

McDonald (by her litigation friend) v McDonald and others [2016] UKSC 28

By Hannah Curtain & George Mallet

In this alerter **Hannah Curtain & George Mallet** consider the Supreme Court's decision in *McDonald (by her litigation friend) v McDonald and Ors* [2016] UKSC 28.

The case considered whether it is open to a court to consider the proportionality of granting a possession order in actions brought by private landlords.

Introduction

1. In *Manchester City Council v Pinnock* [2011] 2 AC 104 it was decided that, in possession proceedings brought by local authorities, it is (in principle) open to a tenant to argue that it is not proportionate to grant a possession order.
2. In *McDonald v McDonald and Ors* [2016] UKSC 28 the Supreme Court have confirmed that possession proceedings brought by private landlords are not subject to the same proportionality tests that apply to public sector proceedings.

The Facts

3. The appellant had previously lost two public sector tenancies owing to her poor behaviour. Her parents (the respondents) then bought a residential property and granted their daughter an assured shorthold tenancy.

4. Unfortunately they were unable to meet mortgage repayments and so LPA receivers were appointed. Whilst rent was paid it was not sufficient and arrears persisted. The receivers served a s.21 notice and issued possession proceedings (s.21 of the Housing Act 1988).
5. The Claim was defended (*inter alia*) on the basis that the court should consider the proportionality of evicting a vulnerable tenant. This was based on section 6 of the Human Rights Act 1998 and article 8 of the European Convention on Human Rights. It was argued that the approach adopted in *Pinnock* (ie, that proportionality can be considered in claims for possession brought by local authority landlords) applied equally to claims brought by private landlords, notwithstanding that the Supreme Court in *Pinnock* had expressly stated 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 that it was “preferable for this court to express no view on the issue until it arises and has to be determined” [37].
6. The Circuit Judge, in granting possession, concluded that he was not able to consider proportionality in claims brought by private landlords; the wording of s.21 HA 1988 and s.89 HA 1980 did not afford the court any discretion. However, the Judge went on to find that, had the question of proportionality arisen, he would have determined that the appellant’s circumstances were sufficiently exceptional to justify dismissing a claim for possession.
7. The appellant’s appeal to the Court of Appeal was dismissed. She appealed to the Supreme Court.

The Law

8. The court has no choice but to grant possession in proceedings properly brought under s.21 HA 1988.
9. Section 21(4) HA 1988 (as amended) allows a landlord under an AST to obtain possession (*inter alia*) so long as two months' notice is given. Where it is, possession cannot be delayed for longer than 14 days unless the tenant can show 'exceptional circumstances' (s.89 HA 1980), in which case the date for possession shall not be postponed by more than six weeks. County Court judges tend to take a reasonably robust approach and decide that 'exceptional' connotes something more than the usual hardship that would be suffered by a tenant that loses their home. Therefore not having alternative accommodation or having children is rarely seen as exceptional whereas suffering from a debilitating illness often is.
10. 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.”
11. 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.

The Issues:

12. There were three issues before the Supreme Court:
- a. Should a court be required to consider the proportionality of evicting an occupier in possession proceedings brought by a private sector owner?
 - b. If the answer to (a) is yes, whether the relevant legislation and in particular section 21(4) can be read so as to comply with that?
 - c. If the answer to questions (a) and (b) is yes, whether the trial Judge would have been entitled to dismiss the claim for possession in this case, as he had indicated he would have done?

The Decision:

13. As to the first issue, the Supreme Court decided that courts are not permitted to consider proportionality in claims brought by private landlords.
14. While it may be that art.8 is engaged in private possession actions it is not open to the tenant to contend that art.8 could justify a different order from that which is mandated by the contractual relationship between the parties. This is the case, at least, where legislative provisions enacted by a democratically elected legislature has properly balanced the competing interests of private sector landlords and residential tenants [40].
15. In effect, the current legislation reflects the state's assessment of where to strike the balance between the art.8 rights of residential tenants and the rights of private landlords. To hold otherwise would make the Convention effectively directly enforceable as between private citizens so as to alter their contractual rights and obligations, whereas the purpose of the

Convention is to protect citizens from having their rights infringed by the state [41].

16. The Court did, however, note (at [45]) that a tenant would not be prohibited from arguing that existing legislation did not properly protect his art.8 rights (i.e. that the legislature had failed in its ECHR obligations when enacting the relevant legislation).
17. The second and third issues therefore did not arise on the facts of the appeal. The Court however held, in relation to the second issue, that it would not be possible to ‘read down’ section 21(4) so as to require the court to make an assessment of proportionality before making a possession order. Reading in such an obligation would not “go with the grain of the legislation” but positively contradict it [69]. Accordingly, the Court held that had it been persuaded that section 21(4) was in fact incompatible with the Convention rights, the only option open to it would be a declaration of incompatibility under section 4HRA.
18. As to the third issue, the Court noted that in the context of *Pinnock* defences against public sector landlords, 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 [73].
19. In the appellant’s case, the Court considered, had it found in the her favour on the first and second issues, that it was difficult to see how the appellant’s circumstances could justify postponing indefinitely the lender’s right to be repaid [74]. On the evidence available before the Circuit Judge, the Court

considered that the most that the appellant could hope for on a proportionately assessment would be an order for possession in six weeks' time [75.]

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June 2016