Article 8 defences against private landlords?
Supreme Court to decide

Last month the Supreme Court heard arguments on the scope for human rights defences in possession proceedings brought by private landlords. It is now settled law that the courts, when considering possession claims brought by public authorities and, in some cases, housing associations, have the power to consider whether an order would be a proportionate interference with the tenant's right to respect for their home, protected by Article 8(1) of the European Convention on Human Rights. Hitherto, however, that power – set out in the *Pinnock* and *Powell* line of cases – had been assumed to apply only in cases involving *social* housing.

McDonald v McDonald

In the case of *McDonald v McDonald* – in which Matt Hutchings and Jennifer Oscroft of Cornerstone Barristers acted on behalf of intervening party Shelter – the Supreme Court was invited to extend this power to possession proceedings in the *private* rented sector. The appellant in the case suffers from a mental disorder which makes her particularly distressed by changes in her environment. She held an assured shorthold tenancy of a property owned by her parents. When the parents defaulted on the mortgage payments, receivers served a section 21 notice seeking possession of the house. The appellant opposed the making of a possession order on the ground – alongside others which were not pursued in the Supreme Court – that the order would be incompatible with her Article 8 rights.

In respect of Article 8, the Court of Appeal dismissed her appeal on the basis that no "clear and constant" jurisprudence of the Strasbourg court indicated that a proportionality analysis applies to private landlords under Article 8(2) ("There shall be no interference by a *public* authority…"). Moreover, the Court was bound by *Poplar Housing v Donoghue* to hold that section 21 of the Housing Act 1988 is compatible with the Convention. The Court found that it was prevented by *Donoghue* from finding that the proportionality test applied, and therefore the question of "reading down" section 21 to achieve compatibility with Article 8 did not arise.[1]

The issues before the Supreme Court

The Court was invited to find that the power to consider the proportionality of making a possession order extends to orders sought by private landlords. First, the wording of Article 8(1) itself: "*Everyone* has the right to respect for…his…home" seems to suggest that no distinction between public and private tenants was contemplated by the signatories to the ECHR. Second, a court is a public authority, as an emanation of the legal branch of the state and for the purposes of the Human Rights Act 1998,[2] and therefore falls within the "no interference by a public authority except…" prohibition set out in Article 8(2). Rather than announcing a new departure in the law, the Supreme Court was simply invited to recognise the logic of both Convention and domestic law. A court in making a possession order is, it was argued, interfering with the defendant's right to respect for his home. Accordingly, it should only be able to do so to the extent "necessary in a democratic society" (the proportionality test).

What next?

Readers will be aware that – other than in very limited circumstances – a court has no power *not* to

[1] Pursuant to the court's interpretive obligation under section 3 of the Human Rights Act 1998.
[2] Section 6(3)(a).

grant possession based on a section 21 notice, which is essentially a 'no-fault' mechanism for securing possession. Depending on the outcome of *McDonald v McDonald*, however, that could be set to change, meaning that private landlords – and those representing them – will need to be aware of the law surrounding Article 8 defences in possession claims. As pointed out by the Residential Landlords Association, who also intervened in the case, this would affect a substantial proportion of the housing market. As of 2014-2015, the private rented sector accounted for 19% of all households (or 4.3 million households) in England,[3] with the Association raising concerns that it would adversely affect the vitality of the market.

In our view, should the Court favour the appellant, there will be no cause for undue celebration on the part of tenants, nor for undue concern on the part of landlords. As Shelter noted in its witness statement to the Court, its solicitors could find no example of a case in which an Article 8 defence alone had been successful. In social housing cases the vast majority of such defences are dealt with – and rejected – summarily. There is only one reported case of an Article 8 defence being deployed successfully.[4] Given the additional factor weighing in the favour of private landlords – the right to peaceful enjoyment of one's possessions under Article 1 Protocol 1 ECHR – there is no reason to think that Article 8 defences will enjoy greater success than they do in the social housing sector. [5]

Nevertheless, should the Court find in favour of the appellant in *McDonald v McDonald*, there may be exceptional cases in which an Article 8 defence will arise in respect of a possession order under section 21. There will be a consequent need for private landlords and their lawyers to verse themselves in Article 8 and proportionality. Watch this space.

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[3] By comparison, the social rented sector comprises 17% of households while 64% are owner-occupiers; see: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/501065/EHS_Headline_report_2014-15.pdf.

[4] *Southend-on-Sea Borough Council v Armour* [2014] EWCA Civ 231.

[5] Although there is no statutory requirement for a private landlord to manage their housing stock, as is the case with social landlords.