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Horizontality and Housing Rights

Protection against Private Evictions from a European and South African Perspective

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Abstract

In the recent decision of *FJM* v. *the United Kingdom*, the ECtHR made a decision on the required protection against private evictions that threatens to water-down the protection of housing rights offered by the ECHR. This article sets out to determine the effect of the *FJM* judgment on the protection provided by Article 8, especially in matters concerning private evictions. The analysis of the case includes a discussion on whether the decision of the ECtHR was correct, considering both its previous decisions, as well as the SA Constitutional Court's findings in similar matters. It analyses the recent European and South African case law with the help of a number of concepts developed in legal theory. These concepts concern vertical and horizontal relations between actors involved in housing law cases, as well as direct and indirect effect of human and constitutional rights.

Keywords

eviction – housing – horizontal effect – vertical effect – right to housing – ECHR – South African Constitution

1 Introduction

The law is essential to protect people against homelessness and eviction. Recent research shows that the level of protection against eviction varies in each country, but that some jurisdictions offer significantly more protection than others.[1] South Africa and the Member States of the Council of Europe seem to be among the frontrunners with respect to the level of protection provided. In 2017, Fick and Vols published an article comparing the protection against eviction offered by Article 8 of the European Convention on Human Rights ("the ECHR") and Article 26 of the South African Constitution ("the SA Constitution").[2] They found that the protections offered by both instruments were quite similar, offering comparable procedural and substantive protection.[3] However, the interpretation and approach of the courts towards the procedural and substantive protection seemed to differ.[4] The European Court on Human Rights ("the ECtHR") seemed more hesitant to find that Article 8 of the ECHR had been violated.[5] Conversely, the South African Constitutional Court's interpretation and approach seemed to strengthen the protection offered by the SA Constitution.[6] This resulted in a finding that the protection offered by the SA Constitution was stronger than that of the ECHR due to how the rights were applied by the court.

Yet, four years after the publication of this article, there is a clear need for further analysis. This is due to the case of *FJM* v. *the United Kingdom* ("*FJM*"),[7] in which the ECtHR made a decision on the required protection against private evictions that confirms the earlier finding regarding the court's hesitance and threatens to water-down even more the protection offered by the ECHR. We consider it necessary to determine the effect of this judgment on the protection provided by Article 8 ECHR, especially in matters concerning private evictions. Our analysis of the case also includes a discussion on whether the decision of

1 See M. Vols, A.C. Belloir, M. Hoffmann, and A.J. Zuidema, 'Common trends in eviction research: a systematic literature review', in: M. Vols and C.U. Schmid (Eds), *Houses, Homes and the Law* (The Hague: Eleven Publishing 2019) 1 at 1–88; M. Vols and E.D. Kusumawati, 'The International Right to Housing, Evictions and the Obligation to Provide Alternative Accommodation', *Asia-Pacific Journal on Human Rights and the Law* 21(2) (2020) 237 at 237–269.

2 S. Fick and M. Vols, "Best protection against eviction? A comparative analysis of protection against evictions in the European Convention on Human Rights and the South African Constitution", *European Journal of Comparative Law and Governance* 3(1) (2016) 40–69.

3 Fick and Vols supra note 2 at 62–65.

4 Fick and Vols supra note 2 at 62–65.

5 Fick and Vols supra note 2 at 68.

6 Fick and Vols supra note 2 at 68.

7 76202/16.

the ECtHR was convincing, considering both its previous decisions, as well as the SA Constitutional Court's findings in similar matters. The decisions of the SA Constitutional Court are valuable since, as explained, the protection offered in the text of the ECHR and the SA Constitution are similar.

As indicated, we will focus our analysis on private evictions, meaning the permanent or temporary removal of individuals, families or communities from their homes against their will on instigation of private individuals or organisations (e.g., landlords, other property-owners or banks). Private evictions differ from public evictions, because in the latter case the removal is initiated by state authorities (e.g., local authorities or the police). Although state authorities can be involved in the ordering, checking or execution of private evictions, the main difference between private and public evictions is that the former are initiated by private actors and the latter by public actors.

This paper will present the results of a comparative analysis of European and South African law.[8] Yet, the character and structure of the analysis differs from the Fick and Vols article published in 2016. In this paper, we will analyse the recent European case law with the help of a number of concepts developed in legal theory and compare the European approach with approaches taken by South African courts. The theoretical concepts used in this paper concern vertical and horizontal relations between actors involved in housing law cases, as well as direct and indirect effect of human and constitutional rights. We will describe these concepts in more detail in section 4. Before this, we will first provide a brief overview of the findings made in the previous analysis comparing the protections against evictions under the ECHR and the SA Constitution (section 2), as well as discuss the facts and findings of the ECtHR's *FJM* decision (section 3). Subsequently, the aforementioned theoretical concepts are discussed (section 4). Thereafter, the article will analyse the *FJM* case through the lens of these theoretical concepts (section 6). The purpose of this critical analysis is to determine the application of these concepts to the rights under the ECHR, especially the rights entrenched in Article 8. This includes a normative assessment whether the ECtHR's approach in *FJM* to these concepts was convincing. It also includes an analysis, whether relevant, of how the SA Constitutional Court used these concepts. In section 7, the principle of stare decisis is discussed to determine the extent to which reliance can be placed on previous ECtHR decisions to analyse *FJM* and also to gauge the binding effect of the *FJM* decision.

8 See M. Siems, *Comparative law* (Cambridge: Cambridge University Press 2018); M. Vols, *Legal Research* (the Hague: Eleven 2021) for the methodological guidelines taken into account in this research project. See Fick and Vols supra note 2 for a detailed description why South African and the European law are considered to be suitable for a comparative legal analysis.

2 Setting the stage: protection offered by ECHR and SA Constitution

As stated, a comprehensive comparison between the protections against eviction offered by these two instruments is done elsewhere.[9] To avoid unnecessary repetition, the entire analysis is not reiterated here. However, a summary of the findings is needed to demonstration how the protections under these two instruments correspond with each other.

The protection offered by the ECHR is found in Article 8. This article provides:

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.

The protection offered by the SA Constitution is found is section 26. This section provides:

1. Everyone has the right to have access to adequate housing.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

In comparing the procedural protection stemming from these provisions, certain similarities were identified. First, both instruments require evictions to be lawful and for a legitimate purpose, including the protection of the rights of the landowner.[10] Second, the eviction procedure under both instruments prescribe court involvement.[11] In South Africa, all evictions must be court ordered. However, the ECHR only requires the court to get involved if a proportionality defence is raised by the evictee,[12] i.e. that the eviction would not be necessary in a democratic society (substantive protection). This indicates a stronger procedural protection by the South African instrument.

9 Fick and Vols supra note 2.

10 Fick and Vols supra note 2 at 62.

11 Fick and Vols supra note 2 at 62.

12 See M. Vols, 'European law and evictions: property, proportionality and vulnerable people', *European Review of Private Law* 27(4) (2019) 719 at 719.

The substantive protection offered by these instruments concern the judicial stage and is, therefore, only activated if the court is involved. Under both instruments, courts hearing eviction matters must test the eviction against an objective standard.[13] The South African Constitution requires an outcome that is "just and equitable",[14] whereas the ECHR proscribes evictions that are "necessary in a democratic society".[15] In essence, this requires courts to conduct a proportionality analysis, and consider all the relevant circumstances and balance the interests of all parties affected.[16]

The study indicated that the ECtHR seemed more hesitant to find that the substantive protection was violated, this may be due to the fact that people facing evictions in South Africa were often from more vulnerable, marginalised groups, tipping the balance in their favour.[17] Moreover, the ECtHR is an international court and often does not deem itself in the best position to judge the decisions and policies of member states.[18]

The remedies granted by the courts in terms of these instruments differed a lot.[19] This was mostly due to the fact that the ECtHR is an international court.[20] As a national court, the remedies ordered by the South African Constitutional Court were more inclined to interfere with the decisions and policies of the executive authority. The remedies were more robust and instructive.[21] Most notable for their robustness are the South African Constitutional Court's orders that the state need to provide alternative accommodation to unlawful occupiers[22] facing homelessness.[23]

13 Fick and Vols supra note 2 at 63.
14 Sec. 172 of the South African Constitution.
15 Art. 8(2) of the ECHR.
16 Fick and Vols supra note 2 at 63; Vols, 'European law and evictions: property, proportionality and vulnerable people' (n 12) 728.
17 Fick and Vols supra note 2 at 65.
18 Fick and Vols supra note 2 at 64.
19 Fick and Vols supra note 2 at 65.
20 Fick and Vols supra note 2 at 66.
21 Fick and Vols supra note 2 at 66.
22 In South African eviction legislation, the term 'unlawful occupier' is defined as 'a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land'. See, s 1 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. This includes a person whose lease was cancelled by the landlord due to a breach of the agreement, such as non-payment of rent.
23 Fick and Vols supra note 2 at 66.

3 The *FJM v. UK* Decision: Facts of the Case

In this section, the facts of the ECtHR *FJM* decision are set out. This case concerned the eviction of a 38 year old woman with psychiatric problems ("FJM").[24] As a result of her mental disorder, she was unable to retain tenancy in the public sector.[25] Her parents bought her a home with an eight-year mortgage to ensure that she has accommodation.[26] However, due to financial issues, they defaulted, leading to the appointment of receivers.[27] The receivers served notice on FJM that allowed them to approach the court for a possession order.[28] This would require FJM to vacate the property and would allow the receivers to sell the property to cover the debt.[29]

FJM defended the application. Since FJM did not have the capacity to litigate, her brother litigated on her behalf.[30] She raised the proportionality defence found in Article 8 of the ECHR.[31] It was argued that a possession order would not be proportional since there was a high likelihood that it would leave her homeless.[32]

This argument failed before all four courts that heard the matter, the County Court, the Court of Appeal, the Supreme Court and the ECtHR. Surprisingly, the argument did not fail because the courts reasoned that a possession order would be proportional but because the courts reasoned that the defence was not available to FJM to rely on.[33]

This was based on the finding that the proportionality defence is only available in matters where the property is owned by the state (or where the state has a substantial interest in the property) or in case of socially-owned properties (e.g. semi-public housing associations).[34] Where the property is owned

24 Para. 1.
25 Para. 3.
26 Para. 4.
27 Para. 5. A receiver takes control of the property against which money is owed and is responsible for recovering the debt. Usually, the mortgage agreement will give the receiver the power to sell the property to recover the debt. See Insolvency Direct. 2013. 'Types of Receivers' Insolvency Direct. Retrieved 13 September 2021 https://www.insolvencydirect.bis.gov.uk/freedomofinformationtechnical/technicalmanual/Ch49-60/Chapter%2056-2/Part%201/Part%201.htm.
28 Para. 5.
29 Stop Foreclosures Help. 2021. 'A Look at the United Kingdom Foreclosure System' Stop Foreclosures Help. Retrieved 13 September 2021 https://www.stopforeclosureshelp.com/look-at-UK-foreclosure-system/.
30 Para. 6.
31 Para. 31.
32 Para. 7.
33 Paras. 8, 9, 17, 45.
34 Paras. 37–38.

by a private person the proportionality had already been determined by the national legislation allowing the possession order.[35] Moreover, the relationship between the evictee and the evictor is governed by the contract between them and an application of the proportionality defence by the court would amount to the convention being applied between private persons.[36] In addition, the legislation allowing for the possession order was not challenged based on inconsistency with the ECHR.[37]

This finding highlighted several issues relating to the lenses identified above. These lenses are discussed below. Thereafter, their application to *FJM* is discussed.

4 Theoretical Lenses: Vertical and Horizontal & Direct and Indirect

This section seeks to describe the theoretical lenses used in this article. These concepts include vertical and horizontal relations between actors involved in housing law cases, as well as direct and indirect (horizontal) effect of human and constitutional rights.

In both South African and European national law, eviction applications can be brought either by the state or by private individuals. When an eviction application is brought by the state, it reflects a vertical relationship. When it is brought by a private person it represents a horizontal relation.[38] Traditionally, vertical relations are governed by public law, including human rights, whereas horizontal relations are governed by private law. This means that human rights traditionally apply vertically, meaning they bind the state and are enforceable against the state.[39] Should human rights have horizontal effect, private persons would be bound by these rights and could be held liable for their

35 Paras. 41–46.

36 Para. 42.

37 Para. 46.

38 G. Brüggemeier, A. Colombi Ciacchi and G. Comandé, 'Introduction', in: G. Brüggemeier, A. Colombi Ciacchi and G. Comandé (Eds), *Fundamental rights and Private Law in the European Union* (Cambridge: Cambridge University Press, 2010) 1; I. Benöhr, *EU Consumer Law and Human Rights* (Oxford: Oxford University Press, 2013).

39 H. Collins, 'The constitutionalisation of European private law as a path to social justice', in: H.-W. Micklitz (Ed), *The Many Concepts of Social Justice in European Private Law* (Cheltenham: Edward Elgar, 2011) 133 at 141; L. Lane, 'The Horizontal Effect of International Human Rights Law in Practice: A Comparative Analysis of the General Comments and Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies', *European Journal of Comparative Law and Governance* 5 (2008) 1 at 6, 15.

violation.[40] Affording horizontal effect to human rights transcends the traditional public/private law divide[41] and is referred to as the constitutionalisation of private law.[42]

Some domestic laws allow for a horizontal effect of human rights. The SA Constitution, for example, provides that:

> "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."[43]

While the positive element of socio-economic rights, such as the right to housing, would rarely apply horizontally under South African law, the negative duties bind private parties.[44] This means that a private party does not have the duty to provide others with housing, for example, but they do have the duty not to interfere with another's existing access to housing.

On the contrary, whether international human rights, such as the rights entrenched in the ECHR, have any horizontal effect is less clear. A primary focus in *FJM* is to resolve this debate. An argument against ascribing a horizontal effect to international human rights is that private persons do not agree to the international agreements entrenching such rights. Only states can agree to international agreements and become members of treaties.[45] In addition, only states can be brought before international forums for the violation of

40 Lane, 'The Horizontal Effect of International Human Rights Law in Practice: A Comparative Analysis of the General Comments and Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies' (n 39) 15.

41 H. Simón-Moreno and P. Kenna, 'Towards a new EU regulatory law on residential mortgage lending, *Journal of Property, Planning and Environmental Law* 11 (2019) 1 at 2. The conceptual distinction between public and private law is said to be 'gradually fading away': H.-W. Micklitz, (Ed.) (2014), *Constitutionalization of European Private Law* (Oxford: Oxford University Press, 2014) 5.

42 C. Mak, *Fundamental rights in European Contract Law*, (Amsterdam: University of Amsterdam, 2007); Micklitz, *Constitutionalization of European Private Law* (n 41); I. Domurath, *Consumer Vulnerability and Welfare in Mortgage Contract*, (Oxford: Hart Publishing, 2017).

43 Sec. 8(2) of the South African Constitution.

44 *Governing Body of the Juma Musjid Primary School & Others* v. *Essay N.O. and Others* 2011 (8) BCLR 761 (CC) paras. 57–60. The positive element of socio-economic rights requires the use of resources to fulfil the rights whereas the negative element involves the duty not to interfere with existing access to the rights.

45 Lane, 'The Horizontal Effect of International Human Rights Law in Practice: A Comparative Analysis of the General Comments and Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies' (n 39) 15.

international rights.[46] When international human rights are attributed horizontal effect, it creates a risk of subordinating private law to international law and could lead to the 'uncontrolled expansion of EU fundamental rights in the private law domain'.[47] Nevertheless, not recognizing a horizontal effect may leave a person in a private dispute without recourse when they have been wronged.[48]

The notion of horizontal effect can be further divided into direct and indirect horizontal effect. When rights have direct horizontal effect private parties are bound to the rights entrenched in the treaties and can be held liable by international forums for breaching the rights, similar to states.[49] At the moment, the direct horizontal effect of international human rights is not recognised to the extent that private individuals cannot be brought before international forums for the violation of international rights.[50] Nevertheless, national courts have held private parties bound by international rights.[51]

When human rights have indirect horizontal effect, the state is held liable for the violation of rights, even by private persons.[52] This is based on the idea that the state has a duty to protect persons against the violation of their rights by third parties.[53] The state not only has a negative duty not to infringe, it also has a positive duty to ensure that rights are secured.[54] Private parties are,

46 Lane, 'The Horizontal Effect of International Human Rights Law in Practice: A Comparative Analysis of the General Comments and Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies' (n 39) 15.

47 O.O. Cherednychenko, 'The impact of fundamental rights', in: C. Twigg-Flesner (Ed), *Research Handbook on EU Contract and Consumer Law* (Cheltenham: Edward Elgar, 2016) 109 at 137.

48 E. Frantziou, *The horizontal effect of fundamental rights in the European Union*, (Oxford: Oxford University Press, 2019) 19.

49 Lane, 'The Horizontal Effect of International Human Rights Law in Practice: A Comparative Analysis of the General Comments and Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies' (n 39) 16.

50 *Ibid* 17.

51 *Ibid* 21, referring to Supreme Court of California case of *Robbins* v. *Pruneyard Shopping Center* [1979] 23 Cal. 3rd 899; the Federal Constitutional Court of Germany case of BVerfG, 1 BvR 699/06 vom 22.2.2011, Absatz-Nr. (1–128); the United States Supreme Court in the case of *Marsh* v. *Alabama* 326 u.s.501 [1946].

52 *Ibid* 26.

53 *Ibid* 26. This is similar to the state's duty in terms of sec 7(2) of the SA Constitution to respect, protect, promote and fulfil rights.

54 Art. 1 ECHR. See J. Boddy and L. Graham; 'FJM v. United Kingdom: The Taming of Article 8?', *Conveyancer and Property* Lawyer 2 (2019) 166 at 173, referring to S. Nield, 'Shutting the door on horizontal effect: *McDonald* v. *McDonald* [2016] UKSC 28', *Conveyancer and Property Lawyer* (2016) 1 at 8 and *Khurshid Mustafa & Tarzibachi* v. *Sweden* 23883/06; *Aksu* v. *Turkey* 4149/04 and 41029/04 para. 61; *A* v. *Croatia* 55164/08 para. 60; European Court of Human Rights *Guide on Article 8 of the European Convention on Human Rights* Council of Europe (2019) 7, 8.

therefore, indirectly bound by the rights, usually enforced through national law.[55] This suggests that on an international level private persons should be able to hold states liable for the violation of their rights by other private persons and on a national level private parties and/or the state should be able to hold private persons liable for the violation of rights. A horizontal interference with an international right, therefore, amounts to a vertical violation of the right.

The *FJM* decision highlights several issues relating to the theoretical lenses discussed here. Firstly, it highlights the question of whether it could be argued that the state violated FJM's rights, even though it was a private eviction matter (so, is there a vertical effect?). Second, and related to this, is the question of whether Article 8 ECHR could apply in private eviction matters either in the sense that FJM should have been able to hold the evictor liable in terms of Article 8 (direct horizontal effect) or in the sense that FJM should have been able to hold the state liable (indirect horizontal effect). The following two sections discuss the application of these sections to the *FJM* case to determine whether the findings in the case are convincing. Throughout, reference is made to the South African application of these lenses, to compare how the South African Constitutional Court approached these issues in respect of similar law and, in this way, substantiate the arguments.

5 Direct and Indirect Horizontal Effect of Article 8 in *FJM*

A big difference between the SA Constitution and the ECHR is that the SA Constitution is national law and the ECHR is an international convention. One of the features of a treaty is that it only binds the member states. It, therefore, arguably only applies vertically and only places duties on the state toward its people and not (a direct duty) on the people within the state toward one another.[56]

Conversely, the SA Constitution expressly provides for the horizontal application of some of its rights.[57] As explained, private parties would unlikely have

55 Lane, 'The Horizontal Effect of International Human Rights Law in Practice: A Comparative Analysis of the General Comments and Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies' (n 39) 26.

56 Boddy and Graham, 'FJM v. United Kingdom: The Taming of Article 8?' (n 54) 172; Lane, 'The Horizontal Effect of International Human Rights Law in Practice: A Comparative Analysis of the General Comments and Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies' (n 39) 15.

57 Sec. 8(2) of the South African Constitution.

a positive duty to fulfil the right of access to adequate housing. Nevertheless, they have a negative duty not to interfere with another's existing access to housing.[58] This was confirmed by the Constitutional Court in finding that: there is, at the very least, a negative obligation placed upon the state *and all other entities and persons* to desist from preventing or impairing the right of access to adequate housing.[59]

Such an interference occurs when a private party is evicted from private land. As such, the proportionality analysis has always been applied to both private and public evictions.[60]

An argument in favour of the *FJM* finding that the proportionality defence cannot be raised in a private eviction case is that allowing such would amount to a horizontal application of the ECHR. This section considers whether Article 8 ECHR applies horizontally and that *FJM* should, therefore, have been decided on the basis of a horizontal breach of Article 8.

As early as 1962, when the ECHR was still in its infancy, Eissen argued that Article 8 could be interpreted to impose obligations on private persons. His interpretation is, firstly, based on the wording in 8(1) that gives "everyone" a right "to respect for his private and family life, his home and his correspondence." He argues that this formulation indicates a duty on all to respect these rights:

> "They thus lay the emphasis on subjective rights rather than on the corresponding obligations. In so doing, they make it appear that the said rights are valid *erga omnes* or, to be more precise, in respect of individuals or corporate bodies within the jurisdiction of Contracting Parties as well as of the States themselves."[61]

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58 *Governing Body of the Juma Musjid Primary School & Others* v. *Essay N.O. and Others* 2011 (8) BCLR 761 (CC) paras. 57–60.

59 *Government of the Republic of South Africa and Others* v. *Grootboom and Others* 2001 (1) SA 46 para. 34, emphasis added.

60 The court is, therefore, faced with balancing the property right of the landowner and the housing right of the unlawful occupier. To solve this issue, the court often grants the eviction order (protecting the owner's property right) and relies on the state's housing duty to require it to provide the unlawful occupiers with alternative accommodation (protecting the occupiers' housing right). This was the case in both *City of Johannesburg* v. *Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA) and *City of Johannesburg Metropolitan Municipality* v. *Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC). For a discussion on this, see S. Wilson, 'Breaking the tie: evictions from private land, homelessness and a new normality', *South African Law Journal* 126(2) (2009).

61 M. Eissen, 'The European Convention on Human Rights and the duties of the individual', *Nordisk Tidsskrift Int'l Ret* 32 (1962) 237.

This formulation differs from Article 3 of Protocol 1 ECHR that specifies that the right is held only against the state:[62]

> "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

Linked to this argument, is the formulation of Article 8(2) ECHR. This article relates to the sanctioned limitation of the right. Since only the state may interfere with the right, it could be argued that the right is only binding on the state. Eissen, however, argues that the fact that only the state can interfere with the right should not be interpreted to mean that the right is only held against the state:

> "From the fact that Article 8, paragraph (2) speaks only of interference by a public authority, should we not infer, on the contrary, that the rights set forth in paragraph (1) are to be respected by the individual absolutely, not conditionally, as in the case of a public authority? It would be different if paragraph 1 stated, for instance, that the Contracting Parties shall respect the right of every person to respect for his private life, etc., but this is not the case."[63]

This indicates that Article 8(1) ECHR is binding on all within the jurisdiction of the member state and that only the member state may limit this right. While this argument suggests that, similar to the SA Constitution, Article 8 imposes obligations on private parties, the Article likely only has indirect horizontal effect.[64] This is because only states can be brought before the ECtHR for the violation of Article 8.[65] Nevertheless, the obligations imposed by Article 8 are

62 Eissen, 'The European Convention on Human Rights and the duties of the individual' (n 61) 240.

63 Eissen, 'The European Convention on Human Rights and the duties of the individual' (n 61) 241.

64 Lane, 'The Horizontal Effect of International Human Rights Law in Practice: A Comparative Analysis of the General Comments and Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies' (n 39) 26–29.

65 Eissen, 'The European Convention on Human Rights and the duties of the individual' (n 61) 242; Lane, 'The Horizontal Effect of International Human Rights Law in Practice: A Comparative Analysis of the General Comments and Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies' (n 39) 15.

still enforced against private parties through national law.[66] This gives effect to the state's duty to protect persons against interference with their right by third parties.[67] In not protecting the right holder against horizontal interference, the state may be guilty of the vertical infringement of the right.[68] Hence, even though Article 8 has horizontal effect, there can only be vertical accountability before the ECtHR.

This suggests that the possessors in *FJM* were, in fact, bound by Article 8(1). While they cannot be brought before the ECtHR, the Member State (the United Kingdom), had the duty to protect FJM against horizontal interference of their right. Part of this protection, is allowing FJM to raise the proportionality defence. In failing to do so, it could be argued that the state violated FJM's right and can be held accountable before the ECtHR. The following section considers whether FJM should have been able to hold the state liable for interfering with its right.

6 Vertical Effect of Article 8 in *FJM*

For there to have been a vertical interference of Article 8 in *FJM*, it must be found that the *state* interfered with the right of a private person. In *FJM*, it seems to be that the primary entity (potentially) interfering with FJM's right is a private person. Nevertheless, despite it being a private dispute, it was the *state* (in its capacity as the court) that granted the eviction order,[69] which was authorised by legislation enacted by the *state* (in its capacity as the legislator). Without these actions by the state, the private eviction would not have been possible.

Hence, instead of protecting FJM's Article 8 right against horizontal interference by allowing for the proportionality defence, the state enacted legislation that did the opposite. This suggests that the state could have been held liable for not providing sufficient protection against interference of the Article

66 Eissen, 'The European Convention on Human Rights and the duties of the individual' (n 61) 243; Lane, 'The Horizontal Effect of International Human Rights Law in Practice: A Comparative Analysis of the General Comments and Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies' (n 39) 15, 26.

67 In *Aksu* v. *Turkey* 4149/04 and 41029/04 para. 61, for example, the ECtHR found that the state had a duty to protect the article-8 rights of Gypsies/Roma against interference therewith by third parties.

68 Nield, 'Shutting the door on horizontal effect: *McDonald* v. *McDonald* [2016] UKSC 28' (n 54) 8.

69 This is also suggested in Boddy and Graham, 'FJM v. United Kingdom: The Taming of Article 8?' (n 54) 170, 173.

8 right by private parties, both when acting in its capacity as legislature and when acting in its capacity as judiciary. As the legislature, such protection would involve including the possibility to advance the proportionality defence in eviction legislation.[70] As the judiciary, such protection would involve allowing FJM to raise the proportionality defence.

Unfortunately, FJM did not challenge the eviction legislation on the basis that it provided insufficient protection against interference by private parties. Hence, the only decision by the ECtHR that can be analysed, is its findings regarding holding the state liable for its actions performed as the national court. In *FJM*, the court dismissed the argument that the state, acting as the national court, interfered with FJM's right on the basis that the court was simply applying legislation that already struck a balance between rights and interests of private parties and that the legislation protecting the rights of occupiers should have been challenged if it was not sufficiently protecting FJM's rights.[71] This was not done and, therefore, it was the end of the matter.

This finding suggests that the national court did not have a duty to and was, in fact, not allowed to grant the proportionality defence, was it not available in the authorising legislation. Such a defence is often not available in legislation due to the notion that the legislation itself reflects the balance of interests of the parties. The question is, therefore, whether the national court could and should have allowed the defence, despite its absence from the authorising legislation.

The following subsection considers whether it could be argued that *FJM* amounted to a vertical interference with Article 8 in that it was the *state* that interfered with FJM's rights. Thereafter, the ECtHR's finding that this argument cannot succeed without challenging the authorising legislation is considered. These subsections rely on the ECtHR's decisions in previous matters. This reliance on previous matters and the value thereof is discussed in the final subsection.[72]

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70 As decided by the ECtHR, in *McCann* v. *the United Kingdom* 19009/04 para. 50: "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 Article 8 of the Convention…". This duty on the state is confirmed in *Khurshid Mustafa & Tarzibachi* v. *Sweden* 23883/06 para. 50. See the discussion of this case in Boddy and Graham, 'FJM v. United Kingdom: The Taming of Article 8?' (n 54) 173, relying on Nield, 'Shutting the door on horizontal effect: *McDonald* v. *McDonald* [2016] UKSC 28' (n 54) 8. See also *DP* v. *the United Kingdom* 11949/86 at 210; *Aksu* v. *Turkey* 4149/04 and 41029/04 para. 59.

71 *FJM* para. 46.

72 Subsection 7.3 below.

6.1 *Interference by the Court*

This subsection considers whether the state was responsible for the eviction through its actions as the court. It was the court order that interfered with the right of FJM, without which, the private entity would not have been able to gain possession of the property. In granting the order, the court was also not protecting FJM against the horizontal interference with her right. The remainder of this section explores previous ECtHR decisions in which the court had found that the state can be held liable for interference with Article 8 (or similar rights) in private matters, due to its role in granting the court order that allows for the interference.

The case *Khurshid Mustafa & Tarzibachi v. Sweden* (2008)[73] involved the eviction of tenants due to a breach of contract. Contrary to the lease agreement, they were using a satellite dish outside their flat to watch television in their own language.[74] They relied on Article 8 and 10 of the ECHR.[75] Article 10 provides that:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

Article 10 (2) ECHR allows limitations that are lawful and necessary in a democratic society. Hence, this article is similar to Article 8 in that the right is afforded to "everyone" and the only possible limitation referred to must be done by the state subject to the limitation being lawful and necessary and it can be assumed that the court would have decided similarly, was it applying Article 8 ECHR.

The tenants in the *Khurshid Mustafa & Tarzibachi v. Sweden*[76] case argued that the state had violated their rights due to the fact that their eviction was ordered by the court and the court is part of the state.[77] The ECtHR confirmed this argument, finding that "Article 10 applies to judicial decisions".[78] The court found that while it is not tasked with settling private disputes, it can question the decisions by national courts in private matters.[79] Since the eviction

73 23883/06.

74 Para. 5–14.

75 Para. 28. Art. 10 provides that: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers".

76 23883/06.

77 Para. 28.

78 Para. 32.

79 Para. 33.

was a result of the national court's ruling, the ECtHR could hear the matter.[80] Furthermore, while the decision was based primarily on Article 10, the ECtHR found the complaint based on Article 8 admissible on grounds similar to those for admitting the Article 10 claim (that the judicial decision was a vertical interference with the tenants' rights).[81]

Similarly, in *Autotronic AG v. Switzerland* (1990),[82] the European Commission of Human Rights (the Commission) found that the judicial decisions of the national courts amounted to "interference by public authority" with Article 10 ECHR.[83] Until 1998, the commission was tasked with hearing matters of admissibility.

Nonetheless, in 1986, four years prior to *Autotronic AG v. Switzerland*[84] and 22 years prior to *Khurshid Mustafa & Tarzibachi v. Sweden*,[85] the Commission made a different decision, in *DP v. the United Kingdom.*[86] This case involved an eviction of a long-lease tenant. The lease term was 99 years at a rate of £10 per annum plus an additional service charge to cover certain costs.[87] After failing to pay the money due, the private landlord obtained an eviction order against the tenant.[88] The tenant approached the ECtHR, claiming that her rights in terms of Article 1 Protocol 1 and Articles 6, 8, 13 and 14 were breached by the state.[89]

The commission found that the fact that the eviction order was granted by a national court was not sufficient on its own to engage state responsibility.[90] This is because the court was merely adjudicating a dispute based on a contract agreed to by private parties.[91] Interestingly, this finding was only made with regard to Article 1 Protocol 1.[92] This might explain the difference between this finding and that of the decisions discussed above.

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80 Para. 34.

81 Para. 53.

82 12726/87.

83 Para. 47.

84 12726/87.

85 23883/06.

86 11949/86. Nield argues that this case should be treated with caution because it pre-dates conflicting decisions by the court. This indicates a possible development in the approach of the ECtHR. See Nield, 'Shutting the door on horizontal effect: *McDonald* v. *McDonald* [2016] UKSC 28' (n 54) 7.

87 *DP* v. *the United Kingdom* 11949/86 at 197.

88 *Ibid* at 198.

89 *Ibid* at 203.

90 *Ibid* at 210.

91 *Ibid* at 210.

92 Art. 1 Prot. 1 reads: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public

Boddy and Graham argue that this kind of conclusion is suitable in the context of Article 1 Protocol 1 because this right "is necessarily shaped by any contract creating that proprietary entitlement".[93] In other words, the entitlement to possess property and, therefore, have the protection of this right, is often dependant on and limited by contracts. This is not the same with the right to a home, which they characterise as a "factual state of affairs" and, therefore, cannot be limited contractually.[94] Hence, a person's right to a home is protected regardless of whether they occupy their home has a legal basis. This is similar to the right to housing in the SA Constitution, in terms of which all persons' home interest are protected, both the home interest that is governed contractually *and* the one that was established unlawfully.[95]

For this reason, it might be argued that the ECtHR finding that the state as the court cannot be held liable in terms of Article 1 Protocol 1 because it is merely adjudicating a contractual dispute is correct because this right is dependent on a contract. However, since the right to housing is not dependant on contract, the same finding is not convincing in respect of Article 8.

This understanding of the Commission's finding, as being limited to Article 1 of Protocol 1 is confirmed by its decision on Article 8 in that same judgment.[96] In considering Article 8, the commission did not find that the matter was inadmissible because state responsibility was not engaged. Instead, it found that the interference was necessary in a democratic society as it was "for the protection of the rights of others".[97] This must mean that the commission considered the judicial decision to be an interference with Article 8. Either that or the commission considered Article 8 to have horizontal application, a conclusion that does not fit with the general tone of the decision.

The case *Aksu v. Turkey* (2012)[98] involved a claim by a member of the Roma community that certain books insulted both the Roma community generally and himself personally.[99] This, he claimed, was a violation of Article 8 ECHR, specifically the right to private life.[100] The ECtHR found that the government

interest and subject to the conditions provided for by law and by the general principles of international law."

93 Boddy and Graham, 'FJM v. United Kingdom: The Taming of Article 8?' (n 54) 172.

94 Boddy and Graham, 'FJM v. United Kingdom: The Taming of Article 8?' (n 54) 172, referring to E. Lees, 'Article 8, proportionality and horizontal effect' *Law Quarterly Review* 133 (2017) 35.

95 In terms of sec 26(3) of the South African Constitution.

96 See discussion in Boddy and Graham, 'FJM v. United Kingdom: The Taming of Article 8?' (n 54) 172.

97 *DP* v. *the United Kingdom* 11949/86 at 211.

98 4149/04 and 41029/04.

99 Para. 40.

100 Paras. 40–42.

ought to have taken positive measures to protect the Roma community against the infringement of their rights by third parties, such as the author.[101] This seemed to relate not only to legislation enacted by the state but also to the decision made by courts:

> "In other words the Court will seek to ascertain whether, in the light of Article 8 of the Convention, the Turkish courts ought to have upheld the applicant's civil claim by awarding him a sum in respect of non-pecuniary damage and banning the distribution of the book."[102]

The case *A v. Croatia* (2006)[103] involved another claim based on Article 8 ECHR, with a focus on the right to private and family life. In this matter, the claimant argued that the state had not sufficiently protected her right to private and family life against interference therewith by her husband, in the form of domestic violence.[104] The court did not only focus on the government's actions but also on how the decisions of the court failed to protect her right.[105] Similarly, in the domestic violence case of *Bevacqua and S v. Bulgaria* (2008),[106] also based on Article 8, the ECtHR examined, amongst others, the decisions by the municipal courts in determining whether Article 8 was infringed.[107]

In, *Zrilić v. Croatia* (2013),[108] a private eviction matter, the ECtHR found that:

> "These interests involved their rights under Article 8 of the Convention and therefore, by the nature of the dispute, there was an inevitable interference by the domestic courts' decisions with the rights of one of the parties guaranteed under that provision."[109]

It is clear from the above cases that the ECtHR have found several times that a national court order based on national legislation can amount to an interference by the state. Interestingly, in support of this argument, the UK's Human Rights Act, enacted to give effect to the ECHR, makes it explicit that courts are also bound by convention rights.[110] The question is, however, whether the

101 Para. 59.
102 Para. 61.
103 55164/08.
104 Para. 48.
105 Paras. 64–66.
106 71127/01.
107 Paras. 68–76.
108 46726/11.
109 Para. 63.
110 Sec. 6. See para. 25.

court was simply acting in terms of legislation. The legislation allowed the eviction without a proportionality analysis. The question is therefore whether the court, as the state, must avoid infringing Article 8 ECHR by applying the proportionality analysis despite not being required to do so by the authorising legislation or whether, to succeed, FJM should have attacked the legislation for not providing sufficient protection. This is considered in the following subsection.

6.2 *The Court's Power & Duty to Allow the Proportionality Defence*

The next step is to consider whether the court should have taken into account the proportionality defence, regardless of it not being available in national legislation. This relates to the idea that courts are bound by legislation and that a failure to perform a proportionality analysis if requested by the evictee is not a failure on the part of the court, if it is not provided for in the legislation. This argument requires the claimant to challenge the compatibility of the legislation with the ECHR before it can raise the proportionality defence (if such legislation does not provide for the proportionality defence).[111]

It must be stressed that the state has a positive duty to enact legislation that would protect the ECHR rights.[112] The fact that the ECtHR, in *FJM*, acknowledges that FJM could have challenged the compliance of the eviction legislation with the ECHR indicates that the ECtHR accepts this fact.[113] However, that is how far the ECtHR was willing to go. In fact, the ECtHR found that the legislation reflected the balance of interests envisioned by the Member State and that this should be considered proportional, unless the legislation is challenged. Hence, the proportionality defence could not be raised in the absence of a challenge to the eviction legislation.[114]

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111 *FJM* paras. 41–46.

112 *Khurshid Mustafa & Tarzibachi* v. *Sweden* 23883/06 para. 50. See discussion of Boddy and Graham, 'FJM v. United Kingdom: The Taming of Article 8?' (n 54) 173, relying on Nield, 'Shutting the door on horizontal effect: *McDonald* v. *McDonald* [2016] UKSC 28' (n 54) 8, referring to *Khurshid Mustafa & Tarzibachi* v. *Sweden* 23883/06. The existence of such an obligation in respect of Article 1 of Protocol 1 in some circumstances was accepted in *DP* v. *the United Kingdom* 11949/86 at 210.

113 Para. 46.

114 Paras. 41–46. This, the ECtHR found, would amount to the legislation being applied directly between private individuals and interfering with their contractual agreements (Para. 42). While there is an argument to be made for challenging the implementing legislation, instead of relying directly on the ECHR, the reason is not the risk of the ECHR applying directly between private individuals. This is because, for one, private individuals have a duty to respect each other's rights, as discussed above. Two, in complying with its duty to realise the rights in the ECHR, the state may impose limitations on other private persons.

This subsection considers whether the national court in *FJM* had the power and the duty to performed a proportionality analysis despite it not being allowed for in the legislation and the legislation not being challenged. Without the power and the duty to allow a proportionality defence not provided for in the legislation, it could not be argued that the state, through the court, interfered with FJM's rights.

From previous ECtHR decisions, it is evident that the court can and has performed a proportionality analysis despite the authorising legislation not allowing it and in the absence of this legislation being challenged. Bates refers to *Kay and others v. the United Kingdom*,[115] in which the court rejected the finding of the House of Lords that a proportionality defence can only be raised if the compatibility of the eviction legislation with Article 8 was disputed.[116] This is based on the infamous quote from *McCann v. the United Kingdom,*[117] where the ECtHR found that:

> "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 Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end."[118]

Despite this clear finding that a national court has the power to perform a proportionality analysis, despite it not being available in the authorising

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These limitations may be in the form of legislation but it may also be through judicial decisions. Moreover, using the existence of a contract between the parties as reason for non-interference creates further difficulties. This includes the fact that sometimes a dispute between private parties may not involve a contract, such as when private land has been unlawfully occupied. The unlawful occupier would have the protection of Art. 8 (see *Orlić* v. *Croatia* 48833/07 para. 65; Boddy and Graham, 'FJM v. United Kingdom: The Taming of Article 8?' (n 54) 172). Hence, the unlawful occupier would have more protection than an occupier that is (or was once) in lawful occupation of the property.

115 37341/06.

116 Para. 74, see J. Bates, 'When "Any Person" Doesn't Mean "Everyone": *FJM* v. *UK*, Proportionality and the Private Rented Sector', *Judicial Review* 24(2) (2019) 70–71.

117 19009/04.

118 Para. 50.

legislation, this finding has not been accepted as applicable to private eviction matters. Instead, it has been limited to evictions by the state. Bates wonders how the idea that "any person" should be able to raise the proportionality defence could suddenly be limited to persons being evicted from state-owned land.[119]

The argument that the balance of interests has already been struck by the authorising legislation cannot justify this distinction between private and state evictions. This is because in all eviction matters (private or state) the authorising legislation can be said to balance the interests of the parties. Nevertheless, the ECtHR has found in numerous previous state eviction matters that this balance may not always be proportional and the ECtHR may perform its own proportionality analysis if the balance struck by the legislation is not proportional under the circumstances of the case.[120] In *Connors v. the United Kingdom*, the ECtHR found that:

> "While it is for the national authorities to make the initial assessment of necessity, the final evaluation as to whether the reasons cited for the interference are relevant and sufficient remains subject to review by the Court for conformity with the requirements of the Convention".[121]

This principle was reiterated by the ECtHR in *FJM*. It is therefore unclear how it could conclude that the balance struck by legislation in private eviction matters would *always* lead to proportionality, as though there could be no circumstances in which the fact that the property is privately owned would be outweighed. As is seen below, this assumption is incorrect since the facts of some private eviction matters may have the effect that an eviction order would not be proportional.[122]

Moreover, even in previous private eviction matters before the ECtHR the court had confirmed the rule in *McCann v. the United Kingdom*[123] that the proportionality defence should be available to any person at risk of losing their

119 Bates, 'When "Any Person" Doesn't Mean "Everyone": *FJM* v. *UK*, Proportionality and the Private Rented Sector' (n 116) 69–75.

120 *Connors* v. *the United Kingdom* 66746/01; *Stanková* v. *Slovakia* 7205/02; *McCann* v. *the United Kingdom* 19009/04; *Ćosić* v. *Croatia* 28261/06, *Paulić* v. *Croatia* 3572/06; *Kay* v. *the United Kingdom* 37341/06; *Orlić* v. *Croatia* 48833/07; *Buckland* v. *the United Kingdom* 40060/08; *Pinnock and Walker* v. *the United Kingdom* (dec) 31673/11; *Yevgeniy Zakharov* v. *Russia* 66610/10; *Shvidkiye* v. *Russia* 69820/10; and *Panyushkiny* v. *Russia* 47056/11; as cited in *FJM* para. 37.

121 Para. 81.

122 See cases discussed below.

123 19009/04.

home.[124] In *Zrilić v. Croatia*,[125] a case concerning a private eviction, the ECtHR found that:

> "In this connection the Court reiterates that any person at risk of an interference with his right to home should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention."[126]

In performing the proportionality analysis, the court found that the domestic courts had sufficiently balanced the interests of the parties. It found that the issue of homelessness would be an important factor in the balancing process. Unfortunately, this issue was only raised before the ECtHR and could not be taken into account.[127] This determination was made in the absence of a challenge to the compatibility of the municipal legislation with the ECHR.

In *Zehentner v. Austria*,[128] the ECtHR had to deal with a matter involving the judicial sale of and subsequent eviction from the applicant's home. The purpose of the sale was to cover a debt almost eight times lower than the judicial sale price.[129] The property was sold to a private company and possession was sought.[130] It later emerged that the applicant did not have the mental capacity to participate in the proceedings.[131] Based on the low debt amount (compared to the value of the property) and the fact that the applicant had lacked the mental capacity during the proceedings (and could not obtain a review once she had representation), the court found that the sale and eviction were not proportional.[132] Hence, even in this private eviction case and in the absence of a challenge to the domestic legislation, the court performed the proportionality analysis. In fact, in this matter, the applicant had not even raised the proportionality defence. She had relied solely on the property right in Article 1 of

124 Bates, 'When "Any Person" Doesn't Mean "Everyone": *FJM* v. *UK*, Proportionality and the Private Rented Sector' (n 116) 72. These cases, discussed below, are *Zrilić* v. *Croatia* 46726/11, *Zehentner* v. *Austria* 20082/02, and *Brežec* v. *Croatia* 7177/10. Boddy and Graham, 'FJM v. United Kingdom: The Taming of Article 8?' (n 54) also makes this point at 168, 170.

125 46726/11.

126 Para. 65. Confirmed in *Kay* v. *the United Kingdom* para. 65.

127 Para. 69.

128 20082/02.

129 Paras. 6–12.

130 Paras. 10–12.

131 Paras. 13–14.

132 Paras. 56–65.

Protocol 1 ECHR. The court, however, found that her arguments related more to Article 8 and raised the proportionality defence *mero motu*.[133]

While based on a different part of Article 8 ECHR, *Aksu v. Turkey*,[134] is another matter in which the court performed a proportionality analysis where two private parties were involved. The court balanced the rights and interests of the two parties. That is, author's right to freedom of expression in terms of Article 10 and the claimant's right to respect for his private and family life in terms of Article 8.[135]

The ECtHR, in *FJM*, despite referring to the above passage in *McCann v. the United Kingdom*,[136] rejected the possibility of raising a proportionality defence in matters involving private parties.[137] This rejection seems, primarily, to be based on past decisions, which is strange seeing the application of the *McCann v. the United Kingdom*[138] passage in the "private eviction" cases discussed above.[139] These private matters were not relied on in *FJM*, on the basis that they were not "normal" private evictions. The court aimed to distinguish "normal" private evictions from the matters in which proportionality defence was applied in the past. It was mostly applied in state evictions matters, two judicial sales (one being *Zehentner v. Austria*), one demolition case and one case on private eviction (*Brežec v. Croatia*).[140]

However, the court distinguished *Brežec v. Croatia* from "normal" private evictions because the property in question was initially state-owned and used for social housing.[141] This distinction is interesting because it looks like the ECtHR is performing a proportionality analysis in dismissing the application of *Brežec v. Croatia*. This is because it balances the relevant factors in the matter (that it was state-owned and used for social housing), finding in favour of of the occupier. It looks like the kind of balancing performed in the South African private eviction case of *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd and Another*.[142] In this case the court found that a private landowner could be expected to have some delay in regaining possession of its property, especially since it bought the property for

133 Paras. 33–35.
134 4149/04 and 41029/04.
135 Paras. 62–63.
136 19009/04.
137 Paras. 26, 43.
138 19009/04.
139 This makes one think that court wanted to rely on to past decisions.
140 7177/10. See *FJM* paras. 37–38.
141 Para. 38.
142 2012 (2) SA 104 (CC).

commercial purposes (not for housing) and knew full well that it was unlawfully occupied.[143]

The fact that the property, in *Brežec v. Croatia*, was initially state-owned and used for social housing does not *make* it a state eviction. Instead, it justifies the outcome of the proportionality analysis since these factors weigh in the balance. In fact, these were factors taken into account in the proportionality analysis in *Brežec v. Croatia* and, contrary to *FJM*, the ECtHR found that a national court cannot simply order an eviction based on the lawfulness of the occupation but must take all circumstances into account.[144] Hence, *Brežec v. Croatia* remained a private eviction matter in which, based on the facts, an eviction would not have been proportional. *FJM*'s distinction does not hold water.

Moreover, in making this distinction with regard to *Brežec v. Croatia* the ECtHR seems to indicate that the proportionality defence could still be put forward in certain private eviction matters. In *FJM*, the ECtHR found that:

> "It was not clear whether Brežec was intended to extend the requirement of a proportionality assessment by an independent tribunal to cases concerning private sector landlords, or whether that judgment was restricted to the particular facts of the case."[145]

The court seems to suggest that the "facts of the case" could sometimes allow a proportionality defence, indicating that it was not of the opinion that the proportionality analysis could never be performed in private matters. This is in line with the ECtHR's decision in *Connors* that "[w]hile it is for the national authorities to make the initial assessment of necessity, the final evaluation as to whether the reasons cited for the interference are relevant and sufficient remains subject to review by the Court for conformity with the requirements of the Convention". Hence, there could be situations in which the initial assessment of necessity made by national authorities in terms of the legislation must be reconsidered by the national court to ensure that the outcome is proportional, as required by Article 8 ECHR.

It is, however, when the ECtHR turns to *Vrzić v. Croatia*[146] where it seems to find more certainly that a proportionality defence should not be raised in private matters. Boddy and Graham argue that the court misconstrued this case authority.[147] The ECtHR found that this decision had "clarified" the court's

143 Paras. 39–40.
144 Paras. 47–50.
145 Para. 39.
146 43777/13.
147 Boddy and Graham, 'FJM v. United Kingdom: The Taming of Article 8?' (n 54) 171.

up-to-then conflicting case law on the matter of whether this defence could be available in disputes between private parties.[148] It relied on *Vrzić v. Croatia* to find that a lessee can never raise the proportionality defence.[149] This is done despite the fact that *Vrzić v. Croatia* did not include such a definitive finding.[150] In fact, it performed a proportionality analysis in a dispute between private parties.[151]

Vrzić v. Croatia merely acknowledged that the proportionality defence would not be available in *all* private matters and that the private ownership would definitely play a role, especially in light of the right to property in Protocol 1.[152] Boddy and Graham interpret this to mean that the ECtHR, in *Vrzić v. Croatia*, recognised that private ownership would be a factor to be considered during the proportionality analysis (as the court in *Vrzić v. Croatia* in fact did) but not that it would bar the proportionality analysis from being done.[153]

In fact, in discussing *Vrzić v. Croatia*, the ECtHR in *FJM* found that:[154]

> "The Court considered the situation in the case before it to be distinguishable as the other parties in the enforcement proceedings were either a private person, or private enterprises, and the case-law of the Convention organs indicated that in such cases a measure prescribed by law with the purpose of protecting the rights of others might be seen as necessary in a democratic society."

The "might" indicates that this is not a fact and that there "might" be situations in which it would not be seen as necessary. This "might" shows that the Convention organs still foresaw a balancing of the factors, albeit mostly in favour of the private owners.

148 Para. 39. See also, Boddy and Graham, 'FJM v. United Kingdom: The Taming of Article 8?' (n 54) 171.

149 The court found that *Vrzić* v. *Croatia* 43777/13 clarified the position. It stated that the court in *Vrzić* v. *Croatia*, "therefore concluded that, *despite the absence of a proportionality assessment by an independent tribunal*, there had been no violation of Article 8 of the Convention." (Emphasis added) This is not the case since *Vrzić* v. *Croatia* never contained these words and actually performed a proportionality analysis. See also, Boddy and Graham, 'FJM v. United Kingdom: The Taming of Article 8?' (n 54) 171.

150 Boddy and Graham, 'FJM v. United Kingdom: The Taming of Article 8?' (n 54) 171.

151 Paras. 63–73.

152 Para. 67. See Boddy and Graham, 'FJM v. United Kingdom: The Taming of Article 8?' (n 54) 171.

153 Boddy and Graham, 'FJM v. United Kingdom: The Taming of Article 8?' (n 54) 171.

154 Para. 40.

Further, in *FJM*, the court stated that:

> "In Vrzić, the Court expressly acknowledged, for the first time, that the principle that any person at risk of losing his or her home should be able to have the proportionality of the measure determined by an independent tribunal did not automatically apply in cases where possession was sought by a private individual or enterprise. On the contrary, the balance between the interests of the private individual or enterprise and the residential occupier could be struck by legislation which had the purpose of protecting the Convention rights of the individuals concerned."[155]

The most confusing part of *FJM*'s reliance on *Vrzić v. Croatia* is that the court in *Vrzić v. Croatia* performed a proportionality analysis. The intention of the court in *Vrzić v. Croatia* was therefore not to create a rule that this analysis should *never* be performed in matters involving private parties and that the "balancing act" performed in legislation would *always* satisfy the requirements of Article 8(2) ECHR.

As further justification for barring the proportionality defence in private evictions, *FJM* misconstrued the court's reliance on the contract in *Vrzić v. Croatia*. It elevated this element from one factor weighing in the balance to a factor that completely bars a proportionality analysis:

> "As the Court noted in Vrzić, in such cases there are other, private, interests at stake which must be weighed against those of the applicant. However, the distinction in fact runs deeper than that. As the Supreme Court acknowledged in the present case, there are many instances in which the domestic courts are called upon to strike a fair balance between the Convention rights of two individuals. 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 … If 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."[156]

155 Para. 41.
156 Para. 42.

In the above passage the court seemed to acknowledge that *Vrzić v. Croatia* requires the interests of the parties to be weighed. However, in contrast with *Vrzić v. Croatia*, it then stated that unlike in all other matters, if there is a contract involved that is governed by legislation, the contract must be respected. This seems to relate to the argument in *Vrzić v. Croatia* but completely disfigures it.[157] In *Vrzić v. Croatia*, the fact that the applicant had agreed to these consequences in a contract was only one of the factors in the balance.

Despite basing its justification for barring a proportionality analysis in "private eviction" cases primarily on the sanctity of contract, the ECtHR acknowledged that *FJM* did not even involve a situation where there was a contract between the evictee and the evictor.[158] Hence, reliance on the contract is ill-founded. The court brushed this absolute death-blow to its argument aside by stating that:

> "Nevertheless, the case still concerns a contractual (landlord-tenant) relationship between two private individuals or entities, which is governed by legislation prescribing how the Convention rights of the parties are to be respected."[159]

However, it is not the landlord-tenant relationship that was at stake in the matter since it was not the landlords (the parents) who were seeking the eviction of the tenant (their daughter).

Moreover, this reasoning is a misrepresentation of the *Vrzić v. Croatia* decision in which the relevance of the contract was that it indicated that "the applicants voluntarily used their home as collateral for their loan".[160] It was but one factor that weighed in the balance. Another factor weighing in the balance in the *Vrzić v. Croatia* case was the amount of debt, in respect of which the court found that "The debt was substantial, namely some EUR 250,320."[161]

In applying *Vrzić v. Croatia*, *FJM* found that, should the raising of the proportionality defence be allowed in private matters where the legislation was not challenged, "the resulting impact on the private rental sector would be wholly unpredictable and potentially very damaging."[162] This is stated despite neither *FJM* nor *Vzric* being matters where eviction was due to default in rental payment. In fact, these cases, like *Zehentner v. Austria*, concerned judicial sales.

157 Boddy and Graham, 'FJM v. United Kingdom: The Taming of Article 8?' (n 54) 171.
158 Para. 43.
159 Para. 43.
160 *Vrzić* v. *Croatia* para. 68.
161 *Vrzić* v. *Croatia* para. 69.
162 Para. 43.

Such contracts are radically different from rental agreements because it often involves a power imbalance between the contracting parties.[163]

The issue regarding the judicial sale of homes have been addressed in South Africa, albeit with the completely opposite outcome. In South Africa, the eviction order and the enforcement order are not granted at the same time. The property is first sold in execution and then an eviction is obtained by the new owner.[164] Hence, according to a strictly textual interpretation of section 26(3) of the South African Constitution, the execution order need not be just and equitable since it is not an eviction order. However, in *Jaftha v. Schoeman and Others, Van Rooyen v. Stoltz and Others*,[165] the Constitutional Court found that this was still an interference with the right of access to adequate housing and, hence, all relevant circumstances should be considered prior to the ordering of a judicial sale.[166] Hence, instead of limiting the proportionality analysis, the SA Constitutional Court acknowledged the vulnerability of the occupier. In fact, execution orders are great examples of private disputes in which a possession order would often be disproportionate.[167] This is especially the case where the debt amount is low, such as in the European *Zehentner v. Austria* case.

Moreover, Bates points out that some evictees, even in landlord-tenant situations, did not agree to the terms of the contract. These include children and spouses.[168] It is unclear whether the emphasis on contractual agreements would require that the proportionality of these, often vulnerable, occupiers could be assessed by the court. From the court's disregard of the vulnerability of FJM and the fact that she did not enter into the agreement with the mortgagee this seems unlikely.[169] Nevertheless, based on the ECtHR's reasoning, the "ban" on proportionality defence should not stretch further than the parties that actually entered into the agreement.

This raises the possibility that even if one accepts ECtHR's reasoning regarding contractual relationships, it could successfully be argued before the court

163 Nield also comments on the illusion of contractual freedom in the private rental housing market, see Nield, 'Shutting the door on horizontal effect: *McDonald* v. *McDonald* [2016] UKSC 28' (n 54) 6.

164 *Jaftha* v. *Schoeman and Others, Van Rooyen* v. *Stoltz and Others* 2005 (2) SA 140 (CC) (*"Jaftha"*) para. 13.

165 2005 (2) SA 140 (CC). *Jaftha* v. *Schoeman and Others, Van Rooyen* v. *Stoltz and Others* 2005 (2) SA 140 (CC) para. 13.

166 As is required by s 26(3) of the SA Constitution. See *Jaftha* paras. 55, 64.

167 *Jaftha* para. 56.

168 Bates, 'When "Any Person" Doesn't Mean "Everyone": *FJM* v. *UK*, Proportionality and the Private Rented Sector' (n 116) 75.

169 See also discussion in Boddy and Graham, 'FJM v. United Kingdom: The Taming of Article 8?' (n 54) 172–173.

that the ban on raising the proportionality defence should only be applicable in landlord-tenant situations where there was a contract governed by legislation involved. This is because the case does not mention other types of private relations. In fact, it seems to distinguish private landlord-tenant matters from other "private" matters such as judicial sales (referring to *Zehentner v. Austria*), albeit ironically since both *Vzric* and *FJM* involved judicial sales. The effect of this would be that *FJM* does not rule out the proportionality defence for all eviction cases involving private persons.

The concern of the court that allowing the proportionality defence in private landlord-tenant matters would have a negative effect on this sector is, however, not without merit.[170] As indicated above, in South Africa, the right to housing may limit the rights and interests of private parties. In an eviction matter, courts perform a proportionality analysis, balancing the rights of the landowner with that of the unlawful occupiers. Each case is decided on its own merits. While courts have said that private landowners should usually not have to house homeless persons indefinitely, they may have to experience some delay in gaining possession of their properties. Such a delay can be for as long as six years and the legal costs could be astronomical.[171] These limits on landowners have definitely affected the rental housing market. Landowners are more reluctant to rent out their properties to poorer persons.[172] The negative effects on landowners are justified by the rights of the occupiers. Placing the burden on landowners is problematic and the barring of a proportionality defence would make private evictions quick and cost-effective. However, considering the devastating effect an eviction may have on occupiers and their housing rights, it seems reasonable that their circumstances should at least be considered, even if this would be unsuccessful in most matters.

7 The Impact of *FJM* and the Principle of Stare Decisis

Many of the above arguments (by both the authors and the ECtHR in *FJM*) rely on previous case law to justify a different finding than the one made in *FJM*.

170 See, for example, see Vols, 'European law and evictions: property, proportionality and vulnerable people' (n 12) 751.

171 As was the case in *City of Johannesburg Metropolitan Municipality* v. *Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC). See Private Property. 2017. 'Evictions just became a whole lot harder.' Private Property. 12 June. Retrieved 14 September 2021 www.privateproperty.co.za/advice/news/articles/evictions-just-became-a-whole-lot-harder/5620.

172 See Private Property, 'Evictions just became a whole lot harder.' (n 171).

The question is, however, what the value of previous case law is in respect of the ECtHR's decisions. This question is also relevant in determining whether *FJM* has the effect to ban all proportionality enquiries in matters involving private evictions.

While there is no duty on the ECtHR to follow previous decisions, it generally does not depart from its previous decisions.[173] This is due to the protection of legal certainty, foreseeability and equality before the law.[174] In developing a body of law, the ECtHR improves efficiency by avoiding having to revisit a legal issue that they have already decided on.[175] Moreover, when a number of decisions are decided similarly, they can be considered a correct interpretation of a legal rule.[176] For the above reasons, the ECtHR is of the opinion that departure should only occur with good reason.[177] In addition, Lupu and Voeten argue that international courts cite previous case law to seem legitimate to their audience, especially to the national courts expected to follow these decisions.[178]

While the ECtHR's reasoning is that it should only depart from a previous decision with good reason, it has, unfortunately, departed from its previous decisions without directly acknowledge it.[179] This has led to departures

173 D. Propovic, 'Prevailing of judicial activism over self-restraint in the jurisprudence of the European Court of Human Rights', *Creighton Law Review* 42 (2009) 374; A. Mowbray 'An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case Law', *Human Rights Law Review* 9(2) (2009) 179; See also, S. Shevchuk, 'Case-law of the European Court of Human Rights and the doctrine of stare decisis', *Law Ukr: Legal J* (2011) 256.

174 Mowbray 'An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case Law' (n 173) 183; Propovic, 'Prevailing of judicial activism over self-restraint in the jurisprudence of the European Court of Human Rights' (n 173) 375, referring to *Beard* v. *United Kingdom* 24882/94 para. 81. See also, Shevchuk, 'Case-law of the European Court of Human Rights and the doctrine of stare decisis' (n 173) 153.

175 Y. Lupu and E. Voeten, 'Precedent in International Courts: A network analysis of case citations by the European Court of Human Rights', *BJ Pol S* 42 (2011) 416. See also, Shevchuk, 'Case-law of the European Court of Human Rights and the doctrine of stare decisis' (n 173) 153.

176 Shevchuk, 'Case-law of the European Court of Human Rights and the doctrine of stare decisis' (n 173) 155.

177 Mowbray 'An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case Law' (n 173) 183, referring to: *Christine Goodwin* v. *the United Kingdom* 28957/95 para. 74; *Mamatkulov and Askarov* v. *Turkey* 46827/99 para. 121. See also, Shevchuk, 'Case-law of the European Court of Human Rights and the doctrine of stare decisis' (n 173) 156.

178 Lupu and Voeten, 'Precedent in International Courts: A network analysis of case citations by the European Court of Human Rights' (n 175) 413.

179 Mowbray 'An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case Law' (n 173) 185.

without the requisite provision of good reason. Where reasons have been provided a few general reasons can be identified. The first reason for departure has been the existence of uncertainty in previous cases.[180] Mowbray argues that this justification is open to abuse and can be used as a tool in both the hands of those in favour of the previous decision and those in favour of it being overruled.[181] A second reason for departing from a previous judgement has been the need to respond to an increasing numbers of applications.[182] A third reason of the ECtHR not to follow an earlier decision is based on the fact that its interpretation must reflect contemporary (changing) standards.[183] Schevchuk identifies a fourth reason for deviation, namely distinguishing the current case from previous cases.[184]

In *FJM*, the court, similarly, did not acknowledge that it is departing from earlier case law.[185] It did, however, seem to rely on a few of the reasons mentioned above. Firstly, it used the distinguishing technique to distinguish *FJM* from other case law in which the proportionality defence was allowed. However, as Boddy and Graham point out, the court left out relevant case law to the contrary.[186] As mentioned above, several cases that involved private parties did allow the proportionality defence. This reason for departure does can, therefore, not hold.

A second reason that the court seemed to rely on is that there is no certainty in case law.[187] However, unlike this ground, *FJM* seemed to indicate that *Vrzić v. Croatia* created certainty in finding that the proportionality defence cannot be raised in matters relating to issues between private parties.[188] Nevertheless, as explained above, this conclusion was not reached in *Vrzić v. Croatia*. Instead,

180 Mowbray 'An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case Law' (n 173) 187, used in *Pellegrin* v. *France* 28541/95.

181 Mowbray 'An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case Law' (n 173) 190.

182 Mowbray 'An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case Law' (n 173) 191, used in *Kudla* v. *Poland* 30210/96.

183 Mowbray 'An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case Law' (n 173) 193, used in *Borgers* v. *Belgium* 12005/86. See also, Shevchuk, 'Case-law of the European Court of Human Rights and the doctrine of stare decisis' (n 173) 158.

184 Shevchuk, 'Case-law of the European Court of Human Rights and the doctrine of stare decisis' (n 173) 158.

185 In fact, it purported to follow earlier case law, see *FJM* para. 39.

186 Boddy and Graham, 'FJM v. United Kingdom: The Taming of Article 8?' (n 54) 169–170.

187 *FJM* para. 39.

188 *FJM* para. 39.

the court performed a proportionality analysis in this private eviction case. This second reason for departure can also not hold.

Finally, the court seems to depart from earlier decisions to protect the private rental sector.[189] Should this reason be aimed at distinguishing private rental matters from other private eviction matters, this would limit the effect of the decision to private rental cases. However, the court seems to use this reason to establish a rule regarding all private eviction matters. This total deviation is, therefore, without good reason.

As for not allowing the proportionality defence in private evictions to protect private landowners, it can be argued that this reason is insufficient for departure. This is because the Article 8 right of occupiers cannot simply be disregarded to protect private landowners. Allowing the proportionality defence does not mean that a court should deny a private eviction application based on the interests of the occupiers. Instead, it may delay the eviction matters to enable to occupiers to secure alternative accommodation or order the state to provide such.

As indicated above, the process of analysing the proportionality in every eviction matter delays eviction matters in South Africa. However, this is justified on the basis that it ensures the protection of the rights of the occupiers. The property rights of landowners are not absolute and are also subject to limitation.[190] Moreover, while the process of eviction in SA may take longer, most evictions are still granted since landowners can rarely be expected to endure an extended delay in regaining possession of their properties. However, since there are situations which may justify the delay or denial of private evictions, allowing the proportionality analysis is crucial. In terms of the ECHR the procedural delay is less problematic because most proportionality defences would not lead to courts performing lengthy proportionality analyses, since it would only be in exceptional circumstances that it would find that the legislation does not sufficiently balance the interests involved.[191] Furthermore, for those matters in which a denial or a delay is justified, not allowing a proportionality defence cannot be defended.

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189 Para. 43.

190 *First National Bank of SA Limited t/a Wesbank* v. *Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank* v. *Minister of Finance* 2002 (4) SA 768 (CC) paras. 49–50. In this case, the Constitutional Court refers to A.J. Van der Walt, *The Constitutional Property Clause* (Juta: Kenwyn, 1997) 15–16 to support this finding. See also, *Port Elizabeth Municipality* v. *Various Occupiers* 2005 (1) SA 217 (CC) para. 16; *City of Johannesburg Metropolitan Municipality* v. *Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) para. 40.

191 *McCann* v. *the United Kingdom* 19009/04 para. 50.

Therefore, had the court acknowledged its departure from case law, it would have had to justify this more convincingly than it did in *FJM*. The reason provided does not seem to justify a total ban on the proportionality defence in private eviction cases.

As stated, the applicability of the *stare decisis* principle is not only relevant to justify reliance on prior case to challenge the accuracy of the ECtHR's decision, it is also relevant to the question of whether the *FJM* decision itself should be considered precedent. In other words, does *FJM* end the debate regarding whether the proportionality defence can be raised in private eviction matters? It is argued here that *FJM* should not be considered precedent because it deviates from the existing ECtHR position. As a single decision, it should not be considered a convincing interpretation of Article 8 ECHR.[192] It must further be emphasised that this was not an ECtHR judgment but merely a decision.[193] The decision stage of a matter deals with admissibility and not the merits of the case.[194] Hence, it should not carry the same value as a judgment.

Only when a number of cases have decided similarly should the issue be considered settled. Schevchuk argues that, as with the higher courts in common law countries, the ECtHR can be ignored if during its adoption the earlier decisions "were not applied or were incorrectly interpreted".[195] This could be argued with regard to *FJM*'s disregard of relevant case law and incorrect interpretation of *Vrzić v. Croatia*.

8 Conclusion

In the recent decision of *FJM*, the ECtHR made a decision on the required protection against private evictions that threatens to water-down the protection of housing rights offered by the ECHR. This article set out to determine the effect of the *FJM* judgment on the protection provided by Article 8, especially in matters concerning private evictions. The analysis of the case included a discussion on whether the decision of the ECtHR was correct, considering both its previous decisions, as well as the SA Constitutional Court's findings in similar matters. It analysed the recent European and South African case law with the

192 Shevchuk, 'Case-law of the European Court of Human Rights and the doctrine of stare decisis' (n 173) 155.

193 Boddy and Graham, 'FJM v. United Kingdom: The Taming of Article 8?' (n 54) 168–169.

194 The European Court of Human Rights *The ECHR in 50 questions* (Council of Europe: 2014) 9.

195 Shevchuk, 'Case-law of the European Court of Human Rights and the doctrine of stare decisis' (n 173) 158–159.

help of a number of concepts developed in legal theory. These concepts concern vertical and horizontal relations between actors involved in housing law cases, as well as direct and indirect effect of human and constitutional rights.

It was found that it could be argued that Article 8(1) ECHR applies horizontally and is binding on all within the jurisdiction of the Member State and that only the Member State may limit this right. This suggests that the possessors in *FJM* were bound by this right. However, the Article likely only has indirect horizontal effect. This is because only states can be brought before the ECtHR for the violation of Article 8. Nevertheless, the obligations imposed by Article 8 are still enforced against private parties through national law. This gives effect to the state's duty to protect persons against interference with their right by third parties. In not protecting the right holder against horizontal interference, the state may be guilty of the vertical infringement of the right. Hence, even though Article 8 has horizontal effect, there can only be vertical accountability before the ECtHR.

The article subsequently considered whether FJM should have been able to hold the state liable for not protecting her Article-8 right by allowing a proportionality defence. First, the national legislation did not allow for a proportionality defence. Second, the national court denied the proportionality defence. Since FJM did not challenge the national legislation, the ECtHR focussed on the actions of the national court. This was, therefore, the focus of this article. Based on previous ECtHR decisions, it was found that the ECtHR could hold a state liable based on a national court's decision in a private Article 8 ECHR case.

A primary question was whether the national court has the power and duty to allow the proportionality defence. The article analysed both the *FJM* case and previous ECtHR decision and found that national courts have the power and the duty to allow the proportionality defence, despite not being required to do so by national legislation. It was found that the ECtHR in *FJM* misconstrued previous ECtHR decisions. It should, therefore, not be considered to have affected the finding that the proportionality defence should be available even in private eviction matters. This does not mean that the proportionality defence will be allowed in every private eviction matter. The national legislation would usually balance the rights sufficiently. Only under very special circumstances would the court have to allow the proportionality defence to ensure compliance with Article 8 ECHR.