FJM v United Kingdom: The Taming of Article 8?

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INTRODUCTION

Both domestic and Strasbourg jurisprudence make it clear that, where a social landlord seeks their tenant's eviction, the right to respect for the home in art.8 of the ECHR accords the resident occupier a right to have the proportionality of that eviction assessed by a court.[1] The key question for the Strasbourg Court in *FJM*[2] was whether this procedural dimension to art.8 also applies where a private party seeks an eviction.

FJM was the assured shorthold tenant of a house owned by her parents in Witney, Oxfordshire. FJM's parents bought the property in order to provide her with a home as her severe long-term behavioural and psychiatric problems had left her without accommodation and unable to work. FJM was granted a series of assured shorthold tenancies (ASTs) and the rent owed was paid through her housing benefit. However, the parents fell into arrears and could not repay the loan when the monies fell due. The appointed receivers subsequently tolerated FJM's occupancy for a period, before serving her with a s.21 notice approximately three years after the fixed-term of her last AST lapsed.

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[1] *McCann v United Kingdom* (19009/04) (2008) 47 E.H.R.R. 40, [50]; *Kay v United Kingdom* (37341/06) (2012) 54 E.H.R.R. 30 [68]; *Manchester City Council v Pinnock* [2010] UKSC 45; [2011] 2 A.C. 104 [49].

[2] *FJM v United Kingdom* (76202/16) [2019] H.L.R. 8.

S.21 of the Housing Act 1988 regulates court orders for possession in respect of expired or terminated assured shorthold tenancies of dwelling-houses. FJM had an assured periodic shorthold tenancy at the time the notice was served and therefore s.21(4) dealt with her case. S.21(4) is mandatory provision, requiring courts to order possession where a landlord has served a notice in accordance with its terms.

FJM complained that her inability to raise any human rights-based defence to possession proceedings breached her Convention rights. She also argued that, in her case, a possession order was *in fact* a disproportionate breach of those rights. In *McDonald*, the domestic iteration of the case, both the Court of Appeal[3] and the Supreme Court[4] gave short shrift to these arguments. FJM applied to the ECtHR, hoping it would be more sympathetic to her plight.

DOMESTIC CASE HISTORY

FJM's argument before the domestic courts involved three sequential steps. First, FJM contended that art.8 entitled her to have the proportionality of her eviction assessed by the court making the possession order. While all three domestic courts apparently conceded art.8's engagement (thus accepting the "applicability"[5] element to this submission),[6] they nonetheless concluded that a proportionality assessment was not required in the private eviction context as existing authorities failed to

[3] *McDonald v McDonald* [2014] EWCA Civ 1049; [2015] Ch 357. Before this court FJM also put forward the argument that the appointed receivers were not permitted to serve a s.21 notice, see [61]-[65]. This ground was abandoned in subsequent appeals.
[4] *McDonald v McDonald* [2016] UKSC 28; [2017] AC 273.
[5] Borrowing Amy Goymour's language: see A. Goymour, "Property and Housing" in D Hoffmann (ed), *The Impact of the UK Human Rights Act on Private Law* (CUP, 2011), p.251.
[6] *McDonald* [2016] UKSC 28 [59] (although with some reluctance); *McDonald* [2014] EWCA Civ 1049 [12]. Cf Arden LJ's later reliance on *Di Palma v United Kingdom* (1986) 10 E.H.R.R. 149 where the Commission concluded A1P1 was not engaged at [36].

establish such a right.[7] In other words, there was no breach on "compatibility" grounds.[8] Lord Neuberger and Lady Hale, giving the Supreme Court's unanimous judgment, took their analysis one step further, providing reasons why no proportionality assessment was needed "as a matter of principle"[9] under the Convention.[10] Significantly, several of these reasons – the presence of a contractual relationship and relevant legislation weighing the parties' conflicting A1P1 and art.8 rights – were seized upon by the Strasbourg Court when the point was re-argued in *FJM*.[11]

As FJM failed to overcome step one, there was strictly no need for the domestic courts to consider the remaining steps. FJM's second contention was that the Human Rights Act 1998 enabled the 1988 Act to be read in such a way as to accommodate her proportionality claim, notwithstanding the mandatory nature of section 21(4).[12] Neither the County Court nor the Court of Appeal addressed this point, while the Supreme Court gave the *obiter* opinion that the 1988 Act's limits precluded such a conclusion.[13]

Finally, FJM argued that an order for possession was disproportionate on the facts of her case. FJM's psychiatrist's evidence stood in her favour. He contended that upon eviction there was "a significant possibility that she would become homeless",[14] likely "requiring admission to hospital" given the impact on her mental health.[15]

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[7] *McDonald* [2016] UKSC 28 [59]; *McDonald* [2014] EWCA Civ 1049 [45], see also [17] for discussion of the trial judge's reasoning.
[8] Again, using Goymour's language: A. Goymour, "Property and Housing" in *The Impact of the UK Human Rights Act on Private Law* (2011), p.5.
[9] *McDonald* [2016] UKSC 28 [47].
[10] *McDonald* [2016] UKSC 28 [40]-[46].
[11] *FJM* [2019] H.L.R. 8 [42].
[12] Relying on the Human Rights Act 1998 ss.3 and 6.
[13] *McDonald* [2016] UKSC 28 [70].
[14] *FJM* [2019] H.L.R. 8 [7].
[15] *McDonald* [2016] UKSC 28 [7].

Even if alternative accommodation were sourced, "harm to herself or suicide" and "violence towards others" remained possibilities.[16] This evidence helped to convince the first-instance judge that, were he allowed to assess proportionality, an order would be disproportionate.[17] The Court of Appeal and the Supreme Court decided otherwise, emphasising the rarity of instances where a possession order is disproportionate *per se* in light of the strong A1P1 rights of landlords and interested third parties such as lenders.[18]

STRASBOURG DECISION

The Strasbourg Court began its assessment of the complaints by restating familiar principles. It reiterated that, while "it is for national authorities to make the initial assessment of necessity" who in turn "enjoy a margin of appreciation", it retains the final say on compliance.[19] The Court repeated its statement in *McCann* that "the loss of one's home is the most extreme form of interference with right to respect for the home" and, as such, "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" (the *McCann* principle).[20]

Nonetheless, the Court ultimately concurred with the domestic authorities: FJM could not use the Convention to challenge her eviction. The Court's finding was

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[16] *McDonald* [2016] UKSC 28 [7].
[17] *McDonald* [2014] EWCA Civ 1049 [46].
[18] *McDonald* [2014] EWCA Civ 1049 [47]-[53], *McDonald* [2016] UKSC 28 [72]-[75]. See also *Europa Oil & Gas Ltd v Persons Unknown* [2017] EWHC 403 (Ch); [2017] 1 WLUK 346, at [16], applying *McDonald*: "the balance against protection under Article 8 firmly falls in favour of a land-owner… [art.8] could not possibly trump those rights".
[19] *FJM* [2019] H.L.R. 8 [33]-[34].
[20] *FJM* [2019] H.L.R. 8 [36], citing *McCann* (2008) 47 E.H.R.R. 40 [50].

primarily based on its previous judgment in *Vrzic*,[21] another private eviction case. After suggesting that the *McCann* principle had "primarily been applied in cases where applicants had been living in state-owned or socially-owned accommodation",[22] the Court contended that *Vrzic* "expressly acknowledged, for the first time," that it "did *not automatically* apply in cases where possession was sought by private individual or enterprise".[23] Any statements to the contrary were, apparently, "clarified" by that more recent pronouncement.[24]

The Court elaborated that eviction proceedings brought by private persons are "distinguishable" from evictions initiated by public bodies because the latter involve private property rights.[25] In a passage echoing the Supreme Court, it stated that such claims are distinct because "two private individuals or entities have entered voluntarily into a contractual relationship in respect of which the legislature has prescribed how their respective Convention rights are to be respected".[26] In its view, therefore, "the balance between the interests of the private individual … and the residential occupier could be struck *by legislation*".[27]

The Court found that FJM's occupancy was regulated by a contractual relationship, which implicitly incorporated the 1988 Act's regulation of how and when her possession could be ended.[28] It also determined that the 1988 Act "reflects the State's assessment of where the balance should be struck between the art.8 rights of residential tenants and the art.1 of Protocol No.1 rights of private sector landlords".[29]

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[21] *Vrzic v Croatia* (43777/13) (2018) 66 E.H.R.R. 30.
[22] *FJM* [2019] H.L.R. 8 [37].
[23] *FJM* [2019] H.L.R. 8 [41] (emphasis added).
[24] *FJM* [2019] H.L.R. 8 [39].
[25] *FJM* [2019] H.L.R. 8 [40].
[26] *FJM* [2019] H.L.R. 8 [42].
[27] *FJM* [2019] H.L.R. 8 [41] (emphasis added).
[28] *FJM* [2019] H.L.R. 8 [43].
[29] *FJM* [2019] H.L.R. 8.

It accepted the Supreme Court's analysis that the "the authorities had regard … to the general public interest in reinvigorating the private residential rented sector" (i.e. was pursuing a legitimate aim), and that this was "best achieved through contractual certainty and consistency in the application of the law" (i.e. was necessary in a democratic society).[30] In any event, the Court noted the domestic law accords tenants some protection from eviction as enforcement action can be postponed for up to six weeks in cases of "exceptional hardship".[31]

COMMENT

The Court's reasoning in *FJM* is beguiled by its unsatisfactory treatment of authorities. Whilst it recognised that it had previously expressed a general principle that those facing eviction should have the opportunity to have the proportionality of that measure assessed by a court,[32] the Court instead relied on a single contrary authority[33] disapplying this principle in 'private landlord' cases.[34] Thus, the Court framed the precedent as clear and its overall conclusion self-evident: the cases have never applied the established principles to those facing private eviction, so the applicant loses. In fact, the Court was so confident that *FJM* was an 'easy' case that gave its answer in the format of a 'Decision': a species of ECtHR output with abridged reasoning short of a full judgment. This format is usually used to filter out applications which fail to comply with the Court's procedural rules.[35] However, and

[30] *FJM* [2019] H.L.R. 8.
[31] *FJM* [2019] H.L.R. 8 [44].
[32] see e.g. *Connors v United Kingdom* (66746/07) (2005) 40 E.H.R.R. 9; *McCann* (2008) 47 E.H.R.R. 40; *Kay* (2012) 54 E.H.R.R. 30.
[33] *Vrzic* (2018) 66 E.H.R.R. 30.
[34] *FJM* [2019] H.L.R. 8, 40-42.
[35] e.g. falling foul of time limits, or failing to exhaust domestic remedies: art.35 ECHR.

more controversially,[36] a Decision may be used to deal with "manifestly ill-founded"[37] cases where the merits are seemingly so self-evidently hopeless that the claim "does not disclose any appearance of a violation of the rights guaranteed by the Convention".[38] Apparently, *FJM* was such a case.

This is surprising. *FJM* raises a controversial and salient point about the Convention's operation in a novel area.[39] The appeal came from a seven-member panel of the Supreme Court. Most importantly, *FJM* raises more complex issues than the Court acknowledged. Its characterisation of the case as a straightforward application of settled principles is simply unfaithful to the reality of the case law (indeed, the domestic proceedings were littered with references to the uncertain Strasbourg position).[40] *FJM* presented an ideal opportunity for the Court to authoritatively resolve these highly-contested issues. Instead, a dubiously-reasoned Decision was given which failed to properly consider relevant authorities and misconstrued those it did cite.

i. Failure to consider relevant authorities

[36] see e.g. J. Gerhards, "Inadmissibility Decisions of the European Court of Human Rights: A Critique of the Lack of Reasoning" (2014) 14(1) H.R.L.R. 148, 153-158.
[37] art.35(3) ECHR.
[38] European Court of Human Rights, "Practical Guide on Admissibility Criteria" (31 December 2018), *echr.coe.int, https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf* [Accessed 16 March 2019], pp. 59 and 61.
[39] The Jurisconsult believes that the case is "of jurisprudential interest" because it involves the "regulation of the private rental sector": "Annual Report 2018 of the European Court of Human Rights, Council of Europe" (2018), *echr.coe.int, https://www.echr.coe.int/Documents/Annual_report_2018_ENG.pdf* [Accessed 16 March 2019], p. 39.
[40] e.g. *McDonald* [2014] EWCA Civ 1049 [24]-[25].

As Nield has noted in this journal,[41] the *McCann* principle appears, on its surface, to be without qualification, holding that "*any* person" facing eviction should be able to have the proportionality of that action assessed.[42] Given that a majority of tenancies across Europe are private,[43] the application of this principle to such arrangements is surely a tenable insinuation. More concretely, the Court has e*xpressly* required the proportionality of an eviction to be assessed in numerous cases involving two private parties. Such cases have concerned enforced sale and seizure of the home to satisfy private debts,[44] eviction and sale of property by an ex-partner,[45] demolition of a house on a co-owned plot of land,[46] eviction from a housing co-operative,[47] and straightforward evictions from private property.[48] In these cases, the Court stressed not only the relevance of the *McCann* principle,[49] but that cases should be examined carefully (on a "case by case" basis),[50] reasons should normally be provided[51] and parties must be able to "participate effectively" in proceedings.[52] Thus, in a number

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[41] S. Nield, "Shutting the door on horizontal effect: McDonald v McDonald" [2017] 1 Conv. 60, 67

[42] See e.g. *Buckland v United Kingdom* (40060/08) (2013) 56 E.H.R.R. 16 [65]; *Lemo v Croatia* (3925/10) unreported 10 July 2014 [40]. The formulation is repeated in *FJM* itself: *FJM* [2019] H.L.R. 8 [36].

[43] In 2018 19.9% of the EU's population rented at a market price, while 10.8% were tenants with reduced-rent or free accommodation: Eurostat, "Housing Statistics" (May 2018), *ec.europa.eu, https://ec.europa.eu/eurostat/statistics-explained/index.php/Housing_statistics#Tenure_status* [Accessed 16 March 2019].

[44] *Zehentner v Austria* (20082/02) (2011) 52 E.H.R.R. 22; *Rousk v Sweden* (27183/04) unreported 25 July 2013.

[45] *Zrilić v Croatia* (46726/11) unreported 3 October 2013.

[46] *Ivanova v Bulgaria* (46577/15) (2017) 65 E.H.R.R. 20.

[47] *Sagvolden v Norway* (21682/11) unreported 20 December 2016.

[48] *Brežec v Croatia* (7717/10) [2014] H.L.R. 3; *Lemo* (3925/10) unreported 10 July 2014; *Belchikova v Russia* (2408/06) unreported 25 March 2010; *Mustafa v Sweden* (23883/06) (2011) 52 E.H.R.R. 24 (an art.10 case that is applicable in the current context).

[49] *Brežec* [2014] H.L.R. 3 [45]; *Zrilić* (46726/11) unreported 3 October 2013 [65]. Indeed, often the Court simply imports the jurisprudence of the public eviction cases: see e.g. *Sagvolden* (21682/11) unreported 20 December 2016 [139].

[50] *Ivanova* (2017) 65 E.H.R.R. 20 [54]

[51] *Ivanova* (2017) 65 E.H.R.R. 20 [53].

[52] *Zehentner* (2011) 52 E.H.R.R. 22 [65]

of instances, a breach of art.8 was found where the eviction was not, or could not be, reviewed in this manner.[53]

However, worryingly, most of these authorities were not acknowledged in *FJM*,[54] never mind clearly and thoughtfully distinguished. The most attention was given to *Brežec*,[55] with the Court making an underdeveloped suggestion that it turned on its particular facts (notably that the property had been owned and managed by the state for many years before privatisation).[56]

Instead, the Court relied on a handful of cases supporting the conclusion that a proportionality assessment was *unnecessary* in the present context. For example, the Court has decided certain cases in a way that seems to suggest that states may bear no responsibility for ensuring the Convention-compliance of purely private relationships, even if the arrangements regulating those relationships are enforced through a court.[57] In addition, one judge has explicitly stated, albeit in a concurring opinion which was not joined by his colleagues, that a proportionality assessment "shouldn't come into the equation" in private evictions.[58] But these authorities neither constitute an established line of case law, nor carry the weight attributed to them in *FJM*. They *certainly* do not justify disposing of the case at the Decision stage.

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[53] *Brežec* [2014] H.L.R. 3 [50]-[51]; *Lemo* (3925/10) unreported 10 July 2014 [45]; *Ivanova* (2017) 65 E.H.R.R. 20 [58], [61]-[62]. cf *Zrilić* (46726/11) unreported 3 October 2013 [66]-[68] and *Belchikova* (2408/06) unreported 25 March 2010.

[54] Beyond *Brežec*, a small number are recognized in *FJM* [2019] H.L.R. 8, [37]-[38]: *Zehentner* (2011) 52 E.H.R.R. 22, *Rousk* (27183/04) unreported 25 July 2013, *Ivanova* (2017) 65 E.H.R.R. 20.

[55] *Brežec* [2014] H.L.R. 3.

[56] *FJM* [2019] H.L.R. 8 [38]. Yet in *Brežec* the Court acknowledged the flats had been privately owned for a significant period prior to the eviction: *Brežec* [2014] H.L.R. 3 [48].

[57] *Di Palma* (1986) 10 E.H.R.R. 149, 210; *Kotov v Russia* (54522/00) unreported 3 April 2012 [90].

[58] *Buckland* (2013) 56 E.H.R.R. 16, per Judge De Gaetano.

ii. Misconstruction of existing authority

Rather than attempting to reconcile these disparate authorities, the Court simply says that the law has been "clarified"[59] by its more recent pronouncement in *Vrzic*.[60] But the Court's treatment of that case is also deeply flawed. *Vrzic* is treated as authority for the proposition that an individual proportionality assessment is *never* required in private eviction cases.[61] On the contrary, the Court in *Vrzic* simply said that an obligation to conduct an individual proportionality assessment would not arise "automatically" in cases between private parties.[62] It said that private evictions might be "different" from those initiated by the state,[63] but this is largely due to the weight of the additional (private) interests in play, including A1P1. The fact that the case involved private parties was "an important aspect"[64] of its evaluation, but there was no suggestion that this was definitive. As such, *Vrzic* leaves room for the possibility that, in certain private landlord cases, an obligation to conduct an individual proportionality assessment might indeed arise, where the facts are such that applicant's private life rights would outweigh even the very significant property rights of the landlord. In *Vrzic*, it was the facts of the particular case, including the amount of debt owed and the behaviour of the parties which led to the Court finding that no proportionality assessment was required.[65]

This exercise did not occur in *FJM*. Instead, the Court moved beyond *Vrzic*, suggesting that the distinction between evictions sought by private landlords and

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[59] *FJM* [2019] H.L.R. 8 [39]. See further "Annual Report 2018 of the European Court of Human Rights, Council of Europe", p.108.
[60] Note that in *Vrzic*, the Court erroneously considered *Brežec* to involve an eviction from state-owned property: see *Vrzic* (2018) 66 E.H.R.R. 30 [66].
[61] *FJM* [2019] H.L.R. 8 [43].
[62] *FJM* [2019] H.L.R. 8 [41].
[63] *Vrzic* (2018) 66 E.H.R.R. 30 [67].
[64] *Vrzic* (2018) 66 E.H.R.R. 30 [66].
[65] *Vrzic* (2018) 66 E.H.R.R. 30 [69]-[72]. This approach fits with that taken in *Kotov* (54522/00) unreported 3 April 2012 [109]-[113]

those sought by public bodies "runs deeper"[66] than previously appreciated. The Court said:

> "What sets claims for possession by private sector owners against residential occupiers apart is that the two private individuals or entities have entered voluntarily into a contractual relationship in respect of which the legislature has prescribed how their respective Convention rights are to be respected… [i]f the domestic courts could override the balance struck by the legislation in such a case, the Convention would be directly enforceable between private citizens so as to alter the contractual rights and obligations that they had freely entered into."[67]

Thus, FJM lost not because the private law rights of her landlords outweighed her individual art.8 rights, but because that balancing exercise is, seemingly, impermissible under the Convention's structure. This move not only artificially construes *Vrzic,* treating it, unfairly, as prohibiting any judicial oversight whatsoever, but also re-frames what was a question of fact ('do the interests at stake in the private relationship warrant a proportionality assessment?') into a pure question of law ('is there a private relationship which automatically forecloses a proportionality assessment?'). Thus, even if it can be said that *Vrzic* constitutes the prevailing Strasbourg authority, the Court left it behind in *FJM*.

iii. Problematic substantive reasoning: horizontal effect

In order to make the move past *Vrzic* the Court relied a concern that the Convention would have direct horizontal effect. This reasoning merits close scrutiny.

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[66] *FJM* [2019] H.L.R. 8 [42].
[67] *FJM* [2019] H.L.R. 8 [42].

Horizontal effect concerns the scope of the Convention's *application*. In brief, the Convention does not directly apply in disputes exclusively between private parties as state responsibility is not engaged.[68] Given that questions of *compatibility* do not arise if the Convention has no application, the question of applicability should be a distinct, logically prior, issue. In *FJM*, the Court implicitly assumed that the eviction order interfered with FJM's art.8(1) rights.[69] This should have ended arguments as to applicability, with the remainder of the case considering *compatibility* arguments. However, these two issues were elided, causing the Court's overall conclusion to be shaped by fundamentally inconsistent arguments.

On the one hand, Convention compatibility was considered to be maintained by the balance struck between the art.8 rights of tenants and the A1P1 rights of landlords in s.21(4) of the 1988 Act. On the other, the Court was concerned that FJM's argument would render the Convention "directly enforceable between private citizens"[70]: an (apparently[71]) impermissible species of horizontal effect. If the Convention did not apply, why did the Court bother discussing the 1988 Act's compatibility and frame the question in these terms? Equally, if the Convention did apply, why was an argument relating to the *admissibility* of the complaint allowed to influence its conclusion on the *compatibility* issues it raised? Either the Convention was inapplicable to the current case, rendering cases on compatibility such as *Vrzic*

[68] see e.g. *Di Palma* (1986) 10 E.H.R.R. 149, 210.
[69] The Court has previously confirmed that an eviction order has this effect: *Vrzic* (2018) 66 E.H.R.R. 30 [59].
[70] *FJM* [2019] H.L.R. 8 [42].
[71] It is clear that some manifestations of "horizontal effect" are not so impermissible. For example, domestic courts have developed common law causes of action in disputes between two private parties: *Fearn v Board of Trustees of the Tate Gallery* [2019] EWHC 246 (Ch); Times, March 07, 2019 [170]-[178].

totally irrelevant, or it was applicable, rendering the court's strained gloss on *Vrzic* a pointless addition.[72]

Related to this point is the questionable role played by contractual agreements. FJM's lease was the device used to introduce the horizontal effect point. While it seems safe to say that a contractual agreement affects the Convention's application in the A1P1 context,[73] it is less clear whether the same argument holds true in art.8 cases. Unlike the right to protection of property, which is necessarily shaped by any contract creating that proprietary entitlement, art.8 protects our interests in the home – a "factual state of affairs"[74] which is notoriously alien to traditional property law reasoning and rhetoric.[75] Given that art.8 is not dependent on a proprietary entitlement existing,[76] it is hard to see why a contract – a property law device – can be used to exclude the protection it offers. Surely the contract's proper place, consistent with case-law in the social housing context,[77] is as *a* weighty consideration in a proportionality assessment.

Let us consider the agreement actually made by this tenant, described by the court as "freely entered into".[78] Although the validity of FJM's lease was never questioned on the ground of incapacity,[79] it seems unlikely that she was aware of its finer details. Moreover, given her previous housing history, she was also largely dependent on

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[72] For a related argument see E. Lees, "Article 8, proportionality and horizontal effect" [2017] L.Q.R. 31, 32.
[73] See A. Goymour, "Property and Housing" in *The Impact of the UK Human Rights Act on Private Law* (2011), p.279.
[74] Lees, "Article 8, proportionality and horizontal effect" [2017] L.Q.R. 31, 35.
[75] R. Walsh, "Stability and Predictability in English Property Law – the Impact of Article 8 of the European Convention on Human Rights Reassessed" [2015] L.Q.R. 586, 607.
[76] *McCann* (2008) 47 E.H.R.R. 40 [46]; *Chapman v United Kingdom* (27238/95) (2001) 33 E.H.R.R. 18 [102].
[77] *Pinnock* [2010] UKSC 45 [52]; *Hounslow LBC v Powell* [2011] UKSC 8; [2011] 2 AC 186 [80].
[78] *FJM* [2019] H.L.R. 8, [42].
[79] For the effect of incapacity on a contract see: *Imperial Loan Co Ltd v Stone* (1892) 1 QB 599, 601.

the support offered by parents. To say that a valid contract limits Convention protection (the court's effective conclusion) is to effectively sweep any details as to the *quality* of that consent under the rug. Surely such considerations ought to be relevant to a proportionality assessment if concluded? Unfortunately, the move in *FJM* signals a triumph of form over substance.

Finally, FJM's particular circumstances return us to horizontal effect. Even accepting that horizontal effect was relevant, the Court's treatment of it was overly simplistic. It is at least arguable that the domestic court in *FJM* was not some passive conduit for the private parties' actions.[80] Since national courts are emanations of the state,[81] the state retains at least a peripheral role in the enforcement of private eviction orders. As Lees puts it, "[i]f a court order is sought, it is enforced by the state".[82] This idea was simply not examined.

Equally, the idea that the UK may have been under a positive obligation to safeguard FJM's art.8 rights from an interference by a private party went underexplored.[83] Nield has highlighted the relevance of "intermediate horizontality"[84] to FJM's case and the failure of the domestic courts to give serious consideration to this species of horizontal effect. Positive obligations can both expand the scope of the Convention's application and increase the intensity of

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[80] This idea prevailed in the old case of *Di Palma* (1986) 10 E.H.R.R. 149. Yet in *Zrilić* (46726/11) unreported 3 October 2013 the state made exactly this argument ([54]) and failed.
[81] see e.g. Human Rights Act 1998 s.6.
[82] Lees, "Article 8, proportionality and horizontal effect" [2017] L.Q.R. 31, 32. see *Zrilić* (46726/11) unreported 3 October 2013 [63]: an "inevitable interference" even when upholding settlement.
[83] See Nield, "Shutting the door on horizontal effect: McDonald v McDonald" [2017] 1 Conv. 60, 68.
[84] ibid.

protection offered thereunder.[85] They exist because of the state's obligation to secure the ability of *every individual* to effectively exercise their Convention rights.

Previous Strasbourg jurisprudence has justified the imposition of positive obligations with reference to the particular vulnerability of the applicant.[86] While the Court explicitly recognized FJM's particular vulnerability,[87] it failed to consider this vulnerability in its analysis of horizontal effect. Peroni and Timmer have highlighted how vulnerability can affect how a proportionality assessment should be conducted.[88] Might it not also be relevant to the question of whether a proportionality assessment was procedurally required under the Convention?[89] These issues could and should have been explored in *FJM*. Instead, the court's treatment of the applicant's vulnerability was merely cursory.

CONCLUSION

FJM is both procedurally and substantively an unsatisfying case. But what are its broader implications for principle and practice? Here, as with *Vrzic*, the Strasbourg Court was prepared to allow "property values"[90] of "certainty", "consistency" and "agreement" to shape its conclusions on the Convention's operation. If the advent of

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[85] L. Peroni and A. Timmer, "Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law" [2013] I.J.C.L. 1056, 1076-1080.
[86] See e.g. *Zehentner* (2011) 52 E.H.R.R. 22 [63]; *Yordanova v Bulgaria* (25446/06) unreported 24 April 2012 [130]; at the domestic level, the Supreme Court has said that "proportionality is more likely to be a relevant issue" where an occupant is vulnerable: *Pinnock* [2010] UKSC 45 [64].
[87] *FJM* [2019] H.L.R. 8 [3].
[88] Peroni and Timmer, "Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law" [2013] I.J.C.L. 1056, 1079-1080 relying on *Yordanova* (25446/06) unreported 24 April 2012 at [129].
[89] In support see e.g. *Connors* (2005) 40 E.H.R.R. 9 [84].
[90] L. Fox O'Mahony, "Property Outsiders and the Hidden Politics of Doctrinalism" (2014) 67 C.L.P. 409, 411.

the Human Rights Act and the art.8 eviction cases culminating in *Pinnock* suggested that the Convention might change property law reasoning,[91] *FJM* seems to indicate that in the long-term the opposite may be true. The lasting impact may be of property law on human rights thinking, not the other way around.

More practically, what, if any, is the next move for future tenants like FJM who are experiencing vulnerability and face private eviction proceedings? One avenue would be challenge the underlying validity of the lease at the possession stage on the ground of incapacity. Of course, this course of action would come with its own problems – establishing the cause of action, overcoming any bars to rescission, and indeed showing that the Convention applies in this context. Alternatively, an eviction could be challenged under the Equality Act, but this avenue will only be open if the eviction raises discrimination on the grounds of disability. It is not clear how that point could have arisen in a case like the present. In terms of the ECHR, however, it seems that neither the Supreme Court nor Strasbourg Court show a particularly strong appetite for such a challenge.

[91] See Walsh, "Stability and Predictability in English Property Law – the Impact of Article 8 of the European Convention on Human Rights Reassessed" [2015] L.Q.R. 586, 602-603; S. Bright, "Manchester City Council v Pinnock (2010): Shifting Ideas of Ownership of Land" in N. Gravells (ed), *Landmark Cases in Land Law* (Hart, 2013), p.274; S. Nield, "Article 8 Respect for the Home: A Human Property Right" (2013) 24 K.L.J. 147, 169-171.