

[2005–06 Gib LR 228]

**ATTORNEY-GENERAL v. VINET, ABECASIS and
OCCUPIERS OF FLAT 13, 39/41 FLAT BASTION ROAD**

SUPREME COURT (Dudley, A.J.): April 28th, 2006

Housing—judicial review—Government housing policy—Government housing policy and “turn-around time” for vacant Government properties not subject to judicial review, either by direct claim or in defence to action for possession

Land Law—action for possession—squatters—Government as lawful owner normally entitled to possession against trespassers/squatters—no duty under Constitution, s.5(1) to house homeless and only in “highly exceptional circumstances” of denial of basic necessities will evicting needy family from Government accommodation constitute “degrading treatment”

The plaintiff brought proceedings against the defendants to recover possession of a Government-owned flat in which they were squatting.

The defendants did not deny that they had been squatting in the premises for more than 18 months. They had applied for Government housing but had merely been put on the waiting list and sought to defend the action because they feared that if they were evicted their baby daughter would be taken into care.

They submitted that (a) the proceedings were unlawful or unconstitutional, since the Government was not fulfilling its role of promoting public benefit by seeking to evict them—if it secured possession it would not automatically make the premises available to others on the waiting list and, in addition, their daughter might be taken into care as homeless; (b) evicting them and thereby preventing them from living together with their daughter as a family, simply so that the flat could stand vacant, would show a lack of respect for their human dignity and amount to “degrading treatment” contrary to s.5(1) of the Constitution; and (c) as they were considering a counterclaim for misfeasance in public office, in which the same issues would be raised, there would be little (if any) saving of costs by granting the Government summary relief. They therefore claimed to have a substantial dispute in respect of the claim and sought case management directions.

The Government submitted in reply that (a) the allegation of the unlawfulness of the proceedings was, in effect, an attempt to seek judicial review of Government housing policy and the “turn-around time” in respect

of vacant properties—and Government policy was neither amenable to judicial review in this way, nor could it be challenged merely by way of defence to proceedings for possession; (b) to grant possession in the circumstances of the defendants, who had been in occupation of the flat for 18 months, had limited financial resources and a young child, would not constitute “degrading treatment” and, by analogy with the authorities on art. 8 of the European Convention on Human Rights, would not amount to “highly exceptional circumstances” supporting the claim of defendants without a legal right to remain against the lawful owner; and (c) there would be no procedural advantage in rejecting the claim and allowing the defendants to defend the action merely because there was a speculative counterclaim. The Crown therefore sought an order for immediate possession.

Held, making an order for possession:

(1) The defendants had not shown that they were genuinely disputing the claim on substantial grounds, within the meaning of the CPR, r.55.8(1), and summary possession would therefore be ordered (paras. 16–17).

(2) There was no authority to support the defendants’ submission that the court could undertake such a wide-ranging housing policy review as was envisaged by their allegation of unlawfulness. The policy was not amenable to judicial review and therefore, irrespective of whether the submission could properly be raised as a defence rather than as a formal application for judicial review, it was not a substantial ground on which to defend the claim (para. 8).

(3) Similarly, the defendants had not established any interference with their human rights. Without the deliberate infliction of pain or suffering, the threshold to be reached to show “degrading treatment” was high. Section 5(1) of the Constitution did not in itself create a duty on the part of the Government to house the homeless or provide for the socially disadvantaged and, although there might be circumstances in which it could afford a defence to a trespasser against an action for possession by the legal owner of the property, they would need to be “highly exceptional circumstances,” which were not present here. Both defendants were entitled to seek financial support from Social Services and to seek employment and they were not, by the deliberate action of the Government, being denied the most basic necessities of life. This, therefore, also failed as a substantial ground on which to defend the claim (paras. 12–15).

Cases cited:

- (1) *Kay v. London Borough of Lambeth*, [2006] 2 A.C. 465; [2006] 4 All E.R. 128; [2006] H.R.L.R. 17; [2006] UKHL 10, *dicta* of Lord Bingham of Cornhill applied.
- (2) *R. (Limbuella) v. Home Secy.*, [2006] 1 A.C. 396; [2007] 1 All E.R. 951; [2006] H.R.L.R. 4; [2005] UKHL 66, *dicta* of Lord Bingham of Cornhill applied.

Legislation construed:

Civil Procedure Rules 1998 (S.I. 1998/3132), r.55.8: The relevant terms of this rule are set out at para. 2.

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), s.5(1): The relevant terms of this sub-section are set out at para. 9.

European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, November 4th, 1950; UK Treaty Series 71 (1953), Cmnd. 8969), art. 8(1):

“Everyone has the right to respect for his private and family life, his home and his correspondence.”

R.R. Rhoda, Q.C., Attorney-General, and R. Pilley for the claimants;
D. Hughes for the first and second defendants.

1 **DUDLEY, A.J.:** By claim form issued on September 15th, 2005 the claimant seeks possession of Flat 13, 39/41 Flat Bastion Road, Gibraltar. The first and second defendants admit that they are squatters but contend that the bringing of proceedings is unlawful and/or unconstitutional.

2 The claim is governed by the CPR, Part 55. The issue requiring determination is whether on the material before me I can decide the claim or alternatively, in the words of r.55.8, whether “the claim is genuinely disputed on grounds which appear to be substantial” so that I need to give case management directions.

Background

3 The Government of Gibraltar is the landlord of the premises. The first and second defendants are a couple who with their baby daughter have been squatting in the premises for upwards of 18 months. They say their family circumstances are such that that if they are evicted they would be homeless and that therefore it is probable that their daughter would be taken into care.

4 An application to the Government for housing by Mr. Vinet was considered by the Housing Allocation Committee on February 24th, 2005, and the application categorized as B. That categorization was not challenged. To date they have not been offered a tenancy in a Government property.

5 The defendants’ contentions are—

(1) that the decision to bring this action is unlawful, and that whilst it is a public law right which is being asserted, it need not be brought under Part 54 but can be put up as a defence;

(2) that the grant of relief would breach s.5 of the Constitution; and

(3) that they are considering making a claim for misfeasance in public office and therefore there would be little, if any, saving of costs in allowing summary relief.

Unlawfulness

6 The thrust of the argument, as I understood it, is that the Government does not have the same freedom as a private landlord in managing its housing stock but rather its housing must be managed in a manner that will promote the public benefit. Possession of the premises by the Government would not result in their being made available to other individuals on the housing waiting list but would remain vacant for a substantial period. Given the personal circumstances of the defendants and particularly since their daughter could end up being taken into care, seeking possession would not promote the public benefit.

7 Whilst undoubtedly the extent to which a public law right can be asserted as a defence was a live issue in argument, the nature of the substantive argument is such that I do not think it necessary to dwell upon that issue.

8 What, in effect, Mr. Hughes is urging by way of defence is a judicial review not of an administrative decision (such as awarding Mr. Vinet “Category B”), but rather in effect a review of Government housing policy as it relates to the seeking of possession against squatters and the “turn-around time” of vacant properties. Review of these would involve *inter alia* consideration of how a Government department budgets and applies moneys towards discharging its various obligations. Not surprisingly, Mr. Hughes is unable to refer me to any authority which would support his contention that the court can undertake what would in effect be a wide-ranging housing policy review. I am of the view that what the defendants seek to challenge is not amenable to judicial review and therefore (leaving aside the procedural issue as to whether it could in any event be raised as a defence) it is not a substantial ground upon which to defend the claim.

Section 5 of the Constitution

9 Section 5(1) of the Gibraltar Constitution Order 1965 provides that “no person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.”

10 The defendants’ contention is that to evict them from the premises and deprive them and their daughter of the right to live as a family, simply so that the premises could stand vacant, would show a lack of respect for their human dignity. Any such order would therefore amount to the imposition upon them of “degrading treatment.”

11 In the context of art. 8 of the European Convention on Human Rights (right to family life), it is settled law that where a person occupying a property has no legal or contractual right to remain there, as against the owner, a claim to recover possession engages art. 8 (see *Kay v. London Borough of Lambeth* (1)). It is significant, however, that in that case, Lord Bingham of Cornhill stresses ([2006] 2 A.C. 465, at paras. 35–36) the need for “highly exceptional circumstances” before art. 8 can afford additional protection.

12 The Gibraltar Constitution Order does not found a right to family life. Hence, I surmise, the reliance upon s.5(1). Mr. Hughes relies upon the recent decision of the House of Lords in *R. (Limbuella) v. Home Secy.* (2), a case concerning determination of the circumstances in which the Secretary of State is obliged to provide support to an applicant for asylum. Lord Bingham of Cornhill, when dealing with what may amount to inhuman or degrading treatment, says ([2006] 1 A.C. 396, at para. 7):

“Treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic of needs of any human being. As in all article 3 cases, the treatment, to be proscribed, must achieve a minimum standard of severity, and I would accept that in a context such as this, not involving the deliberate infliction of pain or suffering, the threshold is a high one. A general public duty to house the homeless or provide for the destitute cannot be spelled out of article 3. But I have no doubt that the threshold may be crossed if a late applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life.”

13 In *Limbuella*, unlike the present case, the asylum seekers had no entitlement to state support or to seek employment. Both Mr. Vinet and Ms. Abecasis are entitled to seek financial support from the Social Services and indeed to seek employment. Moreover, in my view, *Limbuella* supports the proposition that s.5 does not create a duty on the part of the claimant to house the defendants.

14 By analogy with the *dicta* in *Kay* (1), there may be cases where a trespasser can rely upon s.5 as a defence against an action for possession against the legal owner of a property. However, although it was said in the context of an art. 3 right, respectfully borrowing Lord Bingham’s phrase in *Kay*, there would be a need for “highly exceptional circumstances” for s.5 to afford protection.

15 It cannot be said that squatting in the premises for some 17 months prior to the issue of proceedings for possession, having very limited financial means and having a young child, amount to “highly exceptional circumstances” so as to make the institution of proceedings or indeed the

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grant of an order for possession amount to “degrading treatment.” I am therefore of the view that this other ground upon which the claim is disputed is not substantial either.

The counterclaim

16 There being in my view no substantial defence to the claim, there would be no procedural advantage in allowing the defendants to defend the action merely because they may have a counterclaim.

17 In the circumstances I order that the defendants give the claimant possession of the premises. I shall hear counsel as to the time which should be given to the defendants to give up possession and as to costs.

Order accordingly.
