproportionate.”

56. Accordingly, the Government argued that the applicants had the opportunity to challenge the decision by Lambeth to seek possession by way of defence in the possession proceedings, and that the matters upon which they relied which were capable of comprising a contention that a grant of possession was contrary to the requirements of Article 8 were such as could properly be determined in the context of the possession proceedings.

57. The Government noted that each of the applicants raised their defence to the possession proceedings under Article 8 in the same terms and concluded that none of the applicants sought to rely on any personal

circumstances as rendering the decision to seek an order for possession disproportionate. Furthermore, all the applicants had been offered alternative accommodation. In their pleadings before the county court, they simply relied on a general contention that the policy decision taken by Lambeth was unjustified or disproportionate. Even Lord Bingham in *Kay*, who otherwise contemplated there being a wider scope for raising an Article 8 defence in possession proceedings than the majority, concluded that there was no basis to remit the applicants' cases for reconsideration since they had not pleaded factors which gave them a special claim to remain. Unlike *McCann*, cited above, the present case did not involve a disputed issue of fact but turned on whether the decision by Lambeth to seek possession orders pursued a legitimate aim and whether it was proportionate. The possession proceedings provided the applicants with a proper opportunity to raise these matters and for these matters to be properly determined by the court.

58. As to the content of the review by the courts, the Government contended that the scope of inquiry was wide enough to ensure protection of Article 8 rights. It was clear from Lord Hope's opinion in *Kay* (at paragraph 114) that the public law grounds envisaged in his gateway (b) test were broader than traditional *Wednesbury* grounds and could include a challenge based on alleged disproportionality. The Government further argued that the decision in *Doran v. Liverpool City Council* demonstrated that the category of circumstances that would be relevant to whether a defence should succeed was not closed, that the relevant circumstances could include the personal circumstances of the occupiers (and all other matters that would be material to any issue arising under Article 8) and that the principles which underpinned the application of the common law defence were strongly influenced by those which underpinned the Convention. In many situations, the question whether the decision by the public authority to seek repossession was unreasonable at common law would yield the same answer as the question whether the decision was a disproportionate interference with an individual's Article 8 rights.

59. Relying on *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 97, ECHR 2003-VIII and *Blečić v. Croatia*, no. 59532/00, § 64 to 65, 29 July 2004, the Government emphasised the wide margin of appreciation afforded to member States in cases such as the present one. They argued that they were entitled to adopt a general legislative scheme applicable to specific types of occupation which balanced the interests of the occupiers and owners of properties and made provision for the conditions which had to be satisfied before the owners could recover possession of their properties. The legislative schemes in place provided specific protection for tenants and the fact that the applicants fell outside these schemes would itself be a weighty factor in support of the conclusion that any interference with the applicants' Article 8 rights was justified. In the

present case, there was no factual dispute and, accordingly, the court was right to conclude that pursuant to the legislation in force, the application for repossession was a justified interference. The Government concluded that where it had been decided not to provide statutory protection, it would only be in a highly exceptional case that it would even be arguable that Article 8 provided a defence to possession proceedings.

60. In the alternative, the Government argued that if the Court were to find that the gateway (b) defence did not allow the applicants to have the proportionality of the decision to seek the possession orders considered, then it should conclude that what was required under Article 8 extended no further than as stated by Lord Bingham, in the House of Lords' decision in *Kay*.

c. The Equality and Human Rights Commission

61. The Equality and Human Rights Commission (“EHRC”) submitted that the law did not currently provide an adequate opportunity for a court to determine the proportionality of a proposed eviction where the defendant did not have security of tenure. The EHRC supported the approach of the minority of the House of Lords in *Qazi* and *Kay*. It agreed that where the law gave a social landlord (i.e. a local authority landlord or a registered social landlord) an unqualified right to possession, it would be only in exceptional cases that the eviction was not proportionate. Proportionality was most likely to be an issue in respect of occupants who were vulnerable as a result of mental illness, physical or learning disabilities, poor health or frailty. Such individuals were less likely to seek legal advice or attend court. In these cases, proportionality might require local authorities to justify why they were not securing suitable alternative accommodation, an obligation which merely required them to satisfy the court that they were complying with their public law duties. Further, the EHRC argued that it was for the court to ensure in every case that the proportionality of the eviction had been properly considered: examination of this question should not depend on the defendant raising the issue.

62. The EHRC explained that in most cases, tenants of social landlords had security of tenure which provided the appropriate framework within which the issue of proportionality could be addressed in determining whether a proposed eviction was reasonable. In some situations where the tenant of a social landlord did not have security of tenure, legislation provided a framework to address the issue of proportionality. However, in the cases of individuals who had occupied social housing for substantial periods but did not have security of tenure, in joint tenancies which could be determined by a notice to quit served by one tenant only and in cases involving family members without a statutory right of succession following the death of the entitled tenant, difficulties had arisen. In such cases, there was a need to ensure that the proportionality of the decision to seek eviction

was adequately considered. Judicial review did not afford the full jurisdiction necessary to ensure the proportionality review required.

63. The EHRC also pointed to the ambiguity which currently prevailed at domestic level as a result of the recent decisions of the House of Lords. It argued that certainty of the law was required if justice was to be secured. It accepted that the distance between the majority and minority positions was reducing, observing that Lord Hope in *Kay* had indicated that an Article 8 defence based on the occupier's personal circumstances should be struck out, while in *Doherty*, he accepted that such factors may be relevant. However, referring to *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, ECHR 1999-VI, the EHRC argued that conventional judicial review grounds did not permit the intensity of the proportionality review which was required under Article 8 of the Convention, as they set the threshold too high.

64. In the view of the EHRC, there was no reason why domestic courts could not adopt procedures whereby issues of proportionality could be addressed expeditiously, fairly and cost-effectively. They pointed out that county court judges carried out this exercise on a daily basis in respect of tenants who had security of tenure. In most cases, the question could be resolved on the papers although where a real issue was raised requiring that the defendant be given the opportunity to put his case, a hearing might be required to determine disputed issues of fact. In such cases, it would be for the defendant to establish that there were real grounds for contending that the possession claim was not justified.

2. *The Court's assessment*

a. **General principles**

65. An interference will be considered “necessary in a democratic society” for a legitimate aim if it answers a “pressing social need” and, in particular, if it is proportionate to the legitimate aim pursued. While it is for the national authorities to make the initial assessment of necessity, the final evaluation as to whether the reasons cited for the interference are relevant and sufficient remains subject to review by the Court for conformity with the requirements of the Convention (see, among other authorities, *Smith and Grady v. the United Kingdom*, cited above, § 88; and *Connors v. the United Kingdom*, cited above, § 81).

66. In making their initial assessment of the necessity of the measure, the national authorities enjoy a margin of appreciation in recognition of the fact that they are better placed than international courts to evaluate local needs and conditions. The margin afforded to national authorities will vary depending on the Convention right in issue and its importance for the individual in question. The Court set out its approach in *Connors*, cited above, § 82, in which it stated:

“... The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights (see, for example, *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, p. 21, § 52; *Gillow v. the United Kingdom*, judgment of 24 November 1986, Series A, no. 104, § 55). On the other hand, in spheres involving the application of social or economic policies, there is authority that the margin of appreciation is wide, as in the planning context where the Court has found that “[i]n so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation (*Buckley v. the United Kingdom*, judgment of 26 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1292, § 75 *in fine*). The Court has also stated that in spheres such as housing, which play a central role in the welfare and economic policies of modern societies, it will respect the legislature's judgment as to what is in the general interest unless that judgment is manifestly without reasonable foundation (see *Mellacher and Others v. Austria*, judgment of 19 December 1989, Series A no. 169, p. 27, § 45, *Immobiliare Saffi v. Italy* [GC], no. 22774/93, ECHR 1999-V, § 49). It may be noted however that this was in the context of Article 1 of Protocol No. 1, not Article 8 which concerns rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community (see, *mutatis mutandis*, *Gillow v. the United Kingdom*, cited above, § 55; *Pretty v. the United Kingdom*, no. 2346/02, ECHR 2002-III; *Christine Goodwin v. the United Kingdom*, no. 28957/95, § 90, ECHR 2002-VI). Where general social and economic policy considerations have arisen in the context of Article 8 itself, the scope of the margin of appreciation depends on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant (*Hatton and others v. the United Kingdom*, [GC] no. 36022/97, ECHR 2003-..., §§ 103 and 123).”

67. Further, it is clear from the case-law of the Court that the requirement under Article 8 § 2 that the interference be “necessary in a democratic society” raises a question of procedure as well as one of substance (*Connors*, cited above, § 83; *McCann*, cited above, § 49). 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. In particular, the Court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8 (see *Buckley v. the United Kingdom*, 25 September 1996, § 76, *Reports of Judgments and Decisions* 1996-IV; *Chapman v. the United Kingdom* [GC], no. 27138/95, § 92, ECHR 2001-I; and *Connors*, cited above, §§ 83 and 92)

68. As the Court emphasised in *McCann* (cited above, § 50), 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 light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right to occupation has come to an end.

b. Application of the general principles to the present case

69. The Court notes that there is some debate within the United Kingdom as to the correct interpretation of the House of Lords judgment in *Kay* and the effect of subsequent case-law of the Court of Appeal and the House of Lords on the original *Kay* test set out at paragraph 110 of Lord Hope's opinion (see paragraphs 51 to 60 and 63, above). However, it is not for this Court to take the place of the competent national courts in the interpretation of domestic law. The Court's role is confined to determining whether the present applicants had the opportunity to contest the possession orders on the ground that they were disproportionate taking into account their personal circumstances. Consideration of this question must begin with an examination of the facts in the present application. The Court's starting point is the House of Lords judgment in *Kay*, proceedings to which a number of the applicants were party.

70. The judgment in *Kay* has already been considered by the Court in its judgment in *McCann*, cited above. It concluded (at § 52) that:

“...in summary proceedings such as those brought by the applicant, it was not open to the county court to consider any issue concerning the proportionality of the possession order, save in exceptional cases where, as the Court of Appeal put it in the present case, 'something has happened since the service of the notice to quit, which has fundamentally altered the rights and wrongs of the proposed eviction'. No such exceptional circumstances applied in the present case. Furthermore, although since the applicant's landlord was a public authority it was open to him to challenge the decisions to obtain the notice to quit and to bring possession proceedings in an application for judicial review, his application failed because the local authority had not acted unlawfully.”

71. The Government have argued that, as subsequent case-law demonstrated, the gateway (b) test in *Kay* (that the decision of the public authority to recover possession was an improper exercise of its powers at common law on the ground that it was a decision that no reasonable person would consider justifiable – at paragraph 110 of Lord Hope's opinion) was wide enough to ensure respect for occupiers' Article 8 rights.

72. The Court finds it significant, in assessing the scope of gateway (b) as set out by Lord Hope for the majority in *Kay*, that the minority advocated a gateway (b) route which was considered to be wider than that proposed by the majority and which would allow a challenge where, having regard to the occupier's personal circumstances, the local authority's exercise of its power to seek a possession order was incompatible with a Convention right. As set out above (see paragraph 31), Lord Hope in *Doherty* explained that the majority view in *Kay* was that the personal interests safeguarded by Article 8 must be taken to have been sufficiently safeguarded by the fulfilment of the requirements for the recovery of possession by the landowner laid down by the statute or by the common law. He emphasised that it was on this point that the majority in *Kay* differed from the minority, referring to ground (3)(b) in paragraph 39 of Lord Bingham's opinion (see paragraph 28

above). Lord Scott also noted that the only proposition in Lord Bingham's test in *Kay* which was in any respect inconsistent with the majority opinions was in Lord Bingham's wider gateway (b), which according to Lord Scott attributed to the occupier's personal circumstances a central importance that the majority opinions did not accept.

73. The Court welcomes the increasing tendency of the domestic courts to develop and expand conventional judicial review grounds in the light of Article 8. A number of their Lordships in *Doherty* alluded to the possibility for challenges on conventional judicial review grounds in cases such as the applicants' to encompass more than just traditional *Wednesbury* grounds (see Lord Hope at paragraph 55; Lord Scott at paragraphs 70 and 84 to 85; and Lord Mance at paragraphs 133 to 135 of the House of Lords judgment). However, notwithstanding these developments, the Court considers that at the time that the applicants' cases were considered by the domestic courts, there was an important distinction between the majority and minority approaches in the House of Lords, as demonstrated by the opinions in *Kay* itself. In *McCann*, the Court agreed with the minority approach although it noted that, in the great majority of cases, an order for possession could continue to be made in summary proceedings and that 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 (see *McCann*, cited above, § 54). To the extent that, in light of *Doherty*, the gateway (b) test set out by Lord Hope in *Kay* should now be applied in a more flexible manner, allowing for personal circumstances to be relevant to the county court's assessment of the reasonableness of a decision to seek a possession order, the Court emphasises that this development occurred after the disposal of the applicants' proceedings.

74. In conclusion, the *Kay* applicants' challenge to the decision to strike out their Article 8 defences failed because it was not possible at that time to challenge the decision of a local authority to seek a possession order on the basis of the alleged disproportionality of that decision in light of personal circumstances. Accordingly, for the reasons given in *McCann*, the Court concludes that the decision by the County Court to strike out the applicant's Article 8 defences meant that the procedural safeguards required by Article 8 for the assessment of the proportionality of the interference were not observed. As a result, the applicants were dispossessed of their homes without any possibility to have the proportionality of the measure determined by an independent tribunal. It follows that there has been a violation of Article 8 of the Convention in the instant case.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

75. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

76. The applicants argued that they had suffered uncertainty and anxiety as a result of the eviction proceedings. They pointed out that Mr Kay remained under threat of eviction, that Mr Cole, Mr Armstrong and Mr Breschinsky had been evicted and that the remaining applicant had moved under threat of eviction. Mr Armstrong emphasised the particular nature of the work he and his partner had done to his home. The applicants also highlighted that, unlike in *McCann*, there were no allegations of any kind made against them in the possession proceedings. They therefore submitted that a higher award for non-pecuniary damage than that granted in *McCann* would be appropriate. They suggested the figure of 7,000 euros (EUR), which was half of the amount awarded to the applicant in *Connors*.

77. The Government considered that the applicants' cases were more similar to that of *McCann* than that of *Connors*. *Connors* was an unusual case which was particularly traumatic for the applicant as it involved a large-scale police operation which had not only led to homelessness but to family breakdown and health problems. Moreover, the vulnerability of the applicant as a member of a minority gypsy community was an important factor in that case.

78. The Court notes that it has found Article 8 violated in its procedural aspect only. It is far from clear from the applicants' submissions that, had a domestic tribunal been in a position to assess the proportionality of the eviction, the possession order would not still have been granted. The Court therefore considers that the present applicants are closer to the situation in *McCann*. The applicants were deprived of their homes without the opportunity to obtain a ruling on the issues under Article 8 and as a result suffered some non-pecuniary damage, in particular feelings of frustration and injustice, not sufficiently compensated by the finding of a violation of the Convention (see *McCann*, cited above, § 59). Accordingly, it considers that the sum of EUR 2,000 in respect of each applicant would be an appropriate award under this head.

B. Costs and expenses

79. The applicants were granted legal aid in the domestic proceedings. In respect of all but two of the applicants, no personal contribution to legal fees was required. However, Ms Barnett and Mr Constantine were required to pay GBP 444.85 each towards the legal expenses. They therefore claimed this sum before the Court.

80. Mr Breschinsky, who was not a party to the *Kay* proceedings, further claimed the sum of GBP 1,175, which represented the sum paid to solicitors from whom he sought advice as to his defence.

81. The preparation of the application to this Court was partly funded by the Government's "Legal Help" scheme. However, Mr Kay and Mr Ballantine were not eligible for this scheme and were therefore liable for their share of the costs of making the application. Their share amounted to GBP 2,717.39. The applicants' legal expenses post-submission of their application were not funded. Accordingly, the applicants claimed the sum of GBP 13,783.27 in respect of legal fees up to the submission of their written observations, including work done by their solicitor at a rate of GBP 250 per hour.

82. The Government contended that the sum sought by Mr Breschinsky in respect of parallel proceedings was not a matter which should be taken into account by the Court in its award.

83. As to the legal fees relating to the application to this Court, the Government submitted that no more than GBP 150 per hour should be permitted, which they considered to be a reasonable rate in the circumstances. They proposed a global figure of GBP 7,000 in respect of legal expenses.

84. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, the Court considers it reasonable to make the following awards, inclusive of any tax which may be chargeable:

- (a) the sum of EUR 500 each to Ms Barnett and Mr Constantine for personal contributions to costs and expenses in the domestic proceedings;
- (b) the sum of EUR 500 to Mr Breschinsky in respect of the legal advice sought as to his defence to the possession proceedings brought against him;
- (c) the sum of EUR 2,000 altogether to Mr Kay and Mr Ballantine for the costs incurred in making the present application; and
- (d) the sum of EUR 10,000 altogether to the applicants for the proceedings before the Court.

C. Default interest

85. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 8 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros) to each of the applicants in respect of non-pecuniary damage and EUR 500 (five hundred euros) each to Ms Barnett and Mr Constantine, EUR 500 (five hundred euros) to Mr Breschinsky, EUR 2,000 (two thousand euros) altogether to Mr Kay and Mr Ballantine and EUR 10,000 (ten thousand euros) altogether to all the applicants in costs and expenses, inclusive of any tax that may be chargeable, to be converted into pounds sterling at the rate applicable on the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 21 September 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Lech Garlicki
President