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Matt Hutchings QC

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# The Right to Respect for the Home: Privacy's Poor Relation?

Matt Hutchings QC

Cornerstone Barristers

1. Article 8 ECHR 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."

2. In May and June 2016 the Supreme Court delivered two judgments, at the centre of each of which was Art. 8.

3. In *PJS v News Group Newspapers Ltd* [2016] UKSC 26, [2016] AC 1081 it was held that, in the context of an interim injunction, pending trial, to restrain the defendant from publishing in one of its national newspapers a story about the claimant's alleged extra-marital sexual activities, neither Art. 8 nor Art. 10 of the Convention had preference over the other. Where their values were in conflict, an intense focus was required on the comparative importance of the rights being claimed in the individual case, with the justifications for interfering with or restricting each right being taken into account and a proportionality test applied. Applying this approach to the particular facts of the case, the Supreme Court reversed the Court of Appeal and continued an interim injunction restraining publication.

4. Less than one month later, in *McDonald v McDonald* [2016] UKSC 28, [2016] 3 WLR 45, the Supreme Court held that, although Art. 8 might be engaged when a judge made an order for possession of a tenant's home at the suit of a private sector landlord, the tenant's Art. 8 rights could not be invoked to justify a different order from that which was mandated by the contractual relationship between the parties. At least, this was so where there were legislative provisions, such as s. 21(4) of the Housing Act 1988 and s. 89(1) of the Housing Act 1980, which the democratically elected legislature had decided properly balanced the competing interests, including the Convention rights, of private sector landlords and residential tenants when their tenancy contract

had ended. Accordingly, a judge making such a possession order was not required to consider the proportionality of the interference with Art. 8.

5. In this article, I wish to explore what lies behind these contrasting approaches to the implementation of Art. 8 rights and to focus in particular on the reasons why Ms McDonald's challenge failed.

## The indirect horizontal effect of Convention rights

6. Each of the above cases concerned litigation in the courts between private parties. In the first case, the claimant's Art. 8 right to respect for his private life was in conflict with the newspaper's Art. 10 right to freedom of expression. In the second case, the tenant's Art. 8 right to respect for her home was in conflict with the landlord's Art. 1 Protocol 1 ("A1P1") right to enjoyment of his property. Both cases therefore concerned the horizontal effect of Convention rights and Art. 8 in particular.

7. The question whether Convention rights are, in principle, engaged when the courts (as organs of the state) rule on disputes between private individuals has given rise to a lively academic debate, which I do not propose to enter into here. I confine myself to some observations about the case law on this subject.

8. *PJS* and *McDonald* illustrate the different roles that the courts may play in adjudicating on competing private rights and thus the different ways in which they might be said to cause an interference with the Convention rights of either party. Newspapers do not require an order of the court to exercise their right to publish stories that interfere with privacy. In contrast, statute dictates that, in most residential contexts, a landlord requires an order of the court to evict a tenant from his home. Thus, in *McDonald* an order of the county court was an essential step before the landlord could exercise his right to regain possession. The court is thus required to play an active role in the eviction, and for this reason could be thought to be causing an interference with the tenant's right to respect for her home.

9. However, this factor cannot provide a principled litmus test of whether there is state "interference" with Art. 8 rights, nor indeed whether Art. 8 applies. The underlying question is whether the state's provision of a system of private law rights and their enforcement through the courts between private parties engages Convention rights. If it does not, then by ruling on a private law case the court is not interfering with the Convention rights of either party. The Strasbourg case law recognises that the involvement of a court is not the decisive factor. For example, in *A v UK* (1988) 10 EHRR CD149, a forfeiture case, the Commission stated that:

> "It is true that the landlord issued proceedings in the domestic courts in order to forfeit the applicant's lease. This fact alone is not however sufficient to engage State responsibility in respect of the applicant's rights to property, since the public authority in the shape of the

> County Court merely provided a forum for the determination of the civil right in dispute between the parties."

10. But if the Convention does apply to private law disputes, the party who complains that his Convention rights have been infringed should be able to rely on them when bringing or resisting a claim against the other party.

11. Further, from a Convention perspective, state responsibility for private law cannot sensibly depend on the source of the private law in question, in particular whether it is based on statute or common law. This would lead to differences in the scope of application of the Convention in different signatory states, depending on their legal traditions. In *PJS* the court was applying the common law; in *McDonald* the landlord's right to possession was statutory, albeit that the statutory scheme conferred similar rights to those the landlord would have enjoyed at common law. It was not suggested that this distinction was determinative as to the application of Art. 8. The source of law may affect the remedies available under the HRA, but this is a domestic consideration.

12. Thus the fundamental question is whether the Convention operates on a constitutional plane so as to require that private law rights and their enforcement by the courts of signatory states must be compatible with its provisions. This mode of application of the Convention to private disputes is established in the Strasbourg case law. In *MGN v United Kingdom* (2011) 53 EHRR 5 at [137], the Strasbourg Court held that the House of Lords decision that MGN was liable in Naomi Campbell's action for breach of confidence was an interference with Art. 10. The Grand Chamber reasoned similarly in *Couderc and Hachette Filipacchi Associes v France* [2016] EMLR 19 at [79], in relation to the judgment of the TGI against Paris Match on Prince Albert of Monaco's privacy claim. In each of these cases, the court's adverse order was held to have been an interference with Art. 10. In consequence, the content and application of domestic private law was tested against the standards of Art. 10(2).

13. In the *MGN* case (para. 192) the Strasbourg Court also concluded that UK law that provided for the recovery of success fees as part of a costs award interfered with Art. 10. In *Lawrence v Fen Tigers Ltd (No. 3)* [2015] UKSC 50, [2015] 1 WLR 3485, the Supreme Court proceeded on the basis that the recovery of success fees and ATE premiums in litigation concerning a private nuisance was an interference with Art 6 and/or A1P1.

14. Strasbourg appears to have accepted that Art. 8 can also operate on this plane. In *Sahin v Germany* [2003] ECHR 340at [49]–[50], the Grand Chamber agreed with the parties that the Wiesbaden Regional Court's refusal to make a contact order in favour of a father in respect of his child amounted to an interference with Art. 8. The regional court applied the Civil Code in private family law proceedings. The Grand Chamber reached the same conclusion in the similar case of *Sommerfeld v Germany* (2004) 38 EHRR 35 at [44].

15. One may question whether the state was really "interfering" with the fathers' negative Art. 8 rights. However, Art. 8 also has a positive element and these could be seen as cases where the court failed to take positive action to secure Art. 8 rights. Similarly, when delivering judgments in favour of Noami Campbell and the Prince of Monaco, were not the courts in question "merely providing a forum for the determination of the civil right in dispute"? If so, why were these treated as cases of state "interference"? When faced with such hard-edged questions, Strasbourg tends to avoid them. For example, in the Heathrow night flights case *Hatton v United Kingdom* (2003) 37 EHRR 28 at [98] the Grand Chamber stated:

> "Whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under para.1 of Art.8 or in terms of an interference by a public authority to be justified in accordance with para.2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole … "

16. Applying the same approach, regardless of whether the negative or positive element of Art. 8 is engaged, when a court considers making a possession order in respect of a person's home, it has to strike a fair balance between the Convention rights of the occupier and the landlord. A similar fair balance must be struck when a court considers granting an injunction prohibiting a newspaper from publishing details about a person's private life. This is the indirect horizontal effect of Art. 8 in action.

## Domestic law relating to (i) freedom of expression and (ii) landlords' property rights

17. In domestic law, freedom of expression is an essentially negative liberty. Its boundaries are defined in particular by the tort of defamation and breach of confidence. Since *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, the traditional action in breach of confidence has been reshaped to create what has become in all but name a new tort of misuse of private information. What constitutes a wrongful misuse of private information is itself defined by a proportionality test: see *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777, [2008] EMLR 20 at [14], per Eady J.

18. Section 12 HRA applies where a court is considering whether to grant any relief which might affect the exercise of the Convention right to freedom of expression. Section 12 (3) provides that no relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed. Section 12(4) provides that the court must have particular regard to the importance of the Convention right to freedom of expression. Beyond this, there is no legislative steer as to whether or in what circumstances freedom of expression should prevail over privacy. Indeed, in *PJS* the Supreme Court held that

the Court of Appeal had misdirected itself that s. 12 HRA required that Art. 10 be given extra weight.

19. By contrast, rights of possession or occupation in a residential landlord and tenant context are subject to hard-edged common law rules of ancient origin overlaid by detailed modern legislation. At common law, a possession order is the remedy for enforcing the landlord's superior title at the end of the contractual tenancy. The modern possession action derives substantially from the old action of ejectment: see *Secretary of State for Environment, Food and Rural Affairs v Meier* [2009] UKSC 11, [2009] 1 WLR 2780 at [60]. Once the claimant has proved his right to possession, in particular that the tenancy under which the tenant occupies the property has ended, the court has a common law duty to order possession: *Sheffield Corporation v Luxford* [1929] 1 KB 180. If a superior title has been proved, the common law thus leaves no room for consideration of individual hardship or proportionality.

20. In most residential contexts, the landlord requires a possession order to recover possession of his property from a tenant or former tenant. In the private sector, the primary legislative scheme is contained in the Housing Act 1988. Section 5 of the 1988 Act provides that, in most cases, the landlord cannot bring the tenancy to an end except by obtaining an order for possession and executing it. This provision applied in Ms McDonald's case. Parliament had therefore taken away her landlord's common law rights to terminate the tenancy and replaced them with statutory grounds of possession.

21. In some circumstances, domestic housing legislation provides that the tenancy can only be ended if the court is satisfied that this is reasonable. Such provisions can readily be adapted to absorb a structured proportionality review. But in other circumstances, the legislation confers on the landlord an absolute right to possession. This is usually enforceable only by obtaining a possession order from the court, thus providing procedural protection for the tenant: the court is there to check that the statutory requirements have been duly complied with. However, where the landlord proves these, the statutory scheme forbids the court from conducting a proportionality review.

22. The overall aim of the Housing Act 1988 was to free the private rented sector from significant regulation under the Rent Acts, and in this way increase housing supply. Assured shorthold tenancies are a particular means to this end.

23. Section 21(4) of the Housing Act 1988 provides that a court "shall" make an order for possession where a formally valid two months' notice has been served by the landlord on a periodic assured shorthold tenant, no earlier than four months after the tenancy was originally granted. Section 89(1) of the Housing Act 1980 further provides that giving up possession shall not be postponed to a date later than 14 days after the making of the possession order, unless exceptional hardship would be caused, in

which case possession may be postponed for a maximum of six weeks after the making of the order.

24. Thus, save where specific statutory defences are available, the domestic legislation provides that, after the end of a fixed-term assured shorthold tenancy, the landlord's property rights always prevail over the occupier's right to respect for his home. Ms McDonald challenged the application of the above statutory scheme to her particular circumstances.

## Striking the balance at the macro level

25. In the light of the above, is the difference between the approaches of the Supreme Court to Art. 8 privacy rights and respect for the home simply explained by the fact that, in *PJS*, the courts had a "free run" at the balancing act, whereas in *McDonald*, the courts' hands were tied by Parliament?

26. Not exactly: Ms McDonald's case was that Art. 8 *required* that the courts' hands should not be tied in this way. On this basis, it was argued that the Supreme Court should reinterpret s. 21(4) of the Housing Act 1988 so that a court hearing the possession claim was permitted to consider the proportionality of the tenant's eviction (para. 1). Thus, the distinction between the two cases needs some refinement: in *McDonald* a key issue was whether Parliament was entitled to strike the Art. 8/A1P1 balance in the abstract, so as to preclude consideration of the individual facts of the case. This issue did not arise in *PJS*, since the common law encompasses such a balancing exercise and Parliament has not enacted a statutory code providing that the right to freedom of expression should prevail over privacy in specified circumstances.

27. There is history between our highest court and Strasbourg on the issue of whether the Art. 8 balance can be struck "at the macro level". There is not space here to describe it in detail. However, it may be telling that the particular flashpoint for the standoff that ensued with Strasbourg was the common law of property rights. Before turning to *Qazi* (see below), it is helpful to set it in the context of the Strasbourg case law.

## Property rights and the Convention

28. Article 8 embraces a broad collection of rights and is necessarily qualified. But Art. 10 and A1P1 also confer qualified rights: they may be subject respectively to such restrictions as "are necessary in a democratic society" and such controls as are "in accordance with the general interest".

29. Therefore, viewed from the Convention end of the telescope, there is no reason of principle why a conflict between Art. 8 rights and A1P1 rights should be adjudicated upon by the courts in a fundamentally different way from a conflict between Art. 8

rights and Art. 10 rights. In Strasbourg at least, the essential exercise should be the same one of weighing up the importance of each right against the other and applying a proportionality test to the facts of the case.

30. Some of the Strasbourg case law tends to confirm this impression. For example, in *Spadea and Scalabrino v Italy* (1995) 21 EHRR 482, the applicant private landlords complained of successive orders suspending the eviction of their tenants (paras 9–17). The Strasbourg Court held that, when applying legislation providing for such suspensions, the Italian courts had struck a fair balance, particularly having regard to the housing crisis in Italy and the facts that the tenants were senior citizens on low incomes, who had applied for social housing and were paying their rent (paras 36–40).

31. In *Tuleshov v Russia* (Application No. 32718/02) 12 November 2007, the Marx Town Court determined a dispute between Mr Kh and the applicant about title to property in Mr Kh's favour, ordering the applicant's eviction (paras 12–13). Although the eviction was lawful and protected the rights of the owner, it was held in the circumstances to have been a disproportionate interference with Art. 8 (paras 52–55). There is no support here for the notion that, in a contest between the Art. 8 rights of individuals in their homes and the A1P1 rights of their landlords, there can only be one winner. At least in some, unusual, circumstances, respect for the home can trump property rights.

32. A different picture emerges if one considers the law of landlord and tenant as essentially regulating disputes about property rights. The influential Commission admissibility decision in *Bramelid and Malmström v Sweden* (1983) 5 EHRR 249 concerned a shareholders' dispute. The applicants' complaint was that Swedish company legislation had enabled the majority shareholders to buy out their minority shareholdings at an undervalue. Viewing the matter as an essentially private dispute, the Commission stated that:

> "the Commission must nevertheless satisfy itself that, when making rules as to the effects on property of legal relations between individuals, the legislature does not create an imbalance between them which would result in one person arbitrarily and unjustly being deprived of his goods for the benefit of another."

33. This was clearly intended to be a low intensity of review and represents the established Strasbourg approach to commercial property disputes (where only A1P1 is in play). Is a more intrusive review required when possession is sought of a person's home?

34. The much cited (by landlords) Commission admissibility decisions in *Di Palma v United Kingdom* (1986) 10 EHRR 149 and *Wood v United Kingdom* (1997) 24 EHRR CD 69 provide some support for a "weak" application of Art. 8 to private possession claims. Mrs Di Palma's long lease was forfeited for rent arrears. Her main argument was that the forfeiture was contrary to her A1P1 rights (p. 204). This was an ambitious

complaint, as she sought to persuade the Commission that *Bramelid* was wrongly decided. Unsurprisingly, the A1P1 complaint failed. In relation to Mrs Di Palma's Art. 8 complaint, the Commission tersely found that the forfeiture "was in conformity with article 8 para 2 as a measure which was in accordance with the law and necessary in a democratic society 'for the protection of the rights of others'" (p. 211)

35. Mrs Wood fell into arrears with her mortgage payments, which she sought unsuccessfully to blame on the professional misconduct of her former solicitor. The Commission simply stated that her eviction was "necessary for the protection of the rights and freedoms of others, namely the lender". The significance of these decisions is they appear to show that, in a private sector context, Art. 8 adds little to the tenant's A1P1 rights.

## *Qazi*, *Kay*, *Connors*, *McCann* and *Pinnock*

36. In *Harrow London Borough Council v Qazi* [2003] UKHL 43, [2004] 1 AC 983 Mr Qazi and his wife were joint tenants of the local authority. His wife ended the tenancy by serving a notice to quit, as each joint tenant was entitled to do. Mr Qazi remained in occupation and the local authority brought trespasser proceedings against him. The relevant statutory scheme was silent as to the local authority's rights in these circumstances. But at common law Mr Qazi was a mere trespasser, with no defence to the local authority owner's right to possession. Mr Qazi defended the claim, relying on his Art. 8 right to respect for his home, given domestic force by s. 6 HRA.

37. The two senior Law Lords, Lords Bingham and Steyn, would have held that Mr Qazi was entitled to a decision of the county court as to whether his eviction was justified under Art. 8(2). However, Lords Hope, Millett and Scott held that Art. 8 could not be relied on to defeat the landlord's common law right to possession. The majority reasoning was encapsulated by Lord Scott (para. 149): "Article 8 cannot be raised to defeat contractual and proprietary rights to possession". The basic proposition was that the law of contract and of property rights was immune from scrutiny under Art. 8, and the fact that a court was enforcing such laws added nothing. Lord Hope offered a principled route to this conclusion, namely that the peaceful enjoyment or occupation of a person's home was outside the scope of Art. 8 (see in particular paras 50–51). However, this reasoning was subsequently shown to have been wrong.

38. Not long after *Qazi*, the Strasbourg Court produced its judgment in *Connors v United Kingdom* (2005) 40 EHRR 9. The Connors had a licence to occupy plots on a local authority gypsy site. The licence attracted no statutory security of tenure. The local authority terminated the licence by notice to quit. The reason it did so was because of allegations of nuisance behaviour. However, in terms of the local authority's right to possession, the case was on all fours with *Qazi*. The licence had been ended in accordance with its contractual terms. The local authority was the owner and the Connors were mere trespassers. The Strasbourg Court held that there had been a violation of

Art. 8. Part of the argument in *Connors* was whether the UK government could justify the denial of security of tenure to travellers as a class, or whether this amounted to unjustified discrimination. However, if security of tenure in a home had been outside the scope of Art. 8, the finding of a violation of Art. 8 could not have been made.

39. In *Kay v Lambeth London Borough Council* [2006] UKHL 10, [2006] 2 AC 465, the House of Lords by a majority held that the only adjustment to *Qazi* required was to recognise that a defendant might be able to challenge the law under which the possession order was sought, i.e. to argue that "the system" was incompatible with Art. 8. The essence of the majority decision was captured by Lord Hope at para. 110, where he stated that "a defence … based only on the occupier's personal circumstances should be struck out".

40. A few years later, the *Qazi* line took another battering from Strasbourg. *McCann v United Kingdom* (2008) 47 EHRR 40 was another local authority joint tenancy case. The Strasbourg Court held that Mr McCann's eviction without the possibility of a proportionality assessment by the court had ipso facto amounted to a breach of Art. 8. At paras 50 and 54, it reasoned as follows:

> "50. The Court is unable to accept the Government's argument that the reasoning in *Connors* was to be confined only to cases involving the eviction of Roma or cases where the applicant sought to challenge the law itself rather than its application in his particular case. *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.* …
>
> 54. The court does not accept that the grant of the right to the occupier to raise an issue under Art.8 would have serious consequences for the functioning of the system or for the domestic law of landlord and tenant. As the minority of the House of Lords in *Kay* … observed, it would only be in very exceptional cases that an applicant would succeed in raising an arguable case which would require a court to examine the issue; in the great majority of cases, an order for possession could continue to be made in summary proceedings." (emphasis added)

41. In *McCann*, the Strasbourg Court was grappling with this issue: is a domestic law that provides for an owner to have an absolute right to a possession order in respect of a person's home, without the possibility of a court proportionality determination, compliant with Art. 8(2)? The context was one in which the local authority was seeking possession, so that no separate consideration was required of the position of private landlords.

42. It was *McCann*, and the fact that it was cited and followed in many further Strasbourg cases, including an application to Strasbourg following *Kay*, which finally led the Supreme Court to change its mind. In *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104 the Supreme Court held that, in order for domestic law to be compatible with Art. 8, a court which was asked to make an order for possession of a

person's home at the suit of a local authority had to have the power to assess the proportionality of making the order, on the facts of the individual case. Pragmatically, and consistently with the Strasbourg cases, the Supreme Court also stated that it would only be in highly exceptional cases that the court would need to carry out a full proportionality assessment; in most cases, if a proportionality defence was raised, it could be dismissed summarily.

43. The unfinished business related to the above qualification "at the suit of a local authority": in other words, the tenant only had the right to a proportionality assessment if his landlord was a public authority. The position in relation to possession proceedings brought by a private landlord was expressly reserved. This was the issue addressed in *McDonald*.

## The reasons given in *McDonald* for not extending the right to a proportionality assessment to private sector tenants

44. Lord Neuberger PSC expressed the Supreme Court's views on the central issue as a matter of principle (paras 40–46). He then went on to say (paras 51–54) that the Strasbourg case law did not support the extension of *Pinnock* to private tenants. In the interest of stimulating further analysis, respectfully but with an adversarial spirit, I challenge below each of the main reasons given for rejecting Ms McDonald's case.

    (1) *Holding people to their contracts is a basic principle of most legal systems: pacta sunt servanda. But refusing to order possession in accordance with the tenancy agreement is, of course, exactly what the Supreme Court in Pinnock accepted that Art. 8 may require, when the tenant has a public sector landlord. The Supreme Court may have been more willing to take this step in relation to the public sector, seeing it as an evolution of the pre-existing remedy of judicial review, but the effect is that Art. 8 qualifies public bodies' contractual and property rights, or the enforcement of such rights.*

45. To describe a possession order as "mandated by the contractual relationship between the parties" overstates the position. In fact, Ms McDonald's landlord had no contractual or common law right to possession: this was displaced by the statutory scheme. This formulation also assumes that, when deciding what remedy to grant to enforce a contract, the court has no discretion at all. Why is this a given? The domestic judicial remedy that directly enforces contractual obligations is specific performance. It is well established that specific performance may be refused in cases of impossibility, futility and, exceptionally, hardship. Thus, in *Patel v Ali* [1984] Ch 283 Goulding J refused specific performance of a contract for sale of land on exceptional facts, which in his judgment created "hardship amounting to an injustice". It is a tenable view that all that *McCann* requires is that courts hearing possession claims should have a similar residual discretion when enforcing property rights. This may be a difficult concept for a UK property lawyer to

get his head around, but the reasons why a possession order is not a discretionary remedy in the same way as specific performance are essentially historical.

(2) *There are legislative provisions which the democratically elected legislature has decided properly balance the competing interests of private sector landlords and residential tenants.*

46. This is no doubt correct, and the Supreme Court will generally be slow to conclude that Parliament has got it wrong. However, Parliament has also, by s. 3(1) HRA, required the court to read and give effect to legislation in a way which is compatible with the Convention rights. This includes a duty to determine for itself, as a first step, whether the legislation is compatible with the Convention rights. Thus, while the court is entitled to give Parliament's views substantial weight, they are not determinative. The statement at para. 45 that Ms McDonald did not contend that the provisions of the Housing Act 1988 did not properly protect the Art. 8 rights of assured shorthold tenants may reflect the way that the argument was advanced, but seems odd given that her central complaint was that s. 21(4) HA was incompatible with Art. 8.

(3) *To hold otherwise would involve the Convention being directly enforceable between private persons.*

47. As suggested above, the indirect horizontal effect of Convention rights, including Art. 8, is well established at Strasbourg and indeed has been accepted by the Supreme Court in other cases. At para. 46, Lord Neuberger accepted that:

> "there are many cases where the court can be required to balance conflicting Convention rights of two parties, e.g. where a person is seeking to rely on her article 8 rights to restrain a newspaper from publishing an article which breaches her privacy."

48. The real debate is not about whether Art. 8 is applicable, but whether it places the same demands on the court when hearing a private landlord's claim as when hearing a public landlord's claim.

(4) *To hold otherwise would also mean that the Convention could be invoked to interfere with the A1P1 rights of the landlord, and in a way which was unpredictable.*

49. As also suggested above, A1P1 rights are not a trump card. They are qualified rights. In the public sector context, the Supreme Court in *Pinnock* effectively limited the Art. 8 proportionality defence to extreme cases of hardship. It is an exaggeration to suggest that a similar escape valve for cases of exceptional hardship in the private sector would render the general run of possession proceedings unpredictable. If an Art. 8 defence would cause the landlord financial loss without compensation, then this is a reason for rejecting the defence on the facts, not for withholding it in principle,

including in cases where the landlord does not wish to sell the property and the tenant is paying the rent.

(5) *The anomalous position where the land owner is entitled to take the law into his own hands.*

50. For a few residual cases, in which residential landlords are entitled to recover possession without court orders, to dictate the outcome for the vast majority of cases is the tail wagging the dog. The spectre raised of banks entering into possession under mortgages is unrealistic, given that all the major banks have committed to the Council of Mortgage Lender's statement of practice requiring lenders to obtain possession in one of three ways: (i) court order, (ii) voluntary agreement or (iii) surrender by the borrower. Residential lenders are regulated by the Financial Conduct Authority, by reference to the *Mortgages and Home Finance: Conduct of Business Sourcebook*, which proceeds on the basis that repossession will be "legal or voluntary". As a point of principle, the assumption that private landlords taking the law into their own hands would be in a different position as regards the tenant's right to invoke Art. 8 in proceedings brought against them appears to be incorrect. The mere fact that some landlords have to bring possession proceedings cannot make the difference: see *A v United Kingdom* (above), a point referred to by Lord Neuberger at para. 44. Thus, if a tenant can defend possession proceedings on the basis of Art. 8, he can also bring an injunctive claim to restrain a disproportionate eviction.

(6) *Accepting the tenant's argument would involve diluting consistency of application and certainty of outcome, two essential ingredients in the rule of law.*

51. It seems odd to suggest that conferring on a court a residual remedial discretion to refuse to evict a person from his home in exceptional circumstances, when to do so would cause disproportionate hardship, would undermine the rule of law. Analogous discretions are commonplace in our private law, for example, in relation to equitable remedies, and a proportionality test forms a familiar part of judicial decisions across a range of subject matter (including whether the publication of private information renders a newspaper liable to pay damages). It might also be said that modern democracies need a thriving free press as much as a buoyant housing market; and that the editor of a national newspaper is as much in need of legal certainty as a commercial landlord.

(7) *The Strasbourg case law did not support the extension of Pinnock to private sector tenants.*

52. Each of the following cases concerned eviction orders made at the suit of a private owners: *Belchikova v Russia* (Application No. 2408/06) 25 March 2010; *Buckland v United Kingdom* (2013) 56 EHRR 16; *Brežec v Croatia* [2014] HLR 3; *Berger-Krall v Slovenia* (Application No. 14717/04) 12 June 2014; *Lemo and others v Croatia* (Application No.

3925/10) 10 July 2014; and *Budimir v Croatia* (2016) 62 EHRR SE11. In each of these cases the Strasbourg Court decided that a domestic court's eviction order was (or, in *Budimir*, would have been) an interference by a public authority with Art. 8. When determining whether such interference was "necessary in a democratic society", Strasbourg applied the principle established in *McCann* (para. 50), holding that the occupier had an in principle right to a proportionality determination, notwithstanding that his rights of occupation had come to an end. Taken together, these cases represent a total of 30 judges of the European Court of Human Rights, in 36 judicial opinions, who have decided that the *McCann* principle applies to eviction orders made in private possession proceedings.

53. However, Lord Neuberger was undoubtedly right to point out at paras 53–54 that, in several of these cases, the states appearing before the Strasbourg Court did not contest that *McCann* applied to private eviction cases. Indeed, I would go further: in none of them was a principled argument addressed to the court that Art. 8 should be applied differently in private sector eviction cases.

54. I would suggest that a principled point of distinction is as follows. In a public sector eviction case, the state is seeking possession of the land, occupied as someone's home, for its own purposes. That is a true case of state "interference" within Art. 8 (2). When a court makes a possession order to give effect to a private landlord's civil rights, it is not "interfering" with Art. 8 rights at all. The terms of Art. 8 themselves indicate that a more intrusive approach to proportionality may be required to justify state interference with negative Art. 8 rights. This is a different exercise from determining the compatibility of private law with the positive right to respect for the home in Art. 8(1).

## Conclusion

55. At the end of the day, the Supreme Court did not find the above line of Strasbourg case law reason enough to hold that Art. 8 confers a right to an individual proportionality assessment on private sector tenants facing eviction from their homes. This would represent a significant alteration of our domestic law operating in the private sector, cut across government policy in relation to the housing market and impinge on the long-established domestic approach to the vindication of property rights. Collectively, these are powerful reasons for being resistant to changing the law.

56. The standoff between our highest court and Strasbourg starting with *Qazi* served a legitimate purpose: it sparked a dialogue between our domestic courts and the Strasbourg Court, which led ultimately to the Supreme Court accepting Strasbourg's reasoned determination of the position in relation to public sector evictions. Given that the Supreme Court also found at para. 76 that the most Ms McDonald could hope for from a proportionality assessment was a possession order in six weeks'

time, *McDonald* itself is unlikely to provide an opportunity for Strasbourg to respond in relation to private sector evictions.

57. However, there are already signs that a debate may have been triggered in Strasbourg. *Vrzić v Croatia* [2016] ECHR 642 was a mortgage repossession case. The Strasbourg Court said this (paras 66–67):

> "In [a line of cases against Croatia following *McCann*], as well as in the above-cited case of *McCann*, the Applicants were living in state-owned or socially-owned flats and an important aspect of finding a violation was the fact that there was no other private interest at stake. Furthermore, the Applicants in those cases had not signed any form of agreement whereby they risked losing their home.
>
> The situation in the present case is different inasmuch as the other parties in the enforcement proceedings were either a private person, namely M.G., or private enterprises, namely a bank and a company. The case law of the Convention organs suggests that the approach in such cases is somewhat different and that a measure prescribed by law with the purpose of protecting the rights of others may be seen as necessary in a democratic society … "

58. In this context, at paras 71–73, the Strasbourg Court concluded that the fact that the applicants had signed a contract agreeing to the sale of their home, if they did not repay the secured debt, was "sufficient to enable the court to conclude that there has been no violation of art. 8 of the Convention".

59. If this approach is followed in other Strasbourg cases, then this time around there will be no basis for asking the Supreme Court to change its mind.