Improving Procedural Fairness in Housing Possession Cases[1]

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This is a pre-copyedited, author-produced version of an article accepted for publication in Civil justice quarterly following peer review. The definitive published version, Whitehouse, Lisa, Bright, Susan and Dhami, Mandeep K. (2019) Improving procedural fairness in housing possession cases. C.J.Q. 2019, 38(3), 351-375 is available online on Westlaw UK (http://legalresearch.westlaw.co.uk/) or from Thomson Reuters DocDel service (http://www.sweetandmaxw...businesses/docdel.aspx)

Abstract

This article offers an insight into the context and practice of housing possession hearings in which a social landlord seeks a possession order against a tenant who is in rent arrears. Drawing on the findings of the authors' empirical research, supplemented by insights from the psychology of decision-making, this article questions whether judges are able to exercise discretion in a manner consistent with the fundamental demands of 'procedural fairness'. We find that while the legal process requires judges to engage in rational decision-making, and while judges believe that this is what they are doing, the reality is very different: judges are likely to be relying on intuition. It is not that judges eschew engaging in more deliberative decision-making but rather that they are constrained by limits of the human mind as well as the conditions under which they make their decisions. In particular, the practice of housing possession is characterised by information deficits, low levels of legal representation and

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[1] The research team gratefully acknowledges financial support from the John Fell OUP Research Fund, the University of Oxford's ESRC Impact Acceleration Fund and Law Faculty Research Support Fund and the University of Hull Law School. We would also like to thank HMCTS for granting us access to court records and to Saoirse Connor Desai for her invaluable contribution as Research Assistant to the 2017 Study. Thanks are due also to the anonymous reviewers for their helpful comments on an earlier version of this article.

time constraints, and this does not facilitate decision-making that meets accepted standards of fairness. In response, we propose ways in which to enhance the consistency, transparency and accountability of decision-making while recognising the current climate of reform and diminishing resources within the legal system.

Introduction

Each year, large numbers of possession claims come before county court judges in which a social landlord seeks a possession order against a tenant who is in rent arrears.[2] The judge has to decide whether it is 'reasonable' or not to order possession. If the judge decides that possession may be appropriate then there is discretion as to whether to order outright possession or to postpone or suspend it, and, if so, upon what terms.[3] The decision as to whether a social tenant should lose his or her home as a result of rent arrears is a significant one for the tenant, his or her family, and for the wider community.[4] Understanding how these cases operate in practice, therefore, is extremely important but relevant information is difficult to obtain. This is because 'run-of-the-mill' possession cases in the lower courts[5] are held in private and are seldom reported. It is, as Loveland refers to it, 'invisible law'.[6]

[2] In 2017, for example, 81,603 claims for possession were initiated by social landlords, see Ministry of Justice, 'Mortgage and Landlord Possession Statistical Tables: January to March 2018', Table 7.
[3] Housing Act 1985, s 85 (local authority) and Housing Act 1988, s 9 (housing associations).
[4] For the consequences of loss of home see for example: K. Libman, D. Fields and S. Saegert, 'Housing and Health: A Social Ecological Perspective on the US Foreclosure Crisis' (2012) 29.1 *Housing, Theory and Society* 1; S. Nettleton and R. Burrows, 'When a Capital Investment Becomes an Emotional Loss: The Health Consequences of the Experience of Mortgage Possession in England' (2000) 15:3 *Housing Studies* 463; and S. Nettleton, J. England, R. Burrows and J. Seavers, 'The social consequences of mortgage repossession for parents and their children' (Joseph Rowntree Foundation, August 1999).
[5] That is, cases that are neither decided in case-specific scheduled hearings nor go to appeal.
[6] I. Loveland, 'Twenty years later - assessing the significance of the Human Rights Act 1998 to residential possession proceedings' (2017) *Conv* 174, 187. He notes that there is anecdotal evidence about housing litigation but that this cannot 'provide a sound evidential base on which to premise generalised assumptions.'

In order to make visible the context and practice of these hearings, this article draws on the findings of empirical studies conducted by ourselves[7] and others,[8] along with insights from the psychology of human decision-making. What these findings reveal is that only a minority of tenants at risk of losing their home actively participate in the hearings. Information is often incomplete or missing leading to cases being adjourned and there appears to be a systemic lack of 'joined-up-thinking'. In addition, the parties are often not made aware of the reasons for the decision. Furthermore, a large number of possession cases are decided within a few minutes (often on the basis of a limited amount of information) and outcomes appear at times to be inconsistent.

This picture is compatible with the findings of research in decision psychology which suggests that where time is short, decision-makers are likely to adopt simple decision strategies.[9] These strategies typically involve little cognitive effort and use little information by focusing on what are believed to be the most important cues (pieces of information).[10]

[7] S. Bright and L. Whitehouse, *Information, Advice & Representation in Housing Possession Cases* (April 2014), at https://www.law.ox.ac.uk/sites/files/oxlaw/housing_possession_report_april2014.pdf and L. Whitehouse, S. Bright, M. K. Dhami, and S. Connor Desai, *Judicial Decision-Making in Housing Possession Case*s, https://www.law.ox.ac.uk/sites/files/oxlaw/judicial_decision-making_bulletin.pdf.

[8] S. Blandy, C. Hunter, D. Lister, L. Naylor and J. Nixon, 'Housing Possession Cases in the County Court: Perceptions and Experiences of Black and Minority Ethnic Defendants' (London: Department for Constitutional Affairs 11/02, 2002); J. Ford, E. Kempson and M. Wilson, 'Mortgage Arrears and Possessions; Perspectives from Borrowers, Lenders and the Courts' (London: HMSO, 1995); and L. Whitehouse, 'A Longitudinal Analysis of the Mortgage Repossession Process 1995-2010: Stability, Regulation and Reform' in S. Bright (ed) *Modern Studies in Property Law* (Oxford: Hart Publishing, 2011), 151-174.

[9] J. Rieskamp and U. Hoffrage, 'When Do People Use Simple Heuristics, and How Can We Tell?' in G. Gigerenzer, P. M. Todd and The ABC Research Group (eds), *Simple Heuristics That Make Us Smart* (Oxford University Press, 1999) 147.

[10] Ibid, 147, referring to J.W. Payne, J.R. Bettman and E.J. Johnson, *The Adaptive Decision Maker* (New York: Cambridge University Press, 1993); G. Gigerenzer and P. M. Todd, 'Fast and Frugal Heuristics: The Adaptive Toolbox' in Gigerenzer, et al, n 9 above, 15.

Problematically, decision-makers themselves may well not be aware of the fact that they are using this kind of 'intuitive' thinking.[11]

It is this drawing together of empirical work on housing possession and insights from decision psychology that leads us to question whether judges are able to undertake the 'multi-factorial evaluation exercise' of deciding whether it is reasonable to order possession by virtue of a 'proper balancing of all relevant factors.'[12] In turn, this raises questions about the extent to which the possession process is compliant with the demands of 'procedural fairness'.[13] In an effort to address these questions and concerns, we offer a number of proposals designed to enhance the consistency, transparency and accountability of decision-making while recognising the current climate of fundamental reform and dwindling resources within both legal advice provision and the court system.

The article begins with an account of the legal framework relating to housing possession followed in the second section by an exploration of the meaning and requirements of procedural fairness as it applies to these cases. In the third section we discuss how the empirical findings from our research (and earlier studies) suggest that the way housing possession cases operate in practice fails to meet these requirements. The fourth section draws on insights from decision psychology to provide a better understanding of how

[11] M. K. Dhami and P. Ayton, 'Bailing and jailing the fast and frugal way' (2001) 14.2 *Journal of Behavioral Decision Making*, 141–168 and C. Sensibaugh and E. Allgeier, 'Factors Considered by Ohio Juvenile Court Judges in Judicial Bypass Judgments: A Policy-Capturing Approach' (1996) 15.1 *Politics and the Life Sciences*, 35-47.
[12] *Bracknell Forest BC v Green* [2009] EWCA Civ 238 [22] and *Holt v Reading BC* [2013] EWCA Civ 641 [18].
[13] D. J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Oxford: Clarendon Press, 1996), xvii. Note that although the book title refers to 'administrative procedures' the discussion is of both legal procedures, such as those involved in trials, and other administrative procedures.

decision-making is likely to work in practice in possession cases. Finally, we offer suggestions as to how procedural fairness might be enhanced within the possession process.

1. The legal process of housing possession and the role of discretion

The overwhelming majority of possession claims brought by social landlords are for rent arrears.[14] In most of these cases the relevant statute gives the court discretion to make an order for possession 'if it considers it reasonable', provided there is unpaid rent[15] or (for housing associations) if 'some rent lawfully due is unpaid' or 'the tenant has persistently delayed paying rent.'[16] It is these discretionary cases that we focus on. They are typically dealt with in summary proceedings, that is, in a short and quick hearing with less formality than a full hearing. There are additional discretionary grounds for possession, such as where the tenant is being offered suitable alternative accommodation, although these are less commonly used.[17]

[14] A postal survey of social landlords in 2002/3 found that almost 98% of actions entered in court were due to rent arrears, see H. Pawson, F. Sosenko, D. Cowan, J. Croft, M. Cole and C. Hunter, *The Use of Possession Actions and Evictions by Social Landlords* (London: ODPM, 2005) 40. See also J. Neuberger, *House Keeping: Preventing homelessness through tackling rent arrears in social housing* (London: Shelter, 2003) 12.

[15] Housing Act 1985, Sched 2, Ground 1 (local authority) and Housing Act 1988 Sched 2, Part II, Ground 10 (Housing Association).

[16] Housing Act 1988, Sched 2, Part II, Grounds 10 and 11

[17] There is also a mandatory ground (Ground 8) for Housing Associations if there are at least eight weeks rent arrears, Housing Act 1988, Sched 2, Part II, Ground 8 – the 8 weeks applies to weekly or fortnightly tenancies. Ground 8 is controversial and many housing associations appear not to use it: a study in 2005 found that about one-third of housing associations, and one-half of London based housing associations, were making some use of Ground 8, see Pawson et al, n 14 above, ch 5. As with so many issues in housing possession, available data is poor and there are no statistics on which grounds are used.

Although 'reasonableness' affords the court very wide discretion,[18] as Lord Greene MR observed in *Cumming v Danson*[19] (a case on suitable alternative accommodation) this discretion must take account of all relevant factors:

> In considering reasonableness ... it is… perfectly clear that the duty of the judge is to take into account *all relevant circumstances* as they exist at the date of the hearing. That he must do in what I venture to call a broad, common-sense way as a man of the world, and come to his conclusion *giving such weight as he thinks right to the various factors* in the situation.' (emphasis added)[20]

It is clear from this and, other court decisions,[21] that the intention is to give the county court judge room to consider the reasonableness test and not to restrict the circumstances that can be considered. There exist only a tiny number of reported cases specifically involving rent arrears that can be used to examine how reasonableness is addressed in this context.

Woodspring DC v Taylor,[22] for example, involved an appeal to the Court of Appeal. In this case, the first instance judge (a registrar in the county court) had ordered outright (immediate) possession for rent arrears. The tenants had appealed to an assistant recorder who had

[18] In *Whitehouse v Lee* [2009] EWCA Civ 375 at [23], Rimer LJ said that reasonableness was a question of fact entrusted to the trial judge, akin to, although different in kind from, the exercise of discretion.
[19] [1942] 2 All ER 653 (CA).
[20] [1942] 2 All ER 653 (CA), 655: in this case the 'ground' under which possession was sought was that 'suitable alternative accommodation' was available and the judge also had to be satisfied it was reasonable to make an order. In *Williamson v Pallant* [1924] 2 KB 173, 176, Swift J said: 'I can hardly conceive any circumstance which affects the relationship of the tenant to the premises which is not a proper circumstance for him to consider.'
[21] See, for example, *Bracknell Forest BC v Green* [2009] EWCA Civ 238, *Holt v Reading BC* [2013] EWCA Civ 641 and *Whitehouse v Lee* [2009] EWCA Civ 375.
[22] (1982) 4 HLR 95.

allowed that appeal. In turn, the local authority appealed to the Court of Appeal. The question before the Court of Appeal was whether the assistant recorder could have come to the decision that the registrar had been unreasonable in making an order for outright possession. Taking account of how long the tenants had lived in that property, their age, their previously good tenancy history, and the wife's health difficulties, the Court of Appeal found no difficulty in concluding that the assistant recorder could 'come to the conclusion that no reasonable registrar could properly take the view that it was reasonable to make the order for possession.'[23]

In *Second WRVS Housing Society v Blair*[24] (where possession was again sought for rent arrears) the first instance judge had granted a suspended possession order and given a short judgment. In this, he mentioned that he had found it 'extraordinarily hard' weighing the tenant's 'depressive illness' against the pressures on the housing association and homeless persons. Even though it was clear that he had considered a range of circumstances, the Court of Appeal remitted the case for reconsideration because the judge had failed to take account of a proposal that there could be direct payment of housing welfare to the landlord.

What is clear from these cases is that the reasonableness standard to be applied in decision-making requires deliberative decision-making (in other words, compensatory decision-making which involves the weighting and integration of multiple and potentially competing factors). Manning notes that the approach to the reasonableness test is 'almost entirely elusive' and 'leaves maximum room for manoeuvre both for the trial judge, in deciding

[23] (1982) 4 HLR 95, 100
[24] (1987) 19 HLR 104.

whether or not it is reasonable to make an order, and also for the Court of Appeal in deciding whether or not to interfere with the trial judge's decision.'[25] Although elusive, it is evident that the judge's duty is to take into account a very broad range of factors, ranging from financial considerations, to age, length of time in the home, tenancy history, the tenant's vulnerability, the landlord's housing needs and so on.

There may also be cases in which a defence is raised that requires the court to consider the 'proportionality' of ordering possession. This can be required if Article 8 of the Human Rights Act 1998 is engaged (requiring a right to respect for the home)[26] or if the Equality Act 2010 applies to a disabled person facing eviction because of something arising in consequence of his or her disability.[27] In practice, the issue of proportionality within Article 8 is thought to add little to the discretion already afforded judges through the concept of 'reasonableness'.[28] However, something more may be required when the Equality Act 2010 is invoked. For instance, in *Aster Communities Ltd v Akerman-Livingstone*, Lord Neuberger commented that the Equality Act protection is 'an extra, and a more specific, stronger, right afforded to disabled occupiers over and above the Article 8 right.'[29]

Rooting the possession decision in the exercise of discretion indicates that the outcome is designed to be fact sensitive, rather than to follow automatically from the existence of particular facts. Gardner explores the idea of judicial discretion and what is needed for

[25] J. Manning, 'Reasonableness: A New Approach' [1998] 1.4 *Journal of Housing Law* 59
[26] Proportionality should be considered if a defence under Article 8 of the Human Rights Act 1998 is raised and found to be seriously arguable: *Hounslow LBC v Powell* [2011] 2 AC 186.
[27] Equality Act 2010, ss 15 and 35.
[28] See statements by McComble LJ in *Jones v Canal & River Trust* [2017] EWCA Civ 135 [30] and [42].
[29] [2015] 2 A.C. 1399 at [56].

compliance with the Rule of Law. He claims that the idea of discretion enables the outcome to be settled by 'men, not laws', and that 'jurisdiction will need to be discretionary where the law properly seeks to react to multiple considerations', something which cannot be done by bright-line rules but only 'by the work of an individual judge.'[30] This may be true in theory but if we draw on the large body of psychological research on how decisions are actually made we realise that there may be risks associated with discretion, and it is in situations where there are multiple, competing factors that decision-makers may abandon deliberative thinking and resort to using simple heuristic strategies.[31] As the judge commented in the *Woodspring* case, evaluating multiple considerations may be an exceptionally hard task, especially as 'the competing considerations are focused on entirely different interests and the balancing exercise … [involves] a weighing of true imponderables.'[32]

To ensure compliance with the Rule of Law Gardner claims further that decisions, or outcomes, need to be 'susceptible to audit'[33] which he explains requires that there is provision for checking that the factors chosen by the judge were objectively relevant to the goal, 'rather than those which he or she personally thought relevant.'[34] Also, the judicial response must be transparent, that is, 'fully explained by the judge'[35] so that it is possible to ensure that the decision is not arbitrary or biased but explains why the particular outcome was the best one. These requirements give rise to a fundamental constituent of the Rule of Law,

[30] S. Gardner, 'The Remedial Discretion in Proprietary Estoppel – Again' (2006) 122 LQR 492, 504-505, 507. Although his focus is on proprietary estoppel, the discussion of Rule of Law criteria applies more generally.
[31] See Gigerenzer, et al, n 9 above; K. R. Hammond, *Human judgment and social policy: Irreducible uncertainty, inevitable error, unavoidable injustice* (New York: Oxford University Press, 1996) and D. Kahneman, P. Slovic and A. Tversky, *Judgement under uncertainty: Heuristics and biases* (Cambridge: Cambridge University Press, 1982).
[32] *Whitehouse v Lee* [2009] EWCA Civ 375 [31], another case in which the ground for recovery turned on the availability of suitable alternative accommodation, plus satisfaction of the reasonableness test.
[33] Gardner, n 30 above, 509.
[34] Ibid.
[35] Ibid, 510.

namely, the concept of due process[36] or, to use Galligan's preferred term, 'procedural fairness'.[37]

2. Procedural fairness and the housing possession process

Procedural fairness combines elements of both due process and procedural justice. The fundamental tenets of due process[38] demand that a decision 'must be made in accordance with the law.'[39] This requires judicial power to be constrained so as to avoid potential arbitrariness and to promote consistency in outcomes. In other words, due process ensures that 'judges …[are] guided by law and legal principles, not by their personal political commitments or monetary interests, and not by arbitrary procedures such as flipping a coin.'[40] Furthermore, like cases should be treated alike, that is, 'citizens in the same circumstances should receive the same justice. This ideal implies that it should not matter which Judge is assigned to a particular case.'[41] Of course, where the jurisdiction involves discretion there will inevitably be some variation in outcomes, but this should not diminish the desire for consistency in approach.

[36] Saunders and Young, for example, use Rule of Law and due process interchangeably in A. Saunders and R. Young, 'The Rule of Law, Due Process and Pre-Trial Criminal Justice', (1994) 47.2 *Current Legal Problems* 125-156.
[37] Galligan, n 13 above, xvii.
[38] Ibid, 73. See, also, Saunders and Young, n 36 above and T.M. Scanlon, 'Due Process' (1977) 18 *Nomos* 93-125.
[39] Galligan, n 13 above, 198.
[40] M. J. Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Oxford: Princeton University Press, 2013) 39.
[41] W. C. Whitford, 'The Rule of Law' [2000] *Wis L Rev* 723, 727.

Procedural justice, although similar to due process, draws attention not to the decision-maker or the substantive fairness of the outcome per se but to the experience and perceptions of those affected by the decision.[42]

Participation is a key component to both of these dimensions of procedural fairness. For there to be due process and to ensure substantively fair outcomes, the judge needs to receive information about all relevant facts. This requires the parties to participate in the possession process. Participation is also an essential element of procedural justice,[43] as it provides the ability to exercise 'voice', and plays a key role in ensuring dignity and respect for the person and achieving long term solutions to disputes.[44] Research suggests that individuals are more likely to consider an adjudication process to be fair if they have the opportunity to tell their side of the story to an adjudicator who they perceive listens to them and considers their information before making a decision.[45]

It is also important that there is transparency, so that it can be seen that decisions have been taken in accordance with due process and, so that those responsible for taking such decisions can be held to account.[46] These aspects of procedural fairness tend to involve the provision

[42] See, for example, K. Burke and S. Leben, 'Procedural Fairness: A Key Ingredient in Public Satisfaction' (2007-2008) 44.1 *Court Review* (Special Issue on Procedural Fairness) and H. Genn, *The Hamlyn Lectures 2008: Judging Civil Justice* (Cambridge: Cambridge University Press, 2010).
[43] R. Tyler, *Why People Obey the Law* (New Jersey: Princeton University Press, 2006), quoted in Burke and Leben, n 42 above, 4.
[44] T. R. Tyler, 'Procedural Justice and the Courts' (2007-2008) 44.1 *Court Review* (Special Issue on Procedural Fairness) 26, 27; J. L. Mashaw, 'Administrative Due Process: The Quest for a Dignitary Theory' (1981) 61 *Boston Univ. L. Rev* 885-93; and R. Summers, 'Evaluating and Improving Legal Procedure: A Plea for Process Values' (1974) 60 *Cornell L. Rev.* 1-52.
[45] Tyler, n 44 above, 30. See also D. Denton, 'Procedural Fairness in the California Courts' (2007-2008) 44.1 *Court Review* (Special Issue on Procedural Fairness) 44, 46 and K. Murphy, 'Procedural Justice and its Role in Promoting Voluntary Compliance' in P. Drahos (ed) *Regulatory Theory* (Acton, Australia: Australian National University, 2017) 43, 46-47.
[46] C. Guthrie, J. J Rachlinski and A. J Wistrich, 'Inside the judicial mind' (2001) 86 *Cornell L Rev* 777, fn 24.

and publication of reasoned judgments,[47] something that is generally expected of judicial decisions.[48] Indeed, there exists guidance produced by the judiciary that says that accountability to the public, as a general rule, requires that decisions be made public and that they should be reasoned.[49] As Sir Patrick Neill explains, knowing the reasons for a decision is inherently linked to the concept of fairness,[50] as well as serving as a means of ensuring that decision-makers can be held to account through review or appeal processes.[51] Psychological research suggests, however, that we may need to be cautious about reasons given for decisions. There may be a mismatch between what decision-makers say they do and what they actually do.[52] While some have claimed that this demonstrates a lack of self-insight,[53] others note that self-reported decision-making may be biased by social desirability and the limits of memory[54] as well as an inability to access cognitive processes.[55]

In the next section we draw on a range of empirical evidence in order to assess the extent to which the demands of procedural fairness (including voice, participation, deliberative

[47] See *Flannery v Halifax Estate Agencies Ltd* [2000] 1 All ER 373, [381] per Henry LJ.
[48] D. Dyzenhaus and M. Taggart, 'Reasoned Decisions and Legal Theory' in D. E. Edlin (ed) *Common Law Theory* (Cambridge: Cambridge University Press, 2007) Chp 5. See also Hock Lai Ho 'The Judicial Duty to Give Reasons' (2000) 20 *Legal Studies* 42 and *Flannery v Halifax Estate Agencies Ltd* [2000] 1 All ER 373.
[49] Judiciary of England and Wales, The Accountability of the Judiciary, available at <www.judiciary.gov.uk/publications/response-constitutional-reform> accessed 9 July 2018. This is also reflected in the approach taken in the European Court of Human Rights: *Hirvisaari v Finland* (2004) 38 E.H.R.R. 7 para 30, which notes that the extent to which the 'duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of the circumstances of the case... A lower court or authority... must give such reasons as to enable the parties to make effective use of any existing right of appeal.' See also *Garcia Ruiz v Spain* (2001) 31 E.H.R.R. 22 para 26.
[50] For an account of the relationship between the giving of reasons and fairness see Galligan, n 13 above, 431-434.
[51] P. Neill, 'The Duty to Give Reasons: The Openness of Decision-Making' in C. Forsyth and I. Hare (eds) *The Golden Metwand and the Crooked Cord: Essays in Honour of Sir William Wade QC* (Oxford: Oxford University Press, 1998) Chp 8. In *Flannery v Halifax Estate Agencies Ltd* [2000] 1 All ER 373 the duty to give reasons is said to be a 'function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties - especially the losing party - should be left in no doubt why they have won or lost. … The second is that a requirement to give reasons concentrates the mind.'
[52] Dhami and Ayton, n 11 above and Sensibaugh and Allgeier, n 11 above.
[53] D. A. Summers, J. D. Taliaferro and D. J. Fletcher, 'Judgment policy and interpersonal learning' (1970) 15.6 *Behavioral Science*, 514-521.
[54] K. J. Brookhouse, R. M. Guion and M. E. Doherty, 'Social desirability response bias as one source of the discrepancy between subjective weights and regression weights' (1986) 37.3 *Organizational Behavior and Human Decision Processes*, 316-328.
[55] R. Nisbett and T. Wilson, 'Telling more than we can know: Verbal reports on mental processes' (1977) 84 *Psychological Review*, 231-259.

decision-making, consistency, transparency and accountability) are met within the context of housing possession cases involving arrears. What our findings reveal is that many of the fundamental aspects of procedural fairness are subdued. The reasons for this are numerous but derive, in part, from rules that require the hearing to be held in private and attended only by parties connected with the case[56] and for the reason that possession cases only rarely involve the giving of reasons for decisions.

3. Our research on the possession process in practice

This article supplements existing research on the practical operation of the housing possession process by drawing on two empirical studies we conducted in recent years. Full details regarding the methodology employed in each study can be found elsewhere[57] and so a summary is provided here. The first project, 'the 2014 study' was conducted by Bright and Whitehouse during 2012-2014. This used mixed methods that comprised a review of court forms, including the defence form for rented residential premises;[58] semi-structured interviews with 23 actors within the possession process including judges, Housing Possession Court Duty Scheme (HPCDS) representatives and housing advisors; observations of six housing possession lists at three courts; a survey of court managers[59] and a survey of HPCDS representatives.[60] The aim of this study was to examine the importance of information, advice and representation in housing possession cases, including both mortgaged and rented property. The findings were published in a report in 2014.[61]

[56] See Practice Direction 39A; CPR 39.2(3)(c).
[57] Bright and Whitehouse, n 7 above, Annexe 1 and Whitehouse, et al, n 7 above.
[58] N11R available at https://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?original_id=367.
[59] *n* = 86 reflecting a 61% response rate.
[60] *n* = 32, reflecting a 68% response rate.
[61] Bright and Whitehouse, n 7 above.

The second project, 'the 2017 study', was conducted by all of the authors during 2016-2017.[62] This involved the examination of base and process data from paper files, Caseman records,[63] and audio recordings of housing possession cases heard by two judges[64] at two courts (nine records from Court 1 and 42 records from Court 2). The aim of this study was to identify the information presented to judges and to discover more about how judicial decisions are made. The data reported below focuses on 31 of the 51 cases that were examined. These 31 possession cases involved social tenants in arrears (25 with local authority landlords and six with housing association landlords).

While we are aware of the weaknesses of these two studies including, in particular, the age of one and the scale of the other (which limit our ability to assess the representative nature of our claims about the possession process) we are also aware of their strengths including the range of respondents and the appraisal of decided (as opposed to hypothetical) cases. Regardless, the data obtained from both studies is consistent with the findings of earlier research[65] and raises a number of concerns about the housing possession process that deserve to be acknowledged and subjected to further research.

Listing Practices and Time Constraints

[62] Whitehouse, et al, n 7 above.
[63] The County Court case management system.
[64] One was a district judge, one was a deputy district judge.
[65] Blandy, et al, n 8 above; Ford, et al, n 8 above; C. Hunter, S. Blandy, D. Cowan, J Nixon, E. Hitchings, C. Pantazis and S. Parr, 'The Exercise of Judicial Discretion in Rent Arrears Cases' (London: Department for Constitutional Affairs, Research Series 6/05, October 2005); J. Nixon, C. Hunter, Y. Smith and B. Wishart, *Housing Cases in the County Courts* (The Policy Press: London, 1996); and Whitehouse, n 8 above.

The way in which housing possession cases are listed reveals that court schedules are typically very crowded, which impacts on judicial decision-making. Housing possession cases tend to be 'block listed', meaning that a large number of cases are heard by a district or deputy district judge during a particular session without a specific time allocation.[66] For example, Hunter and others (hereafter referred to as 'the 2005 Hunter study') found that in 'some' courts up to 30 possession cases were listed each hour (amounting to two minutes per case).[67] Although different courts have different listing practices, it is usual for this method of allocating court hearings to result in possession hearings set to last approximately five minutes each.[68] Listing practices alone, however, disguise the variability in hearing length. Our 2017 study, for example, found that nine of the 31 cases (29%) took a minute or less, eight cases (26%) took between two to four minutes, eleven (35%) took between five and nine minutes, and two cases (6%) took ten or more minutes (and in one case it was not possible to identify the time spent).

In one of our cases a suspended possession order was given in a hearing lasting one minute. Indeed, decisions regarding loss of home tend to have much shorter hearings than cases which give rise to much less serious personal and societal consequences, as noted by a judge interviewed during our 2014 study, '… small claims, okay, it could be important to the people involved but, you know, not someone's home, not someone's children. And we devote probably a good two hours plus to each case even if it's for £35 eBay charges. Now there's something a bit wrong there.'[69]

[66] Bright and Whitehouse, n 7 above and Hunter, et al, n 65 above, 105.
[67] Hunter, et al, n 65 above, 29.
[68] Bright and Whitehouse, n 7 above, 43 and Hunter, et al, n 65 above, 105.
[69] DJ4. Reference to quotes provided by interviewees are presented in an anonymous form, by 'actor type' and by number, for example, district judges as DJ1 and HPCDS representatives as HPCDS1.

Written Information from the claimant

A social landlord bringing a possession claim for rent arrears is obliged to comply with the Pre-Action Protocol for Possession Claims by Social Landlords (the Protocol),[70] which aims to encourage pre-action contact between the parties in the hope of avoiding the need for litigation.[71] One of the goals is information exchange.[72] In particular, both parties are encouraged to reach an agreement on a way forward[73] in order to avoid court proceedings.[74] The question arises as to how much of the information shared between the tenant and landlord during this pre-action activity is communicated to the judge. One opportunity for this information exchange is when the possession claim is initiated. Around 80% of possession claims based on rent arrears are dealt with through the system known as Possession Claims Online (PCOL).[75] The claimant (the landlord) completes an online claim form, including the particulars of claim, and the court then sends the defendant (the tenant) a printed copy of the claim form and defence form.[76] The tenant has fourteen days to respond through the completion of a defence form which they too can submit online.[77] PCOL then allocates a hearing date and allows users to view the court diary. This automated process provides the means for one of the routes to reform that we suggest later.

[70] See https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/pre-action-protocol-for-possession-claims-by-social-landlords.
[71] Para. 1.5.
[72] Para. 2.1.
[73] Para. 2.2.
[74] Para. 2.6.
[75] Ministry of Justice, *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system*, March 2011, CP6/2011, Cm 8045, Annex A, 86, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/238301/8045.pdf.
[76] CPR, Practice Direction 55B, 6.7.
[77] CPR, Part 55 – Possession Claims, 55(14)(1)(b).

The form for the particulars of a claim[78] requires the claimant to give the reasons for seeking possession, details of persons in possession of the property, the rent payment history, amounts due, and previous steps taken to cover arrears. There is also an open-ended box that provides an opportunity to detail 'information known about the defendant's circumstances', although the steer is towards the provision of financial information. The guidance notes[79] accompanying this form state that the form should give details of financial and other circumstances, especially if housing benefit is being paid. Details of non-financial circumstances are much less prominent, even though they may be relevant factors in deciding whether to order possession. Even though some landlords may be aware of the occupiers' personal and financial circumstances, it appears that they do not commonly divulge this information to the court via the claim form. Our 2014 study suggests that the information provided in the claim forms tends to be fairly minimal. As a solicitor noted, 'as far as the actual process is concerned, you put in X, Y, Z and you get the hearing date through.'[80] Similarly, a judge indicated that, 'we don't get much other than what we elicit by our own questioning really, the documents aren't going to help us.'[81]

Written information from the tenant

The tenant has a number of opportunities to exercise 'voice' within the process: during the implementation of the Protocol, on completion of a defence form, and by attending the hearing. Although the defence form enables the tenant to dispute the reasons for the claim the focus again is largely on the tenant's financial situation. There is an open-ended question that

[78] Form N119 available at https://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?court_forms_id=347.
[79] Form N119a available at https://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?court_forms_id=347.
[80] Solicitor 1.
[81] DJ6.

asks for information about any circumstances that have led to the rent arrears including divorce, redundancy, and illness, but it is hidden within the question relating to reasons for the arrears.[82] Such information is significant because in determining whether it is 'reasonable' to order possession, the court must look at the case as a whole, including matters not directly related to the grounds for eviction.[83] Confirming the findings of the 2005 Hunter study[84] our 2014 study suggests that the case outcome is affected by what the judge knows about the defendant's personal circumstances. As one judge made clear,

> I think they're absolutely essential...it goes to the issue of reasonableness at the end of the day, what somebody's personal circumstances are, if they've had an awful situation with one of their kids being taken into care, or they've got problems that one of their children has mental health issues. I mean, mental health issues are a big issue because then it's very difficult for people to manage their affairs at all. So yes, I think they are very important.[85]

It is questionable whether the defence form for rented property is presented in such a way as to encourage the defendant to provide information about 'all relevant circumstances' or even to submit the form at all. Previous studies have found that tenants tend to find the forms difficult to understand[86] and in our 2014 study respondents, including court managers and duty solicitors, suggested that the forms could be simplified. Furthermore, the defence form does not request information that would actually be relevant in establishing whether the tenant has particular defences. There is, for example, no mention of whether the defendant

[82] Form N11R, question 29, available at https://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?original_id=367.
[83] *Croydon LBC v Moody* (1998) 31 HLR 738 (CA).
[84] Hunter, et al, n 65 above.
[85] DJ2.
[86] See, for example, Nixon, et al, n 65 above, 20-21 and Bright and Whitehouse, n 7 above, 34.

has a disability or other protected characteristic (which may give rise to a defence under the Equality Act 2010).[87] As many defendants will not have sought legal advice prior to the hearing[88] it is highly unlikely that they will be aware of possible defences or be able to alert the judge to relevant considerations via the defence form. A concern therefore is that some defendants might not be accessing the full range of protective measures available to them.

Unfortunately, while the Ministry of Justice (MOJ) produces statistics on the number and type of possession claims, there is no published data on the number and quality of defence forms submitted. This makes it difficult to evaluate the extent to which the provision of written information influences the case outcome. We would recommend therefore that the MOJ collate and publish such information. In the meantime, it is necessary to rely on the few existing empirical studies in order to learn more about tenant engagement with the possession process. What these studies suggest is that the proportion of tenants who file defence forms is low.[89] The survey of court managers undertaken during our 2014 study indicated that fewer than half of defendants file a defence form. Our 2017 study found that a defence form was submitted in only three of the 31 (10%) possession hearings examined.

Attendance at the Hearing

[87] See the illuminating account of such a case in practice, albeit based on a mandatory ground for possession, by I. Loveland, '"Human rights" Defences in Residential Possession Proceedings: A Cautionary Tale' (2017) 28 *Kings LJ* 130.
[88] For an account of the decline in housing work starts since the introduction of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 see Ministry of Justice and Legal Aid Agency, *Legal Aid Statistics quarterly, England and Wales, July to September 2017*, 7-8 and Bright and Whitehouse, n 7 above, Chp 4 and 66-67. The Ministry of Justice and Legal Aid Agency decided in 2017 to increase the size of the geographical areas covered by each HPCDS (e.g. one scheme was to cover the whole of Wales) thereby reducing the number of scheme areas from 100 to 47. A claim for judicial review by the Law Centres Federation Ltd in the High Court resulted in this decision being quashed, see *Law Centres Federation Limited v The Lord Chancellor* [2018] EWHC 1588 (Admin). The response of the Ministry of Justice and Legal Aid Agency is awaited.
[89] The 1996 Nixon study found that only 22% of defendants (borrowers and tenants in arrears cases) used the Right of Reply Form, and a further 14% made other written submissions, Nixon, et al, n 65 above, 20. The 2005 Hunter Study reports that 3% used *only* written submissions as their form of participation; a further 8% used a written response in addition to attending, Hunter, et al, n 65 above, 17.

While the gap in knowledge regarding the individual circumstances of the tenant caused by the failure to submit a defence form can be potentially overcome if the tenant attends the hearing, the preliminary report for the Jackson review described the proportion of tenants attending possession hearings as 'depressingly low'.[90] This confirms earlier findings by the MOJ that 'the defendant is often absent on the day of the hearing: evidence from recent court visits suggests that only 50% of tenants attend rent arrears hearings... Consequently, the majority of cases are decided without any defence being presented.'[91] Beyond this, up to date data regarding the number of defendants who attend and whether they are represented is unavailable. Nixon et al. found that fewer than 25% (of tenants and mortgage borrowers) attended their hearing.[92] In line with these findings and those of the MOJ, our 2017 study found that tenants were present in no more than eleven of the 31 hearings (35%): one of the seven (14%) Housing Association cases and nine of the 24 (38%) Local Authority cases.[93]

Our 2014 study sought to understand why attendance rates are so low by asking respondents to the HPCDS survey what they considered to be the barriers to court attendance. For this question we suggested categories that were drawn up in an earlier study of HPCDS.[94] Our respondents agreed these categories were important and rated them in the following order: burying of heads in the sand, little point attending as nothing could be done, landlords and housing officers told defendants there was no need to attend, fear or misunderstanding of the legal system, the cost and difficulty of attending, general apathy, and the acceptance of what

[90] Ministry of Justice, *Review of Civil Litigation Costs, Preliminary Report, Vol 1*, May 2009, ch 31 para 2.12.
[91] Ministry of Justice, n 75 above, para 98. For other studies reporting attendance rates, see Hunter, et al, n 65 above, and references therein 16-17 and 24-25.
[92] Nixon, et al, n 65 above, 18.
[93] In one Local Authority case it was impossible, due to the poor audio recording, to tell whether the tenant was in attendance.
[94] Legal Services Commission, *Improving access to advice in the Community Legal Service, Report on Evaluation Research on Alternative Methods of Delivery*, July 2004.

is perceived as an unfair system. These issues were also brought out in our interviews. For example, a HPCDS representative said:

> [T]he housing officers visit everybody the week before the court hearing and say "Well, if you reach agreement with me that you'll pay the current rent plus a fiver a week off the arrears you don't have to go to court. We'll tell the court it's all agreed." Now they may very carefully explain the consequences of reaching a possession order but I doubt it… it is stark and it's noticeable how nobody comes from [this local authority] … Sometimes you get the odd one but they tend to be particularly bolshie people who should never have been taken to court in the first place, you know.[95]

Similarly a judge commented:

> People are maybe slightly afraid of court... They may also, foolhardily, go to work and bury their head – if they've got a job they think is more important.[96]

Overall, these findings indicate that only a small minority of tenants threatened with loss of home take advantage of the opportunity to tell their story to the judge.

Effects of Information Deficits

[95] HPCDS Rep 1.
[96] DJ1.

In combination, the low attendance rates and even lower number of defence forms filed mean that in many cases judges will have little information about the defendant beyond information supplied by the claimant, which will be mainly financial. As one judge noted during our 2014 study, 'let us say, I've got a very full housing possession list, which is effectively 45 cases, I will go and start looking at those cases. I probably allow myself two hours. What do I see? Not very much to be blunt.'[97]

The negative impact of the lack of participation by tenants is amplified by our finding that the ability of tenants to tell their 'story directly to the judge'[98] appears to play a significant role in the decision-making process. Given that the reasonableness test requires deliberative (compensatory) decision-making, the outcome of a case is likely to be affected by what is known by the judge about the defendant's personal circumstances. Previous research supports this view.[99] The 2005 Hunter study, for example, explored the ways in which judges exercise discretion in cases where social landlords seek possession on the ground of rent arrears.[100] The researchers presented different scenarios to judges to see what order they would make in each scenario and what explanations judges gave for making their orders. The findings suggest that the personal circumstances of tenants such as problems caused by age, mental infirmity, dependent children, and an inability to understand the proceedings may have an impact on the outcome of a case.[101] These findings were based on hypothetical rent arrears scenarios presented to judges. In the natural setting, given the low rates of participation, there

[97] DJ8.
[98] Denton, n 45 above, 46.
[99] Blandy, et al, n 8 above; Ford, et al, n 8 above; Hunter, et al, n 65 above; Nixon, et al, n 65 above; and Whitehouse, n 8 above, 151-174.
[100] Hunter, et al, n 65 above, see especially Ch 6.
[101] Hunter, et al, n 65 above.

will be many cases in which not much is known about the tenant's personal circumstances, as our own studies suggest.

Of the 31 cases in our 2017 study, three led to an outright possession order. In none of these three cases did the tenant submit a defence form or attend the hearing. Importantly, in all three cases the judge noted the absence of the defendant and indicated that as the defendant was not there to explain certain circumstances (e.g. the reason for the non-payment or whether housing benefit had been applied for) or to request that the order be suspended then the order would be for outright possession in 28 days.

These findings reinforce the responses of a range of respondents to our 2014 study which indicate that the tenant's attendance makes it is much less likely that an outright possession order will be made, and if a suspended possession order is made, the terms will be more realistic. For example, a HPCDS representative said:

> If people don't attend there's an order going to be made and that's going to be a possession order, so they're going to have an outright order. Whereas, if they attend and there's something wrong with it then you may be able to get it struck out or you might be able to get an adjournment or you might be able to get a suspended order on reasonable terms or you can look into all other issues.[102]

[102] HPCDS Rep 2.

In line with the 2005 Hunter study, our findings do not suggest that attendance necessarily results in a more favourable outcome. Rather, attendance gives the judge an opportunity to be made aware of relevant factors such as the personal circumstances of the occupier, and these factors could have an influence on the decision.[103]

Given the lack of information supplied to the court it is unsurprising that, in line with earlier studies,[104] our 2017 study found that the majority of the 31 cases examined resulted in an adjournment, no order or were struck out. Interestingly, this was not just for the short hearings. Of the 17 cases lasting less than five minutes, eight resulted in an adjournment, five led to no order being made, three resulted in a suspended possession order, and one case was struck out. Of the eleven cases that took between five and nine minutes, five led to either a suspended or outright possession order, five were adjourned and one resulted in no order. Finally, of the two cases that took ten or more minutes, one resulted in an adjournment while the other led to a suspended possession order.

Given that in our sample fourteen out of the 31 cases were adjourned, a considerable amount of time and resources, for the judiciary, parties, court staff, and representatives is being spent on cases that are not resolved. The 2005 Hunter study identified factors that may be leading to adjournments, namely unresolved housing benefit issues;[105] lack of tenant representation;[106] a strategy to gain more time for decision-making (in particular to obtain further evidence);[107] and a 'standard order' in preference to a suspended possession order (perhaps to support an agreement made between the landlord and the tenant or because the

[103] Hunter, et al, n 65 above, Executive Summary, iii.
[104] See, for example, Nixon, et al, n 65 above, 52-53 and Hunter, et al, n 65 above, Table 5, 18.
[105] Hunter, et al, n 65 above, 18.
[106] Ibid.
[107] Ibid, 106.

level of arrears was not thought to support even a suspended possession order).[108] Using adjournment as a strategy to gain time is consistent with the findings of our 2014 study which found that if, for example, an issue which was out of the ordinary was raised during the hearing then the case would be adjourned because the time constraints of the listed cases meant that it could not be dealt with. One judge noted, 'I mean you can't hear a defended possession action in five minutes, it's an impossibility.'[109] Indeed, in our 2017 study, there were various reasons for adjournments including missing paperwork, and the need to find an interpreter, but the most common reason concerned the issue of housing benefit despite the court forms specifically requesting information regarding the tenant's financial circumstances. This raises the question of whether there is some way of reducing the number of adjournments by addressing some of these issues before the hearing itself. We return to this point later.

Reasons Given

The outcomes of run-of-the-mill possession hearings are recorded and published on an aggregated basis by the MOJ but the details of individual cases are not made available. This makes it impossible to identify the factors that give rise to particular outcomes, the reasons reported by judges for their decisions, or even whether reasons are offered at all. Reassuringly, in our 2017 study, reasons were expressed orally in all of the cases where a possession order was granted or suspended. The most common explanations included a failure on the part of the defendant to keep to previous payment promises, the non-attendance of the tenant, and the level of the arrears. Although relevant statutes do not give any steer as

[108] Ibid, 18-19.
[109] DJ 8.

to how serious the arrears need to be to justify possession, our research confirms the tendency, identified in the 2005 Hunter study, that judges appear to adopt a rule of thumb strategy in relation to the level of arrears that will usually lead to a possession order.[110] The 2005 Hunter study found that the thresholds were different in different locations and between different judges (varying from £200 to £1000) and were used flexibly so that other factors could be taken into account. This flexibility may support the idea that there is careful deliberation and analytic thinking on the part of the judge, but it has also been perceived by some as reflecting inconsistency in treatment. Indeed, the 2005 Hunter study was commissioned to feed into a review of housing law by the Law Commission which had expressed concern in its 2002 Consultation Paper that there was a 'widespread perception that judicial decision-making on discretionary grounds is less predictable than it should be'[111] and that outcomes from the claimant's perspective may appear inconsistent, and even arbitrary.

Although some explanations for ordering possession were expressed orally during the hearing in our 2017 study they appear not to be transcribed into written form in the documents later sent to the parties informing them of the outcome of the hearing.[112] Whilst it is not uncommon in civil proceedings for reasons only to be articulated in the hearing, the fact is that many defendants do not attend possession hearings. In our 2017 study, in around two-thirds of cases,[113] neither the defendant nor their representative was in attendance, which means that they were not told and could not discover, the reasons for possession being granted or suspended. While we were unable to scrutinise the written forms sent to the parties in the cases we studied, we did ask court staff about how the outcome of the case and the

[110] Hunter, et al, n 65 above, 73-74, 96, and 103.
[111] The Law Commission, 'Renting Homes: Status and Security' (Law Com No 162, March 2002) para. 1.60.
[112] Form N26 'Order for Possession' does not include space for reasons to be entered. Available at http://wbus.westlaw.co.uk/forms/pdf/cpf02078.pdf.
[113] 20 of the 31 cases.

reasons for it were communicated. They indicated that the order for possession form (N26) was completed by office staff on the basis of information provided to them by the judge via a pro-forma indicating factors such as the level of arrears, the type of order granted and whether it was made on discretionary or mandatory grounds. Form N26 does not include space for reasons to be transcribed and it is therefore extremely unlikely that the parties would have received a written account of why it was considered reasonable to order possession.

Nor is it feasible for the parties to use the audio recording to find out the reasons, even assuming that they can be given access to it. Recordings take the form of a continuous stream of audio which can include several different hearings, and so identifying particular hearings is an extremely cumbersome and time consuming task. It is also very challenging to follow the proceedings due to the poor quality of some recordings which on occasion make it difficult to identify who was in the court room, who was speaking and what they were saying. These findings therefore suggest over optimism on the part of Griffiths LJ when stating that courts '… can now rely with confidence upon a transcript of the oral judgment given by a lower court or tribunal as accurately setting out its reasons which may not have been the case 100 years ago.'[114]

Our 2017 study also found that the factors which judges were obliged by law to consider were not always referred to during the hearings. 'Reasonableness' was mentioned in only seven of the ten (70%) cases in which possession was ordered or suspended, despite the fact that possession can be ordered only where it is reasonable to do so. There may be several

[114] *R v Knightsbridge Crown Court, Ex parte International Sporting Club (London) Ltd. and Another* [1982] QB 304 [315] per Griffiths LJ.

explanations for this, for instance, judges may have taken it as given that if they ordered possession, then by implication, they considered it reasonable to do so, or perhaps they simply did not have the time to explain why it was reasonable to order possession. Regardless, the fact that reasonableness was not articulated in court means that those attending would neither hear the test being referred to, nor know why it was considered reasonable to grant the order. Of greater concern is the possibility that the judges simply did not consider the issue of reasonableness at all. Future research is needed to understand why judges may not refer to reasonableness when ordering possession.

The lack of written reasons for decisions also fails to dispel concerns regarding inconsistency in the exercise of discretion by judges. Both the 2005 Hunter Study and our 2014 study suggest that different judges approach possession cases in different ways. The 2005 Hunter Study, for example, found that, 'the particular personal characteristics and responses of judges combined with individuals' decision-making goals were found to be influential in the decision-making process and indicate the importance of individual agency in the exercise of discretion.'[115] Responses to the HPCDS questionnaire in our 2014 study support the finding that the outcome of the case may be affected by the judge who hears it (71% of respondents agreeing with this). Respondents suggested that judges vary in their leniency and in their willingness to hear evidence, 'Certain judges are well known for being less defendant-friendly. The outcome is likely to be less positive or harsher on the defendant if a case is heard by those particular judges.'[116] This finding was also supported by our interview data with a HPCDS representative noting that 'each judge has his or her own view on how his or

[115] Hunter, et al, n 65 above, 105.
[116] HPCDS Questionnaire 30.

her discretion should be exercised and in our view this leads to inconsistency between judges.'[117]

Together with the findings from earlier studies (which, it should be noted, pre-date some of the legal and procedural reforms of recent years),[118] our two empirical studies have allowed us to glimpse into what Loveland refers to as the 'evidential black hole'[119] of housing possession cases and, in particular, the context within which judges make decisions about whether or not to order possession. Examining housing possession using empirical data can help us go beyond the anecdotal, often unrepresentative, tales of good or bad decision-making.[120] What these research findings suggest is that the process of possession, as it operates in practice, is not consistent with the demands of procedural fairness in large part because it does not facilitate deliberative (compensatory) decision-making or engagement by the tenant. Having discussed the latter issue above, we now turn to the former.

4. Implications for compensatory decision-making

It may be that housing possession cases are not perceived to involve particularly complex legal provisions or processes. The question typically boils down to whether the landlord has complied with the necessary procedures and whether the defendant can repay the arrears. This may explain why such cases are allocated only a few minutes of court time. If the judge has no information regarding the defendant's circumstances, then they may decide the case in

[117] HPCDS Questionnaire 8.
[118] Nixon, et al, n 65 above; Blandy, et al, n 65 above; and Hunter, et al, n 65 above.
[119] Loveland, n 6 above, 190.
[120] M. K. Dhami and I. K. Belton, 'On getting inside the judge's mind' (2017) 3 *Translational Issues in Psychological Science*, 214-226.

seconds. If the defendant does attend, the hearing may last a few minutes and in that time, the home may be lost or the case may be adjourned. However, the judge is still obliged during this short amount of time to consider whether it is reasonable to order possession and the question remains as to how they manage to do this in some cases in a matter of minutes, if not seconds.

Judges appear to deal with time pressure and limited information constraints in one of two ways. One is to halt the decision-making process to allow more time for consideration and to obtain further information. This may partially explain the high rate of adjournments that we discussed earlier.

The second way is that judges may engage in fast decision-making, adopting a less deliberative (and more simplistic) way of reasoning about the case,[121] and relying on particular (fewer) cues to assist them in arriving at their decisions. People may also resort to using simple reasoning when there is incommensurability which prevents the various reasons or cues from being reduced into a single currency or scale.[122] According to psychological theories of decision-making, people may adopt System 1 (intuitive, heuristic, experiential) or System 2 (deliberative, analytic, rule-based) thinking.[123] Reasoning intuitively about a case or using a simple heuristic strategy is more likely to be triggered by the sorts of conditions that characterise possession hearings. System 1 operates at an unconscious level and so refers to an automatic and fast process. By contrast, System 2 operates at a conscious level and so can be controlled and deliberative. Judges will, consciously or not, adopt specific decision

[121] Rieskamp and Hoffrage, n 9 above, 147.
[122] Gigerenzer and Todd, n 10 above, 15.
[123] J. St. B. T. Evans and D. E. Over, *Rationality and Reasoning* (Hove: Psychology Press, 1996) and S. A. Sloman, 'The empirical case for two systems of reasoning' (1996) 119.1 *Psychological Bulletin*, 3–22.

strategies.[124] There is evidence from several domains, including the legal domain, that experienced decision-makers may resort to non-compensatory decision-making where limited information is searched and decisions are based on only one piece of information.[125]

In the present context, we found evidence in support of the idea that judges use System 1 thinking from what we call the 'rule of thumb threshold'. As our 2017 Study suggests, one such threshold may be the level of arrears, with outright possession being more likely the higher the arrears (median of £1918 for outright possession, as compared with £875 for suspended orders and £761 for adjournments).[126]

On the surface, there may not be a problem in the two ways in which judges deal with the challenge of limited time and information during the possession process. Clearly, halting the decision-making process in a case to obtain more (relevant) information and more time is probably the most appropriate action to take under the circumstances, although it inevitably has resource implications. Relying on a heuristic strategy that involves little time and information (and effort) may also appear to be appropriate under these circumstances. Indeed, System 1 thinking may be viewed as a form of judgecraft: a way in which judges manage the tasks of the courtroom by reducing hard tasks to simple ones.[127] The problem, however, lies with the fact that both the legal rules around housing possession and the principles of procedural fairness require compensatory decision-making i.e., the balancing of all relevant factors.

[124] Strategies are not necessarily consciously selected, and may be learned by experience: see Payne, et al, n 10 above.
[125] Dhami and Ayton, n 11 above and Gigerenzer and Todd, n 10 above, 15.
[126] A finding consistent with the 2005 Hunter study, see Hunter, et al, n 65 above, 73-75.
[127] K. Mack and S. Roach Anleu, '"Getting Through the list": Judgecraft and Legitimacy in the Lower Courts', (2007) 16.3 *Social & Legal Studies* 341, 341. Their research (based on observation of Australian criminal courts) was concentrated upon the process focused managerial tasks such as judicial engagement with court users, and active intervention in the process.

Heuristics, if used inappropriately however, can produce systematic biases and errors,[128] as well as inconsistency if different judges rely on different factors. It has been said that in housing cases, judges bring into their decision-making their own understandings of the role of housing, home and property rights.[129] It is this System 1 thinking, therefore, that may account for the inconsistency within the legal process of housing possession identified by the Law Commission and others and this is potentially a problem for the Rule of Law.

Of additional concern is the fact that judges purport to be doing something more cognitively complex than appears to be true. As we mentioned earlier, there is evidence to suggest that if judges were asked to explain their reasoning, they may find it difficult to access System 1 thoughts (that do not operate at a conscious level) and/or they may find it difficult to find the language that accurately articulates cognitive activity.[130] Indeed, judges do not appear to recognise how their behaviour is impeded by a lack of information or time. In our 2014 study, for instance, some judges did not consider that the time allocated constrained their judicial powers, as demonstrated by this statement:

> ... quite used to dealing with time pressures and absorbing information and being as fair as you can in any circumstances. …. So no, I don't think time pressures prevent me from exercising my discretion, I really don't.[131]

[128] D. Kahneman, *Thinking Fast and Slow*, (London: Penguin, 2011) 25.
[129] C. Hunter and J. Nixon, 'Better a Public Tenant than a Private Borrower Be: The Possession Process and The Threat of Eviction' in D. Cowan (ed), *Housing: Participation and Exclusion* (Dartmouth: Ashgate 1998) 84; and D. Cowan, S. Blandy, E. Hitchings, C. Hunter and J. Nixon, 'District judges and possession proceedings' (2006) 33.4 *Journal of Law and Society* 547-571.
[130] Nisbett and Wilson, n 55 above.
[131] DJ7.

5. Proposals for improving procedural fairness within the housing possession process

In an effort to enhance compliance with procedural fairness within the housing possession process we propose several responses to the concerns raised above. Central to our proposals is that judicial discretion should be 'confined, structured and checked'[132] so as to ensure that judges consider factors demanded by law in a way that encourages compensatory decision-making, which makes the process more transparent and accountable. This is not a new idea. The Law Commission proposed the adoption of structured discretion in such cases in 2002; their goal being 'to enhance consistency of judgments.'[133] A similar model was introduced in Scotland in 2001[134] which specifies matters that the court *must* have regard to. Although the Law Commission's proposal to structure discretion was not enacted in England, the ideas were recently adopted in Wales.[135]

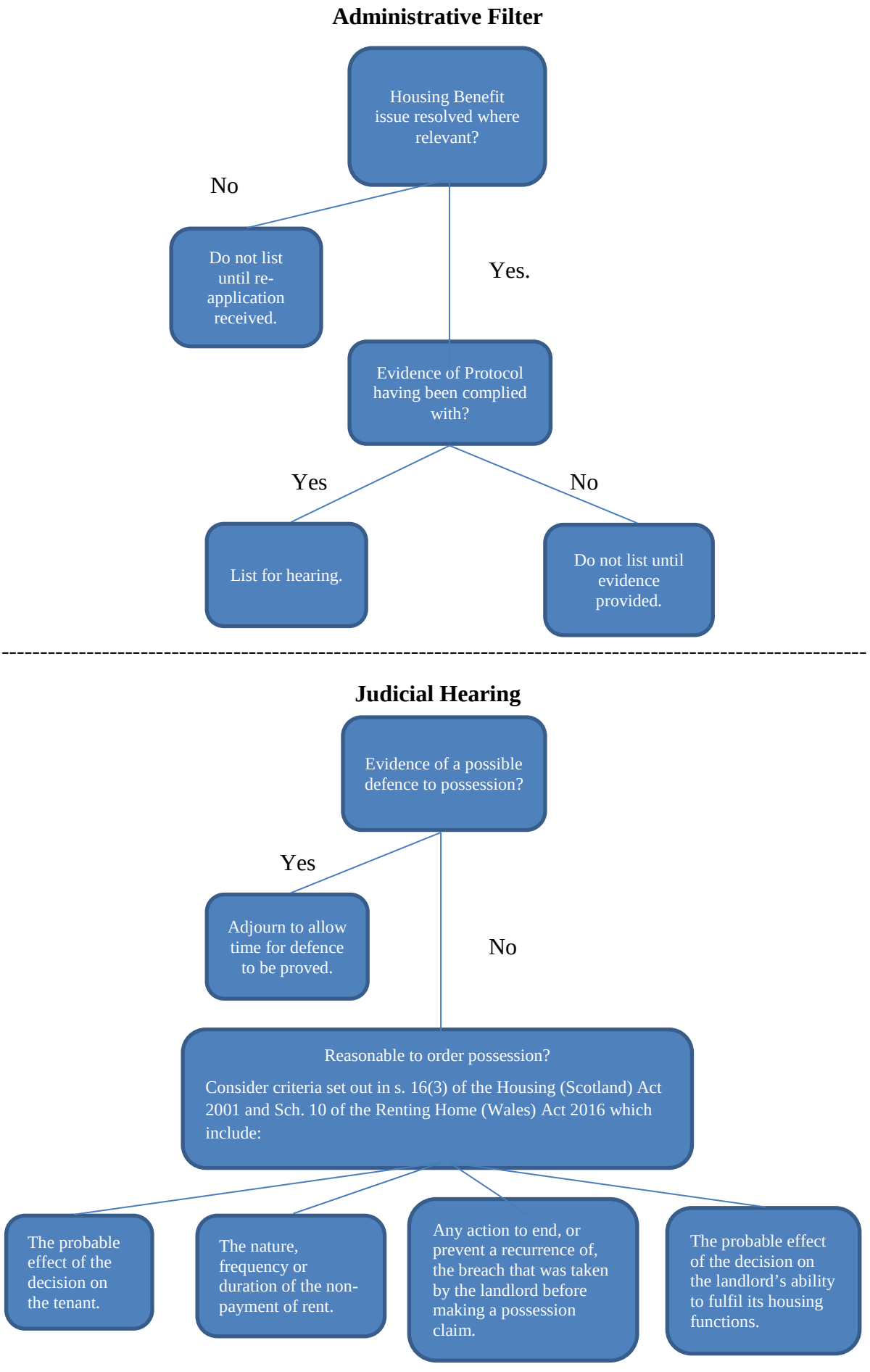
Whether structured discretion would help depends on the reasons for inconsistency in outcome. Of course, if inconsistency is unsystematic (i.e., random noise) then interventions designed to deal with the causes of this noise such as attention span, boredom, memory limitations, distractions and so on may be helpful. If, however, inconsistency is largely due to differences in decision strategies and/or judge bias, as appears to be what the 2005 Hunter study found, then the use of structured discretion ought to be useful.

[132] K. C. Davis, *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969) 4.
[133] The Law Commission, n 111 above, 12.16-12.27.
[134] Housing (Scotland) Act 2001 s 16. There is also reported case law involving rent arrears: *Angus Housing Association Ltd v Fraser* [2004] Hous. L.R. 83; *Stirling Council v Harrower* [2103] Hous LR 32; *Glasgow Housing Association Ltd v Li* [2010] Hous LR 6.
[135] The Renting Homes (Wales) Act 2016, although the relevant sections are yet to come into force.

In an effort to demonstrate how discretion might be structured, and drawing on the structured discretion approach adopted in the Renting Homes (Wales) Act 2016,[136] we have constructed a 'decision tree' or flowchart (see Figure 1 below) which offers an example of the sort of steps that could be followed and the issues that might be considered at each stage.

[136] http://www.legislation.gov.uk/anaw/2016/1/schedule/10/enacted.

Figure 1: Example of how decision-making in housing possession cases might be structured.



The 'Administrative Filter'

The first part of the flowchart establishes an 'administrative filter' designed to avoid the listing and holding of hearings that result in an adjournment on the basis of reasons that do not require the exercise of judicial judgement. This will not only (possibly) allow for more time to be devoted to possession hearings, thereby reducing the time pressure imposed on the decision-making process and consequently allowing for more considered and rational decision-making, but it may also save court resources. Both of our studies indicate that it is possible to predict with a high degree of accuracy possession cases that are likely to or should be adjourned. In particular, these are cases involving unresolved housing benefit claims or where there is no evidence to suggest that the landlord has complied with the Protocol. If resources permitted, a short meeting with a court official could filter cases so as to help with case management. Alternatively, the existing on-line claims process could be expanded to include questions that can help establish if the case is 'hearing ready'. This may include, for example, confirmation that the Protocol has been complied with and whether the claimant is aware of the defendant's position regarding housing benefit. This requires designing PCOL to respond appropriately to factors known commonly to lead to adjournments that could include alerting court staff to the need to seek further information from the claimant before listing the case.

While concerns may be raised regarding the entitlement of landlords to have their claim heard in court even though it is almost certainly going to result in an adjournment it would seem that some landlords would not be averse to identifying and highlighting best practice in respect of avoiding unnecessary adjournments or loss of home. During a seminar held

following our 2014 study, for example, income team leaders from a London housing authority revealed how a frustratingly high number of adjournments had led them to work with judges and court managers in an effort to understand how to initiate better prepared cases.[137]

Increasing Meaningful Participation

In keeping with the demands of procedural fairness, effort should be made to address the lack of engagement and provision of information in the possession process by defendants. Thus, we propose the introduction of an information campaign and a reworking of the 'defence form.'[138]

In order to ensure that the legal process is accessible to all tenants some of the mystery surrounding the court process needs to be removed. This could be achieved through the publication and dissemination of targeted material publicising (in different languages) the relative informality of the hearing, the importance of attending it, and the fact that advice and representation may be available on the day.[139] Eye-catching posters and leaflets could be distributed in places where tenants are likely to go, particularly those in financial difficulty, such as debt advice services, food banks, and doctor's surgeries, as well as wider use being made of social media such as Facebook, and on-line videos etc.

[137] See n 86 above.
[138] Available at http://hmctsformfinder.justice.gov.uk/HMCTS/GetForm.do?court_forms_id=367.
[139] See Bright and Whitehouse, n 7 above, 59-68 and S. Bright and L. Whitehouse, 'The Key to Change', (2014) 164.7619 *New Law Journal* 12-13.

Some evidence suggests that the official forms and attendance at court can prove daunting for some tenants.[140] The defence form could be made as user friendly as possible while encouraging the tenant to provide information directly relevant to the decision (explored in the following section). In order to enhance knowledge of the process we would recommend also that the MOJ publish data on the number and quality of defence forms submitted.

Joined-Up Thinking

The information deficit and the implications it has for the ability of tenants to exercise 'voice' within the process may be addressed through more 'joined-up-thinking' within the process as well as among the various agencies involved with regard to the information they collect from the parties. The Particulars of Claim Form, for example, could request information relevant to the question of whether it is reasonable to order possession (consistent with the information set out under the decision tree in Figure 1). This information would include the nature, frequency or duration of the non-payment of rent and any action to end the breach that was taken by the landlord before making a possession claim. The form might also request information that could assist the judge in determining the probable effect of the decision on the tenant such as whether the tenant suffers from mental health issues, whether he or she has recently experienced domestic violence, whether there are dependent children, and so on.

The defence form should also be revised so as to request information from the tenant that might give rise to a defence under the Equality Act 2010. It might, for example, request

[140] Bright and Whitehouse, n 139 above, 13.

information regarding whether the tenant is 'disabled',[141] whether they have informed their landlord of their disability, and whether they have evidence to suggest that their landlord has treated them unfavourably because of something arising in consequence of their disability.[142]

Reasons for Decisions

In further keeping with the demands of procedural fairness, the reasons for decisions must be given in writing. As Henry LJ made clear in *Flannery v Halifax Estate Agencies Ltd*, a duty to give reasons is 'a function of due process, and therefore of justice.'[143] Those reasons must, at the very least, be communicated to the parties to the case and preferably be made publicly available (in an anonymised form) so as to facilitate research into, and therefore a better understanding of, these important cases.

As Ho argues, 'the giving of reasons on a legal point enables practitioners, legislators and members of the public to ascertain the basis upon which like cases will probably be decided in the future.'[144] Not only will this enhance compliance with fundamental constitutional expectations by ensuring that decisions are transparent and that judges are held accountable for them, it will reinforce also the need for judges to undertake more analytic and deliberative thinking about the case. As Donaldson J noted in *Tramountana Armadora SA v Atlantic Shipping*, 'having to give reasons concentrates the mind wonderfully.'[145] Although caution

[141] Defined in the Equality Act 2010, s 6.
[142] Equality Act 2010, s 15. See also *Akerman-Livingstone v Aster Communities Ltd* [2015] UKSC 15.
[143] (1999) 149 NLJ 284.
[144] Hock Lai Ho, n 48 above, 48.
[145] [1978] 2 ALL ER 870 at 872. See also Hock Lai Ho, n 48 above, 47-48.

must be taken in the meaningfulness of the reasons provided, since, as mentioned earlier, judges may lack awareness and/or the vocabulary to articulate cognitive processes.

Clearly, requiring judges to give reasons may have implications in respect of increasing the time spent on these cases. Dyzenhaus and Taggart note, but do not offer a response to, the objection that a duty to give reasons might 'overburden judges' and might be 'impractical given the workload of the lower courts.'[146] Packer too highlights the resource implications of such an approach, 'the Due Process Model resembles a factory that has to devote a substantial part of its input to quality control. This necessarily reduces quantitative output,'[147] but this is a cost that must be met in the interests of preventing the abuse of power,[148] and erroneous decisions. To reiterate this point, the resource implications of providing reasons is a factor that needs to be addressed rather than a justification for not complying with procedural fairness demands.

Lessons on how to overcome the burden of making judicial decisions available in writing may be learned from the approach adopted in other jurisdictions such as Sweden where the Swedish Enforcement Authority, which decides eviction claims via a summary procedure, published a database of its proceedings (from January 2009 to August 2012) covering 120,000 claims, thereby allowing researchers to identify the reasons for and outcomes of these claims.[149] The Netherlands also makes a number of judgments publicly available.[150]

[146] Dyzenhaus and Taggart, n 48 above, 149.
[147] H. L Packer, 'Two Models of the Criminal Process', (1964) 113.1 *University of Pennsylvania Law Review* 1-68, 15.

[149] S. Stenberg, L. Van Doorn and S. Gerull, 'Locked Out In Europe: A Comparative Analysis of Evictions Due to Rent Arrears in Germany, the Netherlands and Sweden', (2011) 5.2 *European Journal of Homelessness* 39-61 and C. Von Otter, O. Backman, S. Stenberg and C. Q. Eisenstein, 'Dynamics of Evictions: Results from a Swedish Database' (2017) 11 *European Journal of Homelessness* 35-58.
[150] The judgments of the Dutch courts are made available via a number of different sources including the website of the Dutch judiciary, www.rechtspraak.nl, and two journals which specialise in rental cases, Kort Geding and WR Tijdschrift

Vols et al, for example, were able to analyse 239 first instance cases decided during a 12 year period in the Netherlands which involved claims for eviction of tenants on the basis of anti-social behaviour.[151]

Ho's response to concerns regarding the extra burden placed upon an already stretched court system is to propose 'a standard of explanation that is commensurate with the realities of the situation rather than to reject the duty altogether… it is better to be given some reasons than none at all.'[152] Given the volume of cases heard by the lower courts, the implication is that we might expect less in the way of detail and precision in the drafting of such reasons.[153]

In terms of how the reasoning underpinning the decision might be presented, we would propose that, in a manner similar to Form N460 (which requires brief reasons for allowing or refusing permission to appeal to be written by the judge),[154] an extra box be added to the court pro-forma already being employed by courts and to Form N26[155] which asks the court to note the reasons for the decision and in particular, to specify in as much detail as possible, why it is reasonable or not to order possession. If the form was also to record whether the defendant submitted a defence form and attended the hearing, then the MOJ could collate this information and publish statistics on it.

voor Huurrecht, see M. Vols, P.G. Tassenaar and J.P.A.M. Jacobs, 'Anti-social behaviour and European protection against eviction' (2015) 7.2 *International Journal of Law in the Built Environment* 148-161, 151.

[151] Vols, et al, n 150 above. Vols is also currently engaged in a project that will involve the examination of 562 cases on anti-social behaviour, see 'Neighbours from hell': from eviction to solving problems' at https://www.nwo.nl/en/research-and-results/research-projects/i/21/13621.html.

[152] Hock Lai Ho, n 48 above, 51.

[153] Ibid, 52.

In addition, apart from procedural change, there are two more immediate steps that might be considered appropriate to encourage judges to use more deliberative (System 2) thinking. The first step is to offer training designed to raise awareness of the potential for judges to use, whether consciously or unconsciously, System 1 thinking and the problems that may arise as a result. This sort of training is already available in many other domains where experienced individuals make consequential decisions but does not appear to be standard fare in the training given to district judges.[156]

Second, guidance can be developed along the lines of 'decision trees' or flowcharts that can assist in ensuring that all judges consider multiple factors, as required by the discretion they are given. A sample decision tree, based on the position in both Scotland and Wales, is given above in Figure 1. Although legislative change is unlikely in England, judges could be invited to agree upon the factors to be included and the weight attached to them. This would encourage engagement and increase 'uptake'. We would suggest also that where judges feel it necessary to depart from the approach suggested by a decision tree, they must give reasons for that departure (in a manner similar to judges who depart from sentencing guidelines). Finally, if made available publicly, this flowchart would also make the decision-making process more transparent and thereby enhance procedural fairness.

Conclusions

[156] See, for example, I. Belton and M.K. Dhami, 'Cognitive biases and debiasing in intelligence analysis' in R. Viale and K. Katzikopoulos (eds.), *Handbook on bounded rationality* (Routledge, in press), N. E. Dunbar, C. H. Miller, B. J. Adame, J. Elizondo, S. N. Wilson, B. L. Lane, A. A. Kauffman, E. Bessarabova, M. L. Jensen, S. K. Straub, Y. Lee, J. K. Burgoon, J. J. Valacich, J. Jenkins and J. Zhang, 'Implicit and explicit training in the mitigation of cognitive bias through the use of a serious game' (2014) 37 *Computers in Human Behavior*, 307-318 and C. K. Morewedge, H. Yoon, I. Scopelliti, C. W. Symborski, J. H. Korris and K. S. Kassam, 'Debiasing decisions: Improved decision making with a single training intervention' (2015) 2.1 *Policy Insights from the Behavioral and Brain Sciences*, 129-140.

In an effort to shine light on the important process of housing possession and to assess the extent to which it complies with the demands of procedural fairness, we have drawn upon our own empirical data as well as literature on the psychology of decision-making. What our findings reveal is that even though the legal process appears to require deliberative and compensatory decision-making, and this is what the decision-makers themselves consider that they are doing, the reality is that judges are likely - and perhaps inevitably – relying on intuition. We also find that several other important elements of procedural fairness such as transparency, accountability and voice appear to be lacking in the housing possession process. The importance of our work, however, derives not only from its ability to offer an insight into the practical operation of housing possession cases but from our finding that it is the conditions under which these decisions are made (including information and time deficits) that may result in judges being unable to engage in more deliberative decision-making.

Our five proposals are designed to remedy the deficiencies in procedural fairness that we have identified. To summarise, the proposals are first that, judicial discretion must be 'structured' in an effort to ensure that the potential for inconsistent or arbitrary decision-making is reduced. Second, an 'administrative filter' designed to reduce the number of 'avoidable' hearings and hence increase the amount of time available for hearings that do require the exercise of judicial judgement should be introduced. Third, we propose that efforts be made to ensure a more systematic and targeted approach in respect of the collection of relevant information and to encourage the provision of such by the parties, for example, through improved court forms as well as a public information campaign. Coupled with this is the need for the MOJ to collate and disseminate data relating to issues including attendance, the submission of defence forms, and the number of adjournments. Finally, we contend that

the reasons for decisions must be given and made accessible, thereby ensuring that decisions are transparent and that judges can be held to account. While the feasibility and resource implications of the above proposals will require further investigation, we believe that they are essential in ensuring that the legal process of possession is compliant with procedural fairness, as well as having the potential to support 'the overriding objective of enabling the court to deal with cases justly and at proportionate cost.'[157]

[157] CPR, Part 1 – Overriding Objective, 1.1(1).