Hilary Term

[2015] UKSC 15

On appeal from: [2014] EWCA Civ 1081

JUDGMENT

Akerman-Livingstone (Appellant) v Aster Communities Limited (formerly Flourish Homes Limited) (Respondent)

before

Lord Neuberger, President

Lady Hale, Deputy President

Lord Clarke

Lord Wilson

Lord Hughes

JUDGMENT GIVEN ON

11 March 2015

Heard on 10 December 2014

Appellant	Respondent
Jan Luba QC	Daniel Stilitz QC
Russell James	Nicholas Grundy
Catherine Casserley	Sara Beecham
(Instructed by Shelter Legal Services)	(Instructed by Clarke Willmott LLP)

Interven
Monica Carss
QC
Jason Pob
(Instructed
Equality and
Rights Comm

LADY HALE:

1.

This appeal is about the proper approach of the courts where the defendant to a claim for possession of his home raises a defence of unlawful discrimination, contrary to the Equality Act 2010, by the claimant landlord. In particular, the issue is whether the courts are entitled to take the same summary approach to such a defence, where the claimant is a social landlord, as they can normally take to a defence asserting that eviction by a public authority would breach the right to respect for the defendant's home, which is protected by article 8 of the European Convention on Human Rights. Do the principles applicable to article 8 defences, laid down by the Supreme Court in Manchester City Council v Pinnock [2010] UKSC 45, [2011] 2 AC 104 ("Pinnock") and Hounslow London Borough Council v Powell [2011] UKSC 8, [2011] 2 AC 186 ("Powell") also apply to discrimination defences?

2.
The issue could arise, whichever of the characteristics protected by the Equality Act 2010 is relied upon by the defendant to support a discrimination defence, and whatever the type of discrimination complained of. However, this case is concerned with the protected characteristic of disability, which can raise different equality issues from those raised by a claim of, say, sex or race discrimination. Whereas treating a man equally with a woman usually means treating him in the same way as a woman is treated, treating a disabled person equally with a non-disabled person may mean treating him differently from a non-disabled person. This is in order to ensure that he can play a full part in society despite his disabilities.

This case

3.
The appellant is a 47-year-old man who has been diagnosed with Prolonged Duress Stress Disorder or Complex Post Traumatic Stress Disorder. This is the result of sustained physical and emotional abuse by his parents when he was a child, exacerbated by his having been "failed by the system". Disability is one of the protected characteristics listed in section 4 of the Equality Act 2010. The basic definition of disability is contained in section 6, which provides that a person has a disability if (a) he has a physical or mental impairment, and (b) the impairment has a substantial and long term adverse effect upon his ability to carry out normal day to day activities. This is fleshed out by Schedule 1 to the Act and by the Equality Act 2010 (Disability) Regulations 2010. It is not in dispute that the appellant's mental ill-health is so chronic and severe that he falls within this definition.

4.
The appellant became homeless in 2010. In June, the local housing authority in the district where he lives ("the council") accepted that it owed him a duty, under section 193(2) of the Housing Act 1996, to secure that accommodation was available to him. The council had an agreement with a housing association, Flourish, that it would grant tenancies to people to whom the council owed duties under the 1996 Act. Pursuant to that agreement, in August 2010, a one bed-roomed ground floor flat in Glastonbury was let to the appellant on a weekly periodic tenancy.

5.
The duty to secure accommodation for a homeless person under section 193(2) of the 1996 Act is not intended to last indefinitely. Broadly speaking, it comes to an end if he obtains accommodation elsewhere or if he refuses an offer of suitable accommodation elsewhere, in particular if he refuses a final offer of social housing under Part 6 of the 1996 Act (section 193(7)). The appellant joined the council's choice-based scheme for the allocation of social housing, known as "Homefinder Somerset", and over the next nine months various attempts were made to find an acceptable home for him. He put in bids for two properties in Wells, but later withdrew these because he associated Wells with his

childhood abuse. Another bid for a property in Wells was unsuccessful. He successfully bid for a property in Meare, Glastonbury but then declined this as it was too far from his GP. He declined to bid for two more properties, one in Wells and one in Glastonbury, which he was told were open for bids. And he objected to three more bids, one in Wells and two in Street, which the council placed on his behalf. His community psychiatric nurse supported the objection to Wells and so the bid was withdrawn.

6.
In March 2011, the council wrote to him formally making a final offer of one of the properties in Street. He declined to accept this. Hence in April the council wrote notifying him that it considered that its duty under section 193 had been discharged. He requested a review under section 202 of the 1996 Act. The review upheld the original decision that the property was suitable for him and in the same letter the council told him that it would be terminating the provision of temporary accommodation for him in the Glastonbury flat. Accordingly, Flourish served a notice to quit, expiring on 21 August 2011; and on 15 September, it issued a claim for possession in the Yeovil County Court. At the first hearing on 20 October 2011, this was adjourned for the appellant to obtain legal representation.

7.
When the case returned to the county court on 15 December, District Judge Smith had before him the first report of a Chartered Psychologist, Mr Callow, whom the appellant had consulted for the purpose of these proceedings. He had examined the appellant twice and administered a variety of psychometric tests. He described the appellant as “very vulnerable” and “desperately in need of intensive therapy to help him overcome the traumas” from which he had suffered. He also supported the appellant’s claim that he could not live in Street, because of its associations with his childhood.

8.
The district judge gave a short judgment in which he took the view (i) that on the issue of whether the proposed possession order was proportionate for the purpose of article 8, “it falls just beyond the line of its being sufficiently clear that I can say that it cannot apply” (para 24); and (ii) that he did not rule out the Equality Act defence, “but I think there will be formidable problems in maintaining it” (para 26). He concluded that “we are going to have a contested hearing about it not later than the end of January when all these issues can be established” (para 27). Hence he ordered the appellant to file and serve a defence, made provision for the service of any witness statements, and listed the claim for a hearing on 26 January 2012. The defence filed that same day raised three defences: disability discrimination, article 8 and a public law defence based primarily on breach of the public sector equality duty. Mr Callow made a second report, dated 23 January 2012, confirming his opinion that the appellant suffers from a disability within the meaning of the Equality Act and that the accommodation in Street was unsuitable for him because of that disability. However, when the case came back before District Judge Smith on 26 January 2012, he ordered that it be transferred to Bristol County Court for hearing as soon as possible, with a longer time estimate because of the issues raised under the Equality Act.

9.
In the meantime, on 15 December the appellant had also made a fresh homelessness application to the council. This was rejected in April 2012, on the ground that he was intentionally homeless. But in July that decision was overturned on review and the council therefore accepted again that it owed him the duty under section 193(2) of the 1996 Act. By this time Flourish had merged with two other housing associations to form Aster Communities, which became the appellant’s landlord. Bristol

County Court had listed the case for a two-day trial on 18 July 2012 and Mr Callow had prepared a third report on 2 July 2012. In this he stated that “we are not dealing here with a man who thinks and behaves in a reasonable and socially acceptable way but with someone who is profoundly mentally ill and who needs help”. Given the council’s change of view, the trial was vacated on Aster’s application and the case adjourned by consent with liberty to restore.

10.
In September 2012, Aster wrote to the appellant offering him a starter tenancy of a property in the same road in Glastonbury as his current accommodation. Another property in Glastonbury was also available for him, but the appellant did not wish to apply for that. On 27 September 2012 he declined the offer of the property in the same road. In October 2012, the council wrote to notify the appellant of their decision that their duty to him was discharged because of his refusal of suitable accommodation. He did not seek a review of that decision.

11.
Later that month, Aster applied to reinstate the claim for possession. Although the case had previously been set down for a full trial, this time it was listed “for a preliminary hearing to decide whether or not a proportionality and/or Equality Act 2010 defence can be raised”. That hearing was originally listed for February 2013 and Mr Callow made a further report dated 11 February 2013. In this he stated that, “it is impossible to say definitively that [the appellant’s] inaction and/or failure was wholly attributable to his condition, but I would say that his condition seems likely to have played a major part in this inaction and/or failure”. There was insufficient time available in February and so the case was adjourned until June 2013 when it came before His Honour Judge Denyer QC. He heard legal argument over a day on 6 June 2013 and gave judgment on 7 June.

12.
Judge Denyer prefaced his account of the facts with a reference to the role of the court in an appeal against a local authority’s decisions under Part 7 of the 1996 Act, pointing out that in such cases the court was exercising a function not dissimilar to that of the Administrative Court in judicial review (para 2). He returned to this point in his conclusions, where he referred to “what is a quasi-judicial review claim or defence, as here” (para 16, emphasis supplied). After setting out the facts, he observed that the defendant “raises no conventional landlord and tenant type defence, but raises effectively public law defences” (para 8). He went on to say that “Whether the defence is viewed pursuant to the Equality Act 2010 or pursuant to article 8 or both, … the approach outlined by the Court of Appeal to such defences in the case of Thurrock Borough Council v West [2012] EWCA Civ 1435; [2013] HLR 69 is the appropriate starting point” (para 9). He cited extensively from that case, which summarises the principles to be gleaned from Pinnock and Powell and some later Court of Appeal cases. “The threshold for establishing an arguable case that a local authority is acting disproportionately and so in breach of article 8 where repossession would otherwise be lawful is a high one and would be met only in a small proportion of cases” (para 10). Both article 8 and section 15 of the Equality Act involved a consideration of proportionality. It was necessary therefore to go back to Thurrock, “the crucial point being effectively the presumption in favour of proportionality when a public authority is exercising its housing functions” (para 15). The actions of the local authority were entirely reasonable and the action of the claimants could “in no wise be characterised as unreasonable or disproportionate … and certainly not actuated by any malevolent response to the defendant’s disability” (para 16). Hence there was no arguable defence and the claimants were entitled to possession.

13.

Judge Denyer granted permission to appeal on whether the discrimination defence should be treated in the same way as an article 8 defence. That appeal was dismissed by Cranston J, on the ground that the usual structured approach to proportionality issues in discrimination claims should not apply because of the context, which was the homelessness duties of local authorities. The same reasons, given in Pinnock and Powell, for rejecting the structured approach to an article 8 defence applied to a discrimination defence (para 33).

14.
A further appeal to the Court of Appeal was also dismissed: [2014] EWCA Civ 1081, [2014] 1 WLR 3980. It held that the approach to proportionality was the same under the Equality Act as it was under article 8 (para 27) and the weight to be given to the interests of a social landlord was no different (para 29). For a tenant to succeed in a disability discrimination case "he will have to show some considerable hardship which he cannot fairly be asked to bear" (para 37). There was no difference between a social landlord acting on the instructions of a local housing authority and the local housing authority itself (para 46).

The Equality Act 2010

15.
The scheme of the Equality Act 2010 is to define what is meant by discrimination and then to define the circumstances in which such discrimination is unlawful. The Act prohibits both direct and indirect discrimination against disabled persons in the same way that it prohibits discrimination against persons with the other characteristics protected by the Act. But it also contains two types of discrimination which are specific to persons with a disability. It is discrimination to fail to comply with the specific duties to make the reasonable adjustments which are required by the Act in particular contexts (section 21(2)). There is also a more general concept of "disability discrimination" defined by section 15:

"(1) A person (A) discriminates against a disabled person (B) if -

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

16.
Under section 35(1)(b), "A person (A) who manages premises must not discriminate against a person (B) who occupies the premises … by evicting B (or taking steps for the purpose of securing B's eviction)". The eviction is unfavourable treatment for the purpose of section 15.

17.
It was held by the House of Lords in Lewisham London Borough Council v Malcolm [2008] AC 1399 that it might therefore be unlawful to evict a disabled person even though the disabled person had no other claim to remain in the property. As Lord Bingham explained: "Parliament has enacted that discriminatory acts proscribed by the [Disability Discrimination Act 1995] are unlawful. The courts cannot be required to give legal effect to acts proscribed as unlawful" (para 19). The same would, of course, apply to an eviction which was unlawfully discriminatory on other grounds, such as race or sex. Hence, as the Court of Appeal in this case correctly said (para 2), if the appellant succeeds in his

defence that bringing the proceedings amounted to discrimination against him by reason of his disability, in breach of section 15, the court could not make a possession order.

18.
Where section 15 is raised, therefore, and assuming that the defendant is in fact disabled within the meaning of the Act, there are two key questions:

(a) whether the eviction is “because of something arising in consequence of B’s disability”; this was a reformulation from that in the Disability Discrimination Act 1995, intended to make it clear that where something arising in consequence of the disability was the reason for the unfavourable treatment, the landlord (or other provider) would have to justify that treatment; there was no need for a comparison with how it would treat any other person; it might have to behave differently towards a disabled tenant from the way in which it would behave towards a non-disabled tenant; and if so

(b) whether the landlord can show that the unfavourable treatment is a proportionate means of achieving a legitimate aim.

19.
Also relevant is section 136, headed “Burden of Proof”:

“(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

Thus, for example, if there are facts from which the court could conclude that an eviction was “because of something arising in consequence of a person’s disability” then it would be for the alleged discriminator to prove that it was not. If he could not do so, the burden would then be upon him to show that it was nevertheless a proportionate means of achieving a legitimate aim.

Article 8

20.
The Supreme Court cases of Pinnock and Powell were the culmination of a long process of dialogue between the highest courts in the United Kingdom and the European Court of Human Rights in Strasbourg as to the extent to which the protection given to a person’s “home” under article 8 of the European Convention applied to social housing which the occupier had no right to occupy in domestic law. In Manchester City Council v Pinnock [2011] 2 AC 104, the Supreme Court held that article 8 does apply to a possession action brought by a local authority against a tenant who has no other right to remain in the property. If an article 8 defence is raised, therefore, the court has to determine whether it would be proportionate to make the order (para 49). However, the aims of making such an order are, first, to vindicate the local authority’s property rights, and secondly, to enable the authority to comply with its statutory duties in the allocation and management of the housing stock available to it (para 52),

“including, for example, the fair allocation of its housing, the redevelopment of the site, the refurbishing of sub-standard accommodation, the need to move people who are in accommodation that now exceeds their needs, and the need to move vulnerable people into sheltered or warden-assisted housing.”

In many cases there might also be “other cogent reasons”, such as the need to remove a source of nuisance to neighbours, to support the proportionality of dispossessing the occupiers.

21.
These twin aims should be a “given” which did not have to be explained or justified by the authority, unless it wanted to establish some further reason in the particular case (para 53). In virtually every case there will be a strong case for saying that the possession order would be a proportionate means of achieving those aims (para 54). As a general rule, therefore, article 8 should only be considered if it is expressly raised by or on behalf of a residential occupier and initially should be considered summarily and only allowed to proceed if, were the facts alleged to be made out, it might make a difference (para 61). However, the court agreed with the Equality and Human Rights Commission that proportionality was more likely to be relevant “in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty” (para 64). The effect might justify granting an extended period for possession, suspending the order or even refusing it altogether (para 62).

22.
Pinnock concerned a demoted tenancy - that is a formerly secure local authority tenancy which had been “demoted” because of anti-social behaviour. In Hounslow London Borough Council v Powell [2011] 2 AC 186, the same principles were applied to introductory tenancies and to accommodation provided under a local authority’s duties towards the homeless. There was nothing in Part 7 of the 1996 Act which prevented a court from refusing to make a possession order if it would not be proportionate to do so (para 39). Nevertheless, the court would only have to consider the proportionality issue if it had been raised by the occupier “and it has crossed the high threshold of being seriously arguable” (para 33). Otherwise the court could dispose of it summarily.

Are there any differences between article 8 and section 15?

23.
The courts below took the view that whatever differences there may be between the rights contained in article 8 and section 15, they were not such as to require a different approach to evictions from social housing. Both depended on proportionality. The twin aims were in most cases “overwhelming” (Court of Appeal, para 27). There was “no rational basis for saying that the weight to be given to the social landlord’s interest is somehow diminished where the tenant is relying on disability discrimination” (para 29). These propositions, attractive though they may appear, require some examination.

24.
The first and most obvious difference between article 8 and the Equality Act is that section 35 of the Equality Act applies to both private and public sector landlords, whereas only public authorities are obliged by section 6(1) of the Human Rights Act 1998 to act compatibly with the Convention rights. (It has been assumed for the purpose of this case that social landlords providing accommodation to enable local authorities to fulfil their duties towards the homeless are public authorities.) Thus no landlord, public or private can adopt a discriminatory policy towards eviction, for example, by evicting a black person where they would not evict a white. Thus also no landlord, public or private, can evict a disabled tenant “because of something arising in consequence of [his] disability” unless the landlord can show that this is a proportionate means of achieving a legitimate aim.

25.

This tells us that the substantive right to equal treatment protected by the Equality Act is different from the substantive right which is protected by article 8. All occupiers have a right to respect for their home. Parliament has expressly provided for an extra right to equal treatment - for people to be protected against direct or indirect discrimination in relation to eviction. Parliament has further expressly provided, in sections 15 and 35, for disabled people to have rights in respect of the accommodation which they occupy which are different from and extra to the rights of non-disabled people. Landlords may be required to accommodate, or to continue to accommodate, a disabled person when they would not be required to accommodate, or continue to accommodate, a non-disabled person.

26.
This extra right is consistent with the obligations which the United Kingdom has now undertaken under the United Nations Convention on the Rights of Persons with Disabilities. This defines discrimination on the basis of disability to include the “denial of reasonable accommodation” (article 2). States Parties are required, not only to prohibit all discrimination on the basis of disability, but also “In order to promote equality and eliminate discrimination, [to] take all appropriate steps to ensure that reasonable accommodation is provided” (article 5(2) and (3)). By “reasonable accommodation” is meant adjustment to meet the particular needs of a disabled person.

27.
This is not an absolute obligation. The landlord is entitled to evict a disabled tenant if he can show that this is a proportionate means of achieving a legitimate aim. The wording in section 15, and elsewhere in the Equality Act, is not the same as that in article 8, where the public authority has to show that its interference is “necessary in a democratic society” for one of the specific purposes listed there, but they have come to be interpreted in the same way.

28.
The concept of proportionality contained in section 15 is undoubtedly derived from European Union law, which is the source of much of our anti-discrimination legislation. Three elements were explained by Mummery LJ in R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213, at para 165:

“First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?”

This three-fold formulation was drawn from the Privy Council case of de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80, which was itself derived from the Canadian case of R v Oakes [1986] 1 SCR 103. However, as Lord Reed explained in Bank Mellat v Her Majesty’s Treasury (No 2) [2013] UKSC 39, [2014] AC 700, para 68 et seq, this concept of proportionality, which has found its way into both the law of the European Union and the European Convention on Human Rights, has always contained a fourth element. This is the importance, at the end of the exercise, of the overall balance between the ends and the means: there are some situations in which the ends, however meritorious, cannot justify the only means which is capable of achieving them. As the European Court of Justice put it in R v Minister for Agriculture, Fisheries and Food, Ex p Fedesa (Case C-331/88) [1990] ECR I 4023, “the disadvantages caused must not be disproportionate to the aims pursued”; or as Lord Reed himself put it in Bank Mellat, para 74, “In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure”.

29.

In Pinnock and Powell, the Supreme Court rejected this structured approach to proportionality where article 8 was the only defence that could be raised in answer to a possession claim by a social landlord. As Lord Hope explained in Powell, para 41,

"... in the context of a statutory regime which has been deliberately designed by Parliament, for sound reasons of social policy, so as not to provide the occupier with a secure tenancy [the structured approach] would be wholly inappropriate ... It would give rise to the risk of prolonged and expensive litigation, which would divert funds from the uses to which they should be put to promote social housing in the area. In the ordinary case the relevant facts will be encapsulated entirely in the two legitimate aims that were identified in Pinnock ..., para 52. It is against those aims, which should always be taken for granted, that the court must weigh up any factual objections that may be raised by the defendant and what she has to say about her personal circumstances."

In the great majority of cases, the court is simply not equipped to judge the weight of an individual's right to respect for her home against the weight of the interests of the whole community for whom the authority has to manage its limited housing resources (para 35).

30.
It simply does not follow that, because those twin aims will almost always trump any right to respect which is due to the occupier's home, they will also trump the occupier's equality rights. Equality rights prohibit both direct and indirect discrimination, as well as the special concept of disability discrimination. But they all have the same aim, which is to secure equality of treatment, by prohibiting inequality of treatment on grounds of a protected characteristic. Thus, save as expressly provided, there is no defence to direct discrimination. No landlord is allowed to evict a black tenant in circumstances where he would not evict a white tenant. The fact that the landlord is thereby vindicating his property rights is neither here nor there. No landlord is allowed to adopt a lettings or eviction policy which indirectly discriminates against black people, unless he can show that it is a proportionate means of achieving some independent aim. The aim of vindicating his property rights would indeed be a "given", but is scarcely likely to be sufficient to justify a discriminatory provision, criterion or practice.

31.
No landlord is allowed to evict a disabled tenant because of something arising in consequence of the disability, unless he can show eviction to be a proportionate means of achieving a legitimate aim. He is thus obliged to be more considerate towards a disabled tenant than he is towards a non-disabled one. The structured approach to proportionality asks whether there is any lesser measure which might achieve the landlord's aims. It also requires a balance to be struck between the seriousness of the impact upon the tenant and the importance of the landlord's aims. People with disabilities are "entitled to have due allowance made for the consequences of their disability" (Malcolm, para 61). It certainly cannot be taken for granted that the first of the twin aims will almost invariably trump that right. Even where social housing is involved, the general considerations involved in the second of the twin aims may on occasions have to give way to the equality rights of the occupier and in particular to the equality rights of a particular disabled person. The impact of being required to move from this particular place upon this particular disabled person may be such that it is not outweighed by the benefits to the local authority or social landlord of being able to regain possession.

32.
As the Equality and Human Rights Commission have pointed out, the public policy considerations applicable to the general run of social housing cases are also different from the public policy

considerations applicable to Equality Act claims. As Etherton LJ explained in Thurrock, para 25, “the reasons why the threshold is so high lie in the public policy and public benefit inherent in the functions of the housing authority in dealing with its housing stock, a precious and limited public resource”. That public policy and public benefit has to be weighed against the public policy and public benefit inherent in the Equality Act, aiming as it does to secure equal treatment and thus equal respect for the human dignity of all people, irrespective of their race, their gender, their sexual orientation, their religion or belief, or, in particular their disability. When a disability discrimination defence is raised, the question is not simply whether the social landlord is entitled to recover the property in order to fulfil its or the local authority’s public housing functions, but also whether the landlord or the local authority has done all that can reasonably be expected of it to accommodate the consequences of the disabled person’s disability and whether, at the end of the day, the “twin aims” are sufficient to outweigh the effect upon the disabled person. These are questions which a court is well-equipped to address.

33.
A further difference between article 8 and Equality Act cases is that the Equality Act contains express provisions relating to the burden of proof. The general position under the Human Rights Act is that, once an interference with the protected right is established, the burden shifts to the public authority to prove that the interference is justified. However, in Pinnock and Powell the Supreme Court held that, in possession actions brought by social landlords against tenants who otherwise had no right to remain in the property, it could be taken for granted that the landlord was acting in pursuance of the twin aims and that to do so was proportionate in the great majority of cases. Requiring it to plead and prove this would be “burdensome and futile” (Pinnock, para 53, citing Lord Bingham’s observation to this effect in Kay v Lambeth London Borough Council [2006] 2 AC 465, para 29).

34.
I am prepared to accept that, in possession actions brought by social landlords against tenants who otherwise have no right to remain in the property, it can generally be taken for granted that the landlord is acting in pursuance of the twin aims; and further that those twin aims are entitled to weigh heavily in a proportionality exercise. However, as already explained, that is not by itself enough to counter a discrimination defence. Once facts are established that could give rise to a discrimination claim, the burden shifts to the landlord to prove otherwise. This will depend upon the particular type of discrimination alleged. If it is a claim (or defence) of direct discrimination, for example that a disabled person has been evicted when a non-disabled person in the same or similar circumstances has not, then the landlord would have to show that the disability was not the reason for the difference in treatment. If it is a claim of indirect discrimination, for example that the landlord has imposed a requirement upon its tenants which puts disabled tenants at a particular disadvantage, then the landlord would have to show that there was a good independent reason for the requirement. If it is a claim of disability discrimination under section 15, then the landlord would have to show that there was no less drastic means of solving the problem and that the effect upon the occupier was outweighed by the advantages. The express burden of proof provisions in the Equality Act cannot simply be ignored because there are some elements in the proportionality exercise which can be taken for granted.

Summary disposal

35.
Possession actions are governed by Part 55 of the Civil Procedure Rules. A claim will be allocated a fixed return date for hearing between four and eight weeks after it is issued. Given the huge volume

of such claims, they are normally listed in batches on the basis that they will take only a few minutes each. At that hearing the court will either decide the claim or, in the event that it is “genuinely disputed on grounds that appear to be substantial” (CPR 55.8(2)), will allocate it to a track and give case management directions. Thus the case can be summarily disposed of at the first hearing. Nor is there anything to prevent the court deciding to dispose of it summarily at a later hearing. As the Court of Appeal pointed out (para 42), the court can deal with possession claims summarily without the summary judgment provisions of CPR Part 24 being invoked. Hence claims where the only defence is article 8 will be dealt with summarily unless the case raised by the occupier has crossed the “high threshold” of being “seriously arguable” (Powell, paras 33, 34).

36.
There may also be cases where a discrimination defence is so lacking in substance that summary disposal is merited. The test is whether the claim is “genuinely disputed on grounds that appear to be substantial”. I agree with Lord Neuberger (para 59) that the case could be summarily disposed of if the landlord could show (i) that the defendant had no real prospect of proving that he was disabled within the meaning of the Act; or (ii) that it was plain that possession was not being sought because of something arising in consequence of his disability; or (iii) that bringing and enforcing the claim were plainly a proportionate means of achieving a legitimate aim. Like him, I suspect that such cases will be rare. The course taken at the outset of this case by District Judge Smith was, in my view, the entirely proper course to take on the information which was then available to him. The question now is whether the course taken by Judge Denyer QC, in summarily disposing of the case (albeit after a day of legal argument), was the proper one to take in the circumstances as they then were.

Summary disposal in this case?

37.
It is very easy to understand why Judge Denyer reached the conclusion that he did. The local authority had accepted that the appellant was a vulnerable person in priority need and he had been allocated this accommodation accordingly. Numerous attempts had been made to find permanent accommodation which was acceptable to him. Eventually the authority concluded that he had refused a final offer of suitable accommodation. Hence these proceedings were begun. However, he then made a fresh application and the authority acknowledged, on review, that he had not become homeless intentionally. This was because it accepted that the alternative accommodation was not suitable because of his disability. Hence the proceedings were stayed. Then a fresh offer was made of accommodation in the very street where he was living. How could it possibly be disproportionate to require him to move into that?

38.
There are, however, two problems with Judge Denyer’s approach. The first is that he appears to have regarded his role as akin to the role of the county court judge in homelessness appeals under section 204 of the 1996 Act, in other words, as akin to a judicial review role. It is, however, clear that in possession actions generally, and in discrimination cases in particular, the role of the court is not akin to judicial review. It has to undertake the proportionality exercise itself. The second problem is that he regarded the proportionality exercise under section 15 as the same as the proportionality exercise under article 8. For the reasons given earlier, it cannot be exactly the same. While some things can be taken for granted, and some cases may be so clear that summary disposal is warranted, the issues are not all the same.

39.

In this particular case, the first issue was whether the appellant's inability even to take up an offer of accommodation in the same street was something which arose out of his mental illness. Mr Callow's evidence raised a substantial case that it was. If he was right about that (and of course his evidence could have been challenged), then the next question was whether there was any lesser action that could have been taken and, if there was not, whether the harm to the appellant of forcing him to move was outweighed by the benefit to the landlord, the local authority, to the other homeless people in the area, and to the public generally, of being able to obtain possession of this particular property. The landlord might very well have been able to show that it was. There may have been good reasons why it was not practicable to leave the appellant where he was and put the alternative accommodation in the same road to the use to which it was wished to put his flat. But in my view the time which Judge Denyer devoted to this case ought to have been spent on considering the merits of the appellant's defence rather than listening to a day's legal argument devoted to whether to do that.

40.
I am afraid, therefore, that I cannot be satisfied that the outcome would have been the same had he considered the defence on its merits and so, had matters remained as they then were, I would have allowed this appeal and sent it back so that those merits could be properly explored.

41.
I recognise, however, that things have moved on since then. There would not only be little point, but also some injustice, in sending the case back for a hearing, the result of which would be inevitable. Those later events are recounted in Lord Wilson's judgment and I agree with him that they would inevitably result in a possession order now being made. In those circumstances, it would not only be unjust to the respondent and the building owners, but also no kindness to the appellant, to prolong matters further. I would therefore dismiss this appeal.

LORD NEUBERGER:

42.
I have had the benefit of reading in draft the judgments of Lady Hale and Lord Wilson.

43.
As to the law, Lady Hale has fully set out the relevant statutory material at paras 15 to 22. I agree with her that the Court of Appeal, Cranston J and Judge Denyer QC were wrong to hold that, in relation to a claim for possession of residential premises, a court should take the same approach to a defence raising an argument of unlawful discrimination under section 35(1)(b) of the Equality Act 2010 Act ("the 2010 Act") as to a defence based on article 8 of the European Convention on Human Rights ("the Convention").

44.
However, this does not mean that the court cannot summarily make an order for possession against a residential occupier who raises an unlawful discrimination defence. Indeed, on the facts of this case as they now are, I agree with Lord Wilson that the summary order for possession made by Judge Denyer should not be disturbed.

45.
I turn first to the law. In three successive cases, Harrow London Borough Council v Qazi [2003] UKHL 43; [2004] 1 AC 983, Kay v Lambeth London Borough Council [2006] UKHL 10; [2006] 2 AC 465, and Doherty v Birmingham City Council [2008] UKHL 57; [2009] AC 367, the House of Lords held that a residential occupier, who had no right to occupy his home in domestic law, could never succeed in

relying on article 8 of the Convention (“article 8”) to resist an order for possession in favour of a public authority land-owner, on the ground that it would be disproportionate in his particular circumstances. This conclusion was expressed thus by Lord Hope in Kay at para 110: “a defence which does not challenge the law under which the possession order is sought as being incompatible with article 8 but is based only on the occupier's personal circumstances should be struck out”. To much the same effect, he observed that, where the defence did not challenge the compatibility of the legislation with the Convention, then “if the requirements of the law have been established and the right to recover possession is unqualified”, the defendant would not be entitled to raise an article 8 proportionality defence.

46.
In Pinnock, however, the Supreme Court accepted that this conclusion had been decisively rejected by the Strasbourg court. In Pinnock and the subsequent case of Powell, the Supreme Court accordingly restated the law in relation to the issue.

47.
In those two decisions, this court laid down the approach which should be adopted by first instance judges to claims for possession of residential property where the defendant raised a defence that, in the light of article 8 of the Convention, it would be disproportionate to require him to vacate his home even though he had no domestic right to remain there. As Lord Hope explained in Powell at paras 33 and 35, “[t]he court will only have to consider whether the making of a possession order is proportionate if the issue has been raised by the occupier and it has crossed the high threshold of being seriously arguable”, and that “the threshold for raising an arguable case on proportionality was a high one which would succeed in only a small proportion of cases”.

48.
As Lord Hope explained in Powell, para 36, “The proportionality of making the order for possession at the suit of the local authority will be supported by the fact that making the order would (a) serve to vindicate the authority's ownership rights; and (b) enable the authority to comply with its public duties in relation to the allocation and management of its housing stock”. Accordingly, as he went on to say in the next paragraph, “there will be no need, in the overwhelming majority of cases, for the local authority to explain and justify its reasons for seeking a possession order. It will be enough that the authority is entitled to possession because the statutory pre-requisites have been satisfied and that it is to be assumed to be acting in accordance with its duties in the distribution and management of its housing stock”.

49.
So far as procedure is concerned, this court observed in Pinnock at para 61, that “if an article 8 point is raised, the court should initially consider it summarily, and if, as will no doubt often be the case, the court is satisfied that, even if the facts relied on are made out, the point would not succeed, it should be dismissed”. Lord Phillips expressed the same view in Powell at para 92, when he said that “the judge should summarily dismiss any attempt to raise a proportionality argument unless the defendant can show that he has substantial grounds for advancing this” and that it was “extremely unlikely that the defendant will be in a position to do this”.

50.
The question of principle raised by this appeal is whether the same approach is appropriate where the defence raised is based on unlawful discrimination under the 2010 Act.

51.

The facts that (i) the landlord is vindicating its property rights by seeking possession and (ii) the landlord has to take into account competing demands from other potential or actual occupiers of residential accommodation are plainly very telling points when weighed against the article 8 rights of a public sector occupier with no domestic law right to be in occupation. After all, every residential occupier of property, at least if it is owned by a public authority, is entitled to the benefit of article 8, and there are domestic statutes which bestow a measure of protection on residential tenants of public sector landlords.

52.
It is therefore to be presumed, at least in the general run of cases, that Parliament has decided how the right to respect for an occupier's home is to be balanced against a public sector owner's right to possession. Accordingly, it must be very much for the occupier to raise and make out a proportionality defence to a claim for possession of his home, and it will be a very unusual case where such a defence could succeed. It follows that, in the great majority of cases, the court will be able, at a preliminary stage, to hold that a defendant's proportionality argument should be rejected simply on the ground that, even if all the facts which he relies on are made out, he would fail.

53.
The position is different in a case where a defendant relies on section 35(1)(b) of the 2010 Act ("section 35(1)(b)"). That is neatly illustrated by the point that, unlike in the cases cited in para 45 above in relation to article 8, it would be inconceivable that a court could have held that an occupier of residential property could not rely on his particular circumstances to justify a defence under section 35(1)(b) to a claim for possession once his landlord had established a right to possession. (That may appear at first sight to be a questionable proposition in the light of the majority view in Lewisham London Borough Council v Malcolm [2008] UKHL 43; [2008] AC 1399 - subsequently reversed by the 2010 Act - but that was, on analysis, concerned with a rather different point).

54.
The defence afforded by article 8, as considered in Pinnock and Powell, applies to an occupier of residential property against whom possession is sought by a public sector landlord. The defence afforded by section 35(1)(b), by contrast, extends to occupiers of any type of property against whom possession is sought by any landlord - provided, of course, that the occupier is a disabled person. While the marked distinction in the ambit of the two provisions does not automatically undermine the notion that the same substantive and procedural principles apply to possession claims where the two types of defence are raised, it certainly negatives the notion that they should be expected to be the same.

55.
More specifically, although both types of defence involve the court considering the proportionality of making an order for possession, the protection afforded by section 35(1)(b) is plainly stronger than the protection afforded by article 8. Section 35(1)(b) provides a particular degree of protection to a limited class of occupiers of property, who are considered by Parliament to deserve special protection. The protection concerned is founded on a desire to avoid a specific wrong in a number of fields, not just in relation to occupation of property, namely discrimination against disabled persons. Further, once the possibility of discrimination is made out, the burden of proof is firmly on the landlord to show that there was no discrimination contrary to section 15(1)(a), or that an order for possession is proportionate under section 15(1)(b), of the 2010 Act - see section 136 of that Act. Additionally, the proportionality exercise under section 15(1)(b) involves focussing on a very specific issue, namely the justification for discrimination.

56.
All this is very different from the home-related, but otherwise far less specific and targeted, article 8 defence. Thus, the protection afforded by section 35(1)(b) is an extra, and a more specific, stronger, right afforded to disabled occupiers over and above the article 8 right. It is also worth mentioning that this conclusion ties in with what was said in Pinnock at para 64, namely that as suggested by "the Equality and Human Rights Commission, … proportionality is more likely to be a relevant issue 'in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty', and that 'the issue may also require the local authority to explain why they are not securing alternative accommodation in such cases'". In other words, where the occupier is disabled, it is significantly less unlikely than in the normal run of cases that an article 8 defence might succeed.

57.
As Lady Hale says, the difference between the article 8 defence to possession and a defence under section 35(1)(b) is further underlined by the fact that, in relation to an article 8 proportionality defence, the Supreme Court has expressly rejected the applicability of the sort of structured approach which has been held to be generally appropriate to a disability discrimination proportionality defence (and which there is no reason not to apply where proportionality under section 15(1)(b) is in issue in a possession action) - compare Powell at para 34 per Lord Hope and R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213, para 165 per Mummery LJ.

58.
Accordingly, it appears to me clear that it is wrong to equiparate, either procedurally or substantively, a defence under section 35(1)(b) to a possession action with a defence under article 8 to a possession action. Provided that a defendant establishes that the landlord is (or at a summary stage, may well be) seeking to evict him "because of something arising in consequence of [his] disability", the landlord faces a significantly more difficult task in having to establish proportionality than does a landlord who faces an article 8 defence.

59.
That does not, however, mean that a landlord whose possession claim is met with a defence to the effect that possession is being sought "because of something arising in consequence of [the defendant's] disability", cannot seek or obtain summary judgment for possession. Possession could be ordered summarily if the landlord could establish that (i) the defendant had no real prospect of establishing that he was under a disability, (ii) in any event, it was plain that possession was not being sought "because of something arising in consequence of [the] disability", or (iii) in any event, the claim and its enforcement plainly represented "a proportionate means of achieving a legitimate aim".

60.
The problem for a landlord seeking summary judgment for possession in such a case would not be one of principle, but one of practice. Each of the three types of issue referred to in the immediately preceding paragraph would often give rise to disputed facts or assessments, eg whether the defendant suffers from a physical or mental disability, whether it has led to the possession claim, and where the proportionality balance comes down. Summary judgment is not normally a sensible or adequate procedure to deal with such disputes, which normally require disclosure of documents, and oral and/or expert evidence tested by cross-examination. There will no doubt be cases where a landlord facing a section 35(1)(b) defence may be well advised to seek summary judgment, but they would, I suspect, be relatively rare.

61.
Turning to the facts of this case, it is fair to say that the claimant landlord had a fairly strong case before Judge Denyer QC even though it seems clear that (i) the defendant tenant is a person suffering from a disability and (ii) the claimant is seeking possession "because of something arising in consequence of [the defendant's] disability". The history as summarised by Lady Hale suggests that the claimant and the local housing authority had gone out of their way to accommodate the defendant, and that, if there had been a full hearing, a judge may very well have reached the same conclusion as was reached by Judge Denyer QC at a summary stage.

62.
However, for the reasons given by Lady Hale and myself, Judge Denyer QC misdirected himself in holding that he should approach the defendant's section 35(1)(b) defence in the same way as if it had been an article 8 defence. In those circumstances, the appeal against his decision ought to be allowed, unless we could be satisfied that either (i) had the judge applied the right test, namely the threefold approach identified by Mummery LJ in Elias at para 165, he could only properly have reached the same conclusion as he did, namely that an order for possession should be made, or (ii) if the claim was now remitted to the county court, it is effectively inevitable that an order for possession would be made after a full hearing before a judge.

63.
For the reasons given so cogently by Lord Wilson, I am of the view that this is a case where the second of those two alternatives applies. I would therefore dismiss this appeal.

LORD WILSON:

64.
In substantial agreement with the legal analysis offered by Lady Hale and Lord Neuberger I conclude as follows:

(a)
The normal procedure of the court in addressing a defence under section 35(1)(b) of the 2010 Act to an action for possession should not be equated with its normal procedure in addressing a defence to such an action under Article 8 of the Convention.

(b)
Where a defence is raised under section 35(1)(b) to an action for possession, there should be no presumption that the action is fit for summary disposal. On the contrary rule 55.8(2) of the CPR calls for a careful evaluation at that initial stage whether the claim is genuinely disputed on grounds which appear to be substantial.

(c)
Where such a defence is raised, the court should adopt a four-stage structured approach to the claimant's attempt to show, pursuant to section 15(1)(b) of the 2010 Act, that the steps which it is taking for the purpose of securing the defendant's eviction are a proportionate means of achieving a legitimate aim.

65.
I consider however that the appeal should be dismissed on the basis that, although it would be conducted in accordance with the guidance which Lady Hale and Lord Neuberger have given, the full trial would inevitably result in a further order for possession against the defendant. In my opinion the

claimant is correct to submit that there is no real dispute of fact, with the result that there is no inhibition on the ability of an appellate court even at this stage to form a clear view of the proper result.

66.
The situation of the defendant is deeply tragic. The evidence is that he is highly intelligent and gifted but that his disorder has disabled him from engaging in the therapy which he needs and from cooperating with many of those, particularly of those in authority, who seek to help him. Attempts to improve his situation are therefore locked. Sadly the law can do little to unlock them. But he has the support of a close friend and advocate; of Mr Callow, a distinguished chartered psychologist; and of the inestimable Shelter, which represents him. Granted also what appears to be the continued goodwill of the local housing authority ("Mendip") and its acceptance that, even if the defendant's appeal were dismissed, it would nevertheless owe him the limited duties set out in section 190(2) of the 1996 Act, there is some hope that, between them, they can spark a positive response within the defendant.

67.
In that he has a mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities, the defendant has a disability within the meaning of section 6 of the 2010 Act. In that the claimant is taking steps for the purpose of securing his eviction from the flat in Glastonbury, it is treating him unfavourably within the meaning of section 15(1)(a) of that Act. In that its claim is founded on his refusal of Mendip's final offer of accommodation within the meaning of section 193(7) of the 1996 Act and that, as Mr Callow has explained, his refusal is attributable to his psychological inability to make a decision, the cause of the unfavourable treatment is "something arising in consequence of [his] disability" within the meaning of section 15(1)(a) of the 2010 Act. One may therefore confidently conclude that, at any full trial, the only issue would be whether the claimant can show that the steps which it is taking for the purpose of securing the defendant's eviction are "a proportionate means of achieving a legitimate aim" within the meaning of section 15(1)(b) of that Act.

68.
The structured approach requires attention to be given, first, to the claimant's aims or objectives in taking the steps for the purpose of securing the defendant's eviction. In the Pinnock case, cited at para 20 above, Lord Neuberger MR, indicated on behalf of this court, at para 52, that one aim of a possession action would be the vindication of the claimant's ownership rights and that a second aim of a possession action brought by a housing authority would usually be to enable it to comply with its duties in relation to the distribution and management of its housing stock. Adapted to the facts of this case, in which the action is not brought by Mendip, the housing authority, but by a registered social landlord which has agreed with Mendip to let accommodation at its request to those whom Mendip is obliged (or elects) to accommodate under Part VII of the 1996 Act, the usual second aim, if it were to exist in the present case, would be to enable Mendip to comply with its duties (and to exercise its powers) through its agreement with the claimant to provide accommodation to homeless persons under the 1996 Act.

69.
In the Pinnock case Lord Neuberger MR added, at para 53, that, in relation to an Article 8 defence, the twin aims can be a "given" and, at para 34 above, Lady Hale accepts that, in relation to a defence under section 35(1)(b) of the 2010 Act, they can also be a "given".

70.

In its Reply to the Defence the claimant expressly invoked the usual second aim. It did so in the following terms:

“In remaining in occupation, the Defendant is preventing other applicants for housing assistance whom the Council has determined it does owe a duty to … from enjoying the better standard of accommodation which the Council could secure for them by requesting the Claimant to accommodate them temporarily in the Property.”

But the Reply was filed more than two years ago. Events have supervened. The usual second aim no longer exists in the present case and, were there to be a full trial, should therefore on no account be accepted as a “given”. It has been replaced by an aim which is even more compelling: for the claimant now urgently needs vacant possession of the flat occupied by the defendant (“Flat One”) in order to comply with its own legal obligations.

71.
Material to the above effect has, without controversy, been put before this court, as it was before the Court of Appeal, and, were there to be a full trial, the claimant would no doubt be permitted to amend its Reply in order to plead it. There is nothing to indicate that the claimant’s proposed averments are disputed so in all likelihood it would not even have to prove them. They are to the following effect:

(a)
Flat One is one of eight flats in a building in Glastonbury.

(b)
At all material times the freehold of the building has been held by a small property company, subject to a mortgage.

(c)
The claimant’s interest in the flats has been as a leaseholder, namely under eight separate fixed-term leases. The claimant entered into the leases in order to perform its agreement with Mendip to provide temporary accommodation to those whom Mendip was required (or elected) to accommodate under Part VII.

(d)
In August 2010, at Mendip’s request, the claimant let Flat One to the defendant under a weekly tenancy. On 18 July 2011, following Mendip’s conclusion, upon review, that it had ceased to be subject to a duty to secure accommodation for him, the claimant served him with notice to quit effective from 21 August 2011. The appeal proceeds on the basis that the notice to quit validly terminated his tenancy.

(e)
The fixed terms of the claimant’s leases of the eight flats expired on dates no later than February 2014 and thereafter it held them on monthly tenancies.

(f)
Early in 2014 Mendip informed the claimant that, for reasons of policy, it had decided no longer to request it to provide accommodation in the building for those whom it was required (or elected) to accommodate under Part VII.

(g)

Coincidentally and at about the same time, the freeholder, under pressure from its mortgagee, determined to sell the building with vacant possession.

(h)
In April 2014 the claimant served on the freeholder notice to quit seven of the eight flats but, because of the pending appeal, not Flat One.

(i)
On 1 May 2014, however, the freeholder served on the claimant notice to quit Flat One, effective from 30 June 2014. Since then the claimant has had no interest in Flat One, save that the freeholder has granted to it a licence to enforce the possession order made by Judge Denyer QC if and when it can.

(j)
The claimant's breach, to date, of its obligation to give vacant possession to the freeholder of Flat One appears to have disabled the latter from selling the building to a buyer who has been ready to purchase it with vacant possession. In this regard the claimant is at risk of a claim by the freeholder for damages.

72.
It was in his short oral reply on the defendant's behalf that Mr Luba reminded this court that, no doubt after consultation with Mendip, the claimant had made an offer to the defendant of a flat along the very street on which the building is situated; and, he then raised the question why the claimant could not accommodate the intended occupant of Flat One in the flat along the street because, if such could be achieved, it would enable the defendant to continue to occupy Flat One. It seems clear, however, that the claimant does not intend to place another occupant in Flat One: Mendip no longer wishes to place a homeless person there and the claimant no longer has the right to allow anyone to occupy it.

73.
The structured approach requires attention to be given, second, to the existence or otherwise of a rational connection between the claimant's objectives and the defendant's eviction (upon which the conclusion must be that it exists) and, third, to whether the eviction is no more than is necessary to accomplish them (upon which the conclusion must be that it is indeed no more than is necessary). But there is a fourth element to which the structured approach requires that attention be given. For the eviction may be proportionate to the claimant's objectives without being proportionate in the necessary wider sense. Section 15(1)(b) of the 2010 Act requires the claimant to show that the eviction strikes a fair balance between its need to accomplish its objectives and the disadvantages thereby caused to the defendant as a disabled person.

74.
So the focus turns at last upon the defendant, in relation to whom the relevant facts are as follows:

(a)
The defendant began to occupy Flat One in August 2010. It was intended to be temporary accommodation because it was provided pursuant to Mendip's duty to him under section 193 of the 1996 Act.

(b)
By the date of any full trial he will have remained in occupation of Flat One for almost five years.

(c)

Efforts to place the defendant in permanent accommodation owned or procured by Mendip began as soon as he began to occupy Flat One. Mendip operates a system whereby those eligible for social housing can bid for available properties, as can Mendip on their behalf.

(d)
Between the summer 2010 and March 2011 eleven properties in Mendip's area were canvassed for possible occupation by the defendant. In relation to ten of them, either he declined to bid; or he told Mendip not to bid on his behalf; or he withdrew his bid; or, after his bid had been accepted, he rejected the property. But it seems that, in the light of his disability, all 11 of them were unsuitable for him for one reason or another.

(e)
In his Defence dated 22 December 2011 to the claim for possession the defendant asserted that he required to continue to occupy Flat One only for so long as it would take to find more permanent suitable accommodation in a suitable area having regard to his disability.

(f)
In September 2012 the claimant offered to the defendant a starter tenancy of the flat situated along the same street as the building. The fact is that this flat was suitable for him. According to Mr Callow, it was the defendant's state of mind which prevented him from accepting it. Having previously reversed its original decision to this effect, Mendip thereupon again decided that its duty to the defendant under section 193 of the 1996 Act was discharged. Represented at this stage by Shelter, the defendant did not request a review of the decision pursuant to section 202 because he could not dispute that the flat situated along the same street had been suitable for him.

(g)
As recently as 11 June 2014, Shelter, by letter, reiterated to the claimant that the surest way in which it would secure vacant possession of Flat One prior to the expiry, which was then imminent, of the freeholder's notice to quit would be for it immediately to make or procure an offer of suitable alternative accommodation to him.

(h)
But, at the hearing before this court, the stance taken on behalf of the defendant inevitably changed. Change was inevitable because, in that the defendant had been unable to accept the suitable accommodation along the street, there were no grounds for considering that there was any change in his condition which might enable him at this stage to accept other suitable accommodation. The stance became as follows:

"This is a case where therapy was and is required. Pending receipt of this, moves to evict [the defendant] ought not to be made."

(i)
It is unclear whether, and if so when and for how long, the defendant has undergone therapy. In December 2011 Mr Callow commented that he had seldom seen someone more in need of therapy than the defendant and in July 2012 he added that the defendant had needed therapy for many years. There is no evidence that the defendant has embarked – or, as would be a fairer description, has been able to embark – on therapy since Mr Callow made his comments. So the question arises: no eviction prior to receipt of therapy means eviction … when?

75.

In the light of the above my view is that, no doubt with the utmost reluctance, the judge at any full trial of the action would feel bound to conclude that the eviction would strike a fair balance between the claimant's need to accomplish its objectives and the disadvantages thereby caused to the defendant; that therefore the eviction would be a proportionate means of achieving a legitimate aim; and that, by securing his eviction, the claimant would therefore not be discriminating against him.

76.
In January 2013 the defendant's close friend and advocate wrote that the legal issues surrounding his housing, economy and care were causing him severe stress. No doubt they have continued to do so. So my postscript is that it would not even be a kindness to the defendant to prolong the current action by a remission of it for a full trial of which the result is a foregone conclusion.

LORD CLARKE AND LORD HUGHES:

77.
We agree that the relevant principles are those stated by Lady Hale, Lord Neuberger and Lord Wilson. We also agree that the appeal should be dismissed, essentially for the reasons given by Lord Wilson.