Trinity Term
[2016] UKSC 28
On appeal from: [2014] EWCA Civ 1112

JUDGMENT

McDonald (by her litigation friend Duncan J McDonald) (Appellant) *v* McDonald and others (Respondents)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Kerr
Lord Reed
Lord Carnwath

JUDGMENT GIVEN ON

15 June 2016

Heard on 15 and 16 March 2016

Appellant
Kerry Bretherton QC
Rebecca Cattermole
Diane Doliveux
(Instructed by Turpin & Miller LLP)

Respondents
Stephen Jourdan QC
Ciara Fairley

(Instructed by TLT LLP)

Intervener (Secretary of State for Communities and Local Government)
James Eadie QC
Jonathan Moffett
Heather Emmerson
(Instructed by The Government Legal Department)

Intervener (Residential Landlords Association Limited – written submissions only)
Jonathan Manning
Justin Bates
Alice Richardson
(Instructed by Bury & Walkers LLP)

Intervener (Shelter – written submissions only)
Matt Hutchings
Jennifer Oscroft
(Instructed by Freshfields Bruckhaus Deringer LLP)

LORD NEUBERGER AND LADY HALE: (with whom Lord Kerr, Lord Reed and Lord Carnwath agree)

1. This appeal raises three questions. The first is whether a court, when entertaining a claim for possession by a private sector owner against a residential occupier, should be required to consider the proportionality of evicting the occupier, in the light of section 6 of the Human Rights Act 1998 and article 8 of the European Convention on Human Rights ("the Convention"). The second question is whether, if the answer to the first question is yes, the relevant legislation, in particular section 21(4) of the Housing Act 1988, can be read so as to comply with that conclusion. The third question is whether, if the answer to the first and second questions is yes, the trial judge would have been entitled to dismiss the claim for possession in this case, as he said he would have done.

The factual and procedural background

The substantive facts

2. The appellant, Fiona McDonald, is aged 45 and, sadly, she has had psychiatric and behavioural problems since she was five. Dr Peter Sargent, an experienced psychiatrist, explained in his expert evidence that she had "an emotionally unstable personality disorder and at times when her mental state has deteriorated she has presented with frank psychotic symptoms". She has been unable to hold down any employment, and has not worked since 1999; since that time she lost two public sector tenancies owing to her behaviour.

3. In those circumstances, her parents, who are technically the respondents to this appeal, decided to buy a property for her to occupy. Accordingly, in May 2005, they purchased 25 Broadway Close, Witney ("the property") with the assistance of a loan from Capital Home Loans Ltd ("CHL"), which was secured by way of a registered legal charge over the property. From about June 2005, the respondents granted the appellant a series of assured shorthold tenancies ("ASTs") of the property, on the basis that the rent would be covered by housing benefit. The last of those ASTs was granted in July 2008 for a term of one year from 15 July 2008. The appellant continues to live in the property.

4. The financial arrangements between the respondents and CHL were that the respondents were to pay interest on the loan by way of monthly instalments, and that the loan was to be repayable in full after eight years - ie on 12 May 2013. Initially,

the respondents paid the interest instalments as they fell due. However, owing to financial difficulties which they unfortunately encountered in their business, they failed to meet all the interest as it fell due. Accordingly, in August 2008, CHL appointed Andrew Hughes and Julian Smith ("the Receivers") to act as receivers of the property under section 109 of the Law of Property Act 1925. Having been appointed under that provision, the Receivers, although appointed by the chargee, CHL, were entitled to take steps in relation to the property on behalf of, and in the name of, the chargors, the respondents.

5. As the rent was being regularly paid, and the arrears of interest were not substantial, the Receivers took no immediate steps to end the AST or to sell the property. However, not least because the arrears persisted, albeit not on a very large scale, the Receivers served a notice, in the name of the respondents, on the appellant on 13 January 2012, indicating that they would be seeking possession of the property. The notice was served under section 21 of the Housing Act 1988 ("the 1988 Act") and it expired on 14 March 2012.

The procedural history

6. On the expiry of that notice, the Receivers then issued the instant proceedings, again in the names of the respondents, for possession of the property in the Oxford County Court. In the light of the appellant's mental health, her brother, Duncan McDonald, was appointed her litigation friend. The proceedings came on for trial before His Honour Judge Corrie, who heard them on 4 December 2012 and 7 March 2013.

7. The evidence of Dr Sargent included the following passages, which were quoted by the judge in his judgment:

> "[Homelessness], I am sure, would have a major detrimental effect on [the appellant's] mental health and she would decompensate entirely, very probably requiring admission to hospital. …
>
> I think that if she was evicted from the current accommodation … she would have real difficulty in finding alternative rented accommodation that would accept her on benefits and in view of her mental health history including at times aggression towards others. I think that there is a significant possibility that she would become homeless as a consequence.

> Even if alternative accommodation is found for her, I think that the stress and upheaval of trying to find and move into alternative accommodation would also very likely have a significantly detrimental effect on her mental health with the possibility of harm to herself or suicide, or the possibility of violence towards others which she has exhibited on a number of occasions when she has previously de-compensated under stress."

8. Judge Corrie gave judgment on 22 April 2013. In his judgment, he considered a number of issues which are no longer live between the parties, including whether the respondents had misled CHL (they had not), and whether the Receivers had had authority to serve the notice and bring the proceedings (they had). Accordingly, the judge concluded that, subject to the appellant's reliance on article 8, the court had no alternative to make an order for possession. He then turned to consider the appellant's article 8 case, and held that it was not open to her to require the court to consider the proportionality of making an order for possession against a residential occupier, given that the person seeking possession was not a public authority. He went on to hold that, if he was wrong on that issue, and he had been entitled to consider the proportionality of making an order for possession, he would have dismissed the action, because, "on balance", he would "have taken the view that those circumstances were sufficiently exceptional to justify dismissing the claim for possession on the basis that it was disproportionate".

9. The appellant appealed to the Court of Appeal, who dismissed the appeal - [2014] EWCA Civ 1049; [2015] Ch 357. The main judgment was given by Arden LJ, Tomlinson LJ gave a brief concurring judgment, and Ryder LJ gave a concurring judgment agreeing with them both. The Court of Appeal agreed with the judge that article 8 could not be invoked by a residential occupier in possession proceedings brought by a private sector landowner, as a ground for opposing the making of, or the terms of, the order for possession. However, they considered that, if article 8 could have been invoked in this case, the judge would have been wrong to dismiss the claim as he had indicated that he would have done.

10. The appellant now appeals to this court. Before turning to the three issues identified in para 1 above, it is appropriate to explain the relevant provisions of the 1988 Act, and, albeit in very summary terms, the history of the policy of successive Governments towards renting in the private sector.

Private sector residential tenants and the relevant statutory provisions

Government policy since 1977

11. In the late 1970s, residential tenants in England and Wales had two forms of protection, which applied even if their tenancies had contractually expired, namely (i) protection from summary eviction and (ii) security of tenure. The first, which applied to all residential tenants and most licensees, was under the Protection from Eviction Act 1977, which, among other things, precluded their eviction other than through court proceedings. That statute remains in force, and, although it has been amended from time to time (sometimes for the purpose of strengthening or extending), its original provisions remain substantially in place. There were also statutory provisions governing the amount of time which a court could allow an occupier before an order for possession took effect and could be executed.

12. Security of tenure, which only applied to tenants with private sector landlords, was accorded by the Rent Act 1977, whose provisions extended to most but not all such tenancies. In very summary terms, that Act (i) precluded a court making an order for possession against most such tenants unless one or more of a number of specified grounds could be established, (ii) permitted family members to succeed on the death of the tenant in some circumstances, and (iii) limited the level of rent which a landlord could recover from the tenant, often to a rate considerably below the market level. Under Chapter II of Part I of the Housing Act 1980, later replaced by Part IV of the Housing Act 1985, residential public sector tenants were for the first time given a substantially similar degree of security of tenure.

13. In 1987, the Conservative government published a White Paper, *Housing: The Government's Proposals* (Cm 214, 1987). One of its principal aims was to "reverse the decline of rented housing and to improve its quality" - para 1.1. An important part of its thesis was that the protection afforded to tenants by the Rent Act 1977 and similar predecessor legislation, not least because of the security of tenure thereby afforded to tenants, had greatly reduced both the supply and the quality of housing in the private rented sector, which was to the disadvantage of residential tenants as a group - paras 1.8 and 3.1.

14. The 1987 White Paper therefore made proposals which were intended according to para 1.15 to ensure that "the letting of private property will again become an economic proposition". The White Paper therefore proposed two new types of tenancy, namely (i) an assured tenancy, which would be at a freely negotiated rent, but with the tenant having security of tenure (albeit somewhat more attenuated than under the Rent Act 1977), and (ii) an AST, under which the tenant would have very limited security of tenure, and either party could have an

appropriate rent determined (which would be substantially less restricted than the rent fixed under the Rent Act 1977) - para 3.11.

15. The Bill which became the 1988 Act was introduced to give effect to these proposals (as well as giving effect to other proposals). As originally enacted, the 1988 Act defined an AST as being a fixed term tenancy for at least six months, which could not be determined earlier by the landlord, and in respect of which the tenant had been given a notice in a prescribed form before the tenancy was granted. The 1988 Act set out a number of grounds upon which a landlord could seek possession against a tenant under a shorthold tenancy (including an AST); it also contained provision for the landlord to serve a notice seeking possession at any time after the contractual term of an AST had expired, and then provided that the court should grant possession. (Housing Associations which had previously been treated as public sector landlords were brought into the ambit of the 1988 Act by section 140(2) and Schedule 18).

16. In 1995, the Conservative government published another White Paper, *Our Future Homes: Opportunity, Choice and Responsibility* (Cm 2901, 1995). This White Paper noted the increase in the number of private sector tenancies in the residential sector between 1988 and 1994, and ascribed it largely to the 1988 Act, which had "made renting out property a much more attractive alternative for owners" - p 21. It also emphasised the need to reduce unnecessary regulation and control - p 24.

17. The 1995 White Paper led to provisions in the Housing Act 1996 ("the 1996 Act"), whose effect was that (subject to exceptions) all assured tenancies granted after March 1997 would be ASTs; the 1996 Act also abolished the requirements for a six month minimum term and for the service of a prescribed notice (although it gave some protection under section 21(5) and it also required certain information to be given to tenants). At the same time, an accelerated procedure was introduced whereby landlords could obtain possession against tenants under ASTs which had been the subject of notice of determination (see CPR 55.11 to 55.19 and CPR PD55A). Around the same time, the so-called buy-to-let sector "began in earnest", and it subsequently "has undergone an expansion, reflecting the structural and demographic trends towards a larger [private rental sector]" according to a Treasury consultation paper, *Financial Policy Committee powers of direction in the buy-to-let market*, published in December 2015.

18. Following the general election in 1997, the Labour Government stated that it did not intend to reverse the reforms affected by the 1988 and 1996 Acts, but "rather to build on them by promoting choice in both the public and private sectors", to quote from para 2.68 of a Law Commission Consultation Paper No 162 *Renting Homes 1: Status and Security* (2002), citing a paper published by the Department

for Transport, Local Government and the Regions, *Quality and Choice: A Decent Home for All, The Way Forward for Housing* (December 2000). That policy was continued by the Coalition government in 2010 and there is no reason to think that the Conservative government, elected in 2015, has different ideas.

19. Accordingly, since 1996, although the 1988 Act has been amended from time to time, its basic provisions have remained unaffected and continue to apply in England. (The Welsh Assembly has enacted a scheme based upon the Law Commission's recommendations on *Renting Homes: The Final Report* (2006, Law Com No 297) which preserves essentially the same distinction between private and public sector tenancies.) Successive reports emanating from government departments have claimed that the decrease in statutory protection effected by the 1988 and 1996 Acts has been at least one of the factors which has served to reinvigorate the private residential rented sector in England and Wales over the past 25 years - see eg the annual *English Housing Surveys* issued by the Department for Communities and Local Government.

The Housing Act 1988 in its current form

20. Chapters I and II of Part I of the 1988 Act are concerned with assured tenancies generally and ASTs respectively. Section 1 provides that a tenancy "under which a dwelling-house is let as a separate dwelling" to an individual or individuals, who occupy it as her or their "only or principal home" is an assured tenancy, subject to certain specified exceptions (including cases where a local authority is the landlord). None of those exceptions apply here. Section 19A (as inserted by section 96(1) of the 1996 Act) provides that, subject to certain irrelevant exceptions, an assured tenancy entered into after March 1997 shall be an AST.

21. Section 5 of the 1988 Act (as amended by section 299 of, and paragraph 6 of Schedule 11 to, the Housing and Regeneration Act 2008) is in these terms, so far as relevant:

> "(1) An assured tenancy cannot be brought to an end by the landlord except by -
>
> (a) obtaining -
>
> (i) an order of the court for possession of the dwelling-house under section 7 or 21,

and

(ii) the execution of the order,

…

and, accordingly, the service by the landlord of a notice to quit is of no effect in relation to a periodic assured tenancy.

(1A) Where an order of the court for possession of the dwelling-house is obtained, the tenancy ends when the order is executed.

(2) If an assured tenancy which is a fixed term tenancy comes to an end otherwise than by virtue of -

(a) an order of the court [of] the kind mentioned in subsection(1)(a) … or

(b) a surrender or other action on the part of the tenant,

then, subject to section 7 and Chapter II below, the tenant shall be entitled to remain in possession of the dwelling-house let under that tenancy and … his right to possession shall depend upon a periodic tenancy arising by virtue of this section.

…"

22. Section 7(1) of the 1988 Act provides that "[t]he court shall not make an order for possession of a dwelling-house let on an assured tenancy except on one or more of the grounds set out in Schedule 2". Section 7(3) (as amended by paragraph 18 of Schedule 11 to the Anti-social Behaviour, Crime and Policing Act 2014) requires the court to make an order for possession if any of those grounds is made out, subject, inter alia, to "any available defence based on the tenant's Convention rights, within the meaning of the Human Rights Act 1998". Section 7(6) provides that a landlord can only rely on section 7 if the AST has expired or could be brought to an

end on the ground on which possession is sought. A common ground relied on under section 7 is arrears of rent, which represent a mandatory ground for possession if the rent is more than a specified period, between eight weeks and three months (depending on how frequently it is to be paid), in arrear - see ground 8 of Schedule 2.

23. Section 19A provides that (subject to certain exceptions which are irrelevant for present purposes) an assured tenancy entered into after March 1997 is an AST. Section 20A (as inserted by section 97 of the 1996 Act) requires a landlord under such a tenancy to provide the tenant with certain information in writing, failing which the landlord is liable to be convicted.

24. Section 21(1) of the 1988 Act (as amended by section 193 of, and paragraph 103 of Schedule 11 to, the Local Government and Housing Act 1989 and section 98(2) of the 1996 Act) states at the time of the service of notice and the hearing in the County Court in this case:

> "[O]n or after the coming to an end of an assured shorthold tenancy which was a fixed term tenancy, a court shall make an order for possession of the dwelling-house if it is satisfied -
>
> > (a) that the assured shorthold tenancy has come to an end and no further assured tenancy (whether shorthold or not) is for the time being in existence, other than an assured shorthold periodic tenancy (whether statutory or not); and
> >
> > (b) the landlord … has given to the tenant not less than two months' notice in writing stating that he requires possession of the dwelling-house."

(Various other restrictions on a court's power to order possession in relation to an AST have been added by the Housing Act 2004, the Deregulation Act 2015 and the Assured Shorthold Tenancy Notices and Prescribed Requirements (England) Regulations (SI 2015/1646) but nothing hangs on them for period proposed.)

25. Section 21(4) (as amended by section 98(3) of the 1996 Act) is at the centre of this case. It states that:

> "Without prejudice to any such right as is referred to in subsection (1) above, a court shall make an order for possession of a dwelling-house

let on an assured shorthold tenancy which is a periodic tenancy if the court is satisfied -

> (a) that the landlord … has given to the tenant a notice in writing stating that, after a date specified in the notice, being the last day of a period of the tenancy and not earlier than two months after the date the notice was given, possession of the dwelling-house is required by virtue of this section; and
>
> (b) that the date specified in the notice under paragraph (a) above is not earlier than the earliest day on which, apart from section 5(1) above, the tenancy could be brought to an end by a notice to quit given by the landlord on the same date as the notice under paragraph (a) above."

26. Accordingly, a landlord under an AST can obtain an order for possession from a court against the tenant either (i) under section 21, after giving two months' notice once the AST has come to an end, or (ii) under section 7, where the AST is a periodic tenancy or has come to an end or could be brought to an end, and one of the specified grounds is made out by the landlord. In practice, the majority of possession proceedings issued against tenants who have been granted ASTs are brought under section 21 rather than section 7.

27. Chapter IV of the 1988 Act reinforces the protection to residential tenants afforded by the Protection from Eviction Act 1977. In particular, it imposes a fairly steep measure of damages on a landlord who unlawfully evicts a residential occupier, and extends the ambit of the offence of harassment.

28. It is also relevant to refer to section 89(1) of the Housing Act 1980 which applies to possession orders against tenants under ASTs. That section provides that, subject to certain exceptions (which do not include orders for possession in respect of an AST):

> "Where a court makes an order for the possession of any land …, the giving up of possession shall not be postponed (whether by the order or any variation, suspension or stay of execution) to a date later than 14 days after the making of the order, unless it appears to the court that exceptional hardship would be caused by requiring possession to be given up by that date; and

> shall not in any event be postponed to a date later than six weeks after the making of the order."

The issues

29. In summary terms, the appellant's argument is that, when considering whether to make an order for possession against her, and if so on what terms, the judge should have taken into account the proportionality of making any such order, bearing in mind in particular article 8 and the interference which would be occasioned by the making of the order to her enjoyment of her home, and that, had he done so, he would have been entitled to refuse to make an order for possession and to dismiss the claim.

30. The effect of this argument would be that, despite the apparently mandatory requirements of section 21(4) of the 1988 Act (set out in para 25 above), the judge could have refused to make an order for possession in favour of the respondents, or, despite the apparently mandatory terms of section 89(1) of the 1980 Act (set out in para 28 above), he could have suspended or delayed the operation of the order for possession for a substantial, or even an indeterminate, period.

31. This argument gives rise to the three issues set out at para 1 above. We shall take them in turn.

The first issue: can the appellant rely on proportionality?

Introductory

32. Article 8 of the Convention provides as follows:

> "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 wellbeing 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."

33. Section 6(1) of the Human Rights Act 1998 provides that "[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right", which, of course, includes an article 8 right. Section 6(1) is subject to subsection (2), which provides that subsection (1) does not apply if the authority is required so to act as a result of primary legislation or provisions made thereunder which cannot be construed in any other way.

34. Where the party seeking possession of residential property is a local authority, or other "public authority" within the meaning of section 6 of the Human Rights Act 1998, it is now well established that it is, in principle, open to the occupier to raise the question whether it is proportionate to make an order for possession against her, and if it is, to invite the court to take that into account when deciding what order to make. That is the effect of the decisions of this court in *Manchester City Council v Pinnock* [2011] 2 AC 104 and *Hounslow London Borough Council v Powell* [2011] 2 AC 186. *Pinnock* represented the resolution of a protracted inter-judicial dialogue between the House of Lords and the Strasbourg court, discussed in paras 25-50.

35. The view originally taken by the House of Lords was that, although a claim for possession of residential property by a local authority engaged the article 8 right of the residential occupier, the proportionality of making an order for possession was already taken into account by Parliament through the legislation which limited the landlord's right to obtain possession. However, the Strasbourg court took the view that the existence of the legislation did not prevent an occupier in such a case from raising her article 8 rights when possession of her home was being sought.

36. In *Pinnock*, para 49, this court concluded that, in the light of the Strasbourg court's clear and constant jurisprudence, "if our law is to be compatible with article 8, where a court is asked to make an order for possession of a person's home at the suit of a local authority, the court must have the power to assess the proportionality of making the order, and, in making that assessment, to resolve any relevant dispute of fact". However, the Supreme Court also made it clear in paras 51 and 54 that it would "only be in 'very highly exceptional cases' that it will be appropriate for the court to consider a proportionality argument" and that "where … the local authority is entitled to possession as a matter of domestic law, there will be a very strong case for saying that making an order for possession would be proportionate".

37. In *Pinnock*, it was made clear that the Supreme Court's conclusion, that proportionality should, if raised, be addressed (albeit that in the great majority of cases it could and should be summarily rejected) in every possession action against a residential occupier, only applied in cases where the person seeking possession was a local authority or other public authority. That was because section 6(1) of the 1998 Act only applied to "a public authority", which is unsurprising, given that the

Convention is intended to protect individual rights against infringement by the state or its emanations. Thus, in *Pinnock*, para 50, the Supreme Court made it clear that "nothing" said in the judgment in that case was "intended to bear on cases where the person seeking the order for possession is a private landowner", and added that it was "preferable for this court to express no view on the issue until it arises and has to be determined".

38. The present appeal raises that issue, and it therefore now falls to be determined. A private sector landlord, such as the respondents, who are individuals, or CHL, which is a limited company trading for profit, is not a "public authority". However, the appellant argues that, because "a court" is specifically included within the expression "public authority" by section 6(3)(a) of the 1998 Act, no judge can make an order for possession of a person's home without first considering whether it would be proportionate to do so, and, if so, what terms it would be proportionate to include in the order. Again, it can be said with some force that this is not, at least on the face of it, a particularly surprising proposition, as a domestic court would be regarded by the Strasbourg court as part of the state, and therefore obliged to respect individual rights enshrined in the Convention.

39. Accordingly, runs the appellant's argument, in terms of article 8 proportionality, the position of a private sector residential tenant facing eviction is quite similar to that of a public sector residential tenant, as determined in *Pinnock* and *Powell*. Having said that, it is, I think, accepted by the appellant that the position of a private sector tenant is rather weaker in that a private sector landlord can claim that any delay in giving him possession of the property to which he is entitled would be an interference with his rights under article 1 of the First Protocol to the Convention ("A1P1"), which provides as follows:

> "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 interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Accordingly, as Ms Bretherton QC accepts on behalf of the appellant, unlike in the case of a public sector landlord, a judge invited to make an order for possession

against a residential occupier by a private sector landlord would, if the appellant's argument is correct, have to balance the landlord's A1P1 rights against the occupier's article 8 rights. Either party would have a potential claim against the United Kingdom in Strasbourg if the balance were struck in the wrong place.

Preliminary view

40. In the absence of any clear and authoritative guidance from the Strasbourg court to the contrary, we would take the view that, although it may well be that article 8 is engaged when a judge makes an order for possession of a tenant's home at the suit of a private sector landlord, it is not open to the tenant to contend that article 8 could justify a different order from that which is mandated by the contractual relationship between the parties, at least where, as here, there are legislative provisions which the democratically elected legislature has decided properly balance the competing interests of private sector landlords and residential tenants. In effect the provisions of the Protection from Eviction Act 1977, section 89 of the Housing Act 1980 and Chapters I and IV of the 1988 Act, as amended from time to time, reflect the state's assessment of where to strike the balance between the article 8 rights of residential tenants and the A1P1 rights of private sector landlords when their tenancy contract has ended. (It is true that the balance was initially struck in statutes enacted before the 1998 Act came into force in 2000. However, the effect of those statutes has not only been considered and approved in government reports since 2000, as mentioned in para 19 above, but they have been effectively confirmed on a number of occasions by Parliament, when approving amendments to those statutes since 2000).

41. To hold otherwise would involve the Convention effectively being directly enforceable as between private citizens so as to alter their contractual rights and obligations, whereas the purpose of the Convention is, as we have mentioned, to protect citizens from having their rights infringed by the state. To hold otherwise would also mean that the Convention could be invoked to interfere with the A1P1 rights of the landlord, and in a way which was unpredictable. Indeed, if article 8 permitted the court to postpone the execution of an order for possession for a significant period, it could well result in financial loss without compensation - for instance if the landlord wished, or even needed, to sell the property with vacant possession (which notoriously commands a higher price than if the property is occupied).

42. The contrary view would also mean that article 8 could only be invoked in cases where a private sector landowner, or other private sector entity entitled to possession in domestic law, was either required by law, or voluntarily chose, to enforce its rights through the court, as opposed to taking the law into its own hands - eg by changing the locks when the residential occupier was absent. There are a

number of types of residential occupiers who are not protected by the Protection from Eviction Act 1977, and who can therefore be physically (albeit peaceably) evicted, such as trespassers, bare licensees, sharers with the landlord and some temporary occupiers, as well, it appears, as mortgagors - see *Ropaigealach v Barclays Bank plc* [2000] 1 QB 263. The risk of otherwise facing an article 8 defence seems a somewhat perverse incentive for a private sector landowner to take the unattractive course of locking out the occupier rather than the more civilised course of seeking possession through the courts.

43. More broadly, it would be unsatisfactory if a domestic legislature could not impose a general set of rules protecting residential tenants in the private sector without thereby forcing the state to accept a super-added requirement of addressing the issue of proportionality in each case where possession is sought. In the field of proprietary rights between parties neither of whom is a public authority, the state should be allowed to lay down rules which are of general application, with a view to ensuring consistency of application and certainty of outcome. Those are two essential ingredients of the rule of law, and accepting the appellant's argument in this case would involve diluting those rules in relation to possession actions in the private rented sector.

44. It is, of course, true that a court, which is a public authority for the purposes of the 1998 Act (and is regarded as part of the state by the Strasbourg court), actually makes the order for possession which deprives the tenant of his home - and indeed puts an end to the AST. However, as Lord Millett explained in *Harrow London Borough Council v Qazi* [2004] 1 AC 983, paras 108-109, the court is "merely the forum for the determination of the civil right in dispute between the parties" and "once it concludes that the landlord is entitled to an order for possession, there is nothing further to investigate".

45. This conclusion does not mean that a tenant could not contend that the provisions of the 1988 Act did not, for some reason, properly protect the article 8 rights of assured shorthold tenants: that would involve arguing that the legislature had not carried out its obligations under the Convention. However, quite rightly, no such argument was advanced on behalf of the appellant in this case. As the summary in paras 11-19 above shows, the Government's approach to the private rented sector in England has been designed to confer a measure of protection on residential occupiers, without conferring so much protection as to deter private individuals and companies from making residential properties available for letting. The extent of the protection afforded to tenants under ASTs is significant, if limited, and it enables both landlords and tenants to know exactly where they stand. While there will of course occasionally be hard cases, it does not seem to us that they justify the conclusion that in every case where a private sector landlord seeks possession, a residential tenant should be entitled to require the court to consider the

proportionality of the order for possession which she has agreed should be made, subject to what the legislature considers appropriate.

46. Of course, there are many cases where the court can be required to balance conflicting Convention rights of two parties, eg where a person is seeking to rely on her article 8 rights to restrain a newspaper from publishing an article which breaches her privacy, and where the newspaper relies on article 10. But such disputes arise not from contractual arrangements made between two private parties, but from tortious or quasi-tortious relationships, where the legislature has expressly, impliedly or through inaction, left it to the courts to carry out the balancing exercise. It is in sharp contrast to the present type of case where the parties are in a contractual relationship in respect of which the legislature has prescribed how their respective Convention rights are to be respected.

47. Given that that is our view as a matter of principle, it is necessary to consider the jurisprudence of the Strasbourg court to see whether it points to a different conclusion.

The Strasbourg jurisprudence

48. There are two admissibility decisions of the European Commission on Human Rights which are inconsistent with the appellant's case, and are understandably relied on by Mr Jourdan QC for the respondents. They are *Di Palma v United Kingdom* (1986) 10 EHRR 149 and *Wood v United Kingdom* (1997) 24 EHRR CD 69. *Di Palma* was a case where a private sector landlord forfeited a long and valuable residential lease for non-payment of a relatively small amount of service charge, and the court refused the tenant relief from forfeiture owing to her refusal to apply within the statutorily prescribed time. The Commission rejected the tenant's application, which was based on articles 6, 8, 13 and 14 and on A1P1, as manifestly ill-founded, as the Government's Convention responsibilities were not engaged by an "exclusively private law relationship between the parties" (p 154). The Commission also said that the fact that a domestic court made the orders granting forfeiture and refusing relief made no difference, as the court "merely provided a forum for the determination of the civil right in dispute between the parties" (p 155). In *Wood*, the same reasoning led to the conclusion that a mortgagor had no article 8 complaint if a private sector mortgagee sought and obtained possession of her home in circumstances in which she had failed to pay instalments due under the mortgage, which gave the mortgagee the right to seek possession as a matter of domestic law.

49. If these decisions represent the view in Strasbourg, they would be fatal to the appellant's case. However, Ms Bretherton QC contends that the Strasbourg

jurisprudence has developed in a very different direction over the past 15 years. So far as possession actions brought by public sector landlords are concerned, this is undoubtedly correct, as the decisions discussed in *Pinnock*, paras 31-43, demonstrate. However, as we have explained, and as Ms Bretherton fairly accepts, there is a fundamental difference between public sector landlords (who owe their residential tenants an article 8 duty) and private sector landlords (such as those in the two admissibility decisions described in para 48 above, who do not). Accordingly, we do not consider that the decisions concerning cases where a public sector landlord seeks possession are of much relevance.

50. Of those decisions discussed in *Pinnock*, it appears to us therefore that *Connors v United Kingdom* (2004) 40 EHRR 9, *Blečić v Croatia* (2006) 43 EHRR 48, *McCann v United Kingdom* (2008) 47 EHRR 40, *Ćosić v Croatia* (2011) 52 EHRR 39, *Paulić v Croatia* (Application No 3572/06) (unreported) 22 October 2009 and *Kay v United Kingdom* [2011] HLR 13 take matters little further for present purposes, as the party seeking possession was a public institution. The same applies to the decisions in *Orlić v Croatia* [2011] HLR 44 and in *Buckland v United Kingdom* (2013) 56 EHRR 16 (where the local authority owned the site - see para 60). The furthest any observations in those eight decisions can be said to go for present purposes is to support the notion that, whenever an order for possession is made by a court, article 8 is engaged. However, observations which appear to have that effect when read on their own in the context of claims by public authorities, cannot be confidently translated to cases involving private sector landlords seeking to enforce a contractual right to possession subject to legislative constraints. And, even if they can be so read, they beg the question whether a domestic court can be required to take into account the proportionality of making the order for possession required by the contractual terms as softened by domestic legislation.

51. *Zehentner v Austria* (2009) 52 EHRR 22 is at first sight of some assistance to the appellant, because the Strasbourg court held that article 8 rights could be invoked where the court had ordered a sale of the applicant's home to reimburse her creditors. However, quite apart from the fact that Austria does not seem to have challenged the contention that article 8 was engaged, the case was not concerned with the enforcement of a landlord's right to possession, but with statutorily created powers of a court to enforce debts owed to creditors by ordering the sale of the debtor's assets, including her home. The basis of the court's finding of incompatibility was that the decision of the domestic court refusing the applicant any opportunity to pay off what was owing to her creditors had been disproportionate, principally in the light of the absence of any procedural safeguards and the applicant's mental incapacity, which meant that the debts were unenforceable - see paras 61-65. The furthest this decision goes in assisting the appellant is to support the notion that article 8 is engaged whenever a court determines a tenancy of residential property and makes an order for possession. However, once again, the decision does not support the notion that article 8 can be

invoked by a residential occupier to curb her private sector landlord's reliance on its contractual right to possession, where the statutory regime according her a degree of protection is not said to infringe the Convention.

52. *Zrilić v Croatia* (Application No 46726/11) (unreported) 3 October 2013 is unhelpful for the same sort of reasons. It involved the partition and sale of a residential property. Croatia does not seem to have challenged the contention that article 8 could be invoked by the applicant, once she established that the property concerned was her home (see paras 42 and 59). Quite apart from this, the case involved the domestic court exercising its own powers of partition and sale, rather than enforcing the contractual rights of the parties subject to specific legislative protective provisions, and it was a case where both parties had article 8 rights. Thus, in para 65, the Strasbourg court described the domestic court's function as being "to seek a partition model which would be feasible and appropriate in the circumstances of the case". In any event, the application was rejected on the merits.

53. In two other cases involving Croatia, article 8 was successfully invoked by a residential tenant against whom a private sector landlord had obtained an order for possession. In *Brežec v Croatia* [2014] HLR 3, the land owner was a private company, but it had been a state-owned company when the tenancy was granted - a factor which the court plainly thought relevant (see para 48). In any event, Croatia did not rely on the subsequent privatisation to justify an argument that article 8 could not be invoked (see para 33). It therefore seems to us that the judgment in that case can take matters no further on this appeal. The same points can be made about the subsequent decision in *Lemo v Croatia* (Application No 3925/10, etc) (unreported) 10 July 2014 (see paras 28 and 43).

54. For completeness, it is right to mention *Belchikova v Russia* (Application No 2408/06) (unreported) 25 March 2010, which also involved a private land-owner seeking possession (having inherited the property concerned after the former owner's death), but the decision is of no assistance as there appears to have been no challenge to the contention that article 8 could be invoked, it appears that the domestic law may well have involved a balancing exercise, and in any event the application was held to be manifestly ill-founded on the facts.

55. It is worth noting concurring opinions in two of the Strasbourg court decisions mentioned above, which are very much in line with Lord Millett's observation in *Qazi*, cited in para 44 above. In *Buckland*, para OI-1, Judge De Gaetano said that "while it is perfectly reasonable to require that an eviction … notice issued by the Government or by a local authority … should be capable of being challenged on the grounds of proportionality, when the landlord is a private individual the tenant's right should in principle be limited to challenging whether the occupation … has in fact come to an end according to law". He added that "[i]n

this latter case the proportionality of the eviction … in light of the relevant principles under article 8 should not come into the equation". In *Brežec*, at pp 37-38, Judge Dedov, having pointed out that the applicant "did not … challenge the privatisation of the properties", observed that, if the domestic court could hold that it was disproportionate to grant the land-owner possession when domestic law entitled him to it, it would represent an "interference" with "the private owner's claims", and that it "would have amounted to interference with the owner's rights and such interference would be arbitrary from the very outset, since the private owner cannot be responsible for the state's social obligations".

56. Another decision which deserves mention is *Mustafa and Tarzibachi v Sweden* (2008) 52 EHRR 24, where the Strasbourg court considered a claim by applicants who had been evicted by a court order at the suit of their landlords, who had determined their tenancy for installing a satellite dish in breach of covenant. The Strasbourg court held that this infringed the applicant's article 10 rights, but did not go on to consider their claim in so far as it was based on article 8 (see para 54). It is fair to say that the domestic court's involvement was enough to render the application based on articles 8 and 10 admissible (see paras 33-34). However, as we have already said, that does no more than establish that article 8 is engaged in a case where a private sector claimant seeks possession of a defendant's home pursuant to the terms of the contract between them.

57. Beyond that, it does not seem to us that *Mustafa* is of any assistance. Contrary to the submission on behalf of the appellant, we do not consider that this decision involved holding that article 10 could be invoked to vary the contractual rights as agreed between two private persons, in a case such as the present, where there is no suggestion that the legislature has failed to protect the relevant Convention rights. The effect of the decision in *Mustafa*, as we see it, was that the Swedish Government had failed to enact legislation to satisfy article 10, so far as individuals' rights to receive information by satellite were concerned, and that in those circumstances, unless the court had power to give effect to such rights despite the terms of the relevant contract, the applicants' article 10 rights would be infringed (see again para 34).

58. Indeed, it is worth noting that the Strasbourg court in *Mustafa* considered that para 59 of its earlier judgment in *Pla v Andorra* (2006) 42 EHRR 25 was in point (see footnote 8). In that paragraph the Strasbourg court said that it could not "remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary or, as in the present case, blatantly inconsistent with the prohibition of discrimination established by article 14 and more broadly with the principles underlying the Convention". That is a long way from what this case is about.

Conclusion on the first issue

59. In these circumstances, while we accept that the Strasbourg court jurisprudence relied on by the appellant does provide some support for the notion that article 8 was engaged when Judge Corrie was asked to make an order for possession against her, there is no support for the proposition that the judge could be required to consider the proportionality of the order which he would have made under the provisions of the 1980 and 1988 Acts. Accordingly, for the reasons set out in paras 40-46 above, we would dismiss this appeal on the first issue.

60. This renders it unnecessary to address the second and third issues. However, both issues are of potential importance. The second issue is relevant to many cases when the court is faced with a choice between making an order under section 3 or under section 4 of the 1998 Act. The third issue is of importance in terms of giving guidance to judges faced with an article 8 proportionality argument by a residential occupier in the context of a possession claim by a public sector land-owner. Accordingly, we will go on to consider those two issues.

The second issue: could section 3 have applied?

61. Section 3(1) of the 1998 Act provides that "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." The appellant argues that, if this court could read down section 143D(2) of the 1996 Act (as inserted by paragraph 1 of Schedule 1 to the Anti-social Behaviour Act 2003) in *Pinnock* and section 127(2) of the same Act in *Powell*, then there is no reason not to do the same for section 21(4) of the 1988 Act. Their wording is in similarly mandatory terms.

62. Section 21(4) (para 25 above) states that the court "shall make an order for possession of a dwelling house let on an assured shorthold tenancy which is a periodic tenancy" if satisfied, in effect, that the landlord has served the correct two months' notice. Section 143D(2) of the 1996 Act, which relates to demoted tenancies, states that "The court must make an order for possession unless it thinks that the procedure under sections 143E and 143F has not been followed". Section 127(2) of the 1996 Act, which relates to introductory tenancies, states that "The court shall make [an order for possession] unless the provisions of section 128 apply." If those two mandatory provisions can be read down so as to allow for the court to assess the proportionality of making the order, why can section 21(4) not be read in the same way? What is the difference between the notice requirements in section 21(4) and the requirements in sections 143E and 143F or section 128 respectively?

63. This is an attractive argument, so much so that the second interveners, the Residential Landlords' Association, are persuaded that section 21(4) *could* be read in this way (although they argue that it should not). Indeed, we were ourselves initially attracted by it.

64. There are, however, powerful arguments to the contrary. Both demoted and introductory tenancies can only be granted by a public authority landlord. There are three inter-linked reasons why decisions made by public authorities under the 1996 Act are different from decisions made by private landlords. First, public authorities are obliged to use their powers lawfully in accordance with the general principles of public law; it is open to a tenant to defend possession proceedings on the ground that the authority has acted unlawfully: see *Wandsworth London Borough Council v Winder* [1985] AC 461. As Lord Scott of Foscote pointed out in *Doherty v Birmingham City Council* [2009] 1 AC 367, at para 69, this concept of lawfulness has no application to a private landlord, who is entitled to recover possession of his property in accordance with the law for whatever reason he likes. He is not subject to the constraints of *Wednesbury* reasonableness: see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223.

65. Second, section 143E of the 1996 Act (as inserted by paragraph 1 of Schedule 1 to the 2003 Act) requires the landlord seeking to bring a demoted tenancy to an end to serve a notice giving reasons for doing so and informing the tenant of his right to seek a review of the decision under section 143F (as inserted by paragraph 1 of Schedule 1 to the 2003 Act). Similarly, section 128 of the 1996 Act requires the landlord seeking to bring an introductory tenancy to an end to serve a notice giving reasons and informing the tenant of his right to seek a review. In short, both are reasons-based processes. There is nothing equivalent in section 21(4) of the 1988 Act, which is purely mechanical - the right form of notice must be given at the right time to expire at the right time.

66. Third, of course, by section 6(1) of the 1998 Act, it is unlawful for a public authority landlord to act incompatibly with the Convention rights. By section 7(1)(b) a person who claims that a public authority has acted or proposes to act in a way which is made unlawful by section 6(1) may rely on the Convention right concerned in any legal proceedings. None of this applies to a private landlord, who is not obliged to act compatibly with the Convention rights.

67. It was for this combination of reasons that this court, in both *Pinnock* and *Powell*, held that it was possible to read the relevant provisions of the 1996 Act in such a way as to include the article 8 requirement of proportionality in the court's assessment of the lawfulness of the public authority's actions in seeking possession. It is true, as the third interveners, Shelter, point out, that there are constraints on a private landlord's freedom of action, other than those laid down in section 21(4)

itself (an example is the Equality Act 2010, which prohibits unlawful discrimination in bringing possession proceedings). But all of these are laid down by statute or statutory instrument. And none of them imports the public sector obligations, in particular the duty to act compatibly with the Convention rights, set out above.

68. There is therefore not the same flexibility inherent in the language of section 21(4) of the 1988 Act as there is in the language of sections 143D and 127(2) of the 1996 Act such as to enable the court to read into it a requirement that the court consider the proportionality of making an order for possession. More importantly, however, there are substantive limits to what the courts can achieve under section 3(1) of the 1998 Act. It is "possible" to do a great deal with words. In the leading case of *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557, it was possible to read "as husband and wife" to include two people of the same sex. The courts had already learned what could be achieved by interpretation in order to make statutory provisions conform to a higher law, under the European Communities Act 1972 and in construing the legislation of certain Caribbean islands compatibly with the fundamental rights protected by their Constitutions. As Lord Rodger of Earlsferry put it in *Ghaidan* at para 119,

> "Such cases are instructive in suggesting that, where the court finds it possible to read a provision in a way which is compatible with Convention rights, such a reading may involve a considerable departure from the actual words."

69. But there is a difference between interpretation, which is a matter for the courts and others who have to read and give effect to legislation, and amendment, which is a matter for Parliament. While the boundary may not always be easy to discern, the difference was neatly encapsulated by Lord Rodger in *Ghaidan* at para 121:

> "If the court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with Convention rights, it is simply performing the duty which Parliament has imposed on it and on others. It is reading the legislation in a way that draws out the full implications of its terms and of the Convention rights. And, by its very nature, an implication will go with the grain of the legislation. By contrast, using a Convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of interpretation, by implication or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute."

Notably, Lord Rodger was looking at the legislation itself when seeking to draw the line, rather than its broader policy. In the case before us, the "scheme of the legislation" is to draw a careful distinction between those cases in which good grounds must be shown for obtaining possession and those cases, such as this, where no ground need be shown. The "essential principles" disclosed by its provisions are that private landlords letting property under an AST should have a high degree of certainty that, if they follow the correct procedures and comply with their own obligations, they will be able to regain possession of the property. Reading in an obligation to assess the proportionality of doing so in the light of the personal circumstances of the individual tenant would not "go with the grain of the legislation" but positively contradict it. All this can be concluded without considering the broader policy of the 1988 Act, which (as we have explained at paras 12 to 19 above) was to stimulate the re-growth of the private rented sector and in doing so to increase the supply of homes available to rent.

70. For all those reasons, we conclude that it would not be "possible" to read section 21(4) in the way contended for by the appellant. Had we been persuaded that it was incompatible with the Convention rights, the only remedy would have been a declaration of incompatibility under section 4. As was said (in a different context) in *Powell*, at para 64, this is an area where the choice of if, and how, to remedy any incompatibility should be left to Parliament.

The third issue: would the judge have been entitled to dismiss the claim?

71. Even supposing that a proportionality assessment were required, at least where the occupier has crossed the "high threshold" of showing an arguable case, and section 21(4) could be read so as to accommodate it, what should the consequences be? The judge in this case held, that had proportionality arisen, he would "on balance" have taken the view that the appellant's personal circumstances were sufficiently exceptional to justify dismissing the claim for possession on the basis that it was disproportionate. In reaching that *obiter* conclusion, he did not consider whether there were other solutions to the problems than dismissing the claim.

72. In those rare cases where the court is required to assess the proportionality of making a possession order, the court has at least four possible options. One is to make a possession order, and if it does so, its powers to suspend or postpone the effect of the order are severely limited by section 89(1) of the Housing Act 1980 (set out at para 28 above). In *Powell*, at para 62, this court held that the language of section 89(1) was so strong that any reading down to enable the court to postpone the execution of a possession order for a longer period than the statutory maximum "would go well beyond what section 3(1) of the 1998 Act permits".

73. As Lord Phillips pointed out in *Powell* at para 103, the effect of section 89(1) is to increase the options available to the court. It may (a) make an immediate order for possession; (b) make an order for possession on a date within 14 days; (c) in cases of exceptional hardship make an order for possession on a date within six weeks; or (d) decline to make an order for possession at all. The cases in which it would be justifiable to refuse, as opposed to postpone, a possession order must be very few and far between, even when taken as a proportion of those rare cases where proportionality can be successfully invoked. They could only be cases in which the landlord's interest in regaining possession was heavily outweighed by the gravity of the interference in the occupier's right to respect for her home. The evidence filed on behalf of Shelter indicates that *Pinnock* defences hardly if ever succeed against public authority landlords save in combination with some other public law factor (although they may well provide a helpful bargaining counter in particularly deserving cases). Were a proportionality defence to be available in section 21 claims, it is not easy to imagine circumstances in which the occupier's article 8 rights would be so strong as to preclude the making, as opposed to the short postponement, of a possession order.

74. In this case, the judge referred to the fact that the arrears of interest on the mortgage were insubstantial and the rent was always up to date. That is, however, only part of the story. The loan which enabled the appellant's parents to buy this house was for a period of only eight years, expiring on 12 May 2013, three weeks after the judge gave his judgment. The lenders were entitled to their money back then. The amount due (apart from legal costs) was nearly £164,000. The best chance of recovering all that was due to them was to sell the property with vacant possession. It may be, as the appellant argues, that they could recoup everything by selling the property with the appellant as sitting tenant. This does, however, seem unlikely, as her parents would have been advised to do this if they could have done. It was also in their interests to achieve the best price possible on the property, in the hope of realising some equity (which might have helped their daughter find another home). In any event, it would be for the appellant to show that a possession order would be disproportionate, and that to refuse a possession order would not prevent the lenders from recovering the sums to which they were entitled. It is difficult to see how the appellant's circumstances, most unfortunate though they undoubtedly are, could justify postponing indefinitely the lenders' right to be repaid.

75. In the circumstances, therefore, and on the evidence available to the judge, it seems likely that the most the appellant could hope for on a proportionality assessment would be an order for possession in six weeks' time.

Conclusion

76. For these reasons, we would dismiss this appeal.