

## Chapter 4

### **Question 1: How is an interference with the qualified human rights found in Art 1 Protocol 1 and Art 8 justified?**

The general approach to the justification of interference with a qualified right before the ECtHR is considered in section 4.2.2 with further consideration of justification under Art 1 Protocol 1 considered in section 4.3.2 and under Art 8 in section 4.4.2. An interference must be in accordance with domestic law and serve a legitimate aim which falls within a State's margin of appreciation and is proportionate in striking a fair balance between the effect upon the victim and the interference. The legitimate aims under Art 1 Protocol 1 and Art 8 differ. Under Art 1 Protocol 1 a legitimate aim must serve the general or public interest. Under Art 8 the legitimate aim must address a pressing social need within the qualifications set out in Art 8(2): for instance as is necessary in the economic well-being of the country or for the protection of the rights and freedoms of others. Even though an infringement of a Convention right may be in pursuit of a legitimate aim, it must also be proportionate in both adopting the least intrusive means to achieve that aim and in its effect upon the rights holder.

Where an infringement with a qualified human right is at issue before a domestic court the issue is slightly different given the constitutional balance between Parliament and the courts. The domestic courts in matters of socio-economic policy have demonstrated deference, or as the court would prefer due weight, to the policy decisions of Parliament and the administrative decisions of those responsible for the implementation of such policy. This deference is evident within the domestic courts' approach to the interference with Art. 8 rights evident in possession proceedings of the home by a public authority – see section 4.4.2.1.

### **Question 2: To what extent does the ECHR affect relations between private landowners?**

The ECHR is a treaty which binds signatory States including the UK, and a victim can bring action in the Strasbourg Courts against a defaulting state. The HRA 1998 with effect from 2nd October 2000 incorporates the ECHR into the law of this country. The means by which the HRA 1998 does so is considered in section 4.2..

By section 6 of the HRA 1998 public authorities must act in a manner which is compatible with the ECHR and a victim may bring action against a public authority that breaches its obligations to do so – see section 7 HRA 1998. This is known as the vertical effect of the HRA 1998 – see section 4.2.3.

The ECHR may also have an effect upon the relations between private landowners, although the precise ambit of this effect is still uncertain. This is known as the horizontal effect of the HRA 1998 and is considered in section 4.2.4. There are a number of ways in which the ECHR may have horizontal effect. For instance, by section 3 of the HRA 1998 legislation must be interpreted as far as possible in a manner which is compatible with the ECHR. Where it is not possible to so interpret legislation, the courts are able to issue a declaration of incompatibility whereupon the Government may amend the offending provision. Thus where legislation governs relations between private landowners the ECHR will have an impact – see *Ghaidan v Godin-Mendoza*. It is argued that the courts, as public authorities, must act in a manner which is compatible with the ECHR under section 6. Thus, when applying common law and equitable principles in determining the litigants' rights and obligations the courts should also act in a compliant manner. Furthermore, it is argued that the courts may be obliged to develop the common law and equitable principles to accommodate Convention rights. In addition, the Strasbourg Court has emphasised that States have positive duties to protect Convention rights even in disputes between private individuals, for example see *Zehentner v Austria* and *Khursid Mustafa v Sweden*. Such positive duties appear to be particularly potent in requiring States to provide adequate procedural safeguards or to protect vulnerable victims for instance because the victim suffers from some incapacity or because they are a member of a minority cultural group.

Nevertheless, recent cases suggest a row back in the court's role in horizontal effect in consensual property relations between private parties particularly where these relations are regulated by recent legislation see

*McDonald v McDonald*, *FJM v UK* and *Vrzic v Croatia*. These developments are discussed in section 4.4.2.4 and 4.4.2.5.

**Question 3: How does Art 1 of the First Protocol define a possession?**

The meaning of possessions is considered in section 4.3.1.1. It has an autonomous meaning which the Strasbourg Courts have interpreted widely beyond our domestic understanding of property rights. A particular issue for land lawyers is how appurtenant rights and burdens upon an estate or interest in land are considered. Existing appurtenant rights are not generally considered a separate possession nor an existing burden an infringement. Rather they define the proprietary estate or interest. It is the imposition of new burdens by the operation of external legal rules that may constitute an interference with the victim's possessions.

**Question 4: Why are mandatory rights to possession problematic in the context of Art 8?**

The compatibility with Art 8 of the exercise of rights to possession in social housing proceedings is considered in section 4.4.2.1. Mandatory rights to possession are problematic because they fail to meet the procedural safeguards necessary to consider the proportionality of the infringement with respect for the home that is demanded by human rights adjudication. The court, as an independent tribunal, should be able to consider the proportionality of the right to possession in the light of the occupier's personal circumstances and not just their legal status – see *Connors v UK*, *McCann v UK*, *Kay v UK* as acknowledged in *Manchester CC v Pinnock*. Accordingly, domestic courts have re-interpreted statutory and common law rights to possession to confer this discretion – see *Manchester CC v Pinnock*, *Hounslow LBC v Powell*, *Sims v Dacorum DC*.

However, mandatory rights to possession appear only problematic in repossession by a public or quasi-public authority. The compatibility with Art 8 of the exercise of a private landlord's mandatory right to possession was accepted by the Supreme Court in *McDonald v McDonald*. This important case is considered in 4.4.2.4 together with the criticisms that have been levelled at the Supreme Court's approach.

It should be noted that similar procedural concerns surround Art 1 Protocol 1 – see *Zehentner v Austria* and *Vzric v Croatia*.

**Question 5: Is there such a concept as a human property right?**

This is a difficult question to which there is no clear answer. Some commentators have argued that rights may arise based upon the protections enshrined in the ECHR even though the claimant may have no recognized proprietary right. This protection has been dubbed a human property right. It should perhaps more accurately be described as a human right based protection since it is clearly not attached to the property but flows, on the one hand, from a public authority's duty to act in a human rights compliant manner and, on the other hand, from the victim's right to have their Convention rights observed.

One example of this possibility is found in a series of cases where a local authority has brought possession proceedings against a former tenant or licensee who has lost his or her legal right to remain in possession of their home. We consider these cases in section 4.4.2.1 and touch on the wider question in our concluding comments in section 4.5.

It is clear that the meaning of home for the purpose of Article 8 does not depend upon the occupier holding a proprietary interest in the property. A home is a place of residence with which the claimant has sufficient and continuing links – see *Harrow LBC v Qazi*. A former tenant or licensee who has no legal right to remain in possession may thus look to the protection of Article 8 where a local authority seeks possession. This has happened in a number of cases where a local authority has sought possession following their revocation of an occupational licence or non-secure tenancy – see *Connors v UK*, *Hounslow LBC v Powell*, *Buckland v UK*, following the termination of a joint tenancy by a notice given by one joint tenant – see *Harrow v Qazi*, *McCann v*

*UK and Sims v Dacorum DC* and pursuant to one of the statutory regimes intended to combat anti social behaviour see *Manchester cc v Pinnock* and *Hounslow LBC v Powell*. In these cases the occupier of their home has no legal right to remain in possession upon the entirely legal revocation of their licence or termination of their tenancy. Nevertheless, they have argued that the respect for their home has been unjustifiably infringed where the local authority has taken possession proceedings to remove them from their home.

The Supreme Court has subsequently finally bowed to pressure from Strasbourg to accept that the interference with respect for an occupier's home that repossession presents must also be proportionate in its impact upon the personal circumstances of the victim. There must thus be an adequate process before an independent tribunal with sufficient discretion to consider the proportionality of the claim for possession – see *Manchester CC v Pinnock* and *Hounslow LBC v Powell*. This possibility is controversial as it raises the possibility that established property rules might require modification in order to give adequate respect to a particular individual's circumstances regarding their home. The Supreme Court however have been keen to limit the possibility that an occupier's personal circumstances may impact upon the exercise of established legal rules by stating that such an outcome is very exceptional but might conceivably arise where the occupier is particularly vulnerable for instance because of ill health or old age.

The Supreme Court has accepted this radical agenda in the context of possession proceedings brought by a public authority i.e. where the HRA 1998 has vertical effect. The impact however would be even more revolutionary if the HRA 1998 had horizontal effect when possession proceedings brought by private landlords or lenders would also come under the spotlight. Commentators have warned against the uncertainty that would result if the law was to go down this road and in *McDonald v McDonald* the Supreme Court rejected this possibility. The Strasbourg Courts are also hesitant to sanction this possibility. see 4.4.2.5.

**Question 6: How may human rights based courses of action protect those in society who may be classified as vulnerable?**

An infringement with a human right is less likely to be proportionate where the victim is vulnerable and thus likely to suffer particular harm. Indeed the Strasbourg Courts have suggested that State's owe a positive duty to ensure that those that are vulnerable deserve particular protection. We see examples of such positive duties in *Zhentner v Austria* – in the light of Ms Zhentner's mental fragility - and in *Connors v UK, Yordanova v Bulgaria* and *Winterstein v France* – which all concerned the vulnerability of gypsies and travellers.

Parliament has recognised that certain groups may be discriminated against and subject to less favourable treatment in its enactment of the Equality Act 2010. This overtly rights-based legislation both protects against direct and indirect discrimination by both public authorities and private individuals and may also call for measures to be taken to try and ensure that all are treated equally. In so doing it employs the concept of proportionality.

Vulnerability however is a controversial concept. The temptation is to identify particular groups as vulnerable for instance as a result of their age, physical or mental disability or their sexual orientation. This is the approach of the Equality Act 2010 as well as the Strasbourg Courts. However, commentators have argued that everyone can be vulnerable in the light of their situation or ability to overcome economic or personal difficulties.

**Question 7: To what extent is it appropriate for the courts to consider Government policy in determining the compliance of property rules with the ECHR?**

The underlying thrust of the HRA 1998 is for property rules to be human rights compliant but we have examined in question 1 when an infringement with a qualified human right may be justified.

In applying the justification formula, the ECtHR assesses whether or not the legitimate aim of an interference is met and will thus inevitably need to consider policy. However, this examination is made against the fact that the Strasbourg Court accepts that States enjoy a wide margin of appreciation in determining a given policy aim and the means adopted to achieve it – see Section 4.2.2.3. In the domestic context the courts have also accepted

that their constitutional role is not to question Government policy but to assess Convention compatibility of the law, in particular legislation, giving effect to a particular policy. In this regard the domestic courts have indicated that in areas of social and economic policy, including housing, the courts will give considerable weight to the policy choices of Parliament and the administrative implementation of that policy by public authorities – see Section 4.2.2.5. The court’s attention is more focused upon the proportionality of a particular policy measure to evaluate whether there is a fair balance struck between the policy objective and the interference it causes to an individual’s human rights – see Section 4.2.2.4. Examples of this process are found in relation to Article 1 Protocol 1 in the Strasbourg courts’ discussion in *James v UK*, *JA Pye (Oxford) Ltd v UK*, *Hutten-Czapska v Poland*, *Lindheim v Norway* and in relation to Article 8 in the case law considered in section 4.4.2.

**Question 8: How useful is the human rights ‘prism’ through which the law governing property rights must now pass?**

We consider the impact of human rights in section 4.5 in which we refer to the analogy of a prism used by Gray and Gray. Fox uses a similar analogy by describing the mechanism of evaluating the human rights’ compliance as a ‘useful lens’. We describe this mechanism in section 4.2 and illustrate its import in the context of Article 1 Protocol 1 and Articles 8, 6 and 14 in the subsequent sections of this chapter.

Allen has suggested two possible alternative routes that human rights might have on property rules. Either human rights will have little impact because the fundamental principles enshrined in the ECHR reflect the fundamental principles that have shaped our property law for centuries. Alternatively, human rights will have an influence by providing an overt and alternative balancing process against which competing property rights can be reconciled. For instance we have referred in question 7 to the extent to which the courts will need to consider whether a particular policy is a justified and proportionate interference with an individual’s property rights or home. Whilst in the remaining parts of this book we refer to occasions when we feel that human rights prism or lens may have an impact.

The initial signs are that human rights prism will have a limited impact on property rights. The case law to date has demonstrated that exceptionally the law may fail to pass through the human rights prism. The more potent impact is likely to be upon the procedural framework by which the courts can assess the proportionality of the impact of the law upon a particular victim, although in this assessment a disproportionate result is expected also to be rare. This is particularly so where the property relations of private individuals are at stake.