



OUTER HOUSE, COURT OF SESSION

[2019] CSOH 34

A199/18

A191/18

OPINION OF LORD TYRE

in the cause

SHAKAR OMAR ALI

Pursuer

against

(FIRST) SERCO LIMITED, (SECOND) COMPASS SNI LIMITED, and (THIRD) SECRETARY
OF STATE FOR THE HOME DEPARTMENT

Defenders

and in the cause

LANA RASHIDI

Pursuer

against

(FIRST) SERCO LIMITED and (SECOND) SECRETARY OF STATE FOR THE HOME
DEPARTMENT,

Defenders

Pursuers: Dailly (sol adv); Drummond Miller LLP

Defenders (Serco Limited and Compass SNI Limited); Connal QC, Byrne; Pinsent Masons LLP

Defender (Secretary of State for the Home Department); McIlvride QC, Gill; Morton Fraser LLP

12 April 2019

Introduction

[1] Serco Limited (to whom, along with its former sub-contractor Compass SNI Limited,

I shall refer as "Serco") is a party to a contract with the Secretary of State for the Home

Department, in terms of which it provides accommodation and support to asylum seekers on the Secretary of State's behalf. The principal issue that has been raised for determination in these proceedings is whether it is unlawful for Serco to evict an asylum seeker whose claim for asylum has been refused from his or her accommodation without first obtaining a court order authorising it to do so. I was advised that the two cases with which this opinion is concerned are regarded by all parties as representative of a larger number of cases in which the same issue arises.

Factual background: Ms Shakar Ali

[2] Ms Ali is a Kurdish Iraqi national who avers that she is married to a Mr Aryan Hameed. They currently reside together in a flat in Glasgow. On 5 March 2016 Mr Hameed applied for asylum. Ms Ali, who had previously made a claim of her own for asylum, withdrew it and became a dependent on Mr Hameed's application. That application was refused on 25 August 2016. An appeal to the First-tier Tribunal ("FTT") was refused on 7 April 2017, and a further appeal to the Upper Tribunal was refused on 17 October 2017. Mr Hameed became appeal rights exhausted on 2 November 2017, at which date neither he nor Ms Ali had an extant claim for asylum. In the course of the hearing I was informed that on 29 October 2018 further submissions were made on Mr Hameed's behalf to the Secretary of State, but that on 25 January 2019 those submissions were rejected on the ground that they did not amount to a fresh claim. I was further informed that proceedings for judicial review of that decision are in contemplation, and that an application for support under section 4 of the Immigration and Asylum Act 1999 ("the 1999 Act", discussed below) has been made and refused.

[3] Ms Ali and Mr Hameed took up occupancy of the flat in September 2017, in accordance with an occupancy agreement entered into between Serco and Ms Ali on 6 September 2017. On 31 May 2018, Serco served notice addressed to Mr Hameed that their right to occupy the flat was terminated as from 13 June 2018, warning them that if they did not vacate the flat by that date, legal action might be taken through the courts to evict them. Ms Ali avers, however, that on 29 July 2018, Serco announced 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. In a letter dated 1 August 2018 to Glasgow City Council, Serco's group chief executive confirmed that Serco had "developed a very precise set of protocols and procedures to cover lock-changes, called a 'Move On Protocol'" which had been agreed in recent weeks with the Council.

Factual background: Ms Lana Rashidi

[4] Ms Rashidi is married to a Mr Rabar Razaie. She avers that they are both Kurdish Iranian nationals. They arrived in the United Kingdom on 22 February 2017 and claimed asylum. Ms Rashidi subsequently withdrew her application and became a dependant on Mr Razaie's application. That application was refused by the Secretary of State on 2 June 2017. An appeal to the FTT was refused on 26 July 2017, and a further appeal to the Upper Tribunal was refused on 14 March 2018. Mr Razaie became appeal rights exhausted on 28 March 2018.

[5] Ms Rashidi and Mr Razaie took up occupation of a property in Glasgow in March 2018, in accordance with an occupancy agreement entered into between Serco and Mr Razaie. On 23 April 2018, the Secretary of State informed Mr Razaie that as his appeal rights were exhausted, a decision had been taken to discontinue his asylum support, and

that he and Ms Rashidi were expected to leave the property by 6 May 2018. On 15 June 2018, Ms Rashidi made a second claim for asylum in her own name with Mr Razaie as a dependant on it. On 22 June 2018 the Secretary of State advised her that she was not eligible to claim asylum because she had previously made and withdrawn a claim. On 29 June 2018 the Secretary of State refused an application by the pursuer for asylum support; however, on 16 July 2018, the FTT decided that she had an outstanding claim for asylum and was eligible for support under section 95 of the 1999 Act (discussed below). On 6 August 2018 the Secretary of State informed Ms Rashidi by letter that he would provide her and her dependants with accommodation and subsistence support while her asylum application was pending or any subsequent appeal was outstanding. Mr Razaie and Ms Rashidi continue to occupy the property.

[6] Ms Rashidi avers that on 27 May 2018 she suffered a miscarriage which she believes happened because of “the stress and mental anguish caused by the constant threats of eviction from [Serco]”. She further avers that she has been diagnosed as suffering from post-traumatic stress disorder, with low mood and anxiety. She too makes reference in her pleadings to a change of policy by Serco in relation to eviction without a court process, following its adoption of the “Move On Protocol”.

Remedies sought by the pursuers

[7] In each of the two cases the pursuer concludes for the following remedies:

1. Declarator that she is entitled to be provided with accommodation by the defenders under section 95 of the 1999 Act while her application for asylum is being determined by the Secretary of State;

2. Declarator that evicting her from the property she is occupying without a court order would be unlawful, *et separatim* unlawful in terms of section 6 of the Human Rights Act 1998 having regard to her rights under articles 3 and 8 of the European Convention on Human Rights (“the Convention”);

3. Interdict and *interim* interdict against Serco from ejecting her from the property she is occupying, or changing the locks, without a court order.

A conclusion in each case for declarator that eviction would breach the pursuer’s rights under Article 1 of the First Protocol to the Convention was not insisted upon. It was also conceded, in Ms Rashidi’s case only, that given the Secretary of State’s acceptance that she was entitled to be provided with accommodation and support pending determination of her current asylum application, declarator in terms of the first conclusion was unnecessary.

Statutory entitlement to accommodation of asylum seekers and former asylum seekers

Provision of accommodation to asylum seeker

[8] Section 95(1) of the 1999 Act empowers the Secretary of State 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. A person is destitute in this connection if he does not have adequate accommodation or any means of obtaining it, or has adequate accommodation or the means of obtaining it but cannot meet his other essential living needs. “Asylum seeker” is defined in section 94(1) as a person who is not under 18 and has made a claim for asylum which has been recorded by the Secretary of State but not yet determined. In terms of section 94(3) and (4), a claim for asylum is “determined” at the end of a period (to be prescribed) beginning on the date of notification of the Secretary of State’s decision or, if the claimant has appealed, on the date when the appeal is disposed of, ie when it is no

longer pending for the purposes of *inter alia* the Immigration Acts. The combined effect of section 17 of the UK Borders Act 2007 and regulation 2 of the Asylum Support (Prescribed Period following Appeal) Regulations 2007 is that the period prescribed for the purposes of section 94 is (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.

[9] Although section 95 is drafted in permissive terms, it was common ground that the power granted by it to the Secretary of State was converted into a duty incumbent upon him by regulation 5 of the Asylum Seekers (Reception Conditions) Regulations 2005, in order to implement Council Directive 2003/9/EC which laid down minimum standards for reception of asylum seekers. Under section 103(1) and (2) of the 1999 Act, a decision by the Secretary of State that a person does not qualify for accommodation or support under section 95, or a decision to stop providing accommodation or support before it would otherwise have come to an end, may be appealed to the FTT. The FTT may require the Secretary of State to reconsider the matter, or substitute its decision for the decision appealed against, or dismiss the appeal. The FTT's decision is final.

Provision of accommodation to former asylum seeker

[10] If a claim is "determined" (as defined above) without asylum having been granted, the person in question ceases to be an asylum seeker as statutorily defined, and the Secretary of State's obligation in terms of section 95 comes to an end. However, section 4 of the 1999 Act empowers the Secretary of State to provide, or arrange for the provision of, facilities for the accommodation of a person whose claim for asylum has been rejected, and for his or her

dependants. The criteria to be used by the Secretary of State in deciding whether or not to provide or arrange, or to continue to provide or arrange, accommodation in terms of section 4 are contained in regulation 3 of the Immigration and Asylum (Provision of Accommodation to Failed Asylum-Seekers) Regulations 2005, and are as follows:

- (i) the person appears to the Secretary of State to be destitute; and
- (ii) one or more of the following conditions (in regulation 3(2)) is satisfied:
 - (a) he is taking all reasonable steps to leave the UK or place himself in a position to leave;
 - (b) he is unable to leave the UK because of a physical impediment to travel or some other medical reason;
 - (c) he is unable to leave the UK because there is currently no viable return route available;
 - (d) he has made an application for judicial review of a decision in relation to his asylum claim; or
 - (e) the provision of accommodation is necessary for the purpose of avoiding a breach of his Convention rights.

If the Secretary of State decides not to provide, or not to continue to provide, accommodation for a person under section 4, the same right of appeal to the FTT is available under section 103(2A) of the 1999 Act as is available for an appeal against a section 95 decision. Again the FTT's decision is final.

Notice to quit

[11] Where an asylum seeker who, in pursuance of section 95 of the 1999 Act, has been provided with a tenancy or licence to occupy accommodation has his claim determined, or

ceases to be destitute, he may be given notice to quit in accordance with the provisions of regulation 22 of the Asylum Support Regulations 2000. The period of notice specified by regulation 22 is seven days. I was informed that in practice a period of notice of 21 days is used. The notice given to the occupant will draw his or her attention to the possibility of an application under section 4. The aim, I was advised, was for an application under section 4, if made promptly, to be determined within the 21-day period of the notice to quit. There is no statutory period of notice to quit to be given to a person who has been provided with accommodation under section 4.

Eviction without due process of law

[12] Section 23 of the Rent (Scotland) Act 1984 contains a prohibition of recovery of possession, otherwise than by proceedings in the FTT, of premises let as a dwelling where the tenancy has come to an end but the occupier continues to reside in the premises. However, section 23A lists a number of circumstances in which the protection conferred by section 23 does not apply. One of these (section 23A(5A)) is a tenancy or right of occupancy granted in order to provide accommodation under either section 4 or section 95 of the 1999 Act. It is also to be noted that section 23(5) states that “Nothing in this section shall be taken to affect any rule of law prohibiting the securing of possession otherwise than by due process of law”.

The occupancy agreement

[13] A document entitled “Occupancy Agreement” between Serco and Ms Ali signed on 6 September 2017 was produced. An agreement in identical terms, *mutatis mutandis*, albeit with some glitches in paragraph numbering, between Serco and Mr Razaie signed on

16 March (presumably 2018) was also produced. Nothing turns on whether those agreements were entered into by one of the pursuers or by her husband. The preamble to each 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, on a temporary basis, on behalf of UKVI (ie UK Visas and Immigration), whilst his/her asylum application is being assessed. The commencement date of the agreement is specified.

Serco’s obligations include (i) ensuring at the commencement and throughout the period of occupancy that the property is structurally sound, in a wind and watertight condition, and in a reasonable state of repair and maintenance; (ii) providing a day to day housing management service to resolve any issues arising; and (iii) providing furniture and utensils for use within the property. 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.”

Argument for the pursuers

[14] On behalf of each of the pursuers it was submitted that her eviction by Serco from the premises that she occupied would be unlawful without a court order. The argument was founded upon section 22 rather than section 23 of the Rent (Scotland) Act 1984.

Section 22 creates a criminal offence, and hence a civil wrong, where a person unlawfully

deprives the residential occupier of any premises of his occupation of the premises or any part thereof. "Residential occupier" is defined by section 22(5), in relation to any premises, as a person occupying them as a residence, whether under a contract or by virtue of any enactment or rule of law giving him/her the right to remain in occupation or restricting the right of any other person to recover possession.

[15] Eviction without a court order would be unlawful, in terms of section 22, for three separate reasons. In the first place, it would constitute a breach of the occupant's rights under ECHR articles 3 and 8. Serco was a "public authority" within section 6(3) of the Human Rights Act 1998, being a person certain of whose functions were functions of a public nature. Reference was made to the observations of Lord Nicholls in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2004] 1 AC 546 at paragraphs 10-12, and to the opinion of Lord Neuberger in *YL v Birmingham City Council* [2008] 1 AC 95 at paragraphs 165 and 168. The factors in the present case which indicated that Serco was exercising functions of a public nature were:

- The Secretary of State had procured it to provide support and accommodation on his behalf and in order to meet the UK's international and domestic obligations to asylum seekers;
- Serco was publicly funded to provide support and accommodation to asylum seekers, in accordance with the Secretary of State's directions;
- The 1999 Act had introduced a "dispersal" procedure for asylum seekers, whose support and accommodation had previously been a function of local authorities;
- The asylum seeker had no choice: he/she had to accept the accommodation offered by Serco or face destitution.

There was no material difference between Serco's function in providing accommodation and other circumstances in which a private company had been held or admitted to be exercising functions of a public nature, such as *Campbell v Scottish Ministers* [2017] CSOH 35 concerning the transportation of prisoners.

[16] As a person exercising functions of a public nature, Serco could not act in a way that was incompatible with the pursuers' Convention rights. The policy and practice of evicting occupants by changing locks without a court order, and thus placing the occupants in a state of fear and alarm and affecting their mental health, amounted to degrading treatment contrary to article 3. Separately, the "Move On Protocol" was incompatible with their article 8 rights as it was a disproportionate interference with their rights to respect of private and family life and their home. In principle, any person at risk of losing his or her home should be able to have the proportionality of their eviction determined by an independent tribunal, even where the domestic law right to occupation had come to an end: *Manchester City Council v Pinnock* [2011] 2 AC 104; *Panyushkiny v Russia* [2018] HLR 7. The onus rested upon the state to provide a mechanism for assessment by a court of the proportionality of eviction; the applicant should not be required to initiate an appeal process. In any event, the rights of appeal to the FTT conferred by section 103 of the 1999 Act were insufficient because the decision to evict was made by Serco upon notification from the Secretary of State that no further support or accommodation should be provided, without analysis by an independent tribunal of such eviction. In practice such appeals did not prevent eviction.

[17] In the second place, eviction without a court order was unlawful because the pursuers' occupancy rights flowed from an agreement that amounted to a lease in terms of Scots common law. The four cardinal elements of a lease identified in *Gray v University of Edinburgh* 1962 SC 157 were present. In *Bradford Properties Ltd v British Telecommunications plc*

1992 SC 12, the Lord Justice-Clerk (Ross) cited a definition of a lease by Rankine which made clear that the consideration for a lease need not be money alone. In the circumstances of the present case, consideration for exclusive possession of the property was constituted by the existence of an active asylum application to the Secretary of State which gave rise to an obligation under section 95 to provide support and accordingly to a payment to Serco by the Secretary of State. By this means Serco received a payment in exchange for the occupation by the pursuers and their respective husbands of their homes. It was also noteworthy that certain provisions of primary legislation contemplated asylum seekers being provided with tenancies: examples were paragraph 82 of Schedule 14 to the 1999 Act, making consequential amendments to the Housing (Scotland) Act 1987, and regulation 22 of the Asylum Support Regulations 2000 (mentioned above) where reference is made to a person who has “a tenancy or licence to occupy accommodation”.

[18] In the third place, clause 4.1 of the Occupancy Agreement did not permit unilateral termination of the pursuers’ occupation of their respective homes. Serco was not in a position to know whether a person’s asylum claim had been finally “determined”, given the range of possibilities for challenge or submission of a fresh application. Errors could easily be made. So long as the matter remained in dispute, the occupancy agreement remained in force. The only lawful means of bringing it to an end was by an order of the court.

Argument for the Secretary of State

[19] On behalf of the Secretary of State it was submitted that the pursuers’ actions were irrelevant in law and should be dismissed. As regards the first conclusion in each case, ie for declarator that the pursuer was entitled to be provided with accommodation under section 95 while her application for asylum was being determined, there was no live issue in

relation to Ms Rashidi as the Secretary of State had made clear that he accepted that he had an obligation to provide accommodation under section 95 pending determination of her extant claim., and was in fact providing such accommodation. Ms Ali's case for such declarator was irrelevant because she did not aver that either she or her husband had an extant and undetermined asylum claim. Intimation of an intention to seek judicial review of refusal of accommodation and support did not bring her within section 95.

[20] As regards the second conclusion, ie for declarator that eviction without a court order would be unlawful, the pursuers' case was based upon a misreading of the provisions of the Rent (Scotland) Act 1984. Section 22, which created an offence, applied only to *unlawful* deprivation of possession: that begged the question of whether the apprehended actions by Serco would be unlawful. The requirement that court proceedings be brought in certain circumstances was contained in section 23, not section 22 of the Act, and the whole of section 23 was disapplied by section 23A(5A) to provision of accommodation to asylum seekers in terms of the 1999 Act. There remained no provision of the 1984 Act that would make the actions unlawful.

[21] The pursuers' argument at common law was also irrelevant because the four cardinal elements of a lease were not all present. There was no rent payable in terms of the occupancy agreement. Fees paid by the Secretary of State to Serco in respect of the provision of accommodation to asylum seekers were a matter between those parties alone. They were of no concern to the pursuers and did not indicate *consensus in idem* as between the occupier and Serco or the owner. Reference by way of analogy was made to *Mann v Houston* 1957 SLT 89, Lord President Clyde at 92. The situation was not analogous to the payment of housing benefit on behalf of a tenant: in that case funding was provided to meet the tenant's obligation, whereas here there was no obligation.

[22] Nor had the pursuers pled a relevant case that eviction without a court order would breach their Convention rights. Firstly, Serco was not a public authority within the description in section 6(3) of the Human Rights Act 1998. The following principles should be taken from *YL v Birmingham City Council* (above): (i) a distinction had to be made between the function of a public authority in making arrangements in order to fulfil its statutory duty and that of a private company in providing care and accommodation under contract with the authority on a commercial basis rather than by subsidy from public funds; and (ii) the provision of care and accommodation by the private company, as opposed to its regulation and supervision, was not an inherently public function. Although the pursuers had public law rights against the Secretary of State which were unaffected by the existence of the contract between the Secretary of State and Serco, they did not have Convention rights against Serco. The case of *Campbell v Scottish Ministers* was distinguishable because it concerned the exercise of coercive public powers which had to be viewed as public functions. If, as was submitted, Serco was not to be regarded as a public authority, it was not subject to Convention duties. Recovery of possession of property by a private sector landlord did not engage article 8 of the Convention: cf *McDonald v McDonald* [2017] AC 273; *FJM v United Kingdom*, ECtHR, 29 November 2018.

[23] Even if Serco did fall to be regarded as a public authority, it would not be a breach of either of the pursuers' Convention rights for Serco to change the locks on their property or otherwise evict them without having first obtained a court order. As regards article 8 of the Convention, it was accepted, on the basis of the Strasbourg jurisprudence and subsequent decisions of the Supreme Court, that a person at risk of being dispossessed of his home by a public authority should in principle have the right to have the question of proportionality determined by an independent tribunal making its own assessment of the facts, even if the

person's right of occupation under domestic law has come to an end. That requirement was met here by the possibility of appeal to the FTT against refusal or termination of occupancy in terms of section 95, and/or refusal to provide accommodation in terms of section 4. The latter expressly obliged the Secretary of State to provide accommodation for a person who was destitute and where the provision of accommodation was necessary to avoid breaching his or her Convention rights. It was not necessary to provide for a court process to take place before eviction procedure could begin: *R(N) v Lewisham LBC* [2015] AC 1259. Neither pursuer had pled circumstances amounting to treatment capable of constituting a breach of article 3 of the Convention.

Argument for Serco

[24] Senior counsel for Serco sought to draw a distinction between immigration cases on the one hand and housing cases on the other. These were immigration cases, and there was a coherent system in place that protected the human rights of asylum seekers. The relevant legislative provisions were not primarily concerned with the provision of housing but rather with the provision of temporary accommodation pending the outcome of an application for asylum. Where such an application failed, the assumption was that the failed asylum seeker would leave the UK. Section 4 of the 1999 Act was concerned primarily with providing temporary accommodation to persons who, for one of the reasons listed, was unable to leave, but it also covered persons whose Convention rights would be breached if accommodation was not provided. Rights of appeal to an independent tribunal were made available. Parliament had further provided that removal of asylum seekers from temporary accommodation was exempt from any requirement to take court proceedings to obtain possession. Parliament had thus created a seamless structure in which all material decisions

were taken by the Secretary of State and in which the Convention rights of the asylum seeker, or former asylum seeker, could be protected. There was accordingly no requirement for another process before removal was allowed.

[25] Serco was not a public authority and accordingly the Human Rights Act 1998 had no application to it. Any challenge required to be made to the Secretary of State's decision that the right to accommodation had come to an end. It would be curious if a failed asylum seeker who had exhausted his or her remedies against the Secretary of State had a further right to resist removal by Serco without a court order. The leading authority, *YL v Birmingham City Council*, supported the defenders' position. The *McDonald/FJM* case was not in point because it was concerned with rights under housing law, not immigration law.

[26] The pursuers' argument that they were tenants protected by section 22 of the Rent (Scotland) Act 1984 was also unfounded. As no rent was paid by or on behalf of the asylum seeker, there was no lease. Asylum seekers provided with accommodation in terms of the 1999 Act were expressly excluded from statutory protection.

Decision

[26] The issue is whether the pursuers have identified a basis in law for their contention that their eviction, including within that expression the changing of locks, by Serco without a court order would be unlawful. The pursuers have founded their case upon section 22 of the 1984 Act which, as I have noted, creates a criminal offence of unlawfully depriving a residential occupier of his occupation of the premises. I am not persuaded that this provision created any new civil right in favour of the residential occupier. Section 22(4) states expressly that the section is not to be taken to prejudice any liability or remedy to which a person guilty of an offence under section 22 may be subject in civil proceedings.

One is thus directed elsewhere to identify a basis upon which the person unlawfully deprived of possession may seek a remedy in the civil courts. That is unsurprising when one bears in mind that the offence consists of *unlawful* deprivation of occupation; the section does not purport to determine what is or is not unlawful in this context.

[27] Nor is section 23 of any direct assistance to the pursuers. That section created a new protection for occupiers of property let as a dwelling otherwise than as a statutorily protected tenancy or a furnished letting from eviction without proceedings in the FTT. As already noted, however, that protection was not extended to asylum seekers provided with accommodation under either section 95 or section 4 of the 1999 Act. Once again the occupier is left with whatever rights he or she has at common law, and in this regard I respectfully agree with the view expressed by Sheriff GH Gordon QC in *Conway v City of Glasgow Council* 1999 HousLR 20 at paragraph 6-58 that the disapplication of section 23 to, *inter alia*, asylum seekers did not take away the rights preserved by section 23(5). What common law or other rights, then (if any), do asylum seekers provided with accommodation under section 95 or section 4 have not to be evicted by Serco without a court order?

Breach of Convention rights

[28] I begin with the pursuers' contention that such eviction would constitute a breach of the occupier's human rights in terms of article 3 and/or article 8 of the Convention. Such a breach could only occur if Serco is to be regarded as a "public authority" in this connection, ie if Serco is exercising functions of a public nature.

[29] In *Aston Cantlow* (above), Lord Nicholls of Birkenhead observed at paragraphs 10 and 12:

“10. [The Human Rights Act 1998] does not amplify what the expression ‘public’ and its counterpart ‘private’ mean in this context. But, here also, given the statutory context already mentioned and the repetition of the description ‘public’, essentially the contrast being drawn is between functions of a governmental nature and functions, or acts, which are not of that nature. I stress, however, that this is no more than a useful guide. The phrase used in the Act is public function, not governmental function.

...

12. What, then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single test of universal application. There cannot be, given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.”

At paragraph 49, Lord Hope of Craighead regarded the phrase “public function” in this context as “clearly linked to the functions and powers, whether centralised or distributed, of government”. In similar vein, Lord Rodger of Earlsferry at paragraphs 160 and 163 expressed the view that the essential characteristic of a public authority is that it carries out, either generally or on the relevant occasion, the kind of public function of government that would engage the responsibility of the UK before the Strasbourg organs.

[30] All of those observations were referred to with approval by members of the majority in *YL v Birmingham City Council*. At paragraph 91, Lord Mance considered that Lord Nicholls’s view supported a broad application of section 6(3)(b) of the 1998 Act, but also a factor-based approach. At paragraph 159, Lord Neuberger of Abbotsbury derived assistance from the emphasis placed by Lord Hope and Lord Rodger, and also Lord Hobhouse of Woodborough, on functions which are “governmental in nature”. On the other hand, Lord Neuberger acknowledged at paragraph 167 that the fact that some statutory power is attached to a function may not always determine that it is “of a public nature”.

[31] Applying these observations to the facts of the present case, and adopting a factor-based approach as advocated by, among others, Lord Nicholls in *Aston Cantlow* and Lord Mance in *YL*, I have come to the conclusion that when providing accommodation to asylum seekers and former asylum seekers in terms of its contract with the Home Office, Serco is exercising a function of a public nature. The implementation by the UK of its international obligations to receive and provide essential services to destitute people seeking asylum is clearly, in my view, a function which is governmental in nature. The same would be true if and to the extent that the UK undertook the task of providing such services to destitute asylum seekers as a matter of national policy rather than in implementation of international obligations. Equally, it seems to me that provision of accommodation and essential services to destitute asylum seekers and their dependants is not a function analogous to the provision of care and accommodation by a residential care home in pursuance of a contract with a public authority. It is not in any sense a commercial activity. There is no element of choice or competition so far as the occupants are concerned. Rather, adopting Lord Nicholls's words, Serco is taking the place of central government in carrying out what in essence is a humanitarian function. The fact that Serco is being paid under a commercial contract and might have to compete for renewal of its contract does not, in my opinion, outweigh the significance that must be attached to the context in which Serco acts, namely the implementation of a function that must, by one means or another, be exercised by a national government.

[32] Another way of approaching the matter would be under reference to the distinction drawn in freedom of information legislation, mentioned by Lord Mance in *YL* at paragraph 106, between a person who "appears... to exercise functions of a public nature" and a person who "is providing under a contract made with a public authority any service whose

provision is a function of that authority". Provision of accommodation to destitute asylum seekers or former asylum seekers seems to me to fall within the former category and therefore within the scope of section 6(3)(b) of the 1998 Act. It has more in common with the exercise of coercive functions, as in *Campbell v Scottish Ministers* (above) than with the mere contracting out of a service by a public authority.

[33] Having so found, I turn to the question whether Serco has breached the Convention rights of the pursuers by putting in place a system in which they may be evicted from the accommodation that they occupy, including by means of changing locks, without the authority of a court order. In my opinion it has not.

[34] I deal firstly with article 8, which prohibits interference by a public authority with the exercise of a person's right to respect for his private and family life and his home, unless the interference is in accordance with the law and necessary in a democratic society *inter alia* for the protection of the rights and freedoms of others. In *Manchester City Council v Pinnock* (above) at paragraph 45, Lord Neuberger distilled the following propositions from the Strasbourg case law:

(a) Any person at risk of being dispossessed of his home at the suit of a local authority should in principle have the right to raise the question of the proportionality of the measure, and to have it determined by an independent tribunal in the light of article 8, even if his right of occupation under domestic law has come to an end.

(b) A judicial procedure which is limited to addressing the proportionality of the measure through the medium of traditional judicial review is inadequate as it is not appropriate for resolving sensitive factual issues.

(c) Where the measure includes proceedings involving more than one stage, it is the proceedings as a whole which must be considered in order to see if article 8 has been complied with.

(d) If the court concludes that it would be disproportionate to evict a person from his home notwithstanding the fact that he has no domestic right to remain there, it would be unlawful to evict him so long as the conclusion obtains.

Lord Neuberger also noted, however, that it seemed that the European court had franked the view that it would only be in exceptional cases that article 8 proportionality would even arguably give a right to continued possession where the applicant had no right under domestic law to remain.

[35] In *R(N) v Lewisham London Borough Council* (above), the applicant sought judicial review of a housing authority's decision to terminate her temporary accommodation as a homeless person, on the ground that recovery of possession without a court order would be unlawful. The majority of the Supreme Court decided the matter on the basis that the temporary accommodation provided was not a "dwelling" for the purposes of the relevant legislation, and so the provisions of that legislation requiring a court order did not apply. However the Court went on to address the question whether a public authority which evicted a person when its statutory duty to provide interim accommodation ceased without first obtaining a court order for possession violated the person's article 8 rights. In a judgment with which the majority of the Court agreed, Lord Hodge confirmed (paragraph 65) that it was only in very exceptional cases that an applicant would succeed in raising an arguable case of lack of proportionality where he had no right under domestic law to remain in possession, and observed (paragraph 66), under reference to European authorities, that it was for the occupier to raise the question of proportionality and that the court could deal

with such an argument summarily unless it was seriously arguable. At paragraph 71, Lord Hodge held, addressing the circumstances of the case before the Court, that any issue of proportionality could be raised either in a statutory appeal against an adverse decision by the housing authority, or in proceedings for judicial review of a decision to evict. For these reasons, he concluded (paragraph 74) that there were procedures by which an independent tribunal could assess the proportionality of the decision to repossess the accommodation and determine relevant factual disputes. There were therefore sufficient procedural safeguards to satisfy the applicant's article 8 rights without the need for a court order authorising eviction.

[36] None of the cases to which I have referred was concerned with provision of temporary accommodation to asylum seekers or former asylum seekers. The legal principles enunciated are, however, in my view, stated in sufficiently broad terms to apply to the provision of temporary accommodation in such circumstances. The question is whether the statutory scheme for review of a decision to evict an asylum seeker or former asylum seeker whose entitlement to occupation of temporary accommodation has come to an end affords an adequate opportunity for the proportionality of eviction to be assessed by an independent tribunal. In my opinion it does. As I have noted, section 103(1) of the 1999 Act provides a right of appeal to the FTT against a decision by the Secretary of State to refuse or to stop providing support (including accommodation) under section 95. In accordance with the authorities to which I have referred, section 103(1) must be interpreted as empowering the FTT, which is of course an independent tribunal, to address any issue of proportionality that is raised by the appellant. Similarly, section 103(2A) provides a right of appeal to the FTT against a decision of the Secretary of State not to provide or continue to provide accommodation under section 4. It will be recalled that one of the circumstances in

which the Secretary of State must provide accommodation under section 4 to a failed asylum seeker is where such provision is necessary for purpose of avoiding a breach of that person's Convention rights. Clearly, therefore, in such an appeal the FTT will require to address any issue of proportionality raised by the appellant. The jurisdiction of the FTT is full and includes investigation of factual issues. I therefore hold that the availability of a right of appeal to the FTT against an adverse decision under either section 95 or section 4 is sufficient to enable any arguable issue of proportionality to be raised before and determined by an independent tribunal, and that, on the authority of the case law to which I have referred, there is no need for additional proceedings to obtain a court order authorising eviction.

[37] A number of arguments were presented as to why the right of appeal to the FTT was inadequate to satisfy the pursuers' article 8 rights. It was said that those rights were concerned with asylum issues rather than housing issues and that the FTT could not therefore consider questions of proportionality of eviction. I reject that submission: it is clear from the terms of section 103 that it is concerned with appeals against refusal of temporary accommodation as opposed to refusal of asylum more generally. For the reasons I have given, the section must be construed, were there to be any doubt, as enabling the FTT to consider proportionality, if raised by the appellant as an issue, in order to ensure that the appellant's Convention rights would not be breached by eviction. It was also submitted that the onus of assessing the proportionality of eviction at the end of the section 95 process should rest upon the Secretary of State, and that a court process was needed to enable that onus to be discharged. I reject that contention as being contrary to the authority of *R(N) v Lewisham*, and the authorities cited by Lord Hodge at paragraph 66 of his judgment.

[38] It was further contended that the Move On Protocol purported to entitle Serco to change locks without any assessment of proportionality; that the expedited eviction process was in practice detached from the legislation; that the exercise of appeal rights against an adverse decision under section 4 did not in practice stop eviction and lock changing from occurring; that Serco was not always informed of the exercise by a failed asylum seeker of the right of appeal against an adverse decision under section 4; and that the statutory procedure was so complicated that the only practicable means of making a proportionality assessment was in a sheriff court action for recovery of possession. In addressing these arguments it is important to draw a distinction between, on the one hand, the operation of the statutory regime as it was intended by Parliament to work and, on the other hand, the problems that may arise if and when the statutory regime is not properly adhered to. The object of the present litigation, as I understand it, is to challenge the lawfulness of the regime working as intended. It is not, therefore, relevant in these proceedings to consider the situation of a person where, for example, there is a breakdown of communication between the Secretary of State and Serco regarding that person's asylum status, or where a person who is in the process of exercising a right of appeal or, *a fortiori*, a person who has been granted refugee status, is wrongfully threatened with eviction or a lock change. Such cases would require to be dealt with on their own facts, and remedies such as interim interdict might have to be sought. But I am concerned here with the question whether the existence of a system whereby failed asylum seekers may be evicted or have the locks on their properties changed at a time when they have no extant right of appeal is of itself unlawful. That question cannot be determined by reference to cases in which things have gone wrong as a result of failures by Serco or by the Secretary of State's officials to comply fully with the

statutory safeguards. For all of the foregoing reasons the pursuers' argument based upon article 8 must be rejected.

[39] I can deal rather more briefly with the pursuers' argument based upon breach of their rights under article 3 of the Convention. That article provides that no-one shall be subjected to torture or to inhuman or degrading treatment or punishment. It was submitted on behalf of the pursuers that the Move On Protocol, including in particular its threat of changing locks, was a sword of Damocles which hung perpetually over the pursuers, amounting to degrading treatment that affected their mental health. In the case of Ms Rashidi, it was argued, proof before answer was required of her averment that she had miscarried due to "the extreme stress caused by the constant threat of eviction". I note however that only one letter from Serco (dated 9 July 2018) threatening eviction was lodged or referred to, and that that letter was superseded by the Secretary of State's confirmation on 6 August 2018 that he would provide Ms Rashidi and her dependants with accommodation and subsistence support while her asylum application was pending.

[40] In *R (Limbuella) v Secretary of State for the Home Department* [2006] 1 AC 396, the House of Lords held that a decision by the Secretary of State to refuse support under section 95 of the 1999 Act to persons who were destitute but who were found not to have claimed asylum as soon as was reasonably practicable after their arrival in the UK was capable of engaging article 3 if the consequences were so severe as to amount to inhuman or degrading treatment. At paragraph 54, Lord Hope of Craighead emphasised, under reference to ECtHR case law including *Pretty v UK* (2002) 35 EHRR 1, that ill-treatment must attain a minimum level of severity if it is to fall within the scope of the expression "inhuman or degrading treatment or punishment". In *Pretty*, the Court said that

“...where treatment humiliates or debases and individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance, it may be characterised as degrading and ...fall within the prohibition of article 3”.

[41] I was referred to no authority for the proposition that a threat of *ex hypothesi* lawful termination of possession of temporary accommodation is capable of constituting degrading treatment of the minimum level of severity necessary to amount to a breach of article 3. The difficulty with the pursuers’ proposition is that it could apply not only to failed asylum seekers but to any person lawfully threatened with eviction from his or her current place of residence. One must bear in mind that the Secretary of State has a statutory duty under section 4 of the 1999 Act to provide accommodation for a failed asylum seeker and his or her dependants if this is necessary to avoid a breach of the person’s Convention rights, and it is also relevant to Ms Rashidi’s case to recall that the Secretary of State’s letter dated 23 April 2018 to Mr Razaie intimating discontinuance of support under section 95 drew attention to the possibility of claiming support under section 4. The position might be different with regard to persistent threats of *unlawful* eviction (which might also constitute a criminal offence under section 22 of the 1984 Act), but that is not the situation with which this opinion is concerned. In my opinion no relevant case has been made out that the circumstances of either of the present cases are capable of amounting to a breach of the respective pursuers’ rights under article 3 of the Convention.

Breach of rights of tenant under a lease

[42] I turn next to the pursuers’ argument that their removal from the accommodation which they respectively occupy would be unlawful without a court order because the occupancy agreement amounts to a lease at common law. I have narrated (at paragraph 17

above) the basis upon which the pursuers contend that the four cardinal elements of a lease are present in relation to their occupancy of their accommodation. I am not persuaded that the circumstances averred by the pursuers can be construed as the payment of rent. The definition of a lease in Rankine, *Leases* (3rd ed, page 1) cited with approval by the court in *Brador Properties Ltd v British Telecommunications plc* (above, at page 19) is as follows:

“A lease or tack is a contract of location (letting to hire) by which one person grants and another accepts certain uses, current or definitive, or the entire control, of lands or other heritages for a period or periods, definite or indefinite, or even in perpetuity, in consideration of the delivery by the grantee of money or commodities or both, periodically or in lump or in both of these ways.”

[43] In the present case the grantee of the right of temporary occupancy pays nothing for that grant, whether in the form of money or other consideration. The Occupancy Agreement makes no provision for consideration of any kind. 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. Instead there is a separate contract between the Home Office and Serco in terms of which Serco agrees to make available temporary accommodation, free of charge, to asylum seekers falling within section 95 and to failed asylum seekers to whom accommodation is to be provided under section 4, and the Home Office agrees to remunerate Serco for carrying out that service. It is not suggested that this contract imposes any obligation upon an individual occupant of accommodation, and in particular an obligation to make any payment. Accordingly, in my opinion, one of the four cardinal elements of a lease, namely the rent, is absent. Not only is there no *consensus in idem* regarding rent (which was the point at issue in *Gray v University of Edinburgh*): there is no obligation to pay rent at all. It follows that the pursuers as temporary occupants of the accommodation made available by Serco do not acquire the status of tenants and acquire no right at common law to resist removal without a

court order. I do not consider that any doubt is cast upon this conclusion by the fact that there are occasional references in asylum and immigration legislation to tenancies or tenants. At best for the pursuers these references suggest that Parliament envisaged that there might be situations in which asylum seekers would be granted tenancies, but they do not create an inference that any situation in which an asylum seeker is provided with temporary accommodation will amount in law to a tenancy.

Contractual right under the agreement

[44] I address lastly the pursuers' submission that the Occupancy Agreement does not permit unilateral termination of the pursuers' occupation of their respective homes. The argument, as I understood it, was that determination of the asylum seeker's claim did not of itself confer any entitlement on Serco to evict him or her from their accommodation, including changing the locks. This was because at that time it could not be said that the occupier would have to leave: there could, for example, be an appeal, or a fresh claim, or an application under section 4, or an application for judicial review. Unilateral action by Serco in the meantime would be unlawful.

[45] In my view this argument too is unsound. As the terms of the Occupancy Agreement make clear, termination of the agreement under clause 4.1 is subject to service of a written notice on the occupant specifying the date and time of, and the reason for, the termination. The notice period is 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. In this context it is worth repeating two points already made: firstly, that the onus of initiating any further action rests upon the asylum seeker and not on the Secretary of State, and, secondly, that I am concerned in this opinion

with cases in which the statutory procedure is correctly executed by the Secretary of State's officials and by Serco, and not with situations in which errors are made resulting in remedies being sought according to the circumstances of the particular case.

Disposal

[46] I am not persuaded that there is anything in either of the pursuers' cases requiring proof before answer. On the contrary I am satisfied that neither of the pursuers has made out a relevant case for any of the orders sought. I shall therefore accede to the defenders' motions in each action to sustain their pleas to relevancy and to grant decree of dismissal.