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**Human Rights and Property Law.
Towards a New Jurisprudence?**

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Human Rights and Property Law: Towards a New Jurisprudence?¹

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Introduction²

1. The impact of the European Convention on Human Rights (“the Convention”) through the medium of the Human Rights Act 1998 (“the HRA”) on national concepts of property law has divided opinion, not least in the judiciary. This paper considers the impact of the Convention on established concepts of what some see as the exclusive preserve of private law and considers the basis for the recent majority views in *Kay & others v. Lambeth LBC* (jointly decided with *Leeds CC v. Price & others*)³. If attention were given solely to the opposing views in the national courts in *Kay* and *Price*, the question mark in the title to this paper would be well-deserved. From the Strasbourg perspective of cases such as *Connors v. UK*⁴, and *Blečić v. Croatia*⁵, one might be forgiven for wondering what the fuss was about.

2. To what extent to considerations under impinge on real property law and on the proceedings which might be brought to enforce ordinary property rights? The problem is encapsulated in two strongly contrasting views from *Harrow LBC v. Qazi*⁶:

“It would be surprising if the views of the majority on the interpretation and application of article 8 of the European Convention of Human Rights, as incorporated into our legal system by the Human Rights Act 1998, withstood European scrutiny. It is contrary to a purposive interpretation of article 8 read against the structure of the Convention. It is inconsistent with the general thrust of the decisions of the European Court of Human Rights, and of the commission ... It does not accord to individuals “the full measure of the [protection] referred to”: *Minister of Home Affairs v Fisher* [1980] AC 319, 328. On the contrary, it empties article 8(1) of any or virtually any meaningful content. The basic fallacy in the approach is that it allows domestic notions of title, legal and equitable rights, and interests, to colour the interpretation of article 8(1). The decision of today does not fit into the new landscape created by the Human Rights Act 1998.” (per Lord Steyn, §27)

“In no case has article 8 been applied so as to diminish or detract from the contractual and proprietary rights of the person entitled to possession... there is no case in which this conclusion has been reached by considering the degree of impact on the tenant's home life of the eviction. There is no case in which a balance has been struck between the tenant's interests and the landlord's rights. In every case the landlord's success has been automatic. And so it must be unless article 8 is to be allowed to diminish or detract from the landlord's contractual and proprietary rights ... It would deprive the council of its right under the ordinary law to immediate possession. It would constitute an amendment of the domestic social housing legislation. It would give article 8 an effect it was never intended to have and which it has never been given by the Strasbourg tribunals responsible for implementing the Convention. (*per* Lord Scott §§139, 146, 151)

3. Although Lord Scott modified his position slightly in *Kay*, the intervention of new Strasbourg authority in *Connors v. UK* and *Blečić v. Croatia*, did not cause the majority of the House of Lords to significantly modify the *Qazi* approach.

¹ I am grateful to Richard Moules of Landmark Chambers for his assistance with this paper.

² See also **Local Authorities & Human Rights**, ed. Drabble, Maurici & Buley, Chapter 9; **Unlawful Interference with Land**, Elvin & Karas (2nd ed.), pp. 121-139; **Human Rights Practice**, Simor & Emmerson eds, Chapter 15. See, further, **Property & The Human Rights Act 1998**, Tom Allen (2005) which does not deal with important recent developments such as *Beaulane*, *Pye* and *Kay*.

³ [2006] 2 W.L.R. 570. The Court of Appeal decisions are reported at *Price* [2005] 1 W.L.R. 1825 and *Kay* [2005] QB 352.

⁴ (2004) 40 EHRR 189.

⁵ (2004) 41 EHRR 185.

⁶ [2004] 1 A.C. 983

4. Real property law, at least so far as concerns public bodies is not immune from the influence of public law⁷ and human rights. *Connors* and *Blečić*⁸ provide clear examples of Strasbourg holding that a local authority landlord may not enforce its right to possession consistently with the Convention. It is, one might have thought, axiomatic in any event that the Convention is engaged in at least some respects where home and property are affected regardless of the outcome of any decision as to proportionality.
5. Issues arising in respect of the HRA are complex since the Convention binds the courts via s. 6(3), as well as bodies discharging a public function, and do not fall within the exclusive jurisdiction of the Administrative Court⁹. Human rights issues can arise concerning arguments as to termination of tenancies, or adverse possession, whether or not traditional judicial review (“JR”) grounds might have existed. Injunctions to restrain breaches of planning control, which concern with the use of private property though not directly the incidents of private property rights, do attract the application of the Convention¹⁰. Although the scope for the application of the Convention to property issues appears significantly narrowed by *Qazi*, and *Kay*, the Strasbourg decisions in *Connors*, *Blečić* and *J.A. Pye (Oxford) Ltd. v. UK*¹¹, it is unlikely that the arguments have been settled definitively. *Pye* has been referred to the Grand Chamber and it seems improbable that further consideration of the *Kay* issues can be avoided.

Relevant substantive Convention rights

6. In the context of real property issues the most likely applicable ECHR provisions are A8 and A1P1, although there are cases which may engage A6 or A14¹². *Ghaidan v. Godin-Mendoza*¹³ provides a good illustration of the combined effect of A8 and A14.

Article 8

7. A8 provides:

(1) *Everyone has the right to respect for his private and family life, his home and his correspondence.*

(2) *There shall be no interference by a public authority with the exercise of this right except as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

8. In approaching a case with A8 implications, a public authority should follow a five-stage

⁷ See Elvin & Karas, *op. cit.*, pp. 121-139 and cases such as *Cannock Chase DC v. Kelly* [1978] 1 W.L.R. 1, *West Glamorgan CC v. Rafferty* [1987] 1 W.L.R. 457, *R. v. London Borough of Brent ex p. McDonagh* (1989) 21 H.L.R. 494, *R. v. Avon CC ex p. Rexworthy* (1989) 21 H.L.R. 544, *R. v. Essex CC ex p. Curtis* [1991] C.O.D. 9 and *R. v. Lincolnshire CC ex p. Atkinson* [1997] J.P.L. 65. On injunctions see *Avon CC v. Buscott* [1988] 1 Q.B. 656. In respect of planning injunctions, which do engage A8 and A1P1 in the exercise of the court's own primary jurisdiction see *South Bucks DC v. Porter* [2003] 2 A.C. 558.

⁸ Above.

⁹ See e.g. CPR Part 16 PD §15.

¹⁰ *South Bucks DC v. Porter* [2003] 2 A.C. 558.

¹¹ [2005] 3 E.G.L.R. 1.

¹² See e.g. *Sheffield City Council v. Smart* [2002] L.G.R. 467, *R (Smith) v. Barking & Dagenham LBC* [2002] EWHC 2400, *Somerset v. Isaacs* [2002] EWHC 1014 (Admin) and *Newham LBC v. Kibata* [2003] EWCA Civ 1785.

¹³ [2004] 2 A.C. 557.

approach to the issues¹⁴:

- (1) the identification of any A8 rights which may be engaged (e.g. respect for the home, family and private life)
 - (2) whether there been an interference with those A8(1) rights
 - (3) whether such an interference was “in accordance with the law”
 - (4) whether that interference had a legitimate aim or aims (i.e. one of those listed in A8(2))
 - (5) whether that interference was “necessary in a democratic society” i.e. proportionate.
9. “Home” has an autonomous meaning under the Convention¹⁵ and is not restricted to domestic premises but turns on the degree of connection between the premises and the private life of the claimant. See e.g. *Niemietz v. Germany*¹⁶, where a lawyer’s office was considered to be his “home” given its wide meaning and the close connection of the office with his private life¹⁷. Further, a “home” may be held to exist even where it comprises premises occupied unlawfully¹⁸ or unlawfully constructed¹⁹.
10. If A8 is engaged, a public authority seeking possession may have to consider whether its aim in seeking possession is legitimate and whether that aim is proportionate to the impact on the home, family and private life of the occupiers against whom action is contemplated.

A8(2) - Proportionality

Connors

11. In *Connors v. UK* the ECtHR held that A8 had been violated by the making of an order for possession against a gypsy family. Although the gypsy status of the claimant give rise to factors which weighed heavily in the A8(2) proportionality balance, the case was not decided on a combined A8/A14 basis but simply in A8 terms. This is a clear indication that the Court did not consider it was applying principles specific to avoid discrimination but merely general principles.²⁰ It may not mean that the proportionality exercise is weighed so heavily as in *Connors* in all cases, since it is a fact sensitive determination, but it is plain that the Court required that it be applied.
12. As the ECtHR noted [§§68-70] it was common ground that A8 was engaged, that the measures taken were in accordance with the law and pursued a legitimate aim. The only issue outstanding was that of proportionality. Although, as the CA noted in *Price* [§25], the concession as to the engagement of A8 in principle was in any event reflective of the Strasbourg view this is an analysis which did not receive the support of the majority of the House of Lords in *Price*.

¹⁴ See A8 cases such as *Buckley v. UK* (1996) 23 E.H.R.R. 101 and *Chapman v. UK* (2001) 10 B.H.R.C. 48. This approach was discussed by Baroness Hale in *Campbell v. MGN Ltd* [2004] 2 A.C. 457 at §139.

¹⁵ See *Sheffield City Council v. Smart* [2002] L.G.R. 467, §§25 & 26 and *Qazi*, §§8-10, 61-68, 70 & 95-99.

¹⁶ (1992) 16 E.H.R.R. 97.

¹⁷ See §30 “... [I]t may not always be possible to draw precise distinctions, since activities which are related to a profession or business may well be conducted from a person’s private residence and activities which are not so related may well be carried on in an office or commercial premises. A narrow interpretation of the words “home” and “domicile” could therefore give rise to the same risk of inequality of treatment as a narrow interpretation of the notion of “private life”...”

¹⁸ *Buckley v. UK* (1996) 23 E.H.R.R. 101 and *Sheffield v. Smart* [2002] L.G.R. 467.

¹⁹ *Öneryıldız v. Turkey* (2004) 39 E.H.R.R. 23.

²⁰ Cf Baroness Hale at § 184 in *Kay*, referring to *Connors*: “This discrimination could not be justified”.

13. *Connors* repays detailed consideration in the light of the divergence of views in *Kay*. The ECtHR (applying previous Strasbourg authority) drew a distinction between cases where social or economic policies were involved (e.g. planning) and those where the individual's intimate or key rights were more closely involved:

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

82. In this regard, a margin of appreciation must, inevitably, be left to the national authorities, who by reason of their direct and continuous contact with the vital forces of their countries are in principle better placed than an international court to evaluate local needs and conditions. This margin will vary according to the nature of the Convention right in issue, its importance for the individual and the nature of the activities restricted, as well as the nature of the aim pursued by the restrictions. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights (see, for example, *Dudgeon v. the United Kingdom*... §52; *Gillow v. the United Kingdom* ... §55). On the other hand, in spheres involving the application of social or economic policies, there is authority that the margin of appreciation is wide, as in the planning context where the Court has found that "[i]n so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation (*Buckley v. the United Kingdom*... § 75 *in fine*). The Court has also stated that in spheres such as housing, which play a central role in the welfare and economic policies of modern societies, it will respect the legislature's judgment as to what is in the general interest unless that judgment is manifestly without reasonable foundation (see *Mellacher and Others v. Austria* ... §45, *Immobiliare Saffi v. Italy* ... §49). It may be noted however that this was in the context of Article 1 of Protocol No. 1, not Article 8 which concerns rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community (see, *mutatis mutandis*, *Gillow v. the United Kingdom*, ... § 55; *Pretty v. the United Kingdom*...; *Christine Goodwin v. the United Kingdom* ... §90...). Where general social and economic policy considerations have arisen in the context of Article 8 itself, the scope of the margin of appreciation depends on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant ...

83. The procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, the Court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8 (see *Buckley* ... § 76, *Chapman v. the United Kingdom* ... §92)."

14. The vulnerable circumstances of the applicant, as a gypsy, led the Court to consider that -

"special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases..."

15. The Court found that there was no doubt as to the seriousness of the outcome for the applicant, given that his family had lived on the land for about 14 years, there were no readily identifiable alternative sites, together with health problems and the need to secure children's education²¹. Allegations of misconduct against the applicant and his family had not been investigated in the county court and therefore [§85]:

"The central issue in this case is therefore whether, in the circumstances, the legal framework applicable to the occupation of pitches on local authority gypsy sites provided the applicant with sufficient procedural protection of his rights."

16. The crux of the case was the fact that, unlike planning cases²², where gypsies could not

²¹ These problems are unfortunately only too familiar for many gypsies occupying sites unlawfully.

²² E.g. *Chapman v. UK* (2001) 33 E.H.R.R. 18.

seek better treatment than others, in the present case they had lawfully occupied the land for many years but had little or no procedural protections against eviction [§86]:

“The serious interference with the applicant’s rights under Article 8 requires, in the Court’s opinion, particularly weighty reasons of public interest by way of justification and the margin of appreciation to be afforded to the national authorities must be regarded as correspondingly narrowed. The Court would also observe that this case is not concerned with matters of general planning or economic policy but with the much narrower issue of the policy of procedural protection for a particular category of persons. ... In the present case, the applicant was lawfully on the site and claims that the procedural guarantees available to other mobile home sites, including privately run gypsy sites, and to local authority housing, should equally apply to the occupation of that site by himself and his family.”

17. Moreover:

(1) The Court rejected the UK’s arguments that the power to evict summarily was “a vital management tool in coping with anti-social behaviour as without speedily removing troublemakers the other gypsy families would tend to abandon the site” and that the “additional costs of court procedures could increase the fees applicable to gypsy sites and thus act to the overall detriment of the gypsy population as a whole” [§87]. It noted that local authorities rarely used summary eviction to control anti-social behaviour that [§89]:

“... The mere fact that anti-social behaviour occurs on local authority gypsy sites cannot, in itself, justify a summary power of eviction, since such problems also occur on local authority housing estates and other mobile home sites and in those cases the authorities make use of a different range of powers and may only proceed to evict subject to independent court review of the justification for the measure.”

(2) With regard to the absence of security of tenure, the Court found that

“... security of tenure protection covers privately run gypsy sites to which the same considerations would appear also to apply. Consequently the Court is not persuaded there is any particular feature about local authority gypsy sites which would render their management unworkable if they were required to establish reasons for evicting long-standing occupants”.

(3) The Court took note of the absence of benefit to the gypsy community through any duty to provide sites (since the repeal of the duty in the Caravan Sites Act 1968 in 1984). The ECtHR were referred to *Sheffield v. Smart, Isaacs and Barking & Dagenham* but not to *Qazi*, though the hearing (24.1.04) post-dated the HL’s judgment by 6 months. The Court did not consider the review by the domestic courts a basis for finding compliance [§91]:

“The Court would observe that the domestic courts stopped short of finding any breach of the provisions of the Convention, having regard inter alia to the perceived existence of safeguards that diminished the impact on the individual gypsy’s rights and to a judicial reluctance to trespass on the legislative function in seeking to resolve the complex issues to which no straightforward answer was possible. The domestic courts’ position cannot therefore be analysed as providing strong support for the justification of continuing the current regime.”

(4) The Court considered the crucial absence of procedural safeguards [§§92-95] and rejected the contention that JR was a sufficient protection:

“Nonetheless, the local authority was not required to establish any substantive justification for evicting him and on this point judicial review could not provide any opportunity for an examination of the facts in dispute between the parties.”

(5) The Court considered there was a lack of the adequacy of JR in all cases [§92]:

“... the Government drew the Court’s attention to the Court of Appeal’s decision in *Smart*, where it was held that to entitle persons housed under homelessness provisions, without security of tenure, to have a court decide on the facts of their cases as to the proportionality of their evictions would convert their occupation into a form of secure tenure and in effect undermine the statutory scheme ... While therefore the existence of judicial review may provide a valuable safeguard against abuse or oppressive conduct by local authorities in some areas, the Court does not consider that it can be regarded as assisting the applicant, or other gypsies, in circumstances where the local authority terminates licences in accordance with the applicable law.”

18. The Court concluded:

“94. However, even allowing for the margin of appreciation which is to be afforded to the State in such circumstances, the Court is not persuaded that the necessity for a statutory scheme which permitted the summary eviction of the applicant and his family has been sufficiently demonstrated by the Government. The power to evict without the burden of giving reasons liable to be examined as to their merits by an independent tribunal has not been convincingly shown to respond to any specific goal or to provide any specific benefit to members of the gypsy community. ... It would rather appear that the situation in England as it has developed, for which the authorities must take some responsibility, places considerable obstacles in the way of gypsies pursuing an actively nomadic lifestyle while at the same time excluding from procedural protection those who decide to take up a more settled lifestyle.

95. In conclusion, the Court finds that the eviction of the applicant and his family from the local authority site was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with his rights and consequently cannot be regarded as justified by a “pressing social need” or proportionate to the legitimate aim being pursued. There has, accordingly, been a violation of Article 8 of the Convention.”

19. The importance of the decision lies in the fact that it was based on A8 principles and on considerations of proportionality under A8(2). Whilst it may rightly be pointed out that the case involved special considerations attaching to the eviction of gypsies, this was a factor which went to the weight to be attached to the individual’s circumstances in the proportionality exercise, not to any issue of principle.

20. It is plain from *Connors* that neither the availability of JR of the decision nor the status of existing property rights prevented the violation of A8. This logically leaves it open to others to argue that their circumstances are such that the A8(2) exercise should be exercised in their favour and against eviction, or immediate eviction. However, such an approach of recognising the engagement of A8 and the need to carry out the proportionality exercise has been rejected by the House of Lords. The majority of the House of Lords in *Qazi* and *Kay* seek to deny such arguments by effectively deeming compliance with A8(2) in a manner which is highly questionable in the light of *Connors*.

Blečić

21. In *Blečić v. Croatia* the issue was simply whether Ms Blečić had lost her right under the national legislation to security of tenure of her flat in Zadar because of a long absence in Rome, as a result of the armed conflict in Dalmatia, and then because of the lack of resources to return caused by the state’s removal of benefits. Following a series of hearings and appeals, and finally a reference to the Constitutional Court, Ms Blečić’s claim to recover her flat was rejected.

22. The ECtHR, whilst holding that A8 had been engaged, and that there had been an interference with Ms Blečić’s home, there was no violation since the application of the national law to her case was proportionate having regard to the margin of appreciation

which states are given in matters of socio-economic impact and housing²³. The Court held that:

“66. In the light of the foregoing, the Court is satisfied that the contested decisions were based on reasons which were not only relevant but also sufficient for the purposes of paragraph 2 of Article 8. It cannot be argued that the Croatian courts’ decisions were arbitrary or unreasonable, or that the solution they reached in seeking a fair balance between the demands of the general interest of the community and the requirement of protecting the applicant’s right to respect for her home was manifestly disproportionate to the legitimate aim pursued. The Court considers that, when terminating the applicant’s specially protected tenancy, the national authorities acted within the margin of appreciation afforded to them in such matters.

67. Turning to the applicant’s and the third party’s suggestion ... that the national authorities imposed an excessive burden on the applicant when terminating her tenancy right, rather than merely allocating the flat temporarily to another person, the Court finds that this suggestion amounts to reading a test of strict necessity into Article 8, an interpretation which the Court does not find warranted in the circumstances. The availability of alternative solutions does not in itself render the termination of a tenancy unjustified; it constitutes one factor, among others, that is relevant for determining whether the means chosen may be regarded as reasonable and suited to achieving the legitimate aim being pursued. Provided the interference remained within these bounds –which, in view of its above considerations (see paragraph 66 above), the Court is satisfied that it did – it is not for the Court to say whether the measure complained of represented the best solution for dealing with the problem or whether the State’s discretion should have been exercised in another way (see, mutatis mutandis, *James and Others v. the United Kingdom* ... §51).”

23. The Court also held that

“... whilst Article 8 of the Convention contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Article 8...”

However, it found that the written appellate procedure met this requirement.

24. Although there was no violation, it appears clear from the judgment that the Court considered the issues and the application of the relevant national legislation to the facts of the case under A8(2). This was not a case based on special circumstances, or gipsy issues, but that of a tenant of a residential flat, let by a municipal authority, losing her right to occupy²⁴.

Article 1 of the First Protocol (“A1P1”)

25. A1P1 provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided by the law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such law as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

26. According to Strasbourg jurisprudence, this article comprises 3 distinct strands²⁵:

- A general rule embodying “the principle of peaceful enjoyment of property”
- The deprivation of possessions is made subject to a number of conditions

²³ §§60-65. Contrast the outcome in *Gillow v. UK* (1986) 11 EHRR 335 which was equally a decision where the ECtHR applied A8(2) to individual circumstances in relation to the entitlement to occupy property.

²⁴ See §§37 and 40: the arguments have clear parallels with arguments in the UK courts regarding the occupation of premises under statutory schemes creating security of tenure.

²⁵ *Spörrong & Lonroth v. Sweden* (1982) 5 E.H.R.R. 35 and *James v. UK* (1986) 8 E.H.R.R. 123.

- Rules (1) and (2) should not in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

“Possessions”

27. The law of real property is concerned with rights in or over land and the processes whereby those rights and interests are created and transferred. By contrast, A1P1, has a broader focus. The concept of “possessions” is an autonomous concept under the Convention and is much wider than the equivalent real or personal property concepts under the common law and is more akin to a wide concept of economically valuable assets. In *Aston Cantlow PCC & Others v. Wallbank*²⁶, Lord Hobhouse held that “possessions” applies to all forms of property and is the equivalent of “assets”. In *Wilson v First County Trust Ltd (No 2)*²⁷ Lord Nicholls held that “possessions” is apt to embrace contractual rights as much as personal rights.
28. The width of the concept can be seen from the cases where “possessions” were established, e.g. *S v. United Kingdom*²⁸ (restrictive covenants), *Könkämä & Others v. Sweden*²⁹ and *Trevor Adams v. (1) A-G for Scotland (2) Scottish Ministers*³⁰ (sporting rights), *Tre Traktörer v. Sweden*³¹ (liquor licence), *Gudmunsson v. Iceland*³² (taxi licence) *Posti & Rahko v. Finland*³³ (right under a lease granted by the state to fish in state-owned waters), *Crompton v. Department of Transport*³⁴ (road haulage operator’s licence) and *Pine Valley Developments v. Ireland*³⁵ (legitimate expectations as to property). In *R v. Secretary of State for the Environment, ex parte Spath Home Ltd*³⁶ Lord Bingham acknowledged that the right to receive a fair rent was also a “possession”.
29. On the other hand, see:
- *Phillips v DPP*³⁷ (regulations prohibiting the use of vehicles in London parks not a material interference with the enjoyment of the claimant’s private hire vehicle, or the business he conducted with it)
 - *R.(Amvac Chemical UK (Ltd) v Secretary of State for the Environment*³⁸ (a qualified regulatory approval under the Control of Pesticides Regulations 1986 not a “possession” because suspension of the approval had no direct economic impact on the claimant)
 - *R v. Wirral MBC, ex p Royden*³⁹ (removal of restriction on number of licensed taxis not an interference with A1P1 rights as the “property” in the licence inherently subject to

²⁶ [2004] 1 A.C. 546, §91.

²⁷ [2004] 1 A.C. 816, §39.

²⁸ (1985) 41 DR 226.

²⁹ (1996) 87-A DR 78.

³⁰ 2003 S.C. 171.

³¹ (1989) 13 E.H.R.R. 309.

³² (1996) 21 EHRR C.D. 42.

³³ (2003) 37 E.H.R.R. 6.

³⁴ [2003] R.T.R. 517, §19.

³⁵ (1991) 14 EHRR 319.

³⁶ [2001] 2 A.C. 349, §66.

³⁷ [2003] R.T.R. 8.

³⁸ [2001] EWHC Admin 1011 [2002] A.C.D. 219, at §98.

³⁹ [2003] L.G.R. 290.

the possibility of deregulation)

- *International Ferry Traders Ltd v Adur DC*⁴⁰ where, at §37, Pill LJ doubted whether all contractual licences constitute “possessions” (though this need careful consideration in the light of Strasbourg authority listed above).

Public law legitimate expectations as a “possession”

30. The public law concept of a legitimate expectation⁴¹ can also amount to a “possession” within A1P1: *Pine Valley Developments v Ireland*⁴² and *Rowland v Environment Agency*⁴³. The terms of the expectation will depend on the facts as will the ability of the public body generating the expectation to resile from it.
31. In *Dangeville v France*⁴⁴, the applicant company was held to have a legitimate expectation of being able to recover overpaid VAT based on an EC directive which, in breach of EC law, had not been implemented by France.
32. In *Stretch v UK*⁴⁵ the applicant had been deprived of the benefit of an option to renew a lease that had been granted *ultra vires* by a local authority. He was held to have a legitimate expectation of exercising the option which, for the purposes of A1P1, attached to his property rights under the lease.⁴⁶
33. In *Kopecký v Slovakia*⁴⁷ the Grand Chamber held that a requirement imposed on the applicant to show where expropriated coins had been kept did not impose an excessive burden on him. The Court held that A1P1 does not fetter states’ freedom to determine the conditions under which they agree to restore property to former owners and that where categories of owners are so excluded, their claims for restitution cannot provide the basis for a legitimate expectation. The Court reviewed its case law on legitimate expectations and concluded [§52]:

“52. ... it can be concluded that the Court’s case-law does not contemplate the existence of a “genuine dispute” or an “arguable claim” as a criterion for determining whether there is a “legitimate expectation” protected by Article 1 of Protocol No. 1. The Court is therefore unable to follow the reasoning of the Chamber’s majority on this point. On the contrary, the Court takes the view that where the proprietary interest is in the nature of a claim it may be regarded as an “asset” only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it.”

Deprivation or control?

34. The distinction between “deprivation” and “control” is important⁴⁸ since “deprivations” are considered more serious and almost always require compensation: see e.g. *Stran Greek*

⁴⁰ [2004] 2 E.G.L.R. 9.

⁴¹ See e.g. *R v. North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213 and *R v. Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115.

⁴² (1991) 14 EHHR 319.

⁴³ [2005] Ch. 1.

⁴⁴ (2004) 38 E.H.R.R. 32.

⁴⁵ (2004) 38 E.H.R.R. 12, especially paras. 32-35.

⁴⁶ Interestingly, in the subsequent case of *Kopecký v Slovakia*, the ECtHR (§ 47) analysed *Stretch* in rather different terms: “...the persons concerned were entitled to rely on the fact that the legal act on the basis of which they had incurred financial obligations would not be retrospectively invalidated to their detriment”.

⁴⁷ App. No. 44912/98 (28.9.04).

⁴⁸ See *Allen*, *op. cit.*, Chapters 7 and 9.

*Refineries & Stratis Andreadis v. Greece*⁴⁹ and *Former King of Greece & Others v. Greece*⁵⁰. Some forms of control may be so severe that they amount to *de facto* deprivation and the Strasbourg authorities require that the substance of the effect of the legislation be examined: see *Spörrong* at §63 and *Papamichalopoulos v. Greece*⁵¹. The loss of title by adverse possession is a deprivation, not a control: *J.A. Pye (Oxford) Ltd. v. UK*⁵². However, in *Oxfordshire County Council v. Oxford City Council*⁵³, Lord Hoffmann distinguished *Pye* and held that in the context of village greens the system of prescription by which land may after 20 years' user become subject to recreational rights was not a deprivation because the land owner "retains his title to the land and his right to use it in any way which does not prevent its use by the inhabitants for recreation" [§59].

35. That approach is consistent with *Tre Traktörer v. Sweden*⁵⁴, where the ECtHR held that the withdrawal of a liquor licence and the subsequent loss of business did not constitute a "deprivation", since the underlying leasehold and physical assets of the business remained - a view restated by the ECtHR in *Fredin v. Sweden*⁵⁵.

36. Note the distinction drawn by Lord Hope in *Wilson v. First County Trust (No. 2)*⁵⁶ [§106]:

"Here too it is a matter for domestic law to define the nature and extent of any rights which a party acquires from time to time as a result of the transactions which he or she enters into. One must, of course, distinguish carefully between cases where the effect of the relevant law is to deprive a person of something that he already owns and those where its effect is to subject his right from the outset to the reservation or qualification which is now being enforced against him. The making of a compulsory order or an order for the division of property on divorce are examples of the former category. In those cases it is the making of the order, not the existence of the law under which the order is made, that interrupts the peaceful enjoyment by the owner of his property. The fact that the relevant law was already in force when the right of property was acquired is immaterial, if it did not have the effect of qualifying the right from the moment when it was acquired."

37. Where the measure under consideration creates a control which does not amount to *de facto* deprivation of property, the approach in *Jacobsson v. Sweden*⁵⁷ [§55] applies:

"Under the second paragraph of article 1 of Protocol No 1, the contracting states are entitled, amongst other things, to control the use of property in accordance with the general interest by enforcing such laws as they deem necessary for the purpose. However, as this provision is to be construed in the light of the general principle enunciated in the first sentence of the first paragraph, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. In striking the fair balance thereby required between the general interest of the community and the requirements of the protection of the individual's fundamental rights, the authorities enjoy a wide margin of appreciation."

38. In *Banér v. Sweden*⁵⁸ the Commission noted the distinction between control and expropriation which was a common feature throughout convention states [§5]:

"Legislation of a general character affecting and redefining the rights of property owners cannot normally be assimilated to expropriation even if some aspect of the property right is thereby interfered with or even taken away. There are many examples in the Contracting States that the

⁴⁹ (1994) 19 EHRR 293.

⁵⁰ (2000) 33 EHRR 21.

⁵¹ (1993) 16 EHRR 440.

⁵² [2005] 3 E.G.L.R. 1, due for consideration by the Grand Chamber later in 2006.

⁵³ [2006] 2 W.L.R. 1235.

⁵⁴ (1989) 13 E.H.R.R. 309. See also *R (Royden) v. Metropolitan Borough of Wirral* [2003] L.G.R. 290, below.

⁵⁵ [1991] 13 E.H.R.R. 784.

⁵⁶ [2004] 1 A.C. 816.

⁵⁷ (1989) 12 EHRR 56.

⁵⁸ (1989) 60 DR 128.

right to property is redefined as a result of legislative acts. Indeed, the wording of Article 1 §2 (Art. 1-2) shows that general rules regulating the use of property are not to be considered as expropriation. The Commission finds support for this view in the national laws of many countries which make a clear distinction between, on the one hand, general legislation redefining the content of the property right and expropriation, on the other.”

39. The ECtHR tends to classify measures as “controls”, even where they might be considered to be *de facto* deprivations, where they take place within the context of a wider legislative scheme in the general interest: see e.g. *AGIOSI v. UK*⁵⁹ and *Bosphorus Airways v. Ireland*⁶⁰. Note the Commission’s observation in *Fredin v. Sweden*⁶¹ (revocation of a licence to abstract gravel) [§53]:

“The Commission notes that the aim of the relevant provision in the Nature Conservation Act, laying down the conditions for gravel exploitation, is to control this use of property with a view to protecting the environment. The withdrawal of the exploitation permit pursued this aim. This suggests that the present case concerns a measure of control of the use of property.”

40. In *R (Royden) v. Metropolitan Borough of Wirral*⁶², Wirral MBC’s decision to remove an established restriction on the number of licensed taxis in its area was challenged by an existing licence-holder. The claimant contended that the abolition of the restriction constituted an interference with his right to the peaceful enjoyment of his possessions, because “the inevitable result of that decision was to eliminate the premium value of the licence – what the claimant calls ‘the scarcity value’ ” [§81]. Sir Christopher Bellamy QC, sitting as a Deputy High Court, held (by analogy with *Tre Traktörer*) that the effect of the restriction on the number of taxi licences on the claimant’s pre-existing licence could not be classified as a “deprivation” under Rule (2) of A1P1 since the assets of the business remained [§126]. The Deputy Judge then held that the claimant had not been subjected to a “control on the use of property” under Rule (3) of A1P1. The case was distinguishable from *Tre Traktörer* and *Fredin*, in which the withdrawal of licences was held to fall under this rule, because [§127]:

“In the present case the decision of 18 March 2002 allows others, in effect to apply for licences, without imposing or attempting any “control” over Mr Royden’s property. It would seem to me very difficult, even perverse, to say that a measure which was precisely designed to *de-control* the use of property (i.e. hackney carriage vehicles in the Wirral) should be classified as a measure of *control* for the purposes of Article 1 of the First Protocol.”

Fair balance & compensation

41. As with A8, above, interference with possessions is subject to the question of proportionality⁶³ (also referred to as “fair balance”)⁶⁴:

“The Court must determine whether a fair balance has been struck between the demands of the general interests of the community and the requirements of the protection of the individual’s fundamental rights...”

42. In *Jahn v. Germany*⁶⁵ the Grand Chamber recapitulated established principle as follows:

“93.The Court reiterates that an interference with the peaceful enjoyment of possessions must strike a “fair balance” between the demands of the general interest of the community and the

⁵⁹ (1986) 9 EHRR 1.

⁶⁰ App. 45036/98 (30.6.05).

⁶¹ (1991) 13 EHRR 153.

⁶² [2003] L.G.R. 290.

⁶³ In the context of the compulsory purchase of property see ODPM Circular 06/04 §§17-19.

⁶⁴ See *Spörrong*.

⁶⁵ App nos. 46720/99, 72203/01 and 72552/01 (30.6.05).

requirements of the protection of the individual's fundamental rights ... The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole, including therefore the second sentence, which is to be read in the light of the general principle enunciated in the first sentence. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions ...

In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question ... Nevertheless, the Court cannot abdicate its power of review and must determine whether the requisite balance was maintained in a manner consonant with the applicants' right to "the peaceful enjoyment of [their] possessions", within the meaning of the first sentence of Article 1 of Protocol No. 1..."

43. The right to compensation is not expressly part of A1P1. The former Commission held that "the Convention does not provide for an automatic right to compensation for the consequences of legislation": *Pinnacle Meat Processors v. UK*⁶⁶ and *Banér v. Sweden*⁶⁷. However, the existence of compensation is a factor in striking the "fair balance" between public interest and private rights, and may be significant depending on the nature and extent of the control: see, e.g., *Holy Monasteries v. Greece*⁶⁸ and *Banér v. Sweden* (above). The requisite fair balance will not be struck if the person concerned has had to bear an "individual and excessive burden": *J.A. Pye (Oxford) Ltd. v. UK*⁶⁹.
44. In *Banér*, at §6 the Commission rejected a claim that the grant of public fishing rights over private land was not a violation of A1P1 (emphasis added):

"It follows from the case-law of the Convention organs that as regards deprivation of possessions there is normally an inherent right to compensation ... However, in the Commission's view such a right to compensation is not inherent in the second paragraph. The legislation regulating the use of property sets the framework in which the property may be used and does not, as a rule, contain any right to compensation. This general distinction between expropriation and regulation of use is known in many, if not all, Convention countries.

This does not exclude that the law may provide for compensation in cases where a regulation of use may have severe economic consequences to the detriment of the property owner. The Commission is not required to establish in the abstract under which circumstances Article 1 (Art. 1) may require that compensation be paid in such cases. When assessing the proportionality of the regulation in question it will be of relevance whether compensation is available and to what extent a concrete economic loss was caused by the legislation..... The Commission further recalls that the interference with the applicant's property right was limited to one form of fishing in his waters, namely fishing with hand-held tackle. The applicant had not before the reform derived any income from such fishing. He cannot, therefore, claim any direct loss of income from the reform. As to the allegation that the value of his property was reduced, the Commission notes that the legislation affected many fishing properties all over Sweden and it is not easy to see how a specific and concrete reduction in value could result from this general legislation. Even assuming that some theoretical loss in value could be established, the Commission cannot find that such a loss caused by general legislation must necessarily be compensated on the basis of Article 1 of Protocol No. 1..."

45. The Commission's view in these cases appears to be in accord with the approach of the Court. In *James v. UK*⁷⁰ (in the context of the deprivation of property) the ECtHR held at §54:

"Like the Commission, the Court observes that under the legal systems of the Contracting States, the taking of property in the public interest without payment of compensation is treated as

⁶⁶ App 33298/96.

⁶⁷ (1989) 60 DR 128.

⁶⁸ (1994) 20 EHRR 1.

⁶⁹ [2005] 3 E.G.L.R. 1, §§46-47, 75.

⁷⁰ (1986) 8 EHRR 123, concerning the Duke of Westminster's challenge to the Leasehold Reform Act 1967.

justifiable only in exceptional circumstances not relevant for present purposes.

As far as Article 1 is concerned, the protection of the right of property it affords would be largely illusory and ineffective in the absence of any equivalent principle. Clearly, compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicants (see the above-mentioned *Sporrong and Lönnroth* judgment . . . paras 69 and 73).

The Court further accepts the Commission's conclusion as to the standard of compensation: the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1. Article 1 does not, however, guarantee a right to full compensation in all circumstances. Legitimate objectives of 'public interest', such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value. Furthermore, the Court's power of review is limited to ascertaining whether the choice of compensation terms falls outside the State's wide margin of appreciation in this domain (see §46 above)."

The more extreme the interference, the more important the availability of compensation is likely to be. In deprivation cases, compensation is generally required: *Former King of Greece & Others v. Greece*⁷¹ and *J.A. Pye (Oxford) Ltd. v. UK*.

46. There remain exceptional cases where compensation may not be required, such as "the unique context of German reunification": see *Jahn v. Germany*⁷². However, the ECtHR restated the general principle [§94]:

"94. Compensation terms under the relevant legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the applicants. In this connection, the Court has already found that the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 of Protocol No.1 only in exceptional circumstances..."

47. The basis, or precise calculation, of compensation appears unlikely to involve A1P1 provided that it is broadly fair: see *Lithgow v. UK*⁷³.

48. The CA considered the issue of A1P1 and compensation in *R (Trailer and Marina (Leven) Ltd) v. Secretary of State for the Environment, Food & Rural Affairs*⁷⁴. The Court examined the UK and Strasbourg authorities and concluded [§§57, 58]:

"57. We have been referred to no case where the European Court of Human Rights has found that the absence of a provision in the relevant legislation for compensation has resulted in a control of use, as opposed to an expropriation, infringing article 1 of the First Protocol. However, in *S v. France* (1990) 65 DR 250, the commission appears to have concluded that, where substantial compensation was payable in a control of use case (involving substantial interference with the applicant's enjoyment of her property) there was no infringement of article 1 of the First Protocol. None of this comes close to a doctrine that there can be no control of use without compensation.

58. The right analysis seems to us to be that provided the state could properly take the view that the benefit to the community outweighs the detriment to the individual, a fair balance will be struck, without any requirement to compensate the individual. Should this not be the case, compensation in some appropriate form may serve to redress the balance, so that no breach of article 1 of the First Protocol occurs."

49. In assessing whether a control on the use of property satisfies the 'fair balance' test in the absence of compensation, the key factors are:

⁷¹ (2000) 33 EHRR 21.

⁷² App nos. 46720/99, 72203/01 and 72552/01 (30.6.05), §§116-117, 125.

⁷³ (1986) 8 EHRR 329 at §§120-122.

⁷⁴ [2005] 1 W.L.R. 1267 at §§41-58 (Neuberger L.J., giving the judgment of the Court).

- (1) The nature of the interference. If the extent of the control amounts to *de facto* deprivation, then compensation may be required;
 - (2) The public interest in the interference;
 - (3) The extent and weight of that public interest; and
 - (4) The extent of damage to the applicant, in particular whether the impact on owners of rights is an “individual and excessive burden” and, hence, disproportionate.
50. However, in considering these issues the state is accorded a wide margin of appreciation and the role of the court is primarily one of reviewing the legislation: see *Mellacher v. Austria*⁷⁵.

UK authority

51. Given that in *Kay* a seven-judge House of Lords only produced a bare majority to uphold *Qazi I* have set out at some length the discussion in the domestic cases concerning the application of A8 to possession proceedings. It seems almost inevitable that Strasbourg will be called on to deal expressly with this particular issue and it would be unwise to treat *Kay* as the last word on the subject, particularly in the light of the majority’s approach to the Strasbourg authorities.

How wide is the application of the HRA?

52. S. 3 HRA requires that, where possible, legislation be read down so that it is compatible with Convention rights:

“3. Interpretation of legislation

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section applies to primary legislation and subordinate legislation whenever enacted; does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.”

53. Although the Courts have generally made it clear that the duty under s. 3 should not pass the barrier between interpretation and amendment⁷⁶, the line is not a clear one and the approach in *Ghaidan v. Godin-Mendoza*⁷⁷ was one which did require departure from the otherwise unambiguous meaning of the Rent Act 1977. It is clear that the line is one which is demarcated not by the legislative language used but by the more nebulous “grain of the legislation”. Lord Nicholls held:

29. ... It is now generally accepted that the application of section 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may none the less require the legislation to be given a different meaning...

⁷⁵ (1989) 12 E.H.R.R. 391, §53, applied in *Trailer & Marina* at §§54-55.

⁷⁶ See e.g. *R. v. DPP, ex parte Kebilene* [2000] 2 A.C. 326; *Poplar Housing & Regeneration Community Association Ltd v Donoghue* [2002] Q.B. 48, *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291, 313-314, §41, *R. (Anderson) v. Secretary of State for the Home Department* [2003] 1 A.C. at §§59, 81 (*per* Lord Steyn “Section 3(1) is not available where the suggested interpretation is contrary to express statutory words or is by implication necessarily contradicted by the statute”) and *Wilson v. First County Trust (No. 2)* [2004] 1 A.C. 816.

⁷⁷ [2004] 2 A.C. 557.

30. From this it follows that the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3.
31. On this the first point to be considered is how far, when enacting section 3, Parliament intended that the actual language of a statute, as distinct from the concept expressed in that language, should be determinative. Since section 3 relates to the "interpretation" of legislation, it is natural to focus attention initially on the language used in the legislative provision being considered. But once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of section 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, section 3 would be available to achieve Convention-compliance. If he chose a different form of words, section 3 would be impotent.
32. From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is "possible", a court can modify the meaning, and hence the effect, of primary and secondary legislation.
33. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, "go with the grain of the legislation". Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation."
54. Where public bodies are involved, the application of the HRA and the Convention (at least in principle) is generally uncontroversial. There are difficult and as yet unresolved issues with regard to the wide application of the Convention where a public body is not concerned in the issue but the Court is obliged to observe Convention Rights as a result of s. 6(3) of the HRA which provides that a court is a "public authority" to which s. 6(1) applies, namely
- “(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.”
55. This is a difficult issue which largely falls outside the scope of this paper, so I shall merely outline the arguments. As Lord Nicholls remarked in *Wilson v. First County Trust Ltd (No 2)*⁷⁸ [§25]:
- “As is well known, the application of section 6(1) to judicial decisions on matters of substantive law is a highly controversial topic. It is not necessary to venture onto this quicksand in the present case.”
56. The essential question is whether the duty imposed by s. 6 of the HRA require the Courts to apply Convention principles notwithstanding the lack of "public" content in the dispute e.g. in

⁷⁸ [2004] 1 A.C. 816.

a private dispute over the entitlement to possession of real property (“horizontal effect”)⁷⁹. *Ghaidan v. Godin-Mendoza*⁸⁰ shows that the application of the Convention by the Courts to legislation via s. 3 HRA may determine rights even as between private individuals and in *South Bucks DC v. Porter*⁸¹ the HL applied the Convention to the exercise of its own primary jurisdiction to grant injunctions to restrain breaches of planning control. In *Campbell v. MGN Ltd*⁸² Baroness Hale noted that [§132]:

“The 1998 Act does not create any new cause of action between private persons. But if there is a relevant cause of action applicable, the court as a public authority must act compatibly with both parties’ Convention rights.”

57. In *Wilson*, the HL held that s. 6 HRA did not warrant the application of the Convention retrospectively to rights which had arisen prior to the commencement of the Act.
58. In *Kay*, Lord Hope stated [§64] that, although the scope of application of the HRA 1998 was not in issue, the potential ‘horizontal’ application of the HRA 1998 must be borne in mind since private landowners and landlords must obtain possession orders from the court which is itself a public authority. Lord Bingham, on the other hand, preferred to reserve his position on the question of the application of the Convention to non-public authority landowners⁸³.

Cases concerning possession

Before Qazi

59. Even before *Qazi*, although the CA recognised the application of the Convention to possession cases brought by public authorities, there was still evident resistance to the widespread application of the proportionality requirements of A8(2) to the generality of decisions.
60. Convention issues can be subdivided, in accordance with the analysis adopted by the CA in *R (McLellan) v. Bracknell Forest DC*⁸⁴, into -
 - (1) Cases engaging the Convention at the “macro” level, i.e. where the issue is the broader question of whether Parliament has struck the appropriate proportionality balance in enacting particular legislative provisions⁸⁵, or excluding persons from statutory protection⁸⁶, or setting down particular procedures⁸⁷. As Brooke L.J. held in *Michalak v. Wandsworth LBC*⁸⁸ [§46] -

⁷⁹ See **Clayton & Tomlinson, The Law of Human Rights**, §§5.80-5.99, 5.114 & 5.115, **Grosz, Beatson & Duffy, Human Rights**, §§4-01, 4-15 to 4-17 and *Douglas & others v. Hello! Ltd* [2001] 2 W.L.R. 992 at 1025-6, §128 (Sedley L.J.).

⁸⁰ [2004] 2 A.C. 557. Contrast the greater deference accorded to the policy decision inherent in the fair rent provisions in *R v. Secretary of State for the Environment, ex parte Spath Home Ltd* [2001] 2 A.C. 349 which did not raise the stark A8/A14 issues present in *Ghaidan*.

⁸¹ [2003] 2 A.C. 558.

⁸² [2004] 2 A.C. 457.

⁸³ [2006] 2 W.L.R. 570 at 584, §28.

⁸⁴ [2002] 2 Q.B. 1129, *per* Waller L.J. at §44. The case concerned the compatibility of possession proceedings following the termination of introductory tenancies under the Housing Act 1996. The HL gave leave to appeal [2002] 1 W.L.R. 2321.

⁸⁵ E.g. *Poplar Housing & Regeneration Community Association Ltd v Donoghue* [2002] Q.B. 48, *McLellan and Smart*.

⁸⁶ *Somerset v. Isaacs* [2002] EWHC 1014 (Admin).

⁸⁷ E.g. *R (Alconbury Developments Ltd. & others) v. Secretary of State* [2003] 2 A.C. 295, *R v Tower Hamlets LBC ex parte Runa Begum* [2003] 2 A.C. 430 & *R (Adlard) v. Secretary of State* [2002] 1 W.L.R. 2515.

⁸⁸ [2002] H.L.R. 721.

“The objective justification for the possession order lies in the statutory arrangements devised by Parliament for identifying who may succeed to successor tenancies and who may not following the death of a secure tenant. There is ample Strasbourg authority for the proposition that appropriate justification may be derived from a statutory scheme, and that it need not always be demonstrated on a case by case basis.”

(2) Cases engaging Convention issues at the “micro” level, i.e. which involve the application of the Convention to the facts of the case, in particular where the application of proportionality turns on the individual facts rather than the margin of appreciation afforded to Parliament.

61. The principal controversy surrounds the permissibility of raising Convention issues at the micro-level. The fact that the principal ECHR issue in a case is at the “macro” level does not itself exclude consideration at the “micro” level⁸⁹. Laws L.J. held in *Smart*:

“... there might be the rare case where something wholly exceptional has happened since service of the notice to quit, which fundamentally alters the rights and wrongs of the proposed eviction, and the county court might be obliged to address it in deciding whether or not to make an order for possession.”

62. The judgments in *Qazi*, *Bradney*, *Kibata* and *Kay* reduced yet further the possibility of an exceptional case arising at the “micro” level although the minority in *Kay* would have adopted a similar approach⁹⁰.

63. The termination of property rights in accordance with the law, or their own provisions without regard to individual circumstances does not appear to amount to a breach of A1P1: see *JS v. The Netherlands*⁹¹ (withdrawal of a milk quota “reference quantity”) and *Gudmundsson v. Iceland*⁹² (withdrawal of a taxi licence). Thus in *Lancashire CC v. Taylor*⁹³, Stanley Burnton J held:

“57. ... Mr Taylor's rights under his tenancy agreement are... clearly "possessions" for the purpose of A1P1. But his possession is delimited by his tenancy. His "possession" is not the house he occupies, nor the holding as such, but his tenancy. A1P1 confers on him no greater right than that defined by domestic law.... The determination of his tenancy by notice to quit means that as against the County Council Mr Taylor has no relevant possession to be protected under A1P1. He is therefore not being "deprived" of any possession by the present proceedings. He was similarly not so deprived by the operation of a notice to quit that lawfully determined his limited interest – i.e., his tenancy. His tenancy was always subject to being so determined.”⁹⁴

64. Further, interferences resulting from matters of a purely private contractual nature do not appear to fall within the provisions of the Convention: *Gustafsson v. Sweden*⁹⁵ [§60]:

“60. Admittedly, the State may be responsible under Article 1 for interferences with peaceful enjoyment of possessions resulting from transactions between private individuals (see the *James and Others v. the United Kingdom* judgment of 21 February 1986... paras. 35-36). In the present case, however, not only were the facts complained of not the product of an exercise of governmental authority, but they concerned exclusively relationships of a contractual nature between private individuals, namely the applicant and his suppliers or deliverers.”

⁸⁹ See Laws L.J. in *Sheffield v. Smart* at §43 and Mance L.J. in *Michalak* at §§72-76.

⁹⁰ Lord Bingham at §§36-39 (“highly exceptional circumstances”), Lord Nichols at §§54-56 (“exceedingly rare cases”) and Lord Walker at §176.

⁹¹ (1995) 20 E.H.R.R. CD 41.

⁹² (1996) 21 E.H.R.R. CD 89

⁹³ [2004] EWHC 776.

⁹⁴ See also *Money Markets Ltd v. London Stock Exchange* [2002] 1 WLR 1150 (CA).

⁹⁵ (1996) 22 E.H.R.R. 409.

65. The same principle was applied in *Application No. 11949/86 v. UK*⁹⁶ (*Di Palma*) where the Commission rejected the claim that the UK should have taken greater steps to protect the right to relief against forfeiture under the County Courts Act 1984 [§154]:

“... the relations between the applicant and the landlord were regulated by a private contract (the lease) which set out the mutual obligations of the parties. The terms of the lease neither directly prescribed nor amended by legislation, although substantial quantities of legislation regulate the operation of leases in a general way, mainly with a view to protecting the position of tenants. Thus, for example, in order to gain possession of the flat, the landlord had to take proceedings before the courts to obtain a possession order, without which eviction of the applicant would have been unlawful. In view of the exclusively private law relationship between the parties to the lease the Commission considers that the respondent Government cannot be responsible by the mere fact that the landlord by its agents, who were private individuals, brought the applicant’s lease to an end in accordance with the terms of that lease, which set out the agreement between the applicant and the company. ... It is true that the landlord issued proceedings in the domestic courts in order to forfeit the applicant’s lease. This fact alone is not however sufficient to engage State responsibility in respect of the applicant’s rights to property, since the public authority in the shape of the County Court merely provided a forum for the determination of the civil right in dispute between the parties. In contending that State responsibility for an interference with rights protected by the Convention arises in respect of this complaint, the applicant seeks to demand that a State be subject to a positive obligation to protect the property rights of an individual in the context of his dispute with another private individual... In the present case the applicant and the landlord had entered into contractual arrangements set out in the lease which expressly provided for the applicant’s tenancy to terminate if rent remained unpaid once demanded.”

66. However, it might be said that:

- (1) s. 6(3) of the HRA now imposes an obligation on the Courts not “to act in a way which is incompatible with a Convention right”; and
- (2) the case was one where the right to relief was limited by statute, and was not a general power exercisable by the Court.

67. The deprivation of rights, even as part of the general law, may nonetheless engaged and be a violation of A1P1: see *J.A. Pye (Oxford) Ltd. v. UK*⁹⁷.

Qazi

68. The CA had held that a former tenant whose tenancy had come to an end by operation of law could still have a right to a home within A8, relying on the Strasbourg view (see *Buckley* and *Chapman* below) that an unlawful occupier may nonetheless have A8 rights. A local authority tenancy had been terminated by Mr Qazi’s wife giving notice to quit (as she was entitled to do under the tenancy agreement), subsequent to which they were divorced and Mr Qazi remarried and his new wife moved into the premises. On the basis of *Hammersmith v. Monk*⁹⁸ there would be no question as a matter of private law that the tenancy had been properly determined. However, it was alleged that the Council were in breach of A8 in seeking to recover possession. The Court was only asked to consider whether A8 was engaged in principle, and was not asked to consider the facts or how A8(2) might apply on the facts.
69. Although *Qazi* was not criticised in *Smart* and in *Michalak* it was overturned in the HL (Lord Bingham and Lord Steyn dissenting on application of A8(2)) on the basis that, whilst A8 was engaged, the court was not required to carry out a balancing process under A8(2) and the

⁹⁶ (1988) 10 E.H.R.R. 149: the UK proceedings were *Di Palma v. Victoria Square Property Co. Ltd.* [1985] 2 All E.R. 669.

⁹⁷ [2005] 3 E.G.L.R. 1.

⁹⁸ [1992] 1 A.C. 478.

order for possession had rightly made by the county court.

70. In summary, it was held:

- (1) Home has an autonomous meaning⁹⁹ under the Convention not dependent on the provisions of domestic law.
- (2) “Home” is determined by a consideration of the “factual circumstances, namely, the existence of sufficient and continuous links”¹⁰⁰.
- (3) A8 protects respect for the home, but does not guarantee a right to a home.
- (4) A home may exist for A8 purposes even if it is occupied unlawfully.
- (5) Issues of proportionality and A8(2) are unlikely to be relevant at the stage of ordering possession. The Convention rights will be satisfied provided that the rules of the substantive law of property have been observed in terminating the interest and that any discretions applicable under statute or domestic law have been properly exercised.
- (6) The Court’s duty under s. 6(3) does not require it to consider further the issue of proportionality once it has discharged the requirements of UK domestic law.
- (7) There is no difference in result whether the possession action involves a public or a private landowner¹⁰¹.
- (8) It does not appear to matter whether the basis of the action is termination of an interest created or protected by a statutory scheme or at common law.
- (9) If any Convention points are to be taken, the proper approach is to seek judicial review of the landowner (who could only be a public sector landowner), e.g. in seeking to terminate the interest in question¹⁰².

71. The most categorical¹⁰³ expression of opinion was that of Lord Scott [§§144, 146]:

“144 ... If article 8 does not vest in the home-occupier any contractual or proprietary right that he would not otherwise have, and does not diminish or detract from the contractual or proprietary rights of the owner who is seeking possession, the problem identified by Waller LJ does not arise. The fate of every possession application will be determined by the respective contractual and proprietary rights of the parties. Article 8 can never constitute an answer. In my opinion the *McLellan* case, like the *Donoghue* case [2002] QB 48, was correctly decided but for the wrong reason.

...

146... In my opinion, the jurisprudence has shown, in effect, that article 8 has no relevance to these landlord/tenant possession cases.”

72. This most extreme expression of view is difficult to square with the application of A8 to the Rent Act 1977 in *Ghaidan v. Godin-Mendoza*¹⁰⁴, reached a year later.

73. The majority view clearly presents a stark answer to attempts to invoke A8 in property cases

⁹⁹ §§8-10, 61-68, 70 & 95-99.

¹⁰⁰ *Buckley v. UK* (1996) 23 EHRR 101 at §63 cited by Lord Hope at §§63-65 who also referred to *Gillow v UK* (1986) 11 EHRR 335 and *Khatun v UK* (1998) 26 EHRR CD 212 to similar effect.

¹⁰¹ §§78, 80, 108-109, 143-144.

¹⁰² §§79 and 109.

¹⁰³ *Price*, §12.

other than by way of judicial review. Indeed, it drew criticisms from the powerful minority judgments of Lord Bingham and Lord Steyn. Lord Steyn stated [§27]:

“27. It would be surprising if the views of the majority on the interpretation and application of article 8 of the European Convention of Human Rights, as incorporated into our legal system by the Human Rights Act 1998, withstood European scrutiny. It is contrary to a purposive interpretation of article 8 read against the structure of the Convention. It is inconsistent with the general thrust of the decisions of the European Court of Human Rights, and of the commission. It is contrary to the position adopted by the United Kingdom Government on more than one occasion before the European Court of Human Rights. It does not accord to individuals “the full measure of the [protection] referred to”: *Minister of Home Affairs v Fisher* [1980] AC 319, 328. On the contrary, it empties article 8(1) of any or virtually any meaningful content. The basic fallacy in the approach is that it allows domestic notions of title, legal and equitable rights, and interests, to colour the interpretation of article 8(1). The decision of today does not fit into the new landscape created by the Human Rights Act 1998.”

The aftermath of *Qazi*

74. Unsurprisingly, the CA subsequently rejected attempts to rely on the “exceptional circumstances” referred to in *Qazi*. Both *Bradney v. Birmingham CC*¹⁰⁵ and *Newham LBC v. Kibata*¹⁰⁶, like *Qazi*, concerned the consequences of tenants’ notices to quit and judgments in both were given on the same day.
75. In *Kibata*, a wife who (as a result of domestic violence) sought a new council tenancy was required, as condition of the grant of a new tenancy, to sign notice to quit of her former home in which her husband was still resident. The husband argued that, although the notice was valid and he had become a trespasser following its expiry, he was entitled to remain in the property as his “home” within A8. Mummery L.J. reviewed *Qazi* and noted [§§25-26] the stark position that:

“25. In my judgment, the legal position is that, as was held by the House of Lords in *Qazi*, article 8 is unavailable to Mr Kibata as a defence to these possession proceedings. All that the Council is seeking to do is to recover possession of its own freehold property from someone who has no legal right to be living in it. Mr Kibata is a trespasser on the Council's property. His statutory and contractual rights in respect of the Flat ceased on the termination of the tenancy, as a result of his wife's act in giving notice to quit to the Council. The service of the notice to quit was a lawful exercise of her rights as a tenant. (The same would have been true, even if they had been joint tenants, as was the case in *Qazi*. It was held in *Notting Hill Housing Trust v. Brackley* [2001] EWCA Civ 601 that the service of a notice to quit by only one of two joint tenants is effective to determine tenancy.) The notice released her from her obligations to the Council as her landlord. There was nothing unlawful in the Council getting her to give a notice, which she was entitled to give, as a condition of being re-housed by the Council in alternative accommodation. The Council was then entitled to act as it did on the basis of an effective notice to quit by the wife. It had a right to immediate possession of the Flat and it was entitled to enforce that right by taking proceedings for possession and obtaining an order for possession. In those circumstances article 8 was not infringed and the court was not required to enter into a detailed consideration of the merits of the case under article 8(2) in order to be satisfied that the Council could justify an interference with Mr Kibata's right to respect for his home.

76. In *Bradney*, the CA considered two possession actions by the same Council and followed *Kibata*.

- (1) In the first case (*Bradney* itself), the Court declined to consider that an exceptional case had arisen where one of 2 joint secure tenants served a notice to quit on the breakdown of a relationship and the appellant argued that the departing tenant had not been advised by the Council that the effect of her signing a notice to quit would be

¹⁰⁴ [2004] 2 A.C. 557.

¹⁰⁵ [2003] EWCA Civ 1783.

¹⁰⁶ [2004] 1 E.G.L.R. 56.

to terminate her ex-partner's tenancy. The Council had refused to grant him a new tenancy. Although the county court judge made a possession order, she did so pre-*Qazi* having considered the Council's reasons under A8(2). Mummery L.J. (giving the judgment of the Court) referred¹⁰⁷ to the significant shift "in the legal scenery" which had occurred as a result in *Qazi* and said [§§13-15]:

"13. ... No issue of justification under article 8(2), which the judge resolved in the Council's favour, arises as article 8 is not available as a defence to the Council's possession proceedings in this case.... The validity of the notice ... has not been disputed. ... There is nothing exceptional about the circumstances of the case or improper or unlawful in the conduct of the Council, which could give Mr Bradney a defence under article 8 so as to prevent the Council from enforcing its ordinary property rights to immediate possession of No 11.

14. We are unable to agree ... that this is an exceptional case, which can be distinguished from *Qazi*. [Counsel] relied principally on the finding of the judge that the Council had procured the termination of the tenancy by one joint tenant against the wishes and intentions of both joint tenants, so as to defeat the wishes of both of them that Mr Bradney's position should be protected. There was no such finding, he pointed out, about the circumstances in which Mrs Qazi served a notice to quit on the Harrow Council.

15. That difference on the facts is insufficient to displace the ruling of the majority in *Qazi* that, as a matter of human rights law, article 8 is not available as a defence to possession proceedings brought to enforce the ordinary property rights of a local authority. As a matter of the law of landlord and tenant, the notice to quit was effective to terminate the joint tenancy. ... As a matter of public law, there have been no judicial review proceedings challenging the lawfulness of any of the actions of the Council. We are unable to see anything in its obtaining of the valid notice to quit from Miss Bromwell and acting on it which was outside the powers of the Council or an abuse of its power. This is not one of those "wholly exceptional" cases in which a public law challenge to the Council's conduct in the matter might afford a defence to possession proceedings in the county court."

- (2) In the second appeal (*McCann*), the Court reversed the county court's dismissal of the possession claim which had also been based on a tenant's notice to quit obtained by the council from a departing spouse who had not understood the nature of the notice. No application had been made to adjourn the county court proceedings to bring JR and, in any event, the Council "acted lawfully and within its powers" in obtaining the notice.¹⁰⁸

77. The door appeared to close further still in *Kay v. London Borough of Lambeth*¹⁰⁹ in the Court of Appeal. The court again considered the references in *Qazi* to "exceptional circumstances" where a public law challenge might be argued:

"103. But that does not mean that, by the backdoor, art 8 comes back into play as a "relevant consideration". Initially, as in all decisions related to housing, the particular needs of a tenant and his family will form a necessary background to the decision a housing authority has to take. And they will therefore form part of the considerations which the housing authority has to evaluate. But those considerations fall to be evaluated on ordinary administrative law principles."¹¹⁰

78. The Court reconciled this approach with the need to consider Convention rights at a "micro" level by stating that, following *Qazi*:

"98. ...the dictum of Waller LJ in *McLellan* cannot stand in an unqualified way. Article 8(2) will underpin the tenant's right in that situation to a proper evaluation of the extent to which the

¹⁰⁷ §3.

¹⁰⁸ §28. Mr McCann's subsequent application for judicial review was rejected by Leveson J. on the basis that the CA had, in this statement, conclusively determined that there were no public law grounds for challenge: see *R (McCann) v. Birmingham City Council* [2004] EWHC 2156 (Admin).

¹⁰⁹ [2005] Q.B. 352.

¹¹⁰ Auld, Latham, Arden LJJ.

conditions entitling the local authority to serve a notice to quit have been met. But if they have been met, then that evaluation will satisfy the requirement for justification in art 8(2).”

79. Accordingly, even where public law grounds for a challenge exist and such a challenge can properly be made, it seems that a tenant will not get far by invoking A8. Although the subject matter of A8 (i.e. the impact of the decision upon the tenant) may still be relevant, the challenge may only be framed in ordinary administrative law terms¹¹¹.
80. However, in *Leeds City Council v Price*¹¹² the CA reconsidered the law in the light of *Connors* and, considering itself bound by *Qazi*, granted leave to appeal. However, the CA (Lord Phillips MR, Brooke and Sedley L.J.J.) considered *Qazi* to be of doubtful validity in the light of *Connors* [§§29-30]

“29 ... It is true that, at para 86, the court remarked that the case was not concerned "with matters of general planning or economic policy but with the much narrower issue of procedural protection for a particular class of persons", but some of the court's observations appear to be of more general application. Thus, at para 83, under the heading "General principles", the court remarked that the procedural safeguards available to the individual would be especially material in determining whether the respondent state had, when fixing the regulatory framework, remained within its margin of appreciation. Statutory regimes that govern obtaining possession of land must be open to scrutiny. The decision in *Connors's* case does not exclude the possibility that a particular statutory regime may itself achieve the balance required by article 8(2), so that, if the judge complies with it, the requirements of article 8(2) will be satisfied. Equally, however, the decision in *Connors's* case does not exclude the possibility that, if a statutory regime is to comply with the Convention, it must require a public authority to weigh in the balance the impact of its actions on the individual affected and permit the individual affected to challenge in the courts the conclusion reached by the public authority.

30 For these reasons we do not accept that *Connors's* case 40 EHRR 189 can be treated as simply identifying a discrete exception to the general rule propounded by the majority in *Qazi's* case [2004] 1 AC 983. We accept Mr Offer's submission that *Connors's* case is incompatible with *Qazi's* case.”

Kay – Qazi revisited

81. A seven-judge committee heard the appeals in *Kay* and *Price* in the House of Lords and dismissed them on the facts. However, by a majority (Lords Hope, Scott, Brown and Baroness Hale), it held:
- (1) that the decision in *Qazi* was correct;
 - (2) that the right of a public authority to enforce a claim for possession under domestic law would, in most cases, automatically supply the justification required by A8(2);
 - (3) that a public authority was not required to plead or prove justification in every case – the courts were entitled to assume that domestic law was compatible with A8; and
 - (4) that a challenge to a making of a possession order could be raised (subject to issues of jurisdiction) in the county court, if the defendant could, exceptionally, show a seriously arguable case that the relevant domestic law was incompatible with the Convention.
82. Lord Hope held that [§110]:

“But, in agreement with Lord Scott, Baroness Hale and Lord Brown...[s]ubject to what I say below, I would hold that a defence which does not challenge the law under which the possession order is sought as being incompatible with the article 8 but is based only on the occupier's personal circumstances should be struck out. I do not think that *McPhail v Persons, Names Unknown* [1973]

¹¹¹ A similar result occurred in *London Borough of Tower Hamlets v. Begum* [2005] EWCA Civ 116.

¹¹² [2005] 1 W.L.R. 1825.

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.”

83. In the four majority judgments which adopt differing approaches to the A8 issue, the above paragraph appears to represent the main agreement in principle.

84. On the validity of the *Qazi* decision, Lord Hope held [§§111-112]:

“111. How then does the decision of this House in *Qazi* stand up to examination when it is looked at in the light of the subsequent decisions of the Strasbourg court? I would hold that there are no grounds for concluding that the decision itself, on its own facts, was unsound. I would draw support for this conclusion from that fact that the respondent’s subsequent application to Strasbourg was held to be inadmissible. On the other hand I would acknowledge that Lord Scott’s observation in *Qazi*, para 139, that in no case has article 8 been applied to detract from the contractual and proprietary rights of the person entitled to possession is no longer true. *Connors* was such a case. The local authority in that case was relying on its contractual and proprietary rights when it applied for the eviction order. As I have already said (see para 98, above), I agree with the Court of Appeal’s conclusion in the *Leeds* appeal that the decision in *Connors* is incompatible with the extreme propositions that the exercise by a public authority of an unqualified right to possession will *never* constitute an interference with the occupier’s right to respect for his home, and that it will *always* be justified under article 8(2): [2005] 1 WLR 1825, para 26.

112. But it needs to be stressed that the facts in *Connors* were entirely different from those in *Qazi*. There was no need in *Qazi*’s case to give special consideration to the needs of gypsies and their different lifestyles, and the background to the local authority’s decision to seek a possession order was that a valid notice to quit had been served on the local authority by one of the tenants of the tenancy. *Connors* does not resolve the problem as to how the need to give special consideration to cases of that kind where the law itself is defective – and I do not confine this category to gypsies – can be fitted in to the domestic system which requires that orders for possession must be sought in the county court. So I do not think that the decision in *Connors* is incompatible with the view of the majority in *Qazi* that there is no need for a review of the issues raised by article 8(2) to be conducted in the county court if the case is of a type where the law itself provides the answer, as in that situation a merits review would be a pointless exercise. In such a case the article 8 defence, if raised, should simply be struck out.”

85. Similarly, Lord Brown held [§198] that:

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

86. Baroness Hale agreed with these conclusions, in her view the purpose of A8 was not “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" (at § 190).

87. Lord Scott accepted that there were "minor" inconsistencies between *Qazi* and *Connors* [§149]. Moving away from the extreme position which he had adopted in *Qazi*, Lord Scott did however acknowledge the relevance of the Convention to possession proceedings:

"In [*Qazi*], I expressed the view that in a case where the person occupying the property as his home had no legal or contractual right to remain there, as against the legal owner of the property, a claim by the owner to recover possession would not engage article 8 at all. But Lord Bingham, Lord Hope, Lord Steyn and Lord Millett thought differently and I would accept that it is now settled that such a claim does engage article 8. The contrary view is not, and has not been since *Qazi*, in issue. It follows that article 8(2) comes into play in all such possession cases."

Consideration of *Kay*

88. As a result of the majority's judgment in *Kay*, *Qazi* survives virtually intact and arguments relying on A8 at the "micro level" are largely foreclosed. The key question is whether the decision in *Kay* will pass scrutiny in Strasbourg. The Secretary of State intervened in the case and argued that it ought always be open to a defendant to possession proceedings to resist an order on the basis that to make one would be a disproportionate interference with his or her A8(1) rights *because of his or her individual circumstances*. The view of the Government therefore appears to support of the minority view in *Qazi* and *Kay*.

89. Indeed, there is force in the view that *Kay* was incorrectly decided. The majority (Lords Bingham, Nicholls and Walker) persuasively set out the basis for permitting a greater opportunity to take human rights points at the micro-level. Having reviewed the Strasbourg cases, Lord Bingham concluded that [§29]:

"It necessarily follows, in my judgment, that where a public authority seeks to evict a person from premises (which may be land where a traveller has pitched his caravan) which he occupies as his home, that person must be given a fair opportunity to contend that the excepting conditions in article 8(2) have not been met on the facts of his case. I do not accept, as the appellants argued, that the public authority must from the outset plead and prove that the possession order sought is justified. That would, in the overwhelming majority of cases, be burdensome and futile. It is enough for the public authority to assert its claim in accordance with domestic property law. If the occupier wishes to raise an article 8 defence to prevent or defer the making of a possession order it is for him to do so and the public authority must rebut the claim if, and to the extent that, it is called upon to do so. In the overwhelming majority of cases this will be in no way burdensome. In rare and exceptional cases it will not be futile."

90. Accordingly [§37];

"[t]he rule in *McPhail v Persons, Names Unknown* [1973] Ch 447 must, in my opinion, be relaxed in order to comply with article 8, but it is very hard to imagine circumstances in which a court could properly give squatters of the kind [in this case] anything more than a very brief respite".

91. Lord Bingham declined to define the types of exceptional circumstances which might require possession orders to be refused or suspended in order to comply with A8, preferring to rely on the, often robust, common sense of county court judges [§38]:

"I do not think it possible or desirable to attempt to define what facts or circumstances might rank as highly exceptional. The practical experience of county court judges is likely to prove the surest guide, provided always that the stringency of the test is borne in mind. They are well used to exercising their judgment under existing statutory schemes and will recognise a highly exceptional case when they see it. I do not, however, consider that problems and afflictions of a personal nature should avail the occupier where there are public services available to address and alleviate those problems, and if under the relevant social legislation the occupier is specifically disentitled

from eligibility for relief it will be necessary to consider the democratic judgment reflected in that provision. Nor can article 8 avail a tenant, otherwise perhaps than for a very brief period, if he can be appropriately accommodated elsewhere (whether publicly or privately). Where, as notably in the case of gipsies, scarcity of land adversely affects many members of the class, an article 8(2) defence could only, I think, succeed if advanced by a member of the class who had grounds for complaint substantially stronger than members of the class in general.”

92. Lord Bingham then set out the practical position which would ensue from the adoption of the minority’s interpretation of A8 [§39]:

“(1) It is not necessary for a local authority to plead or prove in every case that domestic law complies with article 8. Courts should proceed on the assumption that domestic law strikes a fair balance and is compatible with article 8. (2) If the court, following its usual procedures, is satisfied that the domestic law requirements for making a possession order have been met the court should make a possession order unless the occupier shows that, highly exceptionally, he has a seriously arguable case on one of two grounds. (3) The two grounds are: (a) that the law which requires the court to make a possession order despite the occupier’s personal circumstances is Convention-incompatible; and (b) that, having regard to the occupier’s personal circumstances, the local authority’s exercise of its power to seek a possession order is an unlawful act within the meaning of section 6. (4) Deciding whether the defendant has a seriously arguable case on one or both of these grounds will not call for a fullblown trial. This question should be decided summarily, on the basis of an affidavit or of the defendant’s defence, suitably particularised, or in whatever other summary way the court considers appropriate. The procedural aim of the court must be to decide this question as expeditiously as is consistent with the defendant having a fair opportunity to present his case on this question. (5) If the court considers the defence sought to be raised on one or both of these grounds is not seriously arguable the court should proceed to make a possession order. (6) Where a seriously arguable issue on one of these grounds is raised, the court should itself decide this issue, subject to this: where an issue arises on the application of section 3 the judge should consider whether it may be appropriate to refer the proceedings to the High Court.”

93. Adopting that approach, therefore, would not create the type of difficulties which Lord Hope appeared to consider would ensue from even permitting limited A8(2) consideration [§§73-75]. As Lord Bingham pointed out [§34], county courts in exercising discretion as to reasonableness, have considerable experience of considering precisely the sort of factor which are relevant to the application of A8(2).

94. There are a number of reasons why the minority’s view is to be preferred:

- (1) If the approach of the ECtHR in *Connors* is generally applicable, as the minority in *Kay* (Lords Bingham, Nicholls, and Walker) considered to be the case, then there can be no practically “automatic” answer to A8(2). Indeed, approaching the question from the position of principle, since the application of A8(2) is a fact sensitive exercise, depending on the weighing of competing considerations, it is difficult to see how it can be satisfied as a matter of course. Lord Bingham put the matter clearly and (with respect) accurately at §28:

“In the present instance the governing principle is now clear, and gives fair effect to the right to respect for his home which everyone is entitled to enjoy under article 8(1). ... To evict or seek to evict a person from such a place is to interfere with his exercise of his article 8(1) right, as the House held in reliance on Strasbourg and other authority in *Qazi*. Article 8(2) forbids such interference by a public authority unless the excepting conditions are satisfied. Compliance with domestic property law is a necessary excepting condition but not a sufficient one, since the other conditions must also be met, notably that the interference must answer a pressing social need and be proportionate to the legitimate aim which it is sought to achieve. This must now be recognised as the correct principle. In stating it, I enter the same important reservation as in *Qazi*, para 23: nothing in this opinion should be understood as applying to any landlord or owner which is not a public authority.”

- (2) The Strasbourg cases turned on the application of established A8(2) principles to the facts not on other Convention provisions. Despite the issues, the judgment in *Connors* turned on an application of A8 not A14 provisions. The absence of protection for the

gypsies was considered to be a violation of A8 without the application of A14.

- (3) Lord Hope in *Kay* distinguished *Connors* on the basis of procedural protections and that “No mention is made of the general principles or their application to the situation that was discussed in *Qazi*”¹¹³ and that it involved circumstances of a “special and unusual kind”¹¹⁴. Lord Scott referred to the absence of an “unusual or discriminatory feature” from the cases under appeal. However -
- (a) Cases involving the type of difficulties experienced in *Connors*, or the absence from rented premises in *Blečić*, are scarcely unusual or exceptional. Indeed, the arguments in *Blečić* find a recognisable echo in domestic cases concerning occupation for the purposes of security of tenure; and
 - (b) The procedural issues are nothing to the point since the availability of JR in *Connors* was held to be insufficient. If A8(2) cannot engage at the level of the individual facts in the course of domestic proceedings, JR or otherwise, as the majority in *Kay* held, the situation is no different in substance. §§94 and 95 of *Connors* shows that such protections are not provided simply by allowing a challenge to the legal framework rather than of consideration of the specific decision. As Lord Hope noted¹¹⁵, *Connors* “did not go so far as to say that the recovery of possession will constitute an interference with that right in every case where the premises are occupied by the person as his home” but similarly it did not justify the view that A8(2) does not apply in any, or most, cases, without consideration of the individual circumstances.

Lord Bingham accepted the cases turned on the general application of A8(2) and held that [§26] “The Court of Appeal in its *Leeds* judgment ... was in my view right to hold that the decision in *Connors* is “unquestionably incompatible” with the majority ratio of *Qazi*.” He added “It does not appear that *Blečić* was cited to the Court of Appeal: had it been, it could only have fortified the court in the correctness of its conclusion.”

- (4) Lord Hope derived support for his position from decisions of doubtful relevance. He placed some weight on the Commission’s decision in *S v UK*¹¹⁶ which, as Lord Bingham observed [§19], was an early admissibility decision of the Commission on which the ECtHR has never relied. Lord Hope and Lord Scott both treated the ECtHR’s rejection of the admissibility of *Qazi* as relevant [§§111, 154]. However, the briefly reasoned decision as to the inadmissibility of the *Qazi* complaint in Strasbourg provides no support for the majority. All it demonstrates is that, on the facts, the ECtHR did not consider there to have been a violation. The ECtHR does not view violations in the abstract. It is difficult therefore to regard it as an endorsement of the correctness of the general approach of
- (5) Is there really a clear conceptual distinction between those cases where a defendant wishes to challenge the substantive law which authorises his eviction and those cases where he relies on his own personal circumstances? In the latter case, is the defendant not actually saying that the substantive law is incompatible *because* a possession order may be ordered notwithstanding his circumstances? Statutory

¹¹³ At §99.

¹¹⁴ §108.

¹¹⁵ §98.

¹¹⁶ (1986) 47 DR 274.

schemes for the allocation of housing stock may well satisfy the requirements of A8 given the margin of appreciation, but to say that in all cases the law absent consideration of individual circumstances will comply with A8(2) seems absurd. If the issue of proportionality is decided in most or all cases by a legislative decision to adopt a statutory scheme, then there is no rational explanation for the ECtHR's consideration in *Blečić* of the balancing of the individual circumstances from §§59 to 71¹¹⁷ (nearly 3 pages of the E.H.R.R. report). It was not the legislation which was under consideration in *Blečić* but its application to the facts. The majority judgment in *Kay* simply failed to grasp that essential fact.

Other issues

Adverse possession

95. The application of the right of peaceful enjoyment of possessions in the context of the doctrine adverse possession illustrates the potential for the Convention to alter domestic rules of substantive real property law, subject to review in the near future by the Grand Chambers when it hears *Pye*.
96. The issue had briefly been considered before the national courts: see *Family Housing Association v. Donellan*¹¹⁸; *J.A. Pye (Oxford) Ltd v. Graham*¹¹⁹; *R (Whitney) v. Commons Comrs*¹²⁰. However, it is now subject to fully-reasoned decisions of both the High Court and ECtHR.
97. In *Beaulane Properties Ltd v. Palmer*¹²¹ the Deputy High Court judge (Nicholas Strauss QC) held that the effect of s.17 of the Limitation Act 1980 and s. 75 of the Land Registration Act 1925 was to deprive the landowner of his possession and that the law of adverse possession in England prior to October 2003 was incompatible with A1P1. The familiar justification for adverse possession¹²², namely to avoid stale claims and promote certainty of title etc, was not a sufficient basis to render adverse possession proportionate. To render that law compatible with the Convention, the Deputy Judge considered that s. 75 should be interpreted as being applicable to those cases in which the trespasser established "possession" in accordance with the case law in existence at the time of its enactment.
98. Indeed, foreshadowing *Pye*, in *I.R.S. v Turkey*¹²³, a Turkish law which allowed prescription of immovable property rights used for public purposes¹²⁴ after 20 years' adverse possession¹²⁵ without compensation was held by ECtHR to be a violation of A1P1. In reaching that conclusion, the Court applied the established principle that in general a

¹¹⁷ See Lord Bingham, §22.

¹¹⁸ (2002) 1 P. & C.R. 34.

¹¹⁹ [2001] Ch. 804 (CA), §§43, 46-48, in which the CA held that adverse possession was not contrary to the Convention. The point was not pursued in the HL since it was conceded that the HRA 1998 did not have retrospective effect: see [2003] 1 A.C. 419 at §§65 & 73.

¹²⁰ [2005] Q.B. 282 (on village greens), §§35-38.

¹²¹ [2005] 3 W.L.R. 554.

¹²² Heavily criticised by Neuberger J. at first instance in *Pye* and subsequently by the Law Commission.

¹²³ App. No. 26338/95, 20.7.04 (French text only).

¹²⁴ "... affecté à l'utilisation du service public ou sur lequel des constructions destinées à l'utilité publique ont été construites..."

¹²⁵ "...tous les droits des propriétaires, des possesseurs ou leurs héritiers d'entamer une action relative à ce bien immobilier sont prescrits dans un délai de vingt ans. Ce délai commence à courir à partir de la date de l'occupation des biens immobiliers... »

deprivation of property without compensation would be a breach of A1P1¹²⁶. However, the claim related to prescription by the state for public purposes¹²⁷.

99. Most recently, the ECtHR in *J.A. Pye (Oxford) Ltd. v. UK*¹²⁸, by a narrow majority, found a violation of A1P1 in respect of the pre-Land Registration Act 2002 law on adverse possession.

100. The Court recalled at §§42-48 the standard A1P1 principles against deprivation of property without compensation (see above) and noted that:

“48. Although Article 1 of Protocol No. 1 contains no explicit procedural requirements, the proceedings at issue must also afford the individual a reasonable opportunity of putting his or her case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision. In ascertaining whether this condition has been satisfied, a comprehensive view must be taken of the applicable procedures...”

101. The Court rejected [§§49-52] the UK’s argument that A1P1 was not engaged since adverse possession was simply part of the existing law according to which title was defeasible and held that it was the operation of the LRA 1925 and Limitation Act 1980 which brought an end to the claimants’ title rather than any defect or limitation in that title. At §51 the Court made an important observation:

“51. The Court does not share the Government’s view that the operation of the legislation is to be regarded as an incident of, or limitation on, the applicants’ property right at the time of its acquisition, such that Article 1 ceased to be engaged when the relevant provisions took effect and the property right was lost after 12 years of adverse possession. It is true that the relevant provisions of the legislation existed at the time the property was acquired by the applicants and that the consequences for the applicants’ title to the land of 12 years adverse possession were known. However, Article 1 does not cease to be engaged merely because a person acquires property subject to the provisions of the general law, the effect of which is in certain specified events to bring the property right to an end, and because those events have in fact occurred. Whether it does so will depend on whether the law in question is properly to be seen as qualifying or limiting the property right at the moment of acquisition or, whether it is rather to be seen as depriving the owner of an existing right at the point when the events occur and the law takes effect. It is only in the former case that Article 1 may be held to have no application.”

102. Having found that A1P1 was engaged, the ECtHR then rejected the argument that there had not been an interference with the claimants’ rights [§§53-57] having regard to the judgment in the Court of Appeal and that in *Beaulane*:

“55. ... it is clear that the relevant provisions did more than merely preclude the applicants from invoking the assistance of the courts to recover possession of the property concerned: the combined effect of the provisions was both to deprive the applicants of their substantive property rights and to preclude them from lawfully repossessing the land, the beneficial title to which they had lost.

103. The law of adverse possession promotes the principle that persons should not be dilatory, but should take the initiative with reasonable speed to assert their rights. Under the pre-2002 law, if a landowner brought proceedings after 12 years to recover his land, an adverse possessor could testily retort ‘you are too late, you should have been more vigilant’ – or, if he had a smattering of legal Latin *vigilantibus non dormientibus jura subveniunt*.¹²⁹

¹²⁶ §§49, 55.

¹²⁷ §§12, 13 and 17 – the land appears to have been surrounded by barbed wire and access prevented by a military airbase.

¹²⁸ [2005] 3 E.G.L.R. 1 in respect of the effect of the decision in *J.A. Pye (Oxford) Ltd. v. Graham* [2003] 1 A.C. 419.

¹²⁹ Indeed, the law of adverse possession was a feature of Roman law both for movable and immovable property (*usucapio*, *longi temporis praescriptio* and, in the later empire, *longissimi temporis praescriptio*). See, e.g., Gaius, *Institutes*, Book II, §§42-61; Buckland, *A Manual of Roman Private Law* (2nd ed. 1957) §§147-149; Nörr, ‘Time and the

However, the argument that it was the acts of private individuals which caused the loss of title in *Pye* received short shrift from the ECtHR:

“56. ... the Court also observes that, but for the provisions of the 1925 and 1980 Acts, the adverse possession of the land by the Grahams would have had no effect on the applicants’ title or on their ability to repossess the land at any stage. It was the legislative provisions alone which deprived the applicants of their title and transferred the beneficial ownership to the Grahams and which thereby engaged the responsibility of the State under Article 1 of the Protocol.”

104. The Court found that there had been a deprivation of possessions rather than the imposition of controls [§§58-62]. Although limitation periods were legitimate [§63] the issue was not merely limitation but the deprivation of title [§64]. The Court was clearly influenced by the views of Neuberger J. at first instance, echoed by Lord Bingham in the HL, in doubting the legitimacy of the aims of adverse possession in a system of registered title [§65]. Lord Bingham had stated¹³⁰:

“[The Grahams] sought rights to graze or cut grass on the land after the summer of 1984, and were quite prepared to pay. When *Pye* failed to respond they did what any other farmer in their position would have done: they continued to farm the land. They were not at fault. But the result of *Pye*’s inaction was that they enjoyed the full use of the land without payment for 12 years. As if that were not gain enough, they are then rewarded by obtaining title to this considerable area of valuable land without any obligation to compensate the former owner in any way at all. In the case of unregistered land, and in the days before registration became the norm, such a result could no doubt be justified as avoiding protracted uncertainty where the title to land lay. But where land is registered it is difficult to see any justification for a legal rule which compels such an apparently unjust result, and even harder to see why the party gaining title should not be required to pay some compensation at least to the party losing it. It is reassuring to learn that the Land Registration Act 2002 has addressed the risk that a registered owner may lose his title through inadvertence. But the main provisions of that Act have not yet been brought into effect, and even if they had it would not assist *Pye*, whose title had been lost before the passing of the Act. While I am satisfied that the appeal must be allowed for the reasons given by my noble and learned friend, this is a conclusion which I (like the judge...) ‘arrive at with no enthusiasm’.”

105. On the final issue of proportionality the Court considered the UK’s contentions [§§68-76]:

“68. The Government, like Mummery L.J in the Court of Appeal, place reliance on two factors in particular for contending that the system as it operated in the applicants’ case was proportionate and struck a fair balance – the reasonableness of the period of 12 years for bringing proceedings and the fact that it was neither impossible nor difficult for a landowner to prevent a squatter acquiring title by adverse possession: a mere grant to the Grahams of authority to use the land subject to an acknowledgement of the applicants’ ownership would have been sufficient to stop time running.”

106. Despite the length of the limitation period, the court expressed its concerns as to the deprivation of property with the complete absence of compensation, a result “of exceptional severity” [§71] (again noting comments of Neuberger J. and Lord Bingham). The Court was not convinced of the UK’s argument as to the claimants’ inadvertence or negligence in managing their land and noted [§74] that the reforms of the 2002 Act was a recognition by Parliament of

“the deficiencies in the procedural protection of landowners under the then current system...”

107. The ECtHR concluded that

“75. ... the application of the provisions of the 1925 and 1980 Acts to deprive the applicant companies of their title to the registered land imposed on them an individual and excessive burden and upset the fair balance between the demands of the public interest on the one hand and the applicants’ right to the peaceful enjoyment of their possessions on the other.”

Acquisition of Ownership in the Law of the Roman Empire’ (1963) 3 IJ, 352.
¹³⁰ [2003] 1 A.C. 419 at 426, §2.

108. The Court reserved its decision as to just satisfaction under A41, the claimants having sought to recover in excess of £10 million. The UK has requested a redetermination of the case before the Grand Chamber.
109. There was no suggestion in *Pye* that the new Land Registration Act 2002 scheme is incompatible with A1P1 and this is surely correct. The LRA 2002 preserves the title of the paper owner in the face of a claim of adverse possession and only leads to extinction of his title if there is substantive merit in the adverse possessor's claim of if the paper owner can be taken to have abandoned his title.

Security of tenure

110. *Connors* shows that the positive duties of the state under A8 may require steps to be taken to provide some degree of protection to at least some whose rights to occupy have been terminated in accordance with the general law. However, in most cases where legislation is imposed for socio-economic reasons, a wide margin of appreciation is given to the national legislatures: *Mellacher v. Austria*¹³¹ and, most recently, *Desnousse v. Newham LBC & Ors.*¹³².
111. *Ghaidan* also indicates the acceptance of the HL, one year after *Qazi*, that A8 and A14 may also require the reading down of security of tenure legislation where the justification for discrimination or lack of respect to private life/home does not bear scrutiny.

Positive duty to protect property

112. In *Öneriyildiz v. Turkey*¹³³, the applicant's house in a slum near a rubbish tip that was operated by the City Council was destroyed by a methane gas explosion at the rubbish tip. The Court concluded that the state was under a positive obligation to protect the applicant's property:

"The court has long held that, although the essential object of many provisions of the Convention is to protect the individual against arbitrary interference by public authorities, there may in addition be positive obligations inherent in an effective respect of the rights concerned...The Court reiterates the key importance of the right enshrined in Art.1 of Protocol No.1 and considers that real and effective exercise of that right does not depend merely on the State's duty not to interfere, but may require positive measures of protection. In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interests of the community and the interests of the individual, the search for which is inherent throughout the Convention. This obligation will inevitably arise, *inter alia*, where there is a direct link between the measures which an applicant may legitimately expect from the authorities and his enjoyment of his possessions."

113. It is possible that this obligation may have implications for the duties of local authority as landowners¹³⁴.

Protection from Eviction

114. In *Desnousse v. Newham LBC & Ors.*¹³⁵, there was disagreement within the Court of

¹³¹ (1989) 12 EHRR 391, §§48-57. See also *Gillow v. UK* (1986) 11 EHRR 335 at §56.

¹³² [2006] EWCA Civ 547.

¹³³ (2004) 39 E.H.R.R. 23, §§143-146.

¹³⁴ See, pre-ECHR, *Page v. Epsom and Ewell BC* (1982) 80 L.G.R. 337 although this is only an application of common law of nuisance. See also *Leanse v. Lord Egerton* [1943] 1 K.B. 323 and *Pemberton v. Bright and Devon CC* [1960] 1 W.L.R. 436. Note the difficulties with tortious liability and the Convention in *Marcic v. Thames Water Utilities Ltd* [2004] 2 A.C. 42 and also *Dennis v MOD* [2003] EWHC 793 (QB).

¹³⁵ Above.

Appeal as to whether the approach in *Mohamed v. Manek & Royal Borough of Kensington and Chelsea*¹³⁶ was compatible with A8, namely that s. 3 of the Protection from Eviction Act 1977 does not apply to a licence (or a tenancy) of accommodation arranged under section 188(1) or section 190 of the Housing Act 1996. Lloyd L.J. considered that the decision was incompatible with the Convention [§142]

“To my mind, the most powerful factor is that, inconvenient as it may be for owners to have to go to court, I can discern no policy reason why owners should be free to act without a court order if the accommodation has been made available under a licence but should not be so free if a tenancy has been granted. To distinguish between the two situations according to whether the accommodation was provided by way of licence or of tenancy seems to me to be anomalous and unjustified. There is no substantive reason for making a distinction on that basis between the two types of case. The arbitrary nature of the distinction seems to me to deprive the policy reasons in favour of the *Mohamed v. Manek* reading of much of the force which they would otherwise have, in terms of making good the proportionality between the means used, namely eliminating the procedural safeguard of a mandatory court order on the one hand, and the legitimate aim of protecting the interests of owners on the other hand. If it is not necessary to deprive a former tenant occupier of the procedural safeguard, I cannot see why it should be regarded as necessary to remove it in the case of a former licensee occupier.”

115. However, Pill and Tuckey L.JJ. disagreed and held that the exclusion fell within the margin of appreciation, Pill L.J. [§§174-177] relying on *Kay* and Lord Hope at §77 in particular to the effect that A8 issues are unlikely to arise where exclusions are made on a socio-economic basis.

S. 141 LPA

116. In *PW & Co. v. Milton Gate Investments Ltd*¹³⁷ Neuberger J. held that had subleases survived the service of a break notice in respect of the head lease then the inability of the head lessee to enforce the covenants (s. 139 of the LPA 1925 only applying to surrender or merger), s. 3 HRA would have enabled the court to read down ss. 141 and 142 LPA to enable a landlord to enforce the subtenant's covenants. However, the point as theoretical since the Court found the subleases had been destroyed by the determination of the head lease.

Self-help

117. Self-help raises difficult issues. English common law rules retain some vestiges of the ability to recover possession by means of “self-help”, although the extent to which these may be used in practice by public authorities is unclear. The question is to what extent the ability to obtain a remedy by such means can be regarded as consistent with A6 or 8 where no tribunal (independent or otherwise) has adjudicated prior to enforcement.
118. It can be said there is inherent in certain rights to occupy the means of their determination or enforcement, e.g. in a lease by peaceable re-entry. Such an ability to determine is, in any event, severely circumscribed by the protections afforded by statutory provisions limiting forcible entry (see the Criminal Law Act 1977) and conferring security on occupiers requiring the bringing of legal proceedings to recover possession. They are also not the end of the issue since relief from forfeiture may be sought. However, these matters do not overcome the problem that, in the case of re-entry, it is the physical act which not only determines the right (however limited) to occupy but also achieves the recovery of possession, avoiding the need for legal proceedings. The issue is likely to come before the Court only once action has been taken.

¹³⁶ (1995) 27 HLR 439 especially at 449-450.

119. There are doubts whether self-help is consistent with A6 since it avoids the determination of civil rights by an independent and impartial tribunal. Proportionality may be difficult to demonstrate given that well-established procedures exist for the recovery of possession including the ability to get a case before the courts at very short notice in appropriate cases of urgency, particularly in cases of trespass¹³⁸. Whilst it is open to argument that procedures for reinstatement and compensation in cases of unlawful eviction exist, it remains uncertain where this is sufficient for the purposes of A6 although it may provide an answer to a challenge under A1P1. *Kibata*, in considering the A6 issues on the service of notice to quit, suggests that A6 may be neither engaged (since the case is the exercise not a determination of civil rights) nor violated (because proceedings can be brought before a court).
120. However, such measures only apply *ex post facto*, after the determination has occurred and occupation has been lost (or the distress levied), even if only for a limited period until the position is redressed by the court. It allows the party engaging in self-help to obtain what may be an important advantage without recourse to the protection of legal process.
121. A8(1) problems may also remain if the act of self-help has already violated respect to the home and/or private life.
122. Lightman J. (obiter) expressed concerns over the right to distrain in *Fuller v. Happy Shopper Markets Ltd.*¹³⁹ at §27:
- “...The ancient (and perhaps an anachronistic) self help remedy of distress involves a serious interference with the right of the tenant under Article 8 of the European Convention on Human Rights to respect for his privacy and home and under Article 1 of the First Protocol to the peaceful enjoyment of his possessions. The human rights implications of levying distress must be in the forefront of the mind of the landlord before he takes this step and he must fully satisfy himself that taking this action is in accordance with the law.”
123. Although only of indirect interest, the issue has been considered in respect of provisions similar to A6¹⁴⁰ by the Constitutional Court of South Africa in *Lesapo v. North West Agricultural Bank*¹⁴¹. The Court considered the right of a debtor to seize goods to defray a debt without recourse to a court and reached a conclusion similar to that in *Fuller*. Mokgoro J. held.

“[11] A trial or hearing before a court or tribunal is not an end in itself. It is a means of determining whether a legal obligation exists and whether the coercive power of the state can be invoked to enforce an obligation, or prevent an unlawful act being committed. It serves other purposes as well, including that of institutionalising the resolution of disputes, and preventing remedies being sought through self help. No one is entitled to take the law into her or his own hands. Self help, in this sense, is inimical to a society in which the rule of law prevails... Taking the law into one’s own hands is thus inconsistent with the fundamental principles of our law.

[12] There are circumstances in which the coercive power of the state may be invoked without the sanction of a court. For instance, arrest and detention for the purposes of trial, are permitted if there are reasonable grounds therefor. There may even be circumstances where self help might be permissible, but once again good reasons must exist for this to be permitted...

[14] If the debt itself is disputed, the seizure of property in execution of the debt must equally be disputed. To permit a creditor to seize property of a debtor without an order of court and to cause it

¹³⁷ [2004] Ch. 142 at §§104-137.

¹³⁸ See e.g. C.P.R. Part 55, rr. 55.2(1)(b), 55.5(2), 55.6, 55.7(2), and 55.8.

¹³⁹ [2001] 1 W.L.R. 1681, 1692.

¹⁴⁰ Section 34 of the SA constitution provides “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.” The elements plainly have much in common with A6 ECHR.

¹⁴¹ (1999) Case CCT 23/99.

to be sold by the creditor's agent on the conditions stipulated by the creditor to secure payment of a debt, denies to the debtor the protection of the judicial process, and the supervision exercised by the court through its rules over the process of execution. Yet this is what section 38(2) purports to do. It entitles the Bank to seize and sell property in execution whether the debt alleged to be due is disputed or not...

[16] On this analysis, section 34 and the access to courts it guarantees for the adjudication of disputes are a manifestation of a deeper principle; one that underlies our democratic order. The effect of this underlying principle on the provisions of section 34 is that any constraint upon a person or property shall be exercised by another only after recourse to a court recognised in terms of the law of the land....

[22] ... an important consideration in terms of section 36(1)(a)¹⁴² is the nature of the right impaired. The right of access to courts is important in the adjudication of justiciable disputes.... The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms²⁶ to resolve disputes, without resorting to self help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable."

124. The Constitutional Court found that the interests of the Bank in securing a speedy and inexpensive satisfaction of debts were not proportionate and insufficiently weighty to justify non-compliance with the right to a trial¹⁴³.
125. However, this issue is ripe for reconsideration in the light of *Qazi*, *Connors* and *Kay* since the analysis by Lightman J. may not stand if the view that the Convention does not interfere with the ordinary incidents of property law applies more widely than possession proceedings. However, if the Convention is engaged and departure justified by proportionality, then issues of A6, A8 and A1P1 arise for consideration in terms of the compatibility of self-help with Convention rights.

David Elvin Q.C.
Landmark Chambers
June 2006

¹⁴² This imposed the requirement to consider proportionality in any limitation on rights guaranteed by the Constitution. See §21 of the judgment.

¹⁴³ §29 of the judgment.