**SHUTTING THE DOOR ON HORIZONTAL EFFECT**

**McDonald v McDonald[2016] UKSC 28**

**Keywords:** Eviction; Possession Orders; Article 8 Right to respect for private and family life and home; Horizontal Effect; Proportionality; Assured shorthold tenancies

**Legislation:** European Convention on Human Rights and Fundamental Freedoms Art 8, Human Rights Act 1998 s3 and s6, Housing Act 1988 s21(4), Housing Act 1980 s89(1)

**Cases:** McDonald v McDonald [2016] UKSC 28

**Introduction**

In *Manchester CC v Pinnock[[1]](#footnote-1)*(*Pinnock*)and *Hounslow LBC v Powell[[2]](#footnote-2)*(*Powell*) the Supreme Court accepted the clear and consistent line of decisions from the European Court of Human Rights (the Strasbourg Court) that a person at risk of being dispossessed of his or her home should have the right to question the proportionality of this interference with his or her Article 8 right to respect for their home before an independent tribunal. However, they did so only in relation to a dispossession by a public authority and specifically left open the question of whether the tenant of a private landlord enjoyed a similar right.[[3]](#footnote-3) In *McDonald* the Supreme Court answered this question in the negative. In so doing they also provided an insight into their views on the horizontal effect of the Human Rights Act 1998 (HRA 1998) on private law.

The Supreme Court’s restrictive approach to the application of Article 8 to assured shorthold tenancies (AST) in the private sector, whilst no doubt welcomed by landlords, is disappointing to the emergence of human rights protection of the home. It is understood that the decision is to be appealed to the Strasbourg Court and thus this decision may not be the final word.

**The Facts**

The facts of *McDonald* are unusual. It is not the straightforward case of a landlord wishing to evict their tenant but a mortgage repossession case which utilised the route of appointing a receiver to initiate repossession as a prelude to sale. The case tells the sad story of parents wishing to secure accommodation for their mentally troubled daughter, Fiona. In May 2005 they bought what they hoped would be a permanent home for Fiona by borrowing from Capital Homes Loans Ltd (CHL). The mortgage was interest only with the capital repayable at the end of the comparatively short term of 8 years. The house was rented to Fiona on a succession of ASTs with the mortgage interest partly met from the rent funded by Fiona’s housing benefit.

Unfortunately the McDonalds were unable to keep up their mortgage repayments due to a decline in their business fortunes and CHL appointed receivers in August 2008 to protect their position as mortgagees. The receivers took no immediate steps to evict Fiona. The rent was regularly paid and the arrears of interest were not large. Nevertheless, the arrears persisted and the receivers finally served notice to terminate Fiona’s tenancy with effect from 14 March 2012. Their intention was to regain possession pursuant to section 21(4) of the Housing Act 1988 (Section 21(4)). The 8 year mortgage term was due to expire on 12 May 2013 when CHL would be looking for full capital repayment of the loan. No doubt the receivers had this repayment deadline also in mind.

Fiona had resisted the possession order in the lower courts on two grounds. First, she claimed that a possession order would breach her right to respect for her home under Article.8. Section 21(4) mandates possession on proof that the tenancy had been brought to an end by a two months notice to quit and thus did not allow the court discretion to consider the proportionality of her eviction.[[4]](#footnote-4)Secondly, she claimed that her tenancy had not been terminated, because the requisite notice had been served without the authority of her landlords, namely her parents. Both grounds were dismissed at first instance and by the Court of Appeal but it was only upon the first ground that Fiona appealed to the Supreme Court.

**The Decision**

The Supreme Court gave a unanimous judgment dismissing Fiona’s appeal. The judgment was given by Lord Neuberger and Lady Hale with whom Lords Kerr, Reed and Carnworth agreed. There were three interdependent issues argued before the Supreme Court all of which were dismissed upon more solid reasoning than had been expressed by the Court of Appeal.[[5]](#footnote-5)

*The First Issue*

The first and main issue concerned the nature of a court’s duty to act in a human rights compatible manner under section 6 of the HRA 1998. It was argued on behalf of Fiona that this duty required a court to consider the proportionality of an order for possession in favour of a private landlord made pursuant to section 21(4). This issue was framed differently from that considered by the Court of Appeal. The Court of Appeal had considered and rejected Fiona’s counsel’s argument based on section 3 of the HRA 1998 that the mandatory nature of section 21(4) was itself incompatible and thus the court should read into the section a discretion to consider the proportionality.

If the court in pursuance of its section 6 duty is required to consider the proportionality of a possession order, the position of an occupier facing eviction from their home by either a public sector or a private landlord becomes somewhat similar. The distinction is that a private landlord may also claim that their human right to the protection of their possessions under Article 1 Protocol 1 has been infringed.[[6]](#footnote-6) The court must then balance the respective human rights of the tenant under Article 8 and their landlord under Article 1 Protocol 1.

Although the Supreme Court accepted that Article 8 is engaged by possession proceedings of a tenant’s home brought by a private landlord, they reverted to what is essentially the position the House of Lord originally took in relation to public sector tenancies in *Qazi v Harrow LBC*[[7]](#footnote-7)- namely that the legal relationship between the parties provides the justification for this infringement to the respect due to the tenant’s home.[[8]](#footnote-8) That legal relationship is articulated by the parties’ contractual tenancy agreement and its legislative regulation. As an AST Fiona’s contractual tenancy was regulated by the safeguards contained in the Protection from Eviction Act 1977, the Housing Act 1988 – in particular the requirement for a court order to recover possession and the grounds for possession - and by section 89 of the Housing Act 1980 which dictates the timing of the execution of the possession order.

The Supreme Court accepted that a tenant might challenge the human rights compatibility of this legislative framework pursuant to section 3 of the HRA 1998, although clearly they felt that this would be inappropriate in the case of section 21(4).[[9]](#footnote-9) Indeed they were at pains to review in some detail the policy that lay behind ASTs – namely the abandonment of any meaningful security of tenure or rent control within the private rental sector to encourage the supply of private rented accommodation.[[10]](#footnote-10)

The remaining element of the court’s duties under the HRA 1998 looked to the court’s duty under section 2 to take account of Strasbourg case law. As the Court of Appeal before them, the Supreme Court concluded that there was not yet “clear and authoritative guidance”[[11]](#footnote-11) dictating a consideration of proportionality in repossession proceedings of the home by a private landlord.[[12]](#footnote-12)

It was not strictly necessary for the court to go onto consider the second or third issues, both of which depended on a finding in Fiona’s favour on the previous issue. However, given their importance in the wider context, the Supreme Court did express their obiter opinion.

*Second Issue*

The second issue concerned the court’s duties under section 3 and its interface with section 4 of the HRA 1998. Section 3 requires a court so far as it is able to interpret legislation in a human rights compatible manner. If they are unable to do so then section 4 enables the court to issue a declaration of incompatibility signally that Parliament may wish to consider the amendment or repeal of the offending legislation.

If Fiona had succeeded on the first issue, her counsel maintained that the court, in pursuance of their section 3 duty, could read into the mandatory terms of section 21(4) a discretion for the court to consider the proportionality of the possession order. The Supreme Court had achieved compatibility of the relevant statutory provisions in both *Pinnock* and *Powell* in this way*.*  Although the Supreme Court was initially attracted by the analogy, they decided there were cogent reasons why section 3 could not be employed. They repeated the distinction that had been made in *Ghaidan v Godin-Mendoza* [[13]](#footnote-13) between interpretation and amendment. The former is for the courts and the latter for Parliament. Although on occasions the line between interpretation and amendment may be fine, in the case of section 21(4) the Supreme Court felt that reading in a requirement for proportionality would run so counter to the scheme of the legislative policy governing private sector tenancies that it would amount to amendment.

The Supreme Court also drew three interlinked reasons why possession proceedings by public and private landlords can be distinguished. First, a public authority’s decisions are subject to public law scrutiny in particular the duty to act reasonably. A private landlord is not subject to the same constrains – he or she can generally exercise their legal rights recover possession as they like.[[14]](#footnote-14) There are only limited constraints.[[15]](#footnote-15) Secondly, the court characterised the statutory grounds at issue in *Pinnock* and *Powell* as reasoned-based. A public landlord needs to give reasons for their decision to evict which the tenant can challenge. By contrast section 21(4) was “purely mechanical.”[[16]](#footnote-16) It does not require a landlord to provide reasons for their decision to evict. Finally, a landlord that is characterised as public is subject to a direct section 6 duty to act compatibly. Again a private landlord is not under the same duty. Indirect horizontality springs from the court’s duties under the HRA 1998.

Thus, if the first issue had been found in Fiona’s favour, the court would have issued a declaration of incompatibility rather than interpret section 21(4) to achieve human rights compatibility pursuant to section 3.

*The Third Issue*

The final issue concerned what a court could have done if the first two issues had gone in Fiona’s favour. In particular could a court, in determining proportionality, have refused to make a possession order? The focus turned to section 89(1) of the Housing Act 1980 and the time constraints it imposes upon the court’s discretion to suspend or postpone the execution of a possession order. Strict time limits can be problematic in human rights terms and Lord Neuberger in *Pinnock* had queried the compatibility of section 89(1).[[17]](#footnote-17) However, Lord Hope in *Powell* overcame these doubts.[[18]](#footnote-18) The Supreme Court did not explore these concerns in any depth but preferred to adopt the positive spin provided by Lord Phillips in *Powell* who suggested that section 89(1) actually increased the options available to the court.[[19]](#footnote-19) These options are i) to make an immediate order for possession ii) to postpone the order for not more than 14 days iii) in cases of exceptional hardship to delay for not more than 6 weeks or iv) refuse to make an order.

The Supreme Court described the cases when it would be proportionate for the court to refuse to make an order as “very few and far between” and that in the case of an AST from a private landlord “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.”[[20]](#footnote-20) The judge at first instance had indicated that he would have declined to have ordered possession in view Fiona’s mental instability and the fact that at the time of his judgement the arrears were small and the rent was being paid. By the time the case had reached the Court of Appeal the loan capital had become due and accordingly the Court of Appeal expressed the view that would be disproportionate to refuse repossession. The Supreme Court agreed with the Court of Appeal that Fiona’s circumstances were not sufficiently compelling to have merited refusal of possession. The Supreme Court looked only at the effect that refusal of possession would have had on CHL. It would have left CHL with no foreseeable prospect of repayment of their loan - in itself a possible unjustified infringement of their possessions under Article 1 Protocol 1. The effect of an eviction on Fiona’s medical condition did not feature in this hypothetical balancing exercise.[[21]](#footnote-21)Fiona’s counsel did raise the possibility of a sale of the house with Fiona remaining as sitting tenant but this way forward was dismissed as unlikely and in any event a sale with vacant possession was more likely to produce a balance that might fund alternative accommodation for Fiona.

**Comment**

*McDonald* will no doubt become known for rejecting horizontal effect between private parties in repossession proceedings which interfere with an occupier’s respect for their home under Article 8. However, to do so overlooks the different ways in which horizontality can take effect and the scope of the Supreme Court’s decision.

Horizontal effect can arise both from the court’s responsibilities under the HRA 1998 and from a State’s responsibilities under the ECHR itself. Several of these different routes to horizontality are evident within the *McDonald* litigation.[[22]](#footnote-22)

*Horizontality under Section 3 HRA 1998*

Direct statutory horizontal effect flows from the court’s responsibilities under section 3 of the HRA 1998 to interpret legislation in a human rights compatible manner. Both *Pinnock* and *Powell* provide examples of a section 3 challenge to the compatibility of legislation although in the context of vertical effect in public authority possession proceedings. There are examples of this form of horizontality in proceedings between private parties where one party has challenged the compatibility of legislation governing their private law rights. For instance *Ghaidan v Godin Mendoza[[23]](#footnote-23)* successfully challenged the discriminatory effect of the right to succeed to a secure tenancy pursuant to Articles 8 and 14.[[24]](#footnote-24)

The Court of Appeal had considered and accepted the compatibility of section 21(4) but this argument was not advanced in this appeal and the Supreme Court indicated that Fiona’s counsel was right to drop this line of attack.[[25]](#footnote-25) Their reasons are encapsulated in their approach to the horizontal effect of section 6 HRA 1998.

*Horizontality under Section 6 HRA 1998*

Section 6 requires all public authorities, including the courts, to act in a human rights compliant manner. The scope of this duty has been the subject of much conjecture particularly as regarding the court’s duty to develop the common law in a human rights compatible manner.[[26]](#footnote-26) However, it was not this aspect of the court’s section 6 duty that was at issue in *McDonald*. Rather it was remedial horizontality that shaped the Supreme Court’s response*.* Remedial horizontality relates to the court’s section 6 duty when granting remedial relief – in this case an order for possession.[[27]](#footnote-27)Its ambit is thus potentially wider than statutory horizontality pursuant to section 3 although in *McDonald* the resulting issue is much the same. The question that the Supreme Court addressed was did section 6 require a court to consider proportionality when deciding whether or not to make an order for possession pursuant to section 21(4)? In the light of the housing policy reflected in section 21(4), the Supreme Court decided that they were not under such a duty. In reaching this conclusion it is clear that they were concerned to respect their constitutional position, as defined by the separation of powers, in which housing policy is a matter for Parliament.

The Supreme Court also emphasised the contractual relationship of the parties under an AST as that relationship is shaped by legislative regulation. But they failed to note that the contractual freedom of tenants in the private rental housing market is illusory. If only ASTs are on offer that is all that private tenants can enter into. The very weak security of tenure afforded to AST tenants may work for those that have the few ties and the resources, both financial and personal, to cope with the frequent changes of home that may result. But not all who have to resort to the private rental market value this flexibility – families with children wishing to maintain local ties are an obvious example. The physically or mentally vulnerable, like Fiona, may also need greater security of tenure on health grounds.

Although the Supreme Court noted that the policy shaping ASTs has not waivered since the Housing Act 1988,[[28]](#footnote-28) it is undeniable that the housing market, and with it housing policy, has moved on. The significance of the private rental sector, and with it ASTs, has grown considerably and now forms an important element of the housing market. The private rental sector in England almost doubled in size between 2000 and 2012 mostly at the expense of the public rented sector. [[29]](#footnote-29) Accordingly, there is growing disquiet at the limited protection it affords the diversity of AST tenants. [[30]](#footnote-30) Admittedly these are policy issues but they are issues which are integral to respect for the home under Article 8 which the HRA 1998 calls upon the courts to adjudicate.

The Supreme Court also made no comment on the context of Fiona’s eviction as a mortgage repossession by a receiver which sidestepped the usual mortgage repossession safeguards[[31]](#footnote-31) and has been the subject of concern both from Government[[32]](#footnote-32) and the mortgage industry.[[33]](#footnote-33)

*The Relevance of Strasbourg Jurisprudence – section 2 HRA 1998*

The Supreme Court did not believe that their position on remedial horizontality was at odds with their duty under section 2 of the HRA 1998 to have regard to the case law and opinions of the Strasbourg Court. The Strasbourg Court has not specifically addressed the need for States, in shaping legislation implementing housing policy, to demand proportionality in possession proceedings by a private landlord but by the same token their clear statements on the need for proportionality have been general in tone and not restricted to public bodies.

The line of cases from *Connors v UK[[34]](#footnote-34)* to *Kay v UK[[35]](#footnote-35)* taking in *Blecic v Croatia,[[36]](#footnote-36) McCann v UK, [[37]](#footnote-37) Cosic v Croatia[[38]](#footnote-38)* and *Paulic v Croatia[[39]](#footnote-39)* all concerned public authorities as did *Orlic v Croatia[[40]](#footnote-40)*  and *Buckland v UK*.[[41]](#footnote-41) However, in none of these cases did the Strasbourg Court expressly limit the requirement for proportionality to repossession by a public authority. Only Judge De Gaetano’s in his separate opinion in *Buckland* expresses clear disquiet as to the operation of proportionality between private parties.[[42]](#footnote-42) Nevertheless, the Supreme Court did not feel that these cases could “be confidently translated to cases involving private sector landlords seeking to enforce a contractual right to possession subject to legislative constraints.”[[43]](#footnote-43) They also highlighted Judge De Gatano’s reservations.[[44]](#footnote-44) The limited number of Article 8 cases concerning private parties, namely *Zrilic v Croatia,[[45]](#footnote-45) Brezec v Croatia,[[46]](#footnote-46) Lemo v Croatia[[47]](#footnote-47)* and *Belchikova v Russia,[[48]](#footnote-48)* were dismissed on account of their particular circumstances. These circumstances either did not directly concern possession proceedings or were brought by a private landlord who had succeeded to previously state owned housing. The relationship at issue thus seemed to retain a hint of the public sector although the public:private distinction was not directly raised or argued.

The Supreme Court clearly preferred the message of the earlier admissibility decisions of *Di Palma v UK[[49]](#footnote-49)* and *Woods v UK[[50]](#footnote-50)* which refuted the application of Convention responsibilities to “exclusively private law relationships”[[51]](#footnote-51) in which the court merely provides a forum for the resolution of disputes.[[52]](#footnote-52) These decisions pre-dated the Strasbourg case law already referred to and are at odds with the later decisions concerning State’s positive duties referred to below. They should thus be treated with caution.

*State’s ECHR Positive Duties - Intermediate Horizontality*

What is more problematic is the Supreme Court’s failure to fully engage with intermediate horizontality. Intermediate horizontality refers to a State’s (or other public bodies’) accountability for the actions of private parties that fail to respect Convention rights. *Zehentner v Austria[[53]](#footnote-53)*  and *Mustafa & Tarsibachi v Sweden*,*[[54]](#footnote-54)* provide examples.[[55]](#footnote-55)

*Zehentner* concerned private parties, namely unsecured creditors seeking debt recovery against the home of a vulnerable debtor, in a process that bears some similarity to charging orders. The Austrian enforcement process demanded that the debtor objected to the forced sale of their home within strict time limits. Ms Zehentner was unable to comply with these time limits because she was detained in hospital on account of her mental condition. Austria was found in breach of both Article 1 Protocol 1 and Article 8 because this enforcement process failed to provide adequate procedural safeguards to persons in Ms Zehentner’s position. In effect the ECtHR found that Austria owed a positive duty to safeguard the mentally disabled embroiled in enforcement proceedings even in the face of the legitimate aim of efficient debt recovery and the protection of innocent purchasers. In the context of an AST the question could be framed as whether a State owes positive duties under Article 8 to ensure that the process of repossession provides sufficient safeguards to pay due respect to the vulnerability of a particular occupier. For example in AST repossession proceedings, a proportionality assessment would provide the only opportunity to consider Fiona’s mental disability within the otherwise mandatory terms of section 21(4). However, the Supreme Court did not make this translation. They restricted *Zehentner* to its narrow factual context.[[56]](#footnote-56)

*Mustafa & Tarsibachi* also concerned private parties in the forfeiture of a lease for the minor breach. The tenant’s breach was to erect a satellite dish so they could receive broadcasts in their native language. The case was decided under Article 10 (freedom of information) rather than Article 8 although the balancing of the private parties’ respective Convention rights is much the same.[[57]](#footnote-57) The Supreme Court read the decision as targeting Sweden’s failure to enact legislation to safeguard the victim’s Article 10 rights rather than sanctioning the variation of contractual rights. However it is difficult to see how this positive duty could have be achieved without a State interfering with private parties’ contractual rights. For instance in this jurisdiction Parliament has done so by granting a tenant a right to apply for relief and the court a wide discretion to control the landlord’s contractual right to forfeit.[[58]](#footnote-58)

Adequate procedural safeguards are an integral element of a number of Convention rights including Article 1 Protocol 1 and Article 8. Fundamental to a justified infringement of a human right is the principle that no individual should bear an excess burden. Yet how is this assessment to be achieved without considering the proportionality of the infringement? The focus of human rights is after all upon the victim. As *Zehentner* and *Mustafa* demonstrate that this focus is particularly intense when the victim is vulnerable and may stretch to impose upon States a positive duty to ensure that private parties respect the Convention rights. [[59]](#footnote-59) The Equality Act 2010 provides an example of Parliament’s acknowledgement of the need to protect and advance the interests of vulnerable groups. Its dictates extend to the actions of private parties.[[60]](#footnote-60) For example, a private landlord’s freedom to evict is constrained on direct discriminatory grounds and he or she is required to justify the proportionality of an indirect discriminatory decision to evict.[[61]](#footnote-61) It thus presents a clear inroad into private parties’ autonomy to exercise their contractual rights as they wish.

*The Scope of McDonald*

The Supreme Court has shut the door on a private tenant raising a proportionality defence when faced with eviction based upon section 21(4). But how far does they rejection of a proportionality defence go? It seems some considerable way. The Supreme Court at the heart of their judgment stated:

“... 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, as here there are legislative provisions which the democratically elected legislature has decided properly balance the competing interest of private sector landlords and residential tenants.”[[62]](#footnote-62)

That would certainly capture termination of an AST and the tenant’s subsequent eviction based on rent arrears under Ground 8 and probably also the termination of a periodic joint tenancy by service of a notice to quit by one joint tenant under the rule in *Hammersmith & Fulham LBC v Monk*.[[63]](#footnote-63)

The reference to legislation is telling and suggests that where a right to possession has been conferred upon a private party by statute - at least a statute recently considered by Parliament – then the court in deference to Parliament will not consider a mandatory right to possession incompatible.[[64]](#footnote-64) But the door is left slightly ajar where the legislation is older or indeed where the right to possession is not granted or regulated by legislation. Here there is room for the court to consider whether legal rights to possession still strike the appropriate balance between home occupier and rights holder. It is interesting to note that private law does not seem completely off limits. The Supreme Court draw a distinction between contractual and tortious relations in balancing parties’ Convention rights. They referred to their decisions on balancing press freedom under Article 10 and privacy under Article 8 to develop the tort of misuse of private information[[65]](#footnote-65) “where the legislature has expressly, impliedly or through inaction, left it to the courts to carry out the balancing exercise.”[[66]](#footnote-66) Perhaps surprisingly no further distinction was drawn between the consensual and wrong based nature of contractual and tortious obligations although, as already referred to, the court had earlier placed emphasis on the contractual basis of ASTs.

The decision is framed by landlord and tenant relationships but it could equally apply to other property relationships for instance of mortgagor and mortgagee, landowner and trespasser or licensor and licensee. The Supreme Court seems to have these relationships in mind when they warned that admitting proportionality could encourage extra judicial enforcement action.[[67]](#footnote-67) This disquieting observation arises because there are still occasions when repossession of a home may be obtained without a court order.[[68]](#footnote-68) Instead one might have expected the Supreme Court to have taken the opportunity to call for any eviction, as the most serious interference with respect for the home, to require a court order to afford judicial scrutiny of the grounds for possession even if a proportionality defence is off limits.

More fundamentally the Supreme Court is shutting the door on the rhetoric of functional balancing that proportionality offers to the law effecting home repossession. Left outside is some consideration of personal contextual factors in evaluating what respect for the home means within repossession in favour of the certainty and predictability of mandatory rights to possession. Whether one believes that this is a good or bad thing depends upon one’s view of the value of human rights within property law. Those who fear the destabilising effect of human rights upon property law will welcome the decision.[[69]](#footnote-69) Those who believe, like the author, that the home represents a unique form of property which is deserving of distinct consideration in marginal cases are disappointed. It takes the human out of home repossession by rejecting the relevance of individual vulnerability and in so doing turns away from relative approaches to ownership in favour of reinforcing the absolutism of the right to exclude.[[70]](#footnote-70)

**Conclusion**

*McDonald*  is a landmark case in addressing the long awaited question of the horizontal impact of Article 8 on private parties within home repossession.

Effectively we now have a two tier protection between tenants within the public and private sectors. This is increasingly significant given the growth of less secure tenancies in the public sector.[[71]](#footnote-71) Tenants of a public or quasi-public authority may raise a proportionality defence but private tenants cannot. The distinction is further muddied by measures such as a local authority’s ability to discharge its homelessness duties by resort to the private sector.[[72]](#footnote-72) Exactly where the line is drawn between quasi public and private landlords is thus critical. Even if the import of this public:private divide is to some extent ameliorated by the narrow application of proportionality in public or quasi-public authority possession proceedings laid down in *Pinnock* and *Powell*.[[73]](#footnote-73) Yet the test to determine a quasi-public authority is not without controversy.[[74]](#footnote-74) Many housing associations will be quasi-public authorities and under a duty to act compatibly in their dealings with their tenants, including when terminating an AST. However, their status as quasi-public authorities can raise difficult and functionally fact sensitive questions.[[75]](#footnote-75)

The rejection of remedial horizontality, through the court’s duties under section 6 of the HRA 1998, reflects the general concern that has been expressed on the impact of human rights on private law in compromising personal autonomy and the constitutional importance of separation of powers.[[76]](#footnote-76) The Supreme Court’s judgment is shot through with statements that these principles must be preserved. They reiterate that any compromise to that autonomy through the balancing of private parties’ respective human rights is a matter for Parliament in their proper constitutional role.

As such the judgment reflects the traditional property law values of clarity and certainty. However, in so doing it empties Article 8 of little meaning in the context of possession proceedings brought by private landlords. It is only where the law itself can be challenged as incompatible or where a State is found to be under a positive duty under the ECHR, for instance to protect vulnerability, that human rights may play a role. Whether the Strasbourg Court agrees with this restrictive application of the balance between Article 1 Protocol 1 and Article 8 to home repossession remains to be seen.

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1. [2011] 2 AC 104. [↑](#footnote-ref-1)
2. [2011] 2 AC 186. [↑](#footnote-ref-2)
3. See *Pinnock* per Lord Neuberger at [4] and [50]. [↑](#footnote-ref-3)
4. See also section 7 and Schedule 2 which sets out the grounds for possession of an AST. Ground 8 in particular mandates possession for rent arrears. [↑](#footnote-ref-4)
5. See author’s case note on the Court of Appeal judgment at [2015] Conv 77. [↑](#footnote-ref-5)
6. At [39]. [↑](#footnote-ref-6)
7. [2004] 1 AC 983. [↑](#footnote-ref-7)
8. At [40]. [↑](#footnote-ref-8)
9. At [45]. [↑](#footnote-ref-9)
10. At [11]-[19]. [↑](#footnote-ref-10)
11. At [40]. [↑](#footnote-ref-11)
12. At [48]-[58]. [↑](#footnote-ref-12)
13. [2004] 2 AC 557. [↑](#footnote-ref-13)
14. At [64]. [↑](#footnote-ref-14)
15. For example the Equality Act 2010 prohibits certain forms of discrimination in the management of premises by public and private landlords. [↑](#footnote-ref-15)
16. At [65]. [↑](#footnote-ref-16)
17. *Pinnock* at [63]. [↑](#footnote-ref-17)
18. *Powell* at [57]-[64]. [↑](#footnote-ref-18)
19. *Powell* at [102]-[103]. [↑](#footnote-ref-19)
20. At [71]. [↑](#footnote-ref-20)
21. See [74]. Reference to Fiona’s circumstances is made only within the procedural history of the case at [7]. [↑](#footnote-ref-21)
22. Leigh describes several ways in which horizontality can have effect see I Leigh, ‘Horizontal rights, the Human Rights Act and privacy: lessons from the Commonwealth?’ (1999) 48 ICLQ 57. [↑](#footnote-ref-22)
23. [2004] 2 AC 557. [↑](#footnote-ref-23)
24. See also *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 and *JA Pye (Oxford) Ltd v UK* (2008) 1 EHRR 132 on a similar, but ultimately unsuccessfully challenge, to the horizontal effect of Article 1 Protocol 1 [↑](#footnote-ref-24)
25. At [45]. [↑](#footnote-ref-25)
26. For a summary of this debate see G Phillipson ‘Clarity Postponed: Horizontal Effect after Campbell’ in *Judidical reasoning under the Human Rights Act* (eds H Fenwick, G Phillipson & R Masterman, CUP, Cambridge 2007) Ch 6. [↑](#footnote-ref-26)
27. See Leigh n22. [↑](#footnote-ref-27)
28. At [18]-[19]. [↑](#footnote-ref-28)
29. See A Beckett, ‘Trends in the UK Housing Market’ (Office of National Statistics, 2014). [↑](#footnote-ref-29)
30. But note the Labour Party’s 2015 Manifesto in which they advocated 3 year fixed term tenancies and reintroduction of rent control see <http://www.labour.org.uk/manifesto/housing> viewed on 2nd August 2016. [↑](#footnote-ref-30)
31. In particular s36 Administration of Justice Act 1970. [↑](#footnote-ref-31)
32. Ministry of Justice, *Mortgages: Power of Sale and Residential Property* CP 55/09 (December 2009). [↑](#footnote-ref-32)
33. CML, *The Role of LPA Receivers* (February 2011). [↑](#footnote-ref-33)
34. (2004) 40 EHRR 9. [↑](#footnote-ref-34)
35. [2011] HLR 13. [↑](#footnote-ref-35)
36. [(2006) 43 EHRR 48. [↑](#footnote-ref-36)
37. (2008) 47 EHRR 40. [↑](#footnote-ref-37)
38. (2011) 52 EHRR 39. [↑](#footnote-ref-38)
39. App No 3572/06 (22 October 2009). [↑](#footnote-ref-39)
40. [2011] HLR 44. [↑](#footnote-ref-40)
41. (2013) 56 EHRR 16. [↑](#footnote-ref-41)
42. Ibid at [01-1]. Judge Dedov also expressed some reservations in *Brezec v Croatia* [2014] HLR 3 at p37. [↑](#footnote-ref-42)
43. At [50]. [↑](#footnote-ref-43)
44. At [55]. [↑](#footnote-ref-44)
45. App No 46726/11. [↑](#footnote-ref-45)
46. N. 42 above [↑](#footnote-ref-46)
47. App No 3925/10. [↑](#footnote-ref-47)
48. App No. 2408/06. [↑](#footnote-ref-48)
49. (1986) 10 EHRR 149. [↑](#footnote-ref-49)
50. (1997) 24 EHRR CD 69. [↑](#footnote-ref-50)
51. In *Di Palma v UK* at p154. [↑](#footnote-ref-51)
52. Ibid at p155. [↑](#footnote-ref-52)
53. (2011) 52 EHRR 22. [↑](#footnote-ref-53)
54. (2011) 52 EHRR 24. [↑](#footnote-ref-54)
55. Other examples are drawn from a State’s responsibility to prevent private parties from committing acts of environmental pollution, anti-social behaviour or domestic violence see *Lopez Ostra v Spain* (1995) 20 EHRR 277, *Moreno Gomez v Spain*  App No 4143/02 and *Busuioc v Moldova* App No 61382/09. [↑](#footnote-ref-55)
56. At [51]. [↑](#footnote-ref-56)
57. As a violation of Article 10 was found the Strasbourg Court did not go onto consider the alleged violation of Article 8. [↑](#footnote-ref-57)
58. s146(2) of the Law of Property Act 1925. [↑](#footnote-ref-58)
59. See for growing evidence of positive duties owed to the vulnerable L Peroni & A Timmer, ‘Vulnerable Groups: The promise of an emerging concept in European Human Rights Convention Law’(2013) 11 IJCL 1056. [↑](#footnote-ref-59)
60. See Parts 3 and 4 of the Equality Act 2010. [↑](#footnote-ref-60)
61. S35(1)(b). [↑](#footnote-ref-61)
62. At [40]. [↑](#footnote-ref-62)
63. [1992] 1 A.C. 478. See also *Sims v Dacorum BC* [2013] 3 WLR 1006 in which the Supreme Court expressed continuing approval of  *Hammersmith & Fulham LBC v Monk*. [↑](#footnote-ref-63)
64. The compatibility of the legislation itself would have to be challenged under s3 HRA 1998. [↑](#footnote-ref-64)
65. For example *Campbell v MGN* [2004] UKHL 22. [↑](#footnote-ref-65)
66. At [46]. [↑](#footnote-ref-66)
67. At [42]. [↑](#footnote-ref-67)
68. Provided there is no violence (see Criminal Law Act 1977 s6) or harassment (see Protection from Eviction Act 1977 s1(3)). [↑](#footnote-ref-68)
69. See for example J Howell, ‘The Human Rights Act 1998: land, private citizens and the common law’ (2007) 123 LQR 618. [↑](#footnote-ref-69)
70. For a consideration of these differing perspectives see R Walsh, ‘Stability and predictability in English property law – the impact of article 8 of the European Convention on Human Rights reassessed’ (2015) LQR 585 at 600-603. [↑](#footnote-ref-70)
71. For example flexible tenancies and introductory or starter tenancies. [↑](#footnote-ref-71)
72. See Localism Act 2011, s148, s149. [↑](#footnote-ref-72)
73. *Pinnock* at [53]and *Powell* at [33] and [37]. This approach is endorsed by the Strasbourg Court see *Bjedov v Croatia* Application No 42150/09 (29 May 2012) at [67] and *Brezec v Croatia*  [2014] HLR 3 at [46]. [↑](#footnote-ref-73)
74. See the division of judicial opinion in *London Quadrant Housing Trust v Weaver* [2010] 1 WLR 363.. [↑](#footnote-ref-74)
75. *London Quadrant Housing Trust v Weaver* ibid. [↑](#footnote-ref-75)
76. H Collins, ‘On the (in)compatibility of Human Rights Discourse and Private Law’ LSE Law Society and Economy Working Papers 7/2012.

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