

Written submission from Dr Frankie McCarthy, University of Glasgow

Private Housing (Tenancies) (Scotland) Bill

My primary concern with the Bill as introduced relates to the human rights compliance of section 41. This section provides that the First-tier Tribunal is obliged to issue an eviction order on application by the landlord if one of the schedule 3 grounds is met, provided the relevant procedural formalities have been fulfilled. In summary, I argue that the obligation on the FTT to issue an eviction order without the opportunity to consider the circumstances of the individual case is likely to be a disproportionate interference with the rights of the tenant under article 8 of the European Convention on Human Rights. To ensure the legislation is Convention compliant, section 41 should be amended to provide that a court need only grant a possession order where it is fair and reasonable to do so.

Possession orders and article 8 ECHR

[Article 8](#) of the European Convention on Human Rights provides the right to respect for private and family life, home and correspondence. This right is held by individual persons against the state. In the situation where an individual person is a tenant of a body which represents the state – such as a local authority or housing association landlord¹ – eviction from their rented home is an obvious interference with the right to respect for home. However, the right is not absolute. It can be compromised where necessary for the reasons listed in the second paragraph of article 8, which include the economic well-being of the country or the protection of the rights and freedoms of others. Amongst other requirements, any such compromise of the right must be proportionate, meaning that it must not impose an individual and excessive burden on the holder of the right.

Following a number of decisions of the UK Supreme Court and the European Court of Human Rights, it has been established that where legislation obliges a court to grant a possession order to a public authority landlord without the opportunity to consider the specific circumstances of the case, this will not comply with article 8. The leading judgment is [Manchester City Council v Pinnock](#),² decided by a bench of nine Supreme Court judges and therefore commanding a very high level of legal authority. In Scotland, an example of this type of legislation can be found in the [Housing \(Scotland\) Act 2001, s 36](#) by which the court is obliged to make an order for recovery of possession provided the landlord has complied with the procedural formalities. In [South Lanarkshire Council v McKenna](#),³ the Inner House of the Court of Session confirmed that this provision was in breach of the tenant's article 8 rights. To remedy this problem, the court in McKenna, as

¹ In respect of possession proceedings, housing associations are generally considered a "public authority" under the Human Rights Act 1988, s 6(3): see [R \(on the application of Weaver\) v London & Quadrant Housing Trust](#) [2010] 1 WLR 363.

² [2010] UKSC 45.

³ [2012] CSIH 78.

in *Pinnock*, “read” the legislation in question to include a proportionality jurisdiction. In other words, a court faced with an application for a possession order under the 2001 Act, s36 now has the power to consider the circumstances of the individual case to determine the proportionality of granting a possession order, despite the fact the legislation itself does not expressly give the court this power.

Article 8 and private landlords

I pointed out above that article 8 protects individual persons against actions by the state. It is therefore clearly applicable where a landlord is a representative of the state, such as a local authority or housing association. The Private Housing (Tenancies) (Scotland) Bill deals with an alternate situation, where a landlord is a private legal person such as an individual or a company. Does article 8 have any application to this situation?

I would argue that it does. Private leases fall within the ambit of human rights when the court, as a public body representing the state, becomes involved in enforcing the lease terms. Public bodies must not act in a manner incompatible with Convention rights. Accordingly, the court must not enforce a lease in a manner which breaches the human rights of a landlord or tenant. The European Court of Human Rights seems satisfied that human rights apply where a court becomes involved in enforcing a private tenancy agreement.⁴ The Appeal Court in England recently found there was not a clear enough line of precedent from the ECtHR to determine the position on this application of human rights in domestic law,⁵ but Supreme Court judge Lord Neuberger later indicated that in his view, the jurisprudence is now clear that article 8 must apply to private tenancies in this situation.⁶ It seems only a matter of time until this finding is explicitly made by the domestic courts.

The problem with the Bill

If human rights are applicable to litigation between a landlord and a tenant, as I argue above, then legislation that does not allow for account to be taken of the potential human rights implications of an application for a possession order must itself be in breach of human rights. Although it may be possible for the court to “read in” a proportionality jurisdiction as it did in relation to the Housing (Scotland) Act 2001, for the sake of legislative clarity, and to avoid an unnecessary legal challenge to the competence of the legislation, it would be preferable to explicitly include a proportionality jurisdiction in the text of the legislation itself.

Suggested amendment

I would recommend that section 41(1) of the Bill be amended to read as follows:

(1) The First-tier Tribunal is to issue an eviction order against the tenant under a

⁴See most recently [Lemo v Croatia](#) (App No 3925/10) (10 July 2014).

⁵[McDonald v McDonald](#) [2014] EWCA Civ 1049.

⁶In a [speech to the Supreme Court of Victoria, Melbourne](#) – see paragraph 28.

private residential tenancy if, on an application by the landlord, it finds that:-

- (a) One of the eviction grounds named in schedule 3 applies; and
- (b) It is fair and reasonable to do so

In determining an application under this section, the court could have recourse to the guidance provided in respect of applications for possession orders by public landlords.⁷ In such cases, the onus is on the tenant to challenge the proportionality of the order, and the burden of proof lies on her to show that it is disproportionate. Any proportionality defence should initially be dealt with summarily by the court and rejected unless “seriously arguable.” In the private tenancy context, the court would have to take account of the competing right of the landlord to peaceful enjoyment of his possessions under Article 1 of the First Protocol to the ECHR.

In the small number of cases where the Bill currently empowers the court to consider whether it is reasonable to find that certain circumstances amount to an eviction ground (Sched 3, paras 2(3), 10(2) and 11(3)-(4)), the specific requirement of reasonableness can be removed, since the general requirement of fair and reasonableness will apply to all the grounds listed in Schedule 3.

Minor points

- Section 13 of the Bill provides that the First-tier Tribunal may draw up the terms of the tenancy on application by the tenant where the landlord has failed to provide written terms. The Government intends to introduce a model tenancy agreement in forthcoming subordinate legislation. It would be sensible for s 13 to provide that the FTT will draw up the terms of the tenancy *based on the model agreement*, rather than expecting the FTT to draft an agreement from scratch, as seems to be implied by the current wording of s13.
- Section 41 and schedule 3 provide for eviction grounds where the landlord intends to sell the let property, carry out significantly disruptive works to the property or use the property for a non-residential purpose. Under the Housing (Scotland) Act 1998, where the landlord’s intentions towards the property form the basis of a ground of eviction, the court has held that the landlord must demonstrate not only a genuine wish to undertake the proposed action, but also that there must be a reasonable prospect of him doing so.⁸ For example, if he intends to refurbish the property, he must show that he has adequate finance to do so and has obtained planning permission if appropriate. For legislative clarity, paragraphs 1, 3, and 5 of the schedule should be amended to provide the

⁷ See particularly [Manchester City Council v Pinnock](#) [2010] UKSC 45 and [Hounslow LBC v Powell](#) [2011] UKSC 8 along with discussion in McCarthy, F (2013) “Human rights and the law of leases” 17(2) *Edinburgh Law Review* 184-209 .

⁸ See Rennie, R. (ed.) *Leases (SULI)*(Edinburgh: W Green, 2015) para 22-22.

landlord with a ground for eviction where “reasonably intends” to sell the let property etc, in order that both elements of the intention test (a genuine wish and a reasonable prospect of the action taking place) can be taken into account by the court.