

Human Rights and the Private Sector

On 15th June 2016, the Supreme Court handed down judgment in the case of *McDonald (by her litigation friend Duncan J McDonald) v McDonald & others* [2016] UKSC 28

The case concerned an appeal by a private sector tenant against a possession order evicting her from the property which she occupied under an assured shorthold tenancy



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The facts

The tenant was the landlords' daughter. She was in her mid-forties and had suffered from a personality disorder and psychotic symptoms since childhood. She had previously lost two public sector tenancies owing to her behaviour. The landlords had bought the property for her to occupy. The rent was covered by housing benefit.

The landlords fell into arrears with the mortgage repayments and the loan company appointed receivers, who sought possession in the name of the landlords. The landlords served on the tenant a notice under s.21(4) of the Housing Act 1988.

The claim

The tenant relied on expert medical evidence as to the effect of eviction on her mental health, and pleaded that possession was disproportionate under s.6(1) of the Human Rights Act 1998 and article 8(2) of the ECHR.

The county court judge concluded that the court had no power to consider proportionality, given that the person seeking possession was not a public authority. The judge indicated that if he could have considered proportionality, he would have

found that a possession order was disproportionate. The judge made a possession order based on the expiry of the valid s.21 notice.

The Court of Appeal agreed that he was not entitled to consider proportionality, but held that if he had been so entitled, he would have been wrong to dismiss the possession claim.

The Supreme Court appeal

The questions asked of the Supreme Court were:

- (1) whether, when hearing a claim for possession by a private sector landlord against a residential occupier, the court should be entitled to consider the proportionality of eviction under s.6(1) of the HRA and article 8(2) of the ECHR, particularly as, by virtue of s.6(3)(a) of the HRA, the court was a "public authority";
- (2) if so, whether s.21(4) of the 1988 Act could be read so as to comply with that conclusion;
- (3) if the answers to (1) and (2) were in the affirmative, whether the judge would have been entitled to find that possession of the property was disproportionate.

The outcome

The Supreme Court concluded that;

- (1) It was not open to private tenants to argue that article 8 of the ECHR could justify a different order from that which was mandated by the contractual relationship between them and their landlord.
- (2) (Obiter) It was not possible to read s.21(4) of the 1988 Act so as to allow the court to assess the proportionality of making otherwise mandatory orders.
- (3) (Obiter) In rare cases where the court was required to assess the proportionality of making a possession order, it had at least four possible options to consider. The cases in which it would be justifiable to refuse possession had to be very few and far between. In the instant case, although the tenant's circumstances were unfortunate, it seemed likely that the best she could have hoped for was a six-week postponement of the order, as there was no justification for postponing indefinitely the lender's right to be paid (paras 72-75).

Comment

This decision marks an important line in the sand for both tenants and landlords: in circumstances where the relationship between the parties is a private contract between private individuals, a tenant cannot rely on Convention rights.

Finding for the tenant would have meant diluting the law laid down by Parliament in the Housing Act 1988, the Protection from Eviction Act 1977, and the Housing Act 1980. The ECHR exists to protect individuals from infringement of their rights by the State. This decision highlights the relationship between the citizen in contract with his fellow citizen, the State as law maker, and the Convention.

The Supreme Court conceded that there could be cases in which the landlord's interest in regaining possession was so heavily outweighed by the gravity of the interference in the occupier's article 8 rights that a possession order might not be made. However, it was not easy to imagine what those circumstances might be, particularly as it is open to the court to grant a postponed possession order under domestic law in any event.

The decision comes at an interesting time in British politics, 8 days before polling opens for the referendum on Britain leaving the European Union. In the line of authorities which have arguably opened an ever widening door for the influence of the ECHR on the private citizen, perhaps this is a sign that the door may soon be closing.

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