Trouble at mill

Jon Holbrook questions mandatory rights to possession that are not mandatory

The Supreme Court's judgment in *Manchester CC v Pinnock* [2010] UKSC 45 is as important as it is troubling. It establishes that where Parliament has created a mandatory right to possession the courts may refuse to grant possession.

Mr Pinnock's case concerned a demoted tenancy. Under this regime eviction is a two-stage court process that begins with the court making a demotion order. Having obtained a demotion order the landlord may return to court for a possession order within the next twelve months. The regime offers the tenant substantive protections at the first stage because the demotion order can only be made if the court is satisfied that it would be reasonable to demote the tenancy. But during the second stage the tenant is offered only procedural protections, he may not raise a substantive defence.

Or at least it was Parliament's intention that the occupier would not be able to defend the second stage with a substantive defence. This is clear from s 143D(2) of the Housing Act 1996 which states that during the second stage: "The court must make an order for possession unless it thinks that the procedure under sections 143E and 143F has not been followed."

Despite the apparently clear wording of the statute the Supreme Court read s 143D(2) as qualified according to whether the making of a possession order would be "proportionate" in a democratic society. In other words Parliament's intention of making possession orders mandatory against demoted tenants has been trumped by the courts deciding that they can consider a substantive defence.

The *Pinnock* judgment will affect all possession claims where social landlords seek mandatory possession orders. There are likely to be several thousand claims every year where the occupier may now seek the court's protection, which Parliament has sought to deny. In addition to demoted tenancies, the court's powers to question mandatory rights to possession will apply to introductory and starter tenants (those on one year probationary tenancies with councils and housing associations); those housing association tenants with more than eight weeks rent arrears facing "Ground 8" possession claims; those in temporary accommodation who are owed duties as homeless persons; and other tenants or occupiers who do not have protection because they or the original tenants have died, abandoned, sub-let and so on.

Three's a crowd

The Supreme Court's judgment is problematic at three levels: legal, social and political.

Good laws are laws that are clear and certain. Possession claims are now subject to laws that are unclear and uncertain. It was only two years ago that Lord Hope, in the House of Lords, rejected the introduction of a proportionality test into possession claims on the grounds that: "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." (*Doherty v Birmingham CC* [2008] UKHL 57, [2009] 1 All ER 653.)

> "In *Pinnock* it is the Supreme Court that has placed our government in a strait-jacket"

Lord Hope concluded that the proportionality test, as developed by the European Court of Human Rights, suffered from "a fundamental defect which renders it almost useless in the domestic context". It is that "almost useless" test that will now apply.

The courts will be forced to find a way of applying a proportionality test. And no doubt many, probably the great majority of defences in which a proportionality test is raised will fail. But by then the harm will have been done. The whole point of a mandatory right to possession is to enable a landlord to secure possession promptly, often by requiring it to prove only that a valid notice has been served, and inexpensively. By allowing proportionality to be raised this purpose will have been defeated. During the delay anti-social behaviour may have continued, rent arrears may have increased and those without a good reason to occupy social housing may have remained there. In each case it is the wider public that pays the price: rent arrears and legal expenses are paid by other tenants; anti-social behaviour is endured by others in the neighbourhood and unauthorised occupiers reside at the expense of others in greater housing need. The individual may have had his day or two (or more) in court but this will often have been to the detriment of the wider community.

Political harm

But it is at a political level that the *Pinnock* judgment does most harm. In a democracy those who make the laws must be accountable to the electorate. And in a parliamentary democracy Parliament must have the power to set the parameters within which judges apply the law. MPs legislate on the basis of what they consider to be in the public interest, they are accountable for their decisions and from time to time are replaced. Judges, on the other hand, may have a partial view of the public interest which may be skewed by the apparent plight of the potentially homeless litigants who appear before them. Law making and judging are wholly different disciplines. Furthermore, judges are not elected and are not democratically accountable.

Pinnock ushers in an era where contrary to the clear text of several statutes the courts will now need to consider the proportionality of an eviction. This proportionality test is not a law that has been considered by Parliament and it is not a law that has been debated by the public.

Pointing the finger

How has this state of affairs come about? It is tempting to point the finger at judges of the European Court of Human

Rights who, in a triplet of cases against the UK government since 2004 (*Connors v UK* (2004) 40 EHRR 189, *McCann v UK* (2008) 47 EHRR 913 and *Kay v UK* [2010] ECHR 1322), have decided that evictions without a consideration of proportionality by the courts would breach a person's Art 8 rights to respect for private and family life and home. But the Supreme Court pointed out that "our domestic law was already moving in the direction of the European jurisprudence". In the *Pinnock* judgment the Supreme Court gave no sense of reluctance at going where the ECHR has pointed.

At source, the problem is a political one that stems from the ideas that nowadays tend to inform judicial perspectives. This is a perspective in which personal circumstances tend to be championed over wider interests, tenants are seen as vulnerable rather than as robust and resourceful, and social landlords are viewed with distrust. It is against this perception that some have tended to view judges as the ones who can be trusted to ensure fair play and justice. Many judges have embraced the greater role that some want to give them. Some judges no longer have a strong sense of their own limits or indeed of the strengths of others such as tenants, housing managers and democratically elected politicians.

A generation ago Sir Gerald Fitzmaurice gave a dissenting opinion in which he warned of the danger of the European Court of Human Rights placing governments in a strait-jacket. He described it as: "virtually an abuse of the powers given to the [European Court of Human Rights]…to hold a government, or the executives or judicial authorities of a country, guilty of a breach of the Convention merely by virtue of the existence, or application, of a law which is not itself unreasonable or manifestly unjust, and which can even be represented as desirable in certain respects. That there may be grounds for disagreeing with or disliking the law concerned or its effects in given circumstances is not, juridically, a justification. No government or authority can be expected to operate from within a strait-jacket of this sort and without the benefit of a faculty of discretion functioning within defensible limits. Equally, breaches of the Convention should be held to exist only when they are clear and not when they can only be established by complex and recondite arguments, at best highly controversial, as much liable to be wrong as right." (*Marckx v Belgium* (1979) 2 EHRR 330).

Wrong answer

In *Pinnock* it is the Supreme Court that has placed our government in a strait-jacket. But I would prefer not to point the finger at judges in either the European Court of Human Rights or the Supreme Court but would suggest that bad ideas about tenants, their landlords and democratically elected decision makers result in bad judgments. NLJ

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