HOUSE OF LORDS SESSION 2007–08

[2008] UKHL 57

on appeal from: [2006]EWCA Civ 1739

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Doherty (FC) (Appellant) and others *v* Birmingham City Council (Respondents)

Appellate Committee

Lord Hope of Craighead
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Lord Mance

Counsel

Appellant:
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Respondents:
Ashley Underwood QC
Douglas Readings

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Intervener (Secretary of State for Communities and Local Government)
Philip Sales QC
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LORD HOPE OF CRAIGHEAD

My Lords,

1. The question in this case is whether a local authority can obtain a summary order for possession against an occupier of a site which it owns and has been used for many years as a gipsy and travellers' caravan site. His licence to occupy the site has come to an end. He has no enforceable right to remain there under English property law. But he claims that his removal would violate his rights under article 8 of the European Convention on Human Rights.

The facts

2. The local authority, the respondent, is the freeholder of the site which is known as the Travellers' Site, Tameside Drive, Castle Vale, Birmingham. The site comprises 16 concrete stands for caravans and four ablution blocks. The appellant was granted a licence by the respondent to station a caravan on plot 12 in September 1987. His licence was extended to include plot 14 in November 1998. He and his family had been resident on the site for about 17 years when on 4 March 2004 the respondent served a notice to quit. Section 2 of the Caravan Sites Act 1968 provides that such a notice shall be of no effect unless it was given not less than four weeks before the date on which it is to take effect. The period of notice that was given expired on 10 May 2004.

3. The respondent commenced these proceedings in the Birmingham County Court on 27 May 2004. On the same day the European Court of Human Rights gave judgment in *Connors v United Kingdom* (2005) 40 EHRR 9. It held that the eviction of a family of gipsies from a gipsy site by a local authority was a violation of their rights under article 8 of the Convention. As in this case, the local authority had served a notice to quit which had brought to an end the family's licence to occupy. The family no longer had an enforceable right to remain on the site under English property law. But the court found that, while a legitimate aim was being pursued by the local authority, the eviction of the applicant and his family could not be regarded as necessary in pursuit of that aim as it was not attended by procedural safeguards that would enable the applicant to challenge the factual basis on which the local authority decided to serve the notice. They had been evicted on the ground that they were troublemakers, and it was asserted that they had breached the licence agreement. The applicant disputed these allegations, but he was not given the opportunity to challenge them in court.

4. The respondent in this case asserted in its particulars of claim that it required vacant possession of the site to carry out essential improvement works. Once the works were complete the site was to be managed as temporary accommodation for travellers. Genuine travellers, it was said, were currently deterred from going on the site because of the presence there of the appellant and his family. As a result the site was underutilised. This had led to unauthorised encampments elsewhere in the area. It should be noted that the claim was not based on any allegation of misconduct on the part of the appellant or any members of his family, nor was it alleged that the licence agreement had been breached. It was based on the respondent's judgment as to the appropriate use of the site for travellers. The appellant maintained in his defence that the respondent was only entitled to an order for possession if it was proportionate in all the circumstances of the case, and that in the circumstances of his case this test was not satisfied. He relied, among other Convention rights, on his right to respect for his home under article 8 and on the respondent's duty not to act in a way which is incompatible with a Convention right under section 6(1) of the Human Rights Act 1998.

5. By the time the case came before HHJ McKenna on 21 October 2004 it had been transferred to the Birmingham District Registry of the High Court. He was asked to consider to what extent, if at all, it was open to a defendant to rely on article 8 in answer to an otherwise unchallengeable claim to possession by a local authority landowner.

This was not a novel question. The judge was referred to the decision of this House in *Harrow London Borough Council v Qazi* [2003] UKHL 43, [2004] 1 AC 983. In that judgment, which was given on 31 July 2003, it was held by the majority that the contractual and proprietary rights to possession of a public authority landowner could not be defeated by a defence based on article 8: see para 84. The judge noted the respondent's argument that its decision to take proceedings to recover possession was an administrative one which could be challenged by judicial review, and that a positive obligation to facilitate the gipsy way of life might be relevant to a review of the reasonableness of that decision.

6. Applying that decision, the judge gave summary judgment in favour of the respondent on 20 December 2004. He did not form any view about the merits of the justification that the respondent had given for seeking possession. He held that the appellant could not rely on the provisions of the Human Rights Act 1998 or on article 8 of the Convention. But he did not think that there were factual disputes between the parties such as to make judicial review inappropriate. So he granted a stay of execution of the order for possession for 14 days to enable the appellant to apply to the administrative court for judicial review, although he was already out of time by about five months. The appellant did not avail himself of that opportunity, no doubt because his counsel advised him that the decision of the Strasbourg court in *Connors* had raised questions about the soundness of the decision in *Qazi*. The judge later gave permission to appeal, certified the case as suitable for an appeal direct to the House of Lords and suspended execution of his judgment until the conclusion of the appeal proceedings.

7. In the meantime, having regard to the opinions which were issued by the Court of Appeal in *Kay v Lambeth London Borough Council* [2004] EWCA Civ 926, [2005] QB 352 and *Leeds City Council v Price* [2005] EWCA Civ 289, [2005] 1 WLR 1825, your Lordships decided that the decision in *Qazi* should be reconsidered in the light of the Strasbourg court's judgment in *Connors*. On 22 June 2005 an Appeal Committee held that there was no need for the appellant's case to come to this House as well, as it was thought that the issue that it raised would be decided in the cases of *Kay* and *Price*. It was thought that the Court of Appeal would be able to give effect to that decision without difficulty in due course. The Committee's confidence in this outcome appears to have been misplaced, however. The appellant submits that, despite its best efforts, the Court of Appeal in dismissing his appeal failed to appreciate the guidance that was offered in *Kay* and *Price* and how that guidance should be applied in this case.

Qazi as modified by Kay

8. In *Kay and others v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465 (which I shall refer to from now on as *Kay*) it was held by the majority, affirming *Qazi*, that the county courts, when faced with a defence to a claim to possession by a public authority landlord which is based on article 8, should proceed on the assumption that domestic law strikes a fair balance and is compatible with the occupier's Convention rights. But it was recognised that there might be cases of a special and unusual kind, of which *Connors* was an example, where it would be incompatible with article 8 for the occupier not to be permitted to challenge the factual allegations that were made against him which were the basis for the claim for a possession order. If the legal framework denied him that opportunity it would fall to be regarded as incompatible with the Convention right: see paras 108, 168 and 184-185.

9. In *Kay*, para 110, I said that 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 of the public authority landlord 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 to 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."

I added that, as the common law as explained in *Wandsworth Borough Council v Winder* was compatible with article 8, it provided an additional safeguard. Lord Scott of Foscote (para 174), Baroness Hale of Richmond (para 192) and Lord Brown of Eaton-under-Heywood (para 212) agreed with what I said in that paragraph.

10. The Court of Appeal (Tuckey, Carnwath and Neuberger LJJ) subjected the decision in *Kay* to careful analysis: [2006] EWCA Civ 1739. The court recognised that para 110 of my speech embodied the conclusion of the majority on the scope of the exception to the *Qazi* principle. It appreciated that two routes were provided by this paragraph to a solution of the problem that had been revealed by *Connors*. It referred to them as gateway (a) and gateway (b). I shall do the same, but I would caution against reading too much into this terminology. The description of the two routes as "gateways" tends to suggest that they are mutually exclusive. This is not necessarily so. There may be cases – and I shall suggest later that this is one – where they march hand in hand with each other.

11. The principal area of dispute in the Court of Appeal was as to the application to this case of gateway (a). The basis of the decision in *Connors* was identified. It was that, in the view of the Strasbourg court, the authority had misused its privileged position under the statute which enabled it to bypass the ordinary procedures for alleging and proving breach of licence conditions: para 43. But the Court of Appeal held there was no arguable basis on which the respondent's decision in this case could have been challenged as contrary to article 8 under gateway (a). This was because that decision was in accordance with a statutory scheme which, whether compatible or not, had to be applied by the county court: para 53. The present case was distinguishable on its facts from *Connors* because the authority's decision depended not on a factual allegation of nuisance or misconduct, but on an administrative judgment about the appropriate use of land in the public interest. As for gateway (b), the court understood it as enabling the decision to be challenged on conventional judicial review grounds but not on the ground that it was contrary to article 8. It held that the respondent's overall assessment of the various factors in play was well within the margin of appreciation allowed by the Strasbourg jurisprudence in the exercise of an administrative discretion. No purpose would be served in remitting the matter to the judge for him to re-determine that issue: para 61. He was right to make an order for possession, and the result was consistent with both domestic and Convention law.

12. In the hearing before your Lordships Mr Luba submitted that the appellant's case was indistinguishable from *Connors* and that it fell within what the Court of Appeal had termed gateway (a). He said that the case should be remitted to the county court for a merits review of the respondent's grounds for possession under that heading. Alternatively your Lordships should make a declaration of incompatibility, and the case should be remitted to the county court to enable the appellant to present a defence under gateway (b). The argument which he had presented at the outset of his written case was a broader and more fundamental one. It was that the decisions of the majority in both *Qazi* and *Kay* were wrong and that the approach which had been taken in those cases should be departed from. He appreciated that this was not an argument that could be entertained by this committee, so he did not attempt to develop this part of his case in oral argument. But he wished it to be understood that he had not abandoned it.

13. Mr Sales QC for the Secretary of State for Communities and Local Government, intervening, supported Mr Luba's argument that this case fell within gateway (a). He did not join with him in submitting that the decisions in *Qazi* and *Kay* were wrong. He submitted that there was no basis in the decisions of the Strasbourg court for a wholesale reappraisal of the law as established in *Kay*. The present case was exceptional because of the presence of all of the factors which had led to a finding that there had been a violation of article 8 in *Connors*. The critical feature, as the Court of Appeal in *Smith v Buckland* [2007] EWCA Civ 1318 had appreciated, was the absence of procedural safeguards to which, in view of their vulnerable position, gipsies were entitled. There was no need to go beyond what had been decided by the Strasbourg court in that case.

14. Mr Underwood QC for the respondent submitted that a legislative choice had been made to exclude gipsies from statutory protection. That choice should be given effect to. It was not open to the court to examine the respondent's reasons for seeking possession in this case to see if they were soundly based. The only remedy that could be provided, if the result was incompatible with the appellant's right under article 8, was a declaration of incompatibility. A defence by way of judicial review in the conventional sense that the decision to recover possession was wholly unreasonable would be unarguable.

McCann v United Kingdom

15. On 13 May 2008, after the hearing in this appeal, the Strasbourg court delivered its judgment in *McCann v United Kingdom*, application no 19009/04. In that case the applicant and his wife were joint tenants of a house owned by a local authority. They were also secure tenants under section 82 of the Housing Act 1985. Their marriage broke down, and the applicant's wife moved out of the house with the two children of the marriage. She went back to live there after obtaining a court order which required the applicant to leave the house, which he did. But he returned to the house a few days later and, it was alleged, assaulted his wife. She then applied to the local authority to be re-housed on grounds of domestic violence. She was allocated another house in accordance with the local authority's domestic violence policy. The applicant returned to the house and renovated it, but he found that it was too big for him to live in on his own. So he applied for an exchange of accommodation with another tenant of the local authority. His wife supported his application, but the local authority asked her to terminate the joint tenancy by signing a notice to quit. She was not told before she did this that the effect of her doing so would be to extinguish the applicant's right to live in the house or exchange it for another local authority property.

16. About a week later the applicant's wife sought to withdraw the notice, but it remained effective in law to terminate the joint tenancy. Its effect was to deprive the applicant of the protection which he had enjoyed under the statute and expose him to the common law. In the result he had no defence to the notice to vacate which was served on him by the local authority. He sought to defend the possession proceedings on article 8 grounds. On 15 April 2003 the county court judge dismissed the claim for possession and the local authority appealed. The appeal was adjourned pending the outcome of the appeal to this House in *Qazi*. Following that decision the Court of Appeal allowed the appeal. The applicant then applied to the court in Strasbourg. The Chamber decided that no hearing on the merits was required and invited the parties to reply in writing to each other's observations. In the meantime the House issued its decision in *Kay.*

17. The Strasbourg court was satisfied that the interference with the applicant's article 8 right was in accordance with the law and that it pursued a legitimate aim. The central question was whether it was proportionate to the aim pursued and thus necessary in a democratic society: para 49. It rejected the government's argument that the

reasoning in *Connors* was to be confined only to cases involving the eviction of gipsies or cases where the applicant sought to challenge the law itself rather than its application in his particular case: para 50. It noted that the local authority had chosen to bypass the statutory scheme by requesting the applicant's wife to sign a common law notice to quit, and that it did not appear that in doing so it had given any consideration to the applicant's right to respect for his home. It held that, as in *Connors*, the procedural safeguards required by article 8 for the assessment of the proportionality of the interference were not met by the possibility for the applicant to apply for judicial review: para 53. It added this comment in para 54:

> "The court does not accept that the grant of the right to the occupier to raise an issue under article 8 would have serious consequences for the functioning of the system or for the domestic law of landlord and tenant. As the minority of the House of Lords in *Kay* observed …, it would be only in very exceptional cases that an applicant would succeed in raising an arguable case which would require a court to examine the issue; in the great majority of cases, an order for possession could continue to be made in summary proceedings."

18. At the appellant's request the parties were invited by the Committee to make further written submissions on the effect of this judgment before it reported its opinions to the House. All three parties then did so. Mr Luba submitted that the Strasbourg court had endorsed the reasoning of the minority in *Kay* and that the Committee should now take the opportunity to depart from the reasoning of the majority. For the Secretary of State Mr Sales too submitted that the approach to possession claims set out by the minority in *Kay* should now be followed. Mr Underwood, on the other hand, drew attention to the impact on domestic law that would result if that approach were now to be adopted. He submitted that the decision in *McCann* could and should be read more narrowly in the light of its own facts. I have taken account of these submissions in the preparation of this opinion.

19. I would resist the invitation by both Mr Luba and Mr Sales that your Lordships should now abandon the reasoning of the majority in *Kay* in favour of the reasoning of the minority. First, for the reasons that were discussed in *R v Kansal (No 2)* [2002] 2 AC 69, it is well settled that the power to overrule a recent decision of this House which your Lordships undoubtedly have ought not to be exercised unless there is

some very good reason for doing so: *R v Knuller (Publishing, Printing and Promotions) Ltd* [1973] AC 435, 455, per Lord Reid. The only way this could properly be done in this case would be to require the appeal to be re-argued before a panel of nine Law Lords. That would be a very large step to take, would further delay a decision in this case and in my opinion, for the resolution of the case, it is unnecessary. Of course we must, as Lord Bingham said in *Kay*, para 28, take into account any judgment of the Strasbourg court and give practical recognition to the principles that it lays down. But that can be done in this case by applying, and to some extent developing, the reasoning of the majority: see further paras 36 and 55. The solution which I shall be proposing at the end of this opinion is as consistent as domestic law allows us to be with what in both *Connors* and *McCann* the court held was required to avoid a violation of article 8 of the Convention.

20. Secondly, I am not convinced that the Strasbourg court – which did not hear oral argument in *McCann* – has fully appreciated the very real problems that are likely to be caused if we were to depart from the majority view in *Kay* in favour of that of the minority. The proposition that it would only be in very exceptional cases that an applicant would succeed in raising an arguable case which the Strasbourg court adopted in para 54 of its judgment appears to set a high standard, one that will be hard to achieve. But it suffers from a fundamental defect which renders it almost useless in the domestic context. It lacks any firm objective criterion by which a judgment can be made as to which cases will achieve this standard and which will not. Unless parameters or guidelines are set down, the judgment in each case will be a subjective one. Every solicitor who is asked to advise an occupier will have to consider whether it is arguable that the decision to seek his eviction was not proportionate. If he decides to raise this argument the court will have to examine the issue. The whole point of the reasoning of the majority was to reduce the risks to the operation of the domestic system by laying down objective standards on which the courts can rely. I do not think that the decision in *McCann* has answered this problem. Until the Strasbourg court has developed principles on which we can rely on for general application the only safe course is to take the decision in each case as it arises.

21. My third reason is based on the way domestic law requires us to deal with issues of incompatibility. I remain of the view which I expressed about this in para 114 of my opinion in *Kay*. Primary legislation which cannot be read or given effect in way which is compatible with the Convention right must nevertheless still be enforced, unless the decision of the public authority to seek eviction can

be said, when judicially reviewed, to be arbitrary, unreasonable or disproportionate. That is the effect of section 6(2)(b) of the Human Rights Act 1998. The question is whether, having decided to do what it is doing, the public authority landlord is doing what it has been authorised to do by the primary legislation: *R v Kansal (No 2)*, para 88. If it is, giving effect to it cannot be held to be unlawful within the meaning of section 6(1) of that Act: see further paras 43, 44. That is the system which applies in domestic law, which preserves the sovereignty of Parliament. Incompatible primary legislation remains fully effective unless and until it has been repealed or modified. The solutions that are available to the domestic court in response to decisions of the court in Strasbourg are limited by this fundamental principle. As I indicated in *Kay*, it reinforces the proposition that a defence under article 8 must be struck out unless the legislation can be read and given effect in a way that is compatible with the Convention right. Nothing that was said by the Strasbourg court in *McCann* can alter, or has altered, the way acts authorised by primary legislation must be dealt with under section 6(2) of the 1998 Act.

The basic law

22. So I must make it clear at the outset that nothing that I may say in this opinion is to be understood as detracting in any way from the basic law as laid down by the majority in *Qazi* and re-affirmed by the majority in *Kay*. The effect of those decisions was summarised by Baroness Hale in *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420, para 36:

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

The basic rule is that such interference with the right to respect for the home as may flow from the application of the law which enables a public authority to exercise its unqualified right to possession does not violate the essence of the Convention right. Unless the legislation itself can be attacked, this is a conclusion which can be applied to all cases of this type generally. It is not open to the court, once it has decided in any individual case that the effect of the legislation is that the public

authority's right to possession is unqualified, to hold that the exercise of that right should be denied because of the occupier's personal circumstances.

23. As I pointed out in *Qazi*, paras 37-38, the background to the issue which the House was asked to consider in that case was set out in the Law Commission's Consultation Paper *Renting Homes 1: Status and Security* (Consultation Paper No 162), Part V, The Impact of Human Rights Law. As the author explained in para 5.76 of the Consultation Paper, the implication of a conclusion that article 8(1) was always engaged by an eviction was that a procedure which enabled the court to consider the issue of proportionality would become a necessity in respect of any use by a public authority landlord of a procedure under which, by the operation of law, it would previously have been entitled to recover possession automatically. If so, this result would affect housing associations and other registered social landlords as well as local housing authorities. The point of automatic possession proceedings is generally to provide a quick and reliable way of evicting tenants whose lease has by the operation of law been terminated. A procedure which gave a discretion to the court by requiring it to consider whether having regard to article 8(2) the making of the order would be proportionate would be inimical to that purpose. Lord Bingham of Cornhill was careful to point out in *Qazi*, para 23, and again in *Kay*, para 28, that nothing in his opinions in those cases was to be understood as applying to any landowner or owner who was not a public authority. But, as I said in *Kay*, para 64, the effect of such a procedure on private landlords cannot be left out of account. I described the conundrum that, as I saw it, the minority view in *Kay* gave rise to and which the majority in *Qazi* were seeking to solve in para 65 of my opinion in that case.

24. Therein lies the importance of the decision in *Qazi* in domestic law. But it was soon to become apparent that it was in need of some modification if it was to be compatible with the reasoning of the European Court in Strasbourg in three cases which were decided after the decision of this House in *Qazi*: *Connors v United Kingdom* (2005) 40 EHRR 189, *Blečić v Croatia* (2004) 41 EHRR 185 and *Stankova v Slovakia*, application no 7205/02. The decision in *McCann* fits in to this pattern. The applicant in that case had been entitled under the statutory scheme to the protection of an independent determination by the court of the reasonableness of a claim for possession: see Ground 2A in Schedule 2 to the Housing Act 1985. The local authority deprived him of that protection by inviting his wife to sign a notice to quit. This was something that it was enabled to do by the common law as, in the absence of any term in the tenancy agreement to the contrary, the

tenancy was terminable by a notice to quit given by one joint tenant without the concurrence of the other: *Hammersmith and Fulham London Borough Council v Monk* [1992] 1 AC 478. As in *Connors*, he was evicted from his home without the proportionality of the local authority's decision to recover possession being determined by an independent tribunal.

The exceptional position of gipsies

25. The Strasbourg court was presented in *Connors* with a substantial amount of evidence about the way in which gipsies were dealt with under the relevant domestic law and practice: see paras 36 and following. Although the focus of its discussion was on the right to respect for the home under article 8, it had also been alleged that there had been a violation of the applicant's rights under article 14 because gipsies as a group were discriminated against. As the court found that there had been a violation of article 8 it found it unnecessary to consider the complaint under article 14 further: para 97. But the key to a proper understanding of its decision is that the applicant wished to challenge, on the facts, the allegations of anti-social behaviour which were being made against him. To deny him that opportunity because he was excluded from protection under the statutes was discriminatory. This lies behind the court's observations in para 84, where it stated:

> "The vulnerable position of gypsies as a minority means that some 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. To this extent, there is thus a positive obligation imposed on the Contracting States by virtue of article 8 to facilitate the gypsy way of life."

The regulatory framework referred to in that paragraph was discussed in paras 43-46. The effect of the statutes which apply to sites for caravans and other mobile homes was to deny gipsies the security of tenure that is available to others who occupy such sites. Their effect was to enable the court to apply the common law, which gave the local authority the right to recover possession on the expiry of the period of notice referred to in section 2 of the 1968 Act.

26. Section 24 of the Caravan Sites and Control of Development Act 1960 gives power to local authorities to provide sites for caravans. Section 24(1) provides:

> "A local authority shall have power within their area to provide sites where caravans may be brought, whether for holidays or other temporary purposes or for use as permanent residences, and to manage the sites or lease them to some other person."

Subsection (2) of that section provides that a local authority shall have power to do anything appearing to them desirable in connection with the provision of such sites.

27. Part I of the Caravan Sites Act 1968 provides limited security of tenure to occupiers of caravans on caravan sites. Where a person is entitled under any licence or contract to station a caravan on a protected site such as those established for the purpose by a local authority, a minimum period of notice is required to determine his right to occupy: section 2. He is also protected from harassment: section 3. Section 4 adds to these protective measures a power to suspend the execution of eviction orders. If the court makes an order for enforcing any right to exclude the occupier from the site or any caravan on the site which he was entitled to occupy, or to remove or exclude from the protected site any caravan, it has power to suspend the enforcement of the order for a period not exceeding twelve months. This period may be extended, reduced or terminated from time to time by the court on the application of either party.

28. The Mobile Homes Act 1983 applies to any agreement under which a person is entitled to station a mobile home on land forming part of a protected site and to occupy it as his only or main residence: section 1(1). The occupier must be given a written statement by the owner of the protected site setting out, among other things, the terms of the agreement: section 1(2). There are to be implied into it, notwithstanding any provision to the contrary, the terms set out in Part I of Schedule 1 to the Act: section 2(1). Among them are provisions that regulate the right of the owner of the protected site to terminate the agreement: paras 4-6. In each case they are subject to the supervision of the court, which must be satisfied on the application of an owner who seeks termination because the occupier has breached a term of the agreement that the breach has been established and that it is reasonable for the agreement to be terminated.

29. The protection which section 4 of the 1968 Act gives to the occupiers of caravan sites was not available to the applicant in *Connors* because section 4(6)(a) of that Act, as originally enacted, excluded the court's power to suspend the enforcement of a possession order under that section in the case of possession proceedings brought by local authorities. The effect of that provision was to leave the local authorities' statutory power to manage its caravan sites unqualified. That subsection has now been amended by section 211(1) of the Housing Act 2004. Section 4(6)(a), as originally enacted, has been deleted. The result is that the power to suspend is now generally available in such cases. That amendment came into force on 18 January 2005. But it was not retrospective. So it does not assist the appellant in this case, as the proceedings were brought against him on 27 May 2004.

30. The protection which the 1983 Act gives to mobile home owners is excluded in the case of gipsies occupying local authority sites by section 5(1) of that Act. It provides that the expression "protected site" does not include any land occupied by a local authority as a caravan site providing accommodation for gipsies. The effect of that provision was to leave the local authority's statutory power to manage sites for gipsies unqualified. Provisions to remove that exclusion were contained in the Housing and Regeneration Bill which received the Royal Assent on 22 July 2008: see section 318 and Schedule 16. Here again the provisions are not retrospective, so they will not assist the appellant in this case either.

31. For completeness, it should be noted that Part IV of the Housing Act 1985 confers security of tenure on occupiers of accommodation let or licensed to them by local authorities. But these rights are confined to tenancies or licences for occupation of "dwelling houses": see sections 79(1) and 112 of that Act. The nomadic lifestyle of gipsies excludes them from the kind of home that will attract that protection. A recent paper on the position of gipsies in Scotland has drawn attention to the fact that they still need appropriate accommodation that is compatible with their culture of nomadism: Ian Taggart, *One Scotland Many Cultures?* SCOLAG Legal Journal, March 2008, p 66. As he explains, the difficulty that gipsies experience in finding suitable accommodation inevitably leads to an increase in unauthorised encampments. This is turn leads to a substantial increase in inter-community tension that frequently manifests itself in the form of racial abuse and racially motivated attacks against the gipsy/traveller community.

32. The Strasbourg court said in *Connors*, para 94, that it was not persuaded that the necessity for a "statutory scheme" which permitted the summary eviction of the applicant and his family had been sufficiently demonstrated. The same scheme applies to the appellant's case, as the respondent commenced proceedings against him before the coming into effect of the changes that have been and are about to be made to it. In para 92 the court set out its conclusions on the point that it had made in para 84 that some special consideration should be given to the needs of gipsies and their different lifestyle in reaching decisions in particular cases. The government had relied on the possibility of applying for judicial review to obtain scrutiny of the lawfulness and reasonableness of decisions taken by the local authority. But the court did not consider that this could be regarded as assisting gipsies in circumstances where the local authority terminates licences in accordance with the applicable law. It summarised its conclusions as to the effect of the legal framework in para 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."

33. The procedural safeguard that was lacking in *Connors* was an ability to challenge in court, by way of a defence, the allegations of misconduct that were the basis for the authority's decision to seek the possession order against him. Applied to this case, special consideration to the needs of gipsies and their different lifestyle requires that the appellant must be able to insist, by way of a defence to the claim, that it be shown there is a proper justification for the decision to seek a possession order. It must be shown that the respondent's decision to evict him and his family from the site was justified by a pressing social need and was proportionate. If that cannot be done, there is a risk that the appellant's rights under article 8 will have been violated.

Connors as seen in Kay

34. The issue in *Kay* was whether, and if so to what extent, the decision in *Qazi* required modification in the light of the subsequent decisions in Strasbourg. All of their Lordships were agreed that the facts in *Connors* and *Blečić* were entirely different from those in *Qazi* and that *Connors* in particular was an exceptional case. In para 54 Lord Nicholls of Birkenhead said that there might be the exceedingly rare case where the legislative code or the common law was impeachable on human rights grounds. He said that *Connors* was an example of this possibility, rare and exceptional though it might be. Lord Walker of Gestingthorpe, who was also in the minority, described the circumstances in which domestic law might fail to show the respect for the home required by article 8, as in *Connors*, as highly exceptional: para 176. Lord Scott described the context for the judgment in *Connors* as unusual and discriminatory: para 161. Baroness Hale said in para 179 that, if the ratio decidendi of the majority in *Qazi* was that the enforcement of a right to possession in accordance with the domestic law of property could *never* be incompatible with article 8, it had now to be modified in the light of the decision in *Connors*: para 179. But she described the cases in which a claim that the balance struck by the general law did not comply with the Convention would have a real prospect of success as rare.

35. Lord Brown of Eaton-under-Heywood agreed in para 200 that *Connors* required a modest qualification to be made to the *Qazi* principle. So the contention that our domestic law was incompatible with the occupier's article 8 rights was theoretically available to him. But it would nevertheless not be open to the judge to decide the case other than in accordance with the domestic law. In para 203 he said that where no statutory protection was afforded to occupiers that should be assumed to be Parliament's will – the result of a deliberate decision by Parliament to leave the owner's right to recover possession in these cases unqualified. In para 206 he said that he saw *Connors* as explicable by reference to unjustifiably discriminatory legislation rather than because of a want of a sufficient discretion under domestic law to take account of exceptional circumstances. In para 108 of my speech, on the other hand, I said that the lesson to be drawn from *Connors* was that there will be some cases of a special and unusual kind where the interference with the right to respect for the home which results from the making of a possession order will require to be justified by a decision-making process that requires some special consideration to be given to the interests safeguarded by article 8 and that, if the law was defective in

this respect, it would need to be amended to provide the necessary safeguards.

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

The gateways

37. In many respects the background to this case is the same as in *Connors*. Here too a local authority has an unqualified right to possession in terms of the statutes. Here too the occupier against whom the order is sought is a gipsy together with members of his family, all of whom are gipsies. Here too the plot of which the appellant is the occupier is on a gipsy and travellers' caravan site. The appellant and his family have been in occupation of the site for many years. The period was about 16 years in *Connors*. In this case the period is about 17 years. The legal framework on the date when the possession order was made, both under statute and at common law, is the same. As in *Connors*, that framework was designed by Parliament. No statutory protection is available, with the result that the landowner's right to recover possession is unqualified. The respondent's decision to exercise that right could not have been held to have been unlawful within the meaning of section 6(1) of the Human Rights Act 1998 as it was acting so as to give effect to the provisions of the statute: see section 6(2)(b) of that Act. To hold otherwise would conflict with the intention of Parliament.

38. Mr Luba and Mr Sales submitted that section 6(2)(b) of the 1998 Act did not apply to this case. This was because the effect of the statutes was that the protections that were available to others did not extend to sites on local authority land that were occupied by gipsies. So the court was simply applying the common law when it made the possession order. I would reject that argument. What we have here is a scheme for the management of caravan sites belonging to local authorities that has been laid down by statute. The effect of that scheme, when read as a whole, is to provide protection in some cases which in other cases is not available. Where cases are found to be outside that protection, as they are in the case of gipsies, this is because Parliament has decided that in those cases the protection should not be available. It is, of course, true that where the protections are not available the effect is that the contractual method of recovering possession that the common law provides is unqualified. But that is the result not of the common law but because Parliament has decided to make it so.

39. The cases in which the effect of section 6(2)(b) of the 1998 Act has been considered so far demonstrate that three distinct situations may arise. The first is where a decision to exercise or not to exercise a power that is given by primary legislation would inevitably give rise to an incompatibility. That was the situation in *R v Kansal (No 2)* [2002] 2 AC 69, as Moses J observed in *R (Wilkinson) v Inland Revenue Commissioners* [2002] STC 347, para 41. The prosecutor's decision to adduce evidence of the answers which had been obtained under compulsion pursuant to section 433 of the Insolvency Act 1986 was bound to result in a breach of article 6 of the Convention. The second, which lies at the opposite end of the spectrum, is where the act or omission of the public authority which is incompatible with a Convention right is not touched by one or more provisions of primary legislation in any way at all. As the matter is not to any extent the product of primary legislation, the sovereignty of Parliament is not engaged. The act or omission will be unlawful under section 6(1) because section 6(2)(b) does not apply to it. The third situation lies in the middle. This is where the act or omission takes place within the context of a scheme which primary legislation has laid down that gives general powers, such as powers of management, to a public authority. That is the situation in this case. The answer to the question whether or not section 6(2)(b) applies will depend on the extent to which the act or omission can be said to be giving effect to any of the provisions of the scheme that is to be found in the statutes.

40. Guidance as to how the third situation is to be approached was given in *R (Hooper) v Secretary of State for Work and Pensions* [2005]

UKHL 29; [2005] 1 WLR 1681, with which the House's decision in *R (Wilkinson) v Inland Revenue Commissioners* [2005] UKHL 30; [2005] 1 WLR 1718 should also be read. My noble and learned friend Lord Walker of Gestingthorpe has very helpfully quoted the relevant passages from *Hooper*, so I do not need to repeat them. The important point, as Lord Hoffmann explained in paras 48 and 49, is that section 6(2)(b) assumes that the public authority could have acted differently but excludes liability if it was giving effect to a statutory provision which could not be read in a way that was compatible with the Convention rights. It protects a decision to exercise or not to exercise a discretion that is available to it under the statute. It seems to me, looking at the statutory scheme as a whole that applies to this case, that this is indeed what the respondent was doing when it decided to apply for a possession order. It was exercising its powers of management under section 24 of the 1960 Act when it decided to terminate the appellant's contract. It is true that it was making use of the method which the common law provides for doing this, but this was because the statutory scheme permitted it to do so. Public authorities which make use of the common law in the exercise of their statutory powers of management are in no less favourable a position under that section 6(2)(b) than they would have been had their powers been derived entirely from statute: see my own opinion in *Hooper*, para 83.

41. In one key respect the two cases are different. Here, unlike *Connors*, there are no factual allegations of anti-social behaviour or of misconduct in any other respect on the part of the appellant or members of his family. Had there been allegations of that kind it would have been clear that, unless some special consideration were given to his case to enable him to challenge them, there would be a violation of article 8 of the Convention. There would be a strong argument that this would also result in a violation of article 14 in conjunction with article 8 because the appellant was being discriminated against by the legal framework that existed when these proceedings were brought. But the absence of factual allegations of that kind does not mean that there may not be a violation in this case. On the contrary, the discrimination against gipsies that is inherent in the legal framework applies generally irrespective of the grounds on which possession is being sought.

42. The question is whether it is possible for this violation of the appellant's Convention rights to be avoided, given that the basic principle that was established by *Qazi* is that the law itself strikes a fair balance between the rights of the individual and the interests of the community. As I said in para 109 of my opinion in *Kay*, and again at the outset of para 110, a defence to a possession order which does not

challenge the law under which it is sought but is based only on the personal circumstances of the occupier should be struck out. The personal interests safeguarded by article 8 must be taken to have been sufficiently safeguarded by the fulfilment of the requirements for the recovery of possession by the landowner laid down by the statute or by the common law. That is the basic law that was established in *Qazi* and it is the point on which the majority in *Kay* differed from the minority: see ground (3)(b) in para 39 of Lord Bingham's opinion. This however is an exceptional case, and it is the law itself that is at fault. The legal framework that applies to the appellant's case is defective because the statute excludes the gipsy community from its procedural safeguards. The modification that was made to *Qazi* to accommodate the decision in *Connors* applies to this case.

43. As the law that applies to the appellant's case is defective, the first place to go to find a solution to the problem in para 110 is that part of it that was referred to by the Court of Appeal, para 28, as gateway (a). It was designed expressly for cases such as *Connors*, where the law under which the possession order is sought is incompatible with article 8. That, as Mr Luba has explained, is the position in this case. The question is whether the incompatibility which the legal framework is said to have created can be removed through the exercise by the court of its powers under the Human Rights Act 1998.

44. The other part of para 110, referred to by the Court of Appeal as gateway (b), was designed to leave open the possibility of a challenge on public law grounds that the public authority's decision to bring the claim was so unreasonable as to be unlawful. Its purpose was also to make it clear that this objection could be advanced as a defence in the county court. Lord Brown mentioned this point in *Kay*, para 209; see also Lord Bingham of Cornhill, para 30, Lord Nicholls, para 60. In para 210 Lord Brown said that an argument could perhaps have been mounted successfully in *Connors* that, having regard to the great length of time that the family had resided on the site, it was unreasonable, indeed grossly unfair, for the local authority to claim possession merely on the basis of a determined licence without the need to make good any underlying reason for taking such precipitate action. That comment was made in the context of a discussion about review of the decision at common law. In this case, as the Court of Appeal pointed out in para 61, the respondent's decision was based on an administrative judgment about the appropriate use of the site in the public interest. This is the kind of decision whose lawfulness is open to challenge by way of a defence to the proceedings as an improper exercise of the powers of the

public authority, quite apart from its obligations under section 6 of the Human Rights Act 1998, as Lord Nicholls said in *Kay*, para 60.

Gateway (a)

45. The way through gateway (a) is, as I have said, to be found by making use of the Human Rights Act 1998 ("HRA"). The phrase "the county court in the exercise of its jurisdiction under the Human Rights Act 1998" which is used in para 110 of my speech in *Kay* indicates that it is the provisions of the Act that must guide the court as it seeks to find a way through this gateway. As the words which precede this phrase make clear, the gateway is only available if a seriously arguable point is raised that the law itself which enables the court to make the possession order is incompatible with article 8. That precondition is satisfied in this case as, for the reasons already explained, the legal framework that applies to it is indistinguishable from that which applied in *Connors*.

46. Gateway (a) is divided into two parts. Part (i) envisages that it may be possible for the court to give effect to the law in a way that is compatible with the Convention right by making use of the interpretative obligation in section 3 HRA. But this may not be possible, and the court then comes face to face with the fact that it is a public authority: section 6(3)(a). It is unlawful for it to act in a way which is incompatible with the Convention right: section 6(1). Legislation which cannot be read or given effect in a way which is compatible with the Convention right must nevertheless be enforced, as Parliamentary sovereignty requires this. Giving effect to a decision to do what the legislation authorises will not be an unlawful act within the meaning of section 6(1): see section 6(2)(b) HRA. Part (ii) recognises that, if effect must be given to legislation which is incompatible with a Convention right, consideration should be given, in the public interest, to the making of a remedial order under section 10. A county court is not among the courts listed in section 4(5) which may make a declaration of incompatibility under section 4(2). So, unless gateway (b) provides a solution, the proper course for a county court judge in the situation that section 6(2)(b) refers to will be to adjourn the proceedings to enable the issue of incompatibility to be dealt with in the High Court which has that power. If part (ii) applies and no solution is available under gateway (b), the court will be unable to refrain from making a possession order. That is the effect of section 6(2)(b). But a declaration by a High Court judge under section 4 will enable the Minister to consider taking remedial action to avoid the incompatibility in future cases.

47. The first question in this case is whether a solution can be found in part (i) of gateway (a). To answer it a more precise examination of the source of the alleged incompatibility must be undertaken than was necessary in *Kay*. I agree with my noble and learned friend Lord Walker of Gestingthorpe that the boundary between statute and common law was not an issue in that case. Nevertheless the Court of Appeal rejected the argument for the appellant and the Secretary of State that the respondent's claim for possession depended on its common law rights, not on any statutory entitlement, because they understood this to be contrary to what was indicated by the speeches of the majority: paras 47-53. In my opinion they were right to do so for the reasons given by Lord Walker, and I would reject the arguments that the appellant and the Secretary of State renewed in this House to the contrary.

48. The Strasbourg court used the expression "the legal framework" in the last sentence of para 85 of its judgment in *Connors* to describe the circumstances in which the applicant in that case was provided with insufficient procedural protection of his rights under article 8. In the first sentence of para 94 it referred to the "statutory scheme" which permitted the summary eviction of the applicant and his family. That there was a statutory scheme is clear. Gipsies who occupied sites under a licence granted by a local authority were excluded from the protection from eviction from caravan sites which section 4 of the Caravan Sites Act 1968 gives to occupiers of caravans by section 4(6) of that Act. Moreover gipsies are still excluded from the protection that section 2 of and Schedule 1 to the Mobile Homes Act 1983 give to the occupiers of mobile homes on protected sites, because that expression does not include any land occupied by a local authority as a caravan site providing accommodation for gipsies: see section 5(1). The unqualified right to recover possession immediately is the product of the common law. But it is part of the regulatory framework which was created by Parliament. The incompatibility that results from this is a creature of statute, not of the common law.

49. Section 3(1) HRA provides that, so far as it is possible to do so, primary and subordinate legislation must be read and given effect to in a way which is compatible with Convention rights. But the exclusions from protection that are to be found in these statutes are not susceptible to interpretation in a way that would remove the incompatibility. Giving effect to them is unavoidable. The court cannot make an order postponing the operation or suspending the execution of an eviction order, because that would be contrary to section 4(6) of the 1968 Act as it stood at the date when the respondent commenced these proceedings. There is no agreement of the kind that paragraphs 4 to 6 of Schedule 1

to the 1983 Act refers to, as the appellant was excluded from the protection of that Act. As has often been said, section 3(1) provides the court with a powerful tool to enable it to interpret legislation and give effect to it. But it does not enable the court to change the substance of a provision from one where it says one thing into one that says the opposite.

50. I would hold therefore that it is not possible for a solution to this case to be found in part (i) of gateway (a) by making use of the interpretative obligation in section 3(1) HRA. This raises the question whether your Lordships should make a declaration of incompatibility under part (ii). The incompatibility with the appellant's article 8 rights that was to be found in section 4(6)(a) of the 1968 Act has been removed by section 211(1) of the Housing Act 2004. As already noted, a clause was included in the Housing and Regeneration Bill to remove the exclusion of local authority sites which provide accommodation for gipsies from the protection of the 1983 Act. Nevertheless, prior to its receiving the Royal Assent (which it now has: see para 30), Lord Walker favoured the making of a declaration of incompatibility in relation to section 5(1) of the 1983 Act.

51. I was at first inclined to doubt whether a declaration was necessary. The power to make a declaration under section 4 HRA is, after all, a discretionary one. But on reflection I agreed that it would be appropriate to make such a declaration in this case. Indeed I considered that the decision of the Strasbourg court in *Connors* left the House with no alternative but to do this. That was a judgment which was pronounced in a case against the United Kingdom. Its decision is as plain an indication as there could be that there was an incompatibility in our legislation that ought to be addressed by the United Kingdom Parliament or, if there are compelling reasons for the exercise of the power under section 10 HRA, by the Minister. In such circumstances the decision as to whether the incompatibility should remain was not for the court to take. It had to be left to the government and to Parliament, and it could not be taken for granted that the amending legislation would be passed. In the events that have happened, however, the making of a declaration has become unnecessary. Sections 325(3) and (4) of the Housing and Regeneration Act 2008 leave the choice of the commencement date for the relevant provisions to the Secretary of State. But there is no longer any need for the 1983 Act to be amended under the power that section 10(2) HRA gives to the Minister.

Gateway (b)

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

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

54. The Court of Appeal said in para 61 that it could see no purpose in remitting the case to the judge. I disagree, with respect, with this

assessment. In para 43 of his judgment the judge said that it seemed to him that in this case judicial review would be able to check the fairness and legality of the respondent's decision. Now that it is clear that arguments of that kind may be presented by way of a defence to the proceedings under gateway (b), I think that he should be given the opportunity to carry out that exercise. Any factual disputes that may exist between the parties as to the facts on the basis of which the decision was taken will be capable of being resolved by him too. Lord Brown's observations in para 210 of his opinion in *Kay* add a further point that is relevant to this issue. The site had been occupied as their home by the appellant and his family for about 17 years when the notice to quit was served. So it could be argued that it was unfair for the respondent to be able to claim possession without being required to make good the reasons that it gave in its own statement of claim for doing so.

55. I think that in this situation it would be unduly formalistic to confine the review strictly to traditional *Wednesbury* grounds. The considerations that can be brought into account in this case are wider. An examination of the question whether the respondent's decision was reasonable, having regard to the aim which it was pursuing and to the length of time that the appellant and his family have resided on the site, would be appropriate. But the requisite scrutiny would not involve the judge substituting his own judgment for that of the local authority. In my opinion the test of reasonableness should be, as I said in para 110 of *Kay*, whether the decision to recover possession was one which no reasonable person would consider justifiable. The further point to which Lord Brown referred will have a part to play in that assessment.

Conclusion

56. County Court judges should continue to follow the guidance that was given in *Kay*, para 110, as more fully explained in paras 45-55 of this opinion. As for this case, the Court of Appeal was right to hold that there was no arguable basis for asserting that the incompatibility of the respondent's decision could be dealt with under gateway (a). But it was wrong to hold that no purpose would be served by remitting the case to the judge so that he could examine the appellant's defence under gateway (b).

57. I would allow the appeal. I would remit the case to the judge in the High Court so that he can review the reasons that the respondent has

given for serving a notice to quit to obtain vacant possession of the plots that the appellant and his family occupy. It will be for the judge to resolve any dispute that he needs to resolve about the facts and, having done so, to determine whether the decision to terminate the appellant's licence on the grounds stated in its particulars of claim, and having regard to the length of time that the appellant and his family have resided on the site, was reasonable. If he is satisfied that this requirement has been met he must make a possession order. There will be no answer to the respondent's unqualified right to recover possession. If he is not satisfied he must decline to make the order unless or until a justification that meets that test has been made out.

LORD SCOTT OF FOSCOTE

My Lords,

Introduction

58. The answer to the issue, or issues, arising in this case must be derived, as the Court of Appeal recognised, from the guidance given by this House first in *Harrow LBC v Qazi* [2004] 1 AC 983 and later, and more importantly, in *Kay v Lambeth LBC* and *Leeds City Council v Price* [2006] 2 AC 465. In *Qazi* the House held, by a majority, that contractual and proprietary rights to possession of property occupied as his or her home by a defendant to a possession claim brought by the owner of the property could not be defeated by a defence based on article 8 of the European Convention on Human Rights.

59. The authority of the *Qazi* decision was then said to have been undermined by the decision of the Strasbourg court in *Connors v United Kingdom* (2005) 40 EHRR 9. It was so argued in the *Kay* and *Price* case by Mr Luba QC, who had been the unsuccessful counsel in *Qazi*. Accordingly, since the House was to be invited to depart from its very recent decision in *Qazi*, an Appellate Committee of seven sat on the *Kay* and *Price* appeal. The House, by a majority of four to three, declined Mr Luba's invitation to hold that *Qazi* had been wrongly decided and confirmed that, in general, where a claim to possession of property was made by an owner of the property against an occupier to whom the ordinary domestic law gave no contractual or proprietary right to remain in possession, the occupier could not resist the possession claim by

praying in aid his rights under article 8. In a case where the property in question was the occupier's "home" for article 8 purposes, the requirements of article 8(2) were met by the ordinary domestic law. The House held also, however, that the Strasbourg court's decision in *Connors* showed that in a certain type of case where the owner was a public authority it might be possible for an article 8 challenge to be successfully made. The scope for this possibility was formulated by Lord Hope of Craighead in paragraph 110 of his opinion, a paragraph concurred in by the other three members of the majority. I must return to paragraph 110 which is critical to the result of this appeal.

60. In the present appeal Mr Luba is once again seeking to rely on article 8 in order to resist a possession claim brought by a local authority owner of property against an occupier who has had his home on the property. In his printed case Mr Luba argued, as in *Kay* and *Price* he had done in relation to *Qazi*, that the House's decision in *Kay* and *Price* regarding the scope of article 8 as a defence to possession proceedings should be reconsidered and departed from. At the outset of the hearing of this appeal, however, Mr Luba accepted that he was obliged to accept the authority of *Kay* and *Price* and indicated that he would confine himself to submissions that pursuant to Lord Hope's paragraph 110 formulation the appellant, on the facts of this case, could properly rely on an article 8 defence. Nonetheless I am bound to say that the thrust of Mr Luba's oral submissions appeared to me to constitute a revival of his submission in *Kay* and *Price* that where a local authority was seeking possession of property that constituted the defendant's "home" for article 8 purposes, it was open to the defendant to resist the making of a possession order by contending, in reliance on article 8, that the making of the order was not necessary and proportionate in all the circumstances.

61. My Lords I respectfully suggest that your Lordships must reject this attempt to undermine *Kay* and *Price*. It is, of course, legitimate for Mr Luba to seek to frank his appeal and the legitimacy of an article 8 defence by reliance on Lord Hope's paragraph 110, a paragraph that formed part of the ratio of the majority. But that, in my opinion, is all that is open to him. Your Lordships' function on this appeal is to consider whether the circumstances of this case do enable the appellant to rely on paragraph 110. Anything more would involve the unacceptable spectacle of a committee of five presuming to revise the considered opinion of a committee of seven.

Paragraph 110 of Lord Hope's opinion in Kay and Price

62. Paragraph 110, in the view of the majority of whom I was one, was necessary for the purpose of aligning our domestic case-law with Strasbourg case-law, and in particular with the Strasbourg court's decisions in *Connors* and in *Blečić v Croatia* (2004) 41 EHRR 185, decisions which were said to be (but in the view of the majority were not) inconsistent with *Qazi*. In each of these cases the Strasbourg court had reviewed the domestic law and procedures under which the home-occupier had lost his right to remain in his home and had questioned their compatibility with the occupier's article 8 rights.

63. In *Blečić* the domestic law and procedures were found to be adequate. The court concluded that (para.70)

> "[Mrs Blečić] was involved in the decision making process to a degree sufficient to provide her with the requisite protection of her interests."

64. In *Connors*, on the other hand, the domestic law and procedures were found to be inadequate. The applicant had sought permission to apply for judicial review of the local authority's decision to terminate his licence to remain on the caravan site where for some seventeen years he had had his home, but permission had been refused. It appeared that that decision had been reached because the local authority had thought that Mr Connors and his family had been making a nuisance of themselves on the site. It was said that they were "a magnet for trouble". Mr Connors had denied that that was so but had had no procedural opportunity to satisfy an independent tribunal that his version of what had been happening on the site was the correct one. So the factual basis of the local authority's decision to evict him was never judicially tested. As the Strasbourg court said (para.92)

> "… 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"

It was the "… power to evict without the burden of giving reasons liable to be examined as to their merits by an independent tribunal …"

(para.94) that the Strasbourg court was unable to accept (see also para.95).

65. As to the domestic law, there was in *Connors* a discrimination point. The security of tenure given by the Mobile Homes Act 1983 to travellers licensed to station their caravans on privately owned caravan sites did not apply to local authority owned sites. The court was not persuaded by the government's attempt to justify this discrimination. A similar discrimination point had arisen in *Larkos v Cyprus* (1999) 30 EHRR 597 where, too, the Strasbourg court had not been persuaded of the justification for the discrimination.

66. No comparable issue about domestic law nor about procedures enabling the "home" occupier to challenge the local authority's reasons for seeking possession had been raised in *Qazi*, or in *Kay* and *Price*. Both issues, however, had been raised in *Connors*; and in *Kay* and *Price* a definitive statement from the House regarding the type of case in which an article 8 defence might successfully be raised in answer to a possession claim was needed in order to take into account the possibility that these issues might arise in future cases. Lord Hope's paragraph 110 dealt with that possibility. Lord Hope said this:

> "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."

67. As to (a), Lord Hope was dealing with the possibility that an article 8 defence, perhaps allied, as in *Connors*, with an article 14 discrimination complaint, might be based on some alleged inadequacy of the domestic law, under which the property owner's right to possession arose, to cater for the defendant's article 8 rights. The question was raised in the course of the hearing of the present appeal as to whether Lord Hope's reference to "the law" should be read as a reference to statutory law or to common law or to both. It should clearly, in my opinion, be read as a reference to the domestic law, whether statutory law, common law, or, as is very often the case where property law is concerned, a combination. Thus, in *Connors* "the law" was the law that enabled the local authority to recover possession of the caravan site without the statutory hindrances imposed by the Mobile Homes Act 1983, hindrances that did not apply to local authority owned sites. As to (b), Lord Hope was referring to challenges to the lawfulness of decisions taken by local authorities to recover possession, decisions, that is to say, that would have been open to challenge by judicial review. *Wandsworth LBC v Winder* was a case in which it was held permissible for such a challenge to be raised as a defence to proceedings brought by the local authority to implement the decision. The decision in question in *Winder* was a decision to raise the rents payable by council tenants. The Council had power under the tenancies in question to raise the rents but if the decision to raise them had been so unreasonable as to be an unlawful exercise of power then, it was held, the unlawfulness could be relied on as a defence to a claim for payment of the new rent. Lord Hope contemplated under (b) that if a local authority's decision to recover possession could be shown to be so unreasonable as to constitute an unlawful exercise of power, the notice terminating the occupier's tenancy or licence would be invalid, the tenancy or licence would not have been lawfully terminated and that that unlawfulness could be relied on as a defence to the possession proceedings. Hence his citation of *Wandsworth LBC v Winder*.

68. There is, however, a type of case that straddles Lord Hope's (a) and (b). Traditional features of judicial review challenges to decisions taken by public authorities are that they must be brought in the

High Court, that they cannot be brought unless permission to bring them is first obtained and that that permission is not usually given where the challenge raises and depends upon disputed issues of fact. I am not clear whether permission is invariably, or merely usually, refused in these disputed fact cases. Nor am I clear why normal judicial review procedure should not be adjusted so as to enable issues of fact to be judicially resolved where such resolution is necessary in order to enable the challenge to the decision in question to be fairly disposed of. But it does appear to be the case that permission to bring judicial review proceedings is sometimes, or perhaps usually, refused where the challenge, if it is to succeed, has to dispute facts on which the local authority relies in justification of its decision. A good example is *Connors*. The *Connors* family had for some seventeen years occupied a plot on a local authority gypsy site under a licence which allowed them to do so provided they did not cause a "nuisance". The licence was terminable on notice and notice was given by the local authority. Under the ordinary domestic law, the Connors became trespassers on the site. In the ensuing possession proceedings the local authority justified their decision to serve the notice by asserting that members of the Connors family, in breach of the licence conditions, had been making a nuisance of themselves. The applicant disputed the nuisance allegations and applied for judicial review of the Council's decision to terminate his licence. But permission for a judicial review was refused and the Council, in the possession proceedings, did not attempt to prove the truth of its nuisance allegations but simply asserted a right to possession on the ground that the notice to quit having expired the Connors family had become trespassers. The Strasbourg court, as I have already said, did not accept that this procedure sufficed to satisfy the requirements of article 8.2. The procedural deficiencies relating to judicial review which had prevented the applicant's challenge to the facts, on which the local authority had relied in deciding to serve the notice to quit, from being judicially determined could be regarded as constituting deficiencies in the law, thus bringing the case within Lord Hope's gateway (a). But the perceived procedural deficiencies are surely curable by a simple procedural adjustment enabling a challenge to the public authority's decision to terminate the occupier's tenancy or licence to be part of the occupier's defence to the possession claim (i.e. gateway (b) and see *Winder*), thus enabling any factual disputes that needed to be resolved to be dealt with in the ordinary way in the course of the proceedings. One way or another it must be open to a person in the position of the site occupier in *Connors*, or, for that matter, the site occupiers in the present case, to challenge the lawfulness of the decision of the local authority owner to recover possession of the property, whether on conventional public law grounds or by challenge to the factual allegations (if any) made against them by the local authority, and to do so by way of defence in the possession proceedings. The respect for the "home" to

which each home occupier is entitled under article 8 requires that that be so and paragraph 110 of Lord Hope's opinion in *Kay* and *Price* recognises that that is so. It would, of course, be for the court in each case to decide whether the defence put forward, i.e. the challenge to the local authority's decision, was seriously arguable and, if it was not, to deal with the case summarily.

69. It is worth noticing that gateway (b) and a challenge to the lawfulness of the decision by the property owner to recover possession of the property from its "home" occupier, is of no relevance whatever to possession proceedings brought not by public authority owners but by private owners. If private owners are entitled to recover possession of their property under the ordinary domestic law, whether common law, statute or a combination, their reasons for deciding to recover possession are irrelevant. Private owners are entitled to take decisions about their own property to suit themselves unless and to the extent that statute has fettered that entitlement. Their property rights are recognised and protected by the Convention (see article 1 of the 1st Protocol to the Convention). Trespassers who have established a "home" on the property of a private owner are entitled to no more respect for their home from the owner on whose land they are trespassing than the law prohibiting forcible entry or eviction without a court order affords. Home occupiers whose contractual and statutory rights to remain on the property have come to an end are in no different state. Such balance as is required to be struck between the rights of home occupiers and the rights of the private owners of the properties on which the homes have been established has been struck by the domestic law and, unless a gateway (a) attack on the domestic law can be sustained, e.g. an attack based on discrimination as in *Connors*, article 8.2 has no further part to play. *Qazi* established that that was so and its authority in that respect remains unaltered. But public authorities, and in particular local authorities, are in a different position. Their decision making powers are subject to the constraints of *Wednesbury* reasonableness, and they must not act in a way that is incompatible with Convention rights (section 6 of the 1998 Act). But those public law constraints strike, in my opinion, the balance that article 8.2 requires (see the penultimate sentence of Lord Hope's para.110).

70. Finally, in considering the effect and implications of Lord Hope's paragraph 110 in *Kay* and *Price*, it is worth pointing out how narrow was the area of disagreement between the views of the four in the majority and those of the three in the minority. In paragraph 39 Lord Bingham of Cornhill, with whose opinion Lord Nicholls of

Birkenhead and Lord Walker of Gestingthorpe agreed, summarised his view of the position with six propositions

> "The practical position, in future, in possession proceedings can be briefly summarised as follows. (1) It is not necessary for a local authority to plead or prove in every case that domestic law complies with article 8. Courts should proceed on the assumption that domestic law strikes a fair balance and is compatible with article 8. (2) If the court, following its usual procedures, is satisfied that the domestic law requirements for making a possession order have been met the court should make a possession order unless the occupier shows that, highly exceptionally, he has a seriously arguable case on one of two grounds. (3) The two grounds are: (a) that the law which requires the court to make a possession order despite the occupier's personal circumstances is Convention-incompatible; and (b) that, having regard to the occupier's personal circumstances, the local authority's exercise of its power to seek a possession order is an unlawful act within the meaning of section 6. (4) Deciding whether the defendant has a seriously arguable case on one or both of these grounds will not call for a full-blown 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."

The only proposition which is in any respect inconsistent with the majority opinions is proposition 3(b) and the inconsistency there is slight though important. Proposition 3(a) covers the same ground as Lord Hope's paragraph 110 gateway (a). But proposition 3(b) attributes to the occupier's personal circumstances a central importance that the

majority opinions did not accept. The view of the majority, as expressed by Lord Hope in his gateway (b), was, as I have explained, that a local authority's decision to recover possession would be open to challenge on public law grounds and that the challenge could be raised as a defence in the possession proceedings. The personal circumstances of the defendant might well be a factor to which, along with the other factors relevant to its decision, a responsible and reasonable local authority would need to have regard. The question for the court would be whether the local authority's decision to recover possession of the property in question was so unreasonable and disproportionate as to be unlawful.

The application of gateways (a) and (b) in the present case

71. Much of the difficulty of the present case has, in my opinion, been produced by the fact that at the time when the defence of the appellant and the other defendants to the respondent Council's possession claim was pleaded (22 June 2004), at the time when the issue as to whether the defendants had a "reasonable prospect of successfully defending the claim" (see the order made by District Judge Savage on 24 June 2004) was heard by H.H.Judge McKenna (21 October 2004) and at the time when the judge delivered his reserved judgment (20 December 2004), the *Kay* and *Price* appeals had not yet come before the House. Neither counsel who had settled the Defence nor counsel who had appeared before the judge nor the judge himself had had the advantage of their Lordships' opinions in *Kay* and *Price* and, in particular, of Lord Hope's paragraph 110. It should not be a surprise, therefore, that the pleaded defence did not in terms challenge the Council's decision to serve the Notice to Quit but simply opposed the making of an order of possession.

72. This is not a case where, as in *Connors*, the Council's decision to serve the Notice to Quit in order to terminate the right of the Doherty family to remain on the caravan site had been taken on account of allegations of misbehaviour on their part. Paragraph 4(d) of the Council's Particulars of Claim For Possession had set out the Council's reasons for seeking possession of the caravan site including, of course, the defendants' plots. The pleaded reasons, in short, were that the Council intended to redevelop the site so as to provide sanitation and other facilities, so as to reduce fire risks, and in order to re-wire electricity supplies to the caravan plots, and, after the re-development, to manage the site "as a temporary accommodation for travellers" coming

into Birmingham. The only reference in the pleaded reasons to the Doherty family is a pleading that the proposed re-development

> "… will protect Public Health and Safety and make the site available for genuine travellers, who are currently deterred from going on the site because of the presence of the Defendants, as a result of which the site is severely under utilised and this causes unauthorised encampments in the city" (see para.4(iv))

It is possible that this passage was intended as an implicit allegation of anti-social behaviour or misconduct on the part of members of the Doherty family but I would not, speaking for myself, so read it. It is a well known rule of pleading that if the pleader is intending to allege misconduct the allegation should be made expressly and not be left simply as a possible inference. Be that as it may, the defendants in their Defence denied being guilty of any anti-social behaviour or of causing damage to the site (para.9 (iii)(c) and (d)). If the Council did intend to allege the contrary, there is an unresolved issue as to the truth of the allegation.

73. The defendants' main ground of defence, as pleaded, was that the making of a possession order against them would be neither reasonable nor proportionate (paras.8 and 9). Para.9, in a number of sub-paragraphs, amplified this contention. Thus, the need for the Council to obtain vacant possession of the whole site in order to enable the proposed improvement works to be carried out was challenged; the reasonableness of the Council's proposal to transform the whole site into a temporary stopping place for travellers was challenged; the personal difficulties that the Council's proposals would produce for the Doherty family were prayed in aid. All of these were matters which might have been pleaded as the grounds of a public law challenge to the lawfulness of the Council's decision to serve the Notice to Quit and although the defendants' Defence does not in terms challenge the lawfulness of that decision, the thrust of the pleading is to that effect. And a challenge of that character as a defence to a local authority's possession claim is franked by Lord Hope's paragraph 110 gateway (b).

74. Judge McKenna was aware that a public law challenge to the Council's decision to seek possession could have been mounted by the defendants (see para.38 of his judgment); he observed, in para.43, that "judicial review would be able to check the fairness and legality of the decision". But he was not aware that that challenge could be raised as a

defence in the possession proceedings, made no ruling as to whether those matters pleaded in the defence that could be read as constituting the defendants' grounds for challenging the decision provided any real prospects of success and simply ordered a stay of execution of the order of possession for 14 days to enable the defendants, if so advised, to apply for judicial review. The defendants did not so apply but instead, pursued the route of appealing against the possession order.

75. When the case reached the Court of Appeal in November 2006, the House's decision in *Kay* and *Price* had been reported and the procedural propriety of a challenge to the lawfulness of the Council's decision to serve the Notice to Quit being put forward as a defence in the possession proceedings had been put beyond doubt. So the Court of Appeal examined the issue whether the matters pleaded in the Defence would enable that challenge to have any prospects of success. The Court's conclusion is to be found in paragraph 61 of the judgment of the Court delivered by Carnwath LJ:

> "61. …..In our view this case is distinguishable from *Connors* because the authority's decision depended, not on a factual allegation of nuisance or misconduct, or 'the bald ground that the family were trespassers' (in Lord Brown's words), but on an administrative judgment about the appropriate use of its land in the public interest. It is true that one aspect was an issue about whether the Doherty's [sic] presence 'deterred' others. However, this was not in the context, as in *Connors*, of an allegation of breach of a licence condition (analogous to a private law cause of action), but simply one part of its overall assessment of the various factors in play. That seems to us well within the margin of appreciation allowed by the Strasbourg jurisprudence in the exercise of an administrative discretion … Under gateway (b) the council's action was open to challenge on conventional judicial review grounds, but not on the grounds that it was contrary to Article 8. We recognise that the judge did not rule out the possibility of a successful judicial review challenge, and that he was wrong in any event to hold that such a defence could not be taken in the county court. However, we see no purpose in remitting the matter for him to redetermine that issue. On the pleadings, we can see no arguable basis for asserting that the decision could have been successfully challenged under gateway (a). Accordingly, the appeal must fail."

76. There are two criticisms I would respectfully make of the passage cited above. First, the sentence "Under gateway (b) the council's action was open to challenge on conventional judicial review grounds, but not on the grounds that it was contrary to Article 8" suggests a disharmony between "conventional judicial review grounds" on the one hand and Article 8 on the other hand that I do not accept. The Council as the owner of the caravan site has the power and the duty to manage the site in the interests of the public. In deciding whether or not to redevelop the site and, if the decision is to redevelop, in deciding what steps need to be taken to implement that decision, the Council must take into account and balance a number of conflicting interests. The interests of the Doherty family, and of any other long term occupants of plots on the site, would need to have been taken into account, but there would have been other interests and imperatives as well to which the Council, acting reasonably and responsibly, would have had to have regard. "Conventional judicial review grounds" on which the Council's decisions regarding the redevelopment might be challenged would include the paying of insufficient regard or attributing insufficient weight to the interests of the Doherty family. But the court, bearing in mind the multiplicity of interests and considerations to which a responsible local authority would need to have regard, would not conclude that the Council's decision to serve the Notice to Quit had been unlawful unless the court considered that the decision was one to which the Council could not reasonably have come. If the court did not so conclude, the public law challenge to the Council's decision would, therefore, fail. If that were so, the requirements of Article 8.2 would, in my opinion, have been satisfied. The recovery of possession by the Council would have been shown to be, for Article 8.2 purposes, necessary and proportionate.

77. Second, Carnwath LJ's reference in the penultimate sentence of the cited passage to "gateway (a)" ought, I think, to have been a reference to "gateway (b)". If it was intended to be a reference to gateway (b), and to a challenge by the appellant to the lawfulness of the Council's decision to seek possession of his and his family's plots, it is regrettable that the Court of Appeal did not give any reasons for their conclusion that the challenge was, on the pleadings, unarguable. As I have explained Judge McKenna had not attempted to deal with this challenge and it is not clear what, if any, relevant evidence, other than the pleadings themselves with their requisite Statements of Truth, were before the Court of Appeal. None is referred to in the judgment. It may be that the challenge is, as the Court of Appeal concluded, unarguable but that that is so cannot, in my opinion, simply be assumed from the pleadings. I would, on this point, in agreement with Lord Hope (see the second sentence of his para.56), remit the case to the High Court for the

issue whether for CPR Part 24 purposes a public law challenge to the Council's decision has any prospects of success to be re-considered.

78. As to Lord Hope's gateway (a), this is not a case where the respondent Council's reasons for terminating the licence depended to any significant extent, if at all, on allegations of fact that were in dispute. This was not in that respect a *Connors* case. It was, however, a case in which the discrimination point present in *Connors* was present. If the site had been a privately owned site and the owners had desired to obtain possession of the site, they would have come up against the security of tenure given by the Mobile Homes Act 1983 to residents on privately owned sites. But this security of tenure had been deliberately withheld by Parliament from residents on local authority owned sites, and the United Kingdom's attempted justification of that state of the law had not been accepted by the Strasbourg court in *Connors*.

79. Mr Luba submitted that in these circumstances the court dealing with the possession claim should mould the common law so as to provide the Doherty family with, in effect, the security of tenure withheld from them by Parliament. I am unable to agree with that submission for all the reasons give by my noble and learned friend Lord Walker of Gestingthorpe whose opinion I have had the advantage of reading in draft. The moulding of the common law suggested by Mr Luba would constitute the judicial amendment of an Act of Parliament so as to include a provision which had been deliberately omitted by Parliament. To do such a thing would be inconsistent with the sovereignty of Parliament and inconsistent also with section 6(2) of the 1998 Act.

80. The question has arisen whether, in these circumstances, a declaration of incompatibility should be made. My Lords, I understand that this question has now, with the enactment of the Housing and Regneration Act 2008, become moot but, in any event, the case for a declaration of incompatibility had not, in my opinion, been made out. First, I do not accept that the domestic law, as explained in *Kay* and *Price*, had any incompatibility with article 8 Convention rights. The Strasbourg court's conclusion in *Connors* that the domestic law provided insufficient protection for those in the position of the *Connors* family was, having regard to what had happened in the domestic courts, understandable but was in my respectful opinion, at least since the *Kay* and *Price* decision in this House, mistaken. First, the domestic courts in *Connors* had failed to provide a procedural opportunity for a judicial examination and resolution of the facts in dispute between the parties

(see para.92 of the court's judgment). This opportunity could have been and ought to have been provided (see *Kay* and *Price*). Second, a public law challenge to the lawfulness of the local authority's decision to terminate the licences under which the Connors family occupied their plots could have been and ought to have been relied on as a defence to the possession claim (again, see *Kay* and *Price*). In both these respects the procedural deficiencies identified by the Strasbourg court in *Connors* did not form part of the domestic legal framework properly understood and as explained in *Kay* and *Price* and are not to be found in the present case. Third, the security of tenure given by the 1983 Act to occupiers of plots on privately owned caravan sites but denied to occupiers of plots on local authority owned sites is balanced by the ability of an occupier of a plot on a local authority owned site to challenge on public law grounds the lawfulness of a decision by the local authority owner to terminate the occupier's licence, an ability that the domestic law does not afford to occupiers of plots on privately owned sites. The legal frameworks applicable to privately owned caravan sites and publicly owned caravan sites respectively were different from one another, but it is difficult to say which provided the more satisfactory degree of protection to the plot occupiers. Be that as it may, I find it impossible to stigmatise either framework as having been incompatible with article 8. In my opinion, each framework provided protection to licensed plot occupiers that required regard to be had to their personal circumstances and represented a balance struck by the domestic law that is well within the margin of appreciation that must be afforded to signatory States.

81. Moreover, the making of a declaration of incompatibility is discretionary and the main purpose of doing so is surely to draw the attention of Parliament and the government to the existence of an inconsistency between domestic law and the law necessary to enable effect to be given to the Convention right or rights in question. But the government was, and had been since the *Connors* decision, aware of the security of tenure point and an amending Bill was already before Parliament (see para 30 of Lord Hope's opinion on this appeal). It seems to me therefore that, whether I am right or wrong in the view expressed in the last preceding paragraph, a declaration of incompatibility was unnecessary and would have served no useful purpose. In my opinion, gateway (a) does not in this case lead to any defence of which the appellants can avail themselves. However, for the reasons I have given and in broad agreement with the opinions of my noble and learned friends Lord Hope of Craighead and Lord Walker of Gestingthorpe I would allow this appeal and remit the case to the High Court.

Addendum

82. Since preparing this opinion I, and the other members of the Appellate Committee, have been supplied with a copy of the judgment of the Fourth Section of the European Court of Human Rights in *McCann v The United Kingdom* delivered on 13 May 2008 and, also, with written submissions from the respective parties to the present appeal on the effect of the *McCann* judgment on the issues arising in the appeal. Mr Luba QC, in reliance on the *McCann* judgment, has renewed the submission, made in his original printed Case, that the House's decision in *Kay* and *Price* regarding article 8 as a defence to possession proceedings should be reconsidered (see para.60 above). He, and Mr Sales QC for the Secretary of State, have now, in reliance on the *McCann* judgment, invited your Lordships to approve the approach to article 8 of the three members of the Appellate Committee in *Kay* and *Price* who constituted the minority. My Lords, I am not prepared to accept that invitation. Leaving aside the oddity of a committee of five assuming to set aside the majority opinion of a committee of seven (see para.61 above), I am not prepared to do so because I consider the *McCann* judgment to be based on a mistaken understanding of the procedure in this country whereby proceedings brought by a local authority owner of residential property for the purpose of recovery of possession of the property from a defendant who has, or had had, his home on the property can be defended by reliance on article 8. I consider, also, that the *McCann* judgment discloses a misunderstanding of the various factors that would have been taken into account by the domestic court that dealt with the possession application in concluding that the defendant, Mr McCann, had no arguable article 8 defence. It is, perhaps, unfortunate that the Fourth Section did not receive any oral submissions or argument from the parties but dealt with the case with the assistance only of written submissions. The essential facts of the *McCann* case are set out in paragraphs 15 and 16 of the opinion of my noble and learned friend Lord Hope of Craighead and I gratefully adopt his recital.

83. As to procedure, the Fourth Section expressed their understanding in paragraphs 52 and 55. They said this -

> "52. … under domestic law … in summary proceedings such as those brought against the applicant, it was not open to the county court to consider any issue concerning the proportionality of the possession order, save in exceptional cases where, as the Court of Appeal put in the present case,

> 'something has happened since the service of the notice to quit, which has fundamentally altered the rights and wrongs of the proposed eviction'. No such exceptional circumstances applied in the present case. Furthermore, although since the applicant's landlord was a public authority it was open to him to challenge the decisions to obtain the notice to quit and to bring possession proceedings in an application for judicial review, his application failed because the local authority had not acted unlawfully.
>
> 53. … the procedural safeguards required by Article 8 for the assessment of the proportionality of the interference [with the applicant's right to respect for his home] were not met by the possibility for the applicant to apply for judicial review and to obtain a scrutiny by the courts of the lawfulness and reasonableness of the local authority's decisions. Judicial review procedure is not well adapted for the resolution of sensitive factual questions which are better left to the County Court responsible for ordering possession. In the present case, the judicial review proceedings, like the possession proceedings, did not provide any opportunity for an independent tribunal to examine whether the applicant's loss of his home was proportionate under Article 8 para.2 to the legitimate aims pursued."

84. Lord Hope, in paragraph 110 of his opinion in *Kay* and *Price*, a paragraph which formed a critical part of the majority opinion, described and recommended a procedure which would enable any defendant to possession proceedings brought by a local authority to raise as a defence in the possession proceedings themselves the question whether the local authority's decision to institute the possession proceedings was a lawful one. Local authorities, being public authorities, are obliged by section 6(1) of the Human Rights Act 1998 to act in accordance with the Convention rights incorporated by the Act into domestic law. They are obliged when deciding to terminate tenancies and recover possession of residential properties to act consistently with article 8. If a decision, for example to serve a notice to quit, is inconsistent with the article 8 rights of the person on whom it is served the decision would be unlawful and the notice to quit devoid of effect. Lord Hope's paragraph 110 establishes that a point of that sort can be raised as a defence to the possession proceedings. Such a defence would, if raised, be dealt with by a county court judge as part of the possession proceedings. A separate judicial review application to

the High Court is not necessary. If factual issues need to be resolved in order for the article 8 defence to be dealt with, that can be done before the county court judge in the same way as any other factual issues arising in the possession proceedings.. The Fourth Section's apparent understanding to the contrary was mistaken.

85. Of course, an article 8 defence, like any other defence, would need to be pleaded, or set out, together with the relevant facts relied on, in an affidavit. If an application for summary judgment were made, the County Court judge dealing with the case might conclude that the article 8 defence, as disclosed in the pleadings or in the affidavit, could not succeed. In that case the judge, unless there were some other arguable defence, would be entitled, and would be expected, to deal with the case summarily and make an order for possession. The Fourth Section appear to believe that on an application for a summary judgment the court cannot consider "any issue concerning the proportionality of the possession order". Not so. An article 8 defence requires the judge to review the lawfulness of the local authority's decision to recover possession of the property in question and, in doing so, to review the factors that a responsible local authority ought to have taken into account in reaching its decision. The proportionality of the decision in all the circumstances of the case would be central to the review and if the local authority's decision could be shown to be outside the range of reasonable decisions that a responsible local authority could take, having regard both to the circumstances of the defendant as well as to all the other relevant circumstances, the decision would be held to be unlawful as a matter of public law. But in a case in which it is not reasonably arguable on the face of the pleadings, or from the contents of the affidavits that have been filed, that that is so, the judge can be expected to make a summary order for possession. The adjective "summary" in this context does not mean that the judge would not have considered the proportionality of the requested possession order. It means that the article 8 case put forward by the defendant for a conclusion that a possession order would be disproportionate is not, in the opinion of the judge, capable of being sustained by serious argument. The notion that a defence based on an article 8 right to respect for a home requires the case to proceed to a full trial even though it is apparent that the defence cannot succeed is clearly absurd. An application for a summary judgment does require the defendant's contention that a possession order would be disproportionate to be given proper attention and, if reasonably arguable, to be permitted to proceed to a full trial.

86. "Proportionate" for article 8 purposes must mean proportionate in all the circumstances of the case. The Fourth Section comment, in their

paragraph 52, that "the local authority chose to bypass the statutory scheme by requesting Mrs McCann to sign a common law notice to quit" and that "it does not appear that the authority, in the course of this procedure, gave any consideration to the applicant's right to respect for his home". I find these comments quite astonishing in the context of the actual facts of the *McCann* case as recited in the judgment. The essential facts were these. The applicant was a man whose marriage had broken down and against whom a 3 month non-molestation order and an ouster order had been made. These orders required him to leave the house that had been his, his wife's and his two children's home. The orders had been made for the protection of his wife and children. In breach of the orders he made a forcible entry into the house, using a crowbar in order to do so. His wife and children had to take refuge out of the house as a result. The local authority found them another house in which they could live. On 8 August 2001 the wife returned the house-keys of her former home to the local authority with a note saying she was giving up the tenancy. The local authority subsequently discovered that the house had been seriously damaged by the removal of fixtures so that in excess of £15,000 would need to be expended to make it again habitable. From August to November the house was uninhabited. In November 2001 Mr McCann returned to the house, did some renovation work and resumed living there. In January 2002, having realised that the house was no longer uninhabited the local authority asked Mrs McCann to sign a notice to quit terminating the tenancy that she and Mr McCann had jointly held. She did so. The local authority later commenced possession proceedings against Mr McCann: see paragraph 13 of the *McCann* judgment.

87. This is the background to Mr McCann's claim that the local authority's possession proceedings were contrary to his article 8 right to respect for his home. The home, of course, had not been his home alone. It had been the family home, a home for which he, himself, in the events of April 2001 had shown a truly lamentable want of respect. It was his want of respect for his home and for his wife's and children's article 8 rights to respect for their home that had led to their departure from the home, to his wife's termination of the tenancy and to the local authority's possession proceedings, an aspect of the matter that the Fourth Section's judgment completely ignores. Moreover, the applicant, his wife and children had been occupying as their home a three bedroom house. Housing is, for local authorities in general, a scarce commodity. Mr McCann's conduct in April 2001 had required the local authority to rehouse Mrs McCann and the children in suitable alternative accommodation. It was, or ought to have been, obvious that Mr McCann could not expect to be allowed to remain in the three bedroom house. The house would be required for allocation to some other family

that needed a house of that size. It was obvious that the local authority would need to recover possession of the house in order to allocate it to someone else on their housing list. Mrs McCann had given back her keys and had said she was giving up the tenancy. The proposition that in these circumstances the local authority's request to her that she sign a notice formally terminating the joint tenancy was inconsistent with Mr McCann's right to respect for his home seems to me at variance with the facts. Its apparent acceptance by the Fourth Section suggests that in addressing the proportionality issue they overlooked the facts that any domestic judge would be bound to have taken into account. The domestic court that heard Mr McCann's judicial review application would not have committed that error. The court would, or should, have examined the contention that the local authority's decision first to ask Mrs McCann to sign a notice terminating the tenancy and then to commence possession proceedings was in breach of Mr McCann's right to respect for his home and therefore unlawful. It would, or should, have done so against the background of all the circumstances of the case, including the degree of respect for his home to which Mr McCann could still claim to be entitled. If all the circumstances of the case are taken into account, the conclusion that Mr McCann's article 8 defence was unarguable is, in my respectful opinion, inevitable and plainly right. I do not understand how the Fourth Section could have thought otherwise.

88. For these reasons I feel unable to place any weight on the Fourth Section's conclusions regarding the alleged inadequacies of the domestic procedures for enabling article 8 rights to be raised and relied on as a defence to possession proceedings. Section 2(1)(a) of the 1998 Act requires courts of this country to take into account Strasbourg court decisions regarding the meaning and effect of the articles of the Convention incorporated into domestic law. But the domestic courts are not bound by those decisions and where, as here, they appear to be based on an imperfect understanding of domestic law or procedure, they need not, and in my opinion should not, be followed. I wish to add, also, that I am in full agreement with all the comments made by Lord Hope on the *McCann* case.

LORD RODGER OF EARLSFERRY

My Lords,

89. I have had the opportunity to consider your Lordships' speeches in draft. On a subject already traversed in so many different ways in so many speeches, both today and in the past, it would, I believe, be less than helpful for me to add yet another discourse to the mix. I shall accordingly confine myself to saying that, for the reasons given by my noble and learned friends, Lord Hope of Craighead and Lord Walker of Gestingthorpe, I too would allow the appeal, and remit the case to the judge in the High Court.

LORD WALKER OF GESTINGTHORPE

My Lords,

90. This is the third time in five years that your Lordships' House has had to grapple with the problems posed by local authority landlords seeking possession of tenanted (or licensed) property from tenants (or licensees) who seek to rely on rights under article 8 of the European Convention on Human Rights and sections 6 and 7 of the Human Rights Act 1998 ("the HRA"). The first occasion was *Harrow LBC v Qazi* [2004] 1 AC 983, on which the House was divided. On the second occasion (*Kay v Lambeth LBC* and *Leeds City Council v Price* [2006] 2 AC 465) an Appellate Committee of seven sat in order to consider the effect on *Qazi* (both in terms of judicial precedent and as to its practical implications) of the decision of the European Court of Human Rights in *Connors v United Kingdom* (2004) 40 EHRR 189. (I shall refer to these two cases as *Kay* except where it is necessary to refer separately to *Price*.) Although the Appellate Committee that heard *Kay* were unanimous on the issue of judicial precedent, they were unfortunately again divided by the narrowest of margins on other issues; and there have been difficulties in determining how far the majority decision goes. One reason for the difficulties is that neither *Kay* nor *Price* had any factual similarity to *Connors* (*Price* was concerned with a gipsy family but it was not seriously arguable that the recreation ground which they had occupied as trespassers for two days had become their home). The present appeal, by contrast, arises on facts closely similar to those of *Connors.* Moreover it raises for the first time (at any rate in your Lordships' House, and in the context of local authority landlords) important and difficult issues as to the application of the HRA to an infringement of human rights said to arise from the deficiencies of the common law (and not from statute). These issues were not canvassed in *Connors* because in that case all the relevant events occurred before the HRA came into force.

91. I gratefully adopt the summaries of the relevant facts and legislation set out in the opinion of my noble and learned friend Lord Hope of Craighead. The respondent, Birmingham City Council, the landlord, is of course a public authority within the meaning of the HRA. But so, under section 6(3)(a), is the court—in this case HHJ McKenna (sitting initially in the Birmingham County Court but then, after a transfer, as a High Court judge). Before the Court of Appeal and again before your Lordships, counsel for the appellant (Mr Luba QC) and counsel for the intervener, the Secretary of State for Communities and Local Government (Mr Stilitz in the Court of Appeal and Mr Sales QC in this House) have placed great emphasis on the Court's position as a public authority. They have also energetically submitted that in making a possession order in favour of the City Council the judge was applying the common law, and not some statutory provision. Therefore, they have submitted, section 6(2) of the HRA (the general effect of which is to protect public authorities acting in obedience to statutory provisions) does not apply. That is the first of two distinct points on section 6(2) (both of which are important and difficult) arising in this appeal. The other is as to whether, and how, section 6(2)(b) applies in a case where a public authority has a statutory power or discretion which could be exercised in a way that is incompatible with Convention rights but could also be exercised compatibly with Convention rights.

92. The first of these points was raised only peripherally in *Qazi* and *Kay*. In *Qazi* the issue which attracted the most attention was the autonomous meaning of the expression "home" in article 8. Two of the majority (Lord Millett at para 108 and my noble and learned friend Lord Scott of Foscote at paras 142-144) disapproved of the *obiter* suggestion made by Waller LJ in *R (McLellan) v Bracknell Forest Borough Council* [2002] QB 1129, para 42, that the court as a public authority may have to consider article 8 even in a possession claim by a private landlord. Lord Millett saw the court's position quite differently (para 108):

> "The fact that a person cannot be evicted without a court order does not mean that the court, as a public authority, is bound in each case to consider whether an order for possession would be disproportionate and infringe article 8 rights. The court is merely the forum for the determination of the civil right in dispute between the parties: see *Di Palma v United Kingdom* (1986) 10 EHRR 149. Its task is to resolve the dispute according to law. In doing so it would, of course, have to consider whether the landlord was entitled to possession as a matter of our ordinary domestic law (i e apart from the Human Rights Act 1998),

> taking into account the various statutory provisions which operate in this field. But once it concludes that the landlord is entitled to an order for possession, there is nothing further to investigate."

93. A little earlier in his speech Lord Millett had said (para 103):

> "The premises were Mr Qazi's home, and evicting him would obviously amount to an interference with his enjoyment of the premises as his home. But his right to occupy them as such was circumscribed by the terms of his tenancy and had come to an end. Eviction was plainly necessary to protect the rights of the local authority as landowner. Its obligation to 'respect' Mr Qazi's home was not infringed by its requirement that he vacate the premises at the expiry of the period during which it had agreed that he might occupy them. There was simply no balance to be struck."

The metaphorical question of whether there is a balance to be struck (or conversely whether Parliament, by its frequent and complex modifications of the common law of landlord and tenant, has conclusively struck the balance) has increasingly dominated the debate. For instance in *Kay* Baroness Hale of Richmond observed (para 182):

> "As I understand it, none of your Lordships accepts that the sequential approach adopted in Strasbourg to the cases which it declares admissible should be adopted in the general run of possession actions. This is because the Court is entitled to make two assumptions. The first is that the domestic law has struck the right balance between the competing interests involved: those of a person occupying premises as his home and those of the landowner seeking to regain possession of those premises in accordance with the law. The second is that the landowner, if a public authority, has acted compatibly with the Convention rights of the individual occupier in deciding to enforce its proprietary rights."

But it is clear from the following paragraphs of her speech that Baroness Hale was speaking of prima facie assumptions, not irrebuttable presumptions (para 185):

> "My Lords, we are all agreed that it must be possible for the defendant in a possession action to claim that the balance between respect for his home and the property rights of the owner, struck by the general law in the type of case of which his is an example, does not comply with the Convention. We also agree that the cases in which such a claim will have a real prospect of success are rare."

94. Baroness Hale was in the majority in *Kay*, together with Lord Hope, Lord Scott and Lord Brown of Eaton-under-Heywood. In the Court of Appeal in this case, Carnwath LJ embarked on a very careful analysis of how far para 110 of Lord Hope's speech in *Kay* addressed a local authority's claim for possession which (in the words of Carnwath LJ at para 47, summarising counsel's submissions) "depended on its common law rights, not on any statutory entitlement." Counsel submitted that Lord Hope and (probably) Lord Brown had taken a different view from Lord Scott and Baroness Hale. Carnwath LJ concluded that there was no such division, and that the majority treated the case as covered by section 6(2)(b) of the HRA (which Lord Hope had expressly mentioned in paras 86 and 114 of his speech).

95. My Lords, it is not for me to try to put a gloss on the speeches of any of the majority in *Kay*, but my clear recollection, confirmed by the full reported summary of counsel's arguments ([2006] 2 AC 465, 470-482) is that the boundary between statute and common law was simply not an issue in the case. There was no question of the court exercising its interpretative function under section 3 of the HRA, or making a declaration of incompatibility under section 4. Section 6 of the HRA does not get a single mention in the law reporter's summary of counsel's arguments (although *McLellan* was cited by both sides). Throughout the summary there are many phrases suggesting that the subject-matter was statutory: "statutory code", "statutory regime", "statutory scheme", "considered legislative choice", "legislative scheme". There are others suggestive of statutory and common law taken together: "relevant regulatory framework", "general scheme of property law", "statutory overlay", "general law endorsed or laid down by the legislature" (this last from the argument of Mr Sales and Mr Stilitz at p 481C, which seems a little difficult to reconcile with their submissions in the present case).

96. The problem of the boundary between statute and common law (or to put it another way, the sometimes inextricable tangle between the

two) was therefore near the surface in *Kay*, but my recollection is that it did not surface as a clearly identified issue which needed to be decided. Baroness Hale certainly did spot it but did not feel it necessary to express a definite view about it: see paras 187 and 192 of her speech, the latter quoted by Carnwath LJ at para 52 of his judgment. The same is true of the speeches of Lord Hope, Lord Scott and Lord Brown, as I read them: see paras 110, 169 and 202. My strong impression is that in this case the Court of Appeal was loyally attempting to extract from these passages in the speeches in *Kay* a decision (or at least a clear expression of opinion) on a point which had been adumbrated but by no means fully argued by counsel, because it was not regarded as necessary to the disposal of the appeal. It is possible to see, with hindsight, that guidance to lower courts, if it was to be fully comprehensive, needed to explore this aspect more fully. But even in your Lordships' House it is often unwise to go far beyond what is needed to dispose of the appeal, especially if there is some moot point which has not been fully argued. In this case the point has been squarely raised and it must be decided—and decided on the arguments addressed to us rather than by searching for clues scattered through the speeches in *Kay*.

97. In my opinion the House should not accept the submissions as to the inapplicability of section 6(2) of the HRA put forward by Mr Sales (in support, on this point, of Mr Luba for the appellant). The Secretary of State is understandably anxious that the United Kingdom should not again be subject to an adverse finding, as it was in *Connors*, if this case proceeds to Strasbourg. Another adverse finding at Strasbourg would indeed be regrettable, but it would in my opinion be a smaller misfortune (given that the relevant statutory provision is to be amended in any event) than the long-term damage involved in what I see as a distortion of the proper development of the principles underlying the HRA. One of the most important of those principles, repeatedly emphasized in this House in its judicial capacity, is the continuing sovereignty of Parliament.

98. The appellant's case, vigorously supported (on these points) by the Secretary of State, has two main pillars. One is that it was not as a result of "one or more provisions of primary legislation" (see section 6(2) of the HRA), but as a result of the common law, that the judge made an order for possession against the appellant (and the other original defendants). The other is that the City Council's decision to seek possession, and the judge's order for possession, were not therefore covered by section 6(2) of the HRA, and were unlawful since they infringed the appellant's article 8 rights.

99. The second pillar of this argument starts to raise the spectre of courts at every level having to remould or develop the common law (for instance, by developing common law rights of privacy not derived from confidence) in order to make it fully compatible with the HRA. That is a course which this House was so far firmly and unanimously rejected (*Wainwright v Home Office* [2004] 2 AC 406; compare the views expressed by the Court of Appeal in *Douglas v Hello! Ltd* [2001] QB 967 in the earliest days after the HRA came into force, especially Sedley LJ at paras 128-129). The whole issue of the HRA's "horizontal effect" (between parties who are not public authorities, but are engaged in litigation before a court which is a public authority) was the subject of enormous academic interest when the HRA had been enacted, but was not yet in force (for instance (2000) 116 LQR contains four separate articles and notes on this topic, all by distinguished authors). Since then this topic has been overtaken by others, and the law may still have some way to go before it is fully developed. But it is not necessary to consider it further here, in my opinion, because the first pillar of the argument (that section 6(2) is inapplicable) is in my view mistaken.

100. At common law, a landlord is entitled to possession of the demised premises if the tenant's lease or tenacy has expired or been validly terminated, and similarly *a fortiori* if there was only a licence. To that extent the appellant and the Secretary of State are correct in saying that the City Council was, in seeking possession, relying on a common law right. That is part of the picture, but it is far from the whole picture, and in my opinion it would be unrealistic, and productive of error, not to look at the whole picture. The fact is that the City Council's common law right was surrounded on all sides by statutory infrastructure, like a patch of grass in the middle of a motorway junction. The field of social housing is, as Baroness Hale of Richmond observed in *Kay* (para 185)

> "an area of the law much trampled over by the legislature as it has tried to respond to shifting and conflicting social and economic pressures."

101. As Lord Hope has explained in paras 27 to 30 of his opinion, there are two statutes conferring a degree of protection to those who make their homes in caravans: the Caravan Sites Act 1968 and the Mobile Homes Act 1983. Each expressly makes exceptions to the protection extended to residents on local authority sites. In particular, section 2 of and paras 4 to 6 of Schedule 1 to the Mobile Homes Act 1983 protect the security of tenure of a resident on a "protected site".

The occupant can be evicted only under a court order, which may be made only if (i) the occupier is in breach of a term of his agreement and the court considers it reasonable for it to be terminated; or (ii) the court is satisfied that the occupier is not occupying the caravan as his home; or (iii) the court is satisfied that the condition of the caravan is or will be detrimental to the amenity of the site.

102. By section 5(1) of the Mobile Homes Act "protected site" is defined in such a way that it

> "does not include any land occupied by a local authority as a caravan site providing accommodation for gipsies."

Those words are a very clear indication of Parliament's intention that the law should be different in respect of gipsy caravan sites provided by local authorities. There is no possibility of the different treatment having arisen through some error or inadvertence. Parliament deliberately enacted the exception in order to give effect to a policy based on gipsies' nomadic lifestyle, a policy which the United Kingdom defended, strenuously but unsuccessfully, in *Connors*: see 40 EHRR 189, paras 43-46 (summarizing the statutory provisions and referring to *Greenwich LBC v Powell* [1989] AC 995, 1012); paras 77-80 (the government's submissions); and paras 81-95 (the Court's assessment). It would be disingenuous to say that the government was defending the common law; it was defending Parliament's deliberate adoption of a special regime for gipsy caravans on local authority sites.

103. I am therefore in agreement with the Court of Appeal's own views on this point, which Carnwath LJ expressed as follows (at para 53, after some references to the majority opinion in *Kay*):

> "It simply recognises that Parliament may express its policy intentions in a particular statutory scheme equally by means of exclusion or by inclusion. In *Connors* (para 44) the Strasbourg court itself referred to *Greenwich LBC v Powell* [1989] AC 995, 1012 B-C, where the House of Lords had referred to the clear 'intention of the legislature' shown by the 1983 Act to exclude local authority sites from protection. In our view, in respectful agreement with Lord Hope, it is artificial to draw a distinction between the two means."

104. Where domestic law on a particular topic is a complex amalgam of common law and statute it may be difficult for the court to decide whether section 6(2) of the HRA applies or not. The paramount consideration, I think, will be whether the composite legal scheme in general, and the offending provision in particular (offending, that is, against someone's Convention right) clearly represents the considered intention of Parliament. In my opinion the present case is, for the reasons which I have mentioned, clearly within that category. By contrast the fact that Parliament has made some limited statutory modifications to the common law of defamation could not, I think, be treated as a general parliamentary endorsement of those extensive areas which have been left unmodified. Within these extremes there may be some difficult problems to be determined on a case by case basis.

105. The decision of the Strasbourg Court in *Connors* was based on the deficiencies of the "statutory scheme" which disadvantaged gypsies ((2004) 40 EHRR 189, para 94, summarising the effect of the previous paragraphs). Precisely the same statutory scheme was applicable in this case. It has been held to infringe article 8. Mr Luba's fallback position was therefore that your Lordships should make a declaration of incompatibility. Mr Underwood QC (for the City Council) did not, as I understand it, strenuously oppose that submission. During your Lordships' protracted deliberations on this appeal the Housing and Regeneration Act 2008 has passed through Parliament and received the Royal Assent. It corrects the defect in the statutory scheme. But for that I would have urged your Lordships to make a declaration of incompatibility at least in relation to section 5(1) of the Mobile Homes Act 1983 (the offending provision in the Caravan Sites Act 1968 having already been covered by amending legislation).

106. That is not necessarily the end of the appeal. It provides a conclusion to what has been called gateway (a), but it leaves gateway (b) to be considered. The two gateways are not necessarily exclusive alternatives. My noble and learned friend Lord Hope of Craighead makes that point in para 10 of his opinion.

107. I must candidly admit that I feel difficulty about this part of the appeal. As one of the minority in *Kay*, I must accept the decision of the majority, which distinguishes between grounds of judicial review which are based on the HRA and grounds ("common law" or "conventional" grounds) which are not based on the HRA. The minority accepted the view of Lord Bingham of Cornhill (in *Kay* at paras 36-38, and at sub-para (3)(b) in the summary in para 39) that article 8 might, highly

exceptionally, provide a tenant or licensee with additional protection. Lord Hope, in the leading speech for the majority, disagreed (para 110). So did Lord Scott (para 172), Baroness Hale (paras 189-190) and (most emphatically) Lord Brown (paras 207-208).

108. We are all agreed that the decision in *Kay* cannot be reopened, and I must and do accept it. Nevertheless I think that I may properly express unease and indeed incomprehension at the suggestion, which is at least implicit in this part of the decision, that HRA grounds and traditional judicial review grounds can always be separately identified. My unease is only partly diminished by Baroness Hale's observations in *Kay* at para 190:

> "It should not be forgotten that in an appropriate case, the range of considerations which any public authority should take into account in deciding whether to invoke its powers can be very wide: see *R v Lincolnshire County Council ex parte Atkinson* (1995) 8 Admin LR 529; *R (Casey) v Crawley Borough Council* [2006] EWHC 301 (Admin)."

In *Atkinson* Sedley J (at p 534) quoted from an official circular, the quotation being repeated by Carnwath LJ in this case at para 56):

> ". . . local authorities should not use their powers to evict gypsies needlessly. They should use the powers in a humane and compassionate fashion and primarily to reduce nuisance and to afford a higher level of protection to private owners of land."

He added (at pp 535-536):

> ". . .those considerations in the material paragraphs which are not statutory are considerations of common humanity, none of which can properly be ignored when dealing with one of the most fundamental human needs, the need for shelter with at least a modicum of security."

That case was of course decided several years before the HRA came into force.

109. Public authorities are bound to take account of human rights. As our domestic human rights jurisprudence develops and becomes bedded down, this should be seen as a normal part of their functions, not an exotic introduction. I would echo a note by Anthony Lester QC and David Pannick QC to which I have already alluded ((2000) 116 LQR 380, 383):

> "The central legislative purpose [of the HRA] is that of bringing the Convention rights home, that is, of domesticating them so that they are not regarded as alien rights protected exclusively by a 'foreign' European Court. To change the metaphor yet again, Convention rights must be woven into the fabric of domestic law. In the absence of a written British constitution, it is especially important to weave the Convention rights into the principles of the common law and of equity so that they strengthen rather than undermine those principles, including the principle of legal certainty."

Still more importantly, they must be woven into the fabric of public law. The argument against speaking about "conventional judicial review grounds" is not limited to the verbal incongruity of using that phrase to mean "grounds that have nothing to do with the European Convention on Human Rights."

110. The majority in *Kay* did not spell out clearly why they thought it necessary to distinguish between "conventional" and HRA grounds for challenging a housing authority's decision to take possession proceedings against a tenant. The most likely reason, I think (and Carnwath LJ seems to have taken the same view), is that most of the majority were applying section 6(2)(b) of HRA as construed by this House in *R (Hooper) v Secretary of State for Work & Pensions* [2005] 1 WLR 1681. That brings me to the second important and difficult point on section 6(2). The House's decision in *Hooper* answered (at least partially) a question which had been simmering since the HRA was enacted, as to the scope and effect of section 6(2)(b). The topic was considered in two cases of alleged discrimination which were decided together at each stage of their course through the courts: *R (Hooper) v Secretary of State for Work & Pensions* [2002] EWHC 191(Admin) (Moses J, 14 February 2002); [2003] 1 WLR 2623 (CA); [2005] 1 WLR 1681 (HL) and *R (Wilkinson) v Inland Revenue Commissioners* [2002] STC 347 (Moses J); [2003] 1 WLR 2623 (CA); [2005] 1 WLR 1718 (HL). At first instance they were heard separately, but disposed of in judgments delivered on the same day; in the Court of Appeal they were

heard together, but with separate judgments; in this House they were heard consecutively by the same Appellate Committee. Each case concerned alleged discrimination against widowers on the ground of their gender, *Hooper* in connection with the payment of pensions under social security legislation and *Wilkinson* in connection with the grant of bereavement allowances for income tax purposes. Each case was complicated by issues of constitutional law (as to the authority for and the legality of extra statutory payments and concessions) which make some of the arguments on section 6(2) quite difficult to follow.

111. It is generally accepted that section 6(2)(a) applies to statutory duties, and section 6(2)(b) to statutory powers and discretions. But there is need for more analysis. A public authority with a statutory power may exercise it or not as it thinks fit, subject only to the usual public law restraints. Does section 6(2)(b) enable it to exercise the power with impunity in a way that infringes Convention rights, when it could act differently? In *Wilkinson*, Moses J cited the view expressed by Grosz, Beatson and Duffy, Human Rights: the 1998 Act and the European Convention (2000) para 4-22, that a public authority can rely on section 6(2)(b) only in circumstances where *any* exercise of the power would involve a breach of Convention rights. He saw this as supported by the Divisional Court in the *Alconbury* case (reported at that level as *R (Holding & Barnes plc) v Secretary of State for the Environment, Transport and the Regions* [2001] 1 All ER 929); *R v Kansal (No 2)* [2002] 2 AC 69 and *R (Friends Provident Life & Pensions Ltd) v Secretary of State for Transport, Local Government and the Regions* [2001] EWHC 820. But Moses J went on to hold that the position was different in a situation in which a public authority could avoid a breach of Convention rights only by exercising a power on every single occasion when it was possible to do so, since then the power would become a duty, and would be destroyed as a power (the context was the suggestion that the Inland Revenue should grant an extra-statutory bereavement allowance to every widower, so as to avoid any discrimination). Moses J reached a similar conclusion in his unreported judgment in *Hooper* (his conclusion was quoted by the Court of Appeal, [2003] 1 WLR 2623, para 115).

112. In *Hooper* the Court of Appeal accepted the first limb of Moses J's reasoning, but rejected the second. However, on further appeal to this House Lord Hoffmann (with whom Lord Nicholls of Birkenhead and Lord Hope agreed) differed from the Court of Appeal and also differed from Moses J on what I have called the first limb ([2005] 1 WLR 1681, paras 48, 49, 51):

> "But section 6(2)(b) says nothing about a decision having to be necessary for any particular purpose. If the 1992 or 1999 Acts had made it *necessary* not to make extra-statutory payments, the case would have fallen under section 6(2)(a). The Secretary of State could not have acted differently.
>
> Clearly, section 6(2)(b) has a different purpose. It assumes that the public authority could have acted differently but nevertheless excludes liability if it was giving effect to a statutory provision which cannot be read as Convention-compliant in accordance with section 3. It follows that section 6(1) does not apply if the Secretary of State was acting incompatibly with Convention rights because he was giving effect to sections 36 and 37 of the 1992 Act . . .
>
> This reasoning is in my opinion supported by the evident purpose of section 6(2), which was to preserve the sovereignty of Parliament: see Lord Nicholls of Birkenhead in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546, para 19. If legislation cannot be read compatibly with Convention rights, a public authority is not obliged to subvert the intention of Parliament by treating itself as under a duty to neutralise the effect of the legislation."

113. Lord Hope, as well as agreeing with Lord Hoffmann, added some further reasons of his own, including the following (para 73):

> "The important point to notice about paragraph (b) is that the source of the discretion does not matter. What matters is (a) that the provisions in regard to which the authority has this discretion cannot be read or given effect compatibly with the Convention rights and (b) that the authority has decided to exercise or not to exercise its discretion, whatever its source, so as to give effect to those provisions or to enforce them. If it does this, this paragraph affords it a defence to a claim under section 7(1) that by acting or failing to act in this way it has acted unlawfully. In this way it enables the primary legislation to remain effective in the way Parliament intended. If the defence was not there the authority would have no alternative but to exercise its discretion in a way that was compatible with the Convention rights. This power would

> become a duty to act compatibly with the Convention, even if to do so was plainly in conflict with the intention of Parliament."

Lord Brown of Eaton-under-Heywood took a rather different line, but reached much the same conclusion. *Hooper* and *Wilkinson* were very special cases and the line of argument which the House rejected would indeed have amounted to an obvious large-scale subversion of Parliament's intention. I am not at all sure that the same reasoning can sensibly be applied to a housing authority's general powers of management of its stock of social housing. But I understand that I am bound, by the majority decision in *Kay*, to assume that that is how section 6(2)(b) applies.

114. In cases of this sort the relevant statutory discretions arise as part of the City Council's general statutory functions in managing its social housing stock under s.21 of the Housing Act 1985 or (as in this case) s.24 of the Caravan Sites and Control of Development Act 1960. There seems to be nothing in these statutory provisions which compels the City Council to take proceedings for possession in any particular circumstances (in contrast to the position of a judge who, if the case for possession has been made out, has no freedom of choice because of s.4(6) of the Caravan Sites Act 1968). But for *Hooper* and *Kay* I would have supposed that s.6(2)(b) does not apply to a case where a housing authority had power to start proceedings aimed at a summary order for possession but could lawfully have decided to take a different course (that is, either holding their hand for the moment, or starting proceedings framed in such a way that any complaint which they had against the tenant or licensee would be adjudicated on by the court).

115. My Lords, I had prepared most of my opinion down to this point when the House was informed of the decision of the Fourth Section of the European Court of Human Rights in *McCann v United Kingdom* 13 May 2008, Application No 19009/04, and decided to entertain further written submissions from the parties (including the Secretary of State as intervener) as to the significance of *McCann*. Having studied the decision and the further submissions I do not feel it necessary to withdraw or qualify anything that I have so far written. In common (as I understand it) with the rest of your Lordships I do not think, despite the decision in *McCann,* that it would be right for this Appellate Committee to depart from the decision recently arrived at in *Kay* by an Appellate Committee of seven members. That is my view even though we now know that *McCann* will not go to a full hearing before the Grand

Chamber. But your Lordships certainly have to take account of *McCann.*

116. In the light of *McCann* the precise scope of what was decided by this House in *Kay* becomes a still more pressing question, since the Fourth Section of the Strasbourg Court shows an obvious preference for the views of the minority. Lord Hope takes the view (in para 36 of his opinion) that para 110 of his opinion in *Kay* requires further explanation, and as his explanation develops it narrows (without closing) the gap between HRA grounds and traditional judicial review grounds.

117. At this point I find it helpful to stand back a little and consider the very different positions of the Strasbourg Court and a court hearing a possession action in England and Wales. Strasbourg is concerned with the bigger picture: has the United Kingdom failed, through all or any of its legislative, executive or judicial arms, to meet the requirements of article 8(2) (it being a given that eviction from one's home engages article 8)? The Strasbourg Court is normally not much concerned with the separation of powers under the constitution of any particular country which is a party to a complaint, although it generally does in its written judgments record the part which each arm of government has taken in the matter. In *McCann* there is a particularly careful analysis, in paras 19 to 28 of the judgment, and it is clear that in that case (as in *Connors*) the breach of article 8 which the Court found was procedural (para 59 of the judgment in *McCann*). But the outcome in Strasbourg would have been the same, I think, whether the County Court judge's conclusion that he could not or should not enquire into proportionality had been imposed on him by Parliament (as for instance with an introductory or demoted tenancy under, para 1A or 1B of Schedule 1 to the Housing Act 1985), or resulted from the housing authority's action (under its normal policy, recorded in para 21 of the Strasbourg judgment) in getting Mrs McCann to give a notice to quit, or was caused by the judge's (wholly understandable) inability to foresee the twists and turns by which this area of law has evolved.

118. For the domestic court the position is very different. For the domestic court (at every level from a district judge to your Lordships' House) the European Convention on Human Rights is mediated through the HRA, which preserves parliamentary sovereignty. All courts have a duty to apply the interpretative obligation in section 3, but no one suggests that section 3 applies here. Judges at the level of the High Court and above have the power and duty, in appropriate cases, to make a declaration of incompatibility under section 4. *Kay* shows that a

successful challenge to our housing legislation, as legislation, is likely to be extremely rare, because (as Baroness Hale put it in para 182 of her opinion, in a passage which I have already quoted)

> "the Court is entitled to make two assumptions. The first is that the domestic law has struck the right balance between the competing interests involved: those of a person occupying premises as his home and those of the landowner seeking to regain possession of those premises in accordance with the law."

But it is only an assumption, and both *Connors* and the present case show that the special treatment which Parliament accorded to local authority gipsy caravan sites was, in human rights terms, a legislative error.

119. By contrast, the important distinction drawn by our housing legislation between tenancies as to which the court must be satisfied, and those as to which it need not be satisfied, that it is reasonable to make a possession order is, *Kay* tells us, not open to attack under section 4 of HRA, because Parliament has over a long period worked out arrangements which strike a fair balance between the article 8 rights of existing tenants (who may be only probationary, or may have lost secure status as a result of past failings) and the claims of others with a pressing need for social housing. So the important distinctions drawn by the Housing Act 1985 (as amended) between different types of tenancy cannot, since *Kay* and at the legislative level, be attacked as incompatible with article 8 rights.

120. But *Connors* and *McCann* show that the decisions that a housing authority makes in giving effect to the legislation may be open to attack, subject to section 6(2)(b), as having been made with insufficient respect towards the tenant's article 8 rights. It is understandable that housing authorities, faced with long waiting lists and limited human and financial resources to deal with possession cases, should seek the simplest and cheapest way of obtaining possession from tenants or former tenants. Why embark on proceedings which may involve a day or more's oral evidence (possibly involving witnesses liable to be intimidated) if there appears to be a route under which the defendant will not be able to resist summary judgment? Does not the authority's duty to its council tax payers, and in particular to those on the waiting list, compel the choice of the simpler, cheaper remedy?

121. The decisions of the Strasbourg Court in *Connors* and *McCann* show that housing authorities may find that, in the long run, that course will not be simpler and cheaper. Their housing policies ought to take account of the article 8 rights of tenants or ex-tenants, even if they are protected by section 6(2)(b) from direct challenge in the courts. To adopt a Convention-compliant policy could not possibly be described as subverting the will of Parliament (the expression used by Lord Hoffmann in *Hooper*). Even if section 6(2)(b) of HRA gives a housing authority immunity, the decision-making process leading up to the commencement of proceedings ought to be Convention-compliant. In *Connors*, the authority decided simply to terminate Mr Connors' licence rather than undertake the burden of proving anti-social behaviour amounting to nuisance on the part of his extended family. In *McCann*, the authority gave effect to its policy of obtaining a "relinquishing form" (that is, a notice to quit terminating the tenancy) signed by the departing wife, so making it unnecessary for the authority to call evidence of domestic violence, and depriving Mr McCann of the opportunity of challenging such evidence. The Strasbourg Court stated (para 55):

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

122. In these circumstances I find that I have to reconsider a remark in my dissenting opinion in *Kay*, that circumstances of this sort would be highly exceptional. Obtaining a "relinquishing notice" was (and perhaps still is) part of the Birmingham City Council's housing policy, and it may also be the policy of many other housing authorities. Such policies will need to be reconsidered. In the meantime there may be more cases of this sort than the Strasbourg Court supposed (para 53).

123. In deciding whether an arguable defence has been raised, and in hearing any contested case on its merits, the County Court judge (who is also a public authority for the purposes of HRA) will follow the guidance in para 110 of Lord Hope's opinion in *Kay*, as more fully explained by his opinion in this case. Occasionally section 3 of HRA may be in play. If section 4 is seriously in play, the case will have to be

transferred to the High Court. If the defence is focused not on the legislation but on the housing authority's decision-making process the judge will in effect be hearing an application for judicial review on traditional review grounds. It is clear that any defence on these lines may now be raised and decided on oral evidence given in the County Court. It will no longer be necessary to have an adjournment to enable the defendant to make a separate application for judicial review (in which oral evidence would probably not be permitted).

124. I agree with Lord Hope (paras 54-56) that the Court of Appeal was wrong in its conclusion that there would be no point in remitting the case to the judge for further consideration. I would allow the appeal and make the order for remission that he proposes.

LORD MANCE

My Lords,

Introduction

125. I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Hope of Craighead, Lord Scott of Foscote and Lord Walker of Gestingthorpe. Subject to points made in paragraphs 137 to 139 below about the issues and the course of proceedings before HHJ McKenna, I gratefully adopt the outline of the factual background given by my noble and learned friend, Lord Hope of Craighead. On returning to a field not myself visited since *Wandsworth LBC v. Michalak* [2003] 1 WLR 617, I find counsel as heavily engaged in similar exchanges around an extending range of authorities as the opposing armies around the forts of Verdun. One submission by Mr Luba QC for the appellant supported by Mr Sales QC for the Secretary of State is that the House should, in the interests of European peace, remove from their path obstacles raised by two of the strongholds upon which Mr Underwood QC for Birmingham City Council takes his stand: *Harrow LBC v. Qazi* [2003] UKHL 43; [2004] 1 AC 983 and *Kay v. Lambeth LBC* [2006] UKHL 10; [2006] 2 AC 465. At the time of the oral hearing, I joined with other members of the House in thinking this inappropriate.

126. However, since that hearing, the European Court of Human Rights has in *McCann v. United Kingdom* (Application no. 19009/04) made clear (para. 50) that the reasoning in its previous decision in *Connors v. United Kingdom* (Application no. 66746/01) is not "confined only to cases involving the eviction of gypsies or cases where the applicant sought to challenge the law itself rather than its application in his particular case"; rather, any person at risk of loss of his or her home "should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end". While the House is not *bound* to give effect to *McCann*, under s.2 of the Human Rights Act 1998 it is its duty to "take into account" the decision in *McCann*. It is perhaps unfortunate that *McCann* was decided too late for consideration whether the present appeal should come on before a constitution of more than five members of the House. This appeal nevertheless raises for consideration, among other questions, whether the conclusions in *Qazi* and *Kay* should undergo any and if so what revision or modification.

The statutory background

127. At all relevant times, statutory provisions have existed regulating the termination of any agreement to station and occupy a caravan on a protected site (Caravan Sites Act 1968 s.2 and Mobile Homes Act 1983 s.2(1) and Schedule 1 paras. 1 to 6). In particular, under Schedule 1 paragraph 1 in the 1983 Act any such agreement subsists until determined in accordance with paragraphs 3 to 6. The site occupier is entitled to terminate on four weeks' notice (para. 3). The site owner is entitled to terminate forthwith for breach if, on his application, the court (a) is satisfied of a breach of the agreement not remedied after notice and (b) considers termination reasonable (para. 4). The owner is also entitled to terminate forthwith on satisfying the court that the occupier is not occupying the home as his only or main residence (para. 5) and at the end of any five year period on satisfying the court that the caravan is having a detrimental effect on the site's amenity or is likely to do so within the next five year period (para. 6). However, under s.5 of the 1983 Act "protected site" is stated not to include any land occupied by a local authority as a caravan site providing accommodation for gypsies (a provision to be removed from a date to be determined by s.318 and Schedule 16 of the Housing and Regeneration Act 2008).

128. Under s.3(1) of the 1968 Act it is an offence for an owner, after the expiry or determination of a residential contract, to enforce any right to exclude the occupier from the protected site or from any such caravan, or to remove or exclude the caravan from the site, otherwise than by proceedings in the court; and by s.4(1) a court making any such order is given power to suspend its enforcement for such period not exceeding twelve months from the date of the order as it may think reasonable. However, under s.4(6) of the 1968 Act it was at the relevant times provided that the court should not suspend the enforcement of an order made in proceedings taken by a local authority providing caravan sites within the meaning of s.24 of the Caravan Sites and Control of Development Act 1960. S.24 of the 1960 Act gives to local authorities power to provide such sites within their area and to manage or lease them; s.4(6) was removed with effect from 18 January 2005 by the Housing Act 2004, s.211(1).

Kay – gateway (a)

129. It is necessary to analyse the two-gateway formula to which all members of the majority subscribed in paragraph 110 of *Kay*. Gateway (a) of paragraph 110 concerns, as I see it, only statutory law. It refers in part (i) to section 3 of the Human Rights Act 1998 and in part (ii) to a potential compatibility issue. Gateway (a) does not therefore address what would happen in the case of a right to possession of a home deriving from the common law alone. This would have raised a question as to the possible impact on the court as a public authority of section 6(1) of the Human Rights Act to which my noble and learned friend, Lord Walker of Gestingthorpe, adverts in paragraphs 98 and 99 of his speech. Had the House had such a question in mind in paragraph 110 in *Kay*, the House could have been expected to address it. However, if one does hypothesise a right to possession deriving from common law alone, there are difficulties in seeing how a court could create or grant in an occupier's favour a possessory right which the common law does not confer, or could either deny or postpone a private owner's entitlement to possession by reference to a supposed duty on the part of the court to act inconsistently with the parties' rights inter se. Courts after all exist to administer the law as between the parties before them.

130. The majority took a similar view of the court's role on the facts in *Qazi*: see per Lord Hope (para. 79), Lord Millett (para. 108) and Lord Scott (paras. 142-4). In that case, it was common ground that a valid notice to quit had been served by one co-tenant (an estranged wife) which brought to an end the whole joint tenancy of the house of which

the other joint tenant, the husband, still remained in occupation (see per Lord Bingham of Cornhill at paragraph 2 and Lord Hope of Craighead at paragraph 74). The only issue was whether the court should, under s.6(1), refrain from making a possession order to give effect to the housing authority's legal right to possession against the occupier husband. The majority held that, save perhaps in a wholly exceptional case (see Lord Hope at para. 97 and Lord Millett at paras. 107 and 109), the court's role was to enforce a right to possession which existed under national law. Lord Hope at paragraph 79 contemplated as a "wholly exceptional case" in which article 8 issues might be raised in the county court a case "where proceedings for possession were being taken following the service of a notice to quit by the housing authority, bearing in mind as Lord Millett points out that its decision to serve the notice to quit would be judicially reviewable …..". In *Kay* at paragraphs 98 and 111, Lord Hope noted that *Qazi* should not be regarded as authority for an extreme proposition that the exercise by a local authority of an unqualified right to possession would *never* constitute an unjustified interference under article 8 of the Convention with the occupier's right to respect for his home. Once again, however, that appears to be a point relating to the local authority's rather than the court's duty, one to which I shall return.

131. Be all that as it may, the background to the Council's present claim to possession of the site occupied by Mr Doherty and his co-defendants included Parliament's deliberate choice to exclude, from the concept of "protected site" under the 1983 Act, land occupied by a local authority as a caravan site providing accommodation for gypsies, and to exclude, from the power to suspend otherwise granted to the court under s.4(1) of the 1968 Act, any order for possession made in proceedings taken by a local authority providing caravan sites within s.24 of the 1960 Act. The Council thus submits that there was a statutory law within the meaning of gateway (a), that the situation falls within s.6(2) of the Human Rights Act and that the court can do no more than, at most, declare incompatible under s.4 of that Act any aspect of the statutory legal scheme which it concludes is incompatible.

132. I see force in those submissions. The exclusions in the statutory regime of the 1983 and 1968 Acts are unequivocal and cannot be re-interpreted or qualified under s.3 of the 1998 Act. The exclusions made clear that the court's duty was to give effect to the common law entitlement which would exist apart from the 1983 and 1968 Acts, and in my view (subject to whatever may be the effect of gateway (b)) precluded the court from acting differently within the meaning of s.6(2)(a) of the 1998 Act. The cases of *Connors* and *McCann* before the

European Court of Human Rights show that (in circumstances where that court considered that relief on judicial review grounds could not assist the occupiers) such a regime is in principle incompatible with the Convention rights which are given domestic effect by the Human Rights Act 1998, in particular because any person at risk of loss of his or her home "should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end" (see *McCann*, para. 50 quoted in paragraph 126 above). However, I would add that this may be irrelevant, and that (quite apart from the fact that the Housing and Regeneration Act 2008 will remove any incompatibility from a future date to be determined) it may not justify a declaration of incompatibility, if in the particular case the incompatibility has no relevance because of the impact of gateway (b).

Kay – gateway (b)

133. Gateway (b) provides, with reference to *Wandsworth LBC v. Winder* [1985] AC 461, that, if a defendant has a seriously arguable point that the decision of a local authority to recover possession is an improper exercise of its powers at common law, he should be permitted to raise this by way of defence to its claim to possession. My noble and learned friend, Lord Scott, indicates in paragraphs 69 and 84 to 88 of his speech that, in deciding whether to terminate an agreement by notice to quit, a local authority must under s.6(1) of the Human Rights Act act in accordance with the Convention rights, and that a decision contrary to such rights would be unlawful and the notice to quit devoid of effect. I agree with this conclusion, although I would myself arrive at it by a different route. Gateway (b), as expressed in paragraph 110 in *Kay* was, as I see it, phrased so as to exclude any direct application of the Convention rights or of the Strasbourg Court's test of proportionality, and to confine attention to common law grounds for judicial review, informed though they may increasingly be by ideas of fundamental rights: see also per Baroness Hale of Richmond at paragraph 190 and Lord Brown of Eaton-under-Heywood at paragraphs 208-211, and contrast the approach of the minority as set out in paragraph 39 of Lord Bingham of Cornhill's speech in *Kay*.

134. The general distinction which thus emerges is recognised and described in *R (Daly) v. Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532, per Lord Steyn (para. 27) and Lord Cooke of Thorndon (para. 32, recognising though regretting the

distinction) and in *R (ABCIFER) v. Secretary of State for Defence* [2003] EWCA Civ 473; [2003] QB 1397, paragraphs 32 to 37, where Dyson LJ, giving the judgment of the Court of Appeal, said that any abandonment of the common law's *Wednesbury* unreasonableness test for a proportionality test was a step which could only be taken by this House. Other potential differences between conventional (or "domestic") judicial review were discussed in *R (SB) v. Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100 (see in particular per Lord Hoffmann at para. 68) and *Belfast City Council v. Miss Behavin' Ltd.* [2007] UKHL 19; [2007] 1 WLR 1420.

135. The difference in approach between the grounds of conventional or domestic judicial review and review for compatibility with Human Rights Convention rights should not however be exaggerated and can be seen to have narrowed, with "the '*Wednesbury'* test … moving closer to proportionality [so that] in some cases it is not possible to see any daylight between the two tests" (*ABCIFER*, para. 34, citing an extra-judicial lecture by Lord Hoffmann). The common law has been increasingly ready to identify certain basic rights in respect of which "the most anxious" scrutiny is appropriate: see *R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514, 531 per Lord Bridge of Harwich, quoted in *R v. Ministry of Defence, Ex p. Smith* [1996] QB 517, 554D-556A; and see *R v Secretary of State for Education and Employment, Ex p Begbie*[2000] 1 WLR 1115, 1130B-C per Laws LJ ("the *Wednesbury* principle itself constitutes a sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake." My noble and learned friends Lord Hope and Lord Walker draw on this theme in paragraphs 55 and 108 to 109 of their speeches. Even so, as the subsequent history of *ex p. Smith* demonstrates, the result may not always achieve the degree of protection for Convention rights which the Strasbourg Court requires: *Smith and Grady v. United Kingdom* (1999) 29 EHRR 493. So there remains room in another case to reconsider how far conventional or domestic judicial review and Convention review can be further assimilated, and in particular whether proportionality has a role in conventional judicial review. This was not, however, argued on the present appeal, and, in common I understand with the majority of your Lordships, I do not consider that it is appropriate to embark on such a review on this appeal.

136. On this basis, in circumstances such as those in *Kay*, the only question under gateway (b) as expressed in *Kay* is whether the public authority's decision can be challenged on domestic judicial review grounds, in particular as having been based on material misconceptions or improper considerations or as unreasonable, either in the *Wednesbury*

sense or in a more relaxed sense which takes full account of the basic interest which any occupant has in his or her home. In other words, in circumstances such as those in *Kay*, a full Convention review is not, at least nominally, possible on the majority view taken in *Kay*.

137. At this point, however, it becomes important to consider whether the present circumstances are the same as those in *Kay*. I start by identifying the local authority decision or decisions here in issue. Again, I agree with the way in which my noble and learned friend Lord Scott has identified this in his paragraphs 76 and 84. Mr Doherty and his co-defendants denied in their defence that there had been any valid notice to quit or to determine their licence, tenancy or other interest; and, as HHJ McKenna recognised, any challenge by way of judicial review would be in the first instance to the "fairness and legality of the decision taken by the [Council] to terminate" by the notice to quit served on 4 March 2004 (judgment paras. 43 and 46). The circumstances in *Qazi* and *Kay* were very different in respects to which I shall return (paragraphs 157 et seq below).

138. The present case was in fact transferred from the County Court and heard by HHJ McKenna sitting as a High Court judge in the Birmingham District Registry. Before HHJ McKenna, Mr Doherty and his co-defendants submitted that there were factual disputes which made judicial review inappropriate. HHJ McKenna did not agree that any factual disputes which existed made judicial review inappropriate. In that respect, his view finds considerable support, subject to certain qualifications, in the detailed analysis by the Court of Appeal in *E v. Secretary of State for the Home Department* [2004] QB 1044. I agree with the observations made in paragraph 68 of the speech of my noble and learned friend, Lord Scott, about the possibility of adjusting judicial review procedure in appropriate circumstances to cover any necessary factual investigation and determination.

139. Deciding the case in December 2004, 15 months before the House's decision in *Kay*, HHJ McKenna went on to offer to Mr Doherty and his co-defendants the opportunity of applying for judicial review, although they were already some five months out of time. They did not take up that opportunity, but maintain that they should, if nothing else, have been allowed to defend the proceedings in the County Court on conventional or domestic judicial review grounds under gateway (b). In *Wandsworth LBC v. Winder* the local authority had under s.40 of the Housing Act 1980 the right to vary terms of the tenancy unilaterally by notice. The tenant contended that certain rent increases were

unreasonable in the *Wednesbury* sense, and as such *ultra vires*. The House held that the tenant was entitled to raise this contention by way of defence in the County Court in answer to the local authority's claim for the increased rent, and was not required to challenge the local authority's decisions to increase the rent by judicial review (for which the tenant had in fact already been refused leave as being out of time). In paragraph 110 in *Kay* the House expressly equated a challenge to the reasonableness of a local authority's decision to recover possession with the situation in *Wandsworth LBC v. Winder*. So, if a local authority's decision to serve notice to quit is invalid because unreasonable, it is clear that *Wandsworth LBC v. Winder* would enable this to be raised by way of defence. It follows that, even under gateway (b) as expressed in paragraph 110 in *Kay*, I would (in common I understand with all of your Lordships) hold that there was an arguable defence based on conventional or domestic common law grounds, and that the matter should be remitted to the High Court for its determination on the facts and in the light of the common law principles of judicial review discussed in paragraphs 133 to 136 above.

140. The question thus arises, on the way I approach this appeal, whether the House should now, after *McCann,* reconsider and expand gateway (b) in *Kay*. Should gateway (b) now permit judicial review on full Human Rights Convention grounds (effectively adopting the minority approach in *Kay*)? If gateway (b) in *Kay* is understood in the more limited sense indicated in paragraphs 133 to 136 above, and if the view be taken which I understand the majority of your Lordships to take, that the House should (*McCann* notwithstanding) apply *Kay*, then it follows that any remission to the High Court must be limited to reconsideration of whether the decision to serve notice to quit was invalid on conventional or domestic judicial review grounds. On this approach, that *Kay* is simply binding, it is unnecessary to go into the reasons which may or may not lie behind *Kay*, and in particular unnecessary to consider s.6(2)(b) of the Human Rights Act.

Human Rights Act s.6(2)(b)

141. S.6(2)(b) raises difficult and important issues, which were not fully or adequately addressed either in the parties' written cases or in oral argument and on which I would have wished to hear further argument had it been critical to the outcome to decide them. S.6(2) was mentioned only briefly and very generally in the parties' written cases, and it was only after Mr Ashley Underwood QC for the respondents had indicated the nature of the respondents' reliance on s.6(2) during the

morning of the second and last hearing day that Mr Luba QC and Mr Sales QC asked the House after the midday adjournment for permission for Mr Sales to make further submissions specifically directed to it. Mr Sales's submissions, made with the benefit of the midday adjournment, were well focused but in the circumstances brief. They included a submission that s.6(2)(b) of the 1998 Act should be narrowly interpreted (particularly having regard to s.3 of that Act) and that otherwise the protection intended by the 1998 Act would be radically cut down. They included a reference to *R v. Kansal (No. 2)* [2001] UKHL 62; [2002] 2 AC 69, a very different case from the present on any view as my noble and learned friend, Lord Hope, indicates in paragraph 39 of his speech. No reference was made to any other relevant authority on the scope of s.6(2)(b), and in particular none to *R (Wilkinson) v. Inland Revenue Commissioners* [2002] STC 347 (Moses J); [2005] UKHL 30; [2005] 1 WLR 1718 or to *R (Hooper) v. Secretary of State for Work and Pensions* [2005] UKHL 29; [2005] 1 WLR 1681, authorities which only came to the attention of the House during the preparation of the present speeches. There was no analysis of any role that s.6(2)(b) may have played in the reasoning of the majority in *Kay*. In these circumstances, the ambit of s.6(2)(b) must, I think, await further examination and determination in a case where this arises squarely for determination and is fully argued. My own following observations on the subject, made without the benefit of submissions on these and other authorities or texts, must be seen as tentative and provisional.

142. Logically, the first question ought perhaps to be whether the reasoning in *Kay* binds the House to conclude that s.6(2)(b) covers the present situation (although the House heard no submission from counsel that *Kay* turned on s.6(2)(b)). In my opinion it does not. My noble and learned friend, Lord Hope, was the only member of the House mentioning s.6(2)(b) (see in particular paragraphs 86 and 114). S.6(2)(b) is not mentioned in paragraph 110 (the one paragraph around which the majority all grouped) or in counsels' reported arguments on any side in *Kay* (see Mr Arden QC's argument reported at p.478 and Mr Sales QC's argument at p.480B-G) and it was not addressed by any member of the minority (see Lord Bingham of Cornhill in para.39, Lord Nicholls of Birkenhead in para. 59 and Lord Walker in para.176). Further, although they subscribed to paragraph 110, Lord Scott in paragraph 171 and Baroness Hale in paragraphs 189 to 193 did not identify article 8 as legally irrelevant, but concluded that it was irrelevant on the facts of the cases before them.

143. I understand that the basis on which a majority was able to subscribe to paragraph 110 in *Kay* was that, as a matter of pragmatism

and policy and in the light of *Qazi*, the more sensitive Convention grounds were to be regarded as satisfied by Parliament when devising the statutory scheme, while a local authority's actual decision to seek possession was only to be reviewable under gateway (b), i.e. only if it could be seen to be palpably wrong on the more restrictive "conventional common law" grounds of judicial review. That is what I understand my noble and learned friend Lord Scott to have been saying at paragraphs 170 to 173, Baroness Hale at paragraphs 190 to 193 and Lord Brown at paragraphs 203 to 211.

144. The background to *Hooper* is summarised by my noble and learned friend, Lord Walker, in paragraphs 110 and 111 of his speech. In *Hooper*, [2002] EWHC 191 (Admin), Moses J, after considering previous authority, drew a distinction between (a) situations where compatibility of outcome with the Convention could only be achieved by exercising a statutory discretion one way in every case, as in *Kansal (No. 2)* and *R (Holding & Barnes plc) v. Secretary of State for the Environment, Transport and the Regions* [2001] JPL 291; [2001] 1 All ER 929 (later overruled on another ground under the title *R (Alconbury Developments Ltd.) v. Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 AC 295) and (b) situations where whether the discretion had to be exercised in a particular way in order to ensure a Convention-compatible result would depend on the particular factual circumstances, as in *R (Friends Provident Life & Pensions Ltd.) v. Secretary of State for Transport* [2001] EWHC 820.

145. Moses J held in *Hooper* (para. 183) that

> "the fatal flaw in the claimants' argument is that its effect is to convert the power to make an extra-statutory payment into a duty. It destroys the power altogether. There are no circumstances in which the defendant could exercise a power not to give a benefit."

146. He went on in paragraph 185:

> "The claimants' submissions as to s.6 come ….. perilously close to a submission that the court should impose a duty to grant benefits where Parliament has chosen not to do so. The defendant gives effect to the primary legislation by declining to recognise that duty."

147. The Court of Appeal thought that s.6(2)(b) did not apply because the decision by the defendant (the Secretary of State) not to make *ex gratia* widowers' payments could not be said to be "necessary" in order to give effect to the statutory provisions. The House allowed an appeal, pointing out that the Court of Appeal's approach was relevant only under s.6(2)(a): see per Lord Hoffmann, paragraph 48.

148. In this House in *Hooper*, Lord Hoffmann considered that s.6(2)(b) applied, first, because the discrimination which it was alleged that the Secretary of State should have avoided by making *ex gratia* payments to widowers only arose from giving effect to the statute by making statutory payments to widows (para. 50). (Lord Brown at para 125 had difficulty in accepting this part of Lord Hoffmann's reasoning.) Lord Hoffmann went on, secondly, expressly to endorse Moses J's reasoning in paragraph 185, quoted above, and to say:

> "If legislation cannot be read compatibly with Convention rights, a public authority is not obliged to subvert the intention of Parliament by treating itself as under a duty to neutralise the effect of the legislation".

149. Lord Nicholls agreed at paragraph 1 with Lord Hoffmann's reasoning, but also put the matter in his own words at paragraph 6:

> "Ss.36 and 27 make provision for payments to widows alone. If the Secretary of State were asked "Why are you not making similar payments to widowers?" he would have answered: "Because the statute provides these payments should be made to widows and makes no provision for payments to widowers". The fact that the Secretary of State could lawfully have made corresponding payments to widowers does not detract from the crucial fact that in declining to pay widowers he was 'giving effect' to the statute".

150. In paragraph 73 in *Hooper* (quoted by my noble and learned friend, Lord Walker in paragraph 113 of his speech), my noble and learned friend, Lord Hope, was, as I see it, focusing on whether the source of the discretion mattered for the purposes of s.6(2)(b), rather than on what was meant by "giving effect" to or "enforcing" statutory provisions. He addressed the latter question in the next paragraph, and did so again by endorsing Moses J's approach. Lord Hope said:

> "74 ……The effect of the argument that the commissioners were not entitled to rely on s.6(2)(b) was to convert the power to give an extra-statutory allowance into a duty to do so. That would destroy the power altogether. It would replace it with an obligation to make widowers the same allowance as widows, as this would be the only way that the commissioners could act, as s.6(1) requires, in a way which was compatible with the widowers' Convention right".

151. Both of my noble and learned friends, Lord Scott (paras. 94-95) and Lord Brown (paras. 122-125), preferred to rely on s.6(2)(a) rather than s.6(2)(b), on the basis, as Lord Brown put it (para. 124), that "'as a result of [ss.36 and 37], the [Secretary of State] could not have acted differently': he had to pay the widows and could not lawfully have made matching payments to widowers".

152. *Hooper* is not, therefore, any authority against the approach taken by Moses J, rather the contrary. Further, it is in a different category to the present case. The commissioner, if he had matched widows' benefits with *ex gratia* widowers' payments, would have been doing the opposite of what the statute contemplated, subverting the statutory scheme. The power to make *ex gratia* payments would have had to have been exercised in every case, as if it were a duty, if discrimination between widows and widowers was to be avoided. Here, the position is different. The Council had to decide whether to exercise a contractual right which was, as a result of the exceptions in a statutory scheme, preserved to it in its full common law width. But the Council was at the same time taking this decision as a public authority within s.6 of the Human Rights Act, and more specifically in the exercise of its power of management of caravan sites under s.24 of the 1960 Act. It is not suggested that anything in this scheme precluded the Council from taking into account the Human Rights Convention rights, so s.6(2)(a) has no application.

153. As to s.6(2)(b), it is the court's duty under s.3(1) of the Human Rights Act to read and give effect to the statutory scheme so far as possible in a way which is compatible with the Convention rights. This duty applies to primary legislation "whenever enacted" (s.3(2)). It applies to the Caravan Sites Act 1968 and the Mobile Homes Act 1983. These Acts are directed to caravan sites generally. By far the greater number of such sites must be owned and run privately rather than by local authorities, and this appears to be the case, at least in England and Wales, even if one focuses solely on sites occupied by gypsies. The Acts

were necessary to regulate private relations between site owners and occupiers. The exclusions relating to local authorities say nothing about such authorities' performance of their general public law duties, and in particular nothing to contradict or undermine their duty to act compatibly with their Human Rights Convention obligations, once the 1998 Act came into force. It is possible to read and give effect to the statutory scheme of both the Caravan Sites Act 1968 and the Mobile Homes Act 1983 in a way which entitles (and under s.6(1) of the Human Rights Act 1998 requires) a local authority, when deciding whether or not to give any (and if so what length of) notice to a caravan site occupied by travellers terminating their right to occupy, to take into account the Convention rights, including the length of time for which the site has been the occupiers' home. Whether and to what extent this will be relevant will depend on the circumstances. Accordingly, a local authority which fails to take into account Convention values when deciding whether or not to give any and if so what length of notice to quit cannot, in my opinion, be said to be "acting so as to give effect to or enforce" statutory provisions which are incompatible with the Convention rights.

154. In reaching these conclusions, I do not exclude the possibility that the statutory scheme of the 1968 and 1983 Acts, as it existed at the relevant times, would still be regarded as incompatible with the Convention rights in certain respects. A scheme according to which some occupiers have specific statutory rights (as under the 1983 Act) but gypsy occupiers of local authority caravan sites have the general statutory protection of s.6(1) of the Human Rights Act might perhaps still be regarded as unjustifiably discriminatory in some circumstances under the combination of articles 8 and 14 of the Human Rights Convention. A scheme under which only occupiers of private caravan sites have a statutory right to seek a suspension of enforcement of a possession order for up to 12 months (as under the 1968 Act) could in some circumstances likewise be regarded as unjustifiably discriminatory. However, if the legislation is potentially incompatible with the Convention in any such respects, that is irrelevant. No such incompatibility has been relied upon before your Lordships. Mr Doherty's case has been simply that, if it is not open to him in one way or another to rely on article 8 of the Convention, that is a result incompatible with his Convention rights. It is the scheme of the 1983 Act which is relevant on the present appeal. The potential incompatibility identified in the present paragraph arises from a comparison of the position under the 1983 Act with the position under s.6(1) of the Human Rights Act, and therefore assumes that it would in the present circumstances be open to the local authority to exercise its

discretion consistently with the Convention. It is thus for present purposes beside the point.

155. In the light of my conclusions in paragraphs 152 and 153, there is no question of removing or displacing the general right to give notice to quit or requiring it always to be exercised in one way or of subverting the statutory intention. Compliance with the Convention principles in the exercise of a discretion is not to be regarded in such circumstances as any more of an inadmissible fetter on the exercise of the discretion than is compliance with the general common law principles governing the exercise of administrative discretion (as to which see the powerful quotation from Professor Sir William Wade QC by Lord Bridge of Harwich in *R v. Tower Hamlets LBC, Ex p. Chetnik Developments Ltd.* [1988] 1 AC 858, 872B-G). The Council when exercising any of its multitudinous statutory discretions is bound to exercise the same proportionately taking into account the Convention values. It is, I understand, common ground that discretions granted by statute or common law fall to be exercised in accordance with the Convention values. Thus, for example, it was never suggested in the recent case of *R v. G* [2008] UKHL 37; [2008] 1 WLR 1379 that, because Parliament had created an offence of statutory rape, a prosecuting authority's decision to prosecute in circumstances falling within the scope of that offence could not be reviewed if incompatible with a Convention right. It would, I think, be curious if common law discretions preserved by statute were not also to be exercised in accordance with Convention values.

156. Further, if the Caravan Sites Act 1968 and Mobile Homes Act 1983 had never existed to protect private occupiers, there could have been no question but that, on the coming into force of the Human Rights Act, a local authority would have come under the duty in s.6(1) to act compatibly with the Convention rights when deciding whether or not to give notice to quit to a caravan site occupier. The existence in the 1968 and 1983 Acts of protection for private occupiers presents to my mind no basis for refusing that protection. A main aim of the 1998 Act would otherwise be diluted. If one were to pose a similar question to that put by Lord Nicholls in *Hooper*, by asking a local authority whether it would have any basis in March 2004 for not taking into account the principles and values of the Human Rights Convention when deciding whether or not to give a notice to quit to a gypsy occupying a caravan, I venture to suggest, with all due respect to Mr Underwood's submissions in this case, that it would not refer in answer to the Caravan Sites Act 1968 or Mobile Homes Act 1983. I note Lord Walker's encouragement to local authorities to exercise their discretion taking into account the

Convention principles, and his view that "to adopt a Convention-compliant policy could not possibly be described as subverting the will of Parliament" (paragraph 121). That is encouragement and a view with which I fully concur.

157. The facts of the present case are (as my noble and learned friend Lord Hope also notes in paragraph 36) very different from those of *Qazi* and *Kay*. Here (see paragraph 137 above) the challenge is to the validity of a local authority's decision to give a notice to quit, the validity of which was a pre-condition to any right to possession on the part of the local authority. In *Qazi* and *Kay* the local authority had an undoubted right to possession, and the only possible challenge was to its decision to enforce that right. In *Qazi* possession was sought after a tenancy had been validly determined by one of the co-tenants' own notice (see paragraph 130 above). The recent Strasbourg decision in *McCann* involved similar facts, with the occupier complaining there about, inter alia, the fact that the local authority had procured his estranged wife, the co-tenant, to give the notice to quit. *Kay* concerned two appeals. In one, *Leeds CC v. Price*, there had never been any agreement. The occupiers who claimed the site as their "home" were trespassers who had entered it without authority and within two days the council had issued the possession proceedings. In the other, *Kay v. Lambeth LBC*, the local authority had validly terminated the head lease which it had granted to a housing trust, and the occupiers who occupied under an arrangement with the housing trust (held in other proceedings to constitute a secure tenancy) thus became trespassers in relation to the local authority. Once again, the appeal proceeded in this House on the basis that the local authority had an undoubted domestic law right to possession (private law arguments to the contrary being rejected). The issue in both cases was therefore whether the local authority's action in pursuing proceedings to enforce its unqualified domestic law right to possession could be challenged. In that context, the majority of the House established the common position contained in paragraph 110 in *Kay*.

158. Even in cases such as *Qazi* and *Kay* a local authority has a discretion. It is not bound to take steps, immediate or otherwise, to resume possession. Where (as would appear to have been the position in *Leeds CC v. Price*) the steps open to the local authority are not, at least theoretically, confined to taking court proceedings, it has a discretion whether to take any steps at all. Where (as in *Qazi*, *Connors*, *Kay v. Lambeth LBC*, and *McCann*) the Prevention from Eviction Act 1977 applies so that any such right to possession could only be enforced by proceedings in court, the local authority has a discretion whether or not to bring such proceedings. Even in these situations it does not seem to

me that the decision to pursue court proceedings to enforce a right to possession preserved by a statutory scheme can properly be described as action "to give effect to" or "enforce" any statutory provisions which may be regarded as incompatible with the Convention rights. The statutory scheme permits a decision, but says nothing about what sort of decision or when. In deciding when and how to act, the Council is giving effect to its own evaluation of what was appropriate, as it is entitled and bound to do. Under the imperative of s.3(1) read with s.6(1) of the Human Rights Act, it should be regarded as obliged in so acting to respect Convention values. If it fails properly to respect Convention values it is not, in my opinion, "acting so as to give effect to or enforce" statutory provisions which are incompatible with the Convention rights. That the court, if the local authority pursued possession proceedings, would have no option under the statutory scheme but to give effect to the local authority's right to possession (see paragraph 132 above) unless the local authority's decision to claim possession could be challenged under gateway (b), does not impact on this conclusion and is circular because of the existence of gateway (b). If anything, it underlines the importance which attaches to Convention-compliant decisions being reached by local authorities and to non-compliant decisions being challengeable under the principle in *Wandsworth LBC v. Winder*. Accordingly, construing the statutory scheme so far as possible in a way which is compatible with the Convention rights as required by s.3(1) of the Human Rights Act, I would not see s.6(2)(b) as a bar to reliance on article 8 of the Convention in a challenge to a local authority's decision to pursue proceedings for possession in such cases.

159. However, whatever may be the position in that respect, the present case falls into a different category. Here, as I have pointed out, the challenge is to the decision to give the notice to quit, the validity of which was a pre-condition to any right to possession at all. It is one thing to treat a local authority as "giving effect" to primary legislation which cannot be read compatibly with the Convention in deciding to take possession proceedings to enforce an undoubted right to possession, It is another to hold that a local authority, when deciding whether to serve any and if so what notice to quit under the contractual freedom preserved to it under the statutory scheme, is "giving effect to" or "enforcing" provisions of primary legislation which cannot be read compatibly with the Convention. It follows, in my view, that nothing in s.6(2)(b) requires the House to conclude that it was not open to HHJ McKenna to consider a challenge on article 8 grounds to the validity of the notice to quit of 4 March 2004, and to consider a defence to the Council's claim to possession on that ground.

160. The next question is whether paragraph 110 in *Kay* itself prevents a challenge on article 8 grounds to the validity of the notice to quit. In my opinion, it does not. Both *Qazi* and *Kay* were, as I have shown, concerned with circumstances where it was clear or was held that there existed an unqualified domestic law right to possession. It was in that context that gateway (b) in paragraph 110 addressed the possibility of a challenge to the local authority's "decision….. to recover possession as an improper exercise of its powers at common law", and defined the possibility of such a challenge by reference to conventional common law grounds of judicial review. Gateway (b) was not conceived with reference to a challenge on Human Rights Convention grounds to the validity of a public authority's exercise of a contractual right which if good would mean that no right to possession arose at all. My noble and learned friend, Lord Hope, underlined this distinction in *Qazi* itself. In paragraph 79 he identified as a "wholly exceptional case" - in relation to which he reserved his opinion as to whether article 8 issues might be raised in the county court - a case "where proceedings for possession were being taken following the service of a notice to quit by the housing authority, bearing in mind as Lord Millett points out that its decision to serve the notice to quit would be judicially reviewable in the High Court so long as the application was made within the relevant time limit". He went on to distinguish *Qazi* on the basis that "The situation in the present case is different, as it was a notice to quit served by one of the joint tenants that terminated the tenancy". Since *Kay* the principle in *Wandsworth LBC v. Winder* allows judicial review points to be raised by way of defence and without time limit in the county court, but the distinction remains between cases (like *Qazi* and *Kay*) where the challenge is to a decision to enforce an undoubted right to possession by court proceedings and cases (like the present) where the challenge is to the decision to serve a notice to quit which is a contractual pre-condition to any right to possession.

161. Accordingly, I consider that *Qazi* and *Kay* are distinguishable from the present case. Especially after the Strasbourg Court's decision in *McCann* and in the light of the court's duty under s.2 of the Human Rights Act to take account of Strasbourg case-law, the scope of *Qazi* and *Kay* should not be extended. On the basis of this distinction alone, I would hold that the case should be remitted to the High Court for the Council's decision to issue a notice to quit to be reviewed on Convention as well as conventional or domestic judicial review principles. The High Court would then be able to consider whether the decision to serve notice to quit complied with the respect for Mr Doherty's home due under article 8. On the facts of this case, this would, as I see it, make irrelevant any such incompatibility as may exist between the Convention and the general statutory scheme, and so mean

that (quite apart from the fact that the Housing and Regeneration Act 2008 will remove any incompatibility from a future date to be determined) a declaration of incompatibility was not in any event required.

162. However, I for my part regret that it has not been possible on this appeal to agree to modify gateway (b) in paragraph 110 more generally, so as to allow express regard to be had to Human Rights Convention principles in relation to any defence raised against a public authority under the rule in *Wandsworth LBC v. Winder*, whether in circumstances such as those in *Qazi*, *Connors*, *Kay* and *McCann* or in circumstances such as the present. In paragraphs 19, 36 and 55 of his speech my noble and learned friend Lord Hope mentions the need to take account of any judgment of the Strasbourg Court and to give practical recognition to the principles that it lays down, and states that this can be done in the present circumstances by to some extent modifying the reasoning of the majority in *Kay*. At the same time, he rejects the suggestion that the House should depart from the majority view in *Kay* in favour of the minority, believing that this would create very real practical problems: paragraphs 19 to 20.

163. For my part, I am not persuaded that any significant problems would or need arise, as Convention-compliant statutory schemes are developed and public authorities become accustomed to tailoring their performance of their duties to Convention values. In a large number of cases, County Courts already tackle sensitive issues of reasonableness, as well as issues regarding breach of conditions of occupancy, when deciding whether to make or suspend possession orders; The limited modification that my noble and learned friend Lord Hope would make to gateway (b) of paragraph 110 (see paragraph 55) would add to such cases a further category in which review on traditional *Wednesbury* grounds was relaxed to become a more straightforward examination of reasonableness. If County Courts can handle such issues in possession claims, there is no reason to doubt their ability to tackle, robustly and with due despatch, the largely parallel issues which would arise from any direct application of the Convention principles in cases of challenges to public authority decisions to seek possession.

Conclusion

164. (i) In view of paragraphs 154 and 161 to 163 above, I would not (quite apart from the fact that the Housing and Regeneration Act 2008

will remove any incompatibility from a future date to be determined) have considered a declaration of incompatibility to be required in the present circumstances. (ii) I understand that, had it not been for the passing of the Housing and Regeneration Act 2008, the majority of your Lordships would have considered that a declaration of incompatibility should be made. This is because I understand the majority of your Lordships to conclude that the statutory scheme precludes the court from doing anything other than making a possession order, unless the decision to issue a notice to quit can be challenged on the conventional or domestic common law (rather than Human Rights Convention) grounds of judicial review open under gateway (b) as expressed in *Kay* and explained by my noble and learned friends Lord Hope and Lord Walker in their speeches on this appeal. (iii) In common with all of your Lordships, I agree that the case should be remitted to the High Court for determination of the domestic judicial review issues arising on that basis under gateway (b). (iv) For both the reasons given in paragraph 161 and in paragraphs 162 to 163, I would myself have concluded that the remission could and should go further and cover avowedly the issue whether the Council's notice to quit was invalid as contrary to article 8 of the Convention. (v) I understand the view of the majority of your Lordships to be that this is not open to the House in the light of *Kay*, but that this may not ultimately matter because the common law, developed or modified to the extent indicated by my noble and learned friends Lord Hope and Lord Walker (see paragraphs 135 to 136 and 162 to 163 above of this speech), should itself be capable of achieving fair and reasonable results.