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Public law and art 8 defences in residential possession proceedings: *Fareham BC v Miller* [2013] EWCA Civ 159 [2013] H.L.R. 22 and *Leicester City Council v Shearer* [2013] EWCA Civ 1467

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Introduction

While the Court of Appeal recently declined to engage with what is perhaps the most significant unresolved question in relation to the impact of art 8 of Schedule 1 of the Human Rights Act 1998 (hereafter HRA) on residential possession proceedings - namely whether art 8 can be applied horizontally to defend actions brought by private sector landlords[1] - the court continues apace to add further details to the existing superstructure of art 8 and public law defences. Two more such cases have now joined the ranks. In the first *Fareham BC v Miller,*[2] the Court of Appeal underlined the now firmly established principle that the prospects of a defendant succeeding with a substantive art 8 defence rooted in the assertion that it would be disproportionate for a court to make a possession order because of his/her personal circumstances are slim indeed.[3] In the second, *Leicester City Council v Shearer*,[4] a differently composed bench dismissed a possession claim on the rather more prosaic but

[1] See *Malik v Fassenfelt* [2013] EWCA Civ 798; [2013] 28 E.G. 84 (C.S.) and the discussion of the case by K. Lees, "Malik v Fassenfelt: known unknowns" [1993] 77 Conv. 516 and J. Luba, "Is there a 'human rights defence' to a possession claim brought by a private landlord?" (2011) 15(3) L. & T. Review 79.

[2] EWCA Civ 159; [2013] H.L.R. 22; Patten , Black and Kitchin LJJ.

[3] Consider for example *Corby Borough Council v Scott; West Kent Housing Association Ltd v Haycraft*; [2012] EWCA Civ 276; [2012] H.L.R. 23: *Holmes v Westminster City Council* [2011] EWHC 2857 (QB): *Birmingham City Council v Lloyd* [2012] EWCA Civ 969; [2012] HLR 44: *Thurrock BC v West* [2012] EWCA Civ 1435; [2013] H.L.R. 5.

[4] [2013] EWCA Civ 1467; Jackson and Floyd LJJ and Sir David Keene.

perhaps – for defendants – much more useful orthodox public law basis that the local authority had failed to take any or any proper account of various relevant considerations.

Background to the cases

Mr Miller is an unlikely candidate for any good neighbour of the year awards.[5] One can almost detect a weary despair in Patten LJ's scene-setting of the case:

"2 Mr Miller (who is now 30 years old) has a long history of persistent criminal offending. Most of his convictions are for theft but his criminal record between 2000 and 2012 includes a number of offences of assault and public disorder. He has been using Class A drugs for many years and is a heroin addict. Many if not most of his convictions for theft (mainly for shoplifting) are connected with his drug habit…".

Mr Miller's substance abuse difficulties had led Fareham BC to accept that he was in priority need under the homelessness legislation (Housing Act 1996 Part VII), and in 2009 the council granted him a non-secure (determinable by a valid notice to quit) tenancy[6] of a one bedroom flat in discharge of its homelessness duties to him under Housing Act 1996 s.193. Mr Miller's initial problems arose from his persistent failure to claim housing benefit which triggered a rapid accumulation of rent arrears. Fareham then served a notice to quit on that basis.[7] Mr Miller subsequently claimed housing benefit, the arrears were cleared and the council took no steps to issue proceedings. Mr Miller then spent eighteen months in and out of prison, during which time it appeared that several men were living in his flat and causing repeated nuisance to neighbours. Fareham served another notice to quit, this time on the basis of anti-social behaviour. Following a meeting with Mr Miller's probation officer, the Housing Officer handling the case agreed to 'give Mr Miller another chance' if he adhered to the

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[5] More likely one may imagine to find him appearing in *The Daily Mail's* splendid on-line collection of 'neighbours from hell' stories. For recent entries see especially "A taste of their own medicine: Neighbours from hell get early morning warnings to mend their ways... or face the boot from the estates they terrorise" (2013) December 18; http://www.dailymail.co.uk/news/article-2507069/A-taste-medicine-Neighbours-hell-early-morning-warnings-mend-ways--face-boot-estates-terrorise.html#ixzz2nrvQP2rI: "The schoolgirl's drawing that helped evict neighbour from hell: Family's nightmare comes to an end after girl, 6, drew a picture of 'gangs and loud music'" (2013) November 18; http://www.dailymail.co.uk/news/article-2509237/Schoolgirls-drawing-helped-evict-neighbours-hell-Familys-nightmare-comes-end-girl-6-drew-picture-gangs-loud-music.html#ixzz2nrvx0jLG.

[6] Such tenancies are excluded from secure status by Housing Act 1985 Sch.1 para 4.

[7] There is no requirement that the Claimant provides such reasons. Advocates who appear with any regularity for defendants in (Housing Act 1988) s.21 proceedings or in claims brought against defendants with non-secure tenancies provided under the homelessness legislation will be aware that many claim forms and the (usually cursory) witness statements which (only sometimes) accompany them in such cases offer no reasons at all for the issue of proceedings. This may be a considered response to Lord Hope's comments in *Powell* at para 37:

"37 So, as was made clear in *Pinnock*, para 53, there will be no need, in the overwhelming majority of cases, for the local authority to explain and justify its reasons for seeking a possession order. It will be enough that the authority is entitled to possession because the statutory pre-requisites have been satisfied and that it is to be assumed to be acting in accordance with its duties in the distribution and management of its housing stock…".

licence conditions attached to his latest release from jail. When Mr Miller breached those conditions shortly after being released the council began proceedings.

The claim was defended on what the Court of Appeal variously (and perhaps unhappily because variously) described as art 8 or public law grounds. Those grounds seem to have been that the council's decisions to issue the notice to quit and to issue proceedings were disproportionate because of, inter alia, Mr Miller vulnerability and the council's failure properly to consider whether other, less draconian methods might be used to control his behaviour. It is unfortunate that the Court of Appeal muddied the doctrinal waters in this way, since public law and art 8 defences are jurisdictionally quite distinct matters. At trial however, mattes took an unexpected turn. While Mr Recorder Blunt QC was unpersuaded by the public law/art 8 defences, he concluded that the effect of the council 'giving Mr Miller another chance' was to revoke the notice to quit. Mr Miller was thus still a tenant when proceedings were issued, and so the proceedings would have to be dismissed.

One assumes, although one cannot be sure from what is said in the Court of Appeal's judgment, that the council appealed against this conclusion and Mr Miller cross-appealed against the rejection of his public/law art 8 defence.

Mrs Shearer had not engaged in any form of problematic behaviour while living in her home. Proceedings were initiated against her qua trespasser following the death of her husband. Mr Shearer had succeed to the secure tenancy of the family home on the death of his mother in 2005. The succession provisions of the Housing Act 1985 do not permit a second succession,[8] nor had Leicester granted such a right in the relevant tenancy agreement. Mrs Shearer thus had neither a statutory nor contractual right to succeed. Leicester's allocation scheme did however make provision for direct lettings outside the usual provisions of the scheme in 'exceptional circumstances'. Mrs Shearer made a request to the council that she be granted a tenancy of the premises, but was repeatedly and wrongly told by a council officer that she could only be considered for allocation of another property and could not be considered for a direct let of her existing home. Senior council officers then came to the conclusion that the council was required to follow the normal allocation policy: 'even when the circumstances appear exceptional'.[9] The misleading advice had come from an officer in what the council styled its 'Housing Services Department'. The council maintained at trial that had Mrs Shearer approached its 'Housing Options Department' she would have been given the correct advice and so she was in effect the author of her own misfortune.

The Recorder concluded that the council's decision to issue proceedings was unlawful for what an administrative lawyer might regard as a bit of a mish-mash of reasons:

"So in the light of all those circumstances, in my judgment it cannot seriously be argued that a reasonable Authority would without more on the facts known have refused or omitted to exercise its discretion to grant a Direct Let. I regard that refusal or failure to consider the possibility of a Direct Let had an impact on the decision to seek possession and that failure has had an improper fettering of the discretion. It is a lack of

[8] I have suggested elsewhere that an argument might be made in cases where the first succession is between spouses that the no-second succession rule is incompatible with art 8. That argument would have no force here as the first succession had been an inter-generational one; see I. Loveland "Second successions to secure tenancies" [2012] 96 Conv. 453.

[9] Ibid at para 32.

exercising the discretion. It is a removal from the discretion to be exercised of an investigation of the matters which were appropriate to be looked at. That vitiates and compromises their decision to seek possession."[10]

The Court of Appeal's judgment in *Shearer*

The Court of Appeal saw little merit in the council's suggestion that Mrs Shearer had approached the 'wrong' department for advice:

58 I am afraid this will not do. The defendant was a vulnerable person who had suffered much during her adult life. I need not recount the details. The culmination of her troubles was the suicide of her husband. The defendant found the body after he had hanged himself. The defendant was living on benefits and bringing up two young children as a single mother with, it would seem, little outside help. The defendant cannot be expected to appreciate that one housing department of the Council was giving her wrong advice, but that another housing department of the same Council might give her different and correct advice

Although that conclusion is fact specific, there is a broader issue of principle at stake here. A local authority is of course *a* statutory body. The emphasised *a* denotes that in constitutional terms a local council is an indivisible entity. Unless there are specific statutory provisions dictating that particular types of request be directed to identified divisions of the council,[11] then prima facie a request made to any council officer is a request made to the council. One might surmise that had Mrs Shearer made her request to Percy the Park Keeper at his hut in the park the court would have been minded to refuse any relief to which she might have strictu sensu been entitled, but in general there one might think there is little moral or legal merit in a local authority trying to evade responsibility for it officers' failings by hiding behind the veil of its fragmented organisational structure.

Much the most interesting points which arise from *Shearer* are:

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[10] Ibid at para 43. The bundling together of notionally discrete grounds may of course be justified with reference to Lord Greene MR's observation in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 at 229 (emphasis added):

"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. Warrington L.J. in Short v. Poole Corporation gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, **in fact, all these things run into one another".**

[11] See the discussion of the point – here in relation to a request for a review procedure under the introductory tenancy scheme – in *R (Chelfat) v Tower Hamlets LBC* [2006] EWHC (Admin) and the discussion of the case in J. Luba et al, *Defending possession proceedings* (2010; 7th ed) at pp 165-166. Presumably it is also open to a council to specify in its tenancy agreements that notices served by a tenant in relation to the tenancy must be delivered to be particular departments or addresses, and consequentially – for example – to expect that a court would not accept that a tenant's notice to quit had been served if it was sent to a different address than the one specified in the agreement.

(i) whether the Court of Appeal is holding that a local authority (and presumably by extension any social landlord falling within HRA 1998 s.6) has a positive duty properly to inform a person of her/his possible entitlements under a relevant policy, or if the ratio of the judgment is limited to holding that the council's obligation is merely the negative one of not misleading a person who asks about the policy; and

(ii) whether a failure to have regard to a policy at all, or a failure – having considered the policy – to provide a reasoned basis for not following it in the instant case, will necessarily render a consequential decision to issue possession proceedings unlawful.

While the point might cause some surprise to judges in the higher courts, lawyers who deal routinely with local authority decisionmaking at the county court or pre-trial stages will be perfectly aware that many local authority and housing association officers have what we might kindly describe as a limited familiarity with their organisation's relevant policies.[12] The imposition of a positive duty for officer properly to inform Defendants of relevant policies in the context of widespread ignorance of such policies on the part of Claimant's officers would provide a very powerful weapon in the public law defence armoury.

The judgement is however ambivalent on the issue. Para 56 points firmly in the direction of a positive duty:

"No Council official ever told the defendant that if she made an appropriate application, the Council might be able to make a direct let to her of 35 Martival."

Para 55, in contrast, concerns itself with the negative concept of giving misleading advice:

"At all stages in the story Council officials gave firm advice to the defendant that there was no question of her being able to remain at 35 Martival. It was made clear to her that the most she could achieve by submitting proofs or by visiting the Housing Options Department was to pursue an application for different accommodation".

[12] In the week that I drafted this paper I appeared in the county court for an assured shorthold tenant whose landlord, Notting Hill Housing Trust, had issued s.21 proceedings against her on the basis of one incident (admittedly quite serious) of anti-social behaviour by her son. Notting Hill's website contained an asb policy which include a provision to the effect that a review panel will meet to consider if s.21 proceedings should be issued because of asb. No review had been held or even offered to my client. The policy also highlighted the need for good record keeping and warned officers they would need to be able to show that their decisions to issue proceedings and seek an order were proportionate. The claimant offered no written records of its decisionmaking procedures and the three officers (including one whose job title was 'Legal Officer' and who had drafted the particulars of claim) who gave witness statements did not manage a single reference to the asb policy or to proportionality between them. One of the officers had also taken the trouble to phone up my client before the hearing to tell her that there could be no defence to s.21 proceedings and her solicitors were giving her false hopes. Following some heavy hints from the judge at the outset of the hearing, the Claimant agreed that the claim be dismissed on the basis of no order for costs.
This is not an unusual occurrence. The case was unusual only in that Notting Hill had not given up the ghost when our pleadings and subsequent skeleton argument identified the manifest inadequacy of its decisionmaking processes. It seems likely that many, perhaps most, such cases settle on the basis of a withdrawal of proceedings and no order for costs; and as result, judges in the higher courts simply do not see the frequency with which such abysmal decisionmaking procedures occur.

It is unfortunate that the Court of Appeal left us with an ambiguity on this issue. It is a safe bet that District and Circuit Judges will be presented with para 55 by defendants and para 56 by claimants and asked to choose between them, and an equally safe bet that the choices made will not be consistent.

The Court of Appeal seems to leave less scope for doubt on the issue of giving consideration to relevant policies. At trial, the Recorder accepted that the council had given 'cursory' consideration to the possibility of a direct let to Mrs Shearer. In a strict sense therefore, the council could not be said to have failed to consider (in the *Wednesbury* sense) the policy. However the Reorder concluded that cursory consideration did not suffice: 'proper' consideration was required. The Court of Appeal approved this conclusion:

"72 In commencing possession proceedings against the defendant without giving any or any proper consideration to the option of making a direct let under paragraph 5.6 of the Allocations Policy the Council acted unlawfully".

In reaching this conclusion, the Court of Appeal acknowledged that a public law (presumably per *Doherty*) or art 8 (presumably per *Pinnock*) defence would succeed only in exceptional circumstances. But this case was apparently exceptional. This was not because of the personal circumstances of the Defendant; her circumstances were certainly unhappy but not obviously any more so than those of other defendants whose public law or art 8 defences have failed. [13]

Interestingly, the Court of Appeal seems to equate 'exceptional' with lamentable inadequacy in the council's decisionmaking processes. There is a pretty irony at work here. As suggested above, as a matter of empirical reality, shambolic decisionmaking by housing officers would seem to be a far from 'exceptional' feature of the housing administration landscape. In that sense, there is nothing 'exceptional' about it at all.

From a doctrinal administrative law perspective, however, such behaviour by claimants' officers no doubt *ought* to be 'exceptional' because judges expect that administrators will in the main comply with public law and art 8 requirements. From that same perspective, judges might also expect that local authorities and housing associations will takes steps to ensure that the officers who take decisions to issue proceedings become familiar with the principle *Shearer* applies. Both expectations are surely quite legitimate; and equally surely will in respect of many social sector landlords be disappointed.

The Court of Appeal's judgment in *Miller*

Fareham BC did a rather better job of organising its decisionmaking process vis a vis Mr Miller. The council was perhaps rather surprised to find itself tripped up at trial over the

[13] See the cases referred to at fn xx above. For a general overview of the post-*Pinnock* law see, inter alia, K. Lees, "Article 8 defences - separating the wheat from the chaff: Corby BC v Scott; West Kent Housing Association Ltd v Haycraft" (2012) L. & T. Review 2: I. Loveland, "The holy grail as an empty chalice? Proportionality review in possession proceedings after Pinnock and Powell" (2012) Journal of Planning and Environmental Law 622.

question of the 'revocation' of its notice to quit. The Court of Appeal spent little time in reversing the Recorder's conclusion on that point:

"30 As a matter of law it was impossible for the Council to revoke the notice to quit. Once served it was effective to determine the tenancy according it its terms. Even if the Council had made an irrevocable decision not to rely on the notice the tenancy would still have come to an end: see Tayleur v Wildin (1868) L.R. 3 Ex. 303….".

Mr Miller could therefore only continue to be a tenant if, after the expiry of the notice to quit, the course of dealings between the parties was such as to have created a new tenancy (on identical terms to the determined one). The Court of Appeal saw no basis on the facts to reach that conclusion:

"32…In these circumstances…it is impossible to infer from the use of housing benefit to meet the cost of providing the Flat any intention to create a new tenancy. All the evidence indicates that this is the last thing which the Council would have wished to do. Mr Miller has remained as no more than a tolerated trespasser to this day"

This reasoning and conclusion leave rather a lot to be desired. The reference to a single authority to sustain the conclusion might be characterised as be a splendid example of judicial brevity or as an unhappy example of judicial superficiality. *Tayleur v Wildin* is an 1868 judgment of the Exchequer Court which spans some two pages (one devoted to the headnotes and summaries of submissions) of the reports. It is not a binding authority on the Court of Appeal. And since it is itself unrooted in authority one might have thought the proposition for which it is said in *Miller* to stand could bear some re-examination. That thought arises in part because of the authority's venerable age, in part because it can credibly argued that the common law rule needs to be compatible with Art 8,[14] and in part because the factual matrix

[14] This is a point which perhaps requires housing lawyers to step outside of their comfort zone and consider some of the media law judgments on the impact of Art 8 of the HRA 1998 on the common law. See for example *HRH Prince of Wales v Associated Newspapers Ltd* [2007] EWHC 522 (Ch); [2008] Ch 57 per Lord Phillips CJ:

25 ….. Section 3 of the Human Rights Act 1998 requires the court, so far as it is possible, to read and give effect to legislation in a manner which is compatible with the Convention rights. *The English court has recognised that it should also, in so far as possible, develop the common law in such a way as to give effect to Convention rights. In this way horizontal effect is given to the Convention*. This would seem to accord with the view of the European Court of Human Rights as to the duty of the court as a public authority: see *Von Hannover v Germany* (2004) 40 EHRR 1, paras 74 and 78.

For a firm indication in the housing law context that a rule of common law is as susceptible as a statutory provision to a challenge that it is incompatible with Art.8 see Lord Nicholls in *Lambeth LB v Kay* [2006] UKHL 10; [2006] 2 A.C. 465 at [54]

"... [I]nevitably there may be the exceedingly rare case where the legislative code *or, indeed, the common law* is impeachable on human rights grounds". (Emphasis added).

And see also Lord Scott at [168-169]:

"It is right to notice, however, that *Connors* and *Blečič* do show that in two types of case where an owner is seeking to recover possession of his property the absence of any contractual or proprietary right of the home occupier to remain in possession may not be conclusive. The first type of case is where an arguable article 8 objection can be taken to some aspect of the statutory *and common law rules* that entitle the owner to possession. ...

of the case concerned a guarantor's attempt to release himself from an obligation to pay a defaulting tenant's rent. (Woodfall cites *Tayleur* as its sole authority for the proposition.[15] Reference is made also to the Court of Appeal's 1950 judgment in *Clarke v Grant,*[16] but since that is a forfeiture case it cannot properly be taken as an appellate level endorsement of the ratio in *Tayleur).*

The more obvious objection to the reasoning arises from its consequence; namely that Mr Miller occupied the premises as a 'tolerated trespasser'. This is an unhappy outcome given that the Supreme Court has recently told us in *Austin v Southwark LBC* that the tolerated trespasser idea – on which so much judicial energy and ingenuity was spent for the best part of twenty years - is and always was as a complete nonsense.[17] Even if we leave that disapproval to one side, the idea that a non-secure tenant could ever have been a tolerated trespasser is distinctly problematic. The legal rationale offered for the principle in *Burrows v LB Brent*[18] was rooted in the peculiarities of the statutory scheme for secure tenancies, and especially in the court's powers under the Housing Act 1985 s.85 retrospectively to alter the date of possession given in a possession order and thereby to reactivate a tenancy that per s.82(2) had already ended. No such statutory intricacies arise in respect of non-secure tenancies.

In policy terms. Patten LJ's reasoning is on all fours with that of the House of Lords in *Burrows*; namely that a mechanism should exist to allow a landlord to give the tenant of a determined tenancy another chance to prove him/herself an adequate tenant without imposing upon the landlord the obligation to commence a new set of proceedings which would necessarily arise if the 'another chance' equated to the grant of a new tenancy.

One might doubt if - on further thought – the policy is as desirable as Patten LJ seems to think. It creates quite obviously a situation riven with chronological and behavioural uncertainty. The Court of Appeal was content to accept that a new tenancy had arisen after the council took no steps to enforce the first notice to quit. The rationale was that rent had been offered and accepted. One assumes the fact that this state of affairs continued for many months reinforces that conclusion, but the court is not explicit on the point.

Equally we might assume that since, on the facts of Miller, Mr Miller blew his 'another chance' almost immediately, it is quite easy to assume that a new tenancy did not arise. The conceptual difficulty which arises of course is that the creation of a tenancy takes but an instant: there is no probationary or intermediate or preparatory stage which must be gone through when the 'landlord' and 'tenant' do not have that status vis a vis each other. The practical difficulty is identifying when that 'instant' occurs. One will be reduced, one

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[15] At paras. 6.042, 17.200 and 17.264.

[16] [1950] 1 K.B. 104.

[17] [2010] UKSC 28; [2011] 1 A.C. 355; Baroness Hale describing the idea as – variously – 'an oxymoron' (para 45) and a 'nonsense' (para 49). For comment see variously R. Chan, "Austin v Southwark: the end of tolerated trespassers?" (2010) 13 J.H.L. 87: C. Collins, "An obituary to the oxymoron" 257 Property Law Journal 12

[18] [1996] 1 W.L.R. 1448. See generally S. Bright, "The concept of the tolerated trespasser: an analysis" (2003) 119 LQR 495.

supposes, to the unhelpful proposition that each case must be decided on its facts and – to borrow from *Pinnock* : "that is best left to the good sense and experience of judges sitting in the county court".[19]

In the context of a secure or assured tenancy, a finding that a new tenancy had been created would likely have fatal consequences for a landlord's prospects of regaining possession in any case where the claim rested on an averred breach of a term of the tenancy.[20] If the previous tenancy no longer exists, then any breach of its terms – for the purposes of securing possession – presumably does not exist either. So any claim would have to be dismissed with the usual adverse costs implications, but perhaps more significantly the landlord would have to await a breach of the new tenancy before new proceedings could be issued. While the first consequence would also ensue in respect of a 'new' non-secure tenancy, the second would not necessarily do so. It is perfectly cogent on a substantive public law basis for a landlord to issue proceedings vis a vis the new tenancy on the basis that the tenant behaved unacceptably in the past and there is no good basis for thinking that his/her behaviour will improve in the near future. That rationale would have especial force if the problem lies in anti-social behaviour which has an adverse impact on neighbours.[21]

[19] At para 57.

[20] The usual suspects being either rent arrears or anti-social behaviour.

[21] It is a constant source of surprise to me that in such cases I have never encountered a landlord which offers precise evidence as to how much asb 'costs' it in indirect terms; ie by officers explaining how much time they have spent dealing with such behaviour in the instant case (with a pound per hour calculation) as well as an indication of the other tasks they have not been able to perform (the opportunity cost of asb if you will) because of the problematic behaviour.

Conclusion

The remarkable thing about the House of Lords' judgments in *Kay* and *Doherty*[22] is that anybody could have been surprised by the proposition that a local authority landlord in seeking to evict a person from her home should be subject to general administrative law principles. This is due in part to the 1949 decision of the House of Lords in *Shelley v London County Council*[23] which held that local authorities were entitled to pick and choose their tenants at will and evict them in similar fashion, irrespective of whether the tenant had breached her tenancy agreement. It took some thirty years for the courts to recognise that public law principles had a proper role to play in this areas of government activity.[24] The new trend presumably stalled because the Housing Act 1980 introduced the secure tenancy, which afforded tenants far greater legal rights of possession and occupancy than even the most extravagant understanding of administrative law could provide.

While *Kay* and *Doherty* are seen as 'art 8' cases we ought perhaps to be careful about our terminology. *Kay* and *Doherty* are best read as cases in which the House of Lords 'developed' common law principles of public law to try to reconcile the content of domestic law with the requirements of Art 8 *ECHR*. They are analytically and jurisdictionally and practically quite distinct from *Pinnock* and *Powell*,[25] in which the Supreme Court concluded that reconciliation of domestic law with Art 8 ECHR required that Art 8 HRA be read as creating a statutory right to proportionality review for defendants who lacked security of tenure under the protected, secure or assured tenancy regimes.

It may be oversimplistic to assume that proportionality review per Art 8 HRA can be seen as a more intensive version of 'public law' in its entirety. That conclusion can credibly be reached in respect of the 'core' substantive nature of irrationality; proportionality review as to the substantive content of decisions made by landlords to seek to evict defendants and by courts to make orders which have that effect must securely be somewhat more intensive than that. We cannot yet say however that the statutory Art 8 defence provides a more intensive version of the relevant considerations doctrine, or the no-fettering principle, or ideas as to procedural fairness.

These are important questions for practical as well as theoretical reasons. Defendants would presumably be best advised to plead public law and art 8 defences in the (comprehensive) alternative, for fear of encountering a court that insists for example, that the relevant considerations principle exists only at public law and not within art 8 or conversely that the principle can be found in both sources but that it affords the court a more intrusive jurisdiction under art 8 than in public law. *Shearer* and *Miller* point us to that conclusion by implication, but the most helpful guidance on this point if perhaps provided by Arden LJ in *R*

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[22] Respectively [2006] UKHL 10; [2006] 2 A.C. 465 : [2008] UKHL 57; [2009] A.C. 367;

[23] [1949] A.C. 56. The case contains a notable dissent by Lord du Parcq in which he held that he would require very clear words in a statute to lead him to the conclusion favoured by the majority, and that there was no such clarity in the then relevant Act.

[24] See *Bristol CC v Clarke* [1975] 1 W.L.R. 1443: *Cannock Chase DC v Kelly* [1978] 1 W.L.R. 1: *Sevenoaks DC v Emott* (1979) 78 LGR 346.

[25] Respectively [2011] UKSC 6; [2011] 2 W.L.R. 220: [2011[UKSC 8; [2012] 2 A.C. 186.

(on the application of JL) v Secretary of State for Defence[26] in a passage which ought to be at the forefront of a defendant's lawyers minds when a defence is being drafted*:*

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

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

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

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

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

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

[26] [2013] EWCA Civ 449: [2013] H.L.R. 27.