Horizontal Effect and Article 8: *McDonald v McDonald*

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The Court of Appeal in *McDonald v McDonald* [2014] EWCA Civ 1049 refused to introduce a proportionality assessment into the process of granting a possession order under section 21 Housing Act 1988. In reaching this conclusion, the court engaged with, but ultimately rejected, the possibility of horizontal effect of article 8 in relation to possession actions against tenants by private landlords. The result in this case is correct – there is no opportunity within the statutory scheme for a proportionality assessment. If one is required, the statutory provisions must be amended, but the court's reasoning in reaching this result fails to distinguish between direct horizontal effect, whereby an obligation is imposed onto the landlord, and statutory horizontal effect whereby an obligation is imposed onto the court through the interpretation obligation of section 3(1) HRA 1998. This results in a misrepresentation of the relevant Strasbourg authorities, giving rise to the potential for confusion in future cases.

Facts

Miss McDonald suffered a mental disorder making her particularly sensitive to changes of environment. Her parents had purchased for her a house, which they had leased to her under an assured shorthold tenancy. They had financed the purchase through a mortgage. The lease was in breach of the terms of the mortgage. When they fell into default on the mortgage payments, the lender appointed receivers. The receivers proceeded to make an application under section 21 Housing Act 1998 for an order for possession.

Decision

Under the terms of section 21, the receivers were undoubtedly entitled to a possession order. The section specifies that where a tenancy is an assured shorthold tenancy, the landlord is entitled to a possession order provided that the appropriate notice has been served on the tenant. The court has no discretion either to refuse or to delay such an order. However, Miss McDonald argued that her human rights were affected by such a possession order so that an assessment of the proportionality of granting the order was required, (at [4]). The court rejected this argument, (at [19]).

Firstly, the court held that article 8 was engaged, (at [12]). Miss McDonald was potentially losing possession of her home so that her human rights were indeed brought into play. Secondly, the court acknowledged that, as a public authority, it was bound by Convention rights by virtue of section 6 Human Rights Act 1998, (at [13]). Thirdly, the court concluded, despite this, that it was not bound to apply a proportionality test to the situation before it, and that it was obligated to make a possession order because, (at [19]): (a) there is no clear and consistent line of case law from the European Court of Human Rights (ECtHR) that a proportionality test must be applied (so that even if possible, section 21 does not need to be interpreted to as to incorporate a proportionality assessment), (at [19(1)]); and (b) the Court was bound

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by the decision in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48 that section 21 was compliant with the Convention in any case, (at [19(iii)]). The court then went onto hold that even if a proportionality test were necessary, it would not have availed Miss McDonald in any case as a possession order would be proportionate in this case, (at [53]). Finally, the court held that the receivers were able to serve the appropriate section 21 notice, (at [65]), and therefore a possession order was granted. This case note will focus on the first three aspects of the court's decision.

Article 8 is engaged and the court is a public authority

The first two conclusions – i.e. the engagement of article 8, and the fact of the Court's being a public authority, are uncontroversial. As Arden LJ explains: "there is nothing in Article 8 to exclude a home that is or was let to the applicant by a private landlord" (at [12]). Given that it is possible to have article 8 rights arising through occupation of a property where there is no property right, it is clear that neither the relationship with the freeholder or leaseholder of that property, nor the identity of that right-holder, can be determinative of the fact or otherwise of a property constituting someone's "home". This is a matter of factual degree of connection with the property. In relation to the second conclusion, section 6(3) Human Rights Act 1998 specifies that the court is a public authority.

Is a proportionality test required?

The difficulty with this case is not the result reached. The mandatory wording of section 21 means that whatever the case law of the ECtHR required, and whatever the statutory obligation in section 3(1) HRA 1998 was intended to achieve, the Court was bound by the statutory language to make a possession order with no proportionality test. There is no discretion on their part, and no opportunity on the statutory language to superimpose a proportionality test on top of the statutory procedure. Arden LJ does not make this aspect of the case central to her conclusion (see [56]), unsurprising perhaps given her view of the European authorities, but it is nevertheless sufficient to dispose of the instant case. The only option available, and one which was not put to the court, would have been to make a declaration of incompatibility on the basis of section 4 HRA 1998.

However, in holding that it was not bound to apply a proportionality test, the court over-simplifies the Strasbourg case law, and as such, fails to engage with the different types of horizontal effect which may arise (see A L Young, 'Mapping Horizontal Effect' in D Hoffman, *The Impact of the UK Human Rights Act on Private Law* (Cambridge, CUP 2011) pp 16-47 at 18). The consequences of this are potentially significant where the relevant statutory provision does give the court discretion. The court fails, in effect, to distinguish between: statutory horizontal effect, which arises through the court's obligation to interpret statutory provisions in a Convention-compliant way; "common law" horizontal effect, where existing common law rules would be reinterpreted and shaped so as to protect Convention rights; and direct horizontal effect, where a new rule is created such that a private individual relies directly on their Convention right in an action against another private individual. The court is quite right that there is no clear and consistent case law that direct horizontal effect is required in situations involving a private landlord, but the case law is clear

that statutory provisions must be interpreted in such a way as to ensure that any interference with article 8 rights are proportionate. By failing to make this distinction, the court fails to give clear direction for future cases of this sort.

The reason why this over-simplification occurs is that in Arden LJ's analysis of the relevant European case law, there is a focus on the precise relationship between landlord and tenant, rather than the mechanisms by which article 8 is said to be relevant to that relationship. This results in a misrepresentation of the effect of the relevant European authorities. Her ladyship's reasoning is that although article 8 is engaged, the fact of the article being engaged does not necessarily mean that a proportionality test should be applied (at [16]). Although strictly true, this compresses the reasoning required to reach this conclusion, obscuring the key questions that must be asked.

The only way to assess an interference with a Convention right is on the basis of the proportionality test. The proportionality assessment is required if there has been an interference by a public authority thanks to the text of article 8(2) itself. If such an interference cannot be shown to be proportionate, then it is not permitted. If no proportionality test is carried out, this conclusion cannot be reached and again, the matter cannot stand. The fact that article 8 is engaged therefore necessitates the proportionality test *if* there has been an interference by a public authority.

Therefore, the only relevant question therefore is whether, in fact, there has been an interference with that right *by the Court*, the only applicable public authority. This is the question of horizontal effect. But importantly, horizontal effect is capable of multiple forms as discussed. The specific situation before the court was whether (absent national law precedent to the contrary), article 3(1) would oblige the court, as far as possible, to interpret the provisions of section 21 Housing Act 1998 as requiring a proportionality assessment on the grounds that in actions for possession against a tenant by a private landlord, where the property in question was that tenant's home, any interference with that possession must be shown to be proportionate. Thus, the relevant question was whether there was clear and consistent case law that article 8 has statutory horizontal effect.

Lady Arden divides the case law she considers into two categories: those where a proportionality assessment was required (*Brezec v Croatia* [2014] HLR 3*; Zrilic v Croatia* App. No 46726/11*; Buckland v United Kingdom* [2013] HLR 2*; Zehentner v Austria* (2011) 52 EHRR 22*; Belchikova v Russia* App. No.2408/06*;* and *Khurshid Mustafa and Tarzibachi v Sweden* (2011) 52 EHRR 24) and those were a proportionality assessment was not required (*Di Palma v United Kingdom* (1986) 10 EHRR 149). Perhaps the imbalance here speaks volumes, but further consideration reveals that the key difference between the bulk of the case law and *Di Palma* is that in *Di Palma* the relevant legislation was drafted in such a way that there was no room for statutory horizontal effect. As Lord Scott explains in *Harrow London Borough Council v Qazi* [2003] UKHL 43, [2004] 1 AC 983 at [130], *Di Palma* is authority for the principle that "article 8 rights could not suffice against an owner of property with an otherwise unimpeachable right to possession". The right could not be directly invoked, but if the statute could be interpreted so as to make that right to possession a matter for discretion, the exercise of that discretion, as the bulk of the Strasbourg authority reveals, must include an assessment of the proportionality of the grant of

possession. As Lady Arden herself reasoned, the case is authority for "the principle that parties who have exercised their contractual freedom to agree terms should not be allowed to invoke Convention rights to relieve themselves of the terms of the bargain" (at [37]). It is not authority against the proposition that legislative interventions of the state, applied by the courts, must be interpreted in such a way as to ensure that interferences with article 8 rights to a home are proportionate.

Furthermore, although not binding, there is a line of national law authority that would indicate that article 8 is capable of such of horizontal effect. Firstly, there is case law that article 8 requires convention-compliant interpretation of legislation relating to possession actions at the request of a trustee in bankruptcy (*Barca v Mears* [2004] EWHC 2170 (Ch), [2005] 2 FLR 1, *Nicholls v Lan* [2006] EWHC 1255 (Ch), [2007] 1 FLR 744). In this situation the provision in question (section 335A Insolvency Act 1986) requires that possession must be granted unless exceptional circumstances dictate otherwise. The court therefore has some discretion, and that discretion means that a proportionality assessment must feed into the interpretation of the "exceptional circumstances" test (*Barca v Mears* at [37]. Secondly, there is case law that article 14 will have such statutory horizontal effect in actions against private landlords as seen in the decision of the House of Lords in *Ghaidan v Godin-Mendoza* ([2004] UKHL 30, [2004] 2 AC 557) where article 14 was given statutory horizontal effect in the process of interpretation of the Rent Act 1977. This is, clearly, not an article 8 case, and therefore is not binding on the point, but there is little reason in logic why the approach in *Godin-Mendoza* does not apply equally to article 8.

The equivocation of the courts in relation to horizontal effect of article 8 against private landowners expressed in *Manchester City Council v Pinnock* ([2010] UKSC 45, [2011] 2 AC 104) and *Malik v Fassenfelt* ([2013] EWCA Civ 798, [2013] 3 EGLR 99) are not, therefore, the only relevant authorities on this question, even if there is no binding authority that in this particular set of circumstances, statutory provisions must be interpreted so as to make space for a proportionality assessment if article 8 rights are interfered with. In failing to examine the broader range of relevant authority, the Court of Appeal continues the practice of the national courts of failing to engage fully with status of human rights arguments in disputes between private parties. The number and breadth of property law cases in which human rights concerns have been raised means that some structure in approach is required. The Court of Appeal here is as reluctant as the Supreme Court in *Pinnock* to provide it.

Poplar Housing v Donoghue

Finally, the court also held that even if the ECtHR authorities did require that in general, statutory provisions governing the landlord/ tenant relationship must be interpreted in a Convention-compliant manner, the decision in *Poplar* meant that the court could not interpret section 21 so as to include a proportionality test. "Once it is decided that section 21(4) is compatible with Article 8, it is not open to a court bound by that decision to deal with the matter" (at [55]). This is correct. The court must conclude that section 21(4) is compliant with article 8. The ECtHR could disagree of course, and given the history of the reasoning in *Poplar* in the context of public authorities (culminating in the decision in *Pinnock*), such does seem possible. Nevertheless, the Court of Appeal is right here to say that the decision precludes a

finding that the section be interpreted differently (not that, on the wording of the section, any alternative interpretation is possible anyway).

Conclusion

In his concluding remarks, Ryder LJ states, "[w]here Parliament has determined the balance of rights in legislation and mandates the decision the court must make, then unless the legislation is found to be incompatible with the Convention right, the balance struck is determinative given the wide margin of appreciation in the field of housing law" (at [70]). The key word is "mandates". Where a possession order or similar is mandatory, it is correct that article 8 cannot be directly invoked so as to get around that mandatory statutory provision. The only option is for a declaration of incompatibility. That conclusion is the correct conclusion to reach in the instant case involving section 21(4) precisely because the wording of that section is mandatory.

However, that is not the answer to actions for possession by private landlords where the court does have discretion, in relation to some grounds for Rent Act or Housing Act tenancies, for example. Failure to distinguish between an obligation relating to interpretation, for which there is clear and consistent Strasbourg authority, and highly persuasive national authority, and the ability to directly invoke a Convention right, obscures the role that Convention rights must play in the private landlord/tenant relationship. Discussion of the rights and wrongs of horizontal effect must be left for another day, but what the decision in *McDonald v McDonald* fails to do is provide a clear framework within which that discussion can take place. The constant failure of the higher courts to engage fully with the different types of horizontal effect is much to be lamented, since it leaves much uncertainty both for landlords and tenants alike.