Neutral Citation Numbers: [2013] EWCA Civ 804 (case no. C1/2012/1856)
AND [2013] EWCA Civ 805 (case no. C1/2013/1504)

Case No: C1/2012/1856 & C1/2013/1504

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT
Philip Mott QC (sitting as a Deputy Judge of the High Court)
CO/4797/2012

AND

IN THE MATTER OF A CLAIM FOR
JUDICIAL REVIEW

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/07/2013

Before:

LORD JUSTICE MOSES
LORD JUSTICE KITCHIN
and
LORD JUSTICE FLOYD

- -

Between:

The Queen on the Application of CN	**Appellant**
- and -	
London Borough of Lewisham	**Respondent**
-and-	
The Secretary of State for Communities and Local Government	**Interested Party**

And Between:

The Queen on the Application of ZH (a child by FI, his litigation friend)	**Claimant**
- and -	
London Borough of Newham	**Defendant**

- and -

The Secretary of State for Communities and Local Government — **Interested Party**

- -
- -

Andrew Arden QC and Toby Vanhegan (instructed by TV Edwards LLP) for the Appellant in the first case and for the Claimant in the second case

Matt Hutchings and Jennifer Oscroft (instructed by London Borough of Lewisham Legal Department) for the Respondent in the first case and (instructed by London Borough of Newham Legal Department) for the Defendant in the second case

Martin Chamberlain QC (instructed by The Treasury Solicitor) for the Secretary of State for Communities and Local Government

Hearing dates: 10 and 11 June 2013

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Approved Judgment

Lord Justice Kitchin:

Introduction

1. In *Mohammed v Manek and Royal Borough of Kensington and Chelsea* (1995) 27 HLR 439, this court held that, as a matter of construction of s.3(2B) of the Protection from Eviction Act 1977 ("the 1977 Act"), the expression "occupied as a dwelling under a licence" does not apply to temporary accommodation provided to an applicant for assistance on the basis of homelessness pursuant to an authority's interim duty to house such an applicant while they make further inquiries. This meant an authority did not have to make an application for an order for possession in such cases. In *Desnousse v Newham London Borough Council* [2006] EWCA Civ 547, [2006] QB 831, this court concluded that *Manek* was still binding despite subsequent legislative changes and decisions of the House of Lords. By a majority, this court further held that this reading of the 1977 Act was not inconsistent with the rights of an occupier under the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

2. The central issue on this appeal is whether the decisions in *Manek* and *Desnousse* continue to bind this court in the light of the decisions of the Supreme Court in *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104 and *Hounslow London Borough Council v Powell* [2011] UKSC 8, [2011] 2 AC 186.

The facts

(a) The case of CN

3. CN was born on 3 August 1994. In August 2009 CN's mother, JN, applied to the London Borough of Lewisham ("Lewisham") for assistance under Part VII of the Housing Act 1996 ("the 1996 Act"). Lewisham accepted that it owed to JN a full housing duty under s.193(2) and arranged for Hyde Housing Association to grant to her an assured shorthold tenancy of 54 Elthruda Road, London SE13.

4. Unfortunately JN and her husband were unable to pay the rent and in November 2011 the family were evicted. Shortly thereafter, JN once again approached Lewisham for assistance. The family were provided with temporary accommodation under s.188(1) of the 1996 Act at 57 Uplands Road, London SE22 pending inquiries under s.184(1) and a decision under s.184(3) as to whether Lewisham owed to JN a duty and, if so, the extent of it. This property was privately owned by a Mr Gough but there is no dispute that it was made available to JN and her family on the basis of a temporary licence agreement with Lewisham, which itself had the benefit of a head licence from Mr Gough.

5. By letter dated 15 December 2011 Lewisham notified JN that it had decided she was homeless and in priority need but that she had become intentionally homeless from 54 Elthruda Road as a result of her failure to pay the rent. Accordingly, it continued, it no longer owed to her the full housing duty under s.193(2). It indicated it would, however, allow her to continue to reside at 57 Uplands Road for a further 28 days and would also provide her with advice and assistance to find alternative accommodation. At the same time it referred her to its Homeless Families Floating Support Service for a needs assessment. That assessment was carried out on 12 January 2012 and it

concluded that the family did not have any support needs in areas to which this particular service was directed.

6. JN thereupon requested a review of the decision under s.202 and instructed an experienced firm of solicitors who have represented her ever since. On 27 March 2012, Lewisham issued its review decision which confirmed the original decision that JN was indeed intentionally homeless and it had discharged its duty to her. She was told that she must leave 57 Uplands Road within a further period of 28 days but that she was entitled to contact Lewisham's Housing Options Centre for assistance in obtaining alternative accommodation in the private sector. Finally she was notified of her right to appeal on a point of law, which she has chosen not to do.

7. On 2 April 2012 JN's solicitors requested Lewisham to carry out an assessment of CN under the Children Act 1989. On 12 April Lewisham's Housing Reviews Officer, Mr Alex Clarke, wrote to Lewisham's social services department, informing it of the adverse decision, the family's temporary address and the proposed eviction date, and identifying CN as a dependent child in accordance with its duty under s.213A of the 1996 Act.

8. Over the course of the next few days JN's solicitors corresponded with Lewisham, in the course of which Lewisham reiterated that JN and her husband had been invited to attend the Housing Options Centre, but that they had not yet done so. It also explained that the proposed eviction date was now 24 April 2012, and that it did not consider it was required to obtain a possession order before the eviction could take place.

9. JN's solicitors responded that Lewisham should not evict the family until the social services department had conducted an assessment of CN, and that Lewisham should in any event obtain a possession order.

10. Eventually, on 23 April 2012, JN and her family did indeed attend the Housing Options Centre and also visited the children's services section of Lewisham's social services department. An initial assessment of CN was immediately undertaken and, on the family's return to the Housing Options Centre, they were provided with information about renting in the private sector and housing benefit. Shortly afterwards, the assessment by the children's services department was completed and it concluded that CN was in good health and had no unmet emotional or development needs other than for appropriate housing. However, the assessment continued, if the family had not secured alternative accommodation by the date of their departure from 57 Uplands Road, Lewisham would conclude that CN was a child in need within the meaning of s.17 of the Children Act 1989 and would provide him with accommodation. In the meantime Lewisham extended the family's licence to remain at 57 Uplands Road for a further short period.

11. On 5 May 2012 CN issued these judicial review proceedings seeking an order that Lewisham should continue to accommodate CN and his family at 57 Uplands Road until it had obtained and executed a possession order. He also challenged Lewisham's assessment under the Children Act 1989. This latter challenge is no longer pursued and I need say no more about it.

12. On 9 May 2012 the application was considered by Wyn Williams J on the papers and he made an anonymity order in respect of both CN and JN. More substantively, he made an order requiring Lewisham to continue to accommodate CN and his family at 57 Uplands Road until 14 May 2012.

13. On 15 May 2012 the injunction was continued by Walker J for a further period of three days, primarily, it would seem, on the basis that CN was about to sit his A levels and had secured a place at Brunel University conditional on his results in those examinations. On 17 May 2012 Silber J ordered that the claim be listed for an oral permission hearing and that the injunction should continue in the meantime.

14. The matter finally came before Mr Phillip Mott QC sitting as a Deputy High Court Judge who, in his judgment delivered on 12 July 2012, observed that CN and his family had remained at 57 Uplands Road throughout the period of his A level exams and that he had now left school and hoped to go to university; that CN and his family plainly occupied 57 Uplands Road under a licence rather than a tenancy; that in the circumstances he was bound by the decision in *Desnousse* to hold that the 1977 Act did not apply and that the statutory scheme was compliant with Article 8 of the Convention; and that Lewisham did not therefore need to commence proceedings in the county court for a possession order. He also found that no Article 8 point could arise on the facts of this case in any event.

15. The judge refused permission to appeal but, upon application to this court, Davis LJ granted CN permission to apply for judicial review and directed that the application should be retained in this court.

(b) The case of ZH

16. ZH was born on 23 March 2012. On 16 August 2010 Dane Housing Group granted to ZH's mother, FI, an assured tenancy of 22 Geraint Street in Liverpool. On 30 October 2011, and for reasons that were not explained to us, FI relinquished her tenancy and thereafter FI lived with her sister and their aunt on a temporary basis at Flat 6, The Sidings, Pier Road, London E16. It was while she was living there that ZH was born.

17. Just a few months later, in August 2012, FI's aunt asked her to leave and so, on 7 September 2012, she applied to the London Borough of Newham ("Newham") for assistance under Part VII of the 1996 Act. She was provided with temporary accommodation under s.188(1) at 35a High Street North, London E6 pending inquiries under s.184(1) and a decision under s.184(3), just as in the other case before us. This property was privately owned by Right Choice Properties and there is again no doubt that it was made available to FI and ZH on the basis of a temporary licence agreement with Newham, it having the benefit of a head licence from Right Choice Properties.

18. By letter dated 19 February 2013 Newham notified FI that it had decided that she was homeless and had a priority need but that she too had become intentionally homeless by choosing to relinquish her assured tenancy at 22 Geraint Street in Liverpool, her last settled accommodation. The letter continued that because FI was homeless, eligible for assistance and had a priority need, Newham would help her in her search for alternative accommodation and would allow her to stay in her current

accommodation until 18 March. FI was also given advice as to how to look for accommodation in the private sector, referred to various other agencies from whom she might seek independent legal advice and given guidance upon how to apply to join the Newham housing register. Finally, she was informed of her right to request a review of the decision.

19. By letter of 14 March 2013, Newham refused to provide FI with accommodation pending review. The letter also gave FI a short extension, saying she must leave her current accommodation by 21 March.

20. On 18 March 2013 ZH issued this claim seeking a review of Newham's decision to terminate the provision of accommodation and seeking an injunction to forbid Newham from evicting him and FI. On that same day Nicol J made an anonymity order in respect of ZH and FI and an interim order restraining Newham from evicting them pending the determination of the application for permission. On 20 March, Newham agreed to accommodate them until further order.

21. On 20 March 2013 Newham's social services department commenced an assessment under s.17 of the Children Act 1989 and it concluded that ZH would be a child in need when the family became homeless and that Newham would therefore provide appropriate interim accommodation and financial support to assist FI in securing private rented accommodation.

22. By order dated 9 May 2013 Sales J granted permission for this claim to proceed and directed that it be transferred to this court with a request that it be heard together with that of CN. So it is that both claims have come on for hearing before us together.

The legal framework

Housing Act 1996

23. It is convenient to begin with a brief summary of the key provisions of the 1996 Act which govern applications for assistance by homeless persons. They are, as I have indicated, set out in Part VII.

24. Section 184 provides that if a local housing authority have reason to believe that an applicant is homeless or threatened with homelessness, they must make inquiries to decide whether he is eligible for assistance and, if so, what, if any, duty is owed.

25. Section 188 imposes upon the authority an interim duty to provide accommodation in any case of apparent priority need. It reads, so far as relevant:

> "**188. Interim duty to accommodate in case of apparent priority need**
>
> (1) If the local housing authority have reason to believe that an applicant may be homeless, eligible for assistance and have a priority need, they shall secure that accommodation is available for his occupation pending a decision as to the duty (if any) owed to him under the following provisions of this Part.

…

(3) The duty ceases when the authority's decision is notified to the applicant, even if the applicant requests a review of the decision (see section 202)."

26. Accordingly, if the authority have reason to believe that the applicant may be homeless, eligible and have a priority need, they must secure suitable accommodation for his occupation pending their decision. The duty ceases when the authority's decision is notified to the applicant, even if the applicant requests a review. However, the authority may secure that accommodation is available for the applicant's occupation pending a decision on such a review.

27. If the authority are satisfied that an applicant is homeless, eligible for assistance and has a priority need, and are not satisfied that he has become homeless intentionally then they will owe the full housing duty under s.193 to secure that accommodation is available for his occupation.

28. If, on the other hand, the authority are satisfied that the applicant is homeless and eligible for assistance but that he became homeless intentionally then the lesser duties set out in s.190 are owed. This reads, so far as material:

"190. Duties to persons becoming intentionally homeless

"(1) This section applies where the local housing authority are satisfied that an applicant is homeless and is eligible for assistance but are also satisfied that he became homeless intentionally.

(2) If the authority are satisfied that the applicant has a priority need, they shall -

(a) secure that accommodation is available for his occupation for such period as they consider will give him a reasonable opportunity of securing accommodation for his occupation, and

(b) provide him with (or secure that he is provided with) advice and assistance in any attempts he may make to secure that accommodation becomes available for his occupation.

(3) If they are not satisfied that he has a priority need, they shall provide him with (or secure that he is provided with) advice and assistance in any attempts he may make to secure that accommodation becomes available for his occupation.

(4) The applicant's housing needs shall be assessed before advice and assistance is provided under subsection (2)(b) or (3).

(5) The advice and assistance provided under subsection (2)(b) or (3) must include information about the likely

> availability in the authority's district or types of accommodation appropriate to the applicant's housing needs (including, in particular, the location and sources of such types of accommodation)."

29. Additional obligations are imposed upon authorities in cases involving children by s.213(A). If an authority have reason to believe that an applicant with whom a child is living may be ineligible for assistance or intentionally homeless then the authority must make arrangements for ensuring that the applicant is invited to consent to the referral of the essential facts of his case to the relevant social services authority, and if such consent is given, to make the social services authority aware of the facts and of the decision of the housing authority.

Protection from Eviction Act 1977

30. That brings me to the 1977 Act. This reads, as amended and so far as relevant:

> "**3. Prohibition of eviction without due process of law**
>
> (1) Where any premises have been let as a dwelling under a tenancy which is neither a statutorily protected tenancy nor an excluded tenancy and –
>
> (a) the tenancy (in this section referred to as the former tenancy) has come to an end, but
>
> (b) the occupier continues to reside in the premises or part of them,
>
> it shall not be lawful for the owner to enforce against the occupier, otherwise than by proceedings in the court, his right to recover possession of the premises.
>
> (2) In this section "the occupier", in relation to any premises, means any person lawfully residing in the premises or part of them at the termination of the former tenancy.
>
> (2A) Subsections (1) and (2) above apply in relation to any restricted contract (within the meaning of the Rent Act 1977) which –
>
> (a) creates a licence; and
>
> (b) is entered into after the commencement of section 69 of the Housing Act 1980;
>
> as they apply in relation to a restricted contract which creates a tenancy.
>
> (2B) Subsections (1) and (2) above apply in relation to any premises occupied as a dwelling under a licence, other than an excluded licence, as they apply in relation to premises let as a

> dwelling under a tenancy, and in those subsections the expressions "let" and "tenancy" shall be construed accordingly.

31. Notices to quit are addressed in s.5. This reads, so far as relevant:

> **"5. Validity of notices to quit**
>
> (1) Subject to subsection (1B) below, no notice by a landlord or a tenant to quit any premises let (whether before or after the commencement of this Act) as a dwelling shall be valid unless -
>
> (a) it is in writing and contains such information as may be prescribed, and
>
> (b) it is given not less than 4 weeks before the date on which it is to take effect.
>
> (1A) Subject to subsection (1B) below, no notice by a licensor or a licensee to determine a periodic licence to occupy premises as a dwelling (whether the licence was granted before or after the passing of this Act) shall be valid unless –
>
> (a) it is in writing and contains such information as may be prescribed, and
>
> (b) it is given not less than 4 weeks before the date on which it is to take effect.
>
> (1B) Nothing in subsection (1) or subsection (1A) above applies to –
>
> (a) premises let on an excluded tenancy which is entered into on or after the date on which the Housing Act 1988 came into force unless it is entered into pursuant to a contract made before that date …"

32. There are two other matters to which I must refer. First, "the owner" in relation to any premises means the person who, as against the occupier, is entitled to possession: s.8(3).

33. Second, excluded tenancies and licences are defined in s.3A. They include certain tenancies or licences under the terms of which an occupier shares any accommodation with the landlord or licensor or a member of his family; tenancies or licences granted as a temporary expedient to a person who entered premises as a trespasser; tenancies or licences granted for the purposes of a holiday or otherwise than for money or monies worth; and licences conferring rights of occupation in a hostel provided by a local authority, private registered provider of social housing or specified similar bodies. It is notable that there is no general exclusion for accommodation provided under Part VII of the 1996 Act.

The decisions in Manek and Desnousse

34. *Manek* (1995) 27 HLR 439 was concerned with the provisions of the Housing Act 1985, the predecessor of the 1996 Act. In summary, this court held that to establish that he is entitled to protection from a council under s.3 of the 1977 Act, a claimant must show first, that the council is the "owner" of the accommodation, that is to say the person who, as against the occupier, is entitled to possession; and second, that the council has sought to evict the claimant from the accommodation without court proceedings. In the circumstances of that particular case, although the council had procured the grant of a licence of the particular accommodation to the claimant, that did not make the council the owner of the accommodation for the purpose of s.3(1) or the licensor for the purpose of s.3(2B). Nor did the council's notification to the claimant that his temporary accommodation would be terminated amount to an eviction, that is to say an attempt to enforce without proceedings a right to recover possession. The council had no right to recover possession and was not seeking to do so.

35. Perhaps more importantly for present purposes, this court also held that temporary accommodation made available under a licence pursuant to s.63(1) of the Housing Act 1985 (the predecessor of s.188(1) of the 1996 Act) pending the making of inquiries could not, as a general rule, be accommodation to which the protection afforded by ss.3(1) and 3(2B) of the 1977 Act applied. Auld LJ (with whom Henry and Nourse LJJ agreed) emphasised the practical consequences of a contrary finding in expressing his view as to the correct interpretation of the 1977 Act in these terms at page 450:

> "The provisions in Part III of the 1985 Act for housing the homeless were formerly in the Housing (Homeless Persons) Act 1977. In my view, the provisions of the other Act of 1977, the Protection From Eviction Act, cannot have been intended to apply to the temporary housing by or on behalf of councils of the homeless. Under Part III of the 1985 Act councils have a public duty to secure accommodation under section 63 or 65 for many people. It is in the interests of good public administration that they should not have to commit their limited resources to securing accommodation for persons to whom, after making due inquiries, they properly decide they have no duty, at the expense of others to whom they may have a duty. The threshold for the duty is a low one, "reason to believe that an applicant may be homeless and have a priority need". The inquiries may take only a few days and result in a decision that a temporarily housed applicant is not in fact homeless or in priority need. A council's ability efficiently to perform their public duty as a local housing authority could be seriously affected if the protection of the 1977 Act were automatically to attach to every temporarily housed unsuccessful applicant for housing just because he had been able to satisfy the low threshold under section 63 for investigation of his application.
>
> In my view, as a matter of construction of section 3(2B) of the 1977 Act, the expression "occupied as a dwelling under a

> licence" cannot apply to bed-and-breakfast accommodation of this sort, when, as here, it is provided pursuant to an agreement clearly intended as a purely temporary arrangement pending the making of inquiries under section 62. The council's duty under section 63 is only to secure accommodation pending those inquiries and their decision as a result of them. It cannot have been the intention of Parliament that there should be grafted on to that public and temporary obligation an extension of it by at least four weeks drawn from another statute dealing with the private rights and duties of landlords (licensors) and tenants (licensees) as between themselves. Nor does it accord with the ordinary use of language to describe temporary accommodation in a hotel or hostel for this purpose as premises "occupied as a dwelling under a licence". In my view, that is so whether the council provide the accommodation themselves or arrange it through some third party, subject in each case, however, to any contrary agreement. The agreement here was plainly not to the contrary. It bore all the marks of an arrangement for the purpose of section 63 only, and not, in Lord Greene's words, "as a matter of fair and reasonable construction of simple words" as premises occupied as a dwelling under a licence."

36. Nourse LJ (with whom Henry LJ also agreed) continued at page 451:

> "I rest my decision primarily on the simple proposition, derived from a purposive construction of both statutes, that accommodation made available for an applicant pursuant to section 63(1) of the Housing Act 1985 pending a decision as a result of the local housing authority's inquiries under section 62 cannot, as a general rule, be premises let as a dwelling under a tenancy [or] premises occupied as a dwelling under a licence within section 3(1) and (2B) respectively of the Protection from Eviction Act 1977. The context and purpose of section 63(1) have been fully considered by Auld LJ and I agree with the views he has expressed. Moreover, it cannot be a purpose of the 1977 Act to give protection to persons whose entirely transient needs bring them within section 63(1). True, the general rule may be displaced by an agreement between an authority and an applicant such as had been entered into in *Eastleigh Borough Council v Walsh* [1985] 1 WLR 525, or perhaps if the applicant's occupation is allowed to continue on a more than transient basis. But there was no such agreement or occupation here, nor anything else to take the case out of the general rule."

37. In *Desnousse* [2006] EWCA Civ 547, [2006] QB 831, this court again considered these issues in the context of the 1996 Act. It was argued, inter alia, that *Manek* was not a binding authority, as having been decided per incuriam; or that it had ceased to be binding because of changes in the relevant legislation and decisions of the House

of Lords since 1995; or that it should not be given binding effect because to do so would be inconsistent with the claimant's rights under the Convention.

38. The court held unanimously that *Manek* was authority for the proposition that s.3(2B) of the 1977 Act does not apply to a licence of accommodation secured by a local authority for a homeless person in discharge of its duty under s.188(1) or s.190(2) of the 1996 Act (subject to certain exceptions); that it was not decided per incuriam and that it was still binding despite subsequent legislative changes and decisions of the House of Lords. The court did not, however, agree about the effect of Article 8 of the Convention. Lloyd LJ held that, although *Manek* was otherwise binding on the point, the effect of s.3 of the Human Rights Act 1998 was that, in order to ensure compatibility with the occupier's right to respect for his home under Article 8, where a person was in residential occupation of self-contained accommodation under a licence, the application of s.3 of the 1997 Act was not excluded by the fact of the accommodation having been made available in pursuance of the authority's duties under s.188(1) or s.190(2) of the 1996 Act. He concluded that the judge was wrong to refuse to grant an injunction restraining the owner from taking steps to evict the claimant without first obtaining a court order.

39. The majority (Tuckey and Pill LJJ) disagreed and held that Article 8 did not require the 1977 Act to be construed differently. Their essential reasoning echoes that of Auld and Nourse LJJ in *Manek* and can be summarised as follows.

40. First, accommodation provided under s.188 or s.190(2) of the 1996 Act is, by its nature, temporary. The authority's enquiries may be completed quickly if, for example, it is found that the applicant is not eligible for assistance or is not in fact homeless but other cases, such as those of intentional homelessness, may take longer to investigate. At some point, the accommodation may become the applicant's home within the meaning of Article 8 but there will necessarily be uncertainty as to when, if ever, that happens. The position will obviously be different once the council has decided that an applicant is eligible for assistance, in priority need and not intentionally homeless, at which point it will have a duty to secure accommodation for him until that duty ceases.

41. Second, and on the assumption that the accommodation has become the applicant's home, an eviction will constitute an interference with the right to respect for that home. If, however, the licence has been properly terminated, this interference will be in accordance with the law. The question then becomes one of proportionality, that is to say whether the possibility of eviction without the procedural safeguards contained in the 1977 Act can be justified.

42. Third, it is likely that any process of eviction will be under the council's control and it must be trusted to act lawfully and responsibly. In cases to which s.190(2) applies, the authority must secure that accommodation remains available for the occupation of the applicant for a period sufficient to give him a reasonable opportunity of securing alternative accommodation. It is also generally the practice of local authorities to give 28 days' notice and that this is sufficient for the applicant to assert any rights, and to do so by making an application for an injunction, if necessary.

43. Fourth, the 1996 Act contains other safeguards, notably provisions for review of any decision made by the authority (ss.202 and 203) and an appeal to the county court on

any point of law (s.204). Further, the authority may secure that accommodation is made available to the applicant until the process is completed (ss.188(3), 192(3) and 204(4)). The authority also have general duties to provide advice and assistance about homelessness (s.179) and specific duties to do so in cases of intentional homelessness (s.190) and cases of homelessness but no priority need (s.192).

44. Fifth, the threshold under s.188(1) is a low one and simply requires the authority to have reason to believe that an applicant may be homeless or threatened with homelessness.

45. Sixth, imposition of a requirement that authorities must take court proceedings to evict any applicant who fails or refuses to vacate temporary accommodation would impose a substantial burden upon them. Tuckey LJ put it this way at [154] – [155]:

> "154. But once a decision is made that no duty is owed I do not think the authority should have to take court proceedings to evict any applicant who fails or refuses to vacate the temporary accommodation provided. Even if everything went according to plan from issue of proceedings to court-ordered eviction the period of occupation would it seems to me be prolonged by months rather than weeks in most cases. I think one can also anticipate that this process will be further delayed by unmeritorious defences being raised to the claim for possession. Meanwhile the accommodation will not be available for other applicants to whom the authority owe duties which, as the judge said, might very well act to their detriment. Furthermore, in these days of limited resources the cost of taking proceedings (both in terms of actual expense and manpower) is a factor which should not be underestimated.
>
> 155. All in all I think the consequences of Lloyd LJ's conclusion would be far-reaching and would seriously hamper the ability of local authorities to discharge their duties under the 1996 Act. Subject to the uncertainty to which I have referred (at para 148 above) it would apply to all cases in which the accommodation was made available under section 199(1) and not just to those cases like the present where the applicant was in priority need but intentionally homeless."

46. As Pill LJ explained, it followed that the statutory scheme in Part VII was not contrary to Article 8. The scheme and its interpretation in *Manek* were permitted by the margin of appreciation afforded by the jurisprudence of the European Court of Human Rights ("the European court").

These claims

47. Mr Andrew Arden QC, who has appeared before us with Mr Toby Vanhegan on behalf of CN and ZH, recognises that, as a general rule, this court is bound to follow its own earlier decisions. He also accepts that the decisions of this court in *Manek* and *Desnousse* are potentially determinative of the cases before us. However, he submits we are not bound by those decisions and should not follow them for the following

reasons. First, he contends that they cannot stand with the later decisions of the Supreme Court in *Pinnock* [2010] UKSC 45, [2011] 2 AC 104 and *Powell* [2011] UKSC 8, [2011] 2 AC 186. Second, he argues that they are inconsistent with the later decision of this court in *Patel v Pirabakaran* [2006] EWCA Civ 685, [2006] 1 WLR 3112 and so we are entitled and indeed bound to decide which of the decisions of this court we should follow. Third, he submits that we are now free and ought to decide that in order to act compatibly with Convention rights, an authority must always seek an order for possession against an occupier of a home, including an occupier of temporary accommodation secured pursuant to an authority's duty under s.188(1) or s.190(2) of the 1996 Act.

48. Lewisham and Newham have been represented before us by Mr Matt Hutchings and Ms Jennifer Oscroft. We have also had the considerable benefit of the appearance of Mr Martin Chamberlain QC on behalf of the Secretary of State. Mr Hutchings and Mr Chamberlain submit that *Manek* and *Desnousse* remain binding on this court because there is nothing in the decisions of the Supreme Court in *Pinnock* or *Powell* which should cause this court to depart from them, and the decision in *Patel* is not inconsistent with them. Moreover, they say the reasoning of the majority in *Desnousse* as to the impact of Article 8 on the proper interpretation of s.3 of the 1977 Act remains as apposite today as it was in 2006.

49. Mr Hutchings also submits that the claims are misconceived because Lewisham and Newham are not the owners of the properties in issue within the meaning of s.8 of the 1977 Act and neither is threatening to do anything prohibited by s.3. He argues that the families of CN and ZH are threatened with eviction by private landlords, not the authorities.

50. It is convenient to begin with the argument founded upon the decision of this court in *Patel*. This is not an argument which was deployed before the deputy judge; nor was it developed in any of the written skeleton arguments in either of the cases before us. It is a point which Mr Arden took for the first time in his oral submissions and it is one which I believe can be disposed of relatively shortly.

51. The question before the court in *Patel* was whether premises let partly for residential purposes and partly for business purposes were "let as a dwelling" within the meaning of s.2 of the 1977 Act. This reads:

> "Where any premises are let as a dwelling on a lease which is subject to a right of re-entry or forfeiture it shall not be lawful to enforce that right otherwise than by proceedings in the court while any person is lawfully residing in the premises or part of them."

52. In that case the landlords let to the tenant premises which consisted of a shop with a flat on the first floor. The tenant fell into arrears of rent and the landlords purported to exercise their right of re-entry by causing bailiffs to change the locks of the shop on the ground floor. However, the tenant remained resident in the flat, which had a separate entrance. The landlords then issued a claim against the tenant for an order of possession of the flat, the basis of the claim being that, by their re-entry, the lease had become forfeit. The tenant thereupon sought an injunction restraining the landlords from excluding him from either part of the premises on the basis that the purported

forfeiture of the lease was unlawful because the landlords had not enforced their right to re-entry by proceedings in court as required by s.2 of the 1977 Act. The proceedings were heard together and the judge held that the tenant was not entitled to rely upon s.2 because the premises were not "let as a dwelling" for the purposes of that section. Accordingly the lease had been lawfully forfeited. The tenant appealed.

53. The appeal was allowed, this court (Wilson LJ and Sir Peter Gibson) holding that the phrase "let as a dwelling" in s.2 of the 1977 Act means "let wholly or partly as a dwelling" and so applies to premises which are let for mixed residential and business purposes.

54. This court also considered that a reference to the tenant's human rights fortified that conclusion because an interpretation of s.2 which prohibited a landlord from exercising – otherwise than by proceedings in court – an alleged right of re-entry upon premises let for use as a dwelling as well as for business purposes was an interpretation which would be compatible with the tenant's rights under Article 8; and, by contrast, the opposite interpretation would be incompatible with those rights.

55. It is, I think, clear from this brief summary that the decision in *Patel* is not in any way inconsistent with the decisions in *Manek* and *Desnousse*. They were concerned with quite different issues of interpretation; the former with whether premises let partly for residential purposes and partly for business purposes are "let as a dwelling" within the meaning of s.2 of the 1977 Act and the latter with whether premises provided pending the making of inquiries are "occupied as a dwelling under a licence" within the meaning of s.3 of that Act. Moreover, the decision in *Patel* was not made in a public law context. It was concerned with the potential enforcement by private landlords of contractual rights of re-entry of premises let for mixed purposes otherwise than by proceedings in court. By contrast, housing authorities provide temporary accommodation within the framework of Part VII of the 1996 Act and their decisions may be reviewed, the subject of an appeal to the county court on any point of law and are potentially subject to judicial review. I would therefore reject this first submission.

56. I turn then to consider the arguments founded upon the decisions of the Supreme Court in *Pinnock* and *Powell*. In *Pinnock* the council sought possession of a property occupied by Mr Pinnock under a demoted tenancy on the basis of alleged anti-social behaviour of his children. Mr Pinnock exercised his right to seek a review but the panel effectively upheld the notice. The council then issued a claim for possession in the county court. The judge made an order for possession, holding that his role was limited to conducting a conventional judicial review of the council's decision. Mr Pinnock thereupon appealed to the Court of Appeal, who dismissed his appeal, holding that s.143D of the 1996 Act restricted the county court to a consideration of whether the procedure under ss.143E and 143F had been followed; if the procedure had not been followed, it would not make an order for possession; but if it had, then it must make the order.

57. The appeal gave rise to four main issues: first, whether the jurisprudence of the European court requires that, before making an order for possession of property which consists of a person's home pursuant to a claim made by a local authority (or other public authority), a domestic court should be able to consider the proportionality of evicting that person from his home under Article 8 and, in the process of doing so, to

resolve any relevant factual disputes between the parties; second, what that conclusion meant in practice in relation to claims for possession (and related claims) in relation to residential property; third, whether the demoted tenancy regime could properly be interpreted so as to comply with the requirements of Article 8, or whether at least some aspects of that regime were incompatible with the occupiers' Article 8 rights; and fourth, how the appeal should be disposed of in the light of the answers to the first three issues.

58. In answering the first issue, Lord Neuberger (giving the judgment of the court) began by referring to three cases in which the House of Lords had held that it was not open to a residential occupier, against whom possession was being sought by a local authority, to raise a proportionality argument under Article 8, those cases being: *Harrow London Borough Council v Qazi* [2004] 1 AC 983, *Kay v Lambeth London Borough Council* [2006] 2 AC 465, and *Doherty v Birmingham City Council (Secretary of State for Communities and Local Government intervening)* [2009] 1 AC 367.

59. Lord Neuberger next referred to a series of decisions of the European court which, it was argued, unambiguously supported the contrary view, and from which he derived a number of propositions which he summarised at [45]:

> "From these cases, it is clear that the following propositions are now well established in the jurisprudence of the European court: (a) Any person at risk of being dispossessed of his home at the suit of a local authority should in principle have the right to raise the question of the proportionality of the measure, and to have it determined by an independent tribunal in the light of article 8, even if his right of occupation under domestic law has come to an end: *McCann v United Kingdom* 47 EHRR 913, para 50; *Ćosić v Croatia* 52 EHRR 1098, para 22; *Zehentner v Austria* 52 EHRR 739, para 59; *Paulić v Croatia* given 22 October 2009, para 43; and *Kay v United Kingdom* [2011] HLR 13, paras 73-74. (b) A judicial procedure which is limited to addressing the proportionality of the measure through the medium of traditional judicial review (ie, one which does not permit the court to make its own assessment of the facts in an appropriate case) is inadequate as it is not appropriate for resolving sensitive factual issues: *Connors v United Kingdom* 40 EHRR 189, para 92; *McCann v United Kingdom* 47 EHRR 913, para 53; *Kay v United Kingdom* [2011] HLR 13, paras 72-73. (c) Where the measure includes proceedings involving more than one stage, it is the proceedings as a whole which must be considered in order to see if article 8 has been complied with: *Zehentner v Austria* 52 EHRR 739, para 54. (d) If the court concludes that it would be disproportionate to evict a person from his home notwithstanding the fact that he has no domestic right to remain there, it would be unlawful to evict him so long as the conclusion obtains – for example, for a specified period, or until a specified event occurs, or a particular condition is satisfied. Although it cannot be

> described as a point of principle, it seems that the European court has also franked the view that it will only be in exceptional cases that article 8 proportionality would even arguably give a right to continued possession where the applicant has no right under domestic law to remain: *McCann v United Kingdom* 47 EHRR 913, para 54; *Kay v United Kingdom*, para 73."

60. Lord Neuberger observed there was no question of this jurisprudence failing to take into account some principle or cutting across our domestic substantive or procedural law in some fundamental way. He then expressed the conclusion of the court in relation to the first issue in these terms at [49]:

> "… Therefore, if our law is to be compatible with article 8, where a court is asked to make an order for possession of a person's home at the suit of a local authority, the court must have the power to assess the proportionality of making the order, and, in making that assessment, to resolve any relevant dispute of fact."

61. Turning to the second issue, Lord Neuberger explained that this presented no difficulties of principle or practice in relation to secure tenancies because no order for possession can be made against a secure tenant unless, inter alia, it is reasonable to make the order. But, he continued, the implications of Article 8 being potentially in play are much more significant where a local authority is seeking possession of a person's home in circumstances in which domestic law imposes no requirement of reasonableness and gives an unqualified right to an order for possession. The implications of this obligation would have to be worked out. Nevertheless a number of general points could be made, of which the following are pertinent to this appeal:

> "61. First, it is only where a person's "home" is under threat that article 8 comes into play, and there may be cases where it is open to argument whether the premises involved are the defendant's home (eg where very short-term accommodation has been provided). Secondly, as a general rule, article 8 need only be considered by the court if it is raised in the proceedings by or on behalf of the residential occupier. Thirdly, if an article 8 point is raised, the court should initially consider it summarily, and if, as will no doubt often be the case, the court is satisfied that, even if the facts relied on are made out, the point would not succeed, it should be dismissed. Only if the court is satisfied that it could affect the order that the court might make should the point be further entertained."

62. As for the third issue, Lord Neuberger concluded that a judge who is invited to make an order for possession against a demoted tenant can consider whether it is proportionate to make the order sought, and can investigate and determine any issues of fact relevant for the purpose of that exercise. It followed that the demoted tenancy regime is compatible with Article 8.

63. Finally, although Mr Pinnock was therefore entitled to an opportunity of having the proportionality of the measure determined by a court, Lord Neuberger explained that, having considered the issue, the court was satisfied that it was proportionate to make the order.

64. It is, I think, clear from this review that there is no finding in *Pinnock* that a public authority must always take proceedings before evicting someone from his home. However, Mr Arden also submits that the Supreme Court has embraced and endorsed a body of jurisprudence of the European court from which that conclusion is inevitable.

65. I find myself unable to accept that submission. The propositions which the Supreme Court found to be well established in the jurisprudence of the European Court were summarised at [45] which I have set out above. Importantly for present purposes, the court must have the power to assess the proportionality of an order for possession of a person's home made at the suit of a local authority. But, at least as a general rule, the issue of proportionality need only be considered by the court if it is raised in the proceedings by or on behalf of the occupier. Further, a judicial procedure which is limited to addressing the proportionality of the measure through the medium of what the Supreme Court described as "traditional judicial review" is inadequate for that purpose. However, it is now clear that a court considering a judicial review challenge in this field does have the power to assess the proportionality of the measure and may make its own assessment of any relevant facts which are in dispute, and it is therefore equipped to give effect to an occupier's Article 8 rights in an appropriate case.

66. There are two other important considerations which emerge clearly from the jurisprudence of the European court. First, regard must be had to the decision making process as a whole, as the European court explained in *Tysiąc v Poland* (2007) 45 EHRR 42 at [115]:

> "Finally, the Court reiterates that in the assessment of the present case it should be borne in mind that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. Whilst Art. 8 contains no explicit procedural requirements, it is important for the effective enjoyment of the rights guaranteed by this provision that the relevant decision-making process is fair and such as to afford due respect to the interests safeguarded by it. What has to be determined is whether, having regard to the particular circumstances of the case and notably the nature of the decisions to be taken, an individual has been involved in the decision-making process, seen as a whole, to a degree sufficient to provide her or him with the requisite protection of their interests."

67. I have referred earlier in this judgment to the obligations upon the authority to provide advice and assistance, the right of review and appeal and the opportunity for judicial review. Throughout the process the occupier is given ample opportunity to engage with the authority, and to explain and substantiate why he contends it would be disproportionate to evict him either at all or for a limited period of time or until a particular event occurs. Moreover, the circumstances of the particular cases before us

illustrate that these rights and opportunities are substantive, and they support the proposition that authorities can in general be trusted to act responsibly and reasonably.

68. Second, States have a wide margin of appreciation in implementing social and economic policies in matters concerning housing. As the European court said in *Blečić v Croatia* [2004] 41 EHRR 185 at [65]:

> "65. State intervention in socio-economic matters such as housing is often necessary in securing social justice and public benefit. In this area, the margin of appreciation available to the State in implementing social and economic policies is necessarily a wide one. The domestic authorities' judgment as to what is necessary to achieve the objectives of those policies should be respected unless that judgment is manifestly without reasonable foundation. Although this principle was originally set forth in the context of complaints under Art. I of Protocol No. I …. the State enjoys an equally wide margin of appreciation as regards respect for the home in circumstances such as those prevailing in the present case, in the context of Article 8. Thus, the Court will accept the judgment of the domestic authorities as to what is necessary in a democratic society unless that judgment is manifestly without reasonable foundation, that is, unless the measure employed is manifestly disproportionate to the legitimate aim pursued."

69. This wide margin of appreciation and the part it plays in allowing a State to arrive at a balance between the competing interests of the individual and of the community as a whole was confirmed by the European court in *Tysiąc* at [112]-[113]:

> "112. In addition, there may also be positive obligations inherent in an effective "respect" for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of relations between individuals, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific measures.
>
> 113. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both the negative and positive contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation."

70. In assessing the competing interests of the individual and the community as a whole, it seems to me that the considerations referred to by this court in *Manek* and *Desnousse* remain highly relevant. But there is one aspect of them which I consider

merits a little elaboration. As Mr Chamberlain submitted, most licensees who are subject to an eviction have no arguable Article 8 defence. If we were to hold that possession proceedings are required before eviction in all cases where temporary accommodation has been provided under s.188 or s.190(2) of the 1996 Act, the result would be to impose on local authorities and other landlords the burden of instituting legal proceedings in a very large number of cases, the vast majority of which would involve no Article 8 issue at all, as illustrated by the case of CN. This would have serious practical consequences. The evidence before us shows that the imposition of such a requirement would mean that in Lewisham more than three hundred units of accommodation each year would remain occupied by those who had no entitlement to it for an additional three to six months; in Newham the same would be true of some two hundred units of accommodation each year.

71. It is well known that the pressure on social housing is immense. The relief sought in these cases would therefore have a real and serious impact on homeless families. Mr Hutchings provided us with the following illustration. Accommodation pending review is discretionary under s.188(3) of the 1996 Act but Lewisham routinely provides it to those in apparent priority need. If we were to hold that possession proceedings must be brought in all cases of the kind before us then this is one area where it is likely that savings would have to be made. In short, the relief sought would seriously impact upon the ability of authorities to provide accommodation to those who appear to need it most.

72. The decision of the Supreme Court in *Powell* takes Mr Arden no further forward. This appeal concerned a number of defendants: one had been granted a licence to occupy a dwelling house owned by a local authority pursuant to its duties under s.193 of the 1996 Act, but the authority commenced proceedings for possession after she fell into arrears of rent; the others had been granted introductory tenancies of local authority owned dwelling houses pursuant to Chapter I of Part V of the 1996 Act, but the authorities commenced proceedings for possession following complaints from neighbours about noise nuisance.

73. The court held that in all cases where an authority seeks possession of a person's home the court has power to consider any defence based upon Article 8. So far as material to the cases before us, Lord Hope (with whom the other members of the court agreed) emphasised (at [33]) that the court will only have to consider whether the making of a possession order is proportionate if the issue has been raised by the occupier and it has crossed the high threshold of being seriously arguable. The question will then be whether making an order for the occupier's eviction is a proportionate means of achieving a legitimate aim. He affirmed (at [34]) that a court must have the ability to assess the Article 8 proportionality of making a possession order in respect of a person's home even if his right of occupation has come to an end; and he explained (at [35]) that the threshold is a high one which will succeed in only a small proportion of cases, with the result that:

> "Practical considerations indicate that it would be demanding far too much of the judge in the county court, faced with a heavy list of individual cases, to require him to weigh up the personal circumstances of each individual occupier against the landlord's public responsibilities. Local authorities hold their housing stock, as to other social landlords, for the benefit of the

> whole community. It is in the interests of the community as a whole that decisions are taken as to how it should best be administered. The court is not equipped to make those decisions, which are concerned essentially with housing management. This is a factor to which great weight must always be given, and in the great majority of cases the court can and should proceed on the basis that the landlord has sound management reasons for seeking a possession order."

74. Finally, Lord Hope emphasised (at [42]) that this issue must be considered against the provisions of Part VII as a whole:

> "The decision of the local authority to seek possession in a homelessness case will, of course, have been taken against the background of all the advice and assistance that the provisions of Part VII of the 1996 Act require to be given to the applicant. It is unlikely, as the course of events in Ms Powell's case demonstrates, that the reason why it has decided to take proceedings for eviction will not be known to the tenant. The right to request a review of the decisions listed in section 202 and the right of appeal under section 204 are further factors to be taken into account. They provide the tenant with an opportunity to address any errors or misunderstandings that may have arisen and to have them corrected. She will have a further opportunity to raise such issues as a judicial review for the tenant, not for the local authority. There is no need for the court to be troubled with these issues unless and until, at the request of the tenant, it has to consider whether it should conduct a proportionality exercise."

75. Now it is true to say that the effect of the decision in *Powell* is that accommodation provided under a licence pursuant to s.193 enjoys the same protection as that extended to demoted and introductory tenancies, but there was no finding that this applies to temporary licences under s.188 or s.190(2). To the contrary, there is much in *Powell* which supports the proposition that Parliament, acting within its broad margin of appreciation, was entitled to treat temporary licences under s.188 and s.190(2) differently from licences under s.193.

76. I would therefore reject the submission that the decisions of this court in *Manek* and *Denousse* cannot stand when viewed in the light of the decisions of the Supreme Court in *Pinnock* and *Powell.*

77. Mr Arden also submits that the notices given by Lewisham and Newham to JN and FI respectively failed to comply with the requirements of s.5 of the 1977 Act as to length and prescribed information. I consider that the answer to this submission is, as Mr Hutchings submits, that, subject to the question of compatibility with Article 8, *Manek* establishes that temporary accommodation provided pursuant to s.188 of the 1996 Act is not accommodation which is "occupied as a dwelling under a licence" within the meaning of s.3(2B). The language of s.5(1A) is very similar: "a periodic licence to occupy premises as a dwelling" and, in my judgment, ought to be given the

same meaning. It follows that it too does not apply to temporary accommodation provided pursuant to s.188 of the 1996 Act.

78. Moreover, I think it is clear that this court was of the same view in *Manek*. It was argued on behalf of the council that, looked at as a matter of common sense, the accommodation was not licensed to Mr Mohammed as a dwelling. Further, the very purpose and terms upon which the council arranged the accommodation, namely pending its decision whether to secure more permanent accommodation for Mr Mohammed, were inconsistent with the requirement of at least four weeks' notice of termination under s.5 of the 1977 Act. Indeed, Auld LJ must have had s.5 in mind in stating at page 450 (in terms with which Henry and Nourse LJJ agreed):

> "The council's duty under s.63 is only to secure accommodation pending those inquiries (under s.62) and their decision to resolve them. It cannot have been the intention of Parliament that there should be grafted on to that public and temporary obligation an extension of it by at least four weeks …"

79. This court did not expressly consider s.5 in *Desnousse* but, as I have explained, it held that Article 8 does not require the procedural safeguards of the 1977 Act to be followed in cases of this kind. It seems to me that we should therefore follow *Manek* unless it is inconsistent with the later decisions of the European court. No such cases have been drawn to our attention and I agree with Mr Hutchings that it would be surprising if Article 8 imposed formal requirements as to the specific length of notice and the giving of prescribed information, over and above the public law requirements of reasons and reasonable notice.

80. These findings are sufficient to dispose of the claims before us. In my judgment Article 8 does not require possession proceedings before a person may be evicted from temporary accommodation occupied under licence pursuant to s.188 or s.190(2) of the 1996 Act. Anyone who claims to have an Article 8 defence may raise it in judicial review proceedings.

81. It follows that it is not necessary to address the further argument advanced by Mr Hutchings on behalf of Lewisham and Newham that they have never sought to enforce a right to recover possession of the respective premises in issue because they have never had any such right. In each case it was, he submits, a matter for the owner to recover possession if he wished. For these reasons, he continues, neither Lewisham nor Newham has ever sought or intended to do anything prohibited by s.3(1) of the 1977 Act. This submission derives support from the reasoning of this court in *Manek* to which I have referred at [34] above. However, Mr Arden responds that any eviction must begin with service by the council of notice to terminate the licence and, in practice, it must be under the council's control. Further, he says, it is now clear that these matters engage the Article 8 rights of all persons occupying the premises under the licence and this court can and should grant an injunction to restrain the council or the owner from taking any step which will result in the eviction of the occupiers without first obtaining a court order. These are issues upon which we have not heard fully developed argument, and since it is not necessary to express a conclusion upon them I prefer not to do so.

82. For all the reasons I have given I would dismiss these claims.

83. Mr Arden invited us to address the issue of permission to appeal to the Supreme Court in the event we were to reach this conclusion. He seeks to argue that the decisions in *Manek* and *Desnousse* were wrong, not least because the tenancies and licences which Parliament thought should be excluded from the scope of s.3 of the 1977 Act are set forth in s.3A. He also seeks to contend that an authority wishing to evict a person from his home must use court proceedings in the light of the developing jurisprudence of the European court. For my part, I would refuse permission. Parliament has not legislated to reverse the effect of *Manek* despite many opportunities to do so. Those opportunities include the Homelessness Act 2002, the Housing and Regeneration Act 2008 and the Localism Act 2011, each of which amended Part VII of the 1996 Act; and the Immigration and Asylum Act 1999, the Nationality, Immigration and Asylum Acts of 2002 and the Immigration, Nationality and Asylum Act 2006, each of which amended the 1977 Act. Further, for the reasons I have given, I do not believe the developing jurisprudence of the European court requires a contrary conclusion.

Lord Justice Floyd:

84. I agree with both judgments.

Lord Justice Moses:

85. I agree. The facts outlined by Kitchin LJ demonstrate that both appellants had ample opportunity to explain the situation in which they found themselves and to receive advice. By the time Lewisham had terminated the temporary accommodation on or about 28 April 2012, JN had been referred to the Homeless Families Floating Support Service, had obtained a review under section 202, had been referred to Lewisham's Housing Options Centre for assistance and CN had been assessed under the Children Act 1989. The courts had then granted a series of injunctions before the hearing of the oral application for permission to bring judicial review proceedings.

86. By the time Newham had given notice that it would terminate the temporary accommodation on 14 March 2013, FI too had been given the opportunity to obtain advice, had been given guidance, and obtained a review, and ZH had been assessed under section 17 of the Children's Act 1989. The launch of these proceedings also led to a stay of eviction.

87. It is in that context that the court is asked to consider the contention that in every case, a housing authority is required to bring eviction proceedings under a statutory obligation imposed by section 3 of the 1977 Act when construed with Article 8 of the Convention. Absent such proceedings, it is suggested that the issue of proportionality cannot be determined without a hearing by the court.

88. There is one additional feature which I wish to stress, although it has already been identified by Kitchin LJ at [65]. It is the power of the court in judicial review proceedings fully to consider any issue which might plausibly bear on the proportionality of terminating the temporary accommodation. In 'traditional' judicial review, as Lord Neuberger put it (*Pinnock* [45]), the court does not make its own assessment of the facts. It was for that reason that the European Court had concluded that the claimants in *McCann* and *Kay* succeeded (*Pinnock* [44]). But, for the

purposes of the instant appeal, it is important to acknowledge that the Supreme Court has now recognised that following *Kay* in Strasbourg the court must assess proportionality and resolve any dispute of fact (*Pinnock* 49, cited here at [60]). But that does not require the local authority to bring eviction proceedings. As the ECHR explained, the right to have the issue of proportionality determined by an independent tribunal "does not arise automatically" (*Paulic v Croatia* (no. 3752/06 paragraph 43, *McCann* paragraph 54 and *Pinnock* [40]).

89. Where eviction proceedings are brought by a housing authority, the Article 8 proportionality argument may be advanced by way of defence. If the local housing authority has no need to bring eviction proceedings, then the occupier of temporary accommodation may raise the issue of proportionality by way of judicial review. In such proceedings, if by that time there remains anything at all to argue about, the court may consider all the facts and reach its own assessment based on those facts.

90. There is an example of the Administrative Court undertaking full consideration of proportionality in judicial review proceedings in circumstances where the Secretary of State for Defence sought to enforce a possession order. As the law was understood at the time of the possession proceedings, Article 8 rights could not be deployed by way of defence to the claim for possession, the only opportunity for raising the issue of proportionality under Article 8 was by way of judicial review.

91. In *R (JL) v Ministry of Defence* [2012] EWHC 2216 (Admin) Ingrid Simler QC applied *Pinnock* and fully considered the proportionality of enforcement in JL's claim for judicial review. This case demonstrates the extent to which any remaining issue may be fully considered in judicial review, by the time the local housing authority wishes to terminate the temporary accommodation, which it was under no statutory obligation to provide. It shows that for the purpose of giving an occupier the opportunity to vindicate his Article 8 rights it is not necessary to require the local housing authority to bring proceedings in every case, however pointless it would be.