MODERN STUDIES IN PROPERTY LAW: VOLUME 7

This book contains a collection of peer-reviewed papers presented at the ninth biennial Modern Studies in Property Law conference held at the University of Southampton in March 2012. It is the seventh volume to be published under the name of the conference. The conference and its published proceedings have become an established forum for property lawyers from around the world to showcase current research in the discipline. This collection reflects both the breadth of modern research in property law and its international dimensions. Incorporating a keynote address by Lord Walker of Gestingthorpe, retired Justice of the Supreme Court, on 'The Saga of Strasbourg and Social Housing', a number of chapters reveal the burgeoning influence of human rights in property law. Other contributions illustrate an enduring need to question and explore fundamental concepts of the subject alongside new and emerging areas of study. Collectively the chapters demonstrate the importance and relevance of property research in addressing a wide range of contemporary issues.

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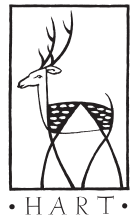

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Preface

This volume contains refereed papers from the ninth Biennial Modern Studies in Property Law Conference that took place at the University of Southampton in March 2012. The conference series has its origins in the Centre for Property Law at the University of Reading, which held its first conference in 1996. These conferences gave rise to the book *Modern Studies in Property Law*, the volumes of which have, since 2001, been the medium for refereed publication of the conference proceedings. The conferences provide a snapshot of debates and developments in property law research for an international audience of speakers, delegates and readers of the proceedings. Collectively, they provide a representation of recurring and emerging themes in property jurisprudence. It is a testament to the vitality of the research in the field that the inaugural Postgraduate Research Student stream of the conference that took place on the final day in Southampton attracted speakers from the UK, Asia and South Africa.

This published volume opens with the text of the keynote address given by Lord Walker of Gestingthorpe. In his speech, 'The Saga of Strasbourg and Social Housing', Lord Walker reviews the case law on social housing and Article 8 of the European Convention on Human Rights (ECHR) and the 'clash of the Titans' between the English domestic courts and the European Court of Human Rights. He describes the saga as 'the most important concluded struggle, so far, between our courts and Strasbourg'. The remaining chapters in Part I of this collection, 'Property and Housing', focus on what is perhaps the most socially, politically and practically significant use of property; its use as a home. In Chapter 2, Susan Bright, Nicholas Hopkins and Nicholas Macklam continue the theme of human rights and social housing in the specific context of English shared ownership schemes. The authors consider how human rights and domestic public law can be used to protect those who 'own part' but risk 'losing all' as a result of the legal model used to deliver this form of low-cost home ownership. In Chapter 3, Warren Barr considers the impact of the Big Society initiative for charities involved in social housing provision. He suggests that despite the shared rhetoric of the Big Society and charitable providers of social housing, the initiative has ultimately provided more of a challenge than an opportunity. Part I concludes with an analysis of the regulation of private residential tenancies in Ireland by Áine Ryall. Written against the background of an increased demand for private residential housing as the 'dream' of home ownership has ended for many in the global economic crisis, Ryall examines the Residential Tenancies Act 2004. Against the background of proposed reform of the Act, she argues that the legislation is in urgent need of substantial amendment.

The contributions in Part II are themed around 'Challenging Perceptions of Property and Trusts'. In Chapter 5, Adam Hofri-Winogradow examines the phenomenon of 'shapeless trusts': those arising through legislation which does not require title to the trust assets to vest in the trustees. His focus is on two jurisdictions; Israel, whose shapeless trust is set to come to an end, and China. By setting

the 'old' alongside the 'new', he suggests that shapeless trusts do have their use, particularly in making trusts more accessible outside the Anglo-Saxon legal tradition. In Chapter 6, Leslie Turano-Taylor challenges the assumptions that underpin the decision in *Hammersmith and Fulham LBC v Alexander-David* and the statutory regime that imposes a trust on the grant of a legal lease to a minor. She highlights the practical and theoretical difficulties caused by the trust against the substantively different relationship between a landlord and tenant and a trustee and beneficiary. In Chapter 7, Magdalena Habdas takes us to condominium schemes in Poland and examines the competence of the 'community of owners' in respect of common parts. Common parts remain the focus for Sarah Blandy in Chapter 8. Drawing on empirical research undertaken in 'cohousing' developments, she challenges the perception of property as being confined to externally imposed 'rights' and argues that recognition should be given to a property regime that emerges from the 'lived experience' of residents. Underlying both of these chapters is the difficulty presented to property law by any move away from individual, private property. In Chapter 9, written by Sue Farran, the division between private and public property is seen to have become increasingly blurred as people go 'back to the land'. Tracing a growth in collective use of land, Farran questions whether the property law 'menu' (the *numerus clausus*) needs to be reviewed to reflect a move away from individualism.

Part III of the collection, 'Intersections between Private Property, the Public and the State', picks up on the themes emerging from Part II. The preceding chapters by Habdas, Blandy and Farran have taken us away from the idea of property rights as individual rights to collective rights and uses of land. In Chapter 10 by John Page, which opens Part III, we move from collective ownership to public property. Page seeks to help fill the gap in the lack of theoretical understanding of such property. Janet Ulph's contribution in Chapter 11 then considers the sometimes controversial issue of the sale and transfer of items in museum collections. She argues that the guidance provided by law is inadequate, but that the gap should be filled by ethical principles. A theme thus recurs between Parts II and III as to the limits of property law, which appears an inadequate expression for the values and interests in issue beyond wholly 'private' rights.

In Chapter 12, Frankie McCarthy poses the challenging question of whether terrorists are entitled to peaceful enjoyment of their possessions. She considers whether anti-terrorist finance measures, designed to stop the flow of money to fund terrorist activities, would and should be found compatible with Article 1 of Protocol 1 of the ECHR. Part III concludes with two chapters focused on property and planning. In Chapter 13, Rachael Walsh explores planning law to cast light on the relationship between property and participation. She argues that the major role afforded to participation in the English planning system is evidence of the increasing 'democratisation' of property. In Chapter 14, Peter Williams considers the rise of property and development rights in Australia and the implications for urban planning policy and law.

The final part of the collection, Part IV, is entitled 'The Nature, Content and Acquisition of Property' and opens with a contribution by Simon Gardner in Chapter 15. Gardner's audio-visual keynote address presented at the conference is not one that could translate to writing. Instead, Gardner uses his contribution to this collection to provide an appraisal of the theory of 'persistent rights' developed

principally by Ben McFarlane. It is particularly appropriate for Gardner to choose this collection to do so, as one of the key texts of the theory is published in the previous volume of *Modern Studies in Property Law*. Gardner rejects the theory, but not without praise for its ambition. Chapters 16 and 17 address the 'content' of property. In Chapter 16, Simon Douglas raises the question of whether a freeholder has 'a right to use' land. He concludes that while a freeholder has 'liberties to use' land, it remains unclear to what extent these liberties impose duties on others. In Chapter 17, Scott Grattan focuses attention on the right to alienate. Locating his discussion in the broader inquiry of the relationship between property and rights, Grattan considers different contexts in which the right to alienate is absent *ab initio* or has been removed. The final two chapters are each concerned with the 'acquisition' of property. In Chapter 18, written by Robin Hickey, the original acquisition of title to personal property by theft is examined. Hickey questions the use of standard actions for interference with goods in situations of 'wrongful' possession and argues that rather than recognising a relative title, in some instances the objects of the law may be better served by the imposition of a personal right. In Chapter 19, written by Emma Waring, the 'acquisition' has taken the form of compulsory purchase, but for private purposes. Waring places current concerns with private takings in the US and the UK in their historical context. She argues for the need for modern private takings to be 'scrutinised carefully and used sparingly' to ensure that their benefits do not come at the expense of the stability of the property regime.

Collectively, the contributions to this volume demonstrate the breadth, depth and variety of modern property scholarship. One of the great benefits of the *Modern Studies in Property Law* series is the ability to bring together a rich diversity of research at an international gathering. The conference owes this to the vision of Professor Lizzie Cooke and her colleagues at the University of Reading and, in no small part, to Richard Hart for his ongoing commitment to the series. On a personal level, I would like to thank my fellow members of the series' Editorial Board for entrusting the ninth conference to me. I am extremely grateful to the keynote speakers, Lord Walker of Gestingthorpe and Professor Simon Gardner, and to the Rt Hon Sir Terence Etherton, who addressed the conference at its dinner. At Southampton, special thanks are due to my colleagues Emma Laurie and Sarah Nield for their continuous support and involvement in the organisation of the conference. To preserve the integrity of the process, Emma and Sarah also arranged for Chapter 2, on which I am co-author, to be refereed. It would not have been possible to hold the event at Southampton without the backing of Professor Natalie Lee as Head of School, whose support was wholehearted and enthusiastic. Finally, the practical administrative burden of organisation was handled with the utmost efficiency by Jo Hazell.

As this book goes to press, we look forward to the tenth *Modern Studies in Property Law* conference that will take place at the University of Liverpool in 2014.

Nicholas Hopkins
Professor of Law, University of Southampton
January 2013

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Part I

Property and Housing

1

The Saga of Strasbourg and Social Housing

LORD WALKER OF GESTINGTHORPE*

WHEN THE HUMAN Rights Act 1998 was enacted, the Lord Chancellor's Department predicted that the Act would cause a wave of litigation for about three years, but that the wave would then subside and the waters would be calm again. This prediction may have been based on the experience in New Zealand, which enacted its Bill of Rights in 1990. But as we all know, it has not worked out like that. There was indeed a wave of litigation, but in the twelfth year since the Act came into force, the waters are far from calm and the Act is still—indeed more than ever—the subject of acute political controversy.

The four most contentious areas have been the impact of the Act on criminal justice, on anti-terrorist legislation, on immigration law and on the law of social housing. The first of these topics is concerned with fair trial rights under Article 6 of the European Convention on Human Rights, including issues as to the reverse burden of proof,[1] trial within a reasonable time,[2] hearsay evidence[3] and the right of access to a lawyer while in police custody.[4] The second topic, engaging rights to personal liberty and fair trial under Articles 5 and 6, is the contentious litigation over detention without trial of foreign national suspects, followed by the control order regime.[5] The third topic is concerned with the right to respect for family life under Article 8,[6] which has had a huge influence on decisions about the deportation of failed asylum-seekers and other immigrants, and led last November to an unusually candid exchange of views between the Home Secretary and the Secretary of State for Justice.

The fourth topic, social housing, is my subject today. Part of its particular interest and difficulty is that it raises issues on both Article 6 and Article 8. Article 6

* Retired Justice of the Supreme Court.

1 *Sheldrake v DPP* [2004] 1 AC 264; *O'Halloran v United Kingdom* (2008) 46 EHRR 397.

2 *Re Attorney General's Reference (No 2 of 2001)* [2004] 2 AC 72.

3 *Kawaja v United Kingdom*, Grand Chamber, 13 December 2011.

4 *Cadder v HM Advocate* [2010] 1 WLR 2601.

5 *A v Secretary of State for the Home Department* [2005] 2 AC 68; *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269.

6 *Huang v Secretary of State for the Home Department* [2007] 2 AC 167; *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166; *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 261; (extradition) *Norris v Govt of USA* [2010] 2 AC 287.

gives everyone the right to have his civil rights and obligations determined by an independent and impartial tribunal. This has raised issues where decisions as to the management of the community's stock of social housing are in effect divided between housing authorities (which may be impartial but are not independent) and a district judge faced with a long list of summary applications for possession. At the same time, Article 8 raises the issue of how (if at all) a housing authority's obligation to show respect for its tenant's home adds to its general obligation to manage its housing stock for the benefit of the community. These are the issues that have led to something of a stand-off between the Strasbourg Court and our highest tribunal, ending (at any rate for the present) a year ago with the decision of the Supreme Court in *Powell*.[7]

There was nothing confrontational about the earliest cases on the impact of the Human Rights Act on social housing. Twelve years ago, the Strasbourg jurisprudence on the subject was much sparser than it is today, although it was already well established[8] that in Article 8 'home' (or in other European languages, 'domicile', 'domicilio' or 'Wohnung') is an autonomous concept that has very little to do with different forms of ownership or tenure under the property laws of different states. One of the first housing cases to reach the Court of Appeal, in April 2001, was concerned with possession proceedings commenced soon after the coming into force of the Act. In the *Poplar Housing Association* case,[9] the Court of Appeal held that the association was (for the relevant purposes) a public authority and that Article 8 was engaged, but that the eviction of an assured shorthold tenant was justifiable under Article 8(2), despite the mandatory terms of section 21(4) of the Housing Act 1988. The court held that section 21(4), which effectively deprived the county court of any discretion to refuse a possession order, was not incompatible with Article 8, and rejected the argument that it should be creatively construed under section 3 of the Human Rights Act by reading in the requirement that the court considered it reasonable to order possession.

To my mind, the judgment of the Court of Appeal showed, at what was a very early stage in our jurisprudence on the Human Rights Act, an impressive grasp of the new problems that it poses. In a key passage, the Court emphasised not the housing authority's proprietary title, but its function in carrying out Parliament's enacted policy for allocation of the limited stock of social housing:

> The Court has to pay considerable attention to the fact that Parliament intended when enacting section 21(4) of the 1988 Act to give preference to the needs of those dependent on social housing *as a whole* over those in the position of the defendant. The economic and other implications of any policy in this area are extremely complex and far-reaching. This is an area where, in our judgment, the courts must treat the decisions of Parliament as to what is in the public interest with particular deference. The limited role given to the court under section 21(4) is a legislative policy decision … the Human Rights Act 1998 does not require the courts to disregard the decisions of Parliament … when deciding whether there has been a breach of the Convention.[10]

[7] *Hounslow LBC v Powell* [2011] 2 AC 186.
[8] *Buckley v United Kingdom* (1996) 23 EHRR 101 [63].
[9] *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48.
[10] Ibid [69].

I feel able to commend this judgment without any fear of appearing condescending, since at the time I was in the Court of Appeal and was a party to one of its least successful early decisions on the Act, *Aston Cantlow*.[11] This was the case about chancel repairs, in which the House of Lords held that we had fallen into error on just about every point in the case. But our misguidedness was not quite so complete as that of another constitution of the Court of Appeal in *Wilson v First County Trust Ltd (No 2)*.[12] This was an appeal from the county court in a small consumer credit case in which the Court of Appeal of its own motion raised an incompatibility issue and proceeded to make a declaration of incompatibility. This was appealed to the House of Lords by the Secretary of State for Trade and Industry (the original parties having lost any appetite for the fight) and argued on behalf of interveners including the Attorney General on behalf of the Speaker of the House of Commons (on *Pepper v Hart*[13] implications) and numerous trade bodies. As in *Aston Cantlow*, the House of Lords allowed the appeal on numerous grounds. I mention the case not simply as a diversion but because, in the context of incompatibility, Lord Nicholls made some general remarks about it being open to Parliament to lay down clear general rules, which the court is bound to follow, even if this produces individual hard cases. Lord Nicholls said:

> Considered overall, this course may well be a proportionate response in practice to a perceived social problem. Parliament may consider the response should be a uniform solution across the board. A tailor-made response, fitting the facts of each case as decided in an application to the Court, may not be appropriate.[14]

One way of putting the Strasbourg Court's message on our social housing legislation—to which I now return—is that this 'one size fits all' attitude may be good enough for a trader doing business under the Consumer Credit Act 1974, but that it is not good enough for a public sector tenant with an Article 8 right to respect for his or her home.

Another early Court of Appeal case explored the other aspect: that of the housing authority as decision-maker. In the *McLellan* case[15] heard in October 2001, a tenant with an introductory tenancy of a flat in Bracknell sought judicial review of the borough council's decision to serve on her notice of proceedings for possession. In such a case, the county court had no discretion to refuse a possession order, provided that the proper procedure had been followed. This was the effect of sections 127 and 128 of the Housing Act 1996, and any review under section 129 was conducted by the housing authority itself, not by the county court. The court's only discretion was, in a case of exceptional hardship, to extend the 14-day period for giving up possession to six weeks. This procedure was challenged as contrary to Article 6 on the ground that it amounted to the determination of the tenant's civil rights otherwise than by an independent and impartial tribunal.

[11] *Aston Cantlow Parochial Church Council v Wallbank* [2002] Ch 51; [2004] 1 AC 546.
[12] *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816.
[13] *Pepper v Hart* [1993] AC 593.
[14] Ibid [74].
[15] *R (McLellan) v Bracknell Forest Borough Council* [2002] QB 1129.

The Court of Appeal rejected this challenge. It followed the decision of the House of Lords in the *Alconbury* case.[16] These two decisions, together with that of the House of Lords in *Ruma Begum*[17] early in 2003, mark the beginning of the slow and uncertain unfreezing of the rigidity of the judicial review process where human rights are concerned. In *Alconbury*, Lord Slynn said of proportionality:

> I consider that even without reference to the Human Rights Act 1998 the time has come to recognise that this principle is part of English administrative law, not only when judges are dealing with Community Acts but also when they are dealing with Acts subject to domestic law. Trying to keep the *Wednesbury* principle and proportionality in separate compartments seems to me to be unnecessary and confusing.[18]

Lord Hoffmann, both in *Alconbury* and in *Ruma Begum*, was less inclined to favour a general extension of judicial review principles to include proportionality. He preferred a nuanced approach (reflecting Strasbourg's margin of appreciation) to the nature of the particular administrative decision subject to review and the character of the particular decision-maker.

These themes—whether it is compatible with the Human Rights Act for the court's discretion to be restricted to vanishing point and whether the possibility of resort to judicial review of the housing authority's decision is a sufficient answer—dominate the leading cases to which I now turn. But to complete the preliminaries, it is appropriate to refer to one other early case, which is the decision of the House of Lords in the *South Bucks* case.[19] It was heard with two other appeals, all of them planning cases concerned with unauthorised development by gipsy communities, and the significance of Article 8 in that context. The point actually decided was a fairly limited one, relating to the width of the court's discretion[20] to grant an injunction in aid of an enforcement notice issued by a local planning authority. But the speeches contain a recognition of the complexities of these problems. Lord Bingham[21] quoted a saying of the late Vaclev Havel that 'the Gipsies are a litmus test not of democracy but of civil society'. Gipsies feature in three of the leading cases.

The first social housing appeal to go to the House of Lords was *Qazi*.[22] Mr Qazi and his wife had a secure tenancy of a two-bedroom council house in Harrow Weald. In 1998, there were matrimonial troubles and his wife moved out with their daughter. A few months later, she gave notice to the council, effectively terminating the joint tenancy. Mr Qazi applied for a new tenancy, but it was not granted because the accommodation was more than a single man needed. The council claimed possession in March 2000. At a preliminary hearing in June 2000, Mr Qazi told the Court that he was living with his new wife and her child. By November 2000, she was pregnant and by the trial in June 2001, there were two adults and two children living in the house. The recorder held that as Mr Qazi had no legal or equitable

[16] *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295.
[17] *Ruma Begum v Tower Hamlets LBC* [2003] 2 AC 430.
[18] *R (Alconbury Developments Ltd)* (n 16) [51].
[19] *South Bucks DC v Porter* [2003] 2 AC 558.
[20] Town and Country Planning Act 1990, s 187B.
[21] *South Bucks DC v Porter* [2003] 2 AC 558 [31].
[22] *Harrow LBC v Qazi* [2004] 1 AC 983.

rights in the house, it could not be his home. In December 2001, the Court of Appeal allowed the appeal and remitted the case to the county court to consider whether the landlord's interference with Mr Qazi's Article 8 rights was justified under Article 8(2).

Harrow appealed on two main grounds. The first, that the house was not Mr Qazi's home, was unanimously rejected. But the House of Lords was deeply divided as to whether a public sector landlord with an immediate right to possession could be required to justify its claim by a balancing exercise under Article 8(2). Lord Bingham and Lord Steyn were firmly of the view that Article 8 was engaged and justification under Article 8(2) was required. Lord Bingham emphasised:

> The Strasbourg authorities have adopted a very pragmatic and realistic approach to the issue of justification. Counsel were agreed that even if the argument for Mr Qazi were accepted, the occasions on which a court would be justified in declining to make a possession order would be highly exceptional.[23]

These words 'highly exceptional' were to be revisited more than once. Later cases have recognised that they cannot be a principle on which to decide cases, but only a prediction as to how many cases will be decided in a particular way—and as a prediction, they have not proved to be particularly reliable.

Lord Hope, Lord Scott and Lord Millett took a very different view. A public sector landlord with an immediate, unqualified right to possession under English property law could not be required to justify the enforcement of that right. Lord Scott was characteristically forthright:

> There is no case in which a balance has been struck between the tenant's interests and the landlord's rights. In every case the landlord's success has been automatic. And so it must be unless Article 8 is to be allowed to diminish or detract from the landlord's contractual and proprietary rights.[24]

All three law lords in the majority stressed the potency of the landlord's proprietary rights under English law, rather than relying, as the Court of Appeal had in the *Poplar Housing Association* case, on the carefully differentiated system of tenure (shorthold, secure, introductory and demoted) that had emerged from almost a century of housing legislation.

In May 2004, the Strasbourg Court gave judgment in *Connors*.[25] This case concerned the eviction of a gipsy family from a gipsy caravan site owned and run by Leeds City Council. This occurred in August 2000, before the Human Rights Act came into force. The Strasbourg Court held unanimously that the UK was in breach of Article 8 and did not find it necessary to decide on a separate complaint about discrimination under Article 14. But the fact that it was a gipsy family that was evicted from a caravan site specially provided for gipsies was important. Because of an exception in the Mobile Homes Act 1983, licences to occupy plots on these sites had only four weeks' security of tenure. This exception was defended by the UK government on the ground that it was in the public interest for local authorities to

[23] Ibid [25].
[24] Ibid [146].
[25] *Connors v United Kingdom* [2004] 40 EHRR 189.

have special flexibility in the management of gipsy caravan sites. But the Strasbourg Court did not accept this as sufficient justification.

However the judgment also contains some important general observations as to the inadequacy of the UK model of judicial review for the resolution of factual disputes. In the *Connors* case, Leeds City Council had indicated in correspondence and in witness statements that Mr Connors and his extended family were anti-social troublemakers, but at the court hearing, the council simply relied on the notice to quit without those allegations being supported by evidence. This is a real dilemma in many of these cases. In practice, housing authorities are slow to evict their tenants, even when there are substantial arrears of rent, because they know that eviction may well lead to other more difficult and more expensive problems in other parts of the social security system. But they may feel bound to evict tenants whose seriously anti-social conduct makes life intolerable for their neighbours. The burden of proving anti-social behaviour is a much heavier one (especially if neighbours are intimidated from giving evidence) than simply giving notice to quit in a case where the county court has little or no discretion about making a possession order.

That is one general point that we can take from *Connors*. The other is that in this, as in the later Strasbourg cases in this area, the Chamber included the UK judge, Sir Nicolas Bratza. It is easy to detect his hand in the full and clear judgment, which shows a real understanding of the problems as seen from the domestic side. I believe that there has been a real dialogue—difficult but salutary—between London and Strasbourg on this issue, and Bratza, recently elected as President of the Strasbourg Court, can take much of the credit for this. I add that I must declare an interest in the matter, since over 40 years ago he was my first pupil in chambers in Lincoln's Inn.

Nearly two years after *Connors*, the problem was reconsidered by seven law lords in *Kay* and *Price*.[26] In *Kay*, the appellants were seven individuals who had believed that they had secure tenancies granted by a housing trust, but found (as a result of a notice given to the trust by Lambeth) that they were in the position of trespassers. They might be thought to have had much more in the way of merits than the Maloney family, the effective appellants in *Price*, who had unlawfully sited their caravans on part of a recreation ground belonging to Leeds City Council and had been in occupation for only two days when proceedings were commenced against them.

The House of Lords was unanimous in concluding that both appeals should be dismissed, but there was an important split, four to three, as to the reasons. The majority (led by Lord Bingham) held that in all these cases, Article 8 is engaged and may be relied on to resist an order for possession in the county court, even though it would require—the same form of words again[27]—'highly exceptional circumstances before Article 8 would avail the occupiers'. Neither appeal met this requirement: *Price* obviously failed, and in *Kay* the appellants had not pleaded or put forward evidence in support of any special claim.

The tenant's right to raise an Article 8 defence was supported, in Lord Bingham's view,[28] by the express terms of section 7(1)(b) of the Human Rights Act. It was also

[26] *Kay v Lambeth BC, Leeds CC v Price* [2006] 2 AC 465.
[27] Ibid [36].
[28] Ibid [36].

supported by the decision of the House of Lords, made over 20 years earlier, in the *Winder* case.[29] In that case, Wandsworth Borough Council, which in the days of Mrs Thatcher claimed to be one of the most efficient local authorities in the country, raised some of its tenants' rents by half within a year—an increase of about 35 per cent followed by 13 per cent on top of that a year later. Mr Winder, a secure tenant of a council flat, refused to pay the increase. When he was sued for arrears of rent and possession, he defended the claim on the ground that the rent increases were unreasonable and thus unlawful. The House of Lords unanimously and forthrightly rejected the council's argument that it was an abuse of process for Mr Winder to raise this defence in the county court rather than by way of judicial review.

The majority, led by Lord Hope and Lord Scott, considered that *Qazi* should not be departed from. *Connors* was treated as a special case. Lord Hope countered Lord Bingham's reliance on section 7 by referring to section 6(2)(b) of the Human Rights Act.[30] This provision disapplies a public authority's duty not to act incompatibly with Convention rights where some provision of primary legislation is itself incompatible and 'the authority was acting so as to give effect to or enforce those provisions'. The precise scope of section 6(2)(b) has still not been fully resolved, but in *Pinnock*,[31] the unanimous judgment of the nine-strong Supreme Court did not accept Lord Hope's view.

Lord Hope went on[32] to set out what he called 'gateways' as the only circumstances in which the county court could refrain from making a possession order, where the statutory requirements were satisfied and the court had no statutory discretion. These were: (a) by applying section 3 of the Human Rights Act, if possible, to avoid incompatibility, or alternatively transferring the case to the High Court, which has the power to make a declaration of incompatibility; or (b) by considering (on the *Winder* principle) any seriously arguable issue as to what Lord Hope called 'an improper exercise of its powers at common law'.

The most moderate majority speech (which is not of course to suggest that the others were immoderate) was that of Lady Hale, who observed:

> 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.[33]

She then referred to some well-known observations of Sedley LJ[34] about local authorities taking account of 'considerations of common humanity, none of which can properly be ignored when dealing with one of the most fundamental human needs, the need for shelter with at least a modicum of security'. Here Lady Hale was

[29] *Wandsworth LBC v Winder* [1985] AC 461.
[30] *Kay; Price* (n 26) [86].
[31] *Manchester City Council v Pinnock* [2010] 3 WLR 1441 [93]–[103].
[32] Ibid [110], a paragraph which has been the subject of much discussion and controversy.
[33] Ibid [190].
[34] *R v Lincolnshire CC, ex p Atkinson* (1995) 8 Admin LR 529, 534.

saying, in effect, that Article 8 did not add anything to a local authority's existing public responsibilities.

Qazi had not been considered by the Strasbourg Court in *Connors* (perhaps, Lord Bingham suggested in *Kay*,[35] because the reasoning of the majority did not support the case that the UK government wished to put forward), but both *Qazi* and *Kay* were considered by the Strasbourg Court in *McCann*,[36] in which judgment was given in March 2008 (by then *Kay* was itself on its way to Strasbourg).

McCann resembled *Qazi* in that a married couple had been secure tenants of a council house. In 2001, after incidents of domestic violence, Mrs McCann moved out with the children and they were rehoused by Birmingham City Council. At the landlord's suggestion, Mrs McCann gave notice to quit, terminating the tenancy of the former home, where her husband was still living. Following the House of Lords' decision in *Qazi*, the Court of Appeal dismissed Mr McCann's appeal from the county court. An application for judicial review also failed and Mr McCann was evicted. The Strasbourg Court's evaluation was very clear:

> It is, for present purposes, immaterial whether or not Mrs McCann understood or intended the effects of the notice to quit. Under the summary procedure available to a landlord where one joint tenant serves notice to quit the appellant was dispossessed of his home without any possibility to have the proportionality of the measure determined by an independent tribunal. It follows that, because of the lack of procedural safeguards, there has been a violation of Article 8.[37]

The next step in the saga (for me it seems like retracing a via dolorosa) is the decision of the House of Lords in *Doherty*.[38] This was another case concerning gipsies, the essential facts of which were similar to those in *Connors*, except that Mr Doherty and his family were not said to be troublemakers. The appeal was argued in March 2008, before the Strasbourg Court's decision in *McCann*, but the speeches (delivered at the end of July 2008) took account of that decision. There were five law lords sitting, so there was no real possibility of the House departing from *Kay*. But there was some hope of a degree of clarification, especially as Carnwarth LJ had made clear (when *Doherty* was in the Court of Appeal)[39] what that Court thought about the number, length and opacity of the speeches in *Kay*.

The speeches in *Doherty* may be said to have provided clarification 'up to a point, Lord Copper'. Lord Hope[40] set out to explain and modify the 'gateways' that he had expounded (with the concurrence of the majority) in *Kay*. Lord Mance and I both expressed regret at the restriction of gateway (b) to 'traditional' or 'conventional' grounds of judicial review, especially as the thinking behind it seemed to be based on a questionable view of the scope of section 6(2)(b) of the Human Rights Act. This led into a further question as to whether the exception of gipsy caravan sites from protection under the Mobile Homes Act 1983 meant that Birmingham City

[35] *Kay; Price* (n 26) [23].
[36] *McCann v United Kingdom* (2008) 47 EHRR 913.
[37] Ibid [55].
[38] *Doherty v Birmingham City Council* [2009] 1 AC 367.
[39] *Doherty* [2007] LGR 165 (CA).
[40] *Doherty* (n 38) [36]–[55].

Council was relying on a common law rather than a statutory right. If I may venture to quote from my own opinion on this point:

> At common law, a landlord is entitled to possession of the demised premises if the tenant's lease or tenancy has expired or been validly terminated, and similarly a fortiori if there was only a licence. To that extent the first defendant and the Secretary of State are correct in saying that the city council was, in seeking possession, relying on a common law right. That is part of the picture, but it is far from the whole picture, and in my opinion it would be unrealistic, and productive of error, not to look at the whole picture. The fact is that the city council's common law right was surrounded on all sides by statutory infrastructure, like a patch of grass in the middle of a motorway junction.[41]

The last important case is *Pinnock*,[42] decided by a nine-strong Supreme Court in November 2010. It is, in domestic terms, the most important case of all, since *Qazi*, *Kay* and *Doherty* were all departed from. Other recent developments—the Strasbourg Court's decision in *Kay*[43] six weeks before *Pinnock*, and *Powell*[44] in the Supreme Court in February 2011—are little more than footnotes. *Pinnock* was remarkable not only for departing from three recent decisions of the House of Lords, but also for the fact that the Supreme Court gave a single unanimous judgment delivered by Lord Neuberger MR. The judgment recorded, correctly, that all members of the court had contributed to it. But it is unmistakeably the work of Lord Neuberger, who produced a judgment (if I may say so) combining comprehensiveness with clarity, and showing sensitivity both to the Strasbourg jurisprudence and to the social problems that are the staple fare of social landlords and county court judges.

The judgment deals with four issues of increasing specificity. The facts are considered in detail at the end of the judgment. It is sufficient to say that Mr Pinnock was the long-term secure tenant of a council house occupied by himself and his female partner, and—sporadically and at different times—by some or all of his adult or teenage children. Mr Pinnock was a pensioner and was not himself accused of anti-social behaviour, but his partner and his children were found to have been guilty of very serious anti-social behaviour. Lord Neuberger described it as a 'history of crime, nuisance and harassment ... extraordinary in its extent and persistence'.[45]

In March 2005, Manchester City Council applied for possession or alternatively a demotion order under section 82A of the Housing Act 1985 (as inserted by the Anti-social Behaviour Act 2003). Neither order could be made unless the judge was satisfied that it was reasonable to do so. In June 2007, after a six-day hearing, the judge declined to make an order for possession, but made a demotion order. It seems to have had little effect on the behaviour of the tenant's family, and within the year before the order would have lapsed, the Council gave notice to terminate the tenancy. Mr Pinnock exercised his right to require a review, but the notice was upheld by the review panel. In these circumstances, under sections 143D, 143E and 143F of

[41] Ibid [100].
[42] *Pinnock* (n 31).
[43] *Kay v United Kingdom* (2012) EHRR 30, noted in [2011] *European Human Rights Law Review* 105.
[44] *Hounslow LBC v Powell (No 1)* [2011] 2 AC 104.
[45] *Pinnock* (n 31) [162].