



Neutral Citation Number: [2009] EWCA Civ 613

Case No: B5/2008/1734

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE LUTON COUNTY COURT
His Honour Judge Overall QC
7LU00623

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/06/2009

Before :

LORD JUSTICE WALLER
LORD JUSTICE LLOYD
and
LORD JUSTICE RICHARDS

Between :

Central Bedfordshire Council
(formerly Bedfordshire County Council
- and -
Paul Taylor and others

Respondent

Appellants

Secretary of State for Communities and Local Government

Intervener

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Clive Pithers (instructed by **Bedfordshire County Council Legal Services**) for the
Respondent

David Watkinson (instructed by **Messrs Pierce Glynn**) for the **Appellants**

Deok Joo Rhee (instructed by the **Treasury Solicitor**) for the **Intervener**

Hearing date : 23rd April 2009

Judgment
As Approved by the Court

Lord Justice Waller :

1. The appellants occupy dwellings on land at St Margaret's Streatley, Bedfordshire. The respondents (the council) are the freehold owners of the land. Originally the claimant (and respondent) was Bedfordshire County Council. As a result of local government changes, on 1st April 2009 that council ceased to exist, and its relevant successor is Central Bedfordshire council, which was substituted as respondent at the hearing. References to the council and to the respondent are to whichever local authority is relevant at a given time. The appellants had rights to occupy under arrangements to which I will return below but became and are now trespassers. The council issued claims for possession on 22nd February 2007 and before His Honour Judge Everall QC the real contest was whether the appellants still had any legal rights to occupy the dwellings. He ruled by a judgment handed down on 1st July 2008 that they did not.
2. The appellants had pleaded as their final point that, even if they did not have any further legal rights, the council's claim for possession constituted an unjustified interference with their rights protected by Article 8 of the European Convention on Human Rights. However on the basis of the law as expounded by the House of Lords in *Kay v Lambeth City Council* [2006] AC 465 (*Kay*) and as at that stage understood by Mr Watkinson, he on their behalf accepted that Article 8 did not provide a defence. He did however seek findings from the judge based on what Mr Watkinson hoped might become the law derived from *McCann v United Kingdom* [2008] LGR 474 (*McCann*) at that time being considered by the House of Lords in *Doherty v Birmingham City Council* [2008] UKHL 57, [2008] 3 WLR 636 (*Doherty*).
3. *McCann* was a decision of the European Court of Human Rights (the ECtHR) handed down on 1st May 2008, which suggested that the minority judgments in *Kay* represented the correct approach to Article 8. The difference between the minority opinions and the majority opinion related to the question as to the extent to which the personal circumstances of the occupier might be raised by an occupier as an answer to a claim for possession by a public authority landowner. Lord Bingham of Cornhill (part of the minority in *Kay*) was of the view that, where the court following its usual procedures was satisfied as a matter of domestic law that the requirements for making a possession order had been met, the court should make that order unless the occupier shows, "highly exceptionally", that he has a seriously arguable case on one of two grounds. The first related to the compatibility of the applicable law with Article 8 and the second is the important one for present purposes "(b) that having regard to the occupiers 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 [of the Human Rights Act 1998]."
4. Lord Hope (part of the majority) was of the view that it was in all but exceptional cases unnecessary for the land owner to have regard to the personal circumstances of the occupiers. He put the matter this way in paragraph 108:-

“ 108. These conclusions can be fitted into the lessons to be drawn from *Connors* and from *Blecic* in this way. There will be some cases of a special and unusual kind, of which *Connors* is an example, where the interference with the right to respect for the home which results from the making of a possession order

will require to be justified by a decision-making process that ensures that "some special consideration" (the words used in *Connors*, para 84) is given to the interests safeguarded by article 8. If there is such a defect the law will need to be amended to provide the necessary safeguards. But there will be many other cases where there are no such special circumstances - where the person's right to occupy the premises as his home has simply been brought to an end by the operation of law and his eviction is necessary to protect the rights under the law of the landowner. In these cases it is enough that the eviction is in accordance with what the law itself requires as the case of *Blecic*, in which it was held that the requirements of the law had been satisfied, demonstrates. Further consideration of the interests safeguarded by article 8 will be unnecessary. Cases where the home was occupied under a tenancy, or some other interest falling short of a tenancy, which has been brought to an end in accordance with the relevant law, as in *Qazi*, will fall into this category. The interests safeguarded by article 8 will be sufficiently protected by the fulfilment of the formal requirements for the eviction laid down by the relevant statute or by the common law."

5. He did however recognise that a decision of a public authority was susceptible to judicial review in the key paragraph on which it will be necessary to focus hereafter at 110. It is convenient at this stage to quote both paragraphs 109 and 110:-

"109. The contrary conclusion, for which the appellants contend, is that procedures must exist in the domestic system for a consideration of the interests safeguarded by article 8 in every case where a person is evicted from his home by the making of a possession order. A requirement that the article 8 issue must be considered by the court in every case by taking into account the defendant's personal circumstances would go further than a reading of these three cases, taken together and in the light of the prior Strasbourg jurisprudence, will justify. It would breach Lord Bingham's "no more and no less" rule. The extent and consequences of this breach should not be underestimated. It would drive a deep wedge into the domestic system for the handling of possession cases and would be a colossal waste of time and money, as Lord Nicholls indicates. So I agree with him that judges in the county courts, when faced with such a defence, should proceed on the assumption that domestic law strikes a fair balance and is compatible with the occupier's Convention rights.

110. But, in agreement with Lord Scott, Baroness Hale and Lord Brown, I would go further. 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 article 8 but is based only on the occupier's

personal circumstances should be struck out. I do not think that *McPhail v Persons, Names Unknown* [1973] Ch 447 needs to be reconsidered in the light of Strasbourg case law. 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, 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, he should be permitted to do this provided again that the point is seriously arguable: *Wandsworth London Borough Council v Winder* [1985] AC 461. The common law as explained in that case is, of course, compatible with article 8. It provides an additional safeguard.”

6. As I say the ECHR in *McCann* preferred the views of Lord Bingham. The hearings in the House of Lords in *Doherty* had been concluded in March 2008 but the House requested written submissions on the effect of *McCann* prior to handing down their judgments on 30th July 2008.
7. Prior to judgment being handed down in *Doherty* and in the light of *McCann* Mr Watkinson was hopeful that in *Doherty* the House of Lords might revisit *Kay* in a way that would allow him to argue that the circumstances of the instant cases were such that “exceptionally” the council should have taken into account the personal circumstances of the appellants and should have concluded that it would be a breach of section 6 to serve a notice to quit in the light of their Article 8 rights. He requested the judge to make findings of fact against that eventuality.
8. The judge refused to make findings of fact on the basis that if the law was to be revisited, it was better to have the guidance of the House of Lords as to what the law was before making findings. The judge thus made an order for possession and refused permission to appeal.
9. At the time of seeking permission to appeal from the Court of Appeal, the decision in the House of Lords in *Doherty* was still pending. Thus Mr Watkinson drafted his original grounds of appeal and sought permission to appeal on the basis of his hopes

that the House of Lords in *Doherty* would take the opportunity of adopting the minority view in *Kay* as the correct view. He hoped to be able to argue that a public authority such as the council before deciding to take possession proceedings, (1) had in “exceptional” [to use the word of the minority in *Kay*] situations an obligation to consider fully the personal circumstances even of trespassers who had made their homes on the subject land; (2) that such an “exceptional” situation existed in the instant case; and (3) that the case was one where the court could judicially review the decision taken by the council, and hold their decision unlawful for failing to take account of the appellants personal circumstances. He further wished to argue that the obligation of the council in taking its decision was to act proportionately and not simply rationally as per *Wednesbury*, and that the court could determine whether it was proportional to make a possession order. The ground of appeal raising the Article 8 defence was at this stage drafted on this basis.

10. When judgments in *Doherty* were delivered on 30th July 2008, Mr Watkinson had to accept that his hopes were not realised, or at least not fully realised, but Mr Watkinson wished to argue that the law as explained by the House of Lords in *Doherty* still gave him important aspects of his argument. He wished to argue that *Doherty*, even if it confirmed the majority view in *Kay*, had put a gloss on that view to an extent that, on the majority view, the position now was (1) that in certain albeit exceptional circumstances a public authority such as the council was bound to consider and take account of the personal circumstances of trespassers such as the appellants, (2) that the circumstances arguably existed in this case, and (3) that the matter should be remitted to the county court to consider whether the council should be directed to reconsider their decision. He thus amended his grounds of appeal and after Rimer LJ had considered the matter on paper and adjourned the permission hearing into open court, Mr Watkinson was successful in persuading Tuckey and Rimer LJJ that the appellants should be allowed to pursue one ground of appeal in the following terms:-

“(3) Having determined the Appellants were trespassers at their various dwellings on land at St Margaret’s, Streatley, Bedfordshire (otherwise known as St Margaret’s or Haz Manor) he failed to deal with or make any findings as to the Appellants’ Defence that the Respondent’s claim for possession constituted an unjustified interference with their rights under Article 8 of the ECHR in particular by failing to consider whether the decision to recover possession was unlawful by applying the law as expressed in *Doherty v Birmingham CC* [2008] UKHL 57, *Kay v Lambeth* 2006 2AC 465 @ para 110 (Lord Hope) and *Wandsworth LBC v Winder* 1985 AC 461.”

11. Since *Doherty* was decided in the House of Lords and permission to appeal was granted in these appeals, the court of appeal has had to consider the Article 8 issue in two other cases albeit in different factual circumstances to those in the present case – *Doran v Liverpool City Council and Secretary of State for Communities and Local Government* [2009] EWCA Civ 146 (*Doran*) and *McGlynn v Welwyn Hatfield District Council* [2009] EWCA Civ 285 (*McGlynn*). These decisions, in judgments delivered by Toulson LJ with which other members of the court in each case have agreed, have helpfully analysed the decision in *Doherty*. 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.

12. 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.
13. What then are the issues on this appeal? The main issue is whether it is arguable that the circumstances were such as to impose on the council an obligation to consider the personal circumstances of the appellants? A second issue is whether, in judging the lawfulness of the council's decision, the test is the strict *Wednesbury* rationality test or something wider? In general terms the issue is how should county court judges approach circumstances similar to those in *Kay*, since *Doherty*? Is Mr Watkinson right in arguing the position has changed to an extent which provides his clients with a possible answer to the council's claim to possession? Mr Watkinson's position it is right to say was not that *Doherty* now gave his clients any legal right to be on the property, but it did provide his clients with an argument that their personal circumstances should have been taken into account, and an entitlement to a proportionate decision. On being pressed as to how far that went in terms of entitling his clients to remain on the property, his response was to the effect that his clients were at least entitled to a lawful decision.
14. In this case we are not concerned with a decision to terminate a lease or licence as in *McGlynn* or with duties under statute such as in *Doran* or *Doherty*. The facts are that the council is the freehold owner of the site which includes the premises, parts of which are occupied by the appellants. In 1993 the council had granted a lease to Luton for 3 years, that lease permitting a sublease to a housing association to enable it to grant assured shorthold tenancies to up to 40 homeless persons. From 1995 there were protracted negotiations in relation to the grant of a new lease by the council to Luton and a new sublease to a housing association latterly Housing Action Zone Ltd who were 1st Defendants to the proceedings. Negotiations came to an end in 2005. In 2006 Bedfordshire resolved to recover possession and proceedings were commenced on 22nd February 2007. Mr Watkinson accepted before the judge and before us, on the basis that his primary defences had failed, that the appellants were and are trespassers.

15. The facts are very similar to those in *Kay* where Lambeth LBC had permitted a housing association to use premises to house homeless persons. In 1995 Lambeth granted a lease to the housing association and the housing association had purported to grant licences to the occupiers but those licences were found to be leases. Lambeth terminated the lease to the housing association, thus bringing to an end the derivative sub tenancies and Lambeth sought possession against the occupiers. There was an issue as to whether the occupiers had some legal right to occupy which was resolved against the occupiers by the trial judge and affirmed both by the court of appeal and the House of Lords.
16. The occupiers were thus held to be trespassers but they also raised Article 8 defences relying on their personal circumstances. That defence was struck out by the county court judge. The trespassers were unsuccessful in their appeals to the House of Lords on their Article 8 defences in the views not only of the majority but of the minority although importantly there was a difference of view as to whether the defences should have been struck out. Thus none of their lordships would have remitted the matter to the county court to consider any Article 8 defence. Lord Bingham reached that conclusion on the basis that he would not have struck out the defence raising the trespassers' personal circumstances but because the only conclusion the court would reach was that Lambeth were entitled to possession. He said:-

“ 46. It follows from the foregoing paragraphs of this opinion that the courts below should have held the premises in question to be the homes of the respective appellants and should have held their eviction or proposed eviction to be an interference with their exercise of their right to respect for their homes within the meaning of article 8(2). Their defences should not have been struck out save on the basis that nothing sufficient was pleaded to support them.

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. I would accordingly, although for reasons differing from those of the Court of Appeal, dismiss these appeals.”

17. Lord Hope as appears from the paragraph 110 already quoted, would have struck out the defence raising personal circumstances and his conclusion is in paragraph 115:-

“115. For the reasons given by my noble and learned friend Lord Scott of Foscote I would reject the arguments which Mr Luba advanced on the private law issue. 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.”

18. How has the decision in *Doherty* impacted on the decision in *Kay*? I will have to analyse in a little detail the judgments but I can start by emphasising that if the land owner were a private landowner there would be no question of that land owner being required to take account of the personal circumstances of the trespassers. The court would be bound to make an order for possession. It is because the council are a public authority and its decisions are susceptible to judicial review that there can be any question of the appellants being able to raise what is loosely called an Article 8 defence. Lord Scott in *Doherty* put it this way:-

“69. It is worth noticing that gateway (b) [in paragraph 110 of Lord Hope] and a challenge to the lawfulness of the decision by the property owner to recover possession of the property from its “home” occupier, is of no relevance whatever to possession proceedings brought not by public authority owners but by private owners. If private owners are entitled to recover possession of their property under the ordinary domestic law, whether common law, statute or a combination, their reasons for deciding to recover possession are irrelevant. Private owners are entitled to take decisions about their own property to suit themselves unless and to the extent that statute has fettered that entitlement. Their property rights are recognised and protected by the Convention (see article 1 of the 1st Protocol to the Convention). Trespassers who have established a “home” on the property of a private owner are entitled to no more respect for their home from the owner on whose land they are trespassing than the law prohibiting forcible entry or eviction without a court order affords. Home occupiers whose contractual and statutory rights to remain on the property have come to an end are in no different state. Such balance as is required to be struck between the rights of home occupiers and the rights of the private owners of the properties on which the homes have been established has been struck by the domestic law and, unless a gateway (a) attack on the domestic law can be sustained, e.g. an attack based on discrimination as in *Connors*,

article 8.2 has no further part to play. *Qazi* established that that was so and its authority in that respect remains unaltered. But public authorities, and in particular local authorities, are in a different position. Their decision making powers are subject to the constraints of *Wednesbury* reasonableness, and they must not act in a way that is incompatible with Convention rights (section 6 of the 1998 Act). But those public law constraints strike, in my opinion, the balance that article 8.2 requires (see the penultimate sentence of Lord Hope's para.110)."

19. What then did *Doherty* decide which impacts on *Kay*? In *Doran*, Toulson LJ helpfully analysed the points on which all seven members of the House of Lords in *Kay* were agreed, the point on which there was disagreement and how he saw the position post-*Doherty* at least in so far as the situation with which the court was dealing was similar to *Doherty*. At paragraphs 15 to 23, and 48 to 52, he said this:-

"15. In *Kay* the House of Lords agreed on a number of points. These included:

1. If a licensee wishes to advance public law grounds for not making a possession order, it is for the licensee to raise the point.

2. There are two potential grounds or gateways (to use the language of later authorities) for making such a challenge;

(a) that the law which requires the court to make a possession order is itself incompatible with the Convention;

(b) that the local authority's exercise of its power to serve a notice to quit and seek a possession order was unlawful on public law grounds.

(There was sharp disagreement as to the breadth of the latter ground or gateway)

3. Where either ground is raised, the court must first consider whether the licensee has a seriously arguable case. As to that, Lord Bingham said at para 39:

"This question should be decided summarily, on the basis of an affidavit or of the defendant's evidence, 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."

4. If the court considers that the defence sought to be raised on either or both grounds is not seriously arguable, the court should make a possession order.

5. Where a seriously arguable challenge is raised on the first ground, the court has either to decide the case itself, doing the best it can to arrive at a result which is compatible with the Convention, or it may refer the case to the High Court.

6. Where a seriously arguable issue is raised on the second ground, the court should decide it. In other words, the licensee is not required to pursue such a challenge by way of a separate judicial review application but can raise it as a defence to the claim for possession.

16. The House was divided as to the width of gateway (b). The minority would have held that it was open to the licensee to argue that the decision to seek a possession order was an unlawful act within the meaning of s6 of the HRA on the ground that it was incompatible with a Convention right. It is implicit on that approach that in considering the issue of proportionality for the purposes of article 8, the personal circumstances of the licensee may be relevant.

17. The position of the majority was summarised in the judgment of Lord Hope at para 110, where he said:

"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 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:...(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, he should be permitted to do this provided again that the point is seriously arguable: *Wandsworth London Borough Council v Winder* [1985] AC 461."

18. In *Doherty* the Court of Appeal (Tuckey, Carnwath and Neuberger LJJ) subjected the judgments in *Kay* to detailed analysis. They concluded, in para 61, that the effect of the majority's decision was that under gateway (b) a council's action was open to challenge "on conventional judicial review

grounds, but not on the grounds that it was contrary to article 8".

19. The House of Lords was invited in *Doherty* to adopt the position of the minority in *Kay*, but it declined to do so. (*Kay* had been decided by a seven judge panel and it would have unprecedented for its decision to be departed from shortly afterwards by a five judge panel.) However, Lord Hope said at para 36 that he acknowledged that the way in which the formula expressed by him in para 110 of *Kay* worked in cases of this kind required further explanation and to some extent modification.

20. In *Doherty* the council's decision to seek possession of the site was not prompted by any concerns about the behaviour of the licensee or any members of his family. They had occupied the site peaceably for 17 years. The decision to seek possession of the site was driven by planning considerations. The council wanted possession in order to carry out essential improvement works and thereafter to manage the site as temporary accommodation for travellers. The judge had made a summary possession order. The Court of Appeal held that it was not open to Mr Doherty to advance an article 8 claim under gateway (b) and that the council's judgment about the appropriate use of its land in the public interest could not be characterised as *Wednesbury* unreasonable. Accordingly, there was no point in remitting the case to the county court for further consideration of whether Mr Doherty had a defence under gateway (b).

21. The House of Lords disagreed and remitted the matter to the county court. Lord Hope's reasons are encapsulated in the following paragraphs of his opinion:

"Gateway (b)

52 As I said earlier, the speeches in *Kay* show that the route indicated by this gateway is limited to what is conveniently described as conventional judicial review...

54. The Court of Appeal said in para 61 that it could see no purpose in remitting the case to the judge. I disagree, with respect, with this assessment. In para 43 of his judgment the judge said that it seemed to him that in this case judicial review would be able to check the fairness and legality of the respondent's decision. Now that it is clear that arguments of that kind may be presented by way of a defence to the proceedings under gateway (b), I think that he should be given the opportunity to carry out that exercise. Any factual disputes that may exist between the parties as to the facts on the basis of which the decision was taken will be capable of being resolved by him too. Lord Brown's observations in

para 210 of his opinion in *Kay* add a further point that is relevant to this issue. The site had been occupied as their home by the appellant and his family for about 17 years when the notice to quit was served. So it could be argued that it was unfair for the respondent to be able to claim possession without being required to make good the reasons that it gave in its own statement of claim for doing so.

55. 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 opinion 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. The further point to which Lord Brown referred will have a part to play in that assessment."

22. The point made by Lord Brown in para 210 of *Kay* was that in *Connors* it might have been argued that, having regard to the great length of time that the family had resided on the site, it was unreasonable and unfair for the local authority to claim possession merely on the basis of a determined licence without the need to make good any underlying reason for taking such action.

23. Lord Rodger (at para 89) and Lord Walker (at paras 123-124) agreed with Lord Hope's approach."

20. Toulson LJ later continued:-

"48. As I see it, the effect of *Doherty* is two fold.

49. 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.

50. 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.

51. There is no conflict between these two propositions, which should be capable of being applied without additional complexity. As Baroness Hale observed in *Kay* at para 190, in a passage cited by Lord Walker in *Doherty* at para 108:

"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 *R v Lincolnshire County Council ex parte Atkinson* (1995) 8 Admin LR 529; *R (Casey) v Crawley Borough Council* [2006] EWHC 301 (Admin)."

52. 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.)"

21. Helpful as paragraphs 48 to 52 are, they do not wrestle, because they did not need to do so with precisely how courts should approach cases where the facts are close to those in *Kay*. That is what as I see it we are concerned to do. I will thus seek to examine *Doherty* for myself, focusing on its impact on circumstances such as existed in *Kay*.
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.
23. The question is whether as Mr Watkinson submits, *Doherty* has now placed a gloss on *Kay* to the extent of requiring a public authority such as the council in the instant

appeals, despite its undoubted right to possession, to have regard to the personal circumstances of the trespassers when making its decision to seek possession; and whether in making a decision it is required to act proportionately. The use of the term proportionately seems to carry with it the connotation that if the council acts proportionately it would in some circumstances be bound not to seek possession and the connotation that it is arguable that such circumstances exist in the instant case. Certainly if Mr Watkinson is to get anywhere he must argue that *Doherty* supports an argument that the council's decision in the instant case should be not only rational but "proportionate" in the sense that it is one under which the council might, if acting reasonably, be driven to decide that the trespassers should continue to occupy the premises; and (as I would understand it) not just for a short period (which they could have been given, although in fact the order for possession made required immediate vacation of the property, though subject to a stay pending appeal), but some more extensive period on terms which I do not believe he spelled out but which he seemed to deny would give them legal rights to stay.

24. Mr Pithers for the council submitted simply that since the circumstances of the instant cases differ insignificantly from the circumstances in *Kay* and since *Doherty* did not suggest that the decision on the facts of *Kay* would have been any different, the appeal should be dismissed on that basis. He submitted that we should make it clear that in relation to trespassers such as the appellants a public authority with an immediate right to possession has no obligation to consider the personal circumstances of trespassers before it proceeds to enforce that right. He points out that the council was never in a direct relationship with the appellants and indeed did not even know the identity of the persons occupying the dwellings. He in any event submitted that even if the minority view in *Kay* were adopted, it is unarguable that a council acting reasonably would have done otherwise than seek possession and that thus there is no purpose in a remission and the appeal should be dismissed.
25. We also heard submissions on behalf of the Secretary of State for Communities and Local Government. She did not endorse the approach of Mr Pithers, at least so far as refusing to remit the case to the county court. Miss Deok Joo Rhee on behalf of the Secretary of State informed us that the concern of the Secretary of State was to ensure "that full and clear guidance is provided by the court of appeal in these early cases in order to ensure a consistent application of the law in this area". Furthermore given the involvement or possible involvement of the Government in proceedings before the European Court of Human Rights in cases such as *Connors* and *McCann*, the Secretary of State wished to assist the court in so far as she was able as to the correct interpretation and application of the law to the facts of these cases.
26. It is understandable that the government would wish to avoid if possible further proceedings in which the United Kingdom was found wanting by the ECtHR and this court would subscribe to that concern. There does appear to have been a tension between the views of the House of Lords as to the proper approach to Article 8, and those of ECtHR, but hopefully the divergence is less serious than some would suggest. Miss Rhee and her client in any event found difficulty in being absolutely clear as to what to submit was the appropriate solution in these cases but ultimately supported Mr Watkinson to the extent of saying that the matter should be remitted so that Mr Watkinson's arguments could be fully considered and the appropriate facts found.

27. It might be tempting simply to remit on the basis that Mr Watkinson has not had the opportunity of developing his arguments before the trial judge and thus has been denied findings of fact relevant to those arguments. But it would be wrong to remit without at least attempting clear guidance as to how the court should now approach the matter if it was to be different from *Kay*. It would in any event be wrong to remit if it were clear that remission would serve no purpose because a court would be bound to reach the same result and make an order for possession. To remit in those circumstances would simply put the parties to extra expense and do neither any favours.

28. I must start with *Kay* and what it decided by reference to the facts. [There were two cases argued in the House of Lords but I am concentrating on *Kay v Lambeth*, the facts in which I have already set out shortly above]. The position seems to me to be reasonably clear on the speeches of the majority. There is no issue but that if an occupier has made his home on the land, even if he is a trespasser, his Article 8 rights will be engaged and what *Kay* was concerned with was whether the law can be assumed to take account of Article 8 rights, and to be keeping the correct balance between the rights of others and the rights under Article 8 of the occupiers. Baroness Hale summarised the effect of *Kay* in this way in *Belfast City Council v Miss Behavin Ltd* [2007] 1 WLR 1420 at paragraph 36, quoted in paragraph 22 of Lord Hope's speech in *Doherty*:-

“there are situations in which the court is entitled to say that the legislation itself strikes a fair balance between the rights of the individual and the interests of the community, so that there is no room for the court to strike the balance in the individual case. That is what this House decided in *Kay v Lambeth London Borough Council* [2006] 2 AC 465.”

29. I have quoted paragraph 108 from the speech of Lord Hope in *Kay* in paragraph 4 above. In holding that a defence which does not challenge the law entitling a landowner to possession but is based on personal circumstances must be struck out he must have also been holding, as it seems to me, that there cannot have been any obligation on the public authority to consider personal circumstances. Thus he must also have been holding in my view [by paragraph 110] that although the decision of a public authority is subject to judicial review on ordinary public law principles, it could not be a ground of challenge that the public authority who otherwise had an absolute right to possession had failed to take account of personal circumstances.

30. Lord Scott put the matter thus at paragraphs 171 and 172:-

“ 171. 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.

172. 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.”

31. Baroness Hale said this at paragraphs 189 and 190:-

“ 189. Thus far I believe that we are all agreed. But, 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?

190. 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 e.g. *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).”

32. Lord Brown put the matter forcefully at paragraphs 203 to 207, concluding in 207 by saying:-

“207. . . . 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.”

33. In *Doherty*, directly relevant to what should be the approach to cases where the facts are similar to those in *Kay*, Lord Hope said this at paragraphs 36 and 42:-

“36. The decision of the majority, as summarised in para 110 of my speech, went as far as it was necessary to go to provide answers to the two cases that were before the House in *Kay*. But the facts in those two cases were very different from those in the present case and from those in *McCann*. The appellants in *Kay v Lambeth London Borough Council* never had any rights of occupation granted to them by the landowner. The appellants in *Leeds City Council v Price* were gipsies, but they had been present on the recreation ground for only two days when proceedings were taken against them for the making of a possession order. In both cases it was held the appellants’ interests were sufficiently protected by requiring proof by the local authority landowner of its entitlement to obtain an order for possession in the exercise of its property rights. Neither of them was close on its facts, as this case is, to *Connors*. For reasons that I shall seek to show, I believe that the answer to the article 8 issue in this case can be found in the formula that is set out in para 110. But I would be the first to acknowledge that the way that the formula works in a case of this kind requires further explanation. To some extent too it needs to be modified.

...

42. The question is whether it is possible for this violation of the appellant’s Convention rights to be avoided, given that the basic principle that was established by *Qazi* is that the law itself strikes a fair balance between the rights of the individual and the interests of the community. 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. This however is an exceptional case, and it is the law itself that is at fault. The legal framework that applies to the appellant’s case is defective because the statute excludes the gipsy community from its procedural safeguards. The modification that was made to *Qazi* to accommodate the decision in *Connors* applies to this case.”

34. Lord Hope must be understood to be saying that *Kay* would still be decided the same way and what he says thereafter in relation to the particular circumstances which existed in *Doherty* must be read in the context of paragraphs 36 and 42.

35. Lord Hope in *Doherty* does place a gloss on what has been identified as gateway (b) in paragraph 110 in *Kay*. That gateway, as I have indicated, contemplated conventional judicial review but the gloss did allow him in the circumstances of *Doherty* to consider that remission to the county court was appropriate. The paragraphs relevant are those already quoted in the passage quoted from Toulson LJ's judgment in *Doran*, i.e. paragraphs 52 to 55.
36. The reinterpretation of paragraph 110 has, I accept, general application, and I have already set out the analysis of Toulson LJ in *Doran*. But as I have emphasised he was dealing with circumstances similar to those in *Doherty*. So far as cases with similar facts to those in *Kay* are concerned I would like to go back to *Doherty* to identify the precise impact.
37. By his reinterpretation and in particular having regard to paragraphs 36 and 42 it cannot have been Lord Hope's intention to reverse the decision in *Kay*. If he had thought either that the view of the minority should now be adopted that defences raising personal circumstances should not be struck out or that it would have been appropriate to remit *Kay* in the light of what Lord Hope was saying in *Doherty*, he surely would have been bound to say so. Furthermore all others of their lordships said in *Doherty* that the majority view in *Kay* should prevail. [See Lord Scott at paragraph 61; Lord Rodger at paragraph 89; Lord Walker at 107 and 108 and Lord Mance at 136 and 161]. There are however signs in the speeches of Lord Walker paragraph 108 onwards, and of Lord Mance, in particular paragraph 162, and even in Lord Scott paragraph 70 that they would welcome a wider concept of judicial review including taking account of the occupier's personal circumstances
38. How then do I suggest a judge in the county court should approach a case such as the present in the light of *Kay* as explained in *Doherty*? The fact that the correct forum for judicially reviewing a decision of the local authority is the county court is important, not only because it follows that the procedural requirements of Article 8 are complied with, i.e. the question whether someone is to lose their home is reviewed by a court – an independent tribunal, but also because, although there is a distinction between a defence raising Article 8 rights directly for decision by the court and the question whether the council as a public authority has made a lawful decision in the light of an occupier's Article 8 rights, that distinction has, very largely, become academic. That will be so in my view whether my suggestion in paragraphs 39 to 41, as to what decision should be the subject of review, is acceptable or not.
39. I would accept that the likely assumption of the majority in *Kay* was that the relevant decision that could be the subject of judicial review was the original decision to seek possession. Furthermore, Toulson LJ was of the opinion in *Doran* that the court should not engage in a retrospective exercise by examining the facts as they are now found to be and asking whether the decision on those facts would have been lawful. [See paragraph 57 to 60]. He was also of the view that the remission in *Doherty* was for the purpose of examining the facts known to the public authority when it made its original decision. I respectfully suggest that there is a difficulty with this approach having regard to the fact that in these cases the burden is on the occupier to raise the circumstances on which he relies and because the approach perhaps does not recognise the possibility that a public authority may make a series of decisions in the light of the facts as they appear. If one looks at it on the basis that, once the public authority knows facts that it has not known up until they are revealed, the public

authority is bound to take a further decision that avoids the concept of an exercise in retrospectivity.

40. 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.
41. 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.
42. Mr Watkinson may feel that some of what I have said points in his favour on this appeal and is beginning to develop a full blown Article 8 defence. That is not so and would of course be quite contrary to *Kay*. Where the above approach would lead me is to recognise that in truth where the circumstances are similar to those in *Kay* a court post- *Kay* and *Doherty* will actually be in much the same position as it has always been even before the convention was made part of the law.
43. 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 (section 89 of the Housing Act 1980), 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.
44. 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.
45. If I were wrong in my suggestion that it is possible to approach the question of review by reference to a series of decisions, no different result would emerge in the instant cases. The decision to be reviewed would be the original decision to take possession. The review would apply a test wider than the pure rationality test by reference to the

facts known to the public authority at the time. Even if one made the assumption that the public authority was aware of the personal circumstances of the occupiers, their obligation to take account of them could never make it unreasonable to take proceedings for possession. Provided they could establish their absolute right to possession, personal circumstances could only be relevant to the extent to which a court was prepared to postpone execution, which a public authority would be entitled to leave to the court.

46. 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.
47. I would accordingly dismiss the appeal.

Lord Justice Lloyd :

48. I agree that the appeal should be dismissed. My reasons, which are much the same as those set out by Waller LJ, are as follows.
49. The judge decided at the trial that the Appellants have no proprietary right to stay in the parts of St Margaret's that they have, respectively, been occupying as their homes for some years. The Respondent Council owes them no relevant statutory duty, and providing accommodation for them (or for anyone else) is no part of its duties or functions. It is, however, a public body and, as such, it is obliged to take whatever decisions it does take in a lawful manner, subject to the sanction of judicial review.
50. When the Respondent decided to take the proceedings which led to the order under appeal, it knew nothing of the circumstances of the Defendants. All it knew was that the property had been the subject of a lease in favour of Luton Borough Council, which had in turn granted some rights to the First Defendant, Housing Action Zone Ltd (HAZ), that after lengthy negotiations the suggestion of a new lease to Luton had come to nothing, and that there were or might be persons in occupation of whom it knew nothing, other than that the Second Defendant was an officer of HAZ. It did not assert that it had any particular plans for the property. Several of its witnesses said that it did not wish to sell or lease the land.
51. On 4 April 2006 the Respondent wrote to Mr Taylor, the Second Defendant, as Chief Executive of HAZ, telling him that the Council had decided to recover possession of the premises, occupation of which had been enjoyed under arrangements with Luton, and asking that HAZ should vacate the land within 3 months. On 29 June 2006 it wrote again to HAZ, giving notice that any implied licence that the Council was to be regarded as having given to HAZ to occupy the land was terminated with effect from

one month after the date of the letter, and it invited reasonable proposals to avoid the need for court proceedings. It started possession proceedings in February 2007.

52. Much later, it came to know of the circumstances of the Appellants, as they were added as Defendants, and as they put in evidence. As Lord Hope of Craighead put it in *Kay v Lambeth London Borough Council*, the issue is whether the decision of the Respondent to recover possession was an improper exercise of its powers at common law. In the circumstances of this case, I agree with Waller LJ that this question should be applied by reference to the Respondent's decision to press for a possession order at trial, rather than at the outset when it knew little or nothing of the circumstances of the Defendants. I recognise that, at that stage, there may not have been a formal decision, and that the decision to proceed, whether express or implicit, is likely to have been taken at a delegated level, not by members of the Council in person. Any lack of formality at that stage is not a defect in itself.
53. The Appellants gave evidence in their witness statements about their circumstances. The factors which they contend should have been taken account of by the Council, in addition to the fact that (it is suggested) the Council has no immediate plans of its own for the property, are summarised in a proposed new amendment to the Defence, put forward during the hearing of the appeal. The factors relied on are these.
54. First, the properties in question are the respective Defendants' homes, and have been so for significant periods - back to 1993 for the Second Defendant (though with a break at the end of the 1990's), from 1998 for the Third Defendant, 2001 for the Fourth Defendant and 1993 for the Fifth Defendant, that occupation being either pursuant to the arrangements between the Respondent and Luton Borough Council which Waller LJ has described, or (since 1996) said to have been with the consent or tolerance of the Respondent. The allegation of consent has to be seen in the light of the judge's findings that none of the Defendants was ever a licensee of the Respondent. The Respondent no doubt knew that Luton had (directly, or indirectly through HAZ) let individuals into possession, and is likely to have known that the same or other persons were in occupation during the lengthy but unsuccessful negotiations following the end of the lease to Luton in 1996. No individual had the Respondent's actual consent to go into, or remain in, occupation of any part of this property. None of them has ever had a relevant direct contractual relationship with the Respondent.
55. Secondly, the effect of eviction from the properties would be severe in relation to the various Defendants. The Second and Fourth Defendants, as single men, would not be eligible for accommodation under the homelessness provisions in Part VII of the Housing Act 1996 and, being unemployed, would have great difficulty in getting any other accommodation. The Third Defendant is disabled and has the care of an infant daughter. Presumably he would be in priority need under Part VII of the 1996 Act. The Fifth Defendant is said to be disabled, and also single, but it is said not to be certain whether he would be accommodated under Part VII of the 1996 Act.
56. Thirdly, reliance is placed on the Second and Fifth Defendants having been instrumental in obtaining funds for and carrying out works of refurbishment to the buildings on the land, which had been vandalised and left semi-derelict, and the Second and Fourth Defendants are said to have continued to carry out works of maintenance and improvement.

57. For reasons explained by Waller LJ, the trial judge did not consider any of these points, and made no findings as to the relevant facts. It is therefore necessary to approach the case on the footing that, if the facts were in dispute, the Defendants could prove the facts which they allege, though, on the findings of fact which the judge did make at trial, the allegation of consent or tolerance of the Council to the Appellants' occupation has to be understood in the sense which I have explained. The question is whether the Appellants have an arguable case for saying that, on these facts, the Respondent's decision to proceed for a possession order at the trial in late June 2008 was arbitrary, unreasonable or disproportionate, so that it was not a lawful decision, as a matter of public law. If so, then the case should be remitted so that the facts can be investigated as fully as may be necessary, disputes resolved by findings of fact, and a decision reached on the facts as found.
58. The seven members of the House of Lords in *Kay* disagreed as to the scope of the protection available in principle by virtue of Article 8, but all agreed, on the facts, that there was no prospect that the decision would go in favour of the Defendants at first instance, whichever principle were adopted. By contrast, the House of Lords in *Doherty* ordered that the case should be remitted for the necessary consideration at first instance. The facts of the present case are much closer to those of *Kay* than to those of *Doherty*.
59. In considering whether the circumstances of this case were such that, once the Council was aware of the nature of the circumstances of the occupiers, it ought to have refrained from seeking possession, at least for the time being, I find assistance, as Waller LJ does, in the words of Lord Bingham (in the minority in *Kay*) in paragraph 47 of his speech, where he explained why he would not remit the case for further investigation:
- “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.”
60. The premises at issue here are not, of course, part of the Council's housing stock, since it is not a housing authority, but they are part of its assets which it has a power and a duty to manage in the interests of ratepayers and council tax payers, and so as to enable it to perform the duties and functions which it does have. Equally, the fact that some of the Appellants are not people to whom a relevant housing authority would owe duties under Part VII of the Housing Act 1996 does not seem to me to put this Council under a higher duty towards them, as it were to make good the omission of Parliament to impose more extensive duties under that legislation.
61. The Appellants do not have any right to stay on the land and, by the time of the trial, they had been there for almost 2 years after the date as at which HAZ, on whom any rights they had had previously had depended, had been told to leave. It does not seem

to me that the Respondent could have been expected to do more, in order to respect the fact that parts of the property were the homes of the several Appellants, than to allow them some time which would give them a reasonable opportunity to make such alternative arrangements as might be open to them for their housing. I regard as unarguable any contention that the Respondent should have taken them on as tenants.

62. Given the period that had elapsed by the time of the trial since the original demand for possession in June 2006, it seems to me clear that the Respondent's decision to press for a possession order at the trial was a proper and valid public law decision. Such time as should, at best, have been allowed to the Defendants would have run from the effective date of the demand for possession from HAZ, in July 2006, and would have expired well before the trial in June 2008. That may not have been enough for the Defendants, even if they had been trying to find alternative accommodation during the whole of that period, given the difficulties they may face, but that would not entitle them to any further time. The Council cannot be obliged to allow them as long as they may turn out to need.
63. In those circumstances, I do not see that the decision to press for a possession order at trial could be regarded as one which no reasonable person would consider justifiable. There would be no point in remitting the case for further investigation of the facts. Those are the reasons for my conclusion that the appeal should be dismissed.

Lord Justice Richards :

64. I agree that the appeal should be dismissed for the reasons given. On the issue of remittal for further factual investigation, I have been persuaded in particular by Lloyd LJ's analysis of why, on the facts alleged by the Appellants, the Council's decision to press for a possession order could not be regarded as one which no reasonable person would consider justifiable.