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Horizontality of Art 8 in the context of possession proceedings

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Abstract

The question of whether HRA 1998 Art 8 can be invoked by defendants in possession proceedings brought by private landlords for the purpose of requiring a trial court to assess if it would be proportionate to grant a possession order was left open by the Supreme Court in *Manchester City Council v Pinnock* ([2011] UKSC 6; [2011] 2 AC 104). Given the size of the private rented sector, this was a question with potentially significant practical consequences. In *McDonald v McDonald* ([2014] EWCA Civ 1049) the Court of Appeal has held that Art 8 does not have horizontal effect in this context. This paper analyses the judgment and suggests both that the decision is not very convincingly reasoned in the narrow sense and, more broadly, takes a problematic approach to the use of ECtHR authority in determining the meaning of provisions in schedule 1 of the HRA 1998.

Introduction

Fiona McDonald is a middle-aged lady with quite severe mental health problems. Her problems were severe enough that she lacks capacity to conduct legal proceedings, although not so severe that she could not live alone. Her parents had sought to provide some stability for her housing situation by purchasing a house which they then let to Fiona on an assured shorthold tenancy per the [Housing Act 1988](#). Mr and Mrs McDonald had evidently borrowed the funds on a buy to let mortgage, which allowed them to lease the property on an assured shorthold tenancy basis not revealed this plan to the mortgage lender—Capital Homes Ltd—from which they borrowed the funds to buy the property. Mr and Mrs McDonald's financial circumstances subsequently led them to default on the mortgage payments. Capital Homes thereafter appointed receivers, who were empowered under the terms of the mortgage to bring possession proceedings in the parents' names.

One might well think, notwithstanding the formal title of the proceedings, that Capital Homes Limited was in substantive terms the claimant. Capital Homes seems to have built up its mortgage book by taking on large numbers of buy-to-let loans in the early part of the 2000s, and was apparently a frontrunner in the market for self-certified loans to self-employed lenders. It had evidently not made any new loans between 2008 and 2013, and has only recently re-entered the market.¹

Rather than seek possession on the basis of rent arrears, the receivers issued a Housing Act 1988 s.21 notice. The s.21 notice - so long as the landlord satisfies the relevant procedural requirements as to the length of notice given and its service - nominally requires a court to grant an outright possession order. While many of the grounds of possession² which can be

¹ www.mortgagesolutions.co.uk/mortgage-solutions/news/2298853/capital-home-loans-to-restart-buy-to-let-lending; <http://www.chlmortgages.co.uk/>

² Rent arrears and anti-social behaviour being the obvious examples.

invoked against assured shorthold tenants require that a court be satisfied that it would be reasonable (in all the circumstances) to make an order,³ there is no reasonableness requirement in respect of a s.21 claim.⁴

S.21 proceedings brought by 'housing associations'.

Prior to *McDonald*, it might have been thought uncontentious that if the landlord is either a core public authority⁵ or is performing a public function per HRA 1998 s.6 in issuing the s.21 notice then defendants may invoke either public law grounds or Art 8 per se as a defence.⁶ The question raised in *McDonald* was whether the second of those protections could be invoked by Ms McDonald against the receivers qua landlord, who were clearly a private sector entity. The Supreme Court acknowledged the significance of this point in *Manchester CC v Pinnock*⁷ but offered no clear indication as to its view. Given the structure of our rented housing market, the omission is unfortunate.

The latest estimates of the housing stock (in England) produced by the Department for Communities and Local Government (2014) *Dwelling stock estimates 2103: England* offer the following breakdown: 23.2 million dwellings; of which 14.7 million (63%) were owner-occupied; 1.7 million (7.3 %) were let by local authorities; 2.33 million (10%) were let by social rented sector landlords; and 4.2 million (18%) were let by private landlords.⁸ Bluntly put, the private rented sector is larger than the local authority and social rented sectors combined. And since most tenancies in that sector will be assured shortholds, from a purely quantitative perspective the question of whether s.21 claims brought by private landlords are caught by s.6 is potentially an important one; albeit that its importance is contingent on just how expansive and rigorous a meaning is lent to the restrictions that Art 8 might impose upon the presumptively uncontrolled s.21 route to possession.

³ The court exercises a similarly expansive jurisdiction under the Administration of Justice Act 1970 s.36 in mortgage default cases.

⁴ The crucial distinction between an assured tenancy and an assured shorthold tenancy is that the former does not provide the landlord with the s.21 route to possession. Since 1997, new assured tenancies have presumptively been shortholds. An assured tenancy must be expressly granted.

⁵ Local authorities and the Crown cannot grant assured tenancies; see Housing Act 1988 schedule 1. The Crown Estates Commissioners can do so.

⁶ See respectively *Birmingham CC v Doherty* [2008] UKHL 57; [2009] 1 A.C. 367 : *Manchester CC v Pinnock* [2011] UKSC 6; [2011] 2 A.C. 104.

⁷ "50 We emphasise that this conclusion relates to possession proceedings brought by local authorities. As we pointed out, at para 4 above, nothing which we say is intended to bear on cases where the person seeking the order for possession is a private landowner. Conflicting views have been expressed both domestically and in Strasbourg on that situation...[I]t is preferable for this court to express no view on the issue until it arises and has to be determined".; per Lord Neuberger (for a unanimous court).

⁸ Department for Communities and Local Government (2014) *Dwelling stock estimates 2103: England*; available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/285001/Dwelling_Stock_Estimates_2013_England.pdf

The courts have lent a broad enough meaning to the notion of ‘public function’ in the possession proceeding context to bring most social rented housing providers within its remit.⁹ The leading authority on the point, *R (Weaver) v London and Quadrant Housing Trust*¹⁰ suggests several factors relevant to establishing if a landlord falls within s.6: whether it is a charity rather than a commercial business; the amount of public funding it has received; the closeness of its relationship with local authorities, especially in terms of accepting local authority nominees as its tenants; and its compliance with relevant regulatory standards are all germane matters. The Court of Appeal’s judgment indicated that there would be few providers of social housing which fell outside s.6 when possession proceedings were in issue:

84.... In my judgment the trust is a hybrid public authority and the act of terminating a tenancy is not a private act. It does not follow, however, that every RSL providing social housing will necessarily be in the same position as the trust. The determination of the public status of a body is fact-sensitive. For example, a potentially important difference is that apparently some RSLs have not received any public subsidy at all, and arguably—and I put it no higher than that—their position could be different.¹¹

A public law defence might prove very effective if, for example, the landlord has failed to take account of relevant considerations when issuing the notice.¹² In contrast, the weight of case law thus far on the question of whether or not it would be disproportionate in a substantive sense for a court to make an order indicates that the threshold the defendant has to surmount is a high one.¹³

It does not seem that Ms McDonald was inviting the court to hold that an indirect effect of Art 8 was to bring notionally private sector claimants within the scope of judicial review by

⁹ The generic term in common parlance is perhaps ‘Housing Associations’. More precisely, the recent terminology was ‘Registered Social Landlord’. The label currently used is Registered Provider. The ‘registration’ alluded to was initially with the Housing Corporation, then with the short-lived Tenant Services Authority, and now with the Homes and Communities Agency. On the HCA’s current role in this regard see: <https://www.homesandcommunities.co.uk/ourwork/regulation>.

¹⁰ [2009] EWCA Civ 587; [2010] 1 W.L.R. 363.

¹¹ Per Elias LJ.

¹² See especially *Leicester City Council v Shearer* [2013] EWCA Civ 1467; [2014] HLR 8 and the discussion of the point in I. Loveland “Public law and art 8 defences in residential possession proceedings” (2014) *Conveyancer and Property Lawyer* 245.

¹³ See for example *Corby Borough Council v Scott*; *West Kent Housing Association Ltd v Haycraft* [2012] EWCA Civ 276; [2012] HLR 23; *Holmes v Westminster City Council* [2011] EWHC 2857 (QB); *Birmingham City Council v Lloyd*; [2012] EWCA Civ 969; [2012] HLR 44; *Thurrock BC v West* [2012] EWCA Civ 1435; 2013 HLR 5.

As of late 2014, the only case in which the Court of Appeal has upheld a trial judge’s conclusion that it would be disproportionate to make a possession order is *Southend-on-Sea DC v Armour* [2014] EWCA Civ 231; [2014] HLR 23. Mr Armour had an introductory tenancy – which bestows very limited security of tenure on the tenant. The Court of Appeal upheld the trial – while it was proportionate for the council to have begun proceedings because of the tenant’s anti-social behaviour, the tenant’s subsequent good behaviour in the year that passed between issue of proceedings and trial meant that it would be disproportionate for an order to be granted.

There is unhappily no way of knowing on how many occasions a Circuit Judge or District Judge in a county court has reached such a conclusion which has not been appealed. Nor can we discover how often the pleading of such points in a defence prompts claimant landlords to settle a case on terms acceptable to the defendant. Most housing law is invisible to everyone other than the immediate participants.

collapsing the common law assumption that one must draw a line between ‘public’ and ‘private’ bodies for the purposes of amenability to public law principles; ie she was not advancing a public law defence. The assertion seems to have been the much narrower (and much less useful) one that Art 8 directly created a statutory right in her favour to have a trial court assess if it would on the facts of the case be proportionate to grant a s.21 order. The obvious route to achieving this would be to assume that s.21 should be read (per HRA 1998 s.3) as containing an implied term to the effect that a court should not grant possession unless satisfied it was proportionate to do so.¹⁴

The remedial effect of a proportionality defence is potentially very broad. Lord Neuberger’s opinion in *Pinnock* canvassed the following possibilities:

“62 Fourthly, if domestic law justifies an outright order for possession, the effect of article 8 may, albeit in exceptional cases, justify (in ascending order of effect) granting an extended period for possession, suspending the order for possession on the happening of an event, or even refusing an order altogether.”

Manifestly it does not follow that the availability of an Art 8 defence against private sector claimants which was limited to the court assessing if it would be proportionate to make an order in the light of the defendant’s personal circumstances offers defendants a strong prospect of success. The nature of the defence is that it requires the trial court to conduct a balancing exercise of the basis of relevant factual matters. Both the ECtHR and the Supreme Court have repeatedly indicated that such a defence will succeed only in exceptional circumstances. In other words, the factors weighing in the defendant’s favour pointing against the making of an order would have to be very strong, and those weighing in the claimant favour towards the making of an order would have to be very weak. The claimant would certainly have rights deriving from Art 1 of the First Protocol, and in many circumstances might also be able to invoke Art 8 home or family life rights as well. There is no realistic prospect that a proportionality defence would ever succeed against a claimant who wished to occupy the premises himself, or make them available to a family member, or who would suffer a significant financial loss if the defendant were to remain in occupation.

But to avail herself of any of these potentially very slender benefits, Ms McDonald had first to carry the argument that Art 8 did indeed extend to s.21 possession proceedings brought by private landlords. The contention was rejected at trial, notwithstanding that one might have thought that there were several points of argument supportive of the notion that Art 8 had horizontal effect in possession proceedings.

¹⁴ While that proposition would seem outlandish absent the existence of s.3, it is accepted as an orthodox way to use that provision. See especially – in the context of notionally mandatory grounds of possession in the public sector – the comment of Lord Phillips in *Hounslow LBC v Powell* [2011] UKSC 8; [2011] 2 AC 186; a post-*Pinnock* judgment

“98..... As to the syntactical argument, the precise formulation of the proviso required by article 8 is of no significance. Compatibility can be achieved in the case of either subsection by implying the phrase “provided that article 8” is not infringed. [S]ection 3 of the 1998 Act applies to all legislation, whether enacted before or after the 1998 Act came into force. In so far as this alters the construction given to legislation before the 1998 Act came into force, the 1998 Act has the effect of amending legislation: see *Ghaidan v Godin- Mendoza* [2004] 2 AC 557”.

Art 8 HRA is horizontally effective – in some contexts

It is now uncontentionous that Art 8 has a horizontal impact when its protection of privacy rights is in issue. The point was squarely put (as long ago as 2004)¹⁵ by Lord Nicholls in *Campbell v MGN*¹⁶ in the context of Art 8 privacy rights:

“17 The time has come to recognise that the values enshrined in articles 8 and 10 are now part of the cause of action for breach of confidence. As Lord Woolf CJ has said, the courts have been able to achieve this result by absorbing the rights protected by articles 8 and 10 into this cause of action: *A v B plc* [2003] QB 195, 202, para 4. Further, it should now be recognised that for this purpose these values are of general application. The values embodied in articles 8 and 10 are as much applicable in disputes between individuals or between an individual and a non-governmental body such as a newspaper as they are in disputes between individuals and a public authority.

18..... It is sufficient to recognise that the values underlying articles 8 and 10 are not confined to disputes between individuals and public authorities. This approach has been adopted by the courts in several recent decisions, reported and unreported, where individuals have complained of press intrusion. A convenient summary of these cases is to be found in Gavin Phillipson's valuable article "Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act" (2003) 66 MLR 726, 726-728.

The same point as to the ‘horizontal’ effect of the HRA on the common law was made three years later by Lord Phillips CJ in *HRH Prince of Wales v Associated Newspapers Ltd*¹⁷ per Lord Phillips CJ (emphasis added):

“25 The English court has recognised that it should also, in so far as possible, develop the common law in such a way as to give effect to Convention rights. In this way horizontal effect is given to the Convention. This would seem to accord with the view of the European Court of Human Rights as to the duty of the court as a public authority: see *Von Hannover v Germany* (2004) 40 EHRR 1, paras 74 and 78.

The *Campbell/Prince of Wales* analysis is not on all fours with what Ms McDonald was seeking. She did not seem to be suggesting that the HRA had triggered a development in the common law such that ‘private’ landlords could now be subjected to public law principles; one might perhaps think there is little prospect of that argument succeeding as it would effectively destroy any public/private divide in administrative law principle. Her argument seemed rather to be for a re-reading of s.21 to imply proportionality review in all s.21 cases, irrespective of the identity of the landlord. This might be thought a modest suggestion, as it would seem intuitively rather odd if Art 8 had a horizontalising effect on the content of common law torts (as in *Campbell*) but not on statutory provisions (as in s.21 proceedings). The obvious rebuttal to that suggestion would be that *Campbell* is an Art 8 privacy case, while *McDonald* is a respect for the home case, and the two concepts which were jammed together in Art 8 ECHR are simply too different in a qualitative sense for such analytical borrowing to be appropriate.

¹⁵ And 11 years is a long time ago in HRA jurisprudence; a point returned to below.

¹⁶ [2002] UKHL 22; [2004] 2 A.C. 457.

¹⁷ [2007] EWHC 522 (Ch); [2008] Ch. 57.

The ECtHR's Art 8 'housing law' jurisprudence is strongly informed by principles articulated in non-housing law cases

Any such rebuttal raises of course nice questions about normative hierarchies within the supposedly comprehensively 'fundamental' provisions of the ECHR (and by extension the HRA), an issue which goes far beyond the remit of this paper. More prosaically however, we might point to the following passage from *Kay v United Kingdom*,¹⁸ one of the ECtHR's most recent judgments relating to English housing law, in which it cited its own earlier decision in *Connors v United Kingdom*¹⁹ to reject the United Kingdom government's assertion that suggestion that States should enjoy a wide margin of appreciation in respect of laws concerning possession proceedings. The passage in *Connors* made this point by drawing on *Pretty v The United Kingdom*²⁰ (an assisted suicide case); *Goodwin v The United Kingdom*²¹ (concerning the legal recognition of post-gender reassignment identity) and *Hatton v The United Kingdom*²² (the Heathrow night flights case):

"Article 8...concerns rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community (see, *mutatis mutandis*, [Gillow v. the United Kingdom](#), cited above, § 55; [Pretty v. the United Kingdom, no. 2346/02](#), ECHR2002-III; Christine [Goodwin v. the United Kingdom, no. 28957/95](#), § 90, ECHR 2002-VI). Where general social and economic policy considerations have arisen in the context of Article 8 itself, the scope of the margin of appreciation depends on the context of the case, with particular significance *1082 attaching to the extent of the intrusion into the personal sphere of the applicant ([Hatton and others v. the United Kingdom, \[GC\] no. 36022/97](#) ECHR 2003-..., §§ 103 and 123)."

This collapsing of cases concerned with different aspects of Art 8 ECHR into a common principle rather suggests that there is no good basis for recognising horizontal effect in privacy cases but not in possession proceedings.

The passage is also notable for the ECtHR's (albeit very brief) reference to the moral reasons underlying the Convention's recognition of 'respect' for the home: for many people, their home is indeed 'of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community'. The ECtHR is suggesting here that Art 8 is not simply paying respect to bricks and mortar, or to money, but rather recognises as well the potential psychological and sociological significance of the home.²³ It is not immediately apparent that

¹⁸ (2012) 54 EHRR 30; [2011] HLR 2.

¹⁹ *Connors v United Kingdom* (2005) 40 EHRR 9; [2004] HLR 52.

²⁰ (2002) 35 EHRR 1.

²¹ (2002) 35 EHRR 18.

²² (2003) 37 EHRR 28.

²³ Obviously there will be a great many circumstances where a person's quality of attachment to her his/home will be so limited that none of the factors identified by the ECtHR in *Kay* will weigh heavily in the balance, notwithstanding that the person concerned will satisfy the threshold requirement of having 'sufficient and continuous links' that is required to bring Art 8 into play at all; see *Gillow v United Kingdom* [1991] 13 EHRR 593.

these factors should become any less weighty because the defendant's landlord or mortgagee happens to be a private sector company rather than a housing association.

The ECtHR has also consistently recognised that being evicted from one's home constitutes the 'most extreme form of interference with the right to respect for the home'.²⁴ From the evictee's perspective, that interference does not become any less extreme dependant on the identity of the claimant.

The ECtHR has not held that proportionality review applies only in cases brought by 'public' sector claimants and has applied Art 8 ECHR horizontally in several housing law cases

The 'most extreme form of interference' comment in *McCann v United Kingdom*,²⁵ a case involving a public sector landlord, continued in the following way:

50 The loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Art.8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end.

The quotation is now a staple ingredient of the Court's Art 8 housing jurisprudence. *Prima facie*, the defendant's 'in principle' entitlement to proportionality review is not qualified by any reference to the identity of the claimant. Nor is there any express basis in any the judgments involving 'public sector' claimants for assuming that the principle is limited to cases brought by such bodies. It is the impact of the loss of the home on the defendant with which the ECtHR is concerned. It is quite correct that the ECtHR has yet *expressly* to decide – in the face of competing submissions on the point – that Art 8 ECHR would be breached by domestic law which did not permit a trial court to exercise proportionality review in possession actions brought by private sector claimants. The Court (in section) has however heard several cases in which both parties in the domestic litigation concerned have clearly been 'private' entities, and in which no issue has apparently been taken by the relevant State nor raised by the court itself that trial courts need not have a proportionality jurisdiction in such circumstances. In all of those cases, the Court has reiterated the 'in principle' comment made in *McCann*.

The first of these, *Zehentner v Austria* ²⁶ might be explained as articulating a narrow principle, as the applicant concerned lacked mental competence at the time her home was lost. The ratio of the case might therefore be limited to the suggestion that a state owes a positive obligation to assist a defendant tenant in such circumstances to retain her home in the face of possession proceedings brought by another individual.

The second case, *Belchikova v Russia*,²⁷ had no such distinguishing feature. The claim was dismissed, but on the basis that Russian law made adequate provision for proportionality analysis to be applied at trial and that the trial court had properly applied the domestic law.

²⁴ *Kay v United Kingdom* (2012) 54 EHRR 30; [2011] HLR 2 at para 68; citing *McCann v United Kingdom* (2008) 47 EHRR 40 at para 50.

²⁵ (2008) 47 EHRR 40 at para 50.

²⁶ (2011) 52 EHRR 22.

²⁷ App. No.2408/06; 25th March 2010.

The claim before the ECtHR was essentially an attempt to appeal against the trial court's findings of fact, and could be successful only if those findings were 'manifestly without reasonable foundation'.

More latterly, in late 2013, the court applied the same approach in *Zrilic v Croatia*²⁸. The domestic litigation in *Zrilic* was between estranged spouses, who were in dispute over the disposition of their former marital home. Again, no issue was taken that the 'private' nature of the proceedings precluded the applicability of Art 8. And again, as in *Belchikova*, the claim failed on the merits because the domestic court had properly applied domestic law which made sufficient provision for a proportionality based judgment to be made.

The Court decision in *Zrilic* was followed a few weeks later by the judgment in *Brežec v Croatia*,²⁹ in which the claimant was a private sector property company. Perhaps significantly, since the claimant company was created by the privatisation of formerly government owned housing stock, the Court made no attempt to root the applicability of Art 8 in a suggestion that the claimant was de facto if not de jure a governmental entity. The assumption seems simply to have been that Art 8 was applicable in any event. The Court upheld the claim on a basis which would seem clearly applicable to s.21 proceedings brought in this country:

49 However, when it comes to the decisions of the domestic authorities in the present case, their findings were restricted to the conclusion that under applicable national laws the applicant had no legal entitlement to occupy the flat. The national courts thus confined themselves to finding that occupation by the applicant was without legal basis, but made no further analysis as to the proportionality of the measure to be applied against the applicant, namely her eviction from the flat she had occupied between 1970 and 2010.

50 By failing to examine the above arguments, the national courts did not afford the applicant adequate procedural safeguards. The decision-making process leading to the measure of interference was in such circumstances not fair and did not afford due respect to the interests safeguarded to the applicant by art.8...

The claimant in the domestic litigation which led to *Buckland v United Kingdom*³⁰ was a body styled the Gypsy Council, which is perhaps best characterised as a pressure group representing and defending the interests of members of the traveller community.³¹ In 2000, the Council entered into an agreement with a Welsh local authority to manage a site for travellers provided under the Caravan Sites Act 1968. The Gypsy Council subsequently sought to evict Ms Buckland from the site for breach of her licence conditions. As domestic law stood when the application to Strasbourg was made, a trial court had power to suspend a possession order for up to a year (and to do so repeatedly) if it felt it reasonable to do so. There was however no reasonableness jurisdiction in respect of the anterior question of whether an order should be granted. The scheme of the Act was that a court was required to grant a possession order if a breach of the licence conditions was made out.³² In finding a breach of Art 8 ECHR in these circumstances, the Court confirmed that there must be more to a proportionality defence than merely an opportunity for a court to forestall a person's

²⁸ App. No 46726/11; <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-126551#%7B%22itemid%22:%5B%22001-126551%22%5D%7D>; (3rd October 2103).

²⁹ (18 October 2013); [2014] HLR 3.

³⁰ (2013) 56 EHRR 16; [2013] HLR 2.

³¹ <http://www.gypsy-association.co.uk/gypsycouncil.html>

³² Subsequent amendments to the scheme extended the reasonableness jurisdiction to this issue in respect of sites in England, but not in Wales.

eviction from her home once a possession order has been made. The defence must also extend to the question of the nature of a person's legal status in her home, which would of course become very precarious if a possession order had been made.³³ For present purposes however the significance of the judgment is that yet again no line was drawn between private and public sector claimants for Art 8 purposes.

There is some persuasive English authority that Art 8 bites on private sector possession claims

Prior to *McDonald* being decided, the most expansive appellate level consideration of whether Art 8 had horizontal effect in possession proceedings was Sir Alan Ward's judgment in *Malik v Fassenfelt*.³⁴ *Malik* was perhaps not the most propitious vehicle with which to explore the public/private boundaries of Art 8. The defendants were all trespassers on Mr Malik's land, having entered the land without his permission initially as part of a protest (the so-called *Grow Heathrow* campaign)³⁵ against planned expansion of Heathrow Airport. The defendants had successfully argued at trial that Art 8 was horizontally applicable in principle, but lost the case on the basis that making a possession order was proportionate in the circumstances. The defendants received permission to challenge that conclusion. While the claimant also received permission to appeal against the conclusion as to horizontality he chose not to do so, evidently for fear of the costs implications. The broader question was therefore not directly in issue when the case came before the Court of Appeal, and Sir Alan Ward was the only member of the court who engaged with it.

The core of Sir Alan Ward's judgment was the presumption that the steady line of cases in which the ECtHR had expounded its view that Art 8 ECHR imposed a the need for proportionality review in possession proceedings - and the reactive line of cases in which the House of Lords/Supreme Court had slowly accepted that Art 8 HRA imposed the same requirement - were concerned essentially with the jurisdiction of the trial court as a governmental body. In the HRA context, it was the court's character as a public authority which was the key issue. There was no basis to assume that character altered depending on the identity of the claimant.³⁶

³³ See A Nield, "(Strasbourg triggers another article 8 dialogue" [2013] 77 *Conveyancer and Property Lawyer* 148;

³⁴ [2013] EWCA Civ 798; [2013] 28 E.G. 84 (C.S.) For a detailed discussion see K. Lees, "Malik v Fassenfelt: known unknowns" [2013] 77 *Conveyancer and Property Lawyer* 516. See also, more generally, J. Luba, "Is there a 'human rights defence' to a possession claim brought by a private landlord?" (2011) 15(3) *Landlord and Tenant Review* 79.

³⁵ For the campaign's own account of its rationale and activities see <http://www.transitionheathrow.com/grow-heathrow/>

³⁶ Academic comment on the opinion was generally approving; see Lees op cit fn. 34 above and Luba op cit fn 34 above. For a less positive comment see C. Delaney, "The squatter's new delaying tactic" (2013) *Estates Gazette* 48.

The judgment in *McDonald*

The only substantial and reasoned judgment offered in *McDonald* was delivered by Arden LJ. Her judgment was described by her colleague, Tomlinson LJ, as ‘penetrating’.³⁷ The label was presumably meant as a compliment, but it does not require an especially rigorous analysis to suggest that there are several very curious ingredients indeed in Arden LJ’s opinion.

Poplar v Donoghue is a binding judgment as to the compatibility of s.21 with Art 8

The first is the assertion that the court is bound by its earlier decision in *Poplar Housing v Donoghue*³⁸ to the effect that s.21 is consistent with Art 8. This is an odd conclusion when one recalls that *Poplar* is a decision which pre-dates the House of Lords judgment in *Qazi*³⁹ by two years. The majority in *Qazi* held of course that Art 8 made no difference at all to our ‘domestic’ housing law. If that law (be it a statutory provision or – as in *Qazi* – a rule of common law) did not afford a court any discretion at all to refuse to grant a possession order then no such discretion was created by Art 8. We now know that view to be profoundly mistaken. The Court of Appeal in *Poplar* held s.21 to be consistent with Art 8 because it concluded Art 8 did not require any proportionality review to be implied into s.21 even where – as in *Poplar* – the landlord was a public authority. On that point, *Poplar* is manifestly inconsistent with *Pinnock*, which undoubtedly tells us that proportionality review at trial is required when a landlord is caught within HRA s.6.⁴⁰ Insofar as *Poplar* held to the contrary, it is no longer good law.

Were there any doubt as to that proposition, it would presumably be dispelled by taking a quick look at the Court of Appeal’s 2012 judgment in *West Kent Housing Association v Haycraft*.⁴¹ In *Haycraft*, the Court of Appeal applied proportionality analysis to s.21 proceedings; the assumption that *Poplar* remained a binding authority to the contrary was not even canvassed, presumably because it would have been considered quite absurd in the light of *Pinnock*. Given that the Court’s sole judgment in *Haycraft* was written by Lord Neuberger some two years after he wrote the sole opinion for the Supreme Court in *Pinnock*, one might assume he was well informed as to the Supreme Court’s view as to the relationship between proportionality review and s.21 proceedings brought by public authority landlords. It is rather surprising that neither the court nor counsel in *McDonald* seemed alert to *Haycraft*.⁴² The omission will presumably be remedied in the Supreme Court.

³⁷ At para 67.

³⁸ [2001] EWCA Civ 595; [2002] QB 48.

³⁹ *LB Harrow v Qazi* [2003] UKHL 43; [2004] 1 AC 983. On *Qazi* see I. Loveland, “A tale of two trespassers: reconsidering the impact of the Human Rights Act on rights of residence in rented housing: Part 1” (2009) EHRLR 148.

⁴⁰ Nor is it possible to conclude that *Poplar* is authority for the lesser proposition that s.21 is consistent with Art 8 when a private landlord is the claimant. That distinction simply was not made in the judgment.

⁴¹ [2012] EWCA Civ 276; [2012] HLR 23.

⁴² This may be because *Haycraft* is joined with *Corby DC v Scott*, a case involving local authority housing. Local authorities cannot grant assured tenancies and so anyone who did for example a westlaw search (using

There is no clear and consistent line of ECtHR authority that Art 8 ECHR requires proportionality review to be applied to private sector claimants in possession cases

The Supreme Court has latterly accepted - most pertinently for present purposes in *Pinnock* - that the effect of HRA 1998 s.2 is to create a very strong presumption that domestic courts should accept that the meaning of articles in the HRA should be conterminous with their textual equivalents in the Convention if there is 'clear and consistent' line of ECtHR authority on the point and there is no basis to assume that - in cases involving the United Kingdom - the ECtHR misunderstands an essential element of domestic law.⁴³ One might have thought, given the cases discussed above, that such clarity and consistency was now evident as to the universal applicability of the proportionality principle in possession proceedings. Arden LJ was not however, for several reasons, impressed by that suggestion.

Her first reason was that the proposition that proportionality review was required in cases such as *Zehentner* and *Zrilic* and *Brezec* and *Buckland* involving private sector claimants had been assumed by the ECtHR and the respective parties rather than argued and decided:

33 In none of these cases was there any decision that the proportionality test applied to a case involving a private landlord or co-owner. It was simply assumed to be the case that the proportionality test applied as if the landlord (or co-owner) was in the public sector. In my judgment, that is not enough to make it a clear and constant line of decisions if there are other indications that there is a countervailing principle.

Arden LJ does not explain why one should not alternatively assume that the lack of argument is a strong indicator that the proportionality principle is simply applicable in all circumstances.

The Court of Appeal also suggests that a principle of the ECtHR will not be clear and consistent if there is no grand chamber judgment on the point. Arden LJ devotes one paragraph (para 41) to this question. She offers no authority - whether drawn from the Convention itself, or from a judgment of the ECtHR or a domestic court to support the assertion. It is not an obviously compelling suggestion. Presumably if we accept this then we should also accept - by analogy - there can be no clear and consistent line of authority on any point of domestic law unless there are House of Lords/Supreme Court judgments on the issue.

Among the 'other indications' to which Arden LJ referred is an admissibility decision of the Commission from 1985 in a possession case involving Art 1 of the First Protocol, *Di Palma v United Kingdom*.⁴⁴ That the case is not an Art 8 judgment might be thought to render *Di Palma* of little relevance in the present context. That it is nearly thirty years old might be thought to decrease its relevance still further. And that Ms Di Palma's complaint to the

assured shorthold and proportionality as search terms would find only *Corby* in the case name might - if she/he did not read the case - assume any reference to s.21 was only of peripheral significance. The case has however received coverage in both professional and academic journals: see inter alia K. Lees, "Article 8 defences - separating the wheat from the chaff: *Corby BC v Scott*; *West Kent Housing Association Ltd v Haycraft*" (2012) *Landlord and Tenant Review* 148; I. Loveland, "Proportionality review in possession proceedings" (2012) *Conveyancer and Property Lawyer* 512.

⁴³ The general applicability of the point has been forcefully restated in the latest prisoners votes case; *R (Chester) v Secretary of State for Justice* [2013] UKSC; [2014] AC 271. See especially the judgment of Lord Sumption at paras 121-123.

⁴⁴ (1986) 10 E.H.R.R. 149.

ECtHR had arisen largely because of a failure on her part to invoke the existing domestic remedy of relief from forfeiture (a remedy which more than satisfies any proportionality test) one might have thought it had absolutely no relevance at all to a s.21 notice case. Apparently not however.

Another ‘other indication’ is that within the half dozen or so cases where the ECtHR has applied Art 8 in ‘horizontal’ scenarios, there is a solitary dissenting judgment that such application is inappropriate. This is the two paragraph judgment of Judge De Gaetano in *Buckland*. Arden LJ cited this opinion at some length, and includes the following passage, in which Judge De Gaetano seems to suggest that majority of the Court is not rooting the ‘principles’ it espouses in a sufficiently rigorous approach to identifying the relevant facts in the cases before it:⁴⁵

As the late Professor A. L. Goodhart said, ‘The principle of a case is not to be found in the reasons given in the opinion’; it should, instead, be found by taking account of the facts treated by the judge as material, and his decision based on those facts. It is precisely to prevent what we have said in the second sentence of para 65 from being extrapolated to a different context that I would have preferred that the principle should have been qualified or otherwise restated.”

Judge Gaetano roots the quotation for Professor Goodhart in a 1931 collection of essays,⁴⁶ although it initially appeared in a 1930 article - ‘Determining the ratio decidendi of a case - published in the *Yale Law Journal*.⁴⁷ Its age and subject matter might suggest that Professor Goodhart’s comment is of very limited utility in this context. The article is about the methodology of the common law, and predominantly the methodology of the English common law. Professor Goodhart notes at one point that the arguments he puts forwards might seem odd: ‘to those who do not understand the theory of the common law’ (at 169). It may or may not be the case that – as a collectivity – the judges of the ECtHR do not understand the theory of the common law. Judge de Gaetano, a former Chief Justice of Malta, would obviously be familiar with it.⁴⁸ But given that the Court’s responsibility is to ascertain the meaning of an international law treaty concerned with – in general terms – the legal articulation of principles of fundamental constitutional morality, and since almost all of the signatory states to the Treaty do not have common law systems, any such failing would be of rather limited relevance.⁴⁹

Judge De Gaetano’s recourse to Goodhart’s article might be thought misconceived. He asks us to reject the jurisprudential tradition of ECtHR and substitute instead a mode of analysing ECtHR cases that was popular in early twentieth century English common law reasoning. More prosaically however, one might just observe that if an opinion is a dissent, then the

⁴⁵ The relevant passage in *McDonald* is at para 39, excerpting from Judge De Gaetano’s judgment in *Buckland* at paras O1 and O2.

⁴⁶ Essays in jurisprudence and the common law (1931) p25.

⁴⁷ “Determining the ratio decidendi of a Case” (1930) 40 *Yale LJ* 161.

⁴⁸ www.judiciarymalta.gov.mt/file.aspx?f=650

⁴⁹ More narrowly, one might observe that the clause which Judge de Gaetano cites is but one of five interlinked propositions with which Professor Goodhart began the conclusion to his article (at p182). The isolated quotation offered is – in isolation – meaningless even in the context of (pre-1930) common law theory.

proposition which it rejects is an authority. And if that proposition has been restated on many occasions it is a clear authority. And if those occasions have arisen on a regular basis over a span of a decade or more then it is consistent authority. Again, however, that would be a mistaken assumption according to Arden LJ's understanding of the law

The better approach is that only relevant factual question in the possession cases which Arden LJ surveys in her judgment is whether or not the domestic law of the state concerned made provision for proportionality review before the respective defendants were either evicted from their home and/or (per *Buckland*) their legal rights in their homes were ended. If there is such provision, domestic law is consistent with Art 8 ECHR. If there is no such provision, domestic law breaches Art 8 ECHR.

Conclusion

McDonald was handed down on 24th July 2014. The parties and the Court of Appeal were presumably unaware that on 10th July 2014 the ECtHR handed down judgment in *Lemo v Croatia*.⁵⁰ The applicant challenged the failure of Croatian law to make provision for her to raise a proportionality defence against possession proceedings brought by her private sector landlord. The ECtHR found in her favour by yet another simple application of the principle articulated in *McCann*. To the ECtHR at least it seems the principle is indeed clear and consistent, and applicable irrespective of the identity of the claimant.⁵¹ Ms McDonald will presumably be seeking permission to appeal to the Supreme Court. Should that be refused, or should any such appeal fail, she would seem to have a clear and consistent path before her to pursue a successful action before the ECtHR.

If that is how events turn out, a further oddity arises. The Court of Appeal decided in any event to consider if it would indeed have been disproportionate for a possession order to have been made, and reached the conclusion that on weighing the relevant factors the making of an order was entirely defensible. If that were indeed the basis on which *McDonald* was decided, there would be no realistic prospect of Ms McDonald succeeding in an action before the ECtHR. Her only possible ground of challenge would be that the Court of Appeal's conclusion on those facts was 'manifestly without reasonable foundation', and that assertion would be quite untenable. The right Ms McDonald will bring home if she succeeds in Strasbourg is a principle that would be worthless on the facts. But it will be a right which once again places the United Kingdom in breach of its Convention obligations.

The final point arising in the case, and one which is perhaps easy to overlook, is that in concluding that the grant of an order would not be disproportionate the Court of Appeal overturned the conclusion of the trial judge that (if Art 8 did apply) it would indeed be disproportionate to make an order. The Court of Appeal held that the trial judge erred both in his selection of criteria relevant to making that assessment and the weighting he attached to the matters concerned. In doing this, the Court of Appeal has – unwittingly perhaps – opened a very large can of appellate worms. One might have expected that the Court of Appeal would interfere in this way only on the express basis that the choices and weighting made by

⁵⁰ App. No. 3925/10; 10th July 2014; [2014] ECHR 755.

⁵¹ The case is noted in J. Luba and N. Madge, "Recent developments in housing law" (2014 – October) *Legal Action* 45 at 47, and attracts the following comment: "It is interesting to note that the ECtHR appeared to make no distinction between the way in which article 8 proportionality has to be considered in a claim brought by a private landlord in comparison with one brought by a public sector landlord".

the trial judge were wholly unsupportable, which make a successful appeal on this basis very difficult to achieve. Arden LJ did not however do that. She said simply:

47 I am unable to agree with the judge's selection of factors for the purpose of the balancing exercise which he carried out for the purposes of Article 8. There were matters which the judge took into account which were irrelevant, such as the lack of dishonesty on the part of Mr and Mrs McDonald in their mortgage application. There were other matters which the judge left out of account which were relevant: as Mr Stephen Jourdan QC, counsel for the Respondents, points out, it is not only the arrears that are relevant because the lender is entitled to recover his capital too.

The Court of Appeal offered no reasoned explanation of its choices on this question. It will be very interesting to see if this leads to a great many more appeals against first instance proportionality judgments (in claimed brought by public authority claimants of course) than are currently made.⁵²

⁵² For further – not very complementary - analysis of the decision see S. Nield, “Thumbs down to the horizontal effect of article 8” [2015] *Conveyancer and Property Lawyer* 77; and E. Lees, “Horizontal effect and article 8: *McDonald v McDonald*’ (2015) 131 *LQR* 34.