

Doherty v Birmingham CC [2008] UKHL 57

Court: House of Lords (Lord Hope; Lord Scott; Lord Rodger; Lord Walker; Lord Mance)

Relevant to: B8.3.2(iii)

Related cases: *Harrow LBC v Qazi* [2004] 1 AC 983; *Kay v Lambeth LBC* [2006] 2 AC 465; *McCann v UK* [2008] ECHR 285 (see the update on this website)

Importance: ***

The background: Birmingham City Council (A) was the freehold owner of a plot of land in Castle Vale, Birmingham. It was known as the Travellers' Site and consisted of 16 concrete stands for caravans and four blocks with washing and toilet facilities. In September 1987, Mr Doherty (B) was given a licence, by A, to station his caravan there. Mr Doherty had remained on the site, with his family, for almost 17 years when, in March 2004, A asked him and his family to leave. A wished to redevelop the land and turn it into a site providing temporary (not permanent) accommodation to travellers. A was not under any contractual duty to B not to revoke B's licence. Nor did B have any statutory protection (other than a brief notice period): whilst the Caravan Sites Act 1968 and the Mobile Homes Act 1983 did provide some protection to those in similar situations, those Acts, as they stood in March 2004, did not limit a local authority's ability to remove an occupier of a local authority caravan site providing accommodation for gypsies (see pp.53-54).

Under the notice provision of that Act, B had to leave by 10 May 2004. B did not leave and so A brought proceedings for a possession order. In response, B did not argue that he had any relevant direct right against A, or any persistent right or property right. Rather B noted that, as a public body, A had a duty, under section 6 of the Human Rights Act 1998, not to interfere with B's rights under the European Convention of Human Rights. B argued that his removal would be an illegitimate interference with his right under Art 8 of the Convention as, given his particular circumstances in having lived on the site for such a long time, his removal would not be a proportionate and justifiable interference with his right to respect for his privacy and home life.

The judge hearing the case followed the House of Lords decision in *Harrow London Borough Council v Qazi* (see B8.3.2(iii)(a)) and held that, as B could not assert a direct right against A, nor a pre-existing right, he could not be permitted to rely on Art 8 as a defence to A's application for possession of the land. The judge did however grant a stay of execution of the possession order, so that B could seek judicial review of A's decision to remove him from the land. In such judicial review proceedings, B could argue that A's decision to remove him was unlawful, as it was a breach of A's duty, under section 6 of the Human Rights Act 1998, to respect B's Art 8 rights.

B did not pursue a judicial review application. Following the decision of the European Court of Human Rights in *Connors v UK* [2004] 40 EHRR 189 (funnily enough given on the very same day on which A began its possession proceedings), the House of Lords in *Kay v Lambeth London Borough Council* had somewhat softened the approach in *Qazi* (see

B8.3.2(iii)(b) and (c)). In *Kay*, it was noted that, in rare cases, it could be appropriate for B to rely on Art 8 in an attempt directly to resist a possession order sought by a public authority: in such cases, there was no need for B to apply for judicial review.

B therefore appealed against the judge's grant of a possession order, arguing that this was one of the special cases, envisaged in *Kay*, in which Art 8 could be used directly in an attempt to resist a possession order. The Court of Appeal considered the impact of the European Court of Human Rights' decision in *Connors*, as well as the House of Lords' decision in *Kay*, but still dismissed B's appeal, holding that this was not one of those special cases in which Art 8 could be used directly in an attempt to resist a possession order. B therefore appealed to the House of Lords.

The questions: The primary question was as follows: if, as recognised by the House of Lords in *Kay*, it may sometimes be possible for B to rely on Art 8 in his attempt to resist a public body's application for a possession order, was *Doherty* one such case? This, in turn, raised a very important further question. Following both its own decision in *Connors*, and the House of Lords' decision in *Kay*, the European Court of Human Rights gave judgment in *McCann v UK* [2008] ECHR 385 (see the update on this website). In *Doherty*, counsel for B argued that the decision of the European Court of Human Rights in *McCann* meant that the approach adopted by the majority of the House of Lords in *Kay* was too restrictive and did not properly protect B's Art 8 right. So the second question was whether, in light of the decision in *McCann*, the *Kay* approach had to be modified (just as *Kay* itself had modified, in light of the decision of the European Court of Human Rights in *Connors*, the earlier approach taken in *Qazi*).

The decision: The House of Lords allowed B's appeal, holding that this *was* one of the special cases, envisaged in *Kay*, in which B could directly attempt to resist a possession order, even though B has no direct right against A, nor any pre-existing right. The House of Lords did *not* accept that the *Kay* exceptions needed to be extended in light of the ECHR decision in *McCann*.

Lord Hope noted that the effect of *Kay* is summarised in [110] of his speech from that case. If A (a public body) applies for possession of A's land, and B has no direct right against A, nor any pre-existing right that binds A, and there is no specific statutory check on A's right to possession, then a court should proceed to give summary judgment in A's favour unless *either*: (a) a seriously arguable point is raised that the law which enables the court to make the possession order is incompatible with Art 8; *or* (b) it is seriously arguable that A's decision to recover possession can be challenged as an improper exercise of A's powers at common law, for example on the ground that it was a decision that no reasonable person would consider justifiable. These two routes were referred to in *Doherty* as Gateway (a) and Gateway (b). If it is found, under (a), that the law which enables the court to make the possession order appears to be incompatible with Art 8, a court should consider whether, as a result of section 3 of the Human Rights Act 1998, it is possible for it to interpret any relevant legislation in such a way as to be compatible with B's Art 8 right. If it is possible to do so, A's application for possession can be denied. If it is not possible to do so, then the High

Court (or any higher court) can make a declaration of incompatibility under section 4 of the Human Rights Act 1998. If it is found, under (b), that A's decision to remove B is a breach of any of A's common law duties, A's application for possession can be denied.

It was held by the House of Lords that, in *Doherty*, B could not rely on Gateway (a). It may have been the case that the statutory scheme permitting A to remove B from the land breaches B's Art 8 right (and his right under Art 14 not to be discriminated against in his enjoyment of that Art 8 right). This is because, as noted on pp.53-54, the scheme under the Caravan Sites Act 1968 and the Mobile Homes Act 1983 deliberately gave less protection to occupiers of local authority caravan sites providing accommodation for gypsies. However, it was not possible to interpret that scheme in such a way as to make it consistent with B's ECHR rights. Lords Hope and Walker, with whom Lord Rodger agreed, explained that the statutory scheme regulating local authority's powers to remove occupiers from its land permitted A to remove B from the land. The need to respect Parliament's intention, as expressed in primary legislation, meant that it therefore could not be argued that A was breaching its duties under section 6 of the Human Rights Act 1998: such is the effect of section 6(2)(b) of that Act. In such a case, a declaration of incompatibility can be made by the High Court, Court of Appeal, or House of Lords. It seems that the House of Lords might well have made such a declaration; but it was decided that this was unnecessary because, as noted on p.54, n 131, the Housing and Regeneration Act 2008 contains a provision that extends statutory protection to occupiers of local authority caravan sites providing accommodation for gypsies.

However, the House of Lords held that B could rely on Gateway (b): the judge hearing A's application for possession should consider whether A's decision to make the application constituted a breach of any of A's common law duties, such as its duty not to act wholly unreasonably. As a result, contrary to the view of the first instance judge and the Court of Appeal, B did not need to bring separate judicial review proceedings to challenge A's decision to bring possession proceedings. B could attempt to resist A's application for possession by arguing directly that, in deciding to seek possession, the local authority was acting in a way which no reasonable person would consider justifiable. In making that argument, B could, for example, point to the long-standing occupation of the land by both himself and his family, and could demand evidence from A that the removal of B was necessary to allow A's planned redevelopment of the land. For a further case, following *Doherty*, in which a judge was instructed to consider a Gateway (b) argument, see *McGlynn v Welwyn & Hatfield District Council* [2009] EWCA Civ 285.

The effect of the decision: The House of Lords' decision is important for two main reasons. First, for its interpretation of section 6(2)(b) of the Human Rights Act 1998, which protects a public body where it acts "so as to give effect to or enforce" primary legislation (or provisions made under primary legislation) which cannot be read or given effect to in a way that is compatible with B's ECHR rights. B had argued that, by seeking possession, A was simply relying on its general property right in the land – it was not seeking to enforce any special statutory power. That argument was rejected by the House of Lords (although it seems that Lord Mance may have been inclined to support it): it was held that, if a statutory

scheme sets out to regulate a particular area (for example, local authority powers to recover possession of its land), then if Parliament leaves part of that area unregulated, that is as much an active expression of Parliamentary intention as any other part of the statutory scheme. So, even though A was relying on its general property right in the land, its ability to do so had implied Parliamentary support, and was therefore protected under section 6(2)(b).

Second, the House of Lords decision, whilst refusing to extend the *Kay* exceptions, does go some way towards the minority position in *Kay*. The gist of that minority position was that, in a highly exceptional case, B might be able to rely on his personal circumstances in arguing that his Art 8 right has been breached. In *Doherty*, it is accepted that B's personal circumstances can be taken into account in applying Gateway (b). The point is that, as Gateway (b) currently stands, it does not involve a purely "human rights" challenge to A's decision to evict B. Rather, it involves B making the more general argument that, as A is a public body, there are certain common law restrictions on its ability to act lawfully – for example, it is not lawful for A to act wholly unreasonably. In assessing whether A has acted wholly unreasonably, B's personal circumstances *can* be taken into account.

Evaluating the decision: In **B:8.2**, we considered the impact that human rights might have on the basic structure. It was noted that human rights can apply in both a *special* and a *general* way, the special way applying only where a public body is involved. The conclusion (see **p.46**) was that, even where a public body is involved, human rights need not modify the basic structure – we simply need to remember that, when considering a dispute between A and B, A clearly cannot act in a way which is unlawful. And if A is a public body, A will act unlawfully if: (i) A breaches its duties under section 6 of the Human Rights Act 1998; *or* (ii) A breaches any of the common law restrictions on its powers, as will occur if, for example, A acts wholly unreasonably. In **B:8.3**, we further noted that, in practice, it will only be in very exceptional cases that A can be said to act unlawfully, if it is seeking to remove B from A's land in a case where B has no direct right against A, nor any pre-existing right it can assert against A.

The decision in *Doherty* confirms these points. The two gateways set out there reflect two different ways in which A may act unlawfully: Gateway (a) involves a failure to abide by its duties under section 6 of the Human Rights Act; Gateway (b) involves a failure to abide by its common law duties. However, it is also confirmed that these gateways will assist B only in very rare cases. The unusual features of *Doherty* were (i) B's long-standing occupation of A's land; and (ii) the anomalous position (before the coming into force of the Housing and Regeneration Act 2008) of gypsies occupying local authority caravan sites.

Nonetheless, *Doherty* does highlight two very important points, which may be crucial in giving further protection, in the future, to parties seeking to remain in occupation of local authority land. First, it may well be the case, that when applying Gateway (b), courts will come to apply the common law in a way very similar to the ECHR: for example, it may be that, in deciding if A has acted wholly unreasonably, a court will ask if A's decision to evict B was justified by a particular aim, and whether it was a proportionate means of achieving that aim. In *Doherty* itself, this point was raised by Lord Scott at [76] and Lord Mance at

[135]. As noted in the *McCann* update on this website, the decision of the ECtHR in *McCann v UK* [2008] ECHR 385 may hasten this process. For example, at [121]-[122], Lord Walker's implied acceptance of *McCann* seems to be based on the view that it will not cause English courts additional problems, as such courts can already take into account proportionality in deciding if "the [local authority's] decision-making process leading up to the commencement of proceedings" is Convention-compliant. Further, as noted by Toulson LJ in *Doran v Liverpool CC* [2009] EWCA Civ 146 at [52], even before the enactment of the Human Rights Act 1998, common law principles of judicial review were influenced by "Convention ways of thinking".

Second, the House of Lords were willing to allow B's personal circumstances to be taken into account in deciding if A's decision to remove B from the land was wholly unreasonable. This opens up the question of when precisely will it be wholly unreasonable for a public body simply to rely on its property right in land in order to remove a party who has no direct right against the public body, nor any pre-existing right binding the public body. Can it be argued that public bodies have special responsibilities in relation to their land, and so can be controlled by the courts using public law rules even if the rules of property law impose no limit on the public body? The possibility of a Gateway (b) challenge, in theory, allows the courts the opportunity to develop a separate set of rules, distinct from the rules of property law, that impose special limits on how public bodies use their land. Different views can be taken on whether such a separate set of rules is desirable: as noted on [p.55](#) and [p.57](#), there is a risk that, in developing such rules, judges would simply be "reinventing the wheel".