



SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 54
A199/2018

Lord Justice Clerk
Lord Drummond Young
Lord Malcolm

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the APPEAL

by

SHAKAR OMAR ALI

Pursuer and Reclaimer

against

(1) SERCO LIMITED, (2) COMPASS SNI LIMITED AND (3) THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Defenders and Respondents

Pursuer and Reclaimer: Bovey QC, Dailly (sol adv); Drummond Miller LLP
1st and 2nd Defenders and Respondents: Connal QC (sol adv), Byrne; Pinsent Masons LLP
3rd Defender and Respondent: McIlvride QC, Gill; Morton Fraser
Intervener: The Scottish Commission for Human Rights

13 November 2019

Background

[1] The appellant is a failed asylum seeker. A claim made in her own right was withdrawn, and a subsequent claim made which was dependant on a claim made by her husband. That claim was refused and appeal rights were exhausted by 2 November 2017, at which date neither the appellant nor her husband had an extant claim for asylum. During

the currency of their asylum claims the appellant and her husband had been provided with temporary accommodation in accordance with the obligations incumbent upon the Secretary of State for the Home Department in terms of section 95 of the Immigration and Asylum Act 1999 (“the 1999 Act”). That accommodation had been provided on behalf of the Secretary of State by the first respondent, Serco Limited, and its subsidiary the second respondent (for convenience referred to jointly as “Serco”) under a contract between the first respondent and the Secretary of State. The accommodation was provided specifically in terms of an agreement between the first respondent and the claimer. The preamble to the agreement states:

“This Occupancy Agreement sets out the terms on which the Occupant occupies the property (“the property”) leased by Serco as part of its contract with [sic] the SERCO and UKVI and the duties and obligations of Serco and the Occupant. This property is for temporary accommodation only.”

Clause 1 narrates that Serco agrees to make the property available to the Occupant, from a specific date, on a temporary basis, on behalf of UKVI (ie UK Visas and Immigration), whilst his/her asylum application is being assessed. Clause 2 narrates the Occupant’s obligations. These include moving, if required by Serco or UKVI, to another property considered appropriate, on a minimum period of seven days’ notice. Clause 4.1 and 4.2 state as follows:

“4.1 This agreement shall terminate upon the determination of the Occupant’s asylum claim, subject to service of a written notice in terms of 4.2 hereof.
4.2 Serco may terminate this Agreement by serving a written notice on the Occupant, specifying the date and time of, and the reason for the termination.”

No rent is payable in terms of the agreement.

[2] After the claimer’s asylum claim had been rejected with appeal rights expired or exhausted, notice was served by the Secretary of State on 22 May 2018 that in these circumstances support under section 95 was being discontinued and stating that by

concession support would be continued to 13 June but at that date the claimant would be expected to quit the property occupied. Advice was given that if support continued to be required after this date, an application could be made under section 4 of the 1999 Act, which provides for support to failed asylum seekers where certain conditions apply. On 31 May 2018, Serco served notice advising that the right of the appellant and her husband to occupy the flat in which they were accommodated was terminated as from 13 June 2018, and warning them that if they did not vacate the flat by that date, legal action might be taken through the courts to evict them. It seems that Serco thereafter adopted a new policy, of changing locks and, without any court process, evicting asylum seekers whom it considered to have no continuing entitlement to be provided with accommodation. It is maintained that they have no right to do this.

[3] Put succinctly the principal question for determination of this court is whether the Lord Ordinary erred in concluding that it was not unlawful under the common law nor under articles 3 and 8 of the European Convention on Human Rights for Serco to evict the claimant from the property she temporarily resides in without first obtaining a court order authorising it.

[4] Under section 95 of the 1999 Act (read with Regulation 5 of the Asylum Seekers (Reception Conditions) Regulations 2005), the Secretary of State has a duty to provide, or arrange for the provision of, support for asylum seekers and their dependants who appear to be destitute or likely to become destitute. By virtue of section 94 of the 1999 Act, "asylum seeker" is a person not under 18 who has made a claim for asylum which has been recorded but not yet determined; and a claim is "determined" at the end of a period which is essentially (a) the period during which an in-country appeal against an adverse decision by the Secretary of State may be brought (disregarding the possibility of an appeal out of time);

or (b) where an appeal is timeously made, 21 days after the appeal has been finally determined, withdrawn or abandoned. The Secretary of State's obligation to the appellant in terms of section 95 came to an end with the failure of her asylum claim. The appellant made an application under section 4 of the 1999 Act which was refused. A right of appeal to the FTT is provided, both in respect of decisions under section 95 and decisions under section 4.

The Pleadings

[5] It is important to recognise the circumstances in which the issues before the Lord Ordinary arose for determination. This is not an action for judicial review. It is an action in which the reclaimer seeks:

- (i) declarator that she is entitled to be provided with accommodation under section 95 "while her action for asylum is being determined";
- (ii) declarator that evicting her without a court order would be unlawful *et separatim* unlawful in terms of section 6 of the HRA 1998, having regard to her article 3 and 8 rights (a reference to A1P1 was not argued); and
- (iii) interdict and interdict *ad interim* to prevent such eviction.

[6] The action came before the Lord Ordinary for discussion on the procedure roll of the pleas of all respondents that the reclaimer's averments being irrelevant and lacking in specification, the actions should be dismissed, pleas which found favour with the Lord Ordinary. The starting point for consideration of the Lord Ordinary's decision must therefore be the reclaimer's pleadings. The reclaimer avers that:

- (i) a fresh asylum claim had been made;

- (ii) she is a “residential occupier” of the property in terms of section 22(5) of the Rent (Scotland) Act 1984 (“the 1984 Act”), since she occupies the property under a contract. It is thus an offence unlawfully to deprive her of occupation (section 22(1);
- (iii) the respondents are not **unlawfully** entitled to terminate the occupancy agreement **while a fresh asylum claim is extant** since this would be an offence;
- (iv) *separatim* the occupancy agreement meets the cardinal elements of a lease requiring an action for recovery of possession of heritable property before she could be ejected. The consideration under the lease is “the fee paid by the third defender from the commencement of the occupancy agreement, calculated in relation to the number of occupiers. Said fee is a third party payment in relation to the pursuer and husband’s occupation akin to third party payment of means tested housing benefit by local government landlords.”
- (v) *Separatim* changing the locks or ejecting the pursuer without a court order is an unlawful act under section 6 of the Human Rights Act 1998 (“the HRA”). Serco carries out functions of a public nature on behalf of the Secretary of State. Serco is a public authority for the purposes of the HRA and cannot act incompatibly with Convention rights. “The pursuer **is** an asylum seeker.” The threat of ejection without due process is degrading treatment under article 3 ECHR; the threat of changing the locks is “incompatible with the pursuer’s convention rights under article 8”. She has a right to challenge the proportionality of her eviction before an independent tribunal.

In support of the claim for interdict it is averred that the claimer “**has a live asylum application** and has a right to occupy the property”.

[7] It was a matter of agreement before the Lord Ordinary that the claimant is not, contrary to her pleadings, an asylum seeker and it is not disputed that her claim has been determined as defined under section 94 of the 1995 Act. She is not entitled to support under section 95 of that Act. In so far therefore as any aspect of her case hinges on the averments that she is an asylum seeker with a live claim, it is doomed to failure. Several arguments advanced during the reclaiming motion were not advanced to the Lord Ordinary and had no foundation in the pleadings. Again, on the issues of relevancy and specification these too are doomed, although to some extent we have dealt with the substantive points in any event.

The Lord Ordinary's decision

[8] The Lord Ordinary dismissed the claimant's arguments. He concluded:

- i. That while section 22 of the Rent (Scotland) Act 1984 ("1984 Act") made it a criminal offence **unlawfully** to deprive someone of property, it did not create any new civil right in favour of a residential occupier.
- ii. Section 23A(5A) of the 1984 Act specifically excluded the claimant from the statutory protections contained in section 23 thereof, although any common law rights she may have were retained.
- iii. The circumstances did not disclose the existence of a lease, one of the cardinal elements thereof, namely rent, being absent. There was thus no common law protection upon which the claimant could rely.

iv. Serco was acting in place of central government, carrying out a 'humanitarian function', irrespective of the fact it was being paid under a commercial contract. It was thus a "public authority" for the purposes of section 6 of the HRA 1998.

v. There was no breach of article 8 ECHR: there were sufficient procedural safeguards to satisfy the applicant's article 8 rights without the need for a court order authorising eviction. The statutory scheme was a lawful one, under which a right of appeal to the FTT against an adverse decision under section 95 or section 4 enabled any arguable issue of proportionality to be raised before and determined by an independent tribunal.

vi. There was no breach of article 3 ECHR. There was no authority for the proposition that a threat of *ex hypothesi* lawful termination of possession of temporary accommodation was capable of constituting degrading treatment of the minimum level of severity necessary to amount to a breach of article 3. In the case of failed asylum seekers there was specific provision to provide accommodation under section 4 should that be necessary to protect convention rights.

vii. The terms of the Occupancy Agreement made it clear that termination was subject to service of a written notice specifying the date and time of, and the reason for, the termination. The notice period was imposed by statute *inter alia* to allow time for the occupant, prior to removal, to take any further steps available to him or her that might result in a prolongation of occupancy of the property. The onus of initiating any further action rested upon the asylum seeker and not on the Secretary of State. The action taken was contractually available.

The reclaiming motion

[9] The claimer submits that the Lord Ordinary erred in all matters save for the decision that Serco was acting as a “public authority”. The respondents argue that on this latter point only did the Lord Ordinary fall into error. In a written intervention the Scottish Commission for Human Rights submit that the Lord Ordinary erred in holding that the statutory scheme, including the appeal provisions, provided sufficient protection of the claimer’s rights under ECHR.

Submissions for the claimer

[10] Senior Counsel for the claimer submitted arguments under the following five headings.

I. Whether eviction in the present circumstances could take place without court order.

[11] The claimer was not afforded statutory protection under the 1984 Act, but retained certain common law rights. Ejection *brevi manu* would only be competent where the remedy of “ejection” was competent, the essence of the remedy being that the acquisition of possession was *vi clam aut precario*, see *Asher v McLeod* 1948 SC 55, at p58. The claimer’s occupancy did not have that quality, being under a contract, and summary ejection was not available: *Lowe v Gardiner* 1921 SC 211, at 218; *Hally v Lang* (1867) 5 M 951.

II. Whether a lease exists

[12] The “rent” requirement for a lease did exist, the consideration being paid to Serco by the Secretary of State. Separately, in an argument not advanced to the Lord Ordinary it was submitted that the principle of *jus quaesitum tertio* applied: *Craigie v Reid*. It was irrelevant that the beneficiary in *Craigie* had paid the rent. The agreement between the respondents was intended to benefit asylum-seekers like the claimer and her husband. It was not

necessary for the agreement to identify by name the claimer as an intended beneficiary, the identification of a category of beneficiary was sufficient: *McLaren Murdoch and Hamilton Ltd v The Abercromby Motor Group Ltd* 2003 SCLR 323.

III. Whether Serco is a body whose actions were in the nature of a “public authority”

[13] The HRA 1998 did not exhaustively define “public authority” but recognised that it included any person whose functions are of a public nature. There was no single test of universal application. Factors to be taken into account included the extent to which, in carrying out the relevant function, the body was taking the place of central government or local authorities- *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank* [2004] 1 AC 546 paragraph 12 per Lord Nicholls of Birkenhead. A purposive construction of section 6 indicated that the essential characteristic of a public authority were that it carried out a function of government which would engage the responsibility of the United Kingdom before the Strasbourg organs (*ibid* para 160, per Lord Rodger), as did the provision of accommodation for asylum-seekers: *R (Limbuella) v Secretary of State for the Home Department* [2006] 1 AC 396.

IV. The applicability of article 3 of the convention

[14] A threat of *ex hypothesi* lawful termination of possession of temporary accommodation was capable of constituting degrading treatment of the minimum level of severity necessary to amount to a breach of article 3: *R (Limbuella)*. Even in the absence of bodily injury or intense suffering, treatment which humiliates or debases an individual may be characterised as degrading: *Burlya v Ukraine – 3289/10* [2018] ECHR 907.

V. The lawfulness of Serco’s actions in terms of convention rights

[15] The requirement of lawfulness expressed in article 8 demanded more than compliance with the relevant provisions of domestic law: *Calder v Frame* 2006 SLT 862. The

loss of one's home was a most extreme form of interference with the right under article 8. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under Article 8, notwithstanding that, under domestic law, she has no right of occupation: *Yordanova v Bulgaria* 25446/06 [2012] ECHR 758.

[16] The Lord Ordinary failed to have regard to the procedural safeguard afforded by requiring utilisation of actions for recovery of possession. *R(N) v Lewisham LBC* [2015] AC 1259 was a homelessness case determined under English law and was not analogous. The safeguards noted by Lord Hodge at [64], [69]-[71] were not present in this case.

Submissions for the Secretary of State

I. Whether eviction in the present circumstances could take place without court order.

[17] The reclaimer's position on record was that a court order was necessary as she was a "residential occupier" within the meaning of s22 of the 1984 Act or, alternatively, because she occupied the property under a contract of lease. The Lord Ordinary was well founded in rejecting both arguments.

[18] The reclaimer's new proposition, that the common law of Scotland prohibited the recovery of residential property without a court order if the occupier entered into possession under a contract (even if not a contract of lease), was also unsound. There was no such prohibition (*Macdonald v Duchess of Leeds* (1860) 22 D 1075; *Macdonald v Watson* (1883) 10 R 1079), provided the occupier was given reasonable notice (*Sinclair v Tod* 1907 SC 1038 and see Reid, *Property* (Stair Memorial Encyclopaedia), para 156; Stalker, *Evictions in Scotland* (chap 2, p 20, 27).

[19] An action for ejection was competent where the occupier possessed the property *precario* – i.e. without title and at the tolerance of the owner- *Cairns v Innes* 1942 SC 164; *Wallace v Simmers* 1960 SC 255. The observation in *Lowe* to the effect that precariousness must be determined at the time a party has taken occupation was unsound as the occupation in question may subsequently be rendered precarious when the occupier has lost any right or title to continue in occupation: *Sinclair; White v Stevenson* 1956 SC 84. The claimer's occupation of the property had at all material times been *precario*.

II. Whether a lease exists

[20] The claimer made no averments which, if proved, would entitle the court to hold that a *jus quaesitum tertio* had been conferred. She made no averments of any provision in the contract to the effect that Serco may not remove individuals from section 95 accommodation without a court order or from which such a right could be implied; nor any averments of an intention on the part of Serco and the Secretary of State that the claimer should benefit from such a provision and have a right to enforce it.

III. Whether Serco is a body whose actions were in the nature of a "public authority"

[21] The international obligations of the UK were implemented by the Secretary of State in fulfilling her duty under section 4 or section 95 of the 1999 Act to "provide, or arrange for the provision of, facilities for the accommodation of" a person, where circumstances require. It did not follow that the private company with which the Secretary of State made arrangements for the provision of accommodation was also, separately, implementing the international obligations of the UK. Such a conclusion elided the distinction, fundamental to the decision of the majority in *YL v Birmingham City Council* [2008] 1 AC 95, between (a) the public function of an authority in making arrangements for the provision of accommodation and (b) the private law obligations and activity of a private company in providing the

accommodation under contract with the authority. The Lord Ordinary accordingly erred in concluding that Serco's provision of accommodation was "[t]he implementation by the UK of its international obligations to receive and provide essential services to destitute people seeking asylum".

[22] As far as Serco itself was concerned, the activity was a purely commercial one. It was not suggested that Serco received any public subsidy or that any statutory powers were conferred upon it. Nor had the claimer offered to prove any facts or circumstances which could displace the obvious inference that Serco is providing services under its contract with the third defender with a view to profit.

[23] Adapting Lord Scott's description of the care home provider in *YL* at [26], it could be said that none of the claimer's averments, if proved, would entitle the court to hold that Serco was anything other than "*a company carrying on a socially useful business for profit*", being "*neither a charity nor a philanthropist*"; and "*operating in a commercial market with commercial competitors*". The Lord Ordinary thus also erred in concluding that the provision of accommodation was "*not in any sense a commercial activity*" because "[t]here is no element of choice or competition so far as the occupants are concerned".

[24] The Lord Ordinary's observation that the provision of accommodation by Serco "*has more in common with the exercise of coercive functions [...] than with the mere contracting out of a service by a public authority*" at [32] was unsound. Proof of the claimer's averments would not entitle the court to hold that Serco's provision of accommodation could properly be characterised as "*coercive*", comparable to the power of a private security firm to hand-cuff a prisoner when escorting him out of the prison estate for a medical appointment, which was the matter under consideration in *Campbell v Scottish Ministers* [2017] CSOH 35. No coercion applies to someone in the position of the appellant. Support was granted on her

own application, and it remained open to her to refuse the accommodation offered. That may involve a stark choice between the accommodation offered and homelessness but it did not follow that the Secretary of State was exercising a coercive power in providing the accommodation.

[25] In any event, none of the claimer's averments, if proved, would entitle the court to hold that the giving of notice of the proposed lock-change amounted in the circumstances to anything other than an act of a private nature.

IV. The applicability of article 3 of the convention

[26] The Lord Ordinary correctly identified the test for severity sufficient to amount to a breach of article 3, as explained in both *R (Limbuella)* and *Pretty v UK* (2002) 35 EHRR 1.

What was required was, per *Pretty*, treatment "*capable of breaking an individual's moral and physical resistance*". The claimer had made no averments relevant to establishing such severity of treatment.

V. The lawfulness of Serco's actions in terms of convention rights

[27] The Lord Ordinary had correctly identified the question for determination by the court at paragraph 36 of his opinion in the light of the guidance provided by the Supreme Court in *Lewisham*. He directly considered the question of "appropriate procedural safeguards".

[28] The requirement for an opportunity for the question of proportionality to be determined by an independent tribunal was met by the availability of judicial review (as contemplated by Lord Hodge in *Lewisham* at 68 and 71) or an ordinary action such as the present proceedings, or in the right of appeal to the FTT against section 4 support. The right to appeal withdrawal of section 95 support was not relied upon.

Submissions for Serco

I. *Whether eviction in the present circumstances could take place without court order.*

[29] None of the reclaimer's arguments gave rise to the kind of entitlement which could allow the court to ignore the provisions, and express exclusions, set out in the 1984 Act. As discussed in *Conway v City of Glasgow Council* 1999 Hous LR 20, the only sensible conclusion was that the intention of Parliament was that those in the list of exemptions under section 23A of the 1984 Act did not have protection. There was no binding, let alone, persuasive authority to support the argument that there was a preserved common law entitlement imposing an obligation to use court proceedings in every case. In *Conway* it was held that an occupier of temporary accommodation was entitled to reasonable notice only.

[30] There was a very slender authoritative basis for a distinction between the former processes of removing and ejection, with eviction *brevi manu* only allowed where ejection was competent. The division between removing and ejection was described by the Lord President (Clyde) in *Lowe* at 216 as "not always readily understandable" and "productive of misunderstanding- even miscarriage".

[31] There were a number of examples of ejection or *brevi manu* eviction being held to be lawful - *Sinclair v Tod* 1907 SC 1038; *Scott v McMurdo* 1869 6 SLR 301; *Wallace v Simmers* 1960 SC 255; *Macdonald v Watson* (1883) 10 R 1079. Both Professor Reid (*Stair on Property Pt 1 (General Law)*, vol 18 at 128 & 152-157) and *Stalker on Evictions* at 27 and 190) conclude that "self-help" means were available in the case under discussion.

II. *Whether a lease exists*

[32] The Lord Ordinary's reasoning as to the absence of the requirements of a lease was sound. In the absence of pleadings it was not open to the reclaimer to advance an argument

based on *jus quaesitum tertio*. There was in any event no basis upon which such an argument would meet the requirements of the principle.

III. *Whether Serco is a body whose actions were in the nature of a “public authority”*

[33] On close examination the dicta of the court in *YL* supported the respondents’ position that Serco was not carrying out acts of a public nature in terms of section 6 of the HRA 1998. Serco was not a public or charitable body, was not regulated other than by its commercial contract with the Home Office, and did not require special registration to carry out its task. It was carrying out a commercial service for a commercial fee, and was not publicly funded or subsidised.

[34] There was no element of “coercion” applied by Serco, which was without statutory powers and merely made accommodation available to those identified by the Home Office. The critical act, namely the termination of the right to occupy, was carried out by the Home Office, which served the statutory notice to quit, not Serco. By the time Serco were advised, this had already been done and the right to occupy had ended. Serco’s own notice merely reflected this.

[35] Alternatively the service of notice by Serco under the private licence and removal of the occupier were *par excellence* private acts in terms of section 6- per *YL* at 34. By this point the occupier’s status as an asylum seeker had ended, the entitlement to accommodation under statute has vanished, and payment had stopped. At this stage the individual had no special status and no anticipation of the use of governmental powers to house her.

Parliament had made it clear, in section 95, that section 4 apart, support could only be provided to “asylum seekers”. The claimer was not an asylum seeker.

IV. *The applicability of article 3 of the convention*

[36] The court should proceed on the basis that there was a scheme in place capable of

operating lawfully and in accordance with Convention rights. *Lewisham* established that removal from what might be described as a “home”, even by an undoubted public authority, did not require the procedural burden of court proceedings in every instance. *Lewisham* had also ruled that instances where a human rights proportionality argument could influence the result were likely to be extremely rare. In such extremely rare examples the ability to access a court by way of, for example, judicial review or interim interdict would be sufficient.

V. *The lawfulness of Serco’s actions in terms of convention rights*

[37] It could not be said that the process was not in accordance with the law- it was precisely in accordance with the Rent Act exemption. It met all the requirements of legal protection, given the availability of judicial review and section 4 relief.

Submissions for the Intervener

[38] The Commission sought to provide background on how asylum support operated in practice, to inform the context of the issues raised by the claimer and the experience of being an asylum seeker. In sum it submitted that the Lord Ordinary’s error was in holding that the system which he identified in terms of section 4, 95 and 103 of the 1999 Act afforded relevant and sufficient protection. *Lewisham* was wrongly applied. There was no scope for consideration of the proportionality of an eviction by an independent and impartial tribunal within the process identified by the Lord Ordinary.

[39] The Commission did not disagree with the Lord Hodge’s analysis of the relevant law in *Lewisham*, but that case was not dispositive of the current issues, turning on English housing legislation.

[40] If the reclaimer was correct that at common law she had the right to eviction only by a court order, her eviction would not be "prescribed by law" under Article 8.

[41] The relevant interference is the threatened eviction and it is this measure which the occupant must be able to challenge before an independent and impartial tribunal, *Yordanova* at [118]. The safeguards that were present in *Lewisham*, for example the right of advice and assistance, review of the decision, and period of notice, were not present, and there were no comparable opportunities to be involved in the decision making process. There were no procedures by which an independent and impartial tribunal could assess the proportionality of the decision to evict and to determine any factual disputes.

[42] While not an automatic outcome, there was a real risk that many persons impacted by lock changes were exposed to a credible risk of a breach of Article 3 if eviction occurred before they could secure alternative accommodation on their own or via section 4 support.

Analysis and decision

[43] It was accepted by the reclaimer that the statutory protection afforded to tenants under section 23 of the 1984 Act, prohibiting recovery of possession other than by proceedings in the FTT, did not apply to her by virtue of section 23A(5A) of that Act. It was submitted, and not disputed, that the reclaimer would continue to retain whatever common law rights would attach to her circumstances, in accordance with the reasoning in *Conway v City of Glasgow Council*, with which the Lord Ordinary is also in agreement. A critical question is thus identification of any common law rights which the reclaimer may have. It was argued that she had the rights of a tenant under a lease. We agree with the Lord Ordinary that this argument is untenable. As the Lord Ordinary noted, the occupancy agreement makes no provision for any consideration and we agree with him that:

“The situation is not therefore analogous to the satisfaction of a tenant’s obligation to pay rent by remittance of housing benefit directly to the landlord; in the present case there is simply no obligation to be satisfied.”

The Lord Ordinary was correct to conclude that therefore one of the four cardinal elements of a lease was absent.

[44] Equally, there is no basis for the reclaimer’s argument that as an occupier under a contract she could not be summarily evicted unless her occupation was, from the outset, *vi, clam aut precario*. Rights of occupancy that do not amount to a lease have been considered in a number of cases. An example is *Macdonald v Watson*, 1883, 10 R 1079, where the pursuers sought damages from the owner of the property where they lived on the basis that they had been illegally removed from that property. It was held that the pursuers had no lease or other legal title to possess, and consequently that the owner of the property was entitled to eject the occupiers without any warrant or charge. On that basis the action for damages could not succeed: LP Inglis at 1082. This case is accordingly clear authority for the proposition that an occupier without a lease may be evicted without proceedings in court. To similar effect is *Sinclair v Tod*, 1907 SC 1038. In that case an employee was permitted to occupy a house as part of the remuneration for his services, and following his dismissal he was compelled to remove from the house through the removal of his furniture 12 days after the termination of his employment. It was held that the former employee had no right to damages for removal in this way. Lord Stormonth-Darling stated (at 1042):

“Now, looking to the cases ... I cannot say that the defender was not entitled to act as he did. After dismissal the pursuer’s title of possession had come to an end; and although I do not think that the defender would have been justified in turning him out the very next day, I cannot see that he had no right to turn him out in twelve days, which was what he actually did”.

Lord Ardwall (at 1044) stated that a landlord does not require a warrant to remove a person who has no title to possess, on the authority of *Macdonald v Watson*.

[45] Further authority to the same effect is found in *Cairns v Innes*, 1942 SC 164, where an employee who had been called up for military service refused to vacate a cottage belonging to his employer in which he and his family had been entitled to reside as part of his contractual remuneration. The employer brought an action for ejection, and the court held that procedure to be competent. LP Normand, after referring to *Sinclair v Tod*, held as a matter of general principle that an employer who had dismissed an employee who had the benefit under his contract of employment of occupying a dwelling house had the right to force him to remove from the dwelling house by the process of summary ejection (at 171-172). Lord Moncrieff (at 176) summarised the law as follows:

“The title so required by the defender to exclude an action of ejection must accordingly be in all cases a title which *de praesenti* may be established as a title active in his favour, and not merely a title which may be found to have been operative in the past. It is clear that in this case no title, and in any event no such effective title, is asserted by the defender. Indeed, the defender sets forth, whether past or present, no right as tenant; he has been at no time the possessor of the subjects. The subjects during the whole course of his employment were and remained in the ownership and possession of his employer alone, while his contract of employment gave him only a contractual right of occupation ... If, accordingly, his only contract is at an end, his right of occupation is equally ended”.

[46] Thus the owner of property is entitled to recover possession by means of summary ejection in any case where a contractual right to occupy that does not amount to a lease has come to an end. In the present case there is no lease, because of the lack of any obligation to pay rent or other consideration. Consequently the reclaimer’s occupation of the property has from the outset been precarious. The agreement under which she occupied the property made clear that her occupancy was temporary only, for the limited duration of the period during which her asylum claim was being assessed. Once that claim was assessed the agreement provided for determination of the right to occupy, on service of written notice. Thus occupancy was precarious, in the absence of any obligation to pay rent, and the first

respondents were entitled to proceed to summary ejection from the property. That does not require court procedure.

[47] As to the arguments that a *jus quaesitum tertio* was created by the agreement between the Secretary of State and Serco, there are no averments capable of instructing such a case. In any event the argument advanced did not provide a basis for the creation of such a right. The details of the contract in which it is said to arise are not specified; the circumstances in which, or the basis upon which, it can be asserted that the parties to that contract expressly or impliedly intended to create such a right in the claimant is not explained; and the exact nature of the alleged right is left unclear. Moreover the creation of any such right would directly contradict the specific terms of the agreement to which the claimant was a party, namely the agreement for temporary occupation.

ECHR

[48] Leaving aside for the moment the issue whether the Lord Ordinary was correct in classifying Serco in these circumstances as a public authority, in any event the claimant's cases on article 3 and article 8, as pled, have no merit. It is well appreciated that for conduct to constitute a breach of article 3, it must meet a minimum level of severity. This usually means actual bodily injury or intense physical or mental suffering. Yet the claimant's pleadings make no effort to grapple with this issue, nor did the arguments advanced. The claim is, in the first place, based on the erroneous assertion that she remains an asylum seeker. More significantly, the nature, extent and degree of the alleged consequences to the claimant of summary eviction are nowhere set out and were not advanced in argument. All this aspect of the claim amounts to is the mere assertion that even the threat of lawful eviction in the claimant's circumstances constitutes a breach of article 3. The hypothesis

upon which the 1999 Act proceeds is that once an asylum claim is refused, the individual should leave the country. Where to do so would cause undue difficulty, measures are available under section 4. There is a means of appeal available against refusal of section 4 support. Otherwise, there is available to an asylum seeker who maintains that eviction would breach article 3 or article 8, the remedy of a judicial review challenging the notice to quit intimated by the Secretary of State, which can be combined with the measure of *interim* interdict against Serco.

[49] As to the article 8 claim, it is clear that there are steps available to the claimer to have the proportionality of the measures taken assessed by an independent tribunal either in the context of a section 4 appeal or as noted above in the context of judicial review. We do not accept that the Lord Ordinary was in any way in error in his interpretation and application of *R(RN) v Lewisham LBC*. The observations made by Lord Hodge in paras 62-66 of that case apply equally to a person in the position of the claimer, and in this regard the case did not turn on any specialty of English housing law.

[50] We are conscious that the Scottish Human Rights Commission sought and were given permission to intervene in the present case. However, it seems apparent that the Commission did not appreciate the extent to which the issues in the case hinged on questions of relevancy and specification rather than the arguments, on proportionality and otherwise, which might have been made in an action for judicial review. Furthermore, the arguments advanced sought to identify a distinction between how the scheme was designed and how it operated in practice. This was not in fact an aspect of the claimer's case. As the Lord Ordinary noted "the object of the present litigation ... is to challenge the lawfulness of the regime working as intended." Any case where there had been a breakdown of procedure would require to be dealt with according to its own facts and circumstances.

[51] We should observe that we agree with the submission that the Lord Ordinary did fall into error in concluding that the availability of an appeal against withdrawal of section 95 support constituted a procedural safeguard, since the right only applies where support is withdrawn “before that support would otherwise have come to an end”. However, we are satisfied that there remain sufficient procedural safeguards to enable the proportionality of the measures involved to be assessed in appropriate proceedings (*R(RN) v Lewisham*).

A public body?

[52] The remaining issue relates to the question raised in the cross-appeal, namely whether the Lord Ordinary erred in concluding that Serco should be classified as a public body. We have reached the conclusion that this conclusion was incorrect, and that Serco should not be so classified. The question of whether an entity is a public body, or exercises a public function, is important in determining whether the acts of that entity engage the European Convention on Human Rights and are thus responsible to the European Court of Human Rights on behalf of the United Kingdom. At a domestic level, the question is important because of the application of section 6(1) of the Human Rights Act 1998, which provides that “It is unlawful for a public authority to act in a way which is incompatible with a Convention right...”. Subsection (3) of that section provides that, for the purposes of the section, the expression “public authority” includes “any person certain of whose functions are functions of a public nature...”. The critical question is accordingly whether Serco was a public authority or exercises functions of a public nature for the purposes of that section.

[53] As parties recognised, there is no single test of universal application to be used in deciding whether a function is a public one such that the body exercising it falls to be

classed as a public authority; that appears from the extensive discussion of the matter in *Aston Cantlow, supra*. Nevertheless, a considerable degree of clarification of the law in this area is found in the opinions of the majority of the House of Lords in *YL v Birmingham City Council, supra*. That case concerned the activities of a private operator of a care home in which it provided health and social care services under a contract with a local authority. Most of the fees for those services were paid by the local authority. The operator of the home sought to terminate the contract for the care of a particular individual and to remove her from the home. It was held that in providing care and accommodation the operator of the care home was not exercising a public function for the purposes of section 6(3) of the 1998 Act. A helpful statement of the approach to be followed is found in the opinion of Lord Scott at paragraph 31:

“[I]t cannot be enough simply to compare the nature of the activities being carried out at privately owned care homes with those carried out at local authority owned care homes. It is necessary to look also at the reason why the person in question, whether an individual or corporate, is carrying out those activities. A local authority is doing so pursuant to public law obligations. A private person, including local authority employees, is doing so pursuant to private law contractual obligations”.

[54] The fundamental distinction, on this basis, is therefore between the entity that is charged with the public law responsibility, in that case a local authority, and the private operator who contracts with that entity to provide the service. The latter person operates according to private law obligations and responsibilities. The public law duty to provide care remains that of the entity with public law responsibility, in that case the local authority. In the present case it is the Home Secretary who is charged with the public law responsibility for providing accommodation for asylum seekers. Serco, by contrast, is merely subject to a private law contract with the Home Office to provide the necessary services. The fact that those services are ultimately intended to fulfil a public law

responsibility is immaterial; they are still provided on a private law basis. Such services are analogous to a wide range of functions that are regularly contracted out by government to private providers, such as construction and maintenance work for government departments and local authorities. Further examples include the manufacture of vehicles, aircraft and munitions for government departments such as the Ministry of Defence; the latter analogy is drawn specifically by Lord Neuberger in *YL* at paragraph 141.

[55] In the present case the function that would engage the responsibility of the United Kingdom under the European Convention on Human Rights is the obligation of the Home Secretary under section 95 of the Immigration and Asylum Act 1999 to provide or arrange accommodation for asylum seekers. The fact that that obligation is discharged by the Home Secretary's arranging for asylum seekers to occupy property provided by a third party under a contract for services does not make that third party answerable for the discharge of the Home Secretary's obligations. Under section 95 of the 1999 Act the obligation is to provide support for asylum seekers, and that obligation remains incumbent on the Home Secretary and does not pass to parties such as Serco who contract with the Home Secretary to provide services for asylum seekers.

[56] In the event that an asylum claim is determined against the claimant, the scheme of the Act is that the Home Secretary should provide written notice to quit to the asylum seeker; that is provided in regulation 22 of the Asylum Support Regulations 2000. That occurred in the present case. If a failed asylum seeker contends that the result of this is a breach of their Convention rights they may challenge that notice to quit, or indeed the decision of the Home Secretary which led to the issuing of that notice. Nevertheless, it is the Home Secretary's refusal of the asylum claim that results in the eviction and is the occasion for the provider of accommodation, in this case Serco, to seek recovery of their property. In

any such case the asylum seeker's complaint, in public law, is against the Home Secretary, not against Serco. The state cannot absolve itself of responsibility for such public law duties as the provision of accommodation to asylum seekers by delegating its responsibility to private bodies. If arrangements are made with a private company to provide accommodation, responsibility for the exercise of the public law duty is not delegated, but remains with the Home Secretary.

[57] That is clear from *YL*, where Lord Neuberger at paragraph 141 states that even if the actual provision of a service that a public authority is obliged to provide as a matter of public law is delegated or subcontracted to a private provider, the actual provision of the service by that provider is not converted from what would otherwise be a function of a private nature into one of a public nature. The public authority, in the present case the Home Secretary, remains answerable for the discharge of the duty. In the event of judicial review designed to enforce an asylum seeker's Convention rights, the claim would be made against the Home Secretary, and not against the private provider. Furthermore, the provision of accommodation to asylum seekers under a contract with the Home Office is not in any way comparable to the exercise of a coercive function. It is rather a private contract for the provision of a service where the public law responsibility remains that of the Home Secretary.

Conclusion

[58] Accordingly, for all these reasons the reclaiming motion at the instance of the claimer must fail, whereas the cross appeal at the instance of the third defender and respondent must succeed.