

TRESPASSERS' HUMAN RIGHTS

1. If some of the rumblings emanating from elements within the Conservative Party this year are to be believed, a future Tory government could decide to curtail the ambit of the Human Rights Act 1998, or even repeal it. The likelihood of such an upheaval is, perhaps, remote, but, in the meantime, the rights to which the courts are to have regard under this legislation continue to extend their reach. In one such journey on the human rights bandwagon, the recently retired Sir Alan Ward gave a lengthy *obiter* judgment on the subject of Article 8 of the European Convention of Human Rights and its ambit in the context of possession proceedings against trespassers brought by private landlords.
2. Under the rubric “Right to respect for private and family life” Article 8 provides that:
 - 1 *Everyone has the right to respect for his private and family life, his home and his 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.*
3. With particular attention to the right to respect for one’s home, the question arises as to how that right can sit with a property owner’s right to possession of his land when it is occupied by trespassers. The trespassers do not own the land (assuming no question of title by adverse possession arises), but what if they made the land their “home”?
4. Article 8 has vertical effect, so that public bodies are bound by its provisions, and most of the cases in which the effect of Article 8 has been considered and

developed are cases where the landlord is a public body. It does not have horizontal effect, and so as between private parties a landlord is not bound to respect a trespasser's right to his home, although the court, as a public body, is bound by Article 6 of the Convention and is therefore obliged to act in a way which is compatible with Convention rights. However, until recently, it could not have been conceived that squatters, who have no right to enter or remain on land, might be able to rely on the Convention rights to avoid the effects of a forthwith possession order.

5. In *McPhail v Persons Unknown* [1973] Ch 447, the Court of Appeal confirmed that when the court makes an order for possession against squatters, the court has no power to suspend that order. The only order open to the court, once it has concluded that the defendants to the claim have no right to enter the land or to remain there, is a forthwith possession order. As Lord Denning MR said (at p.456):

“What is a squatter? He is one who, without any colour of right, enters on an unoccupied house or land, intending to stay there as long as he can. He may seek to justify or excuse his conduct. He may say that he was homeless and that this house or land was standing empty, doing nothing. But this plea is of no avail in law.”

6. To date, there has been no decision of the UK courts to the effect that in a dispute between private individuals, Article 8 rights might be prayed in aid by the occupant of land who has made his home there. The most recent authoritative pronouncement on Article 8 was by the Supreme Court in *Manchester City Council v Pinnock* [2011] 2 AC 104, in which nine members of the Supreme Court considered a claim by the City Council against a demoted tenant of a dwelling house for a possession order. Absent arguments relating to Article 8, the court has no discretion in the case of a

demoted tenant, once the Council has given the required period of notice. However, in construing the statutory basis for making a possession order against a tenant in these circumstances, it was held that the court is obliged to consider the proportionality of making the order, notwithstanding the fact that his right of occupation under domestic law has been terminated, although it is only in exceptional circumstances (whatever they might be) that such rights would entitle the tenant to remain in occupation of the dwellinghouse.

7. The important point about this decision, for present purposes, is that it was limited to a claim for possession by a local authority, a public body. It was not a claim between private individuals and the Supreme Court was at pains to stress that nothing in its decision should be seen as applying to such a case (although in referring to the conflicting views as to whether the Article 8 arguments would be available in such a case, the Supreme Court was, in effect, inviting argument on the point in a future case).
8. For Sir Alan Ward, the occasion for considering the point arose in *Malik v Fassenfelt*. However, this was not a wholly satisfactory context for considering and deciding this all-important point, not least because it was not directly in issue. The defendant squatters took up occupation of a site near Heathrow Airport, without the licence or consent of the claimant owners. The site had become contaminated when it was previously used for storing cars and had subsequently been used for fly-tipping. The squatters, operating under the banner “Grow Heathrow”, cleared the land and created a market garden centre, with a range of glass houses. The land became their home and their “project” even attracted local support. The claimant claimed possession on the ground of trespass.
9. In the County Court, the Judge concluded that Article 8 was, indeed, engaged in a claim between private individuals and therefore that she was obliged to

consider the question of proportionality. She then addressed that question and held that there were no exceptional circumstances which justified displacing the principle that the claimant was entitled to recover possession from the squatters, which was a proportionate means of achieving the aim of entitling a private landowner to possession of his property.

10. The squatters appealed against that conclusion, but the claimant did not pursue a cross appeal (for which he had permission) against the conclusion of the County Court Judge that Article 8 applied in a claim brought by a private landowner. In those circumstances, Lloyd LJ and Lord Toulson declined to engage in the debate, but this was the very question which Sir Alan Ward considered and went on to decide. In characteristic metaphoric prose, he set out the dilemma for the court as follows.

“The idea that an Englishman’s home is his castle is firmly embedded in English folklore and it finds its counterpart in the common law of the realm which provides a remedy to enable the owner of the castle to secure the eviction of trespassers from it. But what if the invaders occupy for long enough to establish their home within the keep? Whose castle is it now? Whose home must the law protect? That, in colloquial terms is the issue in this appeal ...”

11. Since the point was not argued and did not arise for decision, the judgment of Sir Alan Ward on this question was, necessarily, *obiter* and what is more, it was a minority judgment. Indeed, Lord Toulson also expressed the contrary view that “Article 8 does not ordinarily apply to regulate conduct in the private sector”. Lloyd L.J. stuck to his guns and declined to express any views on the point of principle. However, Sir Alan Ward undertook a detailed trawl through the various authorities on the applicability of Article 8 and concluded that Article 8 is, indeed, engaged where a private landowner seeks an order for

possession against an individual occupying the land as his home on the ground that the court is a public authority which, itself, must act compatibly with the Convention.

12. Applying the approach of Lord Hope in *Hounslow LBC v Powell* [2011] 2 AC 186 (another Supreme Court case concerned with Article 8 in a case brought by a public authority), Sir Alan Ward said that even in a case between private individuals, the Court must consider whether the making of a possession order is proportionate, where the issue has been raised by the occupier and it has crossed the threshold of being seriously arguable. The question will then be whether making an order for the occupiers' eviction is a proportionate means of achieving a legitimate aim. Since proportionality is therefore in issue, he concluded, the rule in *McPhail v Persons Unknown* that a court has no jurisdiction to extend time to a trespasser can no longer stand, because proportionality might demand "*albeit most exceptionally*" that a trespasser be given some time before being required to vacate.

13. A further effect of conferring on the court a discretion to consider giving time to the trespasser to vacate, even at the suit of a private landlord, according to Sir Alan Ward, is that section 89 of the Housing Act 1980 will apply, although this does not preclude the court from making a forthwith possession order – it operates in favour of the landowner by preventing the order from being suspended for more than 14 days, unless this causes "exceptional hardship", in which case the order can be suspended for up to six weeks. In *Powell*, the court ruled against the submission that section 89 is incompatible with Article 8. In *Fassenfelt*, it was argued on behalf of the squatters, that where proportionality demands a longer time than six weeks, the court would have no option but to dismiss the application, and the landowner would be required to make a further application to the court if the circumstances have changed. Sir Alan Ward did not consider it necessary to rule on that argument. He saw

“its logical force” but countered this by saying that “an indefinite postponement of possession seems to run counter to European jurisprudence”.

14. Sir Alan Ward concluded this part of his judgment by stating that the fact that the landowner has a legal right to possession is a very strong factor in support of proportionality: *“it speaks for itself and needs no further explanation or justification”*. Therefore, he said, even where the defendant squatters have established a home on the land, where they have otherwise no legal right to remain, *“it is difficult to imagine circumstances which would give the defendant an unlimited and unconditional right to remain. The circumstances would have to be exceptional”*.
15. Sir Alan Ward then went on to uphold the Judge’s conclusion that the application of the proportionality test, in that case, justified making the forthwith possession order which she made, a conclusion with which the other members of the Court of Appeal agreed.
16. What, then, of the Article 8 debate? Where does this leave private landowners? The debate will, no doubt, rumble on. Before *Malik v Fassenfelt*, the Supreme Court had left the door slightly ajar for defendants to possession proceedings brought by private individuals, to argue that Article 8 entitles them to a similar proportionality review as afforded to tenants of public authorities. The decision in *Malik v Fassenfelt* has not opened this door: remember, that the point did not arise for decision and therefore all comments (by both Sir Alan Ward and Lord Toulson) as to the applicability of Article 8 in this sort of case were *obiter*. However, the detailed argument and discussion in which Sir Alan Ward engaged has, no doubt, moved the debate on a stage further – doubtless we can expect it to be cited enthusiastically by future litigants who wish to rely upon Article 8 as tenants or trespassers against a private landlord.

17. That said, what remains extremely unclear is what sort of “exceptional circumstances” would have to apply before a court might conclude that a possession order should be suspended, contrary to the private rights of the claimant to possession of his property, in order to comply with Article 8? The context of *Malik v Fassenfelt*, a claim against trespassers, is even more extreme than a private landlord who has a mandatory ground for recovering possession from a tenant. What could possibly be exceptional about the court requiring a person who does not have (and has never had) any right to be present on the land, to vacate it? Is it remotely conceivable that such extreme circumstances might exist which would lead to the court dismissing a possession claim against trespassers requiring the claimant to await a change of circumstance before being able to return to court to seek a possession order? Those who take an interest in this area of jurisprudence might not have to wait too long before a definitive answer as to the applicability of Article 8 in private possession proceedings is given by the higher courts. However, they might have to wait considerably longer for a case in which the court is persuaded to depart from established practice of giving effect to the rights of private individuals to possession of their property on the ground of “exceptional circumstances”. Moreover, if government policy after the 2015 election follows the current trend of clamping down on those who trespass on private land and even goes so far as to reduce or eradicate the effect of the Human Rights Act 1998, this question might remain unanswered for some time to come.