

## **Article 8, Proportionality and Horizontal Effect**

After the controversial decision in *McDonald v McDonald* [2014] EWCA Civ 1049; [2015] Ch. 357, the Supreme Court has now delivered its judgment [2016] UKSC 28; [2016] 3 W.L.R. 45. The Supreme Court held that in actions for possession between private parties, although article 8 is engaged, no proportionality assessment is required, at least where an underlying statutory provision is itself compliant.

This note will consider four issues arising from the judgment: the relevance of contractual arrangements and statutory interventions to questions of horizontal effect; the consequences of article 8 being engaged; the mechanisms of horizontal effect; and the need to balance article 8 and article 1 protocol 1. It will be seen that despite the brief and simple-seeming judgment, delivered by Lord Neuberger and Lady Hale (with whom the rest of the Court agreed), there are as many issues raised by this judgment as are solved.

The case concerned an action for possession against a tenant by receivers appointed by a mortgage lender. The tenant, Ms McDonald, had severe psychological problems such that it would be extremely disruptive to her well-being for her to lose her home. Her parents acquired the freehold to the property with the help of a mortgage and fell into arrears. Ms McDonald argued that whilst section 21(4) of the Housing Act 1988, on its face, allowed the receiver to obtain an order for possession in these circumstances, the interference with her article 8 right would thereby be disproportionate.

The trial judge held that he was unable to consider article 8 and the proportionality of any order for possession. The Court of Appeal agreed for two key reasons. First, the ECtHR jurisprudence did not require that article 8 have horizontal effect, and without such jurisprudence, common law would not allow for a proportionality assessment (at [19(1)]). Secondly, the decision in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595; [2002] Q.B. 48 required the Court to conclude that section 21 was Convention compliant (at [19(iii)]).

The Supreme Court outlined three questions which required to be answered (at [1]). First, when considering an action for possession by and against a private landlord and tenant, should the court consider the proportionality of eviction in light of article 8? Secondly, if so, could section 21(4) of the Housing Act 1988 be read in such a way as to allow such an assessment? Finally, was the action for possession in this case in fact proportionate? The Court concluded that the answer to the first question was no, and so the remaining two issues were no longer strictly relevant (at [60]). This case note will therefore focus on the Court's answer to the first question.

The Supreme Court held that it was not necessary to consider the proportionality of the order for possession because: (a) absent any binding jurisprudence of the ECtHR, a landlord's right to obtain possession in these circumstances (here, the mortgagee had appointed receivers who, strictly speaking, become agents of the landlord) was governed by statute and contract and thus the Court should not interfere with the balance struck between occupiers and landlords (at [40]); and (b) whilst there is some support in the Strasbourg jurisprudence for the proposition that article 8 is engaged in

these circumstances, there is no requirement that a proportionality test be carried out (at [59]). Both of these conclusions are doubtful.

At the heart of the Court's conclusion is the view that where the rights and obligations of private parties are determined by statute and/or contract, it is not the role of the court to interfere with that balance (at [40]-[46]). That reasoning is strange. First, the potentially relevant statutory provisions must, on any view, include the impact of the Human Rights Act 1998 since this is precisely what the interpretation obligation in the HRA is intended to achieve. This must be true even where "the effect of those statutes has... been effectively confirmed on a number of occasions by Parliament" (at [40]) since all of these 'confirmations' took place against the background of the 1998 Act. This argument is not conclusive as to outcome, but it does mean that we ought not to assume that Parliament 'intends' for the balance between the rights of the occupier and the landlord to be governed by the Housing Act 1988 *alone*, but possibly by that Act modified by controls which provide for human rights protection where appropriate.

Furthermore, the Court reasons that:

although it may well be that article 8 is engaged when a judge makes an order for possession of a tenant's home at the suit of a private sector landlord, it is not open to the tenant to contend that article 8 could justify a different order from that which is mandated by the contractual relationship between the parties, at least where, as here, there are legislative provisions which the democratically elected legislature has decided properly balance the competing interests of private sector landlords and residential tenants. (At [40]).

This line of reasoning is, with respect, puzzling. Either the justification for not considering the proportionality of the order lies with the fact that the rights and obligations are privately negotiated in the form of contractual rights and obligations freely chosen (so that the court would be interfering with a 'private' relationship and therefore overstepping its proper role), or the justification lies in the fact that a democratic legislature has decided the balance and has therefore decided to 'override' the ability of the court to assess whether this balance is compliant with a different statute enacted by Parliament. It is problematic to argue that interference with contractual rights produces an impermissible (species of) horizontal effect, whilst at the same time arguing that the reason why no interference is possible is that Parliament, the supreme organ of the state, has specified the balance to be struck between those parties. If statute governs the relationship, then it is one produced by the state, and if a court order is sought, it is enforced by the state. It is no longer a purely private relationship.

The strangeness of the court's approach in this regard can be seen again when their Lordships reason:

It would be unsatisfactory if a domestic legislature could not impose a general set of rules protecting residential tenants in the private sector without thereby forcing the state to accept a super-added requirement of addressing the issue of proportionality in each case where possession is sought. In the field of proprietary rights between parties neither of whom is a public authority, the state should be allowed to lay down rules which are of general application, with a view to ensuring consistency of application and certainty of outcome. Those are two essential ingredients of the rule of law, and accepting the

appellant's argument in this case would involve diluting those rules in relation to possession actions in the private rented sector. (At [43]).

If the State is laying down rules of general application, then it is already interfering with the private rights and obligations of the landlord and tenant, whether certainty, or 'fairness' in a broader sense is the aim, and in doing so, is potentially invoking the 'super-added' protection of its own legislative act in the form of the HRA. This may produce uncertainty, but if the rules genuinely interfere with an individual's human rights by rendering them homeless in a disproportionate way, then surely this is not necessarily trumped by a plea to certainty. These two considerations may be balanced by the proportionality test, not in the question as to whether or not one is required. The court's assessment that the proper role of the court prevents a proportionality assessment in these circumstances is, therefore, unconvincing.

Furthermore, although the Court acknowledged that article 8 is engaged (since an individual was deprived of their home, at [50]), their Lordships held that no proportionality test should be carried out. However, article 8 itself requires a proportionality assessment to determine whether the rights it embodies have been breached. This is not a matter of judicial precedent, but interpretation of the articles within the Convention as mandated by the HRA. The second problem with this line of reasoning is that it mirrors that in *R v Qazi* [2003] UKHL 43; [2004] 1 A.C. 983. The argument runs that where statutory provisions are, in general, compliant with the HRA, every time that provision is relied upon, the outcome must also be proportionate. There is an appealing logic to this approach. However, it has already been rejected, albeit in a different context, by the ECtHR in *Kay v UK* (2012) 54 E.H.R.R. 30; [2011] H.L.R. 2, leading to the 'exceptional circumstances' approach in *Manchester City Council v Pinnock* [2011] UKSC 6; [2011] 2 W.L.R. 220 and *Hounslow LBC v Powell* [2011] UKSC 8; [2011] 2 A.C. 186. If this approach was wrong in *Qazi*, it is difficult to see why it should be right here notwithstanding the change in the identity of the landlord.

A further reason given by the court to support their conclusion that no proportionality assessment be carried out was that such an assessment would provide a perverse incentive to landlords to resort to self-help methods of eviction (at [42]). Whilst it is true, as the court highlights, that some types of residential occupiers are not protected by the Protection of Eviction Act 1977 (at [42]), most such occupiers are protected. Furthermore, we might assume that if the 1977 Act does not provide sufficient protection, then those statutory provisions themselves may breach human rights.

These reasons do not therefore support the Supreme Court's conclusion. The recognition that article 8 is engaged, the jurisprudence of the ECtHR and the Supreme Court in relation to public authorities, and of the wording of article 8 itself, as incorporated into national law by the HRA, mandate that a proportionality assessment be carried out. The Court's concerns about the proper judicial role and the balance struck between occupier and landlord should filter into this proportionality test under the concept of the margin of appreciation or deference. They do not justify that no assessment be carried out.

The Court was, nevertheless, minded to reject the article 8 argument unless Strasbourg jurisprudence required them to do otherwise. The Court, in examining this jurisprudence, is more thorough in their analysis than had been the Court of Appeal,

but the analysis is still problematic. It is possible to distinguish almost any form of precedent if so desired. That is what the Supreme Court appears to do here. What it does not do is acknowledge the ‘tone’ and sense of the ECtHR’s judgments. For example, in discussing *Zehenter v Austria* (2011) 52 E.H.R.R. 22, the Supreme Court distinguishes between orders for possession and “statutorily created powers of a court to enforce debts owed to creditors by ordering the sale of the debtor’s assets, including her home” (at [51]). In the context of the significant structural question of the horizontal applicability of article 8, this is a distinction without a difference.

Furthermore, the Supreme Court acknowledges that the Strasbourg jurisprudence does support a finding that article 8 is engaged (at [50]). However, they argue, this does not mean that a proportionality assessment must be carried out. Thus, in relation to *Zehenter*,

The furthest this decision goes in assisting the appellant is to support the notion that article 8 is engaged whenever a court determines a tenancy of residential property and makes an order for possession. However, once again, the decision does not support the notion that article 8 can be invoked by a residential occupier to curb her private sector landlord’s reliance on its contractual right to possession, where the statutory regime according her a degree of protection is not said to infringe the Convention. (At [51]).

What, if anything, does the fact of article 8’s being engaged therefore require if not assessment as to whether the article 8 was breached? The court does not answer this question, and it flies, as has been highlighted above, in the face of what article 8, and therefore the HRA, demand.

Finally, their Lordships, in assessing the Strasbourg jurisprudence, repeatedly reason that a case is not of assistance to them because the relevant signatory State did not contest the applicability of article 8 (at [51], [52], [53]). Whilst this means that the Strasbourg court has not definitively pronounced that article 8 does have horizontal effect in actions for possession against a private tenant, this may be because the accepted legal position in these signatory States is that article 8 is so engaged. The failure to contest its applicability is not evidence that it is not applicable.

There are, therefore, difficulties with almost all aspects of the Supreme Court’s reasoning, and, as with the Court of Appeal, this is arguably caused by a failure to engage fully with the mechanisms of horizontal effect, the impact of policy-based statutory provisions in private law, and the proper role of the Court in policing such issues. In particular, the Court does not analyse precisely why and how a proportionality assessment might filter into the possession order process. As discussed elsewhere, horizontal effect can take many forms (see E Lees, ‘Horizontal effect and article 8: *McDonald v McDonald*’ (2015) 131 LQR 34). In this particular case, the court was not asked to construct for Ms McDonald an independent cause of action based on her article 8 rights. They were asked to interpret a statutory provision to be in line with those rights. Thus, given that an action for possession under section 21(4) engages article 8 rights by depriving an individual of their home, as both the Strasbourg Court and the Supreme Court here acknowledge, in order to comply with the Convention the court must examine the proportionality of that deprivation. It is not the jurisprudence of the ECtHR which requires this, it is section 3 of the HRA 1998. If that is not possible because of the wording of the statutory provisions, the Court must make a declaration of incompatibility but must apply the statute anyway.

This is a requirement of section 4 of the HRA. The jurisprudence of the ECtHR is, in this sense, a secondary consideration. First and foremost, this situation is determined by the provisions of the HRA.

If, as is clear from the wording of section 21(4), the provision *cannot* be interpreted so as to allow a proportionality assessment, the next issue is whether the Court must construct a caveat to the mandatory possession order for which section 21(4) provides. This would indeed be outside the proper role of the court. The HRA explicitly does not allow a court to dis-apply statute following a finding that it breaches an individual's human rights. The Convention does not have direct common law horizontal effect in breach of existing statute and so the Court would contravene the HRA if it were to create such a caveat which contradicted the mandatory wording of the HA 1988.

There is one aspect of the judgment however which may provide impetus for open consideration of this structural issue. The Court recognises that if article 8 does have horizontal effect, of whatever type, then the landlord's article 1 protocol 1 rights will also become relevant (at [39]). This, in turn, will require a balancing of the two rights. The Court recognises the difficulty of doing this in practical terms (at [41]). However, there is a more significant problem with carrying out such a balancing exercise. The ECHR and HRA do not envisage horizontal effect in their wording. All human rights rank equal. There is therefore no mechanism for balancing such rights within the ECHR itself, and one will need to be constructed. Secondly, and more importantly, article 1 protocol 1 rights are problematic because of the so-called 'inherent limitation' argument (see A Goymour, 'Property and Housing' in D Hoffman, *The Impact of the UK Human Rights Act on Private Law* (Cambridge: CUP, 2011) 276): since the landlord's rights were always subject to the human rights of the tenant, and all article 1 protocol 1 protects is pre-existing legal rights (as opposed to a factual state of affairs as does article 8), in fact there is no breach of article 1 protocol 1 by giving effect to a tenant's article 8 right. Whether or not this argument holds true (in this author's opinion, it must, as there is no principled way of either creating a 'perfect' reversionary right which exists in a vacuum absent a tenant, or of arbitrarily excluding some considerations, such as human rights, from the scope of that reversionary right for the purposes of article 1 protocol 1), it raises questions of what function article 1 protocol 1 can in fact play. The failure of the Supreme Court to consider this issue in *Sims v Dacorum* [2014] UKSC 63; [2015] A.C. 1336 and here, means that we still await judicial discussion of the mechanisms of horizontal effect, the impact on this on private property rights, and the scope of article 1, protocol 1.

It is unfortunate that the Supreme Court does not discuss this issue. Ultimately, the right result was reached; section 21(4) does not allow for a proportionality assessment. It is mandatory in its wording. It is therefore incompatible with article 8, and the Court ought to have made a declaration to that effect. This declaration would not have availed Ms McDonald however, since the Court is not permitted by the HRA to construct a common law defence for her in the face of the non-compliant statutory provisions. However, as with the Court of Appeal, the judgment provides no resolution, leaving the role of human rights in private law as uncertain as before. By failing to consider the different types of horizontal effect, and by instead focusing on the identity of the parties to the action, the Supreme Court fails to resolve the important structural issues to which this case gives rise.

