Article 8 defences to possession claims

BY TOBY BONCEY
barrister, Falcon Chambers

BY TRICIA HEMANS
barrister, Falcon Chambers

THE HUMAN RIGHTS ACT (HRA) 1998 enshrines various rights derived from the European Convention for the Protection of Human Rights and Fundamental Freedoms in the law of England and Wales. For defendants facing a claim for possession, the rights under Article 8 of the Convention may offer a possible defence. Whether such an argument can be advanced will depend partly on the ground on which possession is sought, and partly on whether the claimant is a public authority or a private landowner.

Article 8 provides that:

1) Everyone has the right to respect for their private and family life, their home and their correspondence.

2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

'Home' is widely defined in the Strasbourg jurisprudence, as a habitation occupied by an individual, with which the individual has 'sufficient and continuing links'. An individual need not have a proprietary right or indeed any right at all, to the property which that individual occupies as their home, in order to engage Article 8. 'Home' is defined:

> '... in terms of the social and psychological attachment or bond that develops with one's accommodation, and neighbourhood, rather than simply with the concept of a roof over one's head' (per Arden LJ in *McDonald v McDonald* [2014]).

A 'home' can even be made on open land: *Chapman v UK* [2001]. Further, in some cases, the European Court of Human Rights (ECtHR) has held that a 'home' can include office premises: *Niemietz v Germany* [1993]; *Societé Colas v France* [2004]. The widely drawn right to a home could therefore apply beyond the field of residential tenancies, and interact with other statutory regimes, such as Part 2 of the Landlord and Tenant Act 1954.

Ordinarily, Article 8 defences will be of concern to public sector landlords. Section 6(1) HRA 1998 provides that:

> 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right'.

Section 3 HRA 1998 imposes a strict interpretative obligation on courts:

> 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'

In *Manchester City Council v Pinnock* [2011], a local authority sought possession against a demoted tenant, having given the requisite two months' notice. Section 143D of the Housing Act 1996 provides:

> 'The court must make an order for possession unless it thinks that the procedure under ss143E and 143F has not been followed.'

The Supreme Court held that it was possible to interpret this apparently mandatory provision in accordance with s3 HRA 1998:

> '... as allowing the county court to exercise the powers which are necessary to consider and, where appropriate, to give effect to, any Article 8 defence which the defendant raises in possession proceedings brought in that court'.

If enforcing a right to possession would be a disproportionate interference with the defendant's Article 8 rights, it would be unlawful to evict him. However, it is only in an exceptional case that enforcing a right to possession would be disproportionate, in circumstances where the defendant has no right to remain. Further, there are various reasons why a public authority landlord would be in a strong position to argue that enforcing its rights would be proportionate in any event. Lord Neuberger explained in *Pinnock* that making a possession order in favour of a local authority would vindicate the authority's ownership rights, and enable the authority to comply with its duties in relation to managing its housing stock.

ARTICLE 8 DEFENCES TO CLAIMS BY PRIVATE LANDOWNERS

The traditional understanding of human rights is that they are rights held by an individual, exercisable against an oppressive state, and not directly against private parties. This understanding has been called into question as a result of s6(3)(a) HRA 1998, which counts a court as a public authority. Thus, it has been argued that, before ordering possession in favour of a private landowner, the court must consider the proportionality of so doing.

This argument was first given credence when advanced, not by a tenant, but by a squatter, in *Malik v Fassenfelt* [2013]. At first instance, Judge Karen Walden-Smith held that:

> '... as the court is a public authority and the land is being occupied as a home, Article 8 is capable of application even though the landowner is a private individual and the occupiers are trespassers.'

However, she continued:

> '... while Article 8 does apply in principle to cases involving a private landowner and a trespasser, it is difficult to envisage circumstances where it would have any consequence and the eviction would not be found to be a proportionate means of achieving a legitimate aim'.

In the Court of Appeal, Sir Alan Ward LJ, dissenting, agreed that there was irresistible logic to the argument that Article 8 is engaged where a private landowner seeks possession against an individual occupying land as their home. The court, as a public authority, must act in compliance with the Convention. Only exceptionally could a court conclude that a defendant with no legal right to remain in possession in domestic law should be permitted to remain, since this would deprive the private landowner of their legal right to possession. He said:

> '... the rule in *McPhail* that the court has no jurisdiction to extend time to a trespasser can no longer stand against a requirement that proportionality may demand, albeit most exceptionally, that a trespasser can be given some time before being required to vacate.'

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The majority of the Court of Appeal had left open the question of whether Article 8 was engaged, and whether a proportionality review would be necessitated. Following *Malik*, it was unclear whether an Article 8 defence could succeed, not only in exceptional cases involving squatters, but also in cases where possession was sought by a private landlord against their tenant.

In *McDonald*, the tenant appealed against a decision to uphold a possession order granted in favour of the respondent LPA receivers. The tenant, who suffered from mental illness, had occupied her home under an assured shorthold tenancy (AST) which had been granted to her by her parents, the freehold owners, who had acquired the property using mortgage finance with the intention that their daughter could live there.

The McDonalds fell into arrears and the lender appointed receivers, who wished to end the tenancy in order to sell the property with vacant possession. The receivers served a notice to terminate the tenancy under s21(4)(b) of the Housing Act 1988.

Section 21 provides that a landlord is automatically entitled to recover possession of a property let on an AST provided that the requisite form of notice under the section is served. Where the notice is validly served, the court has no discretion as to whether a possession order should be made.

In the County Court sitting in Oxford, HHJ Corrie found the notice to be valid and ordered possession. The tenant appealed on two grounds. First, that the receivers lacked power under the mortgage to serve the s21 notice. This was dismissed by the Court of Appeal, which held that the receivers had sufficient authority to serve the notice. The second ground raised the Article 8 defence.

Since the property was the tenant's home it was accepted that Article 8 was engaged. It was argued that the Court, as a public authority, was bound by s6 HRA 1998 to consider whether it was a proportionate interference with her Convention rights to make the order. This would mean that the Court was bound by s3(1) HRA 1998 to read s21 in a Convention-compatible way, transforming what would otherwise appear to be a mandatory provision into one which attracts the court's discretion.

In *Poplar Housing v Donoghue* [2001], the Court of Appeal had held s21 to be compliant with Article 8. It was necessary in the public interest to provide a certain procedure to recover possession following termination of an AST. Arden LJ, giving the leading judgment in *McDonald*, considered herself bound by that decision that s21 did not interfere with Article 8 rights.

Arden LJ also held, apparently following *Pinnock*, that it would not in any event be open to the Court to consider proportionality, since there was no clear and constant line of jurisprudence of the European Court of Human Rights that the proportionality test applied where there was a private landlord, and applying that test would raise 'substantial issues'.

However, notwithstanding this reasoning, it is suggested that it is not necessarily correct to say that a clear and constant line of jurisprudence is required before the court can consider proportionality. The interpretive obligation under s3(1) HRA 1998 requires the court to interpret UK legislation in compliance with the Convention. While the courts should be guided by any clear and constant line of Strasbourg jurisprudence (see *Pinnock* at 48), this does not prevent a court from considering Convention compliance for itself as and when such defences are raised. However, since the Court considered itself bound by *Poplar Housing* to hold s21 to be

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compliant with Article 8, this did not matter. The Court was not required to depart from its earlier decision in the absence of a clear and constant line of Strasbourg jurisprudence.

By its decision in *McDonald*, the Court of Appeal has provided a degree of certainty as to the position of human rights arguments as defences to residential possession claims brought in the private sphere. It is clear that, unless and until the Supreme Court or Grand Chamber of the ECtHR decides differently, Article 8 arguments are limited to cases of public authority landlords and cannot be extended to private landlords by virtue of the court’s position as a public authority. This should reassure private landlords across the county seeking to regain possession of their properties.

What remains unclear is the extent to which human rights arguments will apply outside the context of s21 notices. In *McDonald*, Arden LJ referred to Sir Alan Ward LJ’s *dicta* in *Malik* and stressed that ‘the context on this appeal is different’. The question of whether interferences with the Article 8 rights of trespassers must be proportionate remains at large as regards private landowners. Furthermore, in cases where the court has a discretion in deciding whether or not to order possession, the claimant’s human rights will of course be a relevant consideration.

The risk to landlords if a proportionality assessment is triggered is somewhat ameliorated by the fact that it is only in exceptional circumstances that a possession order will be considered disproportionate. In *McDonald* it was held that even if the proportionality test had applied it would nevertheless have been proportionate for the court to make the possession order. This was in spite of medical evidence that the tenant’s mental illness meant that she was particularly distressed by changes in her environment and would potentially attempt self-harm or even suicide.

In light of this recent example of the balancing exercise being resolved in favour of the landlord, it is hard to envisage a set of circumstances which would be enough tip the scales in a defendant’s favour. It has already been said in public sector cases, where the proportionality exercise is to be undertaken, that there are very few situations which meet the high standard required for interference with the landlord’s rights. So, even if the law were to develop to require consideration of the proportionality of making a possession order claimed by private individuals, the consequences may not be as severe as one might think.

On the other hand, the fact that HHJ Corrie was able to arrive at the opposite conclusion may give pause for thought. After all, judges at County Court level will be dealing with human rights defences to possession claims most regularly and there is obvious scope for disagreement as to what constitutes a proportionate interference and what circumstances will be sufficiently exceptional as to cause a judge to conclude that making a possession order would be disproportionate.

CONCLUSION

What can be said with some degree of certainty is that, for the time being, *McDonald* has put this issue to bed in relation to claims by private landlords under s21. In such cases the courts are not under an obligation to consider the proportionality of making an order for possession. Those acting in possession proceedings based on s21 notices should therefore carry copies of the *McDonald* decision as a matter of course. At County Court level, at least, this should enable summary rejection of Article 8 defences. Having said that, it should be noted that in relation to cases where possession is sought on different grounds, the position is yet to be determined. The *McDonald* reasoning should apply to all claims by private landowners. However, given that this issue remains to be examined by the Supreme Court or the Grand Chamber it is unlikely that defendants will stop raising human rights as a defence to possession claims in courts across the land.

By Toby Boncey and Tricia Hemans, barristers, Falcon Chambers.
E-mail: boncey@falcon-chambers.com; hemans@falcon-chambers.com.

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Chapman v UK
[2001] 33 EHRR 18

Malik v Fassenfelt
[2013] EWCA Civ 798

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[2011] UKSC 6

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[1973] Ch 447

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[1993] 16 EHRR 97

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[2001] EWCA Civ 595

Societé Colas v France
[2004] 39 EHRR 17