HOUSE OF LORDS SESSION 2005–06
[2006] UKHL 10

on appeal from: [2004] EWCA Civ 926
and [2005] EWCA Civ 289

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Kay and others and another (FC) (Appellants) *v.* London Borough of Lambeth and others (Respondents)

Leeds City Council (Respondents) *v.* Price and others and others (FC) (Appellants)

Appellate Committee
Lord Bingham of Cornhill
Lord Nicholls Of Birkenhead
Lord Hope of Craighead
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood

Counsel

Appellants:
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David Watkinson
Kelvin Rutledge
Alex Offer
(Instructed by Davies Gore Lomax for the Leeds appellants, and Nicholas & Co and Thomas & Co for the Lambeth appellants)

Respondents:
London Borough of Lambeth
Andrew Arden QC
Terence Gallivan
John McCafferty
(Instructed by Devonshires)
Leeds City Council
Ashley Underwood QC
Thomas Tyson
(Instructed by Leeds City Council)

Interveners
Philip Sales and Daniel Stilitz intervening in both appeals (Instructed by Treasury Solicitor) for the First Secretary of State
Written intervention in the second appeal by Justice and Liberty

Hearing dates:
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ON
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HOUSE OF LORDS

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LORD BINGHAM OF CORNHILL

My Lords,

1. These appeals have been joined and heard together because they raise an important common issue on the scope and application of the right to respect for the home protected by article 8 of the European Convention on Human Rights and the Human Rights Act 1998. The House is invited to reconsider and depart from its decision in *Harrow London Borough Council v Qazi* [2003] UKHL 43, [2004] 1 AC 983.

The Lambeth appeal

2. The first (*Lambeth*) appeal also raises a discrete issue on the occupation status of the appellants as the result of transactions between the London Borough of Lambeth, the London & Quadrant Housing Trust and them over a period of years. On that issue, I have had the benefit of reading in draft the opinion of my noble and learned friend Lord Scott of Foscote, with which I am in complete agreement and to which I cannot usefully add. I need not repeat the facts summarised in his opinion. I take as the legal and factual premise of this opinion that, on termination by Lambeth of the headleases to Quadrant and notification by Quadrant to these appellants of that termination, the appellants' right to occupy their respective premises came to an end and they continued in occupation with no right to do so under the domestic property law of England and Wales.

3. In July 2000 Mr Gorman (the second-named *Lambeth* appellant) brought an action against Lambeth seeking a declaration that he was a secure tenant. In August 2000 Lambeth began summary proceedings for possession against all these appellants including Mr Gorman. In his case, the claim was struck out as abusive, and Lambeth sought an order for possession by way of counterclaim. Since the other appellants were also seeking recognition as secure tenants, the issue was in each case the same.

4. For detailed reasons given in his judgment dated 13 December 2002, His Honour Judge Roger Cooke resolved all the domestic property law issues against the appellants. The judge then heard argument on the appellants' alternative defence based on the European Convention and the 1998 Act and, following the decision of the House in *Harrow London Borough Council v Qazi* [2004] 1 AC 983, he struck it out. His decision on that ground (as on the domestic property law ground) was upheld by the Court of Appeal (Auld, Latham and Arden LJJ) [2004] EWCA Civ 926, [2005] QB 352. Certain Convention issues argued in the Court of Appeal have not been pursued in the House, and only the appellants' argument on article 8 remains for decision.

The Leeds appeal

5. In the second (*Leeds*) appeal there is an additional issue, on the extent to which, if at all, our domestic rules of precedent are, or should be, modified to give effect to our obligations under the European Convention and the duties imposed on domestic courts by the 1998 Act.

6. The respondent, Leeds City Council, is a local authority and the freehold owner of a recreation ground at Spinkwell Lane in Leeds. On about 24 May 2004 that land was occupied by travellers without the Council's permission. By 2 June 2004 the first group of travellers had left but others had arrived. On 13 June these appellants (who are the Maloney family) moved onto the site. On 15 June the Council issued proceedings for possession in the Leeds County Court. On 24 June, the return date on the claim form, the appellants attended and were represented. On 22 September the proceedings were transferred to the High Court. They had originally been issued against Mr Price, Mr Smith and Persons Unknown, but the Maloney family were the only occupiers to appear at court or contest the proceedings and they were

formally joined as defendants on 18 October 2004 when the claim was heard.

7. The Council claimed possession as freehold owner against the appellants as trespassers. The appellants did not challenge the Council's title, and they claimed no leave or licence to enter or occupy the land. They based their defence on article 8, averring that, although the statutory scheme for the protection of gipsy families, taken with the Government guidance, was compatible with the Convention, the Council could not rely on this when it was itself in clear and substantial breach of its obligations under the scheme and the guidance. They also asserted that their personal circumstances and those of their immediate family were exceptional, and so required the Council to justify evicting them.

8. In making these allegations of breach against the Council the appellants contended that the Council

> "(a) had not addressed the needs of the gipsy population in its homelessness strategy at all, contrary to the Homelessness Act 2002 and the Government Guidance given thereupon. This was also averred to be in breach of its obligations under the Race Relations Act 1976;
>
> (b) had failed to deal adequately with the needs of the gipsy community in its Unitary Development Plan. This was alleged to be contrary to both the Homelessness Act 2002 and the Government Guidance given thereupon and to be a breach of the Respondent's duties under the Race Relations Act 1976;
>
> (c) did not have a Race Relations Strategy which made any provision for the needs of the gipsy/traveller population;
>
> (d) had not complied with the Guidance given either in the 1998 DETR and Home Office publication, 'Managing Unauthorised Camping: A Good Practice Guide' or that given in Circular 18/94."

The appellants further submitted that these alleged failures had to be seen in context, namely that:

"(a) the [Council] had declined to consider additional site provision for the gipsy community; despite the fact that this should be a key part of any homelessness strategy, and;

(b) there was only one official site in the Leeds metropolitan area. This site was full and had a waiting list. Approximately 20% of the gipsy population of Leeds consequently lived on unauthorised encampments."

The appellants further relied on a number of matters particular to them and at the date of trial:

"(a) in the 12 months immediately prior to them moving onto the land at Spinkwell Lane the family had either been evicted or forced to move under the threat of eviction in excess of 50 times;

(b) in May 2004 Kim Maloney had been admitted to the Leeds General Infirmary suffering from exhaustion and stress resulting directly from these regular moves. She had been in hospital for 2 nights;

(c) Patrick Maloney (Senior) suffered from Alzheimer's disease. He was also affected by a serious head injury which he had sustained in a road traffic accident. He was unable to copy on his own and had significant memory loss and care needs;

(d) Ellen Maloney suffered from depression and associated psychiatric problems as detailed in the report of Dr K Rix. She also had mobility problems;

(e) Ellen Elizabeth Maloney suffered from fits. She was hospitalised with pneumonia at the beginning of June 2004. She was only one year old. Her mother Kathleen Maloney was a single parent;

(f) Patrick Maloney (Junior) had major mental health problems as a result of a serious head injury he sustained following a vicious assault on him on 4th July 1998. He was also blind in one eye following a further attack with broken glass. His mental health condition was variable and unpredictable;

(g) there were 3 school age children residing on the site;

(h) Patrick Maloney (Senior) had just been treated as an inpatient at the Leeds General Infirmary for a gall

bladder problem. He was admitted to the hospital on 9th July 2004. He was awaiting further admission and treatment;

(i) Patrick Maloney (Junior) had recently suffered from bowel problems and had been treated as an inpatient at St James' hospital for about 3 weeks. He was awaiting further investigations."

9. Before the trial, by a letter dated 8 October 2004, the Council had formally notified the appellants that they had been found to be unintentionally homeless and in priority need, and had accepted a duty to help them secure accommodation. The appellants at trial contended that in all the circumstances an order for possession was neither necessary nor proportionate. The Council replied that it had an absolute right to possession, that the Human Rights Act had no application to the case and that the court had no need to consider questions of necessity, justification or proportionality. It had been agreed that the question whether article 8 of the Convention could in law provide the appellants with a defence to the Council's claim for possession should be resolved as a preliminary issue and on the trial date His Honour Judge Bush, sitting as a judge of the High Court, heard submissions and reserved his decision.

10. On 25 October 2004 the judge gave judgment resolving the preliminary issue in the Council's favour. Holding himself bound by the decision of the House in *Qazi* and that of the Court of Appeal in the *Lambeth* appeal, he held that the Council's contractual and proprietary claim to possession could not be defeated or qualified by article 8. He made an order for possession forthwith, and refused a stay of execution, but granted leave to appeal to the Court of Appeal.

11. After this order the appellants left the site. But they appealed to the Court of Appeal (Lord Phillips of Worth Matravers MR, Brooke and Sedley LJJ), which on 16 March 2005 dismissed the appeal: [2005] EWCA Civ 289, [2005] 1 WLR 1825. The court held that it was bound by the decision of the House in *Qazi*, [2004] 1 AC 983. But it considered that decision to be incompatible with a later decision of the European Court of Human Rights in *Connors v United Kingdom* (2004) 40 EHRR 189 and granted the appellants leave to appeal to the House.

Mr Qazi's case

12. The facts of this case were summarised by four members of the House (paras 2-3, 40-44, 90-92 and 112-114), and were of the simplest. The local authority were the freehold owners of a house which they let to Mr Qazi and his wife as joint tenants. After some six years she left, with their daughter, and she gave notice to quit, which brought the tenancy to an end. He applied to the local authority for the grant of a tenancy to him alone, but this was refused. The authority issued proceedings for possession, which he resisted. He had married another wife in an Islamic ceremony before the proceedings began, and was later living at the house with her and her young son. He based his resistance to the claim for possession on the right to respect for his home, protected by article 8 of the European Convention, to which effect in the domestic law of the United Kingdom was given by the 1998 Act. Article 8 provides:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

13. In the House there were said to be two issues and a third potential issue (para 6), and there was no difference of opinion on the formulation of the issues (para 28). They were (1) whether, when proceedings were issued and possession was ordered, the house was Mr Qazi's home within the meaning of that expression in article 8 and, if so, (2) whether what the local authority did or proposed to do infringed his right to respect for his home. If those questions were answered in Mr Qazi's favour, there arose the issue whether the local authority's action or proposed action was justified.

14. At first instance, the recorder answered the first question in the local authority's favour and adversely to Mr Qazi. He held that because Mr Qazi had no legal or equitable right in the house, it was not his home and article 8 was not engaged. He did not, therefore, address the remaining questions. The correctness of this answer to the first question was the main focus of debate in the Court of Appeal and in the House (per Lord Steyn, para 29). But the Court of Appeal unanimously took a different view, and a clear view was expressed by the House that the

premises had at the relevant times been Mr Qazi's home within the autonomous meaning of that expression in article 8: see paras 11, 26, 68, 95, 99, 110.

15. A majority of members of the House, and perhaps all members, held in answer to the second question that there had on the facts been an interference by a public authority with Mr Qazi's right to respect for his home. That was my conclusion (para 24) and that of Lord Steyn (paras 30-33). Lord Hope (para 70) and Lord Millett (para 103) were, as I understand them, of the same opinion. Lord Scott (para 149) would for his part have ruled that article 8 was not in the circumstances applicable, but he also expressed agreement with Lord Hope and Lord Millett.

16. There was, however, a clear difference of opinion among the members of the House. In a case such as Mr Qazi's where a public authority had an unqualified right to possession under domestic property law, Lord Hope did not consider article 8 to be irrelevant (para 83) but held that article 8(2) is satisfied where domestic property law gives an unqualified right to possession (paras 78, 83). He concluded (para 84) that contractual and propriety rights to possession cannot be defeated by a defence based on article 8. Lord Millett was of a similar opinion: article 8 was engaged (para 100), but save in wholly exceptional circumstances there would be no lack of respect and no infringement of article 8, where an order is made in favour of a person entitled to possession under domestic property law (para 107). Lord Scott echoed this view in holding that article 8 cannot be raised to defeat contractual and proprietary rights to possession. Lord Steyn and I, dissenting, were of opinion that where, as in that case, there was a proposed interference with a person's right to respect for his home, the question of justification, if raised, did fall to be considered (paras 24, 26), even though considerations of domestic property law were likely to be crucial (para 12) and the occasions on which a court would be justified in declining to make a possession order would, as the parties agreed, be very highly exceptional (para 25).

The Court of Appeal decisions under appeal

17. In its judgment on the *Lambeth* appeal [2005] QB 352, the Court of Appeal first considered at length and in detail the private law issues raised by the appellants, resolving them in favour of the local authority, as the House concludes, rightly. The court then turned to the article 8 issue and (para 93 of the judgment) the decision of the House in *Qazi*,

and stated what it understood to be the ratio of the majority. In para 98 it said:

> "The majority opinions are based, it seems to us, on the logic that the incidents of the domestic law of landlord and tenant provide the answer to the question whether or not, in any case, the interference with the person's home is justified under article 8(2)."

In para 100 it added:

> "The fact is that Lambeth has an unqualified right to possession. And on the basis of the majority opinions in *Qazi's* case by which we are bound, that is a sufficient answer to the claim under article 8."

Thus the appellant's article 8 claim was bound to fail. After reserving judgment, the court received the judgment of the European Court in *Connors* (paras 20, 22 below). It heard no oral argument on the significance of that decision, but concluded (para 106) that it could not affect its assessment of the decision of the House in *Qazi* and that it was of assistance to UK courts only in relation to cases involving gipsies.

18. In its judgment on the *Leeds* appeal ([2005] 1 WLR 1825), the Court of Appeal again summarised the ratio of the majority in *Qazi* (para 13 of the judgment):

> "Thus all three of the majority held that, under the Strasbourg jurisprudence, the exercise of an absolute proprietary right to possession could not infringe article 8. Implicit in this conclusion was the premise that the English domestic law which conferred the absolute right to possession was, itself, compatible with Convention rights."

The court then reviewed the compatibility of the majority reasoning in *Qazi* with the decision of the European Court in *Connors* and concluded (para 26):

> "The decision in *Connors's* case 40 EHRR 189 is unquestionably incompatible with the proposition that the exercise by a public authority of an unqualified proprietary right under domestic law to repossess its land will *never* constitute an interference with the occupier's right to respect for his home, or will *always* be justified under article 8(2). To that extent *Connors's* case is incompatible with *Qazi's* case [2004] 1 AC 983."

The court considered (paras 27-28) the earlier judgment of the court in the *Lambeth* appeal, but did not consider (para 29) that the reasoning of the European Court in *Connors* could be confined to the treatment of gipsies and accordingly accepted (para 30) the appellants' submission that *Connors* was incompatible with *Qazi*.

The Strasbourg jurisprudence

19. In their opinions in *Qazi* the members of the House analysed what were then the leading Strasbourg authorities pertaining to the right to respect for the home, although the majority and the minority drew different inferences from them: contrast the opinions of Lord Hope (para 78), Lord Millett (paras 103-104) and Lord Scott (paras 125, 146 and 149) with those of myself (paras 20,23) and Lord Steyn (para 30). *S v United Kingdom* (1986) 47 DR 274, to which my noble and learned friend Lord Hope attaches much significance, was an early admissibility decision of the Commission on which the Court has never, to my knowledge, relied in any later case. It would, in my opinion, serve no useful purpose to repeat this analysis, since if matters rested where they did when *Qazi* was decided the majority interpretation of the Strasbourg jurisprudence would be bound to prevail, whatever reservations there may have been in the minds of some, at the time, about its correctness. It is, however, argued by the appellants, with strong support by the First Secretary of State as intervener, that matters do not rest where they did when *Qazi* was decided, since two cases have since been decided by the European Court which are inconsistent with the ratio of the majority in *Qazi* and support the approach of the minority. Those decisions are *Connors v United Kingdom* (2004) 40 EHRR 189 and *Blecic v Croatia* (2004) 41 EHRR 185.

20. The facts of these two cases were quite different. Mr Connors and his family had lived as licensees on a local authority gipsy site for most of the preceding sixteen years when, in January 2000, they were

given notice to quit. This notice was prompted by complaints about the behaviour on the site of some members of the applicant's family or their guests, which was said to be a breach of the licence conditions. The applicant did not leave, and proceedings were brought for possession. He sought to challenge the authority's decision to initiate proceedings by judicial review, but permission was refused. The authority's complaints of misbehaviour were strongly denied by the applicant, and so the authority dropped these complaints and relied instead on its right to terminate the applicant's licence on notice, which had been given. There was no answer to this claim under English domestic property law. A possession order was accordingly made, and some weeks later the applicant and his family and their caravans and possessions were forcibly removed from the site.

21. In *Blecic* the applicant had for nearly forty years before 1992 been a specially-protected tenant of a publicly-owned flat in Zadar. Under the domestic property law of Croatia a specially-protected tenancy might be terminated if the tenant ceased to occupy the flat for a continuous period of six months, but termination might not be effected on that ground if the tenant's failure to use the flat was attributable to medical treatment, military service or "other justified reasons". The applicant left Zadar in July 1991 to visit her daughter in Rome. War then intervened, conditions in Zadar were bad, and the applicant did not return until May 1992, by which time another occupant had, without permission, moved into the flat. In February 1992 the local authority had already initiated proceedings to terminate the tenancy. The applicant claimed that she had had justified reasons for not using the flat, and this argument was accepted by an intermediate court, but it was rejected at first instance and, finally, by the Supreme Court. Thus, without justified reasons, the applicant had no grounds for resisting the termination of her tenancy.

22. It was agreed in *Connors* (para 68 of the Court's judgment in that case) and held in *Blecic* (para 52 of the Court's judgment in that case) that the premises in question were, for purposes of article 8, the applicant's home. It was agreed in *Connors* (para 68) and held in *Blecic* (para 54) that the facts disclosed an interference with the applicant's right to respect for his and her home. Under the domestic property law of the two jurisdictions there was no arguable defence to either claim (in the *Blecic* case, once she had been found to have no justified reasons). But in each case the Court went on to consider, at some length, the excepting conditions in article 8. In *Connors* (para 69) it was agreed, and in *Blecic* (paras 57-58) it was held, that the interference had a legitimate aim. In each case the crux was whether the interference was

necessary in a democratic society, namely whether the interference answered a pressing social need and was proportionate to the legitimate aim pursued (*Connors*, para 81; *Blecic*, para 59). These are matters which would not have fallen for consideration at all if a clear answer given by domestic property law were decisive. As it was, the Court devoted fourteen paragraphs of its judgment in *Connors* to this aspect and eleven paragraphs of its judgment in *Blecic*. It reached differing conclusions in the two cases. In ruling against the United Kingdom in *Connors* the court took account of the nature of the rights involved in the case (para 82), the procedural safeguards available to the individual (para 83), the vulnerable position of gipsies as a minority whose way of life member states are positively obliged to facilitate (para 84) and the disadvantageous position of gipsies on local authority as opposed to privately-owned sites (paras 43-46, 87-90). It concluded that judicial review was not an adequate safeguard (para 92) and that (para 95)

> "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 Art. 8 of the Convention."

Reaching a different conclusion in *Blecic*, the Court respected the margin of appreciation accorded to national authorities (paras 64-65) and found (paras 68-70) that the applicant had had a fair opportunity to put forward her views and resist the claim made against her.

23. The decision of the House in *Qazi* was not cited in *Connors*, perhaps because the majority reasoning was inconsistent with the basis on which the United Kingdom's case was put (and had been put on earlier occasions such as *Howard v United Kingdom* (1985) 9 EHRR 117, *P v United Kingdom* (Appn No 14751/89), 12 December 1990, unreported, and *Chapman v United Kingdom* (2001) 33 EHRR 399 and, domestically, in *Southwark London Borough Council v St Brice* [2001] EWCA Civ 1138, [2002] 1 WLR 1537). The respondents, however, place considerable reliance on the fact that when Mr Qazi sought to apply to Strasbourg to complain of a violation of his article 8 right his application was declared inadmissible. From the very brief reasons given, the respondents infer approval of the majority's reasoning. The Court of Appeal in the *Leeds* case discounted the significance of this

finding in paragraph 15 of its judgment, and the House itself has been at pains over the years to make plain that the refusal of leave does not necessarily import approval of the reasoning of the judgment which it is sought to challenge. It may have been thought, as the *Qazi* minority certainly thought, that Mr Qazi was most unlikely to win even if his case were remitted to the county court, and his case may have had more in common with earlier cases held inadmissible because the justification was obvious than cases such as *Connors* and *Blecic.* I do not, in any event, think that any reliable inference can be drawn from the finding of inadmissibility made against Mr Qazi's application.

24. The respondents sought in argument to explain *Connors*, as the Court of Appeal did in its *Lambeth* judgment, as a case turning on the special position of gipsies. This is, in my opinion, partly right and partly wrong. It is right inasmuch as the position of Mr Connors and his family as members of a vulnerable minority, to whom the state owed a positive obligation, and who had inadequate means of protecting their rights in domestic law, founded the Court's finding in their favour on the issue of necessity in a democratic society (i.e. pressing social need and proportionality). It is wrong insofar as it is relied on to support the majority reasoning in *Qazi*: for on that reasoning the applicants' lack of any proprietary interest whatever under domestic property law would have effectively concluded the case against them, without any need to explore questions of necessity, pressing social need and proportionality. The Court of Appeal in paragraph 29 of its *Leeds* judgment was in my opinion correct to hold that the reasoning in *Connors* could not be confined to the treatment of gipsies.

25. The appellants point out that in *Connors* both the applicability of article 8 and an act of interference by a public authority were conceded by the United Kingdom. This is correct, as noted in para 22 above. But the Court of Appeal in its *Leeds* judgment (para 25) rejected the suggestion that the decision was founded on the concession, and thought it clear that the Court considered the concession to have been rightly made. I agree. It is also clear that if either of the two cases now before the House were to reach Strasbourg the same concessions would be made (subject, in the *Leeds* case, to the prior contention that the premises were not the appellants' home: see para 48 below).

26. The Court of Appeal in its *Leeds* judgment (para 26) was in my view right to hold that the decision in *Connors* is "unquestionably incompatible" with the majority ratio of *Qazi*. It does not appear that

Blecic was cited to the Court of Appeal: had it been, it could only have fortified the court in the correctness of its conclusion.

The application of the Strasbourg jurisprudence

27. The appellants contended, with strong support from the First Secretary of State, that

(1) the majority ratio in *Qazi* should be modified to take account of the later Strasbourg jurisprudence, particularly *Connors* and *Blecic*;
(2) defendants to possession proceedings brought by public authorities should be permitted in principle to raise an article 8 defence in those proceedings;
(3) defendants should be permitted to raise such defences in the county court in the possession proceedings and should not be required to raise such defences in separate proceedings for judicial review, and
(4) such a procedure would not in practice impose an excessive or unsustainable burden on the administration of justice in the county courts.

Each of these contentions was challenged by the respondents, and each of them is important.

28. The mandatory duty imposed on domestic courts by section 2 of the 1998 Act is to take into account any judgment of the Strasbourg Court and any opinion of the Commission. Thus they are not strictly required to follow Strasbourg rulings, as they are bound by section 3(1) of the European Communities Act 1972 and as they are bound by the rulings of superior courts in the domestic curial hierarchy. But by section 6 of the 1998 Act it is unlawful for domestic courts, as public authorities, to act in a way which is incompatible with a Convention right such as a right arising under article 8. There are isolated occasions (of which *R v Spear* [2002] UKHL 31, [2003] 1 AC 734, paras 12 and 92, is an example) when a domestic court may challenge the application by the Strasbourg Court of the principles it has expounded to the detailed facts of a particular class of case peculiarly within the knowledge of national authorities. The 1998 Act gives it scope to do so. But it is ordinarily the clear duty of our domestic courts, save where and so far as constrained by primary domestic legislation, to give practical recognition to the principles laid down by the Strasbourg Court as governing the Convention rights specified in section 1(1) of the 1998

Act. That Court is the highest judicial authority on the interpretation of those rights, and the effectiveness of the Convention as an international instrument depends on the loyal acceptance by member states of the principles it lays down. In the present instance the governing principle is now clear, and gives fair effect to the right to respect for his home which everyone is entitled to enjoy under article 8(1). That provision does not, as has been repeatedly and rightly held, guarantee a right to a home or the right to have one's housing problems solved by the authorities: *Chapman v United Kingdom* (2001) 33 EHRR 399, para 99; *Marzari v Italy* (1999) 28 EHRR CD 175, 179; *O'Rourke v United Kingdom* (Application No 39022/97), unreported, 26 June 2001. But it does guarantee a right to respect for the place where a person lives if his links with that place are close enough and continuous enough (*Buckley v United Kingdom* (1996) 23 EHRR 101, 115, para 63; *Mabey v United Kingdom* (1996) 22 EHRR CD 123, 124; *O'Rourke v United Kingdom* above) to make it proper to regard that place as his home. To evict or seek to evict a person from such a place is to interfere with his exercise of his article 8(1) right, as the House held in reliance on Strasbourg and other authority in *Qazi*. Article 8(2) forbids such interference by a public authority unless the excepting conditions are satisfied. Compliance with domestic property law is a necessary excepting condition but not a sufficient one, since the other conditions must also be met, notably that the interference must answer a pressing social need and be proportionate to the legitimate aim which it is sought to achieve. This must now be recognised as the correct principle. In stating it, I enter the same important reservation as in *Qazi*, para 23: nothing in this opinion should be understood as applying to any landlord or owner which is not a public authority. Competing submissions were made on this point. It does not arise for decision in these appeals. It is best left for resolution in a case where it arises.

29. It necessarily follows, in my judgment, that where a public authority seeks to evict a person from premises (which may be land where a traveller has pitched his caravan) which he occupies as his home, that person must be given a fair opportunity to contend that the excepting conditions in article 8(2) have not been met on the facts of his case. I do not accept, as the appellants argued, that the public authority must from the outset plead and prove that the possession order sought is justified. That would, in the overwhelming majority of cases, be burdensome and futile. It is enough for the public authority to assert its claim in accordance with domestic property law. If the occupier wishes to raise an article 8 defence to prevent or defer the making of a possession order it is for him to do so and the public authority must rebut the claim if, and to the extent that, it is called upon to do so. In the

overwhelming majority of cases this will be in no way burdensome. In rare and exceptional cases it will not be futile.

30. The respondents submitted that if, on article 8 grounds, an occupier wishes to resist a claim for possession valid under domestic property law, the proper medium for such a challenge is an application for judicial review and the proper venue the Administrative Court and not the county court. That is the proper forum in which a challenge to an exercise of public power by a public authority should be resolved. If this were a correct submission it would have to be accepted, but it would have very unfortunate procedural consequences. It would lead to the adjournment of the county court proceedings while application was made for permission to apply for judicial review. Even if permission were refused, as would almost always be the case, there would be additional expense and delay, preventing summary disposal of the matter in the county court. The occupier would be restricted to a procedure not well-adapted or routinely used for the resolution of sensitive factual questions and to a court traditionally and rightly reluctant to explore the merits of an apparently lawful decision, as it proved to be in *Connors'* case. But in my opinion it is not a correct submission. Effect must be given to section 7(1)(b) of the 1998 Act, which provides:

> "(1) a person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) [i.e. in a way which is incompatible with a Convention right] may …
>
> (b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act."

This is express authority entitling the occupier to raise his article 8 challenge to the possession order sought against him in those proceedings. It is consistent with authorities such as *Wandsworth London Borough Council v Winder* [1985] AC 461 and *Boddington v British Transport Police* [1999] 2 AC 143, and respects the principle that if other means of redress are conveniently and effectively available to a party they ought ordinarily to be used before resort to judicial review: see, for example, *R v Huntingdon District Council, Ex p Cowan* [1984] 1 WLR 501, 507. Where a party seeks relief, on conventional judicial review grounds, which only the Administrative Court can grant, there will, of course, be no alternative to an application for judicial

review, but that will very rarely, if ever, be the case where an occupier seeks to resist a possession order in reliance on article 8.

31. The respondents contended that if the approach indicated above were given practical effect the result would be to dislocate the conduct of housing claims in the county court, distort local authority housing policies and budgets, and upset the important compromises inherent in our property law and housing legislation. The appellants, supported by the First Secretary of State, strongly challenged this prediction, while accepting that the threshold for relying successfully on article 8 in response to an otherwise well-founded possession claim should be very high and that the number of successful defendants would be minimal. This is an important aspect of these appeals, and one that has caused the House much concern.

32. The respondents insisted on the relevance of three principles which are very familiar but are, indeed, fundamental. The first is that the Strasbourg authorities routinely accord a wide margin of appreciation to the national authorities of member states, not least in the context of both article 8 and article 1 of the First Protocol. While in some situations (such as that in *Connors*) the margin is treated as narrower than in some other situations, and the Court reserves to itself the power of final review, this principle is undoubtedly correct. So is the closely-allied second principle, that the Strasbourg authorities generally respect, subject to similar qualifications, decisions made by democratically - elected assemblies following public debate. So too is the third principle, that inherent in the whole of the Convention is a search for balance between the rights of the individual and the wider rights of the society to which he belongs, neither enjoying any absolute right to prevail over the other. It is unnecessary to cite authority for propositions so well established and understood.

33. The third of these principles has obvious relevance in a context such as that giving rise to these appeals. For the general property law of England and Wales has developed over the centuries reconciling the rights and interests, sometimes in harmony, sometimes conflicting, of owners, landlords and licensors on one hand and occupiers, tenants and licensees on the other. Over the last century or so, this general property law has been overlaid by a mass of very detailed, very specific housing legislation. Giving the House the benefit of their great expertise, the respondents' counsel drew attention to, among other examples, secure tenancies, introductory tenancies, demoted tenancies, assured tenancies, assured shorthold tenancies and demoted assured shorthold tenancies, all

of them created or to a greater or lesser extent regulated by statute. Most of these statutes (and further examples could readily be given) were no doubt prompted by recognition that housing (in which expression I include pitches on which travellers may lawfully pitch their caravans) is a scarce and in the short term finite commodity. The demand for housing at a reasonable price is greater than the supply. This of course means that security of tenure for A means a denial of accommodation for B, recognition of a right for C to succeed to a tenancy means there is no tenancy for D, an extension of time granted to E defers the date when F can find somewhere to live. Our housing legislation strikes a balance between the competing claims to which scarcity gives rise, taking account, no doubt imperfectly but as well as may be, of the human, social and economic considerations involved. And it is, of course, to housing authorities such as the respondents that Parliament has entrusted the power of managing and allocating the local authority housing stock and the pitches on local authority gipsy sites.

34. Under some statutory regimes, as where discretionary grounds are relied on to terminate a secure tenancy under the Housing Act 1985, the court may make an order for possession only where, other conditions for making such an order being met, the court thinks it reasonable to do so. This enables the court to take account of all circumstances which it judges to be relevant. If, in any case covered by such a regime, the statutory conditions are satisfied and the court does, on consideration of all the circumstances, think it reasonable to make a possession order, the court will in effect have undertaken the very assessment which article 8(2) requires. In such a situation article 8(2) adds nothing of substance to the protection which the occupier already enjoys.

35. Under some statutory regimes the court may be required to make an order for possession if certain prescribed conditions are met and there is no overriding requirement that the court considers it reasonable or just to make such an order. The statutory scheme is nonetheless likely to satisfy the article 8(2) requirement of proportionality if it is clear that the statutory scheme represents a democratic solution to the problems inherent in housing allocation. Thus in *Poplar Housing and Regeneration Community Association Limited v Donoghue* [2001] EWCA Civ 595, [2002] QB 48, the Court of Appeal found no breach of article 8(2) in the use of section 21(4) of the Housing Act 1988, as amended, to gain possession of an assured shorthold tenancy granted to a person who had been intentionally homeless, because (para 69) Parliament had intended to give preference to the needs of those dependent on social housing as a whole over those who, like the tenant, had been intentionally homeless. Similarly, in *R (McLellan) v Bracknell*

Forest Borough Council [2001] EWCA Civ 1510, [2002] QB 1129, the Court of Appeal found no breach of article 8 where a housing authority determined the introductory tenancies of tenants whose rent was in arrears under section 127(2) of the Housing Act 1996, since (para 63) Parliament had decided that it was necessary in the interest of tenants generally and the local authorities to have a scheme whereby, during the first twelve months, tenants were on probation and could be evicted without long battles in the county court, there being (it was held) adequate procedural safeguards. The Court of Appeal took a similar approach when holding, in *Sheffield City Council v Smart* [2002] EWCA Civ 4, [2002] HLR 639, para 37, that Parliament clearly enacted the relevant statutory provisions upon the premise that while a tenant is housed as a homeless person he enjoys no security of tenure. See also *Wandsworth London Borough Council v Michalak* [2002] EWCA Civ 271, [2003] 1 WLR 617, paras 63, 78. Where a statutory scheme covers the case of an occupier, and conditions are prescribed for obtaining possession, and those conditions are met, it will only be in highly exceptional circumstances that the occupier will gain additional protection from article 8.

36. There are of course some cases (of which the present cases are examples) in which the relationship between public authority owner or landlord and individual tenant or occupier is not governed by any statutory scheme. But possession may be sought on expiry of the period for which the right to occupy was granted, or because the notice required by domestic property law to bring that term to an end has been given, or because one or more of the conditions on which the right to occupy was granted has been broken. It cannot be said that the relationship between the parties in such cases is the subject of a balance struck by Parliament, but it is not unrealistic to regard the general law as striking such a balance. The public authority owner or landlord has, broadly speaking, a right to manage and control its property within bounds set by statute. The occupier acquires a right, but only a limited right, to occupy. On due determination of that interest, a claim for possession must ordinarily succeed, since any indulgence to the occupier necessarily derogates from the property right of the public authority, whose rights are also entitled to respect. It is not therefore surprising that in *P v United Kingdom* (Application No 14751/89), 12 December 1990, and *Ure v United Kingdom* (Application No 28027/95), unreported, 27 November 1996, the occupiers' complaints were held to be inadmissible because the public authority's interference or assumed interference was held to be clearly justified. It would, again, require highly exceptional circumstances before article 8 would avail the occupiers. The peculiar facts and circumstances of *Connors* could fairly

be regarded as crossing that high threshold, given the positive obligation to which reference is made in paragraph 24 above.

37. Rarely, if ever, could this test be satisfied where squatters occupy the land of a public authority which they do not and (unlike *Connors*) never have had any right to occupy, and the public authority acts timeously to evict them. The public look to public authorities to preserve their land for public purposes and to bring unlawful occupation to an end, with the environmental hazards it is likely to entail. Rules 55.5(2) and 55.6 of the Civil Procedure Rules provide for the summary removal of squatters. The rule in *McPhail v Persons, Names Unknown* [1973] Ch 447 must, in my opinion, be relaxed in order to comply with article 8, but it is very hard to imagine circumstances in which a court could properly give squatters of the kind described above anything more than a very brief respite.

38. I do not think it possible or desirable to attempt to define what facts or circumstances might rank as highly exceptional. The practical experience of county court judges is likely to prove the surest guide, provided always that the stringency of the test is borne in mind. They are well used to exercising their judgment under existing statutory schemes and will recognise a highly exceptional case when they see it. I do not, however, consider that problems and afflictions of a personal nature should avail the occupier where there are public services available to address and alleviate those problems, and if under the relevant social legislation the occupier is specifically disentitled from eligibility for relief it will be necessary to consider the democratic judgment reflected in that provision. Nor can article 8 avail a tenant, otherwise perhaps than for a very brief period, if he can be appropriately accommodated elsewhere (whether publicly or privately). Where, as notably in the case of gipsies, scarcity of land adversely affects many members of the class, an article 8(2) defence could only, I think, succeed if advanced by a member of the class who had grounds for complaint substantially stronger than members of the class in general.

39. 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.

Precedent

40. Reference has already been made to the duty imposed on United Kingdom courts to take Strasbourg judgments and opinions into account and to the unlawfulness of courts, as public authorities, acting incompatibly with Convention rights. The questions accordingly arise whether our domestic rules of precedent are, or should be modified; whether a court which would ordinarily be bound to follow the decision of another court higher in the domestic curial hierarchy is, or should be, no longer bound to follow that decision if it appears to be inconsistent with a later ruling of the Court in Strasbourg. The Court of Appeal concluded, in paragraph 33 of its judgment on the *Leeds* appeal, that the only permissible course was to follow the decision of the House in *Qazi*, despite finding that it was incompatible with *Connors*, but to give permission, if sought and not successfully opposed, to appeal to the House, and in that way to take the decision in *Connors* into account.

41. The House has had the benefit of carefully considered submissions on this issue. In a written case submitted on behalf of JUSTICE and LIBERTY as interveners it is contended that the lower court is free to follow, and barring some special circumstances should

follow, the later Strasbourg ruling where four conditions are met, namely (1) the Strasbourg ruling has been given since the domestic ruling on the point at issue, (2) the Strasbourg ruling has established a clear and authoritative interpretation of Convention rights based (where applicable) on an accurate understanding of United Kingdom law, (3) the Strasbourg ruling is necessarily inconsistent with the earlier domestic judicial decision, and (4) the inconsistent domestic decision was or is not dictated by the terms of primary legislation, so as to fall within section 6(2) of the 1998 Act. The appellants' formulation was to very much the same effect, although they did not suggest that the domestic court should follow the Strasbourg ruling, only that it might; they emphasised that the inconsistency between the otherwise binding domestic decision and the later Strasbourg ruling should be very clear; and they elaborated somewhat the conditions pertaining to primary domestic legislation. The First Secretary of State, after a judicious review of the arguments for and against the Court of Appeal's approach, favoured a (strictly circumscribed) relaxation of the doctrine of precedent in the circumstances of the *Leeds* appeal. He proposed that a lower court should be entitled to depart from an otherwise binding domestic decision where there is a clearly inconsistent subsequent decision of the Strasbourg Court on the same point. But the inconsistency must be clear. A mere tension or possible inconsistency would not entitle a lower court to depart from binding domestic precedent. The respondent gave a guarded answer. A lower court may decline to follow binding domestic authority in the limited circumstances where it decides that the higher courts are bound to resile from that authority in the light of subsequent Strasbourg jurisprudence.

42. While adherence to precedent has been derided by some, at any rate since the time of Bentham, as a recipe for the perpetuation of error, it has been a cornerstone of our legal system. Even when, in 1966, the House modified, in relation to its own practice, the rule laid down in *London Street Tramways Company Limited v London County Council* [1898] AC 375, it described the use of precedent as

> "an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules:" *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.

The House made plain that this modification was not intended to affect the use of precedent elsewhere than in the House, and the infrequency with which the House has exercised its freedom to depart from its own decisions testifies to the importance its attaches to the principle. The strictures of Lord Hailsham of St Marylebone LC in *Broome v Cassell & Co Limited* [1972] AC 1027, 1053-1055, are too well known to call for repetition. They remain highly pertinent.

43. The present appeals illustrate the potential pitfalls of a rule based on a finding of clear inconsistency. The appellants, the First Secretary of State and the Court of Appeal in the *Leeds* case find a clear inconsistency between *Qazi* and *Connors*. The respondents and the Court of Appeal in the *Lambeth* case find no inconsistency. Some members of the House take one view, some the other. The prospect arises of different county court and High Court judges, and even different divisions of the Court of Appeal, taking differing views of the same issue. As Lord Hailsham observed (*ibid*, p 1054), "in legal matters, some degree of certainty is at least as valuable a part of justice as perfection." That degree of certainty is best achieved by adhering, even in the Convention context, to our rules of precedent. It will of course be the duty of judges to review Convention arguments addressed to them, and if they consider a binding precedent to be, or possibly to be, inconsistent with Strasbourg authority, they may express their views and give leave to appeal, as the Court of Appeal did here. Leap-frog appeals may be appropriate. In this way, in my opinion, they discharge their duty under the 1998 Act. But they should follow the binding precedent, as again the Court of Appeal did here.

44. There is a more fundamental reason for adhering to our domestic rule. The effective implementation of the Convention depends on constructive collaboration between the Strasbourg court and the national courts of member states. The Strasbourg court authoritatively expounds the interpretation of the rights embodied in the Convention and its protocols, as it must if the Convention is to be uniformly understood by all member states. But in its decisions on particular cases the Strasbourg court accords a margin of appreciation, often generous, to the decisions of national authorities and attaches much importance to the peculiar facts of the case. Thus it is for national authorities, including national courts particularly, to decide in the first instance how the principles expounded in Strasbourg should be applied in the special context of national legislation, law, practice and social and other conditions. It is by the decisions of national courts that the domestic standard must be initially set, and to those decisions the ordinary rules of precedent should apply.

45. To this rule I would make one partial exception. In its judgment on the *Leeds* appeal, paragraph 33, the Court of Appeal said:

> "In *D v East Berkshire Community NHS Trust* [2004] QB 558 this court held that the decision of the House of Lords in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 could not survive the introduction of the Human Rights Act 1998. This was, however, because the effect of the Human Rights Act 1998 had undermined the policy consideration that had largely dictated the House of Lords decision. Departing from the House of Lords decision in those circumstances has attracted some academic criticism. It remains to see whether this will be echoed by the House itself."

When that case reached the House, no criticism of the Court of Appeal's bold course was expressed, the House agreed that the policy considerations which had founded its decision in *X v Bedfordshire* had been very largely eroded and it was accepted that that decision was no longer good law: [2005] UKHL 23, [2005] 2 AC 373 paras 21, 30-36, 82, 119, 124-125. The contrary was not suggested. But there were other considerations which made *X v Bedfordshire* a very exceptional case. Judgment was given in 1995, well before the 1998 Act. No reference was made to the European Convention in any of the opinions. And, importantly, the very children whose claim in negligence the House had rejected as unarguable succeeded at Strasbourg in establishing a breach of article 3 of the Convention and recovering what was, by Strasbourg standards, very substantial reparation: *Z v United Kingdom* (2001) 34 EHRR 97. On these extreme facts the Court of Appeal was entitled to hold, as it did in paragraph 83 of its judgment in *D*, that the decision of the House in *X v Bedfordshire*, in relation to children, could not survive the 1998 Act. But such a course is not permissible save where the facts are of that extreme character.

Disposal

The Lambeth appeal

46. It follows from the foregoing paragraphs of this opinion that the courts below should have held the premises in question to be the homes of the respective appellants and should have held their eviction or

proposed eviction to be an interference with their exercise of their right to respect for their homes within the meaning of article 8(2). Their defences should not have been struck out save on the basis that nothing sufficient was pleaded to support them.

47. The question then arises whether these cases should, even after this lapse of time, be remitted to the county court for consideration whether eviction is necessary in a democratic society, as that expression has been defined in the Strasbourg jurisprudence. I would favour that course if there appeared any reasonable prospect of the court deciding that it was not necessary. But it is clear that under domestic property law the appellants have no right to occupy their respective premises, of which the local authority has an unqualified right to possession. The appellants fall outside the categories to which Parliament has extended a measure of protection. The local authority has no duty to accommodate the appellants, but has a power and duty to manage its housing stock. The appellants have not pleaded or alleged facts which give them a special claim to remain. I am satisfied that if these cases were remitted, possession orders would necessarily be made. I would accordingly, although for reasons differing from those of the Court of Appeal, dismiss these appeals.

The Leeds appeal

48. It seems to me all but unarguable that the recreation ground at Spinkwell Lane on which the appellants parked their caravans was ever their home within the meaning of article 8(1). On the agreed facts, they had been on the site for two days, without any authority whatever, when the Council issued proceedings for possession. There is nothing to suggest that they could show such continuous links with the land as would be necessary if it were to be regarded as their home. If, however, the land was their home, it is plain that their eviction was in accordance with domestic property law, which had the legitimate end of enabling public authorities to evict unlawful squatters from public land and restore it to public (in this case recreational) use. I can see no ground on which such action could be stigmatised as disproportionate, despite the personal afflictions to which these appellants were unfortunately subject. The facts are far removed from those of *Connors* where the family had been lawful occupiers of the authority's gipsy site, with one relatively brief intermission, for many years. I am satisfied that these appellants could not succeed if the case were remitted to the county court. In any event, they left the site over a year ago. I would accordingly, dismiss this appeal also.

49. I would, in each case, invite written submissions on costs within 14 days.

LORD NICHOLLS OF BIRKENHEAD

My Lords,

50. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill. For the reasons he gives, with which I fully agree, I too would dismiss both appeals. I also agree with his observations on the judicial precedent point. On the '*Bruton* tenancy' issue in the Lambeth appeal, I agree with the conclusions and reasoning of my noble and learned friend Lord Scott of Foscote whose speech I have had the advantage of reading in draft. I add some short observations only on the procedural aspects of the main issue. I must first set them in their context.

51. These appeals concern a subject matter of great importance to many people: the right of a local authority to repossess a property occupied by a defendant as his home. The two sets of proceedings exemplify two typical circumstances where repossession claims are made by a local authority. One is where the defendant was lawfully in possession of property, his rights of occupation were duly terminated, and a possession order was then sought. The other is where the defendant entered upon the local authority's property unlawfully and the local authority then took steps to obtain a possession order.

52. The problems before the House arise from the impact of the Human Rights Act 1998 in these cases. In both sets of proceedings the defendants contend that eviction would violate their Convention right to respect for their home. The House is concerned to give guidance on what should be the general approach to such contentions and, where seriously arguable issues arise, in which court the issues should be decided.

53. The starting point is clear enough. A possession order made by a court in respect of a defendant's home will be, at least ordinarily, an interference with the defendant's right to respect for his home within the meaning of article 8. Equally clearly, in almost all cases of the two

types mentioned above that interference will be justified as 'necessary in a democratic society' on one or more of the grounds set out in article 8(2). The interference will be justified because in one case the defendants never had any right to be on the property at all. In the other case the defendants had only the limited rights afforded by the housing legislation. This complex, ever-changing law is testimony to the elaborate steps taken by Parliament to strike an appropriate balance between the competing interests of all those who are in need of homes. The country's housing stock is finite, and for many years the legislature has striven repeatedly to achieve the best and fairest use of the available housing. Parliament's decisions on this extremely difficult and intricate social problem are to be respected.

54. I said 'in almost all cases' because inevitably there may be the exceedingly rare case where the legislative code or, indeed, the common law is impeachable on human rights grounds. *Connors v United Kingdom* (2004) 40 EHRR 189, regarding the lack of protection for gypsies, is an example. It is this possibility, rare and exceptional though it may be, which gives rise to a hugely important practical problem. Day in, day out, possession orders are routinely made in county courts all over the country after comparatively brief hearings. The hearings are mostly brief because the time needed to dispose fairly of the formalities and also of questions of reasonableness, where they arise, is usually short. This will no longer be the position if, as has been contended, local authorities must now plead and prove in every case that domestic law meets the requirements of article 8.

55. I am unable to accept this remarkable contention. The course proposed would be a recipe for a colossal waste of time and money, in case after case, on futile challenges to the Convention-compatibility of domestic law. On the contrary, despite the possibility of a successful challenge under article 8, I see no reason for the present practice to change. Courts should proceed on the assumption that domestic law strikes a fair balance and that it is compatible with the requirements of article 8 and also article 1 of the first protocol.

56. This assumption is of course rebuttable. It is for a defendant to place before the court material necessary to displace this assumption, and he must have a fair opportunity to do so. Like Lord Bingham of Cornhill, I am in no doubt that judges will quickly be able to recognise the highly exceptional case where there is a seriously arguable issue based on the requirements of article 8 or article 1 of the first protocol.

57. So far I have referred in quite general terms to the compatibility of domestic law with the requirements of the Convention. I must now delve just a little more deeply into the particular types of challenge which may be made, because that has a bearing on which court should decide the issue. At this point it is necessary to recall the two routes by which the Human Rights Act has incorporated Convention rights into this country's law. These are set out in section 3 and section 6 of the Act. These sections provide the protection afforded to Convention rights in United Kingdom law.

58. Against this background take first a case where the defendant's challenge is to the Convention-compatibility of primary or secondary legislation. In such cases a judge in the county court, like every judge in every court, is bound to give effect, should occasion arise, to the interpretive obligation set out in section 3. That is within his jurisdiction. But in the scheme of the Act the section 3 interpretive obligation may lead on to a declaration of incompatibility under section 4, which is a matter not within the jurisdiction of a county court. So, in the rare case where seriously arguable questions of this nature arise in the county court, it will be for the judge to consider whether the more appropriate course is for these questions to be resolved in the High Court.

59. The human rights challenge may take a different form. A local authority is obliged by section 6 to act compatibly with Convention rights. The defendant's contention may be that the local authority's exercise of its power to seek a possession order is, in the circumstances, an unlawful act within the meaning of section 6. As with a challenge to the Convention-compatibility of housing legislation, so here it will be a rare case indeed where this allegation can be made good. This is because in the ordinary course a public authority in seeking possession will be doing no more than relying on its ownership of land coupled with the limits on the defendant's rights of occupation as determined by Parliament or, where the defendant has never had any rights of occupation, coupled with his absence of any rights to be present on the land at all. However, if a Convention-compatibility issue under section 6 is raised in county court possession proceedings, that court is the appropriate forum for deciding the issue. It is the appropriate forum because in such a case the defendant is entitled to rely upon this allegation as a defence in the possession proceedings: section 7(1)(b) of the Human Rights Act. If the allegation is made good, the court may grant relief as provided in section 8 of the Act. The relief would include dismissing the possession proceedings or staying a possession order for such a period and on such terms as the court considers just and

appropriate. I agree therefore with the summary of the practical position set out in paragraph 39 of the speech of Lord Bingham of Cornhill.

60. For completeness I mention a third possibility which has nothing to do with the Human Rights Act. A defendant may seek to challenge the lawfulness of the local authority's decision to pursue possession proceedings as an improper exercise of its powers quite apart from its obligations under section 6. Here again, this issue can be treated as a defence in the proceedings, in accordance with the principle enunciated in the well known decision of *Wandsworth London Borough Council v Winder* [1985] AC 461.

61. These brief observations on section 6 are directed solely at local authorities and other landlords which are public authorities within the meaning of section 6. I say nothing about private landlords. They are not public authorities and they are outside the scope of section 6. The court of course is itself a public authority. Courts are bound to conduct their affairs in a way which is compatible with Convention rights. The court's own practice and procedures must be Convention-compliant. Whether, and in what circumstances, the court's section 6 obligation extends more widely than this, and affects the substantive law to be applied by the court when adjudicating upon disputes between private parties, still awaits authoritative decision. This point does not call for a decision in the present appeals, nor was the point argued.

LORD HOPE OF CRAIGHEAD

My Lords,

62. I have had the advantage of reading in draft the speeches of all my noble and learned friends. I agree with Lord Scott of Foscote, for all the reasons he gives, that the appellants in the *Lambeth* appeal had no right under ordinary domestic law to retain possession of their respective properties after the termination of the 1995 lease and had become trespassers with no right to remain. I agree with everything that Lord Bingham of Cornhill has said on the issue of precedent. I also agree, for substantially the same reasons as those given by all my noble and learned friends, that both appeals should be dismissed.

63. Although the essential point on the main issue has been put much more simply and much more attractively by Lord Nicholls of Birkenhead and Lord Brown of Eaton-under-Heywood, I must deal more fully with the detail of the appellants' argument. It was directed to two main questions. The first was how the right to respect for a person's home under article 8(1) of the European Convention on Human Rights is to be given effect to by the court where a public authority landowner seeks an order for possession of the premises to which it is undoubtedly entitled under domestic property law. The second was whether the decision of the European Court of Human Rights in *Connors v United Kingdom* (2004) 40 EHRR 189 is, as the Court of Appeal put it in its *Leeds* judgment [2005] 1 WLR 1825, para 26, "unquestionably incompatible" with the ratio of the majority in *Harrow London Borough Council v Qazi* [2004] 1 AC 983.

64. These are important questions, as the answers to them will affect all cases in which the owner of land seeks to recover possession from someone who has no right under domestic law to remain there. I agree with Lord Bingham and Lord Nicholls that the position as it affects private landlords does not call for decision in this case, as the respondents to these appeals are both public authorities. But I do not think that it can be left out of account as we explore the wider implications of the argument. As Mr Sales for the First Secretary of State explained, the article 8(1) right to respect for the home does not distinguish between public authorities and private landlords and landowners. Private landlords and landowners too must obtain an order from the court, and the court itself is a public authority (see para 104 below). For the purposes of section 6(1) of the Human Rights Act 1998 the words "public authority" embrace a wide and indeterminate variety of bodies, in addition to those that are "core" public authorities, which perform functions of a public nature: see *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546, paras 6-12, 41, 163. But in my opinion a correct understanding of the basis of the majority decision in *Qazi* and of the Strasbourg jurisprudence both before and after *Qazi* should lead to the conclusion that it is not unquestionably incompatible with *Connors*, although I accept that in one respect the reasoning in *Qazi* needs to be modified. I agree with Lord Scott that such differences as there may be between *Qazi* and the Strasbourg court as to article 8 defences in possession cases are of no relevance to the issue which the House had to decide in *Qazi*.

65. The appellants' argument, following the approach favoured by the minority in *Qazi*, gives rise to the following conundrum. They say

that every person against whom a public authority seeks a possession order with respect to premises which he occupies as his home must be given a fair opportunity to raise as a defence to the proceedings that the excepting conditions in article 8(2) have not been met on the facts of his case and that, if such a defence is raised, it must be rebutted by the public authority. But what if there is a statutory scheme which covers the case of an occupier, and the scheme itself is not challenged as being incompatible with his Convention rights? What if that scheme prescribes conditions that must be met for the obtaining of a possession order by the public authority and the court finds that the requirements of the scheme have all been satisfied? And what if there is no statutory scheme but all the requirements for the making of a possession order by the court under domestic property law, which is not challenged as being incompatible with the occupier's Convention rights, have been satisfied? Lord Bingham says of these cases, that it would require highly exceptional circumstances before a defence under article 8(2) would avail the occupiers: paras 35, 36. But what are these circumstances? What is there in the jurisprudence of the Strasbourg court that tells us that, in those situations, there is anything left for the court to consider under that article? Does that jurisprudence not teach us that the only question that can be raised under that article is whether the law itself is compatible with the occupier's Convention rights and that, so long as the law itself is compatible, it is open to the court to apply it to the facts of each case once the requirements of the law have been satisfied? This is the point that the majority in *Qazi* were seeking to grapple with when they said that, because the domestic property law gave an unqualified right to immediate possession to the housing authority once service of the notice to quit had terminated the joint tenancy, there was nothing left for the court to consider under article 8 in that case and the judge had been right to strike out the defence and make the possession order.

66. The jurisprudence of the Strasbourg court indicates that three requirements must be met under article 8(2) in cases where a possession order is sought before it can be held that the interference with the exercise of the right to respect for the home that will result from the making of the possession order is justified. Article 8(2) provides:

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

The first question is whether the interference is "in accordance with the law". As article 12 of the Universal Declaration of Human Rights which was adopted by the General Assembly of the United Nations in 1948 puts it, no one shall be subjected to arbitrary interference with his home. The requirement that any interference must be in accordance with the law meets the point that it must not be arbitrary. The next question is whether it has an aim that is identified by that paragraph as a legitimate one. Satisfaction of the housing needs of others is regarded as a legitimate aim for this purpose, because it was intended to promote "the economic well-being of the country" and "the protection of the rights of … others": *Blecic v Croatia* (2004) 41 EHRR 185, para 58. In *Connors v United Kingdom* (2004) 40 EHRR 189 the legitimate aim pursued by the interference was "the protection of the rights of … others" - other occupiers of the site and the public authority as its owner and manager: para 69. It is hard to conceive of a case where this requirement would not be met where a landowner seeks to vindicate his right to obtain an order for possession of his property on the grounds that all the requirements that the law lays down for recovery of possession from its occupier by means of a court order have been satisfied. The final question is whether interference in pursuit of that aim is "necessary in a democratic society". The notion of necessity implies a pressing social need, and the measure employed must be proportionate to the legitimate aim pursued: *Blecic*, para 59. In this context a margin of appreciation is allowed to the government of the contracting state. The scope of this margin of appreciation will depend not only on the aim of the interference but also, where the right to respect for the home is involved, the importance of that right to the individual: *Gillow v United Kingdom* (1986) 11 EHRR 335, para 48; *Blecic*, paras 59, 60. This is the only area for legitimate debate in cases where the other requirements have been satisfied.

67. But, as I shall seek to show in the following paragraphs, *Connors* is the only case where the Strasbourg court has held that the making of a possession order against an occupier in favour of a public authority in accordance with the requirements of domestic property law has failed to meet the third requirement in article 8(2). It failed to do so in that case because the making of the order was not attended by the procedural safeguards that were required to establish that there was a proper justification for the interference with the applicant's right to respect for his private and family life and his home. So it could not be regarded as justified by a pressing social need or as proportionate to the aim being pursued: para 95. The point of that case, however, was that the law enabled the public authority to evict the applicant from the site which he had been given a licence to occupy without giving reasons which could be examined on their merits by an independent tribunal. There were

exceptional circumstances, but it was the law itself that was defective. The margin of appreciation within which in spheres such as housing the judgment of the legislature will be respected did not save it from this criticism: para 82. It leaves untouched cases, of which *Qazi* is an example, where the judgment of the legislature on issues of property law meets the third requirement of the article.

The correct starting point

68. The key to a proper understanding of the decision in *Qazi* is to be found in an appreciation of the fact that the question whether an interference with the respondent's right to respect for his home is permitted by article 8(2) of the European Convention for Human Rights raises a question of procedure as well as one of substance. The question of substance is whether, on the facts of that case, the interference with the respondent's Convention right is permitted by article 8(2). The question of procedure is whether it is necessary, as the appellants submit, for the question whether the excepting conditions in article 8(2) are met to be considered by the county court in every case where the court is asked to make a possession order. In the view of the majority in *Qazi* the question does not require to be considered by the county court if the case is of a type where an application of the law shows that the outcome is a foregone conclusion, as it was in that case because the tenancy which gave the right to occupy had come to an end on the expiry of a notice to quit. In that situation the exercise would have been a pointless one: paras 83, 84; 103; 152.

69. The jurisprudence of the European court to which we must look for guidance as to how the question of substance should be answered does not provide much guidance as to how we should deal with the question of procedure. It is a domestic problem. It is not one which troubles the European court when it is asked to decide the issues remitted to it by article 41 of the Convention. That is why the questions arising under article 8(1) and 8(2) are so often run together at the admissibility stage, with the result that the commission or the court, as the case may be, is content to address article 8(2) on the assumption that, or after only a cursory examination of the question whether, the right to respect for the home has been interfered with and has to be justified: *S v United Kingdom* (1986) 47 DR 274, para 4; *O'Rourke v United Kingdom* (Application No 39022/97), 26 June 2001, p 5; *Connors v United Kingdom* (2004) 40 EHRR 189, para 68 (the parties were agreed that the applicant's eviction disclosed an interference with his right to respect for his private life, family life and home); *Blecic v*

Croatia (2004) 41 EHRR 185, para 54 (the court found, in the light of its finding in para 52 that the flat in question could reasonably be regarded as the applicant's home, that the termination of her specially protected tenancy of it by the domestic courts constituted an interference with her right to respect for her home).

70. The European court leaves questions of procedure to the contracting states. Its only concern is that procedures are in place which enable individuals to assert their Convention rights where there is a live question as to whether or not they have been violated. How this is to be done is a matter for the domestic system. There is therefore no objection in principle, on Convention grounds, to a system which treats cases where a violation of article 8 of the Convention is likely to be a live issue differently from those where it is not. Provided means are in place which enable those cases where this is a live question to be dealt with appropriately, a system which provides for all other cases where possession is sought to be dealt with simply and summarily will not be objectionable. That, no doubt, is why, notwithstanding Lord Steyn's strong condemnation of it in para 27 of his dissenting opinion, the decision in *Qazi's* case which on its own facts did not disclose a breach of the Convention right has survived European scrutiny: see para 88.

71. In the domestic legal order actions for possession are brought in the county court. In Scotland they are brought under the summary cause procedure in the sheriff court. This has important implications for the way issues as to whether an interference with the article 8 right is justified can be dealt with domestically. These courts do not have unlimited jurisdiction. They cannot make a declaration of incompatibility: see section 4(5) of the Human Rights Act 1998. The question whether, and if so to what extent, they have a discretion to make or withhold an order for possession depends, and depends only, on the law which has to be applied to the facts of each case.

72. The effect of the decision in *Qazi* is that where an order for possession is made by the court in accordance with domestic property law the essence of the article 8(1) right to respect for the home will not be violated. So the question whether the interference is permitted by article 8(2) is not a matter that need be considered by the county court. The law itself provides the answer to that question. The only matter which the court needs to consider is whether the requirements of the law and the procedural safeguards which it lays down for the protection of the occupier have been satisfied. There may perhaps be cases where the party seeking to recover possession is a public authority and there is a

live issue as to whether the requirements of the law and the procedural safeguards which it lays down fall short of what is required to satisfy the Convention right. The law in this area is guided by the decisions of the European court in Strasbourg, and it must be acknowledged that it is capable of being adapted to new and as yet unexplored circumstances. But cases of this kind are likely to occur only very rarely in practice. As a general rule all the court need concern itself with are the requirements of the law and the relevant safeguards.

73. Almost every working day judges sitting in the county and sheriff courts throughout the United Kingdom are presented with a long list of claims by public authorities seeking orders for possession of houses and other property forming part of their social housing stock against their occupiers. Almost all of these cases are brought by local authorities, housing association trusts or registered social landlords with respect to property let to tenants on a secure tenancy under section 79 of the Housing Act 1985 and the equivalent legislation that operates in Scotland under the Housing (Scotland) Act 2001. For the most part they are cases where, assuming that one or other of the various grounds for possession which are laid down in Schedule 2 to the 1985 Act or its Scottish equivalent is established (and there is usually little or no dispute about this), the court cannot make an order for possession unless it considers it reasonable to make the order, or it is satisfied that suitable alternative accommodation will be available and it is also reasonable to make the order: see section 84(2) of the 1985 Act and section 16 of the 2001 Act.

74. The hearings on this issue are, for the most part, brief and to the point. They are often unopposed, although an order cannot be made in accordance with the statute unless the party seeking possession can show that the statutory requirements are satisfied. Where there is opposition the hearings are frequently adjourned for a short period for the parties to reach agreement. Where agreement cannot be reached a full hearing is necessary. But this rarely happens. On the whole, despite the high volume of cases, the system appears to work well. It is widely seen as fair, quick and reliable. The legislation relating to housing in the public sector has been in place for over twenty years. It was recently reviewed and the Scottish equivalent of the 1985 Act was re-enacted in 2001 with only minor modifications by the Scottish Parliament. Nowhere has it been suggested in the Strasbourg case law that a public authority landlord's claim to possession which has been upheld on these grounds in accordance with the statute was a violation of the occupier's right to respect for his home under article 8 of the Convention.

75. At the other extreme, and much less frequent, are actions brought by the owners of land in the public or private sector for the recovery of possession of property over which the occupiers had no security of tenure at all. These include licensees, other than those such as persons employed in agriculture whose licence to occupy is protected by statute, tenants such as those in property with a high rateable value who are excluded from the security of tenure which most tenants in the private sector have under the Housing Act 1988 and other statutes whose contractual right to occupation of the property has been terminated, occupiers under student or holiday lets and trespassers. The absence of any statutory protection in these cases is the result of a deliberate decision by Parliament that the owner's right to recover possession should in these cases be unqualified, other than by the requirement that an order for possession must be sought from the court which ensures that procedures are in place to safeguard the rights of the occupier. That was the position in *Connors* under the legislation that was then in force. The significance of the decision in that case is that it has shown that cases falling within this end of the spectrum may raise issues as to whether the law itself satisfies the requirements of article 8(2). This is not something that can be dealt with in the county court.

76. In between these extremes there are a wide variety of lettings of one kind or another controlled by statute or by the common law which it is impossible accurately to summarise in a few sentences. The position is complex because it has been appreciated for many years that the law in this area has a strong social content. By the end of the war of 1914-1918 many countries had enacted provisions controlling rent: John W Willis, "A Short History of Rent Control Laws" (1950) 36 Cornell LQ 54, 67-71. By 1950 some 150 countries had adopted such laws: Megarry, *The Rent Acts*, 10th ed (1967), p 7. Hand in hand with rent control goes security of tenure. In *Feyereisel v Turnidge* [1952] 2 QB 29, 37, Denning LJ said that the guiding light through the darkness of the Rent Acts was to remember that they confer personal security of tenure on a tenant in respect of his home. The same approach is taken almost every day in the county and sheriff courts as the judges apply the legislation by which Parliament controls the provision of housing in the public sector. As Lord Porter observed in *Baker v Turner* [1950] AC 401, 417, the rules of formal logic must not be applied with too great strictness to legislation of this kind.

77. The issues addressed by this legislation involve questions of social and economic policy where the choices that are to be made can easily be seen as falling within the discretionary area of judgment best left to the considered opinion of the legislature. They include decisions

as to the circumstances in which protection of tenure is not to be given to those who have no contractual right to occupy as well those in which there is to be security of tenure, and if so, on what terms. Cases falling into this category are typical of those where the Strasbourg court will respect the judgment of the contracting state. They are most unlikely to raise an issue as to whether the right to possession which is afforded by domestic law violates the article 8 Convention right. If they do, the county court in the exercise of its ordinary jurisdiction should, so far as it is possible for it to do so, deal with it: see para 109. But no example has been referred to in the Strasbourg jurisprudence where a claim to possession in such a case has failed on article 8(2) grounds.

78. This is the background to the claim by the appellants in these two appeals that the orders for possession which were made against them in the county court violated their rights under article 8(1) of the Convention.

The appeals

79. In the *Lambeth* appeal the properties in question are owed by Lambeth. The appellants were let into possession of them by the London and Quadrant Housing Trust ("LQHT") at various times from about 1981, initially under an informal arrangement with Lambeth and from 1986 under the authority of a licence which was replaced in 1995 by ten year leases granted by Lambeth to LQHT which were subject to a break clause providing for early termination by either party. In 1999 Lambeth gave notice to terminate these leases. The county court judge, HH Judge Roger Cooke, held that the effect of the notices was that Lambeth had an unqualified right to possession and that, as the appellants were not tenants of Lambeth, they had no security of tenure under the 1985 Act. The defence under article 8 was struck out. The Court of Appeal, applying *Qazi*, dismissed the appeal: *Kay v Lambeth London Borough Council* [2005] QB 352.

80. In the *Leeds* appeal the respondent local authority is the freehold owner of a recreation ground onto which the appellants, who are gypsies, moved without the respondents' consent on 13 June 2004. The respondents issued possession proceedings against them two days later on 15 June 2004 on the ground that they were trespassers. It was not disputed that the appellants had entered onto and remained in occupation of the land without any licence from or consent of the respondents. The case having been transferred to the High Court, HH Judge Bush held

that the appellants had no defence to the claim for possession under article 8. The Court of Appeal held that the decision in *Qazi* was incompatible with *Connors*. But, regarding itself as bound to follow the decision in *Qazi*, it dismissed the appeal: [2005] 1 WLR 1825.

81. The following points are common to both cases. First, the claim by the owners of the properties is that the appellants have no right to remain in occupation of them. They seek to vindicate their right, as owners of the land, to exclusive occupation of the properties. Secondly, the owners in each case are a public authority. They are under a statutory duty to use the property which they own for public purposes – in *Leeds'* case as land held for use as a public recreation ground, in *Lambeth's* case as part of the land held for use as part of its social housing stock. Thirdly, as they are public authorities, they are under a duty not to act in a manner that is incompatible with the appellants' Convention rights: section 6(1) of the Human Rights Act 1998. Fourthly, the factual circumstances are different from those which were before the House in *Qazi*. In neither of these cases was there a right to possession of the property granted by the owner of the land which under domestic law was no longer enforceable against it by the occupier.

The article 8(2) issue

82. In *Connors v United Kingdom* (2004) 40 EHRR 189 the European Court of Human Rights held that the eviction of the applicant and his family, who were gypsies, from a local authority gypsy site which they were licensed to occupy so long as they did not cause a nuisance was a violation of article 8 because it had not been attended by the requisite procedural safeguards. The appellants submit that this case shows the decision of the majority in *Harrow London Borough Council v Qazi* [2004] 1 AC 983 was wrong, and that the decision in *Qazi* should be departed from because it is incompatible with what the European court said in *Connors*.

83. The facts in these two cases were different, as indeed are the facts in these two appeals. But the scope of the argument is such as to raise again the question of procedure to which the majority drew attention in *Qazi's* case. In para 5.74 of the Law Commission's Consultation Paper on Renting Homes I; Status and Security (Consultation Paper No 162, March 2002), Part V, The Impact of Human Rights Law, it is said that a procedure which gives a discretion to the county court by requiring it to consider whether having regard to article 8(2) the making of an order

would be proportionate is inimical to the purpose of providing a quick and reliable way of evicting tenants whose leases have by the operation of law been terminated. This conclusion has all the more force if the case is one where the person in possession never had a right to occupy the land in the first place.

84. Mr Luba QC for the appellants submitted that it was a norm of Convention law that every case of a person's dispossession from his home had to be justified under article 8(2). He said that a merits review was required in every case, and that there was no room for a short cut. It was not sufficient for the public authority to show that it had an absolute right to possession. Its claim for possession must be accompanied in every case by a pleaded case that the claim for possession was justified under article 8(2). Mr Sales for the First Secretary of State submitted that in principle it was open to any defendant to proceedings for possession to advance an article 8(2) defence in the county court. He differed from Mr Luba in that he accepted that in the vast majority of cases it would be sufficient for the public authority simply to assert its absolute right to possession. But he maintained that in every case – even in those cases where the statutory reasonableness test had to be satisfied by a housing authority – there was a balance that had to be struck under article 8(2) of the Convention. This was a matter about which the county court had to be satisfied in every case, notwithstanding the fact that in the overwhelming majority of cases this would, as Lord Bingham points out, be both burdensome and futile: para 29.

85. Despite Mr Luba's assurances to the contrary, there are substantial grounds for thinking that, if it were to be open to a defendant to raise this issue in the county court in every case where the premises are occupied as his home, this would have serious consequences for the system which Parliament has chosen for dealing with possession cases – as the Law Commission has pointed out. He would have to be given a fair opportunity to advance this defence, as the article 8 right carries with it the right to respect for the interest safeguarded in the decision-making process. So he would have to be permitted to plead the defence if he wished to do so. This would have consequences both for the public authority, which would have to rebut it, and for the court which would have to consider and dispose of the issue in every case where it was raised. This is the procedural problem under the domestic system which confronts us, as it did in *Qazi*.

86. Any procedure that requires consideration of the article 8(2) issue on its merits would be bound to delay the proceedings in one way or

another. It is preferable, wherever possible, that the matter should be dealt with in the county court, rather than by adjourning the proceedings to enable the defendant to apply in the High Court for permission for judicial review of the decision to apply for the possession order. A defendant has the right to contend in his defence that the decision of a public authority to recover possession was one which no reasonable person could consider justifiable, as Lord Fraser of Tullybelton explained in *Wandsworth London Borough Council v Winder* [1985] 1 AC 461, 506C-D, 509E-H. But it has to be borne in mind that it would not have been open to the county court to hold that the claim by the public authority in *Connors* to seek to recover possession was unlawful as it was invoking a right to possession that was provided by statute: see section 6(2)(b) of the Human Rights Act 1998, which provides that section 6(1) does not apply to an act if the authority was acting so as to give effect to or enforce provisions under primary legislation which cannot be read or given effect to in a way which is compatible with the Convention rights. If the ground of challenge is that the legislation is incompatible with article 8 and the statute cannot be read or given effect in a way that is compatible with that article, the county court judge must make the order required by the legislation notwithstanding the incompatibility. The defendant can, if he wishes, apply to the High Court for a declaration of incompatibility. But it would serve no good purpose for the proceedings in the county court to be adjourned to allow him to do so.

87. In *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, para 20 Lord Bingham of Cornhill acknowledged that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court:

> "This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 [of the Human Rights Act 1998] should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the

> Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."

88. The question is whether the jurisprudence of the Strasbourg court now requires us to say that county courts trying a claim for possession must in every case conduct a review of the defendant's personal circumstances before they can be satisfied that the requirements of article 8(2) are met before they make a possession order or, if the proposition for which Mr Luba contends is too wide, how far if at all the decision in *Qazi* needs to be modified in the light of the decision in *Connors*. The question is not made easier by the fact that when *Qazi's* case reached the Strasbourg court it was dismissed as inadmissible without any reasons having been given, and by the absence of any mention of the House's decision in *Qazi* in the court's judgment in the *Connors* case. Lord Steyn's declaration in *Qazi*, in para 27, that it would be surprising if the views of the majority on the interpretation and application of article 8 withstood European scrutiny cannot have escaped attention in Strasbourg. But two opportunities to meet his challenge have now been passed over. This is not a ground for complacency. But it does make it all the more important for us to be careful lest taking account of the decision in *Connors* leads us to breach Lord Bingham's rule that national courts should not outpace the Strasbourg court. The "no more" part of this rule is just as important as the "no less" part.

89. I propose therefore to examine this issue in three stages: (1) to look again at the Strasbourg cases before *Qazi*, (2) to look at the Strasbourg cases after *Qazi* and (3) then to re-examine *Qazi* itself to see whether that decision should be departed from and, if so, to what extent.

The Strasbourg cases before Qazi

90. I do not think that any advantage is to be gained by conducting a fresh review of all the decisions of the Strasbourg institutions that were considered in *Qazi*. There was a good deal of common ground between the majority and the minority as to the cases that were relevant and their effect. It was agreed that article 8 does not in terms give a right to be provided with a home and does not guarantee the right to have one's housing problem solved by the authorities: Lord Bingham, para 6; myself, paras 50, 53, 55. It was agreed that sufficient and continuous

links are required for a house to be considered a "home" for the purposes of article 8: Lord Bingham, para 9; myself, paras 64, 68. It was accepted by both parties that the Strasbourg jurisprudence did not provide a conclusive answer to the case in the respondent's favour: Lord Bingham, para 13. Lord Bingham's analysis of the relevant Strasbourg authority was matched step by step in the analysis of it by the majority. There was only one case about the effect of which there was any real disagreement. This was *S v United Kingdom* (1986) 47 DR 274. In that case the commission, when considering whether a house could be regarded as the applicant's home and whether her right to respect for her home could be regarded as interfered with, attached importance to the fact that she was not entitled in domestic law to succeed to the tenancy of the dwelling house and remain in possession of it on the death of her partner who had been the tenant of it: para 4.

91. For reasons which he explained in para 10 and were concurred in by Lord Steyn, Lord Bingham concluded that the ruling in *S v United Kingdom* no longer offered guidance on the issue of justification as it was made before the formulation of the sufficient and continuing links test in *Gillow v United Kingdom* (1986) 11 EHRR 335, para 46. The majority however took a different view on this point: myself, paras 62, 67; Lord Millett, paras 97, 98, 103; Lord Scott of Foscote, paras 126-129, 134. I recognised that the decisions in *S* and in *Gillow* were not entirely consistent with each other. But I drew support from the commission's approach in *S*, para 4, to the contractual relations established between the local authority and the deceased partner for the proposition that the purpose of article 8 must be kept firmly in mind when one is considering the question whether the right to respect for the home is being interfered with, and for my conclusion that such interference with that right as flowed from the claim for possession by the public authority landlord did not violate the essence of it: para 83. Lord Millett and Lord Scott were of the opinion that, although it was clumsily expressed, the commission's decision in *S*, properly understood, remained authority for the proposition that the applicant's house could no longer be regarded as attracting the protection of article 8 so as to afford a defence to the local authority's claim to possession as she no longer had any right vis-à-vis the landlord to remain there: Lord Millett, para 97; Lord Scott, para 134.

92. I acknowledge Lord Bingham's point that *S* has not been relied on in any later case: para 19. This is, of course, not untypical of decisions on admissibility that turn on their own facts. It must be approached with caution too because its reasoning is not entirely in tune with the view developed in later cases that the real issue in these cases is

not whether there is an interference but whether that interference is justified. Having reflected again on what was said in *S* in the light of the other pre-*Qazi* authorities, I remain of the opinion that the commission's decision in that case provides authority for the proposition that the right to respect for the home does not provide the occupier with a defence to the local authority's claim where it was entitled under domestic law to enforce its contractual right to have the property back at the end of the tenancy. This was, of course, a crucial step in the reasoning of the majority that the Strasbourg jurisprudence shows that contractual and proprietary rights of a person entitled to possession cannot be defeated by a defence based on article 8. In none of the Strasbourg cases before *Qazi* was anything said which diminished or detracted from such a person's contractual and proprietary rights, as Lord Scott was careful to emphasise: para 139.

93. In *Fitzleet Estates Ltd v Cherry* [1977] 1 WLR 1345, 1349D-E Lord Wilberforce said that the best way to resolve a question as to which there are two eminently possible views is by the considered majority opinion of the ultimate tribunal, and that much more than mere doubts as to the correctness of that opinion are needed to justify departing from it. Assuming, which I would respectfully question, that there were two eminently possible views as to whether the commission's decision in *S* provides the guidance which was found in it by the majority, the fact is that it was the considered opinion of the majority that it did provide that guidance. In these circumstances it would only be if the Strasbourg cases after *Qazi* showed that the majority were wrong that your Lordships would be justified now in departing from what that case decided. This, of course, leaves open the question whether the present cases are distinguishable on their facts from *Qazi*, which I shall reserve until later.

The Strasbourg cases after Qazi

94. Three cases must be considered under this heading. The first is *Connors v United Kingdom* (2004) 40 EHRR 189, which was a decision issued on 27 May 2004. The second is *Blecic v Croatia* (2004) 41 EHRR 185. The third is the decision of the Strasbourg court, issued in March 2004 shortly after the oral hearing in *Connors* which took place on 22 January 2004, that the application in *Qazi's* case was inadmissible. The judgment of your Lordships' House in *Harrow London Borough Council v Qazi* [2004] 1 AC 983 was delivered on 31 July 2003.

95. The significance of *Connors* is best judged by examining the court's assessment of the general principles that fell to be applied to the question whether there had been a violation of article 8: paras 81-84. The parties were agreed that article 8 applied to the circumstances of that case and that the eviction of the applicant disclosed an interference with his right to respect for, among other things, his home: para 68. They were also agreed that the interference was in accordance with the law and that it pursued a legitimate aim: para 69. This left for examination by the court the question whether the interference was "necessary in a democratic society": para 70.

96. In its discussion of the general principles bearing on this issue the court dealt with the matter in three stages. First, there was the scope of the margin of appreciation in cases which give rise to general social and economic considerations. The scope of this margin depends on the context of the case. Particular significance is to be attached to the extent of the intrusion into the personal sphere of the individual. Then there was the question of procedural safeguards which the state has provided when fixing the regulatory framework. The decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded to the individual by article 8. Finally there was the vulnerable position of gypsies as a minority. This meant that some special consideration should be given to their needs and their different lifestyle both in the regulatory framework and in reaching decisions in particular cases. As the court put it in the last sentence of para 84, there is to this extent a positive obligation on the contracting states by virtue of article 8 to facilitate the gypsy way of life.

97. The conclusion which the court reached, after examining the facts from this standpoint, was that the eviction of the applicant and his family was not attended by the requisite safeguards: para 95. The particular defect that was identified was the failure to provide a proper justification for the serious interference with the applicant's rights that resulted from his eviction. The court had noted in para 85 that the respective merits of the arguments as to whether there had been a breach of the licence conditions were not examined in the county court proceedings. They were only concerned with the fulfilment of the formal requirements of the eviction, as the council had relied simply on the power to give 28 days' notice to obtain summary possession without proving any breach of licence. The court held that, in the absence of that justification, the applicant's eviction from the local authority site could not be regarded as justified by a pressing social need or as proportionate to the legitimate aim that was being pursued.

98. I agree with the Court of Appeal's conclusion in the *Leeds* appeal that the decision in *Connors* is incompatible with the proposition that the exercise by a public authority of an unqualified right to possession will *never* constitute an interference with the occupier's right to respect for his home, and that it will *always* be justified under article 8(2): [2005] 1 WLR 1825, para 26. Nowhere in my speech in *Qazi* did I subscribe to a proposition in such extreme terms. On the other hand, as I read the Strasbourg court's judgment, it did not go so far as to say that the recovery of possession will constitute an interference with that right in every case where the premises are occupied by the person as his home. *Connors* was decided, as is usual in that court, on a relatively narrow ground which was related to its own facts.

99. As the court said in *Connors* at the end of para 85, the central issue was whether, in the circumstances, the legal framework applicable to the occupation of pitches on local authority gypsy sites provided the applicant with sufficient procedural protection of his rights. There is an echo here of the point made in para 84 about the vulnerable position of gypsies as a minority and the need for some special consideration to be given to their needs and different lifestyles. No mention is made of the general principles or their application to the situation that was discussed in *Qazi*, where the issue was whether the procedure by which a public authority landlord recovers possession of residential accommodation from a former tenant whose tenancy has come to an end by operation of law by asserting its unqualified right to possession was incompatible with the rights guaranteed by article 8. It is, of course, possible to envisage special cases other than that of gypsies. But the fact that special consideration must be given to their needs does not justify the proposition that this must be done in every case. As the Court of Appeal acknowledged in para 29, a statutory regime may itself achieve the balance required by article 8(2) so that, if the judge complies with it, the requirements of article 8(2) will be satisfied.

100. There was also criticism in *Connors* of the procedure that was adopted in the county court, on the ground that it was concerned only with the fulfilment of the formal requirements for the eviction. The case for the local authority was that it had an absolute and unqualified right to possession, as the applicant's licence had been validly terminated. But this criticism was made in the context of a case where there was a need to give special consideration to the needs of gypsies and their different lifestyles, which was absent from the local authority's decision that the licence should be terminated and for which the statutory regime then in force did not provide. There was no request that the possession proceedings should be stayed for judicial review of the question whether

the decision to seek possession was arbitrary, unreasonable and disproportionate.

101. The facts in *Blecic* were also unusual. The applicant was the holder of a specially protected tenancy of a publicly-owned flat in a town in Croatia. Among the conditions that were applied to a specially protected tenancy by the relevant statutes was the holder's entitlement to purchase it under favourable conditions. But it was open to the public authority to terminate it if the holder ceased to occupy the flat for an uninterrupted period of six months. The applicant left the flat in July 1991 to stay with her daughter in Rome for the summer. As this was intended to be for a short period only she left her furniture and belongings in the flat. She locked it and asked a neighbour to take care of it during her absence. But soon after she left it there was an escalation in the armed conflict which made living in the city dangerous and uncomfortable. Her pension was stopped, she lost the right to medical insurance and her flat was broken into in her absence and occupied by another family. She decided to stay in Rome and did not return until May 1992, by which date a civil action had been brought against her for the tenancy to be terminated. After protracted legal proceedings the Supreme Court held in February 1996 that the applicant's non-use of the flat was unjustified as all residents in the town were exposed to the same living conditions as she would have been, had she made the considerable mental and physical effort that would have been required to provide for her basic living needs there.

102. The court dealt first with the question whether the flat was the applicant's home within the meaning of article 8 of the Convention. It held that it was, as it was satisfied that she did not intend to abandon it and had made appropriate arrangements for its maintenance with a view to its return: para 52. Having found that the termination of the tenancy was an interference with her right to respect for her home, the court then concentrated on the question whether the interference was justified. It was not disputed that the interference was in accordance with the law, and the court held that a legitimate aim was being pursued by the statutory provision which enabled the public authority to terminate specially protected tenancies held by individuals who no longer lived in the publicly-owned flats that had been allocated to them. The only point at issue was whether, in applying that provision to the applicant's case, the Croatian courts infringed her right to respect for her home in a manner that was disproportionate: para 58.

103. In its introduction to its judgment on this issue in para 59 the court made the familiar points that the crucial questions were whether there was a pressing social need, whether the measure employed was proportionate to the legitimate aim pursued and that the scope of the margin of appreciation enjoyed by the national authorities depended not only on the nature of the aim of the restriction but also on the nature of the right involved. Having examined these issues and decided in para 66 that the decisions of the Croatian courts were based on reasons that were not only relevant but also sufficient for the purposes of article 8(2), the court dealt with the question whether the applicant had been involved in the decision-making process, looked at as a whole, to a degree that was sufficient to provide her with the requisite protection of her interests: para 68. As it was satisfied on this point too, it held that there had been no violation of article 8: paras 70, 71.

104. The important point which emerges from the court's decision for present purposes is the need for the applicant to be sufficiently involved in the decision-making process leading to her eviction so that she had the opportunity to present the arguments which in her view were decisive for the outcome of the proceedings. Article 8 contains no explicit procedural requirements, as the court acknowledged at the outset of para 68. But it said that the decision-making process must be fair and such as to ensure due respect of the interests safeguarded by article 8. The task which the court set for itself therefore, basing itself on its existing case law, was to determine whether, having regard to the circumstances of the case and the importance of the decision to be taken, the applicant was involved to a sufficient degree in the decision-making process, seen as a whole, to provide her with the requisite protection. It is also worth noting that the institutions whose actions in the domestic system were under scrutiny in that case were the courts in the contracting state. This suggests that no relevant distinction can be drawn between cases where the party seeking possession is a public authority and those where it is not. The court itself has a function to fulfil in all cases where there is an interest under article 8 that needs to be safeguarded, as it too is a public authority.

105. That however was a case where, as in *Connors*, the question whether the interference with the applicant's home was justified under article 8(2) was a live issue. As I said earlier in this opinion (see para 70, above), the court's only concern as to the question of procedure is that procedures are in place which enable individuals to assert their Convention rights where there is a live question as to whether or not they have been violated. The circumstances which led to the court's decision that there was an interference with the right to respect for the

home that had to be justified were quite different from those in *Qazi*. There was a real and substantial issue as to whether the Supreme Court's decision to terminate the specially protected tenancy in the unusual circumstances of that case was proportionate to the legitimate aim which was being pursued by the public authority. It does not follow that a procedure which enables this issue to be addressed to the extent that was found to be necessary in *Blecic* must be available in every case.

106. This provides the context for an assessment of the significance of the court's decision that the application in *Qazi* was inadmissible. This is after all a decision of the Strasbourg court. The court was provided with the entirety of your Lordships' judgment in that case, as it was submitted as an annexe to the application. So it had before it in full the two dissenting opinions, including Lord Steyn's observation that it would be surprising if the views of the majority on the interpretation and application of article 8 withstood European scrutiny. The fact that there was a sharp division of opinion on these issues could not have been put more clearly. The application was held nevertheless, without detailed discussion, to be inadmissible. What are we to make of this?

Conclusions

107. I would draw the following conclusions. I think that it is reasonable to think that the court accepted that the applicant had established that the house was his home for the purposes of article 8 and that the enjoyment of his right to respect for his home was interfered with at least to some extent by the order for possession sought by the local authority. To that extent therefore there was an issue to be considered under article 8(2). But I think that it is reasonable also to think that the court was satisfied that the requirements of article 8(2) were so obviously met by the law which was applied in that case that there was, as Lord Millett put it in para 103, simply no balance left for the court to strike between the interference with the applicant's right and the legitimate aim that was being pursued by the local authority. As Lord Scott says, the obvious inference is that the Strasbourg court were satisfied that there was nothing more to be said in Mr Qazi's case. The tenancy had come to an end, and he no longer had any right to remain in occupation of the premises. His personal circumstances were irrelevant.

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

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

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

110. But, in agreement with Lord Scott, Baroness Hale and Lord Brown, I would go further. Subject to what I say below, I would hold that a defence which does not challenge the law under which the possession order is sought as being incompatible with the article 8 but is based only on the occupier's personal circumstances should be struck out. I do not think that *McPhail v Persons, Names Unknown* [1973] Ch 447 needs to be reconsidered in the light of Strasbourg case law. Where domestic law provides for personal circumstances to be taken into

account, as in a case where the statutory test is whether it would be reasonable to make a possession order, then a fair opportunity must be given for the arguments in favour of the occupier to be presented. But if the requirements of the law have been established and the right to recover possession is unqualified, the only situations in which it would be open to the court to refrain from proceeding to summary judgment and making the possession order are these: (a) if a seriously arguable point is raised that the law which enables the court to make the possession order is incompatible with article 8, the county court in the exercise of its jurisdiction under the Human Rights Act 1998 should deal with the argument in one or other of two ways: (i) by giving effect to the law, so far as it is possible for it do so under section 3, in a way that is compatible with article 8, or (ii) by adjourning the proceedings to enable the compatibility issue to be dealt with in the High Court; (b) if the defendant wishes to challenge the decision of a public authority to recover possession as an improper exercise of its powers at common law on the ground that it was a decision that no reasonable person would consider justifiable, he should be permitted to do this provided again that the point is seriously arguable: *Wandsworth London Borough Council v Winder* [1985] AC 461. The common law as explained in that case is, of course, compatible with article 8. It provides an additional safeguard.

The decision in Qazi itself

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

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

113. For these reasons I do not think that the reasoning of the majority in *Qazi* should be departed from. But I accept that the reasoning needs to be clarified. In the light of the subsequent Strasbourg cases I would now place greater emphasis on the need for the court to provide a remedy in those special cases of a kind not considered in *Qazi* where it is seriously arguable that the right to possession which is afforded by domestic law violates the Convention right. Lord Millett suggested in para 109 of his speech in *Qazi* that judicial review would provide the appropriate remedy. On balance I think that it would be better for the issue to be dealt with by way of defence to the proceedings in the county court, to the extent that the limits on the jurisdiction of that court permit it to do so: see paras 86, 110.

114. There may, however, be cases like *Connors* where the incompatibility with the article 8 Convention right lies in primary legislation which the county court is being asked to apply to the case by the public authority: see para 86, above. In such a case it would be open to the High Court to make a declaration of incompatibility, if it was not possible to read or give effect to the legislation under section 3 of the Human Rights Act 1998 in a way which was compatible with the Convention right. But the legislation would nevertheless still have to be enforced, unless the decision of the public authority to seek to enforce it when faced with that incompatibility could be said, when judicially reviewed, to be arbitrary, unreasonable or disproportionate. The decision could not be held in the county court to be an unlawful act within the meaning of section 6 of the 1998 Act: see section 6(2)(b). The fact that the question of incompatibility that was raised in *Connors*

was not capable, under the domestic system, of being dealt with effectively in the county court because of the limits on its jurisdiction reinforces, rather than detracts from, the proposition that a defence which is raised in that court under article 8 should be struck out unless the legislation can be read and given effect in a way that is compatible or it raises an issue as to its incompatibility that ought to be considered in the High Court.

Conclusion in the Lambeth appeal

115. For the reasons given by my noble and learned friend Lord Scott of Foscote I would reject the arguments which Mr Luba advanced on the private law issue. The appellants' right to continue in occupation of premises over which they never had any rights granted to them by the landowner was brought to an end by the operation of law when Lambeth gave notice terminating the leases to LQHT. They have no right to remain there indefinitely, which would be the effect of denying to Lambeth its unqualified right to possession of the premises on the ground that to give effect to this right would be incompatible with article 8. Their interests will be sufficiently protected by the fulfilment of the formal requirements for the eviction, which demand proof by the public authority landowner of its entitlement to obtain an order for possession in the exercise of its property rights. I would dismiss this appeal.

Conclusion in the Leeds appeal

116. These appellants had been present on the recreation ground for only two days when proceedings were taken against them for the making of the possession order. Unlike the applicant and his family in *Connors*, they never had any right of any kind to make their home there. They were trespassers. They are, of course, gypsies who are in a vulnerable position as a minority. But they had not established the links with the place which they were occupying that were needed for it to be considered as their home within the meaning of article 8(1). Even if it was, such consideration as ought to be given to their needs and their different lifestyle under article 8(2) is met, on the facts of their case, by requiring proof by the public authority of its entitlement as the owner of the land to obtain an order for possession in the exercise of its property rights. I would dismiss this appeal also.

LORD SCOTT OF FOSCOTE

My Lords,

Introduction

117. An Appellate Committee of seven has heard two appeals together in each of which the main issue for decision is the scope that should be given to article 8 of the European Convention on Human Rights.

118. Article 8, entitled "Right to respect for private and family life", provides that

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence."

and, in 8(2), imposes a bar on interference by a public authority with that right:

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

119. The article 8(1) "right to respect" covers, potentially, a very wide spectrum of personal interests (see Lester & Pannick, Human Rights Law and Practice, 2nd ed (2004), para 4.8.2), but these appeals are concerned only with the article 8 right of a person to respect for his home. It is contended by the appellants, against whom possession orders have been made, that whenever an owner of land takes legal proceedings to recover possession of the land from an occupier who has his home on the land, the action taken by the owner constitutes, *prima facie*, an interference with the occupier's right to respect for his home, and, consequently, that an order for possession cannot properly be made unless the article 8(2) conditions are satisfied. It may be, of course, that

the occupier has some ground under ordinary domestic law for resisting the possession application. In that case reliance by the occupier on article 8 rights will be unnecessary. But in a case in which the occupier is a trespasser with no right under ordinary domestic law to resist the landowner's possession application, article 8(2), it is said, provides a further ground for resistance and obliges the judge who hears the application to be satisfied, before making an order for possession, that the order is necessary and proportionate in furthering one or other of the legitimate aims referred to in article 8(2).

120. In *Harrow London Borough Council v Qazi* [2004] 1 AC 983 this House by a majority rejected that contention and held that "contractual and proprietary rights to possession cannot be defeated by a defence based on article 8" (per Lord Hope of Craighead at para 84). If that is right, both these appeals must fail. But the issue has come back before the House, this time with an Appellate Committee of seven, because in *Connors v United Kingdom* [2004] 40 EHRR 189 the European Court of Human Rights in Strasbourg held that the eviction of a gypsy family and their caravan from a local authority gypsy site on which the family had no contractual or proprietary right to remain constituted a violation of their article 8 right to respect for their home. It is submitted that the decisions in the *Qazi* case and the *Connors* case are irreconcilable and your Lordships are asked to follow the latter case, reverse the former case, and hold that the possession orders made against the appellants violated their article 8 rights. The main issue for your Lordships is whether or not to accede to that submission.

121. In both the cases now before the House the lower courts held themselves bound to follow *Qazi* notwithstanding the later decision of the Strasbourg Court. The question has been raised whether the requirement imposed by section 2(1) of the Human Rights Act 1998, that a domestic court determining a question which has arisen in connection with a Convention right must take into account "any judgment, decision, declaration or advisory opinion" of the Strasbourg court, relieved the domestic courts of their obligation to follow the prior ruling of your Lordships in *Qazi*. This, too, is an important issue regardless of whether on these appeals your Lordships conclude that the *Connors* decision requires the conclusion that the *Qazi* ruling was wrong. On both these two important issues the First Secretary of State has intervened and, through Mr Philip Sales, has assisted your Lordships with written and oral submissions. As to the issue of precedent, I am in complete agreement with what my noble and learned friend Lord Bingham of Cornhill has said in paras 40 to 45 of his opinion and to which there is nothing that I can usefully add.

122. In addition, however, there is a domestic private law issue which arises in the *Lambeth* appeal. The appellants contend that they were entitled to be treated by Lambeth Borough Council ("Lambeth") as tenants, not as trespassers. If that is right, it is common ground that the tenancies under which they say they are entitled to occupy the properties in question were never terminated and the possession orders made against them must be set aside. It is convenient to deal with this private law issue before grappling with the article 8 issue. First, however, I should refer to the essential facts of the two cases.

The facts in the Leeds case

123. The appellants are the Maloney family. There are five of them. They are travellers, whose home is in one or more caravans, often on the move from one place to another.

124. The respondent is Leeds City Council ("Leeds"). Leeds is the owner of a recreation ground at Spinkwell Lane in Leeds. On or about 24 May 2004 a number of travellers with their caravans entered the recreation ground and parked their caravans there. This was without Leeds' permission. After a few days the first group of travellers moved on, but others took their place. On 13 June 2004 the Maloneys moved on to the recreation ground. Two days later, on 15 June, Leeds commenced proceedings in the Leeds County Court for possession of the recreation ground. The particulars of claim said that the travellers were trespassers and refused to vacate the recreation ground. 24 June 2004 was the return date specified on the claim form. The Maloney family were the only occupiers of the recreation ground to attend court on that date and contest the possession application. They were formally joined as defendants. The case was adjourned to be heard on 18 October.

125. Leeds' claim to possession was based on its ownership of the recreation ground which was not in dispute. Nor was it in dispute that the Maloneys were trespassers who had entered onto and remained on the land without any licence or consent from Leeds. They sought to defend by relying on article 8 and by contending that Leeds was in breach of its statutory obligations to provide suitable sites where gypsies could park their caravans. They said, also, that their personal circumstances were "exceptional" in that several members of the family suffered from medical and psychiatric problems, three members of the family were school age children and in the twelve months preceding

their entry onto the recreation ground the family had been evicted or forced to move under threat of eviction more than fifty times. Leeds responded by notifying the family that their status as unintentionally homeless and in priority need was accepted and by accepting a duty to help them obtain accommodation.

126. On 22 September the case was transferred to the High Court. The article 8 issue was dealt with as a preliminary issue and, on 25 October, His Honour Judge Bush, sitting as a deputy judge of the High Court, following *Qazi*, held that contractual and proprietary rights to possession could not be defeated or qualified by reliance on article 8. So he made an order for possession forthwith. He refused a stay of execution but gave leave to appeal to the Court of Appeal.

127. Following the order for possession and the refusal of the stay of execution the Maloneys and their caravans left the recreation ground. But, nonetheless, they gave notice of appeal to the Court of Appeal. The appeal seems to have been prosecuted simply for the purpose of ventilating the article 8 issue. Important though this issue undoubtedly is, it seems to me a misuse both of public money and of court time to have prosecuted on appeal a point that had become moot. No one has suggested that an appellate court would have had power to order Leeds to permit the Maloneys and their caravans to re-enter the recreation ground, trespassers again as they had been before. No one has suggested that any monetary award should be made in favour of the Maloneys and against Leeds.

128. There is a further point to be made on the facts of the Leeds case. Whether the approach to article 8 taken in *Qazi* be right or wrong, it is common ground that the article does not give any protection to the occupation of land or a building unless the land or building is the occupier's "home". If a traveller with his caravan enters as a trespasser upon a piece of land, by what process does the small area of land on which he happens to station his caravan and, presumably, a few square yards surrounding that small area of land, become identified as his "home"? If a homeless person enters an unoccupied building, places his few possessions in one of the rooms and spends the next night or two there, does the room become his "home" in relation to which he is entitled to an article 8 "right of respect"? The answer must, I think, be 'No'. It is clearly possible for a trespasser to establish a "home" in property that belongs to someone else but whether and when he has done so must be matters of degree. In *Buckley v United Kingdom* (1996) 23 EHRR 101 the Strasbourg commission, in para 63, said that

> "whether or not a particular habitation constitutes a 'home' which attracts the protection of article 8(1) will depend on the factual circumstances, namely, the existence of sufficient and continuous links."

129. It could not, in my opinion, credibly be suggested that in the two days between the entry by the Maloneys on the recreation ground and the commencement by Leeds of possession proceedings the Maloneys had established "sufficient and continuous links" with the piece of land on which their caravan stood so as to constitute that singular piece of land their article 8(1) "home".

130. In my opinion, the *Leeds* case was a very bad one to choose for the purpose of revisiting the correctness of *Qazi* since, whether the appellants' arguments be right or wrong, it is grotesque to suppose that the Maloneys could claim that the commencement by Leeds of possession proceedings to recover its recreation ground was an interference with their right to respect for a "home" that they had established on Leeds' land. Be that as it may, the *Lambeth* case, by contrast, seems to me a very good test case.

131. Both Judge Bush and the Court of Appeal, following *Qazi*, rejected the Maloneys' reliance on article 8.

The facts in the Lambeth case

132. This case involves residential premises as opposed to open spaces on which caravans may be parked. The properties in question are owned by Lambeth and are mostly in the area of Rushcroft Road London SW2. They are, and have been for several years, occupied by the appellants and it is common ground that they constitute the appellants' homes for article 8 purposes. The properties are part of Lambeth's "short life" housing stock, that is to say, they "are not in a condition suitable for normal housing use or capable of being rendered so suitable within finances available to Lambeth" (per Auld LJ at para 7 of his Court of Appeal judgment).

133. London and Quadrant Housing Trust ("LQHT") is a charitable housing trust. In 1979 Lambeth and LQHT came to an informal arrangement under which Lambeth licensed "short life" premises to

LQHT for LQHT to make the premises available as accommodation for persons who were homeless but to whom Lambeth owed no statutory duty to arrange accommodation. LQHT purported to grant licences to those whom it allowed into occupation. Each of the appellants is a person who was allowed by LQHT into occupation of a Lambeth owned short life property under a purported licence granted by LQHT.

134. In 1986 the informal arrangement between Lambeth and LQHT was replaced by a formal licence agreement which reflected the previous informal arrangements. On 4 December 1995, however, Lambeth granted LQHT a ten year lease of the short life properties. Clause 2 of the lease gave Lambeth the right to determine the ten year terms on the expiry of six months and one week's notice in writing to LQHT stating that Lambeth required possession of the demised properties.

135. On 24 June 1999 this House announced its decision in *Bruton v LQHT*, now reported in [2000] 1 AC 406. The House held that the "licence" arrangement between LQHT and Mr Bruton, who had been allowed by LQHT into occupation of one of the properties that had been subject to the 1986 licence arrangements and, since 4 December 1995, subject to the 1995 lease, had created as between LQHT and Mr Bruton a relationship of landlord and tenant and not, as LQHT had supposed, a relationship of licensor and licensee. It followed from the *Bruton* decision that each of the occupiers who had been allowed by LQHT to occupy properties on similar terms to those under which Mr Bruton occupied was a tenant of LQHT, not a licensee. So each of the appellants in the *Lambeth* case was a tenant of LQHT.

136. Lambeth's response to the *Bruton* decision was to give notice to LQHT to terminate the 1995 lease. The notice was given on 23 November 1999. Lambeth then notified the occupiers that they were, or would soon become, trespassers vis-à-vis Lambeth and would have to leave their respective residences. Six actions were commenced over the period between July 2000 and the end of that year. In each action Lambeth claimed possession of a property of which LQHT had been the lessee under the 1995 lease. The possession claim was made against the occupier of the property. Each occupier, who had, as a result of *Bruton*, been a tenant of LQHT, responded by claiming to have become, on the determination of the 1995 lease, a tenant of Lambeth. And, in addition, each occupier claimed that his article 8 right to respect for his home gave him an alternative defence to Lambeth's possession claim.

137. Judge Roger Cooke, in the county court, and the Court of Appeal followed *Qazi* and rejected the occupiers' reliance on article 8. As to the private law tenancy defence, that too was rejected both at first instance and on appeal. A number of grounds in support of the tenancy defence that were relied on in the courts below were not relied on here. Two grounds only have been relied on here and to those I now turn.

Are the appellants tenants of Lambeth?

138. The first of the two grounds relied on starts with the proposition that the grant of the 1995 lease by Lambeth to LQHT involved, by necessary implication, a surrender by LQHT of the licence it had been granted by Lambeth in 1986. But, it is said, it was not open to LQHT to surrender the tenancies that, as *Bruton* had held, LQHT had granted to the appellants. So, the argument proceeds, the appellants' *Bruton* tenancies must have survived the surrender by LQHT of its 1986 licence and have become, in the *scintilla temporis* between the surrender of the licence and the grant of the 1995 lease, tenancies held directly of Lambeth. Lambeth thereby became, and has remained, bound by the tenancies. The grant of the 1995 lease to LQHT interposed LQHT once more between Lambeth and the appellants but could not detract from the rights that the occupiers had already, in the *scintilla temporis*, acquired against Lambeth.

139. Alternatively, it is said that when Lambeth served notice on LQHT to determine the 1995 lease, the only effect of the notice, as between Lambeth and the appellants, was to clear away LQHT's intermediate estate. The notice could not affect the appellants' rights under their tenancies which predated the grant of the 1995 lease.

140. For the purpose of both these arguments the appellants rely on the principle established by *Mellor v Watkins* (1874) LR 9 QB 400, namely, that where A has granted a tenancy to B and B has granted a sub-tenancy to C, a surrender by B to A of B's tenancy does not determine C's sub-tenancy but has the effect that A becomes C's landlord i.e. C holds his tenancy directly from A. The principle was explained by Blackburn J at p 405:

> "[B] had no power to derogate from his landlord's [A's] rights. Subject to those rights, he had a right to sub-let; and by doing that he could not prevent the landlord from

> giving a notice to quit in invitum, which would have determined both [B's] and the defendant's [C's] interest. But no voluntary act on the part of [B], by which his own interest might be determined, could put an end to the interest which he had created in the defendant. [B's] tenancy was put an end to as far as he was concerned, as between him and [A], by the voluntary surrender of his lease; but the defendant's [C's] tenancy … still remained, until determined by a proper notice to quit."

141. The reason why this principle is applicable where an intermediate tenant who has granted a sub-tenancy surrenders his tenancy to his landlord is that the sub-tenancy is a derivative interest created by the intermediate landlord out of the interest created by the head landlord. The sub-tenancy belongs to the sub-tenant, not to the intermediate landlord. It is an item of property that cannot be given away by someone to whom it does not belong. It follows that it cannot be surrendered by the intermediate landlord. A surrender is a consensual transaction between landlord and tenant. It derives its effect from the terms of that transaction, not from the terms of the lease or tenancy that is surrendered. The rights of a sub-tenant cannot be reduced or terminated by a transaction to which the sub-tenant is not a party (see *Barrett v Morgan* [2000] 2 AC 264 per Lord Millett at 271 D - E).

142. If, on the other hand, the termination of the lease is provided for in the terms of the lease itself, e.g. a provision in the lease enabling the landlord or the tenant to give a week's notice terminating the lease, a sub-tenancy cannot, absent statutory intervention, survive the termination of the tenancy by such a notice. The interest of the sub-tenant was created out of the term created by the lease and was, therefore, always subject to termination in accordance with the terms of the lease. *Pennell v Payne* [1995] QB 192 is a recent re-affirmation by a strong Court of Appeal of this principle and was approved by this House in *Barrett v Morgan* at 274B.

143. But the *Mellor v Watkins* principle and the *Pennell v Payne* principle can have no relevance to a case in which a tenancy has been granted by someone without any estate in the land in question. The *Bruton* tenancies are all of that character. LQHT was, when it granted the *Bruton* tenancies, merely a licensee of Lambeth. The tenancies were not granted by Lambeth and were not carved by LQHT out of any estate that Lambeth had granted to LQHT. They were not derivative estates. LQHT, prior to the grant of the 1995 lease, had no estate in the land. It

merely had a contractual licence. In these circumstances the *Mellor v Watkins* point that the intermediate landlord cannot by a consensual surrender give away an interest that belongs to a sub-tenant has no substance. True it is that LQHT could not by a surrender of its licence give away or prejudice the rights of the *Bruton* tenants against itself, LQHT. But these rights never were enforceable against Lambeth. Once the LQHT licence had been terminated the appellants were trespassers as against Lambeth.

144. An analogous situation would arise if a person not the owner of land but in adverse possession of it were to grant a tenancy of the land to another. As between the grantor and grantee there would be a valid "non-estate" tenancy. But unless and until the adverse possession had continued for the requisite 12 years the tenancy would not bind the true owner of the land. An agreement by the adverse possessor to deliver up the land to the true owner would not affect the rights of his tenant against him, the landlord, but equally could not turn the tenant into the true owner's tenant or give the tenant any rights against the true owner.

145. So, too, the consensual termination of LQHT's contractual licence from Lambeth could not, in my opinion, turn the *Bruton* "non-estate" tenants into estate tenants of Lambeth. I agree with Mr Luba, counsel for the appellants, that the *Bruton* tenants were not bound by a transaction between Lambeth and LQHT to which they were not parties. But the contended for conclusion that they therefore became tenants of Lambeth is a non-sequitor. They never were *sub*-tenants holding, via a grant from LQHT, an interest created by Lambeth. They were tenants of LQHT holding an interest created by LQHT. The *Mellor v Watkins* principle has, in my opinion, no application to such a case.

146. As to the effect on the *Bruton* tenancies of the grant of the 1995 lease to LQHT and the termination of that lease in 2000, there are two points to be made. First, I agree with the appellants that when in 1995 LQHT were granted a term of years by Lambeth the *Bruton* tenancies became, vis-à-vis Lambeth, no longer "non estate" tenancies but estate tenancies. The *Bruton* tenancies were, so to speak, fed by the estate that their landlord, LQHT, had acquired.

147. But that estate was from the outset subject to the terms of the 1995 lease. The termination of that lease in 2000 in accordance with the termination provisions contained in it terminated the entitlement of the *Bruton* tenants to claim an estate derived from and binding on Lambeth:

see *Barrett v Morgan* [2000] 2 AC 264 where, at 272, Lord Millett referred to a sub-tenant's derivative title as precarious "… for it cannot survive the natural termination of the head tenancy in accordance with its terms agreed before his subtenancy was created." The "estate" tenancies held by the appellants were derived from and could not survive the termination of the 1995 lease. The "non-estate" *Bruton* tenancies could survive as against the grantor of them, LQHT, but they were not binding as against Lambeth.

148. In my opinion, therefore, in agreement with Judge Cooke and the Court of Appeal, the appellants had no right under ordinary domestic law to retain possession of their respective properties after the termination of the 1995 lease. They had become, vis-à-vis Lambeth, the owner of their properties, trespassers with no right to remain.

The article 8 issue

149. These appeals have proceeded on the footing that at the heart is the issue whether there is an inconsistency between the Strasbourg court's judgment in *Connors* and the judgment of this House in *Qazi* and, if so, to what extent. The Court of Appeal in *Leeds* thought that the two were inconsistent. A differently constituted Court of Appeal in *Lambeth* distinguished *Connors* as being applicable only to cases involving gypsies (see para 106) but Mr Luba QC's article 8 submissions to the House on both these appeals were based on the proposition that there were substantial inconsistencies between *Qazi* and *Connors*. My Lords I believe this focus to be misdirected. There are, I would accept, inconsistencies between *Qazi* and *Connors* but they are minor. Much more important is an analysis of the Strasbourg article 8 jurisprudence, ending with *Connors* and *Blecic*. If that is done then I think it becomes apparent that such differences as there are between the approach of the majority in *Qazi* to article 8 defences in possession cases and the approach of the Strasbourg court to article 8 defences in possession cases is of no relevance to cases like those now before the House or, indeed, to a case such as *Qazi*.

150. Let me start with the state of Strasbourg article 8 jurisprudence as it stood when the House heard the appeal in *Qazi*. The Strasbourg case law as it then stood was examined and analysed by my noble and learned friends Lord Bingham of Cornhill and Lord Hope of Craighead. In the opinion I gave, I expressed the view that in a case where the person occupying the property as his home had no legal or contractual

right to remain there, as against the legal owner of the property, a claim by the owner to recover possession would not engage article 8 at all. But Lord Bingham, Lord Hope, Lord Steyn and Lord Millett thought differently and I would accept that it is now settled that such a claim does engage article 8. The contrary view is not, and has not been since *Qazi*, in issue. It follows that article 8(2) comes into play in all such possession cases. But the Strasbourg jurisprudence showed, also, that where an ordinary housing possession claim is being made, whether by a local authority landlord eg *S v United Kingdom* (1986) 47 DR 274, a private landlord eg *Di Palma v United Kingdom* (1986) 10 EHRR 149, a mortgagee eg *Wood v United Kingdom* (1997) 24 EHRR CD 69, an article 8 defence cannot assist the occupier to resist a possession order sought by the legal owner. *A fortiori* article 8 could not assist an occupier who had entered and remained on the property as a trespasser. In each of the cases to which I have referred the ex-occupier's article 8 complaint was dismissed. In *S* the Commission said that the possession order

> " … was clearly in accordance with the law and was also necessary for the protection of the contractual rights of the landlord to have the property back at the end of the tenancy". (para 4)

In *Di Palma*, the Commission said that the interference with the applicant's article 8 rights brought about by the forfeiture of her lease on account of her failure to pay a service charge

> " … was in conformity with Art.8(2) as a measure which was in accordance with the law and necessary in a democratic society for the protection of the rights of others" (pp 155 - 156).

For "the rights of others", read "the rights of the landlord".

In *Wood* the Commission said that the re-possession of the applicant's home on account of her failure to keep up repayments of the mortgage loan

> " … was in accordance with the terms of the loan and the domestic law and was necessary for the protection of the

> rights and freedom of others, namely the lender" (pp 70 - 71).

In none of these cases did the Commission undertake a balancing exercise which put into the scale the personal difficulties and problems of the occupier whose home had been the subject of the possession order.

151. Contrast, on the other hand, the Strasbourg approach to the article 8 cases where the interference with the "right to respect" for the home did not consist of an application for possession by the owner.

(1) In *Gillow v United Kingdom* (1986) 11 EHRR 335, a Guernsey case, the issue concerned a provision of the housing legislation under which a person not resident in Guernsey required a licence to take up residence there. This provision was applied to Mr and Mrs Gillow. They were refused a licence and their occupation of the residence they had acquired for themselves some years earlier was declared unlawful by the domestic courts. On their complaint to Strasbourg the court examined all the facts, held that the housing law provisions were not *per se* inconsistent with article 8 but that the decision to refuse Mr and Mr Gillow the requisite licence did constitute an article 8 breach (see para 58).

(2) *Buckley v United Kingdom* (1996) 23 EHRR 101 is an important case. This was a gypsy case. The article 8 issue arose because the applicant, who with her family lived in caravans on land that she had acquired for that purpose, had been refused planning permission for that use of the land. An enforcement notice had been served. The Commission had held that the enforcement notice was "excessive and disproportionate" (para 84 at p120) but the case then went to the full court. The court looked carefully at the justification for the application of the statutory planning controls to the applicant, noted that it was for the national authorities to make the initial assessment of the necessity for the enforcement measures (para 74) and said (at para 76) that

> "Whenever discretion capable of interfering with the enjoyment of a Convention right such as the one at issue in the present case is conferred on national authorities, the procedural safeguards available to the individual will be especially material in determining whether the respondent state has, when fixing the regulatory framework, remained

> within its margin of appreciation. Indeed it is settled law that … the decision making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded to the individual by Article 8."

The court then (in para 84) held that the planning authorities, in deciding to apply enforcement measures, had paid proper regard to the applicants' interests. The court emphasised that "… it is not the court's task to sit in appeal on the merits of [the planning authorities'] decision." So no violation of the applicant's article 8 rights was found. I would, however, draw particular attention to the court's emphasis on the need for "procedural safeguards". This emphasis is found also in *Connors*.

152. I have mentioned *Gillow* and *Buckley*, neither of which was a possession order case, for the purpose of the contrast they present when compared with the ordinary housing possession cases. There are several other non-possession order cases but none adds anything to assist in the clarification of the Strasbourg jurisprudence relating to the possession cases. I should mention, however, *Larkos v Cyprus* (1999) 30 EHRR 597. This was a possession case which, on analysis, seems to me to have had a good deal in common with, and therefore to be of assistance in understanding, *Connors*. The applicant, Larkos, was a tenant of the house in which he lived. His landlord was the government. His tenancy was terminated by the government and an eviction order was made against him. This, as I would now accept, was an interference with his article 8 right to respect for his home. Statutory provisions applicable in Cyprus gave a degree of security of tenure to domestic tenants that did not extend to domestic tenants of government owned property. The applicant complained that this statutory discrimination constituted a violation of his rights under article 14 of the Convention in conjunction with article 8. He said there was no good reason why he should enjoy less protection than tenants of private landlords. Both the Commission and the Court agreed. The Court said that

> " … the legislation was intended as a measure of social protection for tenants …. A decision not to extend that protection to government tenants living side by side with tenants in privately-owned dwellings requires specific justification …" (para 31)

and that the government had failed to provide "any convincing explanation" for that decision (para 31).

153. In *Qazi* the majority, of whom I was one, held that "contractual and proprietary rights to possession cannot be defeated by a defence based on article 8" (per Lord Hope of Craighead at para 84). Mr Qazi and his wife had been tenants of a local authority house. They had parted company and Mrs Qazi had served a notice to quit on the landlords. This had the effect in law of terminating the tenancy. Mr Qazi wanted to remain in the house and applied for a new tenancy in his sole name; but his application was refused. The council said they wanted to let the house to someone else on their housing list. They instituted possession proceedings in the county court. Mr Qazi had no right under ordinary domestic law to remain in the house but he resisted the possession application on the ground that his article 8 right to respect for his home was being unlawfully interfered with. The trial judge held that once his legal and equitable right to occupy the house had come to an end the house could not constitute his "home" for article 8 purposes. So the judge made a possession order. The Court of Appeal did not agree that the house no longer constituted Mr Qazi's home and remitted the case to the county court in order for the issue as to whether the interference with his article 8 right could be justified under article 8(2) to be decided. On the council's appeal to this House we all agreed that the Court of Appeal's conclusion on the "home" issue was correct but the majority took the view that it would be pointless to remit the case to the county court since it was plain that the article 8(2) point would have to be decided in the council's favour.

154. The conformity of the majority's opinion on the article 8(2) point with Strasbourg jurisprudence was confirmed when Mr Qazi took his article 8 complaint to Strasbourg where it was peremptorily dismissed. The Court dismissed his complaint as being manifestly ill-founded and inadmissible. This decision by the Court was entirely consistent with their 1995 decision in *Ure v United Kingdom* (Application No 28027/95). My noble and learned friend Lord Bingham has expressed doubt whether any reliable inference can be drawn from the finding of inadmissibility made in respect of Mr Qazi's application (para 23). The inference I would draw is the obvious one, namely, that the Court thought his article 8 complaint could not succeed because his eviction could clearly be justified under article 8(2). His tenancy had come to an end and there was nothing more to be said. I would draw comparable inferences from the decisions in *S*, in *Di Palma* and in *Wood*.

155. It is true that the Strasbourg jurisprudence is not entirely consistent. In *Ure v United Kingdom* (Application No 28027/95), for instance, the Commission appear to have reviewed the manner in which the council had "balanced the various interests involved, such as the interest of the leaving co-tenant, of those in need of accommodation, and of the applicant" before concluding that the council's decision to evict the applicant was neither arbitrary nor unreasonable (p 3). And in *Marzari v Italy* (1999) 28 EHRR CD 175, where the applicant had been evicted for failure to pay his rent and had prayed in aid, in support of his article 8 complaint, his serious medical condition, the Court said that

> "To the extent that the ITEA aimed at recovering possession of the apartment on the ground that the applicant had ceased to pay the rent, the Court considers that the impugned decision had a legitimate purpose under paragraph 2 of Article 8, namely the protection of the rights of others" (p 180)

but then went on to consider the applicant's medical condition in connection with the question whether the eviction was necessary in a democratic society. The Court found that it was, mainly, I think, because the applicant had been "never co-operative" and had not "use[d] the avenues which were available to him and which were even pointed out to him in order to avoid the eviction." Very similar comments could have been made about the applicant in *Di Palma*.

156. Nonetheless, despite some inconsistencies, the state of Strasbourg jurisprudence, at the time *Connors* was decided, exhibited, in relation to article 8 defences to possession applications made by the owners of properties that constituted the homes of the occupiers from whom possession was sought, the following features:

(1) There had been no case in which the grant of a possession order to enable the owner to evict from possession a person who was, or had become, a trespasser had been held to constitute a breach of the latter's article 8 right to respect for his home.
(2) In the majority of cases the right of the owner to a possession order had been treated as axiomatic once it had become clear that the occupier had no contractual or proprietary right as against the owner to remain in possession.
(3) But if the domestic law rules applicable to the relationship between the owner and the occupier included some unusual feature that placed the occupier in a position of particular disadvantage, that

> feature of the law, if insufficiently or unconvincingly justified, might lead to a finding of an article 8 infringement. It may be that *Larkos v Turkey* should be regarded as an example of this. It so happens that the complaint made was an article 14 complaint. But the grounds on which the complaint was held to be well-founded seem to me to show that if the complaint had been couched as an article 8 complaint it would, for the same reasons, have been held to be well-founded.

157. Both *Connors* and *Blecic* are, in my opinion, consistent with this analysis of the pre *Connors* jurisprudence. There are three features of *Connors* that contributed to the Court's conclusion that the eviction of the family from the local authority caravan site constituted a breach of their article 8 right to respect for their home.

158. First, the security of tenure given by the Mobile Homes Act 1983 to travellers licensed to station their caravans on privately owned caravan sites was not extended to travellers licensed to station their caravans on local authority owned sites. The Court was not persuaded by the government's attempt to justify this discrimination which raised an issue of the same nature as that which in *Larkos v Turkey* had been successfully raised as an article 14 issue. In *Larkos* the result would have been the same if the complaint had been an article 8 complaint. In *Connors* the result on this point would have been the same if the complaint had been dealt with as an article 14 complaint.

159. Second, Strasbourg jurisprudence in relation to article 8 and gypsies has established that contracting states have a positive obligation "to facilitate the gypsy way of life" (see para 84 of the *Connors* judgment). The Court said 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."

It was this requirement for "special consideration" to be given to gypsies that led the Court of Appeal in *Lambeth* to conclude that the principles expressed by the Strasbourg court in *Connors* were not applicable to Kay and the other *Bruton* tenants.

160. The third notable feature of *Connors* is the importance placed by the court on "procedural safeguards". 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. But the High Court had refused permission. In consequence, the reasons why the local authority had wanted him off the site were never challenged in court proceedings. Under the applicable domestic law the local authority did not have to justify their decision to terminate his licence but in fact their reason had been that they thought Mr Connors and his family had been making a nuisance of themselves on the site. Mr Connors denied that that was so but, his attempt to seek judicial review of the decision having foundered, the issue was never judicially tested.

161. The three features to which I have referred provide the context for the Strasbourg court's *Connors* judgment, a context that has no counterpart in the facts of either of the appeals now before the House (nor in the facts of the *Qazi* case). There is no unusual or discriminatory feature of the legal framework under which Lambeth in the *Bruton* tenancy appeals and Leeds in the Maloney appeal became entitled to possession orders in respect of their respective properties. In the Maloney case, whatever positive obligation there may be for Leeds to provide sites for gypsies and their caravans, the Maloney family cannot claim that two days of trespassing with their caravans on a local authority recreation ground enabled them to claim an article 8 right of respect for the patch of recreation ground on which they happen to have parked the caravans.

162. As to "procedural safeguards", each of the *Bruton* tenants filed a pleading setting out the basis on which his article 8 defence, as well as his domestic law defence, was based. The article 8 defences were given due judicial consideration but were struck out as being incapable of constituting a defence to Lambeth's possession claim. Whatever "procedural safeguards" are requisite, they cannot bar a court from ruling in a particular case that the pleaded facts and matters relied on are not capable of outweighing in the balance the contractual and/or proprietary right to possession of the owner of the property in question. If the home occupier thinks the judge's ruling to be in error, the ruling can, as happened in the *Bruton* tenancy cases, be reviewed on appeal, or on an application for permission to appeal.

163. *Blecic v Croatia* (2004) 41 EHRR 185 is an interesting example of the Strasbourg court's approach to a case where the interference with the home has involved an unusual statutory provision. *Blecic* was not a

case of an owner of property seeking possession from a home occupier. Mrs Blecic had left her flat in Zadar, Croatia, which she occupied under a "specially protected" tenancy granted by the local authority, in order to visit her daughter in Rome. While she was away armed conflict erupted in the area, her pension ceased to be paid and she lost the right to medical insurance. So she stayed in Rome for some nine months. During her absence another family moved into her flat and the local authority commenced proceedings to terminate her tenancy. The proceedings were taken in reliance on a provision of the applicable housing legislation which said that a specially protected tenancy could be terminated if the tenant ceased to occupy the flat for a period exceeding six months without justified reasons. So the issue was whether Mrs Blecic had justified reasons for staying away for nine months. The course of the proceedings was somewhat convoluted but, despite some successes in the lower courts, Mrs Blecic lost both in the Croatian Supreme Court and in the Constitutional Court. She then took her complaint to Strasbourg and lost there as well.

164. In para 65 of its judgment the Strasbourg court explained its approach. They said that in socio-economic matters such as housing the domestic authorities should be accorded a wide margin of appreciation and that the judgment of the domestic authorities as to what was necessary to achieve its objectives should be respected unless that judgment was manifestly without reasonable foundation. They said that 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."

The court held, further, (in para 70) that they were satisfied

> "… that the procedural requirements implicit in Art. 8 of the Convention were complied with and that [Mrs Blecic] was involved in the decision-making process to a degree sufficient to provide her with the requisite protection of her interests."

So Mrs Blecic lost.

165. It is informative, I think, to compare what was said in *Blecic* with what had been said nine months earlier in *Connors*. Where interference with gypsies' article 8 rights had happened, the court said that "particularly weighty reasons of public interest by way of justification" were required and that the margin of appreciation to be afforded to the national authorities "must be regarded as correspondingly narrowed" (para.86 of *Connors*). Accordingly, the court 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" (para 94 of *Connors*). But in *Blecic*, a housing case, the margin of appreciation was held to be wide and the judgment of the domestic authorities was to be accepted unless manifestly ill-founded.

166. In both *Connors* and *Blecic* the Strasbourg court reviewed with article 8 spectacles, first, the legal framework under which the home occupier had been deprived of his home. In *Blecic* that framework passed muster. In *Connors* it did not. Second, the court reviewed the manner in which the legal framework had been applied. In *Blecic* that, too, passed muster. In *Connors*, the review was of the local authority's decision to seek a court order to evict the Connors family. The only domestic law review of that decision consisted of the adverse ruling on the application for permission to seek judicial review of the decision. That review was held to be inadequate.

167. So what are the implications of these two Strasbourg judgments, first, for the House's decision in *Qazi* and, more important, for the appeals now before the House? As to *Qazi*, the domestic law which left Mr Qazi, one of the joint tenants, without a tenancy once his wife, the other joint tenant, had served a notice to quit terminating the tenancy, had no special or discriminatory feature which might have attracted the attention of the Strasbourg court on an article 8 review – as, indeed, the result when the *Qazi* case did reach Strasbourg demonstrated. As to the decision of the local authority to seek possession of the property from Mr Qazi and not to grant him a new tenancy, that decision, on the approach exemplified in *Blecic*, was within the wide margin of appreciation available to local housing authorities faced with conflicting demands for a scarce commodity. This, too, is demonstrated by Strasbourg's rejection of Mr *Qazi*'s article 8 complaint. The conclusion that the decision in *Qazi* is consistent with Strasbourg jurisprudence is further supported by the absence of any mention of *Qazi* either by counsel in the course of the *Connors* hearing or by the Strasbourg court in its *Connors* judgment.

168. It is right to notice, however, that *Connors* and *Blecic* do show that in two types of case where an owner is seeking to recover possession of his property the absence of any contractual or proprietary right of the home occupier to remain in possession may not be conclusive. The first type of case is where an arguable article 8 objection can be taken to some aspect of the statutory and common law rules that entitle the owner to possession. *Connors* was such a case. So was *Larkos*. So, too, was *Blecic* although the argument in the end failed. The second type of case is where the procedural means available to the home occupier for challenging the decision by the owner of the property to evict him are inadequate. *Connors* was thought by the Strasbourg court to be such a case. Subject to that qualification, the conclusion of the Court of Appeal in *Leeds* that *Connors* and *Qazi* could not stand together and that a decision had to be taken as to which to follow is a conclusion with which I respectfully disagree.

169. As for these appeals, may I consider first the *Lambeth* appeals. The possession orders sought by Lambeth engage the article 8 right to respect for the home of the respective occupiers from whom possession was sought. But an order for possession was in accordance with domestic law. As against Lambeth the occupiers had become trespassers with no right to remain in occupation. There was nothing discriminatory or unusual about the statutory and common law framework that produced that result nor about the absence of any statutory protection given to the occupiers by the housing legislation. I respectfully agree with my noble and learned friend Lord Bingham of Cornhill's remarks in para 36 of his opinion that the balance required by article 8(2) to be struck was struck by the general law, that the public authority owner had a right to manage and control its property within the bounds set by statute, that the occupier acquired only a limited right to occupy and that on due determination of that right, a claim by the owner must ordinarily succeed. The appellants, the *Bruton* tenants of LQHT, could not resist Lambeth's possession applications on article 8 grounds unless either they mounted an article 8 attack on the legal framework that entitled Lambeth to possession or they attacked on article 8 grounds Lambeth's decision to seek possession. The first attack was not attempted, and, if it had been, would in my opinion have been bound to fail. There is nothing the matter, from an article 8 standpoint, with a common law rule which gives the owner of property, which is occupied as a home by a person who has no right as against the owner to remain there, the right to recover possession of the property. Parliament's omission to provide any statutory security of tenure for home occupiers in the position in which the *Bruton* tenants found themselves is well within the wide margin of appreciation referred to in *Blecic*.

170. As to the decision of Lambeth to seek possession of the properties occupied by the *Bruton* tenants, I agree with and adopt the conclusion expressed by Lord Bingham in para 47 of his opinion. No facts have been pleaded or alleged by the appellants which outweigh the right and the duty of Lambeth to manage its housing stock. The wide margin of appreciation referred to in *Blecic* must be accorded to Lambeth.

171. The article 8 defences were struck out by Judge Roger Cooke. They were in my opinion rightly struck out. If a defendant does not plead or allege sufficient facts which, if made good, could constitute a defence, the defence can be struck out. On the facts pleaded and alleged in the article 8 defences the defences could not have succeeded.

172. Nor, in my opinion, where a home occupier has no contractual or proprietary right to remain in possession as against the owner of the property, could an article 8 defence based on no more than the personal circumstances of the occupier and his family ever succeed. *Connors* is no authority to the contrary. The successful article 8 defence in *Connors* was founded on a combination of Mr Connors inability to enjoy the security of tenure advantages afforded by statute to occupiers of privately owned caravan sites and on the Strasbourg court's perception (which I think was an unjustified perception) of a lack of sufficient procedural safeguards enabling him to dispute the grounds which had led the council to terminate his site licence.

173. As to the *Leeds* appeal, first, it is inconceivable, I repeat, that the part of the recreation ground occupied by the caravans could in two days have become the Maloney home for article 8 purposes. But, second, even if that were not so, Leeds had an unimpeachable right to evict them and restore the site to use as a recreation ground for the benefit of the public generally. No court, domestic or in Strasbourg, has ever suggested that a person who enters and remains on land as a trespasser can assert an article 8 right to respect for the home he has unlawfully established on the land as a defence to the owner's eviction proceedings. In *Connors* the defendant did not enter as a trespasser. He had for some fourteen years held a licence entitling him to park his caravans on the caravan site. When the article 8(2) balance is struck in a case with facts like those in the *Leeds* case the balance must at once come down with a resounding clank in favour of the local authority. An article 8 defence in such a case could not ever succeed.

174. For these reasons, and in agreement with the reasons given by my noble and learned friends Lord Hope of Craighead, Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood, these appeals should in my opinion be dismissed. And, for the avoidance of any doubt I wish to express my agreement, in particular, with the whole of Lord Hope's para 110.

LORD WALKER OF GESTINGTHORPE

My Lords,

175. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Nicholls of Birkenhead. I agree that these appeals should be dismissed for the reasons which they give.

176. In an earlier draft of this speech I tried to envisage the sort of highly exceptional circumstances in which (as in *Connors v United Kingdom* (2004) 40 EHRR 189) domestic law might fail to show the respect for the home required by article 8 of the Convention. On reflection, however, I think that such an exercise would be speculative and unhelpful. As Lord Bingham says, the practical experience of county court judges is likely to prove the surest guide, so long as they bear in mind the stringency of the test.

177. I am in full agreement with Lord Bingham on the issue of judicial precedent. I am also in full agreement with my noble and learned friend Lord Scott of Foscote on the private law issue which arises in the *Lambeth* appeal.

BARONESS HALE OF RICHMOND

My Lords,

178. I have had the advantage of reading, indeed of re-reading several times, the draft opinions circulated by your Lordships. I agree with, and have nothing to add to, the opinions of my noble and learned friend Lord Bingham of Cornhill, on the question of precedent, and of my noble and

learned friend, Lord Scott of Foscote, on the issue of domestic law arising in the *Lambeth* cases. On the main issues, however, while there are many points upon which we are all agreed, there is one matter upon which we remain divided.

179. First, there is no reason to suppose that the actual outcome of the decision of this House in *Harrow London Borough Council v Qazi* [2004] 1 AC 983 was incompatible with Mr Qazi's right to respect for his home guaranteed by article 8 of the European Convention on Human Rights. The European Court of Human Rights would not otherwise have found his complaint inadmissible. However, if the *ratio decidendi* of the majority's decision was that the enforcement of a right to possession in accordance with the domestic law of property can *never* be incompatible with that right, then it must now be modified in the light of the decision of the European Court of Human Rights in *Connors v United Kingdom* (2004) 40 EHRR 189. There both the local authority and the court had acted entirely in accordance with the domestic law but the United Kingdom was nevertheless held to have acted in breach of article 8.

180. Secondly, however, we are all agreed that in the vast majority of cases, the right of a public landowner to enforce a claim to possession of his own land in accordance with the relevant domestic law would automatically supply the justification required by article 8(2) for an interference with the occupier's right to respect for his home. By definition, it would be "in accordance with the law"; it would serve the legitimate aim of protecting the property rights of the landowner and in some cases the rights of neighbouring occupiers; and it would be proportionate to that aim, the proper balance between the competing rights having been struck by Parliament: see Lord Bingham at paras 35, 36. If that is so, in most cases, granting a possession order in accordance with the domestic law would be the only means available of protecting the right which the landowner wished to assert, and thus could not be disproportionate in the individual case.

181. Thirdly, we are all agreed that there can be no question of requiring the public landowner to plead and prove individual justification for that interference in every case: see Lord Bingham at para 29. This was Mr Luba's bold submission to us on behalf of the occupiers in these cases. He was right to make that submission, as he recognised that it was the logical consequence of the case which he was putting forward: that the analysis adopted by the Strasbourg court in the cases found admissible should also be adopted in county and sheriff courts up and down the land when considering any claim for the

possession of premises where a person lives. Is it the defendant's home? Will the order interfere with his right to respect for that home? Is that interference in accordance with the law? Does it serve a legitimate aim? Is the interference "necessary in a democratic society", ie proportionate to the legitimate aim pursued?

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.

183. Hence it is only if the occupier advances grounds for challenging either or both of those assumptions that there need be any modification to present practice. Under the Civil Procedure Rules, rule 24(2), the court may give summary judgment against a defendant if it considers that the defendant has no real prospect of successfully defending the claim. This is similar to but wider than the power to strike out all or part of the written statement of case in CPR, rule 3.4.

184. So far, so good. Let us next suppose a *Connors* type of case. There an argument could readily be raised that United Kingdom property law did not strike the right balance. Someone who had lived, perfectly lawfully, on a designated gypsy caravan site for many years could be evicted without any good cause being shown, whereas someone who lived on a site governed by the Mobile Homes Act 1983 could only be evicted for cause. The gypsies had no means of challenging the reasons why the local authority wanted to evict them. This discrimination could not be justified.

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. This is 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. If there were enough suitable and affordable housing to share amongst those who needed it there would be no problem. But there is not, so priorities have to be established, either by Parliament or by the public sector landlord, who has to allocate this scarce resource in accordance with the priorities set by Parliament.

186. The balance has changed over time in accordance with what were perceived to be the needs of the time. Once upon a time, it was thought necessary to control the freedom of private landlords to let for such terms and on such rents as the market allowed. Public sector landlords, on the other hand, could be left to manage the public housing stock in a responsible manner. Then things changed. Controls over private landlords were progressively relaxed, although never abandoned, with a view to expanding the supply of privately rented homes. Controls over public sector landlords, on the other hand, were increased and public sector tenants were given the security which previously only private sector tenants had enjoyed. This and other measures reduced the supply of public sector rented homes. These were all intensely political judgments. The extent to which, and the terms on which, public authorities should be engaged in providing housing for those who for whatever reason cannot or will not buy it on the private market was one of the most politically controversial issues of the 20th century.

187. To the extent that a court insists that a public authority does not rely upon its right to evict an occupier, it is obliging that public authority to continue to supply that person with a home in circumstances where Parliament has not obliged (and may not even have empowered) it to do so. In this politically contentious area of social and economic policy, any court should think long and hard before intervening in the balance currently struck by the elected legislature. There may be more scope for argument in a case not covered by statute, but the most obvious example of that is a trespasser who has never had any right to occupy the premises in question.

188. We are also agreed as to the procedural route whereby a challenge to the general law may be made. The Human Rights Act 1998, section 7(1), provides that a person who wishes to rely upon his Convention rights may do so either in a free-standing action or by defending an action brought against him by a public authority. In those very rare cases where a person may be evicted from his home without any court order at all, a challenge would have to raised by way of a free-

standing action or judicial review. Otherwise, a defence can be raised in the possession action itself. However, the county court will not always be able to supply a remedy. In some cases the statute under which it is operating may be sufficiently flexible to enable the argument to be accommodated. But in many others, it will not. The very source of the complaint of incompatibility will be the inflexibility of the statutory scheme, leaving no discretion to the county court. The court will then have to decide whether the interpretative obligation in section 3 of the 1998 Act will enable it to solve the problem. If not, the matter could only be resolved by a declaration of incompatibility in the High Court, which would have no effect upon the outcome of the individual case.

189. Thus far I believe that we are all agreed. But, as I understand it, some of your Lordships would go further and accept that there may be highly exceptional cases in which the occupier could argue that his individual personal circumstances made the application of the general law disproportionate in his case. When, if at all, should the court be able to say that, even though there is no obligation to continue to provide housing in these circumstances, it is not "necessary in a democratic society" to permit the landowner to assert its property rights?

190. My Lords, I myself do not think that the purpose of article 8 was to oblige a social landlord to continue to supply housing to a person who has no right in domestic law to continue to be supplied with that housing, assuming that the general balance struck by domestic law was not amenable to attack and that the authority's decision to invoke that law was not open to judicial review on conventional grounds. It should not be forgotten that in an appropriate case, the range of considerations which any public authority should take into account in deciding whether to invoke its powers can be very wide: see eg *R v Lincolnshire County Council and Wealden District Council, Ex p Atkinson, Wales and Stratford* (1995) 8 Admin LR 529, *R (Casey and others) v Crawley Borough Council* [2006] EWHC 301 (Admin).

191. There is no doubt that article 8 entails both negative obligations – not to interfere – and positive obligations – to secure the right to respect for a person's private and family life, his home and his correspondence. But it does not confer any right to health or welfare benefits or to housing. The extent to which any member state assumes responsibility for supplying these is very much a matter for that member state. In this country, housing law defines the extent of the obligation and the power to provide housing at public expense. Social services law defines the extent of the obligation to provide services (which sometimes includes

assistance with housing) for vulnerable people, such as children, the elderly, the sick and the disabled. If social services law does not provide assistance to an occupier whose personal circumstances are said to make eviction from this particular accommodation disproportionate, then I question whether housing law should be made to do so. In an appropriate case, it is incumbent upon the housing authority to liaise with the social services and education authorities before deciding to take action. There is nothing in the jurisprudence to indicate that article 8 requires more of them than is already required.

192. The Convention began life as a code of individual civil and political rights, not a code of social and economic rights. The distinction between the two is not clear cut, particularly in the context of article 8. But to refuse to allow a landowner to recover possession of the dwelling to which he is entitled is to impose upon him a positive obligation to continue to make those premises available to the occupier. There might be more scope for argument where the claim lies in common law unregulated by legislation, but in such cases the landowner is likely to be a private person, upon whom no such positive obligation could be laid, or the occupiers are likely to be squatters who have never had a right to occupy the premises. There is nothing yet in the Strasbourg jurisprudence to require a reconsideration of the rule in *McPhail v Persons, Names Unknown* [1973] Ch 447. In common, therefore, with my noble and learned friends Lord Scott of Foscote and Lord Brown of Eaton under Heywood, I agree with the conclusions reached by my noble and learned friend, Lord Hope of Craighead, set out in paragraph 110.

193. Each of the cases before us is a classic example of one in which a defence based upon article 8 would have no real prospect of success. In the *Leeds* case, it cannot plausibly be asserted that the respondents had established a home on the recreation ground. There was therefore no Convention right to be interfered with. In the *Lambeth* cases, the occupiers had undoubtedly established homes in the dwellings but they had done so on terms which made them vulnerable, like many sub-tenants, to the superior claims of the landowner. Lambeth's attempts to evict them were in accordance with the law and in pursuit of the legitimate aim of regaining control over this short life housing stock. All the "*Bruton* tenants" were offered alternative accommodation. It would take a very different case from that pleaded to give their claims to remain in the particular dwellings occupied a real prospect of success.

194. In agreement with all of your lordships, therefore, I would dismiss both appeals.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

195. The most important single question arising upon these appeals is to my mind whether a trial judge, seised of a home repossession claim, must in every case where the occupier seeks to raise an article 8 defence consider, however peremptorily, whether the particular facts of the case enable (indeed require) him to make an order (either withholding or postponing possession) more favourable to the occupier than would be permissible under the applicable domestic property law.

196. In *Harrow London Borough Council v Qazi* [2004] 1 AC 983, the House by a majority held that "contractual and proprietary rights to possession cannot be defeated by a defence based on article 8" (Lord Hope of Craighead para 84); "there is no lack of respect and no infringement of article 8, where the [possession] order is made in favour of the person entitled to possession by national law" (Lord Millett para 107); "Article 8 cannot be raised to defeat contractual and proprietary rights to possession" (Lord Scott of Foscote para 149). The dissenting view of the minority (Lord Bingham of Cornhill and Lord Steyn) was that in every home repossession case the question of justification under article 8(2), if raised, has to be considered although the domestic property law is "likely to be crucial" (Lord Bingham para 12) and "the occasions on which a court would be justified in declining to make a possession order would be very highly exceptional" (Lord Bingham para 25).

197. It is now contended by the appellants that two subsequent decisions of the European Court of Human Rights, *Connors v United Kingdom* (2004) 40 EHRR 189 and *Blecic v Croatia* (2004) 41 EHRR 185, are inconsistent with the majority view in *Qazi* and support instead the approach of the minority.

198. For my part I would accept that the recent Strasbourg jurisprudence requires some qualification to be placed on the *Qazi*

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

199. *Connors* exemplifies a failure of the first condition: the domestic law under which possession was sought and ordered could not be justified: only gypsies (indeed only gypsies living on local authority caravan sites) were excluded from the protection afforded by the Mobile Homes Act 1983 to those living in caravans or mobile homes as their only or main residence. I shall return to *Connors* in a little more detail later. *Blecic* illustrates the application of both conditions although in the event the European Court of Human Rights found that both were satisfied: Croatia's domestic law, under which a specially-protected tenancy was terminable if the tenant was unjustifiably absent for six months, was held to be within the wide margin of appreciation available to a state in implementing social and economic policy; and the domestic law had been reasonably and fairly applied—"the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force" being afforded the same "wide margin of appreciation" as "the domestic legislature" (para 65).

200. The modest qualification which *Connors* now requires to be made to the *Qazi* principle is that a defence to possession proceedings based upon the contention that our domestic law is incompatible with the occupier's article 8 rights is theoretically available to him. I say *theoretically available* because it seems to me that it will not in fact be open to the trial judge (whether in the High Court or, as will almost invariably be the case, the county court) to decide the case other than in accordance with the domestic law. Take, for example, the case of *Connors* itself. Because the local authority there, once the defendant had disputed the original ground (essentially nuisance in breach of his licence conditions) on which possession was sought, relied instead on its

absolute right to terminate his licence on notice, there was simply no answer to the claim under domestic law. The European Court Human Rights found this law unjustifiable; the government having failed in its attempt to justify the exclusion of local authority gypsy sites from the protection otherwise available under the Mobile Homes Act. Rather the Court concluded, consistently with its judgment in *Chapman v United Kingdom* (2001) 33 EHRR 399 (a planning case, of course, not a possession case), that, because of "the vulnerable position of gypsies as a minority", article 8 imposes "a positive obligation" on the state "to facilitate the gypsy way of life" (para 84). The Court therefore concluded that the eviction "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" and so was in violation of article 8 (para 94). That this was because of the deficiency in the substantive domestic law, however, is plain from the terms in which the Court rejected Mr Connors' further complaint under article 13:

> "Article 13 does not go so far as to guarantee a remedy allowing a contracting state's primary legislation to be challenged before a national authority on grounds that it is contrary to the Convention. The applicant's complaints related in essence to the exemption conferred on local authority gypsy sites by the Mobile Homes Act 1983." (para 109)

There is, indeed, a striking resemblance between *Connors* and the earlier (non-gypsy) case of *Larkos v Cyprus* (1999) 30 EHRR 597 in which the European Court of Human Rights found a violation of article 14 taken in conjunction with article 8 because Larkos, as a government tenant, did not enjoy the same security of tenure under domestic law as was enjoyed by tenants of private landlords.

201. Following the decision in *Connors* the domestic legislation was amended. With effect from 18 January 2005 section 4 of the Caravan Sites Act 1968 was amended by section 211 of the Housing Act 2004 to permit the county court to suspend, for up to twelve months at a time, any possession order in respect of a local authority caravan site which the court would otherwise be bound to make. Now, therefore, the county court would be entitled to suspend the order made against someone in Mr Connors' position; previously, it was not.

202. By the same token moreover that the county court judge would have been unable, under the pre-existing law, to decline or postpone a possession order in the case of someone in Mr Connors' position, so too in my judgment he is unable in other cases to give greater effect or weight to the occupier's right to respect for his home than is allowed for under domestic law, whether that law is to be found in legislation or under the common law, or indeed a mixture of both. I refer to a mixture of both because there will be many cases where the landlord's contractual or proprietorial rights fall to be determined essentially under the common law but which nevertheless are affected by general statutory provisions. Section 3 of the Protection from Eviction Act 1977, for example, under the heading, Prohibition of eviction without due process of law, precludes the owner from enforcing his right to recover possession of his premises once the tenancy comes to an end "otherwise than by proceedings in the court". And section 89 of the Housing Act 1980, under the heading, Restriction on discretion of court in making orders for possession of land, prevents the court in certain cases from postponing (whether by the order or any variation, suspension or stay of execution) the giving up of possession of premises for more than 14 days, save where that would cause "exceptional hardship" when the total permitted postponement is extended to six weeks.

203. Of course, where the domestic law requires the court to make a judgment (most notably perhaps in those cases under Schedule 2 to the Housing Act 1985 where repossession can only be ordered if the court considers it reasonable), or to exercise a discretion, the judge will bear in mind that he is performing this task in the context of the defendant's article 8 right to respect for his home. But where under domestic law the owner's right to possession is plainly made out (whether at common law or, for example, under the legislation providing for assured short-hold tenancies or introductory tenancies), the judge in my opinion has no option but to assume that our domestic law properly strikes the necessary balances between competing interests (as envisaged in paras 32 and 33 of my noble and learned friend Lord Bingham's judgment) and that in applying it properly he is accordingly discharging his duty under section 6 of the Human Rights Act 1998. Where section 89 of the Housing Act 1980 applies, the judge will to that extent have a discretion to postpone possession. That apart, however, he has no discretion and the order must be made, leading to the eventual execution of the warrant for possession. Where no statutory protection is afforded to occupiers that should be assumed to be Parliament's will: sometimes that will be clearly evident from the terms of the governing legislation (as in the cases considered by Lord Bingham in para 35); even, however, where the owner's rights arise at common law, the absence of statutory

protection must surely be, as my noble and learned friend Lord Hope suggests, the result of a deliberate decision by Parliament to leave the owner's right to recover possession in these cases unqualified. As Lord Bingham observes at para 36, it is not unrealistic to regard the general law as striking the required balance.

204. One of the difficulties I have with the appellants' contended for application of article 8 in these cases is in understanding what sort of "highly exceptional circumstances" (Lord Bingham's expression at paras 35 and 36) could possibly entitle the county court judge to disregard a clear provision of domestic law so as to deprive the owner (who, according to the logic of the argument, could as well be a private landlord as a public one) of his apparently clear entitlement to possession; another is in understanding what are supposed to be the parties' respective rights and interests in the premises once the judge has felt obliged under article 8 to set aside the dictates of domestic law.

205. I repeat, and will labour the point no further: if our domestic law is incompatible with article 8 (as it was in *Connors*) then it is not for the county court judge to remedy it; he is to assume compatibility and simply apply the law as he finds it. That is something which county court judges have been doing for many years (long before the introduction of article 8 into domestic law): residential occupiers have never lightly been dispossessed from their homes. The rights and interests of others too, however, are at stake—and not merely landlords but the many others who also require homes—and the law as a whole has been developed to give effect to these as well.

206. I doubt whether the legal regimes of many contracting states are more sensitive than ours to the rights of residential occupiers. If, indeed, article 8's impact upon property law is as wide-reaching as the appellants contend it is to my mind surprising that the Strasbourg jurisprudence is not replete with examples of successful claims. In fact, however, these are few and far between and, certainly in *Connors'* case (and in *Larkos*), explicable by reference to unjustifiably discriminatory legislation rather than because of a want of sufficient discretion under domestic law to take account of exceptional circumstances. There is, for example, no possible support to be found in the Strasbourg case law for doubting the justifiability of the clear rule as to squatters established by the Court of Appeal in *McPhail v Persons, Names Unknown* [1973] Ch 447 (Mr McPhail himself being, one may note, a private landowner) and I would respectfully disagree with the suggestion to the contrary at para 37 of Lord Bingham's opinion.

207. I too, therefore, would dismiss both these appeals but I would do so for a reason more fundamental than that suggested by certain others of your Lordships. These appellants' defences must fail, not because they disclose no sufficient (highly exceptional) personal merit but because they depend upon establishing a freestanding article 8 right to remain in possession incompatible with the respective claimants' clear entitlement to possession under domestic property law. I would hold that no such freestanding right exists.

208. I should perhaps just add this. These appeals were brought on the basis that it is for the trial judge, pursuant to his section 6 duty, to consider for himself the issue of justification under article 8 (2) in any contested possession action. There is, however, a quite different basis upon which an occupier could, challenge a public authority's claim for possession, namely on the conventional public law ground that the decision to bring the claim was itself so unreasonable as to be unlawful. Such a defence can clearly be advanced in the county court—see the decision of the House of Lords in *Wandsworth London Borough Council v Winder* [1985] AC 461.

209. The difficulty with such a defence, however, is that it would be well nigh impossible to make good, the challenge necessarily postulating that under domestic property law the claimant authority was entitled to possession. Accordingly the argument could only be that no reasonable public authority could properly invoke that domestic law right. This would be a more stringent test than would apply were the court, as the appellants assert, under a primary duty to reach its own judgment on the justifiability of making a possession order.

210. For my part I think that such an argument could perhaps have been mounted successfully in *Connors*: having regard to the great length of time (most of the preceding sixteen years) that that gypsy 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 was *not*, be it noted, the basis of the actual judicial review application for which permission in that case was sought and refused. Indeed the council's decision there to drop the allegations of breach of licence and to assert instead a right to summary possession on the bald ground that the family were trespassers (see para 25) followed rather than preceded the failed judicial review challenge.

211. It is difficult to suppose, however, that a defence based on a public law challenge of this character to a public authority's decision to pursue its domestic law rights could properly succeed except in such an infinitely rare case as *Connors* itself. Manifestly it could not have succeeded in either of the present cases which doubtless explains why defences of this particular character were not advanced.

212. It follows from all this I am in full agreement with what Lord Hope says at para 110 of his opinion.

213. There is nothing which I wish to add on the other issues raised on these appeals: on the question of precedent I agree with all that Lord Bingham says. On the issue as to the appellants' occupation status in the *Lambeth* appeal I agree with the analysis and conclusions of my noble and learned friend Lord Scott of Foscote.